



An
Bord
Pleanála

Inspector's Report ABP-310275-21

Type of Appeal	Appeal against a Section 18 Demand for Payment.
Location	Lands at Howth Road, Howth, County Dublin.
Planning Authority	Fingal County Council.
Planning Authority VSL Reg. Ref.	VS/0119.
Site Owner	Atlas GP Limited.
Date of Site Visit	15 September 2021.
Inspector	Stephen Rhys Thomas.

1.0 Introduction

- 1.1. This appeal refers to a Section 15 Notice of Demand for Payment of Vacant Site Levy issued by Fingal County Council, stating their demand for a vacant site levy for the year 2020 amounting to €2,310,000 for vacant site lands at Howth Road, Howth, County Dublin and identified as VS/0119.
- 1.2. A Notice of Proposed Entry on the Vacant Sites Register was issued to The Secretary (Atlas GP), Patrick Crean (Atlas GP), Paul Horn (Atlas GP) and Roisin Sweeney (Atlas GP) on the 23 September 2019. On the 3 December 2019, the Notice of Entry on the Vacant Sites Register was issued to Atlas GP Limited and related others. This section 7(3) notice was not appealed to the Board.
- 1.3. A valuation pertaining to the site was issued by Fingal County Council on the 10 January 2020. The value of the subject site is stated to be €33,000,000. A Notice of Demand for Payment of Vacant Site Levy under Section 15 of the Urban Regeneration and Housing Act was issued to Atlas GP Limited and related others on the 21 April 2021 for the value of €2,310,000. The appellant Atlas GP Limited and related others have 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 is on the northern side of the Howth peninsula c 13km north-east of Dublin's city centre. It occupies part of the flat coastal strip between the Howth Road and the sea below the Hill of Howth to the south. The site is elongated on an east-west axis. Its eastern end is close to the railway station and the town centre of Howth facing the harbour. The site comprises the former premises of the Techrete factory, a car dealership and a garden centre. It is a large brownfield site, currently under construction. Most buildings have been demolished and the remains removed off site, there are deep excavations and mounds on the site. The site is an active construction site with stout hoarding around its boundaries.

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) and 5(2) of the Act. A section 7(3) Notice was issued 3 December 2019 and the site was subsequently entered onto the register on that date.

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.

4.0 Development Plan

4.1. The **Fingal County Development Plan 2017 – 2023** is the operative development plan. As shown on Sheet 10 Baldoyle-Howth, the site is shown within the TC – Town and District Centre land use zoning where the objective is to: Protect and enhance the special physical and social character of town and district centres and provide and/or improve urban facilities. The vision for this land use is to maintain and build on the accessibility, vitality and viability of the existing Urban Centres in the County. Develop and consolidate these Centres with an appropriate mix of commercial, recreational, cultural, leisure and residential uses, and to enhance and develop the urban fabric of these Centres in accordance with the principles of urban design, conservation and sustainable development. Retail provision will be in accordance with the County Retail Strategy, enhance and develop the existing urban fabric, emphasise urban conservation, and ensure priority for public transport, pedestrians and cyclists while minimising the impact of private car based traffic. In order to deliver this vision and to provide a framework for sustainable development, Urban Centre Strategies will be prepared for centres in accordance with the Urban Fingal Chapter objectives. The site is within an ‘Urban Framework Plan’ area.

4.2. Chapter 3 of the Development Plan sets out the Council's objective in relation to Vacant Sites. Relevant objectives include:

- Objective PM24 - Identify and secure the redevelopment and regeneration of areas in need of renewal.
- Objective PM25 - Implement the Vacant Sites Levy for all vacant development sites in the County and prepare and make available a Register of Vacant Sites, as per the requirements of the Urban Regeneration and Housing Act 2015.

