



An
Bord
Pleanála

Inspector's Report ABP-315951-23

Type of Appeal	Appeal against a Section 18 Demand for Payment.
Location	1-15 Brookfield Road, Dublin 8.
Planning Authority	Dublin City Council South.
Planning Authority VSL Reg. Ref.	VS-0002.
Site Owner	Brookfield Property Limited.
Planning Authority Decision	Charge Levy.
Date of Site Visit	7 June 2023.
Inspector	Stephen Rhys Thomas.

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1.0 Introduction

- 1.1. This appeal refers to a Section 15 Notice of Demand for Payment of Vacant Site Levy issued by Dublin City Council, stating their demand for a vacant site levy for the year 2018 amounting to €48,000 for vacant site lands at 1-15 Brookfield Road, Dublin 8, and identified as VS-0002. The notice was issued to Brookfield Property Limited and dated 3 February 2023. Brookfield Property Limited has appealed the Demand for Payment Notice issued pursuant to Section 15 of the Urban Regeneration and Housing Act.
- 1.2. A valuation pertaining to the site was issued by Dublin City Council on the 31 May 2018. The value of the subject site is stated to be €1,600,000.
- 1.3. A Notice of Proposed Entry on the Vacant Sites Register was issued on the 1 March 2017. On the 12 April 2017, the Notice of Entry on the Vacant Sites Register was issued to the owner. This section 7(3) notice was not appealed to the Board.

2.0 Site Location and Description

- 2.1. The site is located along Brookfield Road in the south Dublin inner city suburb of Kilmainham. The site has been cleared and there are mounds of earth present at the northern end. There are no buildings on site. The road level along the site frontage falls steeply towards Kilmainham Road to the north. The area has a mixture of terraced houses, in different states of repair and some small apartment developments. The site is close to the site of the National Paediatric Hospital which is nearing completion.

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)(b) of the Act. A section 7(3) Notice was issued 12 April 2017 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.

3.2. Development Plan Policy

3.2.1. Dublin City Development Plan 2022-2028

3.2.2. The Dublin City Development Plan 2022-2028 was adopted at a Special Council meeting on the 2 November 2022. The plan came into effect on the 14 December 2022.

14.8 Vacant Site Levy

The Urban Regeneration and Housing Act, 2015, (as amended) made provision for a vacant site levy to incentivise the development of vacant and under-utilised sites in urban areas for housing and regeneration purposes. The Act enables local authorities to provide a specific objective in their development plan for the development and re-use of vacant sites in specific locations within urban areas where it is considered beneficial towards securing the objectives of the core strategy. The Act sets out two broad categories of vacant land that the levy may apply to:

- Lands zoned solely or primarily for residential purposes in accordance with Section 10 (2)(a) of The Act.
- Lands identified with the objective of development and renewal of areas in need of regeneration in accordance with Section 10(2) (h) of The Act.

For the purposes of the Act and the implementation of provisions relating to the vacant site levy, the following comprise lands which are zoned solely or primarily for residential purposes in accordance with Section 10 (2)(a) of The Act:

- Z1 Sustainable Residential Neighbourhoods - To protect, provide and improve residential amenities.
- Z2 Residential Neighbourhoods (Conservation Areas) - To protect and/or improve the amenities of residential conservation areas.
- Z8 Georgian Conservation Areas - To protect the existing architectural and civic design character, and to allow only for limited expansion consistent with the conservation objective.
- Z10 Inner Suburban and Inner City Sustainable Mixed-Uses - To consolidate and facilitate the development of inner city and inner suburban sites for mixed-uses.
- Z12 Institutional Land (Future Development Potential) - To ensure existing environmental amenities are protected in the predominantly residential future use of these lands.

Residential lands identified in the city's SDRAs (Z14 zones: To seek the social, economic and physical development and/or regeneration of an area with mixed-use, of which residential would be the predominant use) as these lands are the crucial redevelopment and regeneration areas in the city - see also Chapter 13: Strategic Development and Regeneration Areas and also SDZ Planning Schemes and LAPs where relevant.

