



An
Bord
Pleanála

Inspector's Report ABP-313460-22

Type of Appeal	Section 9 Appeal against section 7(3) Notice.
Location	Former Paper Mills, Clonskeagh, Dublin 6.
Planning Authority	Dublin City Council.
Planning Authority VSL Reg. Ref.	VS-0800.
Site Owner	Harley Issuer DAC.
Planning Authority Decision	Place on register.
Date of Site Visit	21 December 2022.
Inspector	Stephen Rhys Thomas.

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1.0 Introduction

- 1.1. This appeal refers to a section 7(3) notice issued by Dublin City Council, stating their intention to enter the Former Paper Mills, Clonskeagh, Dublin 6 on to the Vacant Sites Register (VSR) in accordance with the provisions of section 6(2) of the Urban Regeneration and Housing Act 2015.

2.0 Site Location and Description

- 2.1. The subject site is located within the administrative boundary of Dublin City Council approximately 5.3 kilometres south of the city centre and in close proximity to the Dun Laoghaire Rathdown administrative area. The site is irregularly shaped and bounded to the west by the Clonskeagh Road (R825). The Dodder River is located along the eastern boundary of the site. For the most part rows of existing houses and commercial premises front onto the Clonskeagh Road, with the bulk of the site located to the rear of these houses/premises. The buildings fronting onto the Clonskeagh Road in the vicinity of the site range from 1 to 3 storeys in height. There are two separate road frontages from the site onto the Clonskeagh Road. The site has a continuous frontage onto the River Dodder to the rear (east of the site).
- 2.2. The site has been cleared of buildings and some construction activity is ongoing. Wooden hoarding has been constructed around the site where it fronts onto the Clonskeagh Road and a high wall runs along the eastern boundary of the site adjacent to the River Dodder. The Beech Hill Road runs along the eastern side of the River Dodder to the east of the site.

3.0 Statutory Context

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

- 3.1.1. The Notice issued under Section 7(3) of the Act states that the planning authority is of the opinion that the site referenced is a vacant site within the meaning of Section 5(1)(a) of the Act. The Notice is dated 5 April 2022 and is accompanied by a map outlining the extent of the site to which the Notice relates.
- 3.1.2. The relevant sections of the 2015 Act are as follows:

(1) In this Part, a site is a vacant site if—

(a) in the case of a site consisting of residential land—

(i) the site is situated in an area in which 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—

(I) 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.]

3.1.3. And, section 6(4) and (5) as follows:

(4) A planning authority, or the Board on appeal, shall determine whether or not there was a need for housing in an area within the planning authority's functional area for the purposes of this Part by reference to—

(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 households qualified for social housing support in accordance with section 20 of the Housing (Miscellaneous Provisions) Act 2009 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, and

(d) whether the number of habitable houses available for purchase or rent was less than 5 per cent of the total number of houses in the area.

(5) A planning authority, or the Board on appeal, shall determine whether or not a site was suitable for the provision of housing for the purposes of this Part by reference to—

(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 of 2000) necessary to enable housing to be provided and serviced, and

(c) whether there was any thing affecting the physical condition of the land comprising the site which might affect the provision of housing.

4.0 Development Plan Policy

- 4.1. The **Dublin City Development Plan 2016-2022** is the operative development plan. The site is located on lands that are subject to zoning objective Z1 with a stated objective 'to protect, provide and improve residential amenities'.
- 4.2. One of the key strategies of the Development Plan, as set out in section 4.4 is the creation of a consolidated city, whereby infill sites are sustainably developed and new urban environments are created, by actively promoting active land management, a key component of which is the vacant site levy.
- 4.3. Section 2.2.8.4 of the plan states that in accordance with the Urban Regeneration and Housing Act 2015, it is a key pillar of the development plan to promote the development 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.
- 4.4. Section 14.9 of the Development Plan 2016-2022 states that the VSL will apply to lands zoned Z1, Z2, Z3, Z4, Z5, Z6, Z7, Z8, Z10, Z12 and Z14.
- 4.5. Policy CEE16 states that it is the policy of DCC to: (i) To engage in the 'active land management' of vacant sites and properties including those owned by Dublin City Council, as set out in the Government's Planning Policy Statement 2015; to engage proactively with land-owners, potential developers and investors with the objective of encouraging the early and high quality re-development of such vacant sites. (ii) To implement the Vacant Land Levy for all vacant development sites in the city and to

