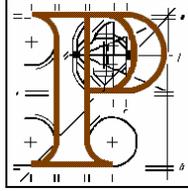


An Bord Pleanála



Inspector's Report

Development: Retention permission for 25 metre high monopole and associated site equipment, previously granted permission under reg.ref: P04/2498.

Site Address: Clonmoney South, Bunratty, County Clare.

Planning Application

Planning Authority: Clare County Council.
Planning Authority Reg. Ref.: 10/877
Applicants: Hutchison 3G Ireland Limited
Type of Application: Permission
Planning Authority Decision: Grant

Planning Appeal

Appellant: Hutchison 3G Ireland Limited
Type of Appeal: 1st party –v- (contribution) condition
Observers: None
Date of Site Inspection: Site not inspected due to nature of appeal.

Inspector: G. Ryan

1.0 SITE

The subject site is located southwest of the town of Bunratty, directly adjacent to the westbound carriageway of the N18 national primary route between Limerick and Ennis/Shannon, which is a dual carriageway at this point. It consists of a monopole telecommunications mast structure and associated compound and cabinets. The surrounding area is low lying, given the proximity to the Shannon Estuary to the south. The site has a stated area of 49m².

Given the limited scope of the appeal (against the conditions of permission only), a site inspection was not deemed necessary to determine the issues at hand.

2.0 PROPOSAL

The scheme consists of the retention of a monopole mast structure on site, which was granted a temporary permission, which has since expired (see section 5.0 below). A report submitted with the application provides some background and asserts the case for the proposal.

3.0 SUMMARY OF REPORTS TO THE PLANNING AUTHORITY

3.1 Planning Officers report

The issues raised in the planning officer's report can be summarised as follows: -

- The proposed development would reduce the requirement for further masts in the area.
- The nearest building is 266m away.
- A handwritten amendment to the report, dated the same date as the countersignature of the Senior Executive Planner (the planning officer was an Executive Planner in this instance), notes that "No contributions were attached to P04/2498. Appropriate to charge under this permission".

3.2 Departmental Reports and external consultees

Irish Aviation Authority): - Submission states that they have no observations on this application.

3.3 Representations

None

4.0 PLANNING AUTHORITY DECISION

The planning authority decided to grant permission subject to 6 conditions, many of which could be considered 'standard' conditions. Others of note can be summarised as follows:-

- 2 Works to be removed if antennae and dishes become obsolete.
- 3 Requires the facilitating of co-location
- 5 Permission for 5 years only (temporary permission)
- 6 Requires a development contribution of €6,291.77 on foot of the council's development contribution scheme.

5.0 HISTORY

Planning authority ref **04/2498** – permission granted to Hutchison 3G Ireland Limited on 3rd March 2005 to construct a 25 metre high monopole with antennae and point-to-point dishes together with cabinets, associated equipment and fencing for a new 3G broadband network.

The planning authority attached 14 conditions, many of which could be considered 'standard' conditions. Of note and of relevance to the current appeal is Condition 2, which imposed a temporary duration on the permission of 5 years. It should be noted that no development contribution was required under this permission, nor does the planning officer's report on file make any reference to the issue. A copy of the manager's order is on file, as submitted by the planning authority.

6.0 POLICY

6.1 Clare County Development Plan 2005-2011

Section 4.2.1 states that the Planning Authority will support the continued expansion of access opportunities to the broadband network. The site is located in an area classified as a vulnerable landscape.

6.2 South Clare Local Area Plan 2009 – 2015

Section 12.4 relates to telecommunications, with Policy IF6 stating that the planning authority will implement the provisions of the "Planning Guidelines for Telecommunications Antennae and Support Structures 1996". Policy IF7 states that proposals for the erection and/or re-placement of telecommunications infrastructure will be permitted where it can clearly be demonstrated that:

- a) The proposal will make a significant contribution to the provision of telecommunications services;
- b) The proposal is not located in an area designated for landscape or environmental protection;
- c) Opportunities for co-location have been maximised;
- d) There are no adverse environmental or transportation effects; and
- e) The proposal will not have a negative impact on the residential amenities of the area.