Section 10(2)(h) of The Act provides that a development plan shall include objectives for the development and renewal of areas, that are in need of regeneration, in order to prevent: adverse effects on existing amenities in such areas, in particular, as a result of the ruinous or neglected condition of any land; urban blight and decay; anti-social behaviour, or; a shortage of habitable houses or of land suitable for residential use or a mixture of residential and other uses. In accordance with Section 10(2)(h) of The Act, and for the purpose of implementation of the Urban Regeneration and Housing Act 2015 (as amended), the following land-use zoning objectives are identified as they may contain lands in need of regeneration/renewal:

- Z3 Neighbourhood Centres - To provide for and improve neighbourhood facilities.

- Z4 Key Urban Villages and Urban Villages - To provide for and improve mixed-services facilities.
- Z5 City Centre - To consolidate and facilitate the development of the central area, and to identify, reinforce, strengthen and protect its civic design character and dignity.
- Z6 Employment/Enterprise - To provide for the creation and protection of enterprise and facilitate opportunities for employment creation.
- Z7 Employment (Heavy) - To provide for the protection and creation of industrial uses, and facilitate opportunities for employment creation including Port Related Activities.

3.3. Planning History

3.3.1. Subject Site:

Planning Authority Case Reference: 2725/21 – Permission for the construction of build-to-rent residential development incorporating 79 apartments and all associated site works.

3.3.2. VSR History:

ABP Reference VX29S.309827 - Demand for payment for Vacant Site Levy Cancelled 5 September 2022.

ABP Reference ABP-315948-23 - Demand for payment for Vacant Site Levy. Concurrent appeal, as yet undecided.

4.0 Planning Authority Decision

4.1. Register of Vacant Sites Report:

A Report was prepared for the site outlining the date of the visits to the site, description of the area, zoning (Z6), planning history and the type of site for the purposes of the Act which in this case was Residential at the time of the section 7(3) Notices (2017) and the Determination of Market Valuation Notices (2018)

The following key points are noted: Site visits were undertaken on 4 May 2016 and 18 April 2019, Aerial Images for 2013 and 2016 are included in the report. Planning

Authority stated that the site was considered vacant in accordance with section 5 of the Urban Regeneration and Housing Act, for regeneration lands.

A report with a Site Inspection Date of 13 January 2022 – Zoning Z1. Residential land, site in a similar condition as before (18 April 2019), remain on the register.

4.2. Planning Authority Notices

- 4.2.1. A Notice of Proposed Entry on the Vacant Sites Register was issued to EWR Investments Limited on the 1 March 2017.
- 4.2.2. On the 12 April 2017, the Notice of Entry on the Vacant Sites Register under section 5(1)(b) was issued to EWR Investments Limited, no appeal was made to the Board in relation to this notice.
- 4.2.3. On the 31 May 2018, a Notice under section 11(1) advising the owner that a levy would be charged was issued to EWR Investments Limited, no appeal was made to the Board in relation to this notice.
- 4.2.4. A valuation pertaining to the site was issued by Dublin City Council on the 31 May 2018. The value of the subject site is stated to be €1,600,000.
- 4.2.5. A Notice of Demand for Payment of Vacant Site Levy for 2018 under Section 15 of the Urban Regeneration and Housing Act was issued to Brookfield Property Limited on the 3 February 2022 for the value of €48,000.
- 4.2.6. *A Notice of Demand for Payment of Vacant Site Levy for 2019 under Section 15 of the Urban Regeneration and Housing Act was issued to Brookfield Property Limited on the 3 February 2023 for the value of €112,000.**
- 4.2.7. A Notice issued with reference to section 18(3) of the Urban Regeneration and Housing Act was issued to Brookfield Property Limited on the 3 February 2023 informing the owner that the charge for 2020 is cancelled and that the site no longer stands on the register. Note that a charge for 2018 and 2019 will be charged.
- 4.2.8. A Notice issued with reference to section 18(3) of the Urban Regeneration and Housing Act was issued to Brookfield Property Limited on the 16 February 2023 informing the owner that the site had been cancelled and no longer stands on the register.

