



An
Bord
Pleanála

Inspector's Report ABP.301543-18

Development	Import soil and stone for the raising of an agricultural field in order to improve the agricultural output of the field, construction of a new entrance and a new haul road to link with existing farm road
Location	Inchee, Kilgarvan Co. Kerry
Planning Authority	Kerry County Council
Planning Authority Reg. Ref.	17/1252
Applicant(s)	Conchabhar Ó Luasa
Type of Application	Planning permission
Planning Authority Decision	Grant permission
Type of Appeal	First Party
Appellant(s)	Conchabhar Ó Luasa
Observer(s)	None
Date of Site Inspection	30 th June 2018
Inspector	Mary Kennelly

1.0 Site Location and Description

- 1.1.** The site is located in a rural area approx. 10km to the east of Kilgarvan. It is accessed by means of the R569, (Kilgarvan to Glenflesk Road), and a local road L3201, which branches off the regional road at Morley's Bridge. The local road follows the Roughty River which eventually flows into Kenmare Bay. A further local road/track branches off this road about 200m east of Inchee Bridge and travels uphill in a north-westerly direction. The site is located approx. 6km to the east of the regional road and approx. 250m to the north of Inchee Bridge.
- 1.2.** The area of the site is given as 3.55ha. The River Roughty is located to the southwest and there is a stream which flows through the site, discharging to the Roughty River, and several internal drainage channels within the northern section of the site. The site is steeply sloping with a stated gradient of 1:7. The submissions with the application state that the site is comprised of rough terrain with little or no top soil and several deep drainage channels and that it is unsuitable for agriculture. The submissions also indicate that the site has formerly been in use as a quarry and prior to that, had been planted with conifers.

2.0 Proposed Development

- 2.1.** The proposed development involves the importation of soil and stones with a fill volume of c. 62,325m³. It is proposed to provide a new haul route to connect the site with the local road to the south east and to provide a new entrance from this road. The stated purpose of the importation of material is to improve agricultural lands.
- 2.2.** The submissions on file indicate that the soil material will be used to fill existing excavated areas so that a uniform surface topography can be achieved. It is anticipated that upon completion of the deposition of material, the finished surface will be seeded and managed as agricultural grass land habitat. An agricultural report submitted with the application indicated that the presence of a number of hollows on the site means that it is unsuitable for the use of modern agricultural machinery. The intention is to scrape back the soil out of the hollows and fill them up with imported material.

- 2.3.** The proposed new haul route, which would be constructed within the field, would connect the existing farm track adjacent to the site to the existing lower road (L3201). It is proposed that sightlines of 180m to the east and 90 m to the west would be provided at the new entrance. A new silt fence and protective bund would be provided along the western boundary with a buffer zone from the Roughty River. The silt fence would also run alongside the proposed haul route. This bund is intended to prevent any surface water from discharging to the Roughty River. The proposed bund would consist of inert material and would be c. 0.5m in height, and it would be seeded and vegetated to minimise loss of sediment. The silt fence would be installed to the west of the bund during the vegetation consolidation period.
- 2.4.** In addition, there are a number of artificial drainage ditches, which will be infilled, and in advance of this, the downstream end will be blocked with stone slabs. The natural watercourses within the site will be culverted and a number of silt fences will be installed along the stream between the culvert opening and the confluence with the Roughty River.

3.0 Planning Authority Decision

3.1. Decision

The planning authority decided to grant permission subject to 5 no. conditions. The conditions related mainly to retention of boundary, drainage matters and finished ground levels.

Condition 2 required the payment of a development contribution of €18,074.25 in accordance with the General Development Contribution Scheme.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Area Planner's report noted that the proposed development is located in an area zoned Rural Secondary Special Amenity Area, which is a sensitive landscape with a limited capacity to absorb development. However, it was considered that the proposed development would not give rise to visual amenity issues.

3.2.2. Other Technical Reports

Environment Dept. – (14/2/18) No objection.

County Archaeologist – Initial report (10/01/18) had noted that given the scale of the project, an archaeological impact assessment would be required.

FI was submitted on 16/03/18 in the form of an archaeology report.

The County Archaeologist (22/03/18) stated that having regard to an Archaeological Impact Assessment report in respect of the proposed development, which notes that the site has previously been stripped and disturbed, no further mitigation is required.

