



An  
Bord  
Pleanála

## Inspector's Report 306486-20

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<b>Type of Appeal</b>	Section 9 Appeal against Section 7(3) Notice
<b>Location</b>	Daly's Hill, Kilkenny
<b>Planning Authority</b>	Kilkenny County Council
<b>Planning Authority VSL Reg. Ref.</b>	VSR 20-1
<b>Site Owner</b>	Daly's Hill Limited
<b>Planning Authority Decision</b>	Place on Register
<b>Date of Site Visit</b>	17 <sup>th</sup> April 2020
<b>Inspector</b>	Erika Casey

## 1.0 Introduction

- 1.1. This appeal refers to a Section 7(3) Notice issued by Kilkenny County Council, stating their intention to enter a site referred to as Daly's Hill, Kilkenny onto the Vacant Sites Register (VSR) in accordance with the provisions of Section 6(2) of the Urban Regeneration and Housing Act 2015. The Notice states that the Planning Authority is of the opinion that the site is a vacant site within the meaning set out in Sections 5(1(b) of the URH Act 2015.
- 1.2. The appeal site registered under VSL reference VSR 20-1, has one registered owner: Daly's Hill Limited.

## 2.0 Site Location and Description

- 2.1 The subject site with a stated area of 8.9ha 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 comprises very rough poor grade grassland. Throughout the site there are numerous small areas of dumping and litter, particularly close to laneways to the rear of existing houses. There were no livestock or horses on the site during the site visit.

## 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. The Notice is dated 31<sup>st</sup> December 2019. Prior to this, a Notice of Proposed Entry was issued to the landowner on the 21<sup>st</sup> November 2019. The Planner's report which accompanied the Section 7(1) notice states that the site consists of regeneration land.
- 3.1.2. Section 5(1)(b) of the Act stated that a site is a vacant site if, 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 2000) in the area in which the site is situated or has adverse effects on the character of the area.

3.1.4 With regard to adverse effects, Section 6(6) of the Act sets out a number of criteria including:

- (a) land or structure in the area were, or are, in a ruinous or neglected condition;
- (b) antisocial behaviour was or is taking place in the area;
- (c) there has been a reduction in the number of habitable houses, or the number of people living in the area;
- (d) and whether or not these matters were affected by the existence of such vacant or idle land.

3.1.5 The Act defines regeneration land at Section 3 as follows:

*“regeneration land means land identified by a Planning Authority in its development plan or local area plan, after the coming onto operation of section 28, in accordance with section 10(2)(h) of the Act of 2000 with the objective of development and renewal of areas in need of regeneration, and includes any structure on such land.”*

## 3.2. Development Plan Policy

### **Kilkenny City and Environs Development Plan 2014-2020**

3.2.1 The Kilkenny City and Environs Development plan 2014-2020 is the operative development plan for the area. The site is located on lands that are subject to zoning 'Mixed Use' with the objective: *“To consolidate and facilitate the development of inner suburban sites for mixed use development which will allow for commercial and residential uses.”*

3.2.2 The following applies to the subject site:

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.

3.2.3 With regard to the vacant site levy, the plan includes:

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.

3.2.4 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

### Appeal Reference 303497-19

4.1 A previous appeal against entry onto the vacant site register in relation to the subject site was cancelled by the Board on the 31<sup>st</sup> of May 2019. The Board cancelled the entry due to a procedural error in that there was an absence of sufficient evidence to support the contention that the site was vacant or idle for the period of 12 months preceding the date of placing the site on the register.

4.2 The Inspector recommend that the entry be confirmed. Key points from the assessment included:

- Was not satisfied that the design process leading to a planning application or even to 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 a meaningful use for the site so as to remove it from the register.
- Conceded that the site, despite recent evidence of dumping, is neither in a ruinous or neglected condition.
- Anti-social behaviour persists as evidenced by Council photographs and Inspector's own observations. Satisfied that antisocial behaviour was and is taking place in the area. The site, therefore, satisfied section 6(6)(b) of the 2015 Act.

### Application Reference P19/887

4.3 Permission sought for a mixed use development comprising:

- (i) 266 no. residential units including 133 no. houses (17 no. 4 bed units; 106 no. 3 bed units and 10 no. 2 bed units) and 133 no. apartment and duplex units (46 no. 1 bed units; 77 no. 2 bed units and 10 no. 3 bed units).