4.3. Land Use Zoning Objectives - 11.7 Vacant Land Levy – Residential and Regeneration Lands:

The Urban Regeneration and Housing Act 2015 sets out two broad categories of vacant land that the levy may apply to:

- Lands zoned primarily for residential purposes
- Lands in need of regeneration

The following lands zoned for residential or primarily residential purposes are included for the purposes as set out in the Urban Regeneration and Housing Act 2015 in relation to the vacant land levy:

RS and RA zoned lands as they have capacity to provide residential accommodation.

The following zoned lands are included as lands with the objective of development and renewal of areas in need of **regeneration**:

LC & TC mixed use zonings as they offer great potential for the significant supply of housing and employment space, as set out in their Zoning Objectives. Furthermore, the local and town centre zoned lands are included given their critical role for sustainable neighbourhoods and wider communities.

MC zoned lands are included as there are significant vacant lands in this zone which provide an opportunity for the County and given the Zoning Objective: "protect, provide for and/or improve major town centre facilities."

GE zoned lands are included because the Objective is “provide opportunities for the general enterprise and employment.” The primary objective is to facilitate long-term economic development in the region.

5.0 Planning History

5.1. Subject site

ABP-**306102**-19 - Demolition of structures on site, construction of 512 no. apartments, childcare facility and associated site works. April 2020.

PL06F. **246151**, Reg. Ref. 15A/0362 –On 20th June 2016 the board granted permission for 145 apartments, 55 houses, 6 commercial units and 487 car parking spaces on the site.

PL06F. **240171**, Reg. Ref. F11A/0028 – On 13th March 2013 the board granted permission for 281 apartments, 5 houses, 3 commercial units and 462 car parking spaces on the site. The period of this permission has been extended to 13th March 2023.

PL06F. **235083**, Reg. Ref F08A/1172, - On 25th March 2010 the board refused permission for a mixed use development on the site including 386 homes, as well as offices, shops and a hotel. The reasons for refusal referred to visual impact and overdevelopment, poor levels of amenity for the proposed apartments and inadequate information about the excavation of the site.

VSL History – None

6.0 Planning Authority Decision

6.1. Register of Vacant Sites Report:

- 6.1.1. A Vacant Site Report (30.08.2019) was prepared for the site outlining the dates of the visits to the site, description of the area, zoning, planning history 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 17/04/19 and 30/08/19,

- Former Techcrete works, Beshoff Motors and a Garden Centre (all not in use), the site is vacant, idle and it is not being used for the purposes of its zoning.
- The site has a neglected appearance.
- No development has commenced on site.
- It is not listed on the Derelict Site Register.
- The site is subject to ongoing incidents of antisocial behaviour.

6.1.2. In terms of criteria set out in section 5(1)(b) it is detailed that:

- The lands are vacant and idle. It is stated that it has been a vacant site for the duration of the 12 months preceding the report. Supporting evidence of this includes:
 - Site inspection photographs dated 17/04/19 and 30/08/19.
 - Bluesky Orthos aerial photographic survey on behalf of Fingal County Council dated 27.06.2018.
 - Google Street view images from 2009 to 2018.
 - Planning Authority's knowledge and familiarity with this site due to the planning history of the site and SHD pre-app meetings.
- Though Beshoff Motors may have been in use in 2018, the majority of the site remained vacant.
- The site is in a neglected condition.
- There is evidence of antisocial behaviour.
- The report concludes that the site is visually prominent and is a strategically important site. It has adverse effects in terms of visual amenity in an established urban setting and streetscape.

The report is accompanied by site photographs, maps, Dangerous Structures/Place Inspection and a report of notable incidences from Raheny Garda Station.

6.1.3. Vacant Site Report 2 – Additional site visit on 28/11/19. In response to a submission received opposing the proposed entry onto the VSL register, it was noted:

- Revised addresses to which sent future correspondence, noted and considered an acceptable request.
- The submission has not demonstrated that the site is not vacant and has not been vacant, for the duration of the preceding 12 months. In this regard, it is considered the site remains within the criteria of a 'regeneration site'.
- Notwithstanding the planning history of the site, it is considered that if FCC decides not to enter the site on the register, there remains a risk that the site may not be developed in the foreseeable future. It recommended that the lands should be included on the Vacant Sites Register.

