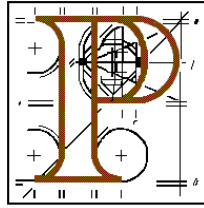


An Bord Pleanála



Inspector's Report

Development: Retain existing 12m monopole carrying antennae and dishes with associated equipment rack, access track and fencing, at Drombohilly, Tuosist, Killarney, Co. Kerry.

Planning Application

Planning Authority : Kerry County Council
Planning Authority Register Ref. : 15/1051
Applicant : Three Ireland (Hutchinson) Ltd.
Type of Application : Permission
Planning Authority Decision : Grant Permission

Planning Appeal

Appellant(s) : Three Ireland (Hutchinson) Ltd.
Type of Appeal : 1st Party v Financial Contribution
Observer(s) : None

Date of Site Inspection : None

Inspector : **Michael Dillon**

1.0 Site Location & Description

The site, with a stated area of 0.01ha, is located approximately 1km south of the hamlet of Tuosist, south of the Kenmare River in south Co. Kerry. There is an existing phone mast on the site – set within a palisade fencing compound – and accessed from a hard-core access track. The applicant is indicated as being a leaseholder.

2.0 The Proposed Development

Permission sought on 25th November 2015, to retain the 12m high mast and associated equipment on this site – where a temporary permission had previously been granted.

3.0 Development Plan & Other Guidance

The Kerry County Development Plan 2015-2021 came into effect on 16th March 2015. Section 13.14 of the Plan deals with Telecommunication Masts Standards and Guidelines. The principal change to this section of the Plan from the previous Plan, is the removal of the 1 kilometre exclusion zone around such facilities. The section refers to access, design, landscape considerations/amenity areas and natural environment, obsolete structures; permanent telecommunications exchange radio station containers and sharing of facilities and clustering. The section states- “The Planning Authority will show due deference to individuals, residents, communities, institutions and amenities in dealing with telecommunication masts”.

4.0 Planning History

Ref. 09/981: Permission refused by Kerry County Council for construction of a 12m high communications mast and associated equipment container on this site. On appeal by the 1st party to the Board (**PL 08.234973**), permission was granted on 22nd February 2010, subject to 7 no. conditions. Condition no. 1 provided that permission was for five years from the date of the order. Condition no. 8 required that the developer pay a development contribution (amount unspecified).

5.0 The Planning Authority’s Decision

By Order dated 22nd January 2016, Kerry County Council issued a Notification of decision to grant planning permission subject to 4 no. conditions:-

1. The development shall be retained in accordance with plans and particulars received by the authority on 25th November 2015.

2. Requirement to pay development contribution of €14,000.
3. Equipment in containers shall be used exclusively for the purposes of concentrating and re-routing calls. There will be no future expansion of the site or increased activity at the site, including an increase in the numbers of dishes or antennae secured to the monopole.
4. Refers to reinstatement of the site.

6.0 Grounds of Appeal

6.1 The appeal from Three Ireland (Hutchinson) Ltd, received by the Board on 16th February 2016, can be summarised in bullet point format as follows-

- This is an appeal under Section 48(10)(b).
- Temporary planning permissions were used to allow for an evaluation in relation to advances in technology and functional obsolescence. The mast on this site is still functional.
- There has been no intensification or material change in the use of the structure since the original temporary permission was granted.
- The applicant has already paid in full the development contribution levied against the original planning application ref. 09/981 – as confirmed by Kerry County Council in the attached letter.
- Condition 2 requires payment of €14,000 by way of development contribution.
- Local authorities are required to include development contribution waivers for broadband infrastructure in their Development Contribution Schemes, as provided for in Circular Letter PL 07/12 (dated 19th October 2012). This structure provides broadband services to the surrounding area in this part of rural Co. Kerry.
- No development contribution should be levied against this development.
- The Board decided in case ref. PL 08.242185 that a contribution should not be paid in cases of this sort. The Inspector's Report stated- *"The Kerry County Council Development Contribution Scheme 2011 provides no exception from the requirement to pay development contributions for telecommunications masts. Contrariwise the Circular Letter 07/12 from the DoEC&LG which is explicitly issued under section 28 of the Planning and Development Act 2000 as amended requires that planning authorities when revising their development contribution schemes should provide a waiver for broadband infrastructure (masts and antennae) from the requirement to pay development contributions"*.

- The Board should anticipate the amendment of the Kerry County Council Development Contribution Scheme and not apply this condition no. 2.

6.2 The appeal is accompanied by a copy of a letter from Kerry County Council to the applicant (dated 1st September 2010) stating that all development contributions had been paid in full for application ref. 09/981.

7.0 Observations

None

8.0 Response Submissions

There was no response from Kerry County Council to the grounds of appeal submitted, notwithstanding that the Board issued on 23rd March 2016, a subsequent section 132 letter requesting the Council to comment.

9.0 Assessment

The principal issue of this appeal relates to the payment of a development contribution.

9.1 This is an appeal under Section 48(10)(b) of the 2000 Act, which states – “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”. Section 48(10)(c) would appear to restrict the Board to considering the condition appealed only – on the basis that it allows for the planning authority to make a grant of permission where no other appeal has been made under section 37, provided that the applicant furnishes to the planning authority security for payment of the full amount of the contribution as specified in the condition. It is not clear from documentation on file as to whether the applicant has or has not furnished such security. The mast is already in place and the application is in the nature of “continuation of permission”.