- (ii) 126 no. bed nursing home of 7,236.79 sq. m. with ancillary office.
- (iii) Crèche facility of 733.12 sq. m.
- (iv) 2 no. office blocks with a gross floor area of 3,548.38sq. m. including provision for basement car parking.
- (iv) 2 no. commercial/retail units with a gross floor area of 327.40 sq. m. (net retail area of 99.6sq. m. & 82.3 sq. m. each) with 4 no. office units overhead with a gross floor area of 722.26 sq. m.
- (v) Provision of 3.96 hectares of open parkland comprising part of the Breagagh Regional Park including the provision of combined cycleway/footpath through the park.
- (vi) Supporting development works including (a) ESB substation (b) 3 no. combined bin and bicycle stores (c) underground surface water attenuation. (d) temporary construction signage (e) estate signage and (f) all associated site development works. The primary access to the site shall be from a roundabout to be delivered as part of the proposed new Western Environs Road. The proposed development will construct a new access road from this roundabout with a new bridge over the Breagagh River. A minor secondary access road shall be provided to serve a limited number of units from the Kennyswell Road.

4.4 Further information was requested on the 30<sup>th</sup> of January 2020 and decision is pending.

## 5.0 Planning Authority Decision

### 5.1. Planning Authority Reports

5.1.1 A Vacant Site Report (20.11.2019) was prepared for the site outlining the dates of the visits to the site, zoning and the type of site for the purposes of the Act which in this case is Regeneration. The following key points are noted:

- Site visits were undertaken on the 10<sup>th</sup> of October 2018 and the 12<sup>th</sup> of

November 2019.

- There is evidence of dumping on the site, unauthorised horses on site and the land is in a neglected condition.

5.1.2 A further Planning Report (16.12.2019) was prepared in response to a submission received opposing the proposed entry onto the Vacant Site Register. This noted:

- Site visits also undertaken on the 18<sup>th</sup> of December 2018 and the 11<sup>th</sup> of March 2019.
- Until the site is actually brought into active use, it remains a vacant site under the legislation.
- The lands are in a neglected condition. The lack of secure perimeter fencing has led to this site being used for the keeping of unregistered third party horses.
- The dumping on the site is continuous. The Environment Section served a notice under Section 14 of the Waste Management Act on the 11<sup>th</sup> of March 2019 in relation to waste material being present on the site. The Council have inspected the site on 4 occasions over the past 14 months and each time there was evidence of dumping. The previous Inspector's report stated that antisocial behaviour was and is taking place in the area.
- It recommended that the lands should be included on the Vacant Sites Register and that a section 7(3) Notice be issued.

## **6.0 The Appeal**

### **6.1. Grounds of Appeal**

6.1.1 An appeal was received from HRA Planning on behalf of the land owners on the 21<sup>st</sup> of January 2020 which can be summarised as follows:

- Submit that there are a number of unique contextual and extenuating circumstances in which the appeal is made.
- Note that a planning application has been lodged on the site and that a stay should be placed on the Section 7(1) Notice until such time as planning

- permission has been granted on the land and development can proceed.
- State that the site is currently inaccessible. The PA have confirmed that notwithstanding the ability to service a portion of the lands from the Kennyswell Road, the development of the site is dependent on the road and roundabout being delivered under LIHAF. Development on the site is effectively premature until the road is constructed by KCC and pending the provision of an access to the site. It is the Council's own policy objectives in their adopted development plan, which has hindered and restricted development on the land. The applicant has demonstrated development intent but the fact remains that until such time as planning permission is secured, no authorised development can be commenced.
  - Note that Dalyshill Limited is the owner of the site, not Robertshill Limited. The notices have been issued to the wrong owner/entity. The PA having issued the Notice in the absence of notification of the owners of the site as defined by the provisions of Section 7 of the Act have acted ultra vires.
  - The PA has not given written notice to the property owner setting out the reasons for the proposed entry onto the VSR. References to Section 5(b)(2) of the Act by the PA are presented in a vague and tenuous manner relative to the subject property. No meaningful or conclusive evidence presented. There is a material requirement to state specific and confirmed reasons as to why the site must be entered into the register.
  - It is submitted that for a site to have adverse effects on amenities it must in the first instance be in a ruinous or neglected state as per criteria (a). If the land is not in a ruinous or neglected state then irrespective of whether criteria 'a' or 'b' apply, the land cannot be considered to fulfil the requirements under Section 6(6) of the Act.
  - Note that a local contractor has been engaged to carry out works including the removal of fly tipped debris and the provision of security around the site. The issue of unauthorised horses on the site has been rectified and the Council has removed the horses from the site. The site cannot be described as being in a



ruinous or neglected condition.