Biodiversity Officer – 09/02/18 It was noted that the site is located a considerable distance from the Kenmare River SAC but that it is close to the Roughty River. This watercourse is noted as having a high status under the Water Framework directive and retains extant populations of Fresh Water Pearl Mussel. Thus it was considered that water quality of the Roughty is key and that the water protection measures must be in place before any works or disturbance of soil takes place. It was requested that all water protection measures proposed in the application be conditioned if permission is granted.

3.3. Prescribed Bodies

None.

3.4. Third Party Observations

None.

4.0 Planning History

No relevant history.

5.0 Policy Context

5.1. Development Plan

Kerry County Development Plan 2015-2021

Zoned Rural Secondary Special Amenity. Development in such area must be designed to minimise the effect on the landscape and take account of topography, vegetation and existing boundaries. Permission will not be granted for development which does not integrate into the landscape. Development must not be unduly obtrusive and existing features such as trees and hedgerows should be retained.

Objective ZL-1 Protect the landscape of the County as a major economic asset and an invaluable amenity which contributes to people's lives.

5.2. Natural Heritage Designations

There are five European sites in the vicinity the site –

Killarney National Park and Macgillycuddy Reeks & Caragh River Catchment SAC (Site Code 00365), approx. 4km from site;

Killarney National Park SPA (Site code 004038), approx. 12km from site;

Kilgarvan Ice House SAC (000364) approx. 4km from the site;

Glanlough Woods SAC (002315) approx. 7km from site;

Kenmare River SAC (002158) approx. 16km from the site.

There are a further three NHAs in the vicinity –

Sillerhertane Bog NHA (001882)

Slaheny River Bog NHA (000383)

Doughill Bog NHA (001948).

6.0 The Appeal

6.1. Grounds of Appeal

The first party appeal is solely against **Condition No. 2**, which requires the payment of a Development Contribution of €18,074.25 in accordance with the General

Development Contribution Scheme. The grounds of appeal may be summarised as follows:

6.1.1. Failure to comply with terms of adopted General Development Contribution Scheme

The applicant considers that the condition does not comply with the current GDCS for Kerry County in respect of the following:

- **There is no development category for importing soil and stone to raise agricultural land in order to improve output** – The development does not fall into any of the categories set out in the GDCS.
- **The rates applied are based on the category for Quarries and Landfill** – The proposed development is for agricultural purposes and does not fall into this category of development. It is for the recovery of soil and stone and is not a landfill, which is defined as the disposal of waste.
- **The condition fails to identify the nature and extent of the works of the specific public infrastructure and facilities that will benefit the proposed development** – there is no detailed breakdown of the costs of the infrastructure, how the contribution was calculated, how the costs and benefits would be apportioned to other development in the surrounding area. There are several other developments in the area which contribute to the deterioration of the road network e.g. Grousemount Wind Farm, agricultural operations and private residential developments.
- **The proposed development is for a temporary period** – the proposed development would operate for five years only and the land will be put back into grass once the ground is raised.

It is therefore sought that Condition 2 be omitted.

6.1.2. Double or treble charging

The P.A. has failed to outline how the €18,074.25 was calculated in terms of the specific costs not covered by the General Development Contribution Scheme. Furthermore, it is submitted that levies have been paid in respect of other development in the area and that road tax is paid by hauliers, as this is a statutory requirement. Thus, substantial contributions have already been paid in respect of the

road infrastructure in the area and it is submitted that this amounts to charging triple revenue for the same infrastructure and facilities. As these levies have been paid under the General Development Contribution Scheme, any further levies would amount to double or treble charging.

6.1.3. Contrary to the provisions of Sections 48 and 49 of the Planning and Development Act 2000 (as amended) – a development contribution condition would only be justifiable if it complies with these sections of the Act as follows:

- The development should give rise to specific costs, which should be incurred by the Local Authority.
- The public infrastructure and facilities should benefit the proposed development.
- Particular infrastructural works and facilities must be specified in the condition requiring payment of a Development Contribution. Inadequate justification has been given for €18,074.25.

There is an absence of clear identification of the works required and the costing of same, the apportionment of said costs to the subject proposal. Thus, it is not possible to determine if a refund is required should the works not commence or be only partially carried out.

6.1.4. Precedent – Reference is made to several recent Board decisions where development contribution conditions have been removed – the Board decided to remove a condition in two cases (243568 and 248671), each of which related to appeals against financial contribution conditions regarding developments involving the importation of stone and soils for the improvement of agricultural land. The other case (249314) related to an appeal against the decision of the P.A. to grant permission subject to conditions, one of which imposed a financial contribution condition, which was subsequently omitted from the Board's final decision.