6.1.4. Following a Chief Executive's Order signed on the 21 April 2021; a section 15 Demand Notice issued.

6.2. **Planning Authority Notices:**

6.2.1. Fingal County Council advised the site owner that the subject site (Planning Authority site ref. VS0119) is now liable for a payment of the levy for 2020 of €2,310,000. Payment terms and methods are outlined.

6.2.2. A Notice of Determination of Market Value was issued to others at Atlas GP Limited on the 10 January 2020 stating that the valuation placed on the site is €33,000,000 and instructions to make an appeal to the Valuations Tribunal, accompanied by a map with the site outlined.

6.2.3. A section 7(3) Notice issued on the 3 December 2019, advising the owner that their site had been placed on the register.

6.2.4. A section 7(1) Notice issued on the 23 September 2019, 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 Fingal 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 site is not a vacant site because the development of the lands was stalled by legal proceedings against a planning decision to grant permission. On the 3 April 2020 permission was granted by the Board for 512 residential units, ABP-306102-19 refers. The final decision of the court on *Morris v An Bord Pleanála*, High Court 2020 No 470JR issued 6 November 2020. For the period from 14 July 2020 to 6 November 2020 the owner was prevented from carrying out development. The site was not vacant as defined by section 5(1)(a), the site was not suitable for housing because of a legal challenge on it and could not be in use for that reason. The 2015 Act is meant to bring sites into use and not as a revenue gathering mechanism.
- A commencement notice was submitted once the outcome of the legal challenge was useful. During 2020, the owner started demolition works, set up staff facilities on site, completed asbestos clearance/removal, installed hoarding and further site investigations. By May 2021, the owner has also completed all demolition works, installed tree protection measures, brought materials on to the site, prepared site services in advance of construction and commenced excavations.
- Section 6(5)(c) of the Act refers to any thing that may affect the provision of housing. The site was contaminated, not possible to provide housing until the site was decontaminated. The owner outlines the steps taken and notes that the Act refers to how things might affect a site and this is such a case.
- The site is and was not vacant, as the owner took steps allowed for under exempted development rights and other statutes to prepare the site for development, return to work protocols, enabling works, slit trenches and the erection of hoarding

The appeal raises questions about the legal definition of a vacant site within section 18, there is imprecision in the definition of the ‘year concerned’ and ‘no longer a vacant site on the date on which the appeal under this section is made’ and other terminology in section 18 and 5 of the 2015 Act.

The appeal is accompanied by the demand letter, commencement notice dated 27/11/20 and a Materials Management and Remedial Strategy Plan (technical memo dated 2/03/21)

7.2. **Planning Authority Response**

The planning authority have provided a response to the appellant's grounds of appeal that include:

- Clarification that the site was assessed under section 5(1)(b) of the 2015 Act, regeneration lands.
- The site, not being a residential lands for the purposes of the Act, the test for the provision of housing does not apply. Reference to all those works being held up in relation to the provision of housing do not apply.
- An extant permission for a site, should not be reason to remove a site from the register.
- The site should be confirmed as a vacant site and the levy for 2020 applied.

7.3. **Further Response**

The appellant has provided a response as follows:

- Agree that the demand in question is for 2020.
- No reference is made by the planning authority in relation to the owner's contention that the site was no longer on the date that the appeal was made, 18 May 2021.
- The planning authority do not comment in relation to those works carried out in 2020, the owner is entitled to raise all issues in relation to a vacant site (s51(a) and (b)), no comments were made in relation to the Navratil legal case.
- The site was in use for the period concerned, as such works constitute a use for the site.

8.0 **Assessment**

8.1. **Introduction**

- 8.2. The Board should note that the owner refers to section 5(1)(a) of the 2015 Act and its provisions in relation to 'residential' land. The site was assessed and placed on the register by the planning authority under the test for 'regeneration' lands, section 5(1)(b) refers.