* Concurrent appeal, reference number ABP-315948-23

5.0 The Appeal

5.1. Grounds of Appeal

5.1.1. The appellant has submitted an appeal to the Board, against the decision of Dublin City Council to retain the subject site on the Register and charge the levy. The grounds of the appeal can be summarised as follows:

- ABP decision 309827 instructed the planning authority to cancel the entry of the site on the register, September 2022 for the levy year 2020.
- Demands should not therefore be made with respect to 2019 and 2018, when it was decided by the Board that in 2020 the site was not a vacant site.
- The procedures employed by the Council were at the heart of the appeal, that is why it was removed from the register and the same reasons stand. Procedural irregularities apply to the site and therefore also for the years 2018 and 2019.
- Dublin City Council have not corresponded with regard to the re-registration of the site on to the register, and this is unfair.
- Since purchase in 2017 the owner has worked hard to development the site, with over 2.6 million euro spent on fees, demolition and maintenance. Some of these activities were carried out through 2018 and 2019.
- The demand is unlawful, because during 2018 and 2019, works to the site were ongoing, there is no legal basis to demand the levy. Given that the Demand of 2020 was decided to be unlawful, the other demands should also fall.

The appeal is supported by a list of 19 enclosures.

5.2. Planning Authority Response

5.2.1. None.

6.0 Assessment

6.1. Introduction

6.1.1. This current appeal refers to a levy charge demanded by the planning authority for the year 2018. The planning authority has also demanded a charge for the same site for the year 2019 and this forms the basis for a concurrent appeal, reference number ABP-315948-23 refers. The Board decided to cancel the levy charge for 2020 and the site has now been removed from the register.

6.1.2. 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.

6.2. The site is no longer vacant

6.2.1. The Board should be aware that the provisions of Section 18(2) of the Act does not specify whether the applicant must demonstrate that the site constitutes a vacant site as per the provisions of Section 5(1)(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, the site is no longer a vacant site as of the 1st of January in the year concerned, in this case 2018 or at the time of appeal lodgement of the 2 March 2023.

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

6.3. Is it a Vacant Site?

6.3.1. A Section 7(3) Notice of Entry on the Vacant Sites Register was issued on the 12 April 2017, under the terms of section 5(1)(b) of the 2015 Act. At that time the site was zoned Z6 and the criteria for regeneration lands was correctly applied and the site placed on the register. No Section 9 appeal was made to the Board. Subsequently, Variation No. 19 of the Dublin City Development Plan 2016-2022 was adopted on 10 March 2020 and the site now remains Z1 in the Dublin City Development Plan 2022-2028. A section 18 appeal against a demand for payment of

the levy for the year 2020 was cancelled by the Board and the reason can be summarised as follows: the fact that the zoning of the area of land had changed from Z6 (for the purpose of regeneration) to Z1 (for the purpose of residential), the Board could not be satisfied that the land continued to be a vacant site on the date the appeal was made. The demand was cancelled, and the site removed from the register, a notice issued with reference to section 18(3) of the Urban Regeneration and Housing Act and dated 16 February 2023 from the planning authority refers.

- 6.3.2. The appellant maintains that as the site has been removed from the register and that faulty procedures before the demand was levied means that a charge for 2018 should not now be made. It is claimed that the owner should have been informed about the re-designation of the site as vacant site for the years 2020, 2019 and 2018 but there was no communication about any process about re-entering the site on the register. Mention is made by the appellant about the section 7(1) process and a 28 day period in which to make a submission. There appears to be some confusion about the processes at play in this scenario.
- 6.3.3. My reading of the facts is that prior to the ownership of the site by the appellant the lands were placed on the register under the terms of section 5(1)(b) regeneration lands, I can see that the correct procedures were followed, no appeal was made and the site stood on the register. The site was acquired by the appellant and no notices were served until the levy demand for 2020 in March 2021. This was appealed, the charge cancelled, and the site removed from the register. The appellant takes the Board's decision to mean that because the zoning changed, the site should go through the process of registration all over again and this did not happen. There may be some strength in this argument, however, it is important to look at the dates carefully in respect of the appeal on hand.
- 6.3.4. The zoning did not change from regeneration to residential lands until 10 March 2020, I am satisfied that the test for regeneration lands should still apply for the years 2019 and 2018. The Board will note that the criteria for regeneration and residential lands differ, section 5(1)(a) and 5(1)(b) of the 2015 Act refer. The appellant claims that they received no notification about anything until February 2021 and an appeal was duly made and was successful. However, the 2015 Act states with reference to 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.