6.2. Planning Authority Response

The planning authority did not respond to the grounds of appeal

7.0 Assessment

7.1 Legislation and Guidance

- 7.1.1.** Section 48 (10)(b) of the Planning and Development Act 2000, as amended, provides that an appeal may be brought against a development contribution condition where the applicant considers that the terms of the General Development Contribution Scheme have not been properly applied. As the appeal is solely against Condition 2 of the planning permission, relating to a Financial Contribution, Section 48 (10)(c) applies. This requires that the Board shall not determine the relevant application as if it had been made in the first instance, but shall determine only the matters under appeal.
- 7.1.2.** Condition 2 requires the payment of a development contribution of **€18,074.25** in respect of public infrastructure and facilities benefitting development in the area in accordance with the terms of the adopted Kerry County General Development Contribution Scheme, made under Section 48(2)(a) of the Act.
- 7.1.3.** Further guidance on the matter is provided in the Development Management Guidelines, 2007 (Section 7.12) and in the Development Contribution Guidelines 2013.

7.2. Compliance with the terms of the General Development Contribution Scheme

7.2.1. Categories of development

The Kerry County Development Contribution Scheme 2017 (Section 4) states that the development contribution charges are based on the costs and expenditure for future infrastructure projects based on two main categories of infrastructure as follows:-

Roads and Transport Infrastructure.

Community and Amenity Infrastructure.

The table on pages 9 and 10 of the DCS sets out the charges applicable for each category of development in respect of each of the two forms of infrastructure to be provided. The rate for the category 'Quarries and Landfill' is stated as follows:

Roads & Transport €0.19 per m³

Community & Amenity €0.10 per m³

Further information is provided on developments which will attract development charges on Page 14 under the heading Quarries and Landfill, which relates to buildings associated with a landfill or waste recovery use, which are to be charged at an industrial rate.

The appellant claims that the proposed development does not fall within the category of 'landfill' as the material to be deposited on site does not constitute 'waste'. The rationale for this appears to be based on the stated purpose of the proposed works, i.e. the improvement of agricultural lands to improve output. The appellant also claims that the proposed development does not fall within any category of development and that the P.A. does not have the right to 'plug a hole' in the GDCS.

I would agree that the purpose of the proposed development is a beneficial one and that it is intended to improve the lands which are currently unproductive. However, this does not mean that the material to be deposited is not 'waste'. Article 3 of the Waste Framework Directive (2008/98/EC) defines 'waste' as any substance or object that the holder discards or intends or is required to discard. I note that the matters that are excluded (Article 2) include uncontaminated soil and other naturally occurring material excavated in the course of construction activities, where it is certain that the material will be used for the purposes of construction, but this relates to the site from which it was excavated. 'Waste Management' is defined as the collection, transport, recovery and disposal of waste, including the supervision of such operations and the aftercare of disposal sites.

The proposed development involves the importation of stone and soil, the origin of which is not specified. However, the volume is stated to be 62,325m³ and the area of land to be covered is 3.55ha. I note that there is correspondence on the file which indicates that the source of the material could potentially be soil and stone arising from the ESBI cabling - ducting project in the area. It is further noted that the Environment Section (14/2/18) stated that a Waste Facility Permit will be required and the application was accompanied by information relating to procedures to be adopted on acceptance of waste at the site (Appendix V), received by P.A. 15/12/17. These include checking, monitoring and recording all waste arriving on site in accordance with the waste permit. It is considered, therefore, that the categorisation of the proposed works as 'landfill' in terms of the appropriate class of development under the terms of the GDCS is reasonable.

7.2.2. Nature and extent of the infrastructure to be provided

The appellant raised concerns that insufficient information has been provided in respect of the nature and extent of the specific public infrastructure that is to be provided and that it is impossible to determine whether the said infrastructure will benefit the proposed development. Section 48 of the Planning and Development Act 2000 (as amended) enables the planning authority to include conditions in the grant of planning permission requiring the payment of a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority. There are three categories of conditions under which the payment of these financial contributions may be required (as set out in the Development Management Guidelines - 7.12). These are firstly, contributions under the GDCS (Section 48 (2)(a)), which relate to existing/proposed provision of infrastructure, and is described as a “general levy on development”. Secondly, contributions under a further Supplementary Contribution Scheme (Section 49). Thirdly, contributions can be required under Section 48(2)(c) which are referred to as Special Contributions. These relate to infrastructural items which would not have been anticipated at the time of the making of the GDCS or Supplementary Scheme. Thus, they are specific exceptional costs which benefit the particular development that is the subject of the planning application.

