



An
Bord
Pleanála

Inspector's Report ABP-310057-21

Type of Appeal	Appeal against a Section 18 Demand for Payment.
Location	Site off the Old Bray Road, Foxrock, Dublin 18.
Planning Authority	Dun Laoghaire Rathdown County Council.
Planning Authority VSL Reg. Ref.	VS-0011.
Site Owner	Cornel Living Limited.
Planning Authority Decision	Charge Levy.
Date of Site Visit	23 December 2021.
Inspector	Stephen Rhys Thomas.

Contents

1.0 Introduction.....	3
2.0 Site Location and Description	3
3.0 Statutory Context	4
4.0 Development Plan	4
5.0 Planning History.....	5
6.0 Planning Authority Decision	6
6.2. Planning Authority Notices:	7
7.0 The Appeal	8
7.1. Grounds of Appeal	8
7.2. Planning Authority Response	9
8.0 Assessment.....	10
9.0 Recommendation.....	14
10.0 Reasons and Considerations	14

1.0 Introduction

- 1.1. This appeal refers to a Section 15 Notice of Demand for Payment of Vacant Site Levy issued by Dun Laoghaire Rathdown County Council, stating their demand for a vacant site levy for the year 2020 amounting to €840,000 for vacant site lands off the Old Bray Road, Foxrock, Dublin 18 and identified as VS0011.
- 1.2. The appeal site has one stated registered owner Cornel Living Limited.
- 1.3. A Notice of Proposed Entry on the Vacant Sites Register was issued to Fellhurst Limited on the 8 August 2017. On the 14 February 2018, the Notice of Entry on the Vacant Sites Register was issued to Fellhurst Limited. This section 7(3) notice was appealed to the Board on the 14 March 2018. On the 27 September 2018, the Board confirmed the notice and determined that the site is a vacant site within the meaning of the Act. A section 11(1) Notice to Owner of Site Entered on Vacant Sites Register and Levy to be Charged was issued to Cornel Living Limited on the 29 April 2019.
- 1.4. A valuation pertaining to the site was issued to Fellhurst Limited by Dun Laoghaire Rathdown County Council on the 28 June 2018. The value of the subject site is stated to be €12,000,000. A Notice of Demand for Payment of Vacant Site Levy 2019 under Section 15 of the Urban Regeneration and Housing Act was issued to Cornel Living Limited on the 2 June 2020 for the value of €840,000 and was cancelled on the 15 May 2021 by the Board. On the 15 April 2021 a charge for the value of €840,000 was demanded for period 2020. The appellant (Cornel Living Limited) has appealed the Demand for Payment Notice issued pursuant to Section 15 of the Urban Regeneration and Housing Act.

2.0 Site Location and Description

- 2.1. The site, with a stated area of 1.89 Hectares, is located in Cornelscourt Village, County Dublin. The site bounds the N11 dual carriageway (Stillorgan Road) and takes access from the Old Bray Road between the AIB bank building and Texaco petrol station. The remainder of the site bounds the rear of existing housing along the Old Bray Road and Willow Grove.
- 2.2. The site slopes downwards from south west to the north west. The majority of the site is overgrown with grass and other vegetation. To the north western portion of the site an area has been levelled and surrounded by a high earthen berm and is

surfaced with hardcore/gravel overgrown with low vegetation. No cars were parked on this area. No sporting activity was taking place and no playing pitches were marked out.

3.0 Statutory Context

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

3.1.1. The site was entered onto the register subsequent to a Notice issued under Section 7(1) of the Act that stated the PA was of the opinion that the site referenced was a vacant site within the meaning of Section 5(1)(a) of the Act. A section 7(3) Notice was issued 14 February 2018 and the site was subsequently entered onto the register on that date. Under section 18 of the Act, the levy charge and placement on the register was cancelled on the 15 May 2021 by the Board.

3.1.2. 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 to the Board within 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.

3.1.3. Section 17 of the Act states

(1) Notwithstanding sections 15 and 16, where in any year there is a change in ownership of a vacant site the amount of vacant site levy to be charged in respect of that site for that year, and for the preceding year, shall be zero.