prepare and make publicly available a Register of Vacant Sites in the city as set out in the Urban Regeneration and Housing Act 2015. (iii) To improve access to information on vacant land in the city including details such as location, area, zoning etc. via appropriate media/online resources and the keeping of a public register as a basis of a public dialogue in the public interest. (iv) To encourage and facilitate the rehabilitation and use of vacant and under-utilised buildings including their upper floors. (v) To promote and facilitate the use, including the temporary use, of vacant commercial space and vacant sites, for a wide range of enterprise including cultural uses, and which would comply with the proper planning and sustainable development of the area and the provisions of the Development Plan.

- 4.6. Policy QH3 states that it is policy of the Council (i) To secure the implementation of the Dublin City Council Housing Strategy` in accordance with the provision of national legislation. In this regard, 10% of the land zoned for residential uses, or for a mixture of residential and other uses, shall be reserved for the provision of social and/or affordable housing in order to promote tenure diversity and a socially inclusive city. (ii) To engage in active land management including the implementation of the vacant levy on all vacant residential and regeneration lands as set out in the Urban Regeneration and Housing Act 2015.
- 4.7. **Dublin City Development Plan 2022-2028** – The Dublin City Development Plan 2022-2028 was adopted at a Special Council meeting on the 2nd of November 2022. The plan came into effect on the 14th of December 2022.
- 4.8. **Residential Zoned Land Tax** - Draft RZLT maps were published by local authorities on 1 November 2022. Submissions could be made by the public on the Dublin City Council RZLT draft map up to the 01 January 2023.

5.0 Planning History

5.1. Subject site:

PA **3774/21** - residential and aparthotel development – withdrawn.

PA ref **3159/17** and **ABP Ref PL29S.300024** – Increase in apartment units from 96 to 116 with increase in block heights from 3 to 4 storeys with 30 additional parking spaces & additional bicycle spaces & associated site works.

PA ref **2308/16** and **ABP Ref PL29S.247062** - Amend previous permission (reg.ref.2620/14), increase apartments from 88 to 97, widen access, 27 additional parking spaces.

H0006/16 – Enforcement action opened August 2016, non-compliance with a permission.

6.0 Planning Authority Decision

6.1. Register of Vacant Sites Report:

- 6.1.1. Planning Report - Site inspection took place on the 16 August 2021, with previous inspections noted September 2016, June 2017, February 2018 and May 2019. After a series of site visits detailing the pace of construction work on site, it was decided that the site had become vacant/idle and a notice should issue.
- 6.1.2. Correspondence of 10 February 2022 – submission received, and contents noted, decision to place the site on the register.

6.2. Planning Authority Notices

- 6.2.1. A section 7(3) Notice issued on the 5 April 2022 referencing sections 5(1)(a) and 6(2) of the Act, advising the owner that their site had been placed on the register, accompanied by a site map.
- 6.2.2. A section 7(1) Notice issued on the 10 January 2022, advising the owner that their site had been identified as a vacant site and invited submissions, also accompanied by a site map. The notice references sections 5(1)(a) and 5(2) of the 2015 Act.

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 Dublin City Council to enter the subject site on the Register. The grounds of the appeal can be summarised as follows:

- The initial notice issued by the Council failed to provide a full reasoning for its decision. A submission was lodged by the owner, after which a letter from the council and site report were issued and the site placed on the register.

The section 7(1) notice was legally invalid because it failed to disclose a plethora of information that that owner thought they should be entitled to, various judgements are quoted.

- Since taking ownership, the owner has lodged a revised planning application, the outcome of which is in the hands of the Council. The council failed to take this matter into account.

The grounds of appeal are accompanied by; the notices, previous submission and planning report documents.

7.2. Planning Authority Response

- 7.2.1. The section 7(1) Notice clearly states that the site was entered under the criteria for residential lands section 5(1)(a) of the 2015 Act, all other information was made available to the owner.
- 7.2.2. It is noted that circular letter PL7/2016 states that 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.
- 7.2.3. The site should stay on the register.

7.3. Further Response

The appellant reiterates many of the points set out in the initial grounds of appeal, in addition, they outline the following:

- The site report and accompanying letter were sent after the period during which a submission could be made on the initial notice. This is considered to be a retrospective fix for what was a legally deficient notice in the first place.
- The council should consider the vacant or idle status of the site as illustrated by the Navratil judgment on the matter of the interpretation of the 2015 Act and the natural meaning of the term vacant/idle.