- 6.3.5. The key point in this section of the Act, is the year concerned and the date upon which the appeal is made. The rationale follows that if the planning authority had demanded the levy each consecutive year, as I believe the 2015 Act intended, the site would have been rightly classified as regeneration lands right up until 2020, section 15(1) refers:

Subject to subsection (2), there shall be charged and levied for each year beginning with 2018 in respect of each vacant site in relation to which a market value has been determined in accordance with section 12 and that stands entered on the register a levy to be known as vacant site levy

- 6.3.6. However, the grouping together in time of separate demand notices for 2018 and 2019, as has happened in this instance, means that the period of analysis now stretches from the year concerned (2018) right up until March 2023. Matters have changed in between times, the lands have been rezoned and the Board have identified that different criteria of the 2015 Act should now apply. In my view this cautionary approach by the Board serves to ensure that any property owner is not disadvantaged in their right to challenge decisions made by the planning authority, in this case the consequences of a zoning change from regeneration lands to residential lands. The 2015 Act is not so clear about what happens when zoning changes to such an extent that a site would fall to be assessed differently, but the Act does talk about whether a site is no longer a vacant site, and the definition of a vacant site are clearly defined as either residential or regeneration, section 5 of the Act refers 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.

and

(b) 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 of 2000) in the area in which the site is situated or has adverse effects on the character of the area.

6.3.7. The appellant has claimed that all sorts of administrative and maintenance activities have occurred on site and a large number of enclosures have been included to demonstrate this. I do not consider that any of these functions are an actual use for the site, at best the activities on site are just the responsible actions of any landowner, to maintain and make secure their site. However, the crux of the appeal is the change in circumstance of the land use zoning and how the lands should now be considered. As I have already pointed out because the appeal has been lodged in 2023, relatively recent matters that concern the lands should be taken into consideration. The site is now zoned residential (by variation and remains Z1 in the Dublin City Development Plan 2022-2028) and as can be seen, different tests apply that could mean that the site cannot be defined as a vacant site in the same way that it was back in 2017.

6.3.8. Taking the new zoning as an example, the site is clearly vacant, it has had no use and is not in use, it is vacant in the ordinary sense of the word. The site is in area consisting of residential land in which there is a need for housing and for which the site is suitable for housing, permission reference: 2725/21 refers. The exception

about after becoming residential land has no part to play (section 5(1)(a)(iii)(I)(A) and (B)), because no actual use is being carried out on the site. Irrespective of all these factors that would mean the site is a vacant site, the very application of a different test without the opportunity for the landowner to appeal goes against the principle of natural justice. The Board cancelled the demand and removed the site from the register on this basis in the previous appeal. I am satisfied that similar circumstances apply in this instance, the definition of these lands as a vacant site has changed, the test has changed and the owner has been excluded from engaging in this process. I believe that this circumstance as already decided by the Board in the previous appeal, would not have occurred if the section 15 Demand Notices had issued in the year for which the levy was demanded. That opportunity has passed and now the demand notice window of opportunity for appeal has been inordinately extended right up until the date that the appeal was lodged, March 2023, section 18(3) of the 2015 Act refers.

6.3.9. Even though, I am satisfied that the site could still be considered a vacant site, whether residential or regeneration is a hypothetical exercise, when I consider that matters of fact have changed for the lands concerned. I note that the appellant has not sought to engage with these changed circumstances with reference to residential land zoning and has not advanced any reasons why the site would not be considered in terms of the need and suitability for housing and nor should they. The planning authority have pulled up short in terms of the fair application of the Vacant Site Levy on a number of fronts including: the annual issuance of a demand notice that would have excluded the opportunity to appeal because of a failure to reclassify this site as residential lands when the zoning changed in 2020. It is for these reasons that I am satisfied that the demand for payment notice should be cancelled, and the planning authority advised to remove the site from the register.