9.2 Condition 2 of the Notification of decision to grant planning permission required the applicant to pay a development contribution of €14,000. The applicant states that a development contribution of €14,000 was paid to Kerry County Council on foot of permission ref. 09/981 (**PL 08.234973**) wherein condition no. 8 of the Board’s grant of permission required the applicant to pay a development contribution (amount unspecified) to the Council. Condition no. 1 of that same permission stated that the permission was for a period of five years only from the date of the order (22nd February 2010).

- 9.3 The current General Development Contribution Scheme for Kerry County Council (dating from 21st March 2011) provides for a development contribution of €14,000 for retention applications for masts – section 13(b). This amount is stated to be for “amenity”, where other elements refer to “water”, “sewerage” and “roads”.
- 9.4 The Minister for Environment, Community and Local Government under section 28 of the Act, issued the following – “Development Contributions – Guidelines for Planning Authorities” in January 2013. These Guidelines required local authorities to begin reviewing their Development Contribution Schemes by 31st March 2013, to ensure, *inter alia*, development contribution waivers for broadband infrastructure, including masts and antennae.
- 9.5 The aforementioned Guidelines were issued under section 28 of the Planning and Development Act 2000 (as amended). The Act provides that the making of a development contribution scheme is a reserved function of the elected representatives. Section 2 of the Guidelines states baldly that “Development contributions are not cash cows”. Section 2 states that “planning authorities **are required** to include the following in their development contribution schemes:
- Reduced rates for temporary permissions to be calculated as follows:
 - 33% of normal rate for permissions of up to 3 years.
 - 50% of normal rate for permissions of up to 5 years.
 - 66% of normal rate for permissions of up to 10 years.
 - Waivers for broadband infrastructure (masts and antennae).
- The first bullet point is not relevant, as the appeal relates to continuation of permission – where a temporary planning permission has already been granted, and development carried out on foot of that temporary permission. The second bullet point clearly refers to developments of the type at issue in this appeal. Section 2 goes on to state- “The practice of ‘double charging’ is inconsistent with both the primary objective of levying development contributions and with the spirit of capturing ‘planning gain’ in an equitable manner. Authorities are reminded that any development contribution already levied and paid in respect of a given development should be deducted from the subsequent charge so as to reflect that this development has already made a contribution”.
- 9.6 The Guidelines state on p.2 that “All planning authorities should commence a review of their existing development contribution scheme(s) by 31st March 2013 to ensure compliance with the content of this guidance”. The Guidelines do not state a completion date for any such review. It is not clear whether the Council embarked on such a review.

- 9.7 I note that in a similar case appealed to the Board by Three Ireland (Hutchinson) Ltd – ref. PL 08.244864, the Board reasoned, in its decision dated 24th August 2015, as follows

Having regard to the terms of the Kerry County Council Development Contribution Scheme 2011, which require the payment of financial contributions in respect of retention of telecommunications masts, which does not provide any waivers or reductions of contributions for cases in which a previous financial contribution was paid in respect of a previous time-limited planning permission for the same development on the same site, and which provides that reductions will not apply to retention applications, it is considered that the provisions of this Development Contribution Scheme 2011 had been properly applied in this instance.

The Board noted the legislative provisions relating to appeals against the imposition of financial contributions under Section 48 of the Planning and Development Act 2000, as amended, and also relevant case law, which de-limit its consideration in such cases to whether or not the terms of the relevant Development Contribution Scheme had been properly applied, and noted that there are no exemptions or waivers in the current Kerry County Council Development Contribution Scheme in respect of telecommunications infrastructure, and furthermore that the Scheme provides that reductions will not apply to retention applications . The Board noted the reference in the Inspector's report and recommendation to the Development Contributions Guidelines of January 2013, but considered that, in the light of the legislative provisions in Section 48 of the Act, the Board is not empowered to have regard to the Guidelines in this context.

- 9.8 In light of this precedent case, within the same county and under the terms of the same Development Contribution Scheme, I recommend that condition no. 2 should be attached.

10.0 Recommendation

I recommend an Order in the following terms-

The Board, in accordance with section 48 of the Planning and Development Act, 2000, as amended, considered, based on the reasons and considerations set out below, that the terms of the Development Contribution Scheme for the area had been properly applied in respect of condition number 2 and directs the said Council to ATTACH condition number 2 and the reason therefor.

MATTERS CONSIDERED

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

REASONS & CONSIDERATIONS

Having regard to the terms of the Kerry County Council Development Contribution Scheme 2011, which require the payment of financial contributions in respect of retention of telecommunications masts, which does not provide any waivers or reductions of contributions for cases in which a previous financial contribution was paid in respect of a previous time-limited planning permission for the same development on the same site, and which provides that reductions will not apply to retention applications, it is considered that the provisions of this Development Contribution Scheme 2011 had been properly applied in this instance.

The Board noted the legislative provisions relating to appeals against the imposition of financial contributions under Section 48 of the Planning and Development Act 2000, as amended, and also relevant case law, which de-limit its consideration in such cases to whether or not the terms of the relevant Development Contribution Scheme had been properly applied, and noted that there are no exemptions or waivers in the current Kerry County Council Development Contribution Scheme in respect of telecommunications infrastructure, and furthermore that the Scheme provides that reductions will not apply to retention applications. The Board noted the reference in the Inspector's Report to the Development Contributions Guidelines of January 2013, but considered that, in the light of the legislative provisions in Section 48 of the Act, the Board is not empowered to have regard to the Guidelines in this context.

**Michael Dillon,
Inspectorate**

22nd April 2016.