8.3. The appeal on hand 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 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) or (b) 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.

8.4.2. For the purposes of this assessment, I will consider both scenarios.

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 3 December 2019. A Section 9 appeal was not made to the Board. However, the owner did make a submission in relation to the section 7(1) notice and so I am satisfied that there was significant engagement with the VSR process and the owner elected not to appeal in the first instance. For clarity, the site was placed on the register based upon the criteria for a regeneration site, section 5(1)(b) and section 6(6) of the 2015 Act refer. The planning authority reiterate this in their submission in relation to the current appeal. The grounds of appeal raised by the owner refer back to section 5(1)(a), which of course relates to residential lands. Mention is made of the suitability of the site for the provision of housing and whether there was such a thing that would affect this, section 6(5)(c) of the 2015 Act refers. Specifically, the issue of contaminated lands and the imposition of legal proceedings that prevented permission being carried out were advanced as things that might affect the provision of housing. In the owner's final submission in relation to this appeal, they

acknowledge that the site is a regeneration site, but state that they are entitled to utilise all aspects of the 2015 Act to defend their case.

8.5.2. Setting aside things that occurred on the site in 2020 and 2021, matters that I consider later in relation to whether the site was no longer a vacant site. The site was initially placed on the register in December 2019 and the majority of the site was considered vacant for the period of twelve months prior to that date. The assessments provided by the planning authority provide the basis for the decision to place the site on the register and I find them to comply with the requirements of the 2015 Act in relation to regeneration land. The owner elected not to appeal this decision of the planning authority, however, they did engage with the process and made a submission after the initial section 7(1) notice. I am satisfied that the owner was sufficiently engaged with the process at the time to make a reasoned decision not to appeal. I am satisfied that the site was correctly entered onto the register as a vacant site under the criteria of a regeneration site.

8.5.3. The owner has not directly challenged the decision to place the site on the register in the first place. Instead, the focus is on the demand for payment of the levy charge for 2020 and the legal framework generally, around a section 18 appeal. I think that quite rightly the owner has narrowed their attention to the matter of whether the site was no longer vacant and I focus on this in the following sections of my report.

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

8.5.4. The owner has made much about the legal circumstances that surround the lands, and this effectively paused efforts to develop the site. In this regard, I note that a strategic housing development with the Board reference number ABP-306102-19 was granted permission on the 3 April 2020. This decision was judicially reviewed and a decision in favour of the Board (and also the owner) finally issued from the High Court on the 6 November 2020. The owner ramped up efforts to get the site to work with a combination of a commencement notice and extensive site preparation works including: demolition works, the set-up of staff facilities, completed asbestos clearance/removal, installation of construction hoarding and further site investigations. All of this, the owner claims, means that site was not vacant during 2020 and when the current appeal was made more works occurred including completion of all demolition works, installation of tree protection measures,

importation of materials, prepared site services in advance of construction and excavations commenced. I note that the owner refers to the site as a residential site and applies those tests, specifically section 6(5) and the contaminated condition of the site. The planning authority correct this view and remind the Board that the site was entered onto the register as a regeneration site not a residential site for which the criteria is different.