- Not aware of any antisocial behaviour. Refers to the Criminal Justice Act 2006 definition of anti-social behaviour and that no activity on the site gives rise to or has given rise to anti-social behaviour and does not give rise to significant or persistent impairment in the use or enjoyment of the subject property or neighbouring properties. Fly tipping cannot be considered anti-social behaviour.
- There is no evidence of a reduction in the number of habitable houses or the number of people living in the area. Refers to detailed census data. The population increased by 8.5% over the last intercensal period. SAP data surrounding the site indicates that the population has increased. This demographic data illustrates that there has not been a reduction in the number of people living in the area and, therefore, the site fails to meet criteria set out in Section 6(6)(c).
- The subject site is located on the edge of the urban area, adjoining agricultural land. There are no significant public infrastructure and/or facilities in the area which would be directly or indirectly affected by a lack of development on the subject site.
- The site in its existing form assimilates into its natural setting and context and is cognisant of other undeveloped land surrounding it. The site does not adversely affect the character of the area as set out in Section 5(1)(b)(ii) of the Act.

## 6.2. Planning Authority Response

- Section 3 of the Urban Regeneration and Housing Act 2015 defines 'owner' as being "*a) in relation to land that is registered within the meaning of the Registration of Title Act 1964, the registered owner*". According to the Property Registration Authority of Ireland, the registered owner of folio KK31253F is Robertshill Ltd., with the same postal address as Dalyhill Ltd.
- The PA are of the view that the reasons for entry are clearly set out in the Section 7(1) notice. The notices comply with the requirements of the Act.
- The land is in a neglected condition. The lack of secure perimeter fencing has

led to this site being used for the keeping of unregistered third party horses. Secondly, there is continuous evidence of dumping on the site. Photographic evidence attached.

- The site is designated on the basis that it is a regeneration site, therefore, the servicing of the site is not a criterion for qualifying as a vacant site. The Council considers the site is serviced.
- The objective quoted by the appellants from Kilkenny City and Environs Development Plan does not preclude access from the Kennyswell Road. The objective is to prevent a through connection from the Kennyswell Road to the Western Environs (LIHAF) road scheme.

## 7.0 Assessment

### 7.1. Introduction

7.1.1. This Notice has been issued under the provisions of Section 5(1)(b) of the Act which relates to 'regeneration lands'.

7.1.2. Section 5(1)(b) of the Act states that a site is a vacant site if, in the case of a site consisting of 'regeneration' land:-

- (iii) The site, or the majority of the site, is vacant or idle, and
- (iv) 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 2000) in the area in which the site is situated or has adverse effects on the character of the area.

7.1.3. I will firstly address whether the site is vacant or idle. The appellant's main contention is that the whilst vacant, the site does not give rise to adverse effects on existing amenities or reduce the amenity provided by existing public infrastructure and facilities. My assessment will, therefore, specifically assess this issue having regard to the specific criteria set out section 6(6) of the Act. I will then address the procedural matters raised regarding the statutory section 7(1) and 7(3) notices.

7.1.4 I also note that the appellants make detailed reference to contextual and extenuating circumstances, including the fact that an application for planning permission for a mixed use development has recently been lodged on the subject site and that that in the interests of fairness and justice, that a stay should be placed on the Notice until such time as planning permission has been granted on the land and development can proceed. 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.”*

## 7.2 **Vacant of Idle**

7.2.1 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. On the day of my site visit, I observed that the site was performing no productive role and was clearly vacant and idle.

7.2.2 I note that the previous entry of this site on the VSR was cancelled due to a procedural error regarding the 12 month period. In this case, the Planning Authority carried out at least 2 site visits with an intervening period of 12 months. A site visit was undertaken on the 10.10.2018 and a subsequent visit on the 12.11.2019. The Section 7(3) Notice was issued on the 31.12.2019. I am satisfied that the PA have demonstrated that the site constituted a vacant site for a period of 12 months and that the site was vacant for the relevant period.

## 7.3 **Adverse effects amenities/character of the area**

### **(a) land or structure in the area were, or are, in a ruinous or neglected condition**

7.3.1 I note it is argued by the appellant that the criteria ‘a’ as stated in the legislation is not superseded by an ‘and’ or ‘or’ and, therefore, stands independent of the other two criteria listed in ‘b’ and ‘c’ of section 6(6). This has not been the interpretation of the Board heretofore and I note that the Inspector in their previous assessment of this site noted that given the inclusion of ‘or’ in the Act, there is no requirement to meet all three criteria.