8.0 Assessment

8.1. Introduction

- 8.1.1. An appeal under section 9 of the Act, requires that the burden of showing that the site was not a vacant site for the 12 months preceding the date of entry on the Register is on the owner of the site. Section 9(3) of the Act states that the Board shall determine whether the site was a vacant site for the duration of the 12 months concerned or was no longer a vacant site on the date on which the site was entered on the register. The subject site was entered onto the Dublin City Council VSR on the 5 April 2022.
- 8.1.2. The section 7(1) Notice was issued under the provisions of section 7(1) of the Act, to which the owner responded, and the planning authority took into account. I note that the section 7(1) Notice referred to section 5(1)(a) residential lands. Prior to the placement of the site on the register as detailed in the section 7(3) Notice but after the period for the making of a submission under section 7(1) of the Act, the planning authority corresponded with the owner to explain the rationale for the decision.
- 8.1.3. The section 7(3) Notice was issued under the provisions of Section 5(1)(a) of the Act which relates to residential lands. The assessment undertaken by the Planning Authority to inform the placement of the site on the Register, which I outline in section 6.1 above, refers to the tests included for residential lands under section 5(1)(a) of the Act as is required for lands zoned for residential purposes. The lands are subject to zoning objective Z1, To protect, provide and improve residential amenities. Section 14.9 of the Development Plan 2016-2022 states that the Vacant Site Levy will apply to lands zoned Z1, Z2, Z3, Z4, Z5, Z6, Z7, Z8, Z10, Z12 and Z14. Given that lands zoned Z1 fall under part 1 of section 14.9 of the Development Plan, the site can therefore be considered as residential for the purposes of the levy.
- 8.1.4. The main concerns of the appellant are that the initial section 7(1) Notice was legally unsound as it failed to fully set out the reasons why the planning authority decided to place the site on the register and invite submissions. The appellant provides a detailed legal argument why the planning authority should have provided more information in its notice and numerous legal judgements are cited. I note that in this regard the 2015 Act states the following:

Before entering a site on the register a planning authority shall give written notice to the owner of the site setting out the reasons for the proposed entry and the owner may make submissions in respect of the proposed entry to the planning authority in writing within 28 days after the date of such notice

- 8.1.5. The planning authority maintain that they followed the correct procedure and sent written notice to the owner setting out that it was intended to place the site on the register and invite submissions. The notice specifically mentions section 5(1)(a) with regard to residential land and section 5(2) with reference to the definition of a site and that of a home. In the mind of the planning authority, they believe that they have correctly followed the requirements of the 2015 Act.
- 8.1.6. There are no regulations to guide the implementation of the 2015 Act and thus no proforma layout for what information should be included on any notice issued in relation to the Vacant Site Levy. In my experience planning authorities have issued notices with regard to the Vacant Site Levy to inform and alert the owner of the intention to place a site on the register on the basis of being residential or regeneration lands, with two very distinct criteria to be met. Such a methodology has been acceptable in the past and continues to be so.
- 8.1.7. The section 7(1) notice is simply a mechanism to invite submissions and on this occasion the owner did so, and thusly considered by the planning authority. The section 7(1) notice is not a determination or a decision that would have any other consequence other than to invite a submission. The initial notice alerted the owner, a submission was made on the 4 February 2022, the planning authority replied to the points made and foretold placement on the register which of course could be appealed to the Board. This is the circumstance that we are now in, a section 9 appeal against entry on register. I find that the section 7(1) Notice is not defective, it served its purpose, and the owner has been engaged with the planning authority from the start. The vacant site levy involves a process, clearly set down by the 2015 Act and the owner has availed of all opportunities to make their case. I am satisfied that the correct procedures have been followed by the planning authority and all available documents and reports have been made accessible to the owner in the preparation of their grounds of appeal. As far as I can tell no legal boundaries have been over stepped and the rights of the owner to appeal the section 7(3) notice have not been constrained, as evidenced by the appeal now before the Board.

