



An  
Bord  
Pleanála

## Inspector's Report

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<b>Development</b>	Retain existing development, Reg Ref 10/64 for 30m high telecommunications mast and ancillary works at Tullaha, Bunane, Kenmare, Co Kerry
<b>Planning Authority</b>	Kerry County Council
<b>Planning Authority Reg. Ref.</b>	16/277
<b>Applicant(s)</b>	Vodafone Ireland Limited
<b>Type of Application</b>	Permission
<b>Planning Authority Decision</b>	Grant
<b>Appellant(s)</b>	Vodafone Ireland Limited
<b>Observer(s)</b>	None
<b>Date of Site Inspection</b>	None
<b>Inspector</b>	Mary Crowley

## 1.0 SITE LOCATION AND DESCRIPTION

- 1.1 The appeal site with a stated area of 0.031 ha is located at Tullaha, Bunane, Kenmare, Co Kerry. The plans and particulars together with site photos that were lodged with the application are available to view on the appeal file. I would also draw the Boards attention to the site photos accompanying the local authority planners report.

## 2.0 PROPOSED DEVELOPMENT

- 2.1 This is an application for planning permission for the retention of existing development, Reg. Ref: 10/864, for 30m high telecommunications mast and ancillary site works. It is stated that the development forms part of Vodafone Irelands Limited existing GSM and 3G Broadband telecommunications network. The application was accompanied by a planning report and associated maps and drawings.

## 3.0 TECHNICAL REPORTS

- 3.1 The **Local Authority Planner** recommended that planning permission be granted subject to 4 conditions. Their report also stated that the amenity levy calculation for retention is €14,000. Condition No 2 of their report and recommendation refers.

## 4.0 OBJECTIONS / OBSERVATIONS TO THE PLANNING AUTHORITY

- 4.1 None recorded on the file.

## 5.0 PLANNING AUTHORITY DECISION

- 5.1 The planning authority issued notification of decision to **grant** planning permission subject to **4 conditions**. Condition No 2 is relevant to this appeal as follows:

*Within 3 months of receipt of this decision the developer shall pay a contribution of EUR 14,000 to Kerry County Council (Planning Authority) in respect of community infrastructure, environmental amenities and facilities benefitting the development. The amount of this contribution is calculated in accordance with the Councils prevailing Development Contribution Scheme and will be increased from January 1<sup>st</sup> 2017 and annually thereafter (unless previously discharged) in line with the Wholesale Price Index for Capital Goods, Building and Construction as published by the Central Statistics Office*

*unless the Scheme is superseded by a further Development Contribution Scheme adopted by the Council.*

**Reason:** *It is considered appropriate that the Developer should contribute towards the cost of public infrastructure and facilities benefitting the development, as provided for in the Councils prevailing Development Contributions Scheme, made in accordance with Section 48 of the 2000 Planning and Development Act and that the level of construction payable should increase at a rate in the manner specified in that Scheme.*

## **6.0 PLANNING HISTORY**

6.1 There was a previous appeal on this site that may be summarised as follows:

**PL08.237781 (Reg Ref 10/864)** – Kerry County Council refused permission to Vodafone Ireland Limited for the retention of 30 meter high telecommunications structure (06/1191) antennas equipment container and associated equipment within a fenced compound and access track. An Bord Pleanála granted planning permission for 5 years subject to 5 conditions. Condition No 5 required the payment of a Section 48 Development Contribution – no amount was specified. In a letter dated 21<sup>st</sup> June 2011 from the Kerry County Council to the applicant it is stated that the amount outstanding is as follows:

- Development Contribution Amenity – Commercial      €10,000
- Development Contribution Road Improvement      €4,000

6.2 Reference is made in the appeal to the following appeals; PL03.238101, PL21.241352, PL20.242445, PL16.241460, PL16.241939, PL11.240855, PL26.245312, PL26.245311, PL09.245344 and PL09.245345. The most recent appeal may be summarised as follows:

**PL08.245345 (Reg Ref 15/442)** – This was an appeal by Vodafone Ireland Limited in relation to the application by Kildare County Council of the terms of the Development Contribution Scheme made for the area in respect of Condition number 6 of its decision.