The condition that is the subject of the current appeal relates to the general infrastructure to be provided within the area under the control of the planning authority in accordance with an adopted GDCS and does not relate to a special contribution. Thus, the requirement is to comply with the terms of the General Development Contribution Scheme and it is not required to satisfy the tests associated with a Special Contribution, (set out in Section 48(12) of the Act), which must relate to the development that is being applied for. It is considered that the Kerry County GDCS provides an appropriate level of information and detail on the public infrastructure and facilities that the P.A. intends to provide and the methods for funding the said infrastructure. It is further considered that Condition No. 2 is in accordance with the terms of the Scheme.

7.2.3. Temporary period

Notwithstanding the concluding comment in the previous section, it is noted that the GDSCS includes a provision for reduced contributions in respect of development which is granted temporary planning permission (Section 8, page 19). The application to import stone and soil is stated to be for a temporary period of five years. This is referred to in several documents on the file, including the covering letter attached to the application and in the grounds of appeal. I note, however, that this is not stated in the description of development, nor has the planning authority attached a condition to this effect. The reduction for a temporary permission of five years is 50% of the normal rate.

The nature, scale and purpose of the works are such that it would be a finite process involving the importation of a finite amount of fill with the objective of improving the output of the agricultural lands. Thus, it not be a continuous process, such as a commercial or municipal landfill, and would be limited in extent and duration by both the scale of the project and the duration of the planning permission. Thus, the permission is, in effect, a temporary permission. It is considered that in these circumstances, the Board could direct the Planning Authority to apply the reduction for a temporary permission, which would reduce the contribution to €9,037.13.

7.2.4. Other matters

The appellant has claimed that as the Local Authority will have received contribution payments in respect of other development in the area, as well as road tax from hauliers, the proposed infrastructure is already paid for by other means. However, Section 48(1) of the Act enables a planning authority to require the payment of a financial contribution when granting permission under Section 34 of the P & D Act in respect of public infrastructure and facilities benefitting development in the area, regardless of other sources of funding for the infrastructure and facilities.

7.2.5. The appellant also makes reference to several Board decisions where the Board had removed conditions requiring the payment of a financial contribution, and it is claimed that the developments in question are similar to that currently proposed. The cases referred to were 234568; 248671 and 249314. Each case related to a similar form of development, i.e. importation of stones and soil for the improvement of lands. The first two cases related to appeals against financial contributions, but did not

relate to conditions attached in accordance with a General Development Contribution Scheme. The conditions appealed related to a requirement to pay a Special Contribution which was specific to that case, and is not directly comparable to the current case before the Board.

- 7.2.6.** The final case (249314) is a third-party appeal against permission granted for the importation of soil and stone. The P.A. had attached a requirement to pay a Special Contribution, and not development contribution in accordance with the terms of the General Development Contribution Scheme. The Board decided to grant permission subject to revised conditions, which included the omission of this condition and its replacement with a specific condition requiring the applicant to assume full responsibility for the cost of repair of the roadway. It is considered that these cases are not directly comparable to the current case which relates to the issue of whether the terms of the GDCS have been properly applied, rather than whether there is sufficient justification for the requirement to pay a Special Contribution in respect of a particular development.

8.0 Recommendation

- 8.1.** Having regard to the information on the file, the grounds of appeal, the planning and technical reports of the planning authority in relation to the development, and to the assessment above, I recommend that the Board directs the planning authority to **AMEND** Condition 2 and the reason therefor as follows for the reasons and considerations set out below.

9.0 Reasons and Considerations

The current Kerry County Development Contribution Scheme sets out the development contributions required in respect of different categories of development. It is considered that, on the basis of the information submitted with the application and appeal, the proposed development falls within the category of Landfill and that the rate for the total contribution required is €0.29 per m³ as set out in the Scheme. The Board further considers, however, that a reduction in development contributions in relation to development granted temporary planning permission should be applied, having regard to the limited

extent and duration of the proposed development, due to the finite nature, scale and purpose of the project. Therefore, it is considered that the terms of the Planning Authority's Development Contribution Scheme have not been properly applied in respect of the reduction required for a temporary permission. The condition requiring the payment of the contribution should, therefore, be amended to provide for a reduction of 50% in the amount of contribution from €18,074.25 to €9,037.13

Mary Kennelly
Senior Planning Inspector

17th October 2018