8.2. Vacant or Idle?

8.2.1. Section 5(1)(a) refers to lands considered to come within the meaning included for Residential Land and the tests for such sites are as follows:

(i) the site is situated in an area in which there is a need for housing,

(ii) the site is suitable for the provision of housing,

(iii) the site, or the majority of the site is -

(I) 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.

8.2.2. The site must meet all three tests (housing need, suitability for housing and vacant/idle status) and I will address each in turn.

8.2.3. Housing Need – The appellant makes no case at all as to the lack of housing need and this is not unexpected given that permission has been granted on several occasions for a housing scheme on the site. A current planning permission governs the site, and it appears that the implementation of same has been ongoing for some time. There can be no rationale argument advanced that there has not been a housing need in the area, and that this need continues today. I am satisfied that there is a housing need in the area and the core strategy of the Development Plan takes a holistic view of housing need in general. That is why the VSR refers to all residentially zoned land, if section 5(1)(a) is to be applied, such as in this case.

8.2.4. Suitability for Housing – The appellant advances no case for the unsuitability of the site for housing. The site has the benefit of planning permission for residential development, the implementation of which appears to have stopped and started over the years. I am satisfied that the site is suitable for housing.

8.2.5. Vacant/Idle – The appellant has not advanced a use for the site, however, they do make the case that a live planning application for an increased number of residential

units is pending a decision of the planning authority. The preparation of this planning application was initiated soon after the owner came into possession of the lands concerned and this shows the owner's intention to deliver housing on site. All of this took place during a period of sporadic national lockdown of certain construction activity and the owner maintains that it is unfair that a notice was served whilst at the same time the decision on a planning application lay with the same authority that issued the notice. I note that a recent planning application with reference to these lands and made by the owner (Harley Issuer Designated Activity Company on the 19 October 2021) was subsequently withdrawn in September 2022, pa reference 3774/21 refers.

8.2.6. The planning authority make reference to practical matters (taken from Circular letter PL7/2016) that should be noted when a vacant site is to be established and an extant planning permission should not be taken into consideration. The appellant picks apart this conclusion and notes that only extant permissions should be disregarded, advice is silent on live pending planning applications. The appellant advances their current intention and past record of delivering housing as an indication that the site is neither vacant or idle. The appellant also leans on the interpretation of the term vacant (empty or unoccupied) or idle (not in use) that was discussed in the Navratil judgment and asserts that the site is not vacant and not idle for the reasons set out above.

8.2.7. This is in my mind, the nub of the appellant's case, whether the site was vacant or idle, section 5(1)(a)(iii)(I) of the 2015 Act refers. My observations of the site agree with the images and findings of the Register of Vacant Sites planning report prepared by the planning authority. In summary, it is apparent that construction activity had taken place and stalled, the site therefore is not vacant in the normal meaning of the word. However, the contention of the planning authority is that work had stopped on site and more correctly I would conclude that the site was idle and not therefore in use. On the day of my site visit, I observed that construction activity was taking place on site. But according to the planning authority's recorded site visits this activity stalled and this state of affairs is tacitly agreed with by the appellant by virtue of their planning application preparation process. A process the planning authority have disregarded as a use for the site and I agree. Matters are slightly complicated by the short periods of national lockdown imposed by government in

response to a global pandemic that halted most construction activity. However, such periods of lockdown were not so long in time frame to limit the use of the site in furtherance of the permitted development. Like many other construction sites during that time, building activity continued when allowed to do so and it would seem this did not occur on the subject site as demonstrated by the site inspections carried out by the planning authority. I do not consider that the administrative function of a preparing and lodging a planning application can be considered as an actual and real use for the site and thus the site remained idle for the relevant period.

9.0 Recommendation

9.1. I recommend that in accordance with section 9(5) of the Urban Regeneration and Housing Act 2015 (as amended), the Board should confirm that the site at the Former Paper Mills, Clonskeagh, Dublin 6, was a vacant site for the 12 months concerned. Therefore, the entry on the Vacant Sites Register on the 2 April 2022 shall be deemed to take effect from that date.

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 Inspector;
- (d) That the site was and is a vacant site as demonstrated by its idle or not in use condition during the relevant period, 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 extant planning permissions, and that insufficient reason is put forward to cancel entry on the Vacant Sites Register

the Board considers that it is appropriate that a notice be issued to the planning authority who shall retain the entry on the Vacant Sites Register.

Stephen Rhys Thomas
Senior Planning Inspector

9 January 2023