The proposed development was for the retention of an existing 30-metre high telecommunications support structure with antennae, equipment container and associated equipment within a fenced compound and access track, previous permission, planning register reference number 11/1034 refers.

The Board treated this case under section 48 of the Planning and Development Act, 2000, as amended. The Board decided that the planning authority be directed to remove condition 6. The Board considered that the terms of the Development Contribution Scheme have not been properly applied and decided that the planning authority be directed to remove Condition 6.

## 7.0 POLICY CONTEXT

7.1 The operative plan for the area is the **Kerry County Development Plan 2015 – 2021**. Kerry County Council **Development Contributions Scheme 2011** was adopted on the 21<sup>st</sup> of March 2011.

7.3 The **Telecommunications Antennae and Support Structures – Guidelines for Planning Authorities** (1996) generally advocates improvements in the country's telecommunications infrastructure, subject to a range of considerations and limitations. **Circular Letter: PL 07/12** issued in October 2012 by the Minister for the Environment, Community and Local Government under section 28 of the Planning and Development Acts 2000-2012 to update certain sections of the Telecommunications Antennae and Support Structures Guidelines (1996) states inter alia *that all future Development Contribution Schemes must include waivers for broadband infrastructure provision and these waivers are intended to be applied consistently across all local authority areas.*

7.4 It is also noted that the **Development Contributions Guidelines for Planning Authorities** (2013) require planning authorities in reviewing their development contributions schemes to include *waivers for broadband infrastructure (masts and antennae)*. The Guidelines further state that 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 had already made a contribution.*

## 8.0 GROUNDS OF APPEAL

8.1 The first party **appeal against Condition No 2 only** (development contribution of €14,000) has been prepared and submitted by Focusplus Ltd on behalf of the applicant Vodafone who request that it be removed. The appeal may be summarised as follows:

- 8.2 The appeal site is in place for approximately 10 years and has been granted planning permission on 3 separate occasions (Reg Ref 06/1191, 10/64 and the subject application 16/227 refers). Stated that Vodafone Ireland Ltd has paid the sum of €14,000 in relation to the original development of the mast on the site (Reg Ref 10/864 refers) 6 years ago. Reference is made to appeal PL18.238993 where multiple charging was considered to be *indefensible*. Reference is also made to appeal PL11.244705 where it was emphasised that if a contribution was paid on the original grant a second levy shall not apply.
- 8.3 Precedents for similar cases include PL03.238101, PL21.241352, PL20.242445, PL16.241460, PL11.240855, PL26.245312, PL26.245311, PL09245344 and PL09.245345.
- 8.4 Circular Letter: PL 07/12 recommends that levies are waived for the facilitation of broadband infrastructure.
- 8.5 The applicant is supplying a public utility in the form of mobile phone coverage and mobile broadband. Levying operators every five years for providing a public service is unsustainable.
- 8.6 The precedents already set by the Board in relation to similar conditions applied by Mayo County Council, Sligo County Council, Clare County Council and Roscommon County Council, Wexford County Council and Kildare County Council reinforces the appellants arguments that the levy does not comply with requirements as set out in Section 48 of the Planning and Development Act 2000.
- 8.7 The Board is requested to

## **10.0 RESPONSE OF THE PLANNING AUTHORITY (S.132)**

- 10.1 There is no response recorded on the appeal file.

## **11.0 OBSERVATIONS**

- 11.1 None received

## **12.0 ASSESSMENT**

- 12.1 Further to my examination of the planning file and the grounds of appeal I note that the first party appeal is confined to the development levy set out in Condition No 2 (Section 48 Development Contribution) of the notification of decision of the planning authority to grant permission. Section 48 (13) of the Planning and Development Act 2000 states that an appeal that relates solely

to a condition dealing with a special contribution and no appeal is brought by any other person under Section 37 of the decision of the planning authority under that section, the Board shall not determine the relevant application as if it had been made to it in the first instance but shall determine only the matters under the appeal. I consider that it is therefore appropriate that this appeal should be confined to the consideration of whether or not the terms of the Kerry County Council Section 48 Development Contribution were properly applied in this instance.