Subsections set the detail and exceptions in relation to change of ownership.

4.0 Development Plan

4.1.1. The site is zoned objective A 'To protect and/or improve residential amenity' in the Dun Laoghaire Rathdown County Development Plan 2016-2022. Section 1.3 of the Development Plan deals with Development Areas and Regeneration.

5.0 Planning History

5.1. Subject site VSL History

ABP-307450-20 - Vacant Site Levy – Appeal S.18 – Decision to Cancel, the site was for the period of 2019 and continues to be unsuitable for the provision of housing, because the site was not served by the public infrastructure and facilities (within the meaning of section 48 of the Act of 2000) necessary to enable housing to be provided and serviced, thus for the period concerned the site was not in accordance with section 5(1)(a)(ii) as defined by section 6(5)(b) of the 2015 Act (as amended), of the Urban Regeneration and Housing Act 2015 (as amended).

ABP-301161-18 - Vacant Site Levy - Appeal S.9. Notice Confirmed on the 27 September 2018 because of the majority of the site was and is vacant or idle, there is a need for housing in the area, the site is suitable for the provision of housing as demonstrated by the residential land use zoning for the area, and that insufficient reason is put forward to cancel the entry on the Vacant Sites Register.

5.2. Planning history on the site.

An Bord Pleanála reference - **ABP-312132-21** - 419 residential units (7 houses, 412 apartments), crèche and associated site works. Decision due on 6 April 2022.

An Bord Pleanála reference **ABP-306225-20** – Permission refused for 468 residential units (16 houses, 452 apartments) and associated site works, 16 April 2020. Reasons as follows:

1. The proportion of single aspect apartments in the proposed development would contravene Specific Planning Policy Requirement 4 of the Sustainable Urban Housing: Design Standards for New Apartments Guidelines for Planning Authorities issued by the Department of the Housing, Planning and Local Government in March 2018. In addition, the level of communal open space provision is below the minimum standard set out in Appendix 1 of the guidelines. The proposed development would, therefore, fail to provide an adequate level of residential amenity for future occupants of the scheme and would be contrary to Ministerial guidelines issued to planning authorities under section 28 of the Planning and Development Act 2000, as amended.

2. The proposed development would be premature having regard to the existing deficiencies in the wastewater sewerage network in the area and the period within which this constraint may reasonably be expected to cease.

6.0 Planning Authority Decision

6.1. Register of Vacant Sites Report:

- A Vacant Sites report outlining the date of the visit to the site (3 November 2016), the site area, zoning and the type of site for the purposes of the Act which in this case is Residential. It is noted that a part of the site is in use as a car park and that this activity may be unauthorised, a pending planning application is noted – pa reference D17A/0597 refers. The remainder of the site is a greenfield and not in use. It is stated that the subject site is not in residential use and is not being used for the purpose for which it was zoned.
- In terms of need for housing (tests outlined in Section 6(4)) it is stated that in terms of (a) any site zoned for residential development implies that there is a need for housing in accordance with Section 5(1)(a)(i); (b) for 3-bed house average monthly rent is €2,687 (Sept 2017) and average purchase price is approx. €492,217 (2017); (c) approx. 4,927 households qualified for social housing support (October 2017); (d) 422 properties for sale (295) or rent (127) (Sept. 2016) which is 0.5% of the 88,500 housing stock with the assessment noting that having regard to the criteria that it is considered there is a need for housing in accordance with Section 6(4) of the Act.
- In terms of suitability for housing (tests outlined in Section 6(5)) in terms of (a) as site is zoned for housing it is considered suitable for housing; (b) site is served by public infrastructure and facilities; and (c) there does not appear to be any physical condition or constraint impacting the site which might affect the provision of housing and in conclusion it is stated that the site appears suitable for the provision of housing.
- In relation to the majority of the site being vacant or idle for the last 12 months, it is stated that the site was vacant on the date of site inspection November 2016 and was considered to be in the same condition for the preceding time periods

(aerial photography) June/December 2013 and April 2015. It is considered that the site is vacant and has been vacant for a period beyond twelve months.