7.3.2 The subject site does not accommodate any buildings and, therefore, the question of

a ruinous condition does not apply.

7.3.3 With regard to whether the site is in a neglected condition, the Council state that continued unauthorised dumping on the site and illegal horse grazing is evidence of same. I note that the appellants have set out that measures have been undertaken to address these issues. At the time of the site visit, there were no horses grazing on the site. In the previous assessment, the Inspector concluded that notwithstanding evidence of illegal dumping, that the site was neither in a ruinous or in a neglected condition. I note however, that this assessment was largely predicated on the fact that the photographic evidence of the dumping had only commenced less than three months before the site was entered on the register.

7.3.4 In their response to the appeal, the Council have noted that there is continuous evidence of dumping on the site with photographs taken over a period of a year. I am of the view, that notwithstanding the conclusions in the previous Inspector's assessment, this continued issue of illegal dumping is evidence that the site is indeed in a neglected condition and that the neglected condition of these lands has an adverse effect on existing amenities and on the character of the area. During my site visit there was extensive evidence of dumping and litter across the site. This significantly detracts from the amenity of the area and in this regard, the site in my view appears neglected.

#### **Antisocial behaviour was or is taking place in the area**

7.3.5 With regard to anti-social behaviour, the previous Inspector's report in relation to the site (303497-19) referred to the persistent illegal dumping and it was concluded that anti-social behaviour was and is taking place in the area.

7.3.6 I note the additional evidence submitted by the Planning Authority regarding this ongoing issue. From this information and my own observations on the site, I am satisfied that such activity is evidence of anti-social behaviour. The site meets the second parameter, that of antisocial behaviour was or is taking place in the area and should be considered a vacant site for the purposes of the Act.

#### **There has been a reduction in the number of habitable houses, or the number of people living in the area**

7.3.7 There is no evidence to suggest that as a result of the vacant site that there has been a reduction in the number of habitable houses, or the number of people living in

the area. The Planning Authority have not raised any opposition to the appellant's contention that population and housing has in fact increased in Kilkenny. I would concur with the previous assessment in relation to this matter under appeal reference 303497-19 that in overall terms, the population and housing availability for Kilkenny City as a whole may well have increased.

- 7.3.8 In conclusion, I consider that 2 of the tests in Section 6(6) are met and that site is neglected and has an adverse effect on existing amenities and has been subject to anti-social behaviour and thus can be categorised as a vacant site as defined by Section 5(1)(b).

### **Other Issues**

#### Owner of the Site

- 7.3.9 The appellant stated that the notices have been issued to Robertshill Limited who is not the owner of the site and that Dalyshill Limited is the owner of the site. The PA state that Robertshill Limited are registered as owners according to the Property Registration Authority of Ireland.
- 7.3.10 It would appear to me that the Council has made every effort to serve the notice on the appropriate landowner. 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. No further action is warranted with regard to this appeal now before the Board.

#### Reasons for Entry

- 7.3.11 It is also submitted by the appellant that the PA has not set out the reasons for the proposed entry of the site onto the Vacant Site Register and that the correspondence presented is vague and tenuous. The Section 7(1) Notice however, explicitly sets out the reasons as to why the site is considered to be a vacant site. A Planning Report was also prepared with respect the section 7(1) and 7(3) notices. I am satisfied that there is no ambiguity as to the rationale for the entry of the site onto the register and that the PA have complied with their statutory obligations under the Act.

## 8.0 Recommendation

- 8.1. I recommend that in accordance with Section 9(5) of the Urban Regeneration and Housing Act 2015 (as amended), the Board should confirm the entry on the register of site (VSR 20-1) as it was a vacant site for the 12 months concerned. Therefore, the entry on the Vacant Sites Register on the 31<sup>st</sup> of December 2019 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 Planning Inspector,
- (d) The provisions of the Kilkenny City and Environs Development Plan 2014-2020;
- (e) That the neglected condition of these vacant lands with persistent illegal dumping activity has an adverse effect on existing amenities; reduces the amenity provided by existing public infrastructure and facilities (within the meaning of Section 48 of the Act 2000) in the area in which the site is situated, particularly due to the strategic location of the lands in proximity to physical and social infrastructure; has an adverse effect on the character of the area and that insufficient reason is put forward to cancel entry on the Vacant Sites Register.
- (f) The evidence that antisocial behaviour has taken place in the area.

The Board is satisfied that the site was a vacant site for the relevant period.

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**Erika Casey**  
**Senior Planning Inspector**

**17<sup>th</sup> April 2020**