6.3 Telecommunications Antennae and Support Structures – Guidelines for Planning Authorities (Dept. of Env. 1996)

This document generally advocates improvements in the country’s telecommunications infrastructure, subject to a range of considerations and limitations.

6.4 Clare County Council Development Contribution Schemes

Development Contribution Scheme or notice of revised rates	Section referring to telecom. masts.
2004	Class 14 provides for the payment of €5,420 per mast or turbine for “The erection of wind turbines ancillary buildings and telecommunications mast”.
2005 (in place at the time of 04/2498)	As per 2005 above
‘Revised Development Contributions’ 1 st Jan 2009	As per 2005 above, with figure amended to €4,609.00
Draft 2011 (published 20/09/10)	Section 5.8 relates to telecommunications masts and recommends that the current rate be increased from €6,361 to €15,000 per mast. Section 6 lists exemptions, with none relevant to the subject appeal.
‘Revised Development Contributions’ 1 st Jan 2011	This document gives notice of revisions to rates. Class 14 provides for the payment of €6,549.73 per mast or turbine for “The erection of wind turbines ancillary buildings and telecommunications mast.”
2011-2017 Adopted on 10th January 2011	Section 5.2.3 relates to non-residential development. “Telecommunications Mast” is to be charged €10,000 per mast

6.5 Natural Heritage Designations

The Shannon Estuary to the south is a pNHA/SAC/SPA, although the subject site is not proximate to any of the boundaries.

7.0 GROUNDS OF APPEAL

The 3rd party appeal was submitted by Tiger Chartered Surveyors on behalf of the applicant, Hutchison 3G Ireland Limited. The appeal relates to the development contribution only. The main grounds of this appeal can be summarised as follows:

- 7.1 Notes the planning history of the mast, and the terms of the original permission 04/2498, including that it was a temporary permission. On this basis, permission for retention was sought under the subject application.
- 7.2 Condition 6 of the subject permission imposes a new development contribution on the applicant of €6,291.77 under Class 14 of the Development Contribution Scheme, which relates to the erection of wind turbines, ancillary buildings, and telecommunications masts.
- 7.3 The appeal contends that this condition should not be imposed as the development does not involve the ‘erection’ of a telecommunications mast, as it is currently in place. The erection took place under the original grant of permission, and if such a development contribution condition was to have been imposed, then it should have applied to that permission.
- 7.4 It was not the intention of the 1996 telecommunications guidelines to use temporary permissions to impose multiple development contributions on operators.
- 7.5 Furthermore, the applicant contends that the development does not benefit from any infrastructure or services, as per the intentions of the scheme.

8.0 SUMMARY OF RESPONSES

8.1 Planning Authority

The planning authority have responded to the matters raised in the appeal, with the following points from their submission being of note:-

- 8.1.1 Refers to Section 5 Exemptions of the Development Contributions Scheme 2010. Retention of a mast is not expressly stated as being exempt from contributions.
- 8.1.2 The original permission 04/2498 did not include any condition for payment of contributions even though the scheme in place at the time allowed for it. A copy of the 2005 scheme is attached.
- 8.1.3 In the interest of fairness and constancy, it is appropriate to seek payment at this time.

8.2 Appellant’s Response to Planning Authority’s submission

A response submitted on behalf of the appellant counters the planning authority’s submission (8.1 above). It is asserted that the planning authority have acknowledged that the retention of masts is not covered under class 14. Disagrees with the planning authority’s assertion that because the retention of masts is not specifically stated as exempt, that it is not exempt. The 2005 development contribution scheme had only been adopted a number of days prior to the 04/2498 grant of permission, and prior to this no development contribution existed for telecoms masts in the county. The appellant assumes that the contribution was not applied at this time for reasons of fairness and consistency with other providers.

9.0 ASSESSMENT

9.1.1 Having reviewed the file documents I am satisfied that the determination by the Board of this application as if it had been made to it in the first instance would not be warranted. Accordingly, I consider that it would be appropriate to use the provisions of Section 139 of the 2000 Act in this case in relation to condition 6, which relates to a financial contribution under the requirements of the Development Contribution Scheme.