- Site does not have an active use. Reference is made to the Circular (PL07/2016) which references temporary uses and development appropriate to the zoning and concludes that the site is a vacant site as it is situated in an area where there is a need for housing, the site is suitable for the provision of housing and the site or the majority of the site is vacant or idle.
- The planning authority's submission is accompanied by a Report on the Submissions received in relation to the establishment of the register, a record of the chief executive's order, the initial submission from Dunnes Stores on behalf of Fellhurst Ltd (landowner) in relation of the intention to place the site on the register.

6.2. Planning Authority Notices:

- 6.2.1. Dun Laoghaire Rathdown County Council advised the site owner that the subject site (Planning Authority site ref. VS0011) is now liable for a payment of 7% of its valuation and hence the levy for 2020 is €840,000, dated 15 April 2021. Payment terms and methods are outlined.
- 6.2.2. Dun Laoghaire Rathdown County Council advised the site owner that the subject site (Planning Authority site ref. VS0011) is now liable for a payment of 7% of its valuation and hence the levy for 2019 is €840,000, dated 2 June 2020. Payment terms and methods are outlined.
- 6.2.3. A Notice of Determination of Market Value was issued to Fellhurst Limited on the 28 June 2018 stating that the valuation placed on the site is €12,000,000 (twelve million euro) and instructions to make an appeal to the Valuations Tribunal, accompanied by a map with the site outlined.
- 6.2.4. A section 11(1) Notice to Owner of Site Entered on Vacant Sites Register and Levy to be Charged was issued to Fellhurst Limited on the 29 April 2019.
- 6.2.5. A section 7(3) Notice issued on the 14 February 2018, advising the owner that their site had been placed on the register.

6.2.6. A section 7(1) Notice issued on the 8 August 2017, advising the owner that their site had been identified as a vacant site and invited submissions, accompanied by a site map.

7.0 The Appeal

7.1. Grounds of Appeal

7.1.1. The landowner has submitted an appeal to the Board, against the decision of Dun Laoghaire County Council to retain the subject site on the Register and charge the levy. The grounds of the appeal can be summarised as follows:

- The appellant notes that the appeal ABP-307450-20 (demand for levy payment 2019), is currently pending.
- The appellant sets out their interpretation of the 2015 Act and in particular in relation to section 18, what should be considered the year concerned, the definition of vacant site and other legal aspects.
- The site is not a vacant site because the site is not served by the public infrastructure and facilities to enable housing to be provided. A decision to refuse permission for an SHD application 16 April 2020, was issued by the Board and one of the reasons for refusal related to prematurity and the deficiencies in the waste water sewerage network, APB-306225-20 refers. The site was and is not a vacant site in accordance with section 5(1)(a)(ii) and the placement on the register should be cancelled, legal case Navratil v ABP is highlighted as relevant.
- The site is not a vacant site because there was something affecting the physical condition of the land comprising the site which might affect the provision of housing, in this case invasive alien species (Japanese Knotweed, Three Cornered Garlic and Spanish Bluebell). A situation that can take time to resolve, an Invasive Plant Solutions plan has been prepared.
- The site is not a vacant site because it is being used for sporting activities. A licence to use the site was granted to Geraldine Morans GAA on the 2 November 2019, the site was in use until Covid restrictions came in to play. Sporting use does not require planning permission and the Council were written to in order to cancel the entry on the register (9 December 2019 and

later 18 March 2020). The site was not removed from the register but remains in active use for sporting activities until housing can be provided on the lands. The appellant details two vacant site appeals that set out that sporting and recreation as a use for a site, ABP-303914-19 and ABP-303529-19 refer. In ongoing contact with the Council, the appellant sets out their theories in relation to Class 33 and exempted development.

The appellant has attached a number of appendices that include; the demand notice for 2020, the decision that relates to ABP-306225-19, an Invasive Plant Solutions plan, the licence granted to Geraldine Morans GAA to use the site for sporting activity, photographs showing sporting use, letter of 9 December 2019 requesting cancellation of entry on the register, the reply of the Council dated 12 February 2020 and a letter dated 18 March 2020 in response to the Council's letter.