- 8.5.5. The owner has differentiated a section 18 appeal from a section 9 appeal, in particular they reference section 18(2)(a) where the onus for the owner is just to prove if a site was no longer a vacant site. In this respect they state that they are entitled to use all or either residential or regeneration criteria to defend their case. In essence, presenting all matters as they refer to the site and how they relate to a use for the site. The planning authority take a different view and remind the Board that the site is a regeneration site and the provision of housing is not a concern that should be considered by the Board.
- 8.5.6. I am not going to offer an opinion on what the 2015 Act means in relation to a section 18 appeal and whether residential or regeneration criteria has a bearing or not. I am satisfied that the particular circumstances that pertain to this site can be dealt with on the basis of the events that occurred in 2020 and 2021 alone and not questions of law.
- 8.5.7. The planning authority have rightly demanded a charge for 2020. During that year planning permission was permitted for a large-scale housing development. This is not a matter that I would consider as an actual use that would lift the site from the register and the planning authority also note this with reference to circular PL7/2016. After the planning consent process the decision of the Board to grant permission was unsuccessfully challenged by judicial review and by November 2020 the site could potentially be development as legal matters had been swept away. The legal delay matter, though inconvenient, has no actual or material bearing on the case in hand. Instead, I focus on the activities that occurred in the latter part of 2020 and on into 2021 that relate to actual works that I would consider as a bona fide use for the site as it transformed from a vacant site to a building site. On the date of my site visit, I observed that the site was securely fenced behind construction hoarding and extensive construction works were and are ongoing.

8.5.8. There are two main parts to a section 18 appeal with respect to a vacant site and its retention on the register. Firstly, that the burden on showing the site is not a vacant site is on the owner of the site, section 18(2)(a) as follows:

On an appeal under this section the burden of showing that—

*(a) the site was no longer a vacant site on 1 January in the year concerned, ...
is on the owner of the site.*

8.5.9. In this instance, I have not seen any information on the file that would lead me to conclude that on the 1 January 2020 anything had changed in relation to the site to avoid a demand for payment and the site would stay on the register. Some amount of construction activity did take place during the latter part of 2020, but the Act under section 18 does not ask this to be taken into account.

8.5.10. The other part of a section 18 appeal, is the role of the Board and this is outlined by section 18(3) as follows:

Where the Board determines that a site was no longer a vacant site on 1 January in the year concerned, or is no longer a vacant site on the date on which the appeal under this section is made, it shall give written notice to the planning authority who shall cancel the entry on the register in respect of that site and shall cancel the demand made in respect of that year.

8.5.11. Dispensing with the first element, that of the 1 January in the year concerned (2020), as above, I do not consider that matters changed for the site to avoid the levy and remove the site from the register. However, the second part of section 18(3) refers to the date on which the appeal was made and this is relevant. In my view it allows the Board to consider matters that pertain to the site on the day the appeal was made and in this case that would be the 18 May 2021. It is evident from the information on file that a significant amount of works had occurred on the site to progress a planning permission. These works continue to occur on site as much construction activity was observed on the day of my site visit. I am satisfied that even though the site may have been a vacant site as of the 1 January 2020 it was no longer a vacant site on the date on which the appeal was made, 18 May 2021. This would accord with the spirit of the 2015 Act as articulated by circular letter that the levy is intended to act as a site activation and release mechanism, to incentivise the development of vacant or idle sites in urban areas identified by planning authorities as “regeneration land” or

“residential land”, with a view to bringing such sites into beneficial use. This is just such a case where a previously underutilised and vacant regeneration site has been compelled by threat of a significant charge on land to come into a beneficial use, in this case for housing. In my mind the 2015 Act has served its purpose and brought into use a large tract of blighted regeneration lands and it would be reasonable of the Board to conclude that the site should be removed from the register and the charge cancelled. In this instance the planning authority have achieved a key County Development Plan objective for the development and renewal of areas in need of regeneration through the effective use of the Vacant site Register.

8.6. Levy Calculation

- 8.6.1. A Notice of Determination of Market Value was issued to Atlas GP Limited on the 10 January 2020 stating that the valuation placed on the site is €33,000,000. 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 Atlas GP Limited on the 21 April 2021 for the value of €2,310,00.
- 8.6.3. The applicable rate is 7% and it is evident, therefore, that the levy calculation has been correctly calculated. The Demand Notice issued under section 15 of the 2015 Act correctly states the levy due.

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 on the 18 May 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 correctly calculated in respect of the vacant site.

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 extent of construction works on the site on the 18 May 2021, the date on which the appeal was made,

the Board is not satisfied that the site was a vacant site on the 18 May 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

22 September 2021