9.1.2 The sole question at hand, as framed by Section 48(10)(b) of the 2000 Act is that of whether the ‘terms’ of the development contribution scheme have been ‘properly applied in respect of any condition laid down by the planning authority’, in other words, whether Condition 6 is a correct interpretation of the development contribution scheme.

9.1.3 The subject appeal essentially turns on two questions. The first is whether the terms of the scheme are limited to the *erection* of the mast, and as such exclude the subject case which is concerned with the mast’s *retention*. The second question relates to the issue of multiple charges in the case of repeat temporary permissions, with the specific additional circumstance of this case being that there was no development contribution applied under the initial permission.

9.1.4 In relation to the first question, it is necessary to ascertain which scheme is to be applied. As per the table set out in section 6.4 above, the scheme in place at the time of the planning authority’s decision (23rd November 2010) made specific reference to ‘the erection of...telecommunication mast’, while the scheme in place since 10th January 2011 simply states ‘Telecommunications Mast’. The interpretation of this distinction may prove important. I note that Section 48(1) of the Planning and Development Act 2000 states that “A planning authority may, when granting a permission under section 34, include conditions for requiring the payment of a contribution in respect of...”, with section 2(a) going on to state that “), the basis for the determination of a contribution under subsection (1) shall be set out in a development contribution scheme made under this section,” As such, it is my opinion that it is the scheme in place at the time of *the planning authority’s decision* that is to be applied. In general terms, the board, in assessing the scheme ‘de novo’ under an appeal would be obliged to consider the scheme in place at the time of the board’s decision, even if that differed from that which was before the planning authority.

9.1.5 However, in the subject case, where the appeal relates to the application of the scheme only, the provisions of Section 48(10)(b) are applicable: “An appeal may be brought to the Board where an applicant for permission under section 34 considers that the terms of the scheme have not been properly applied in respect of any condition laid down by the planning authority.” As such, the board is being asked to adjudicate on the application of the scheme by the planning authority. In this case, it is my opinion that the scheme in place at the time of *the planning authority’s decision* must be what is considered (rather than the scheme in place at the time of *the board’s decision*), as it would not make sense to adjudicate the planning authority’s performance in relation to a scheme that was yet to come into existence.

9.1.6 On the basis of the above permission, it is my opinion that the original wording of Class 14 is of relevance, namely “The erection of wind turbines ancillary buildings and telecommunications mast”. I concur with the appellant’s permission that this clearly relates to the act of erecting the mast, and should not be applied to subsequent instances of retention.

9.1.7 Turning to the second question, the planning authority’s position (see sections 3.1 and 8.1 above) can be inferred as being based, at least partially, on the fact that no contribution condition was applied under the original permission (04/2498). Applying principles of fairness and pragmatism, there may be some merit in this approach. However, in my opinion, this ‘purposive’ approach to the matter would fall outside the terms of the scheme and the terms of the matter before the board. I note that a development contribution scheme was in place from at least 2004, which specifically included Class 14, yet in the planning authority’s decision in March 2005, no such condition was applied, either by error or by deliberate omission (there is no reference to the issue in the planning officer’s report at the time). I do not consider there to be any scope for the planning authority to revisit this omission under a subsequent application

10.0 CONCLUSION AND RECOMMENDATION

Based on the above, I recommend that Condition 6 be removed on the basis of the following.

Having regard to the nature of the conditions the subject of the appeal, the Board is satisfied that the determination by the Board of the relevant application as if it had been made to it in the first instance would not be warranted and, based on the reasons and considerations set out below, directs the said Council under subsection (1) of section 139 of the Planning and Development Act, 2000 to REMOVE condition number 6.

11.0 REASONS AND CONSIDERATIONS

Having regard to the fact that the Clare County Council Development Contribution Scheme in force at the time of the planning authority's decision makes provision for the levying of financial contributions in respect of "The erection of wind turbines ancillary buildings and telecommunications mast", and that the subject proposal is for the retention (rather than the erection) of a telecommunications mast, no such contribution is applicable. The Board considers that the terms of the said scheme have not been properly applied in this case.

G. Ryan
Planning Inspector
28th February 2011