7.2. Planning Authority Response

The planning authority's response is dated 11 May 2021. The planning authority have provided a response to the appellant's grounds of appeal similar to the response prepared for the appeal previously under consideration (ABP-307450-20) and can be summarised as follows:

The site was sold by Fellhurst Limited to Cornel Living Limited, after the decision on the section 9 appeal (November 2018).

Works have not taken place on the site to implement a valid planning permission, in the year concerned (2020) and so the demand notice was issued. No active use had occurred on the date the appeal was lodged 23 April 2021.

The planning authority's issues regarding the SHD application are outlined, but specifically, the report of Irish Water and downstream constraints are highlighted. The planning authority maintain that the site can be serviced, there is no local impediment to connection for a lower number of units.

With reference to invasive species, the p.a. note the appellant has been in control of the site since at least the end of 2018, with ample opportunity to deal with invasive species that only affects a small proportion of the overall site as an ongoing maintenance measure. Invasive species management cannot be considered as a means to the provision of housing in itself.

The use of the site for sporting activities is not considered a use that consists solely or primarily of the provision of housing or the development of the site for the purpose of such provision. The use of the site for a temporary sporting activity is not accepted and there is no clarity in relation to the need for planning permission. No attempt has been made to apply for a section 5 Declaration since the previous appeal date.

7.3. **Further Response**

Sought but none received.

8.0 **Assessment**

8.1. **Introduction**

8.2. The Board should note that a section 18 appeal under ABP-307450-20 was decided on the 11th May 2021, it was decided to cancel the levy charge for the period 2019 and remove the site from the register. The subject appeal is for the period 2020, this notice was issued on the 15th April 2021 and the most recent correspondence from the planning authority is dated 11th May 2021. The planning authority will not have been aware of the decision taken by the Board on the 15th May 2021 to cancel the levy for 2019 and remove the site from the register. As explained in the assessment below, I am of the opinion that the site no longer stands on the Vacant Site Register.

8.3. This current 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.

8.4. **The site is no longer vacant**

8.4.1. 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 just 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 in the year concerned, in this case 2020.

8.5. Is it a Vacant Site?

- 8.5.1. A Section 7(3) Notice of Entry on the Vacant Sites Register was issued on the 14 February 2018. Subsequently a Section 9 appeal was made to the Board under appeal reference ABP-301161-18. An assessment as to whether the site constituted a vacant site was carried out by the Reporting Inspector. It was determined by the Board that given the need for housing in the area and the suitability of the site for the provision of housing as demonstrated by the residential land use zoning, the site could be placed on the register.
- 8.5.2. Following the payment demand for 2019, the owner successfully appealed the planning authority's decision, and the Board cancelled the entry of the site on the register and cancelled the demand for payment, order dated 11th May 2021. That decision was made after the date of the demand notice for the period 2020, 15th April 2021 (the appeal now before the Board). The planning authority issued a notice to demand payment for 2020 because they had yet to be directed by the Board in relation to the appeal that concerned the period 2019. However, I would suggest that if the planning authority had already received notification that the entry of the site on the register had been cancelled, then they would not have issued a demand for 2020.
- 8.5.3. The Board have already made a decision regarding this site and have decided that it should be removed from the register and the levy for 2019 cancelled. In the current appeal, the owner has raised the same issues as before, namely: the site is unsuitable for housing, an invasive alien species affects the site and that the site has been in use for sporting activities. The planning authority have raised the same issues as before and request that the levy for 2020 is charged and the site remain on the register.
- 8.5.4. Matters have not significantly changed for the site in the intervening time period and the fact that the site was removed from the register on the 11th May 2021 has a major bearing on the assessment of the current appeal. I have taken the meaning that because the site was removed from the register by Board Order, it is not relevant to re-assess whether the site was a vacant site although I do touch on these

matters in brief. The site was not a vacant site for the period of 2019 and was removed from the register by Board Order. Even though the date of the Board Order was 11th May 2021, for all intents and purposes the site was no longer on the register and thus a levy should not be charged until placed on the register again by going through the formal section 7 process from the beginning.