- 12.2 For clarity and completeness I have had due regard to the provisions of the Habitats Directive and conclude that having regard to the source-pathway-receptor model along with the nature of the proposed development (a continued use) I would not consider that an NIS or Appropriate Assessment is necessary in this case.
- 12.3 The Kerry County Council Development Contribution Scheme 2011 provides no exception from the requirement to pay development contributions towards amenity for the retention of telecommunications masts.
- 12.4 Contrariwise the Circular Letter 07/12 from the Department of Environment, Community and Local Government 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. Further the Development Contributions Guidelines for Planning Authorities (2013) require that planning authorities in reviewing their development contributions schemes should include waivers for broadband infrastructure (masts and antennae) and that 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. The Guidelines remind Authorities 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 had already made a contribution.
- 12.4 According to the appeal the subject site is in place for approximately 10 years and has been granted planning permission on 3 separate occasions 06/1191, 10/864 (PL08.237781) and the subject application 16/227 refers
- 12.5 Most recently An Bord Pleanála granted permission for the development now the subject of this retention application in 2011 (PL08.237781 (Reg Ref 10/864) refers) for a period of 5 years subject to 5 conditions. Condition No 5 required the payment of a Section 48 Development Contribution but no

amount was specified. In a letter dated 21st June 2011 from the Kerry County Council to the applicant it is stated that the amount outstanding is as follows:

- Development Contribution Amenity – Commercial €10,000
- Development Contribution Road Improvement €4,000

According to the appeal Vodafone Ireland Ltd duly paid the sum of €14,000 in relation to **PL08.237781 (Reg Ref 10/864)**. The stated amount paid is in line with the Kerry County Council Development Contributions Scheme 2011 which was adopted on the 21st of March 2011 and is still in effect today. It is noted that the Planning Authority has not confirmed receipt of this payment.

12.5 Having regard to the information available with the appeal and the foregoing it is evident that the Kerry County Council Development Contributions Scheme 2011 has not been amended or updated to reflect either Circular Letter 07/12 or the section 28 Ministerial Development Contributions Guidelines for Planning Authorities issued in 2013. To apply the operational 2011 Development Contributions Scheme without due regard to the statutory guidelines is wholly inappropriate. However it is reasonable the amendment of the Kerry County Council Development Contribution Scheme is anticipated and therefore the Board should not apply a contribution condition as per the requirements of both the Circular Letter and the Section 28 Guidelines. I therefore recommend that the planning authority be directed to remove said condition and the reason therefore.

### **13.0 CONCLUSION & RECOMMENDATION**

13.1 Having regard to the nature of the condition the subject of the appeal and based on the reasons and considerations set out below, I am 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 recommend that the Board directs the Council under subsection (13) (a) of Section 48 of the Planning and Development Act, 2000 to OMIT Condition No 2.

### **14.0 REASONS AND CONSIDERATIONS**

14.1 Having regard to the:

- Kerry County Council Development Contribution Scheme 2011
- Circular Letter 07/12 issued from the Department of the Environment, Community and Local Government is explicitly issued under Section 28 of the Planning and Development Act 2000 (as amended) which 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 and

- The Development Contributions Guidelines for Planning Authorities (2013) which require planning authorities in reviewing their development contributions schemes to include waivers for broadband infrastructure (masts and antennae) and that 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.

It is considered that it would be inappropriate to attach a Section 48 Development Contribution in this instance as:

- (1) A Section 48 Development Contribution in the amount of €14,000 has been paid for this development under the previous decision of Kerry County Council for this site PL08.237781 (Reg Ref 10/864) and in line with the Kerry County Council Development Contribution Scheme 2011 and to apply a Development Contribution condition would amount to “double charging” and the
- (2) Section 28 Ministerial Development Contributions Guidelines for Planning Authorities issued in 2013 that require planning authorities in reviewing their development contributions schemes to include waivers for broadband infrastructure (masts and antennae) and that 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.

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**Mary Crowley**  
**Senior Planning Inspector**  
**10<sup>th</sup> August 2016**