6.4. **The site is no longer vacant as of the 1st of January 2018**

6.4.1. The appellant has advanced various administrative and maintenance uses for the site and I have already explained that these cannot be considered, section 6.3 of my report refers. Since purchase in 2017 the owner has worked hard to develop the site, with over 2.6 million euro spent on fees, demolition and maintenance. Some of these activities were carried out through 2018 and 2019. These activities are not a use for the site, the paper exercise to secure planning permission is just that and the

routine maintenance and upkeep of a property falls under the duty and care of any property owner and does not constitute development in this instance.

- 6.4.2. Under section 18 of the 2015 Act, the Board is asked to make a determination about the site in the year concerned (in this case 2018) and on the date of the appeal (in this case 2023). I have explained at length in section 6.3 of my report that because the zoning changed and the Board have already decided that such a change posed questions about the administration of the levy by the planning authority, the site should be cancelled. In addition, I have also pointed out that notices should really be served each year for the levy charge demanded and this did not take place. This all raises difficulties in making any real and fair assessment of whether the site was a vacant site for the year concerned or when the appeal was made. The question remains is whether to assess the appeal in terms of residential or regeneration lands. Even though the site is patently vacant or idle in the normal usage of the words, in terms of the 2015 Act and how a Vacant Site is defined for the register is now different after the 2020 zoning change, and that consideration of the lands must now extend into 2023 and incorporate the zoning change, I cannot be satisfied that any meaningful or fair consideration of this site can be concluded.

6.5. Levy Calculation

- 6.5.1. A Notice of Determination of Market Value was issued on the 31 May 2018 stating that the valuation placed on the site is €1,600,000. No evidence from the appellant has been submitted to show that this valuation was appealed to the Valuation Tribunal.
- 6.5.2. A Notice of Demand for Payment of Vacant Site Levy for 2018 under Section 15 of the Urban Regeneration and Housing Act was issued to Brookfield Property Limited on the 3 February 2023 for the value of €48,000.
- 6.5.3. The applicable rate is 3% 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. If the site should remain on the register, the charge is confirmed.
- 6.5.4. The appellant has not questioned the calculation of the levy and it is clear that the simple calculation of the levy demanded is correct. However, the demand itself and its lawfulness is challenged by the appellant and for the reasons explored in sections

6.3 and 6.4 of my report, I am satisfied that the charge demanded cannot be confirmed and should be set at zero.

7.0 Recommendation

7.1. 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 no longer a vacant site as defined by the 2015 Act, on the 2 March 2023, 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 should correct the amount of levy demand to nought, as the circumstances under which to define the lands as a Vacant Site and levy the charge had altered as a result of a change in zoning in 2020 and so the amount of levy cannot be properly calculated in respect of the vacant site.

8.0 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 fact that the zoning of the area of land had changed from Z6 (for the purpose of regeneration) to Z1 (for the purpose of residential) upon the adoption of Variation 19 of the Dublin City Development Plan 2016-2022 on the 10 March 2020 and remains Z1 in the Dublin City Development Plan 2022-2028 at the time that the appeal was lodged, the circumstances and criteria by which a site is classified as a Vacant Site have therefore changed without engagement between planning authority and landowner and thus

the Board could not be satisfied that the area of land continued to be a Vacant Site as defined by section 5(1)(b) of the Urban Regeneration and Housing Act 2015 (as amended) on the 2 March 2023, the date on which the appeal was made.

The Board considers that it is appropriate that a notice be issued to the planning authority to cancel the entry on the Vacant Site Register and cancel the demand for payment.

I confirm that this report represents my professional planning assessment, judgement and opinion on the matter assigned to me and that no person has influenced or sought to influence, directly or indirectly, the exercise of my professional judgement in an improper or inappropriate way.

Stephen Rhys Thomas
Senior Planning Inspector

12 June 2023