- 8.5.5. The site has been removed from the register by Board Order, this significant event occurred since the current Section 18 Notice was issued. It is however, still the case that the site was not served by the public infrastructure and facilities necessary to enable housing to be provided and serviced. For clarity, the Board decided to refuse a large residential development because there were infrastructural problems with the lands and this impacted upon the ability of the site to deliver housing, Board reference ABP-306225-19 refers. The site was and is still not suitable for the provision of housing because it lacked and lacks the public infrastructure and facilities (within the meaning of section 48 of the Act of 2000) necessary to enable housing to be provided and serviced.

The site is no longer vacant as of the 1st of January 2020

- 8.5.6. I have already clarified that according to a Board Order the site should no longer be on the Vacant Site Register. As the owner has pointed out, they await the outcome of their previous appeal and state the same issues as the previous appeal under ABP-307450-20, that being the site was in use by a sports club, an invasive alien species blights the site and that the site was not suitable for housing. All of these matters were assessed in detailed under the previous appeal and the Board decided to cancel the entry on the register and cancel the levy charge for 2019. Matters have not changed for the period 2020 and even if the site had not been cancelled, I would still recommend to the Board that the site is not suitable for housing because it cannot be serviced by water services. Matters did not change in 2020 that would change my opinion.
- 8.5.7. A new planning application for strategic housing has been lodged with the Board as of December 2021, reference ABP-312132-21 refers. The proposed development is for 419 residential units and a decision is due on the 6th April 2022. It may well be that water service issues have been resolved, but this will not alter matters for the site for the period 2020, it could not be serviced during that period. The lodgement of

a planning application or even the granting of permission will not place the site back on the register. The Board have already removed the site from the register and the procedure to place a site on the register must begin again if the planning authority are so minded.

- 8.5.8. To be clear, the entry of the site has already been cancelled by Board Order dated 11th May 2021. The Board Order post-dated the issue of the levy demand charge for 2020. In my view, the levy demand for 2020 should not have been issued by the planning authority and its issuance only occurred because of the slow sequence of events concerning the previous section 18 appeal, ABP-307450-20 refers. The planning authority should remove the site from register as per the Board Order of 11th May 2021.

8.6. Levy Calculation

- 8.6.1. I have already explained how in my opinion, the levy demand for 2020 should not have been issued, however, the following is of note: a Notice of Determination of Market Value was issued to Fellhurst Limited on the 28 June 2018 stating that the valuation placed on the site is €12,000,000 (twelve million euro). No evidence from the appellant has been submitted to show that this valuation was appealed to the Valuation Tribunal.
- 8.6.2. A Notice of Demand for Payment of Vacant Site Levy under Section 15 of the Urban Regeneration and Housing Act was issued to Cornel Living Limited on the 15th April 2021 for the value of €840,000.
- 8.6.3. The levy rate applicable in this instance is 7%. The rate of levy has been increased from 3% to 7% of the market valuation of relevant sites with effect from January 2020, to be applied in respect of sites that were included on vacant site registers in 2019.
- 8.6.4. The applicable rate is 7% and it is evident, therefore, that the levy calculation has been correctly calculated if the site had stood on the register. However, given all of the foregoing, the levy calculation for 2020 should be zero or no charge, as the site was no longer entered on the register for the period concerned.

9.0 Recommendation

9.1. 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 1 of January 2020 and was not a vacant site on 23 April 2021, 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 incorrectly calculated in respect of the vacant site as the site was no longer held on the register.

10.0 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 site was for the period of 2020 and continues to be unsuitable for the provision of housing, because the site was not served by the public infrastructure and facilities (within the meaning of section 48 of the Act of 2000) necessary to enable housing to be provided and serviced, thus for the period concerned the site was not in accordance with section 5(1)(a)(ii) as defined by section 6(5)(b) of the 2015 Act (as amended), of the Urban Regeneration and Housing Act 2015 (as amended),
- (e) The site has already been removed from the register by Board Order dated 11th May 2021 and hence the levy charge should be correctly calculated to be zero or no charge.

the Board is satisfied that the site was not a vacant site on the 1 of January 2020 and was not a vacant site on 23rd April 2021, 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.

Stephen Rhys Thomas
Senior Planning Inspector

21 February 2022