



An
Bord
Pleanála

inspector's Report ABP-303036-18

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| Development | Continued Use of a 36 Metre High Communication Structure at ESB's Waterford IDA 38kv Substation Site |
| Location | ESB's Waterford IDA Substation Site, Cork Road, Waterford |
| Planning Authority | Waterford City and County Council |
| Planning Authority Reg. Ref. | 18601 |
| Applicant | ESB Telecoms Ltd. |
| Type of Application | Permission |
| Planning Authority Decision | Grant |
| Type of Appeal | First Party – v – Financial Contribution Condition |
| Appellant | ESB Telecoms Ltd. |
| Date of Site Inspection | None |
| Inspector | Paddy Keogh |

1.0 Site Location and Description

- 1.1. The subject site which has a stated area of 0.0189 ha. is situated within the existing ESB compound which is located approximately in the centre of Waterford Industrial Park in the southwestern environs of Waterford City.
- 1.2. The appeal relates to the matter of a financial contribution only. I have not inspected or photographed the site.

2.0 Proposed Development

- 2.1. The proposed development involves the continuation of use of an existing 36m high lattice telecommunications structure, carrying radio antennae, including dishes within a 2.4m high palisade compound shared with other licenced operators.

3.0 Planning Authority Decision

- 3.1. Notification of a decision to grant planning permission for the proposed development was issued by the planning authority per Order dated 25th, October 2018.

Condition No. 2 of the planning authority notification of decision levied a financial contribution in the sum of €10,000 pursuant to S.48 of the *Planning and Development Act, 2000*.

3.2. Planning Authority Report

- 3.2.1. A report from the planning authority Area Planner dated 24th, October 2018 refers to the planning history of the site including previous planning permissions granted for telecommunications infrastructure on the site viz. temporary (5 year duration) planning permissions granted in 2002 (Reg. Ref. 02500356), 2007 (Reg. Ref. 07/500363) and 2012 (Reg. Ref. 12/500129).
- 3.2.2. The Area Planner's report highlights elements of the Applicant's submission to the planning authority including the suggestion that there should be no 'double-charging' in the context of financial levies imposed by the planning authority. The Area Planner reports that a financial contribution has never been levied previously in respect of the

telecommunications that is the subject of the current application and appeal. Ergo, the issue of ‘double-charging’ does not arise in this instance.

- 3.2.3. Circular Letter PL07/12 refers to a waiver from Development Contributions in respect of the provision of broadband infrastructure. However, in accordance with the provisions current Development Contribution Scheme a development contribution is applicable for telecommunications masts.

4.0 Planning History

Reg. Ref. 12/500129 – Planning permission for continuance of use of a 36 m high, free standing lattice communications structure was granted by the planning authority on 22nd, November 2012 (date of final grant 14th, January 2013) for a period of 5 years from the date of the planning authority Order.

Reg. Ref. 07/500363 - Planning permission for continuance of use of a 36m high, free standing lattice communications structure was granted by the planning authority per Order dated 16th, December 2007 for a period of 5 years from the date of the planning authority Order.

Reg. Ref. 02500356 – Planning permission granted to ESB Telecoms to erect a 36 m free standing communications structure on site at the centre of Waterford Industrial Estate per Order dated 13th, September 2002. This planning permission was for a temporary period of 5 years.

5.0 Policy and Context

5.1. Waterford City & County Council Development Contribution Scheme 2015-2021

- 5.1.1. Section 6 of the Scheme is entitled ‘**Development Contribution Charges**’ and lists charges applicable for various categories of development. Included under the category headed **(B) Non-Residential Development** and sub-heading ‘**Other Non-Residential Development**’ is

Telecommunication masts €10,000

- 5.1.2. Section 7 of the Scheme makes provision for certain categories of development that will be exempted from the requirement to pay a development contribution that would otherwise be levied pursuant to S. 48 of the *Planning and Development Act, 2000*

(as amended). Included under the heading relating to **'Non-Residential Exemptions'** is...

9) Broadband infrastructure (i.e. masts, dishes and antennae).

5.2. Circular Letter PL07/12

- 5.2.1. Circular Letter PL07/12 dated 19th, October 2012 issued by the Minister for the Environment, Community and Local Government pursuant to Section 28 of the *Planning & Development Act, 2000* (as amended), updates provisions under the *Telecommunications Antennae and Support Structures Guidelines (1996)*.
- 5.2.2. Circular Letter PL07/12 stipulates that the practice of attaching a condition to a permission for telecommunication masts and antennae which limit their life to a set temporary period should cease (Section 2.2 refers).
- 5.2.3. Circular Letter PL07/12 also stipulates that the attachment of a condition to a grant of planning permission requiring the lodgement of a bond of cash deposit is no longer appropriate (Section 2.4 refers)
- 5.2.4. Circular Letter PL07/12 also stipulates that in line with the provisions of the *Draft Guidelines on Development Contributions* all future Development Contribution Schemes must include waivers for broadband infrastructure (Section 3 refers). (Guidelines published in January 2013).

6.0 The Appeal

- 6.1.1. The submitted grounds of appeal state that all three national mobile network providers have a substantial quantum of equipment mounted on the existing structure providing mobile broadband coverage (4G services). The site is also connected to ESB's national fibre network allowing all of the ESBT's customers to offer the latest services from this site including high speed broadband services (4G). The site has developed into what is known as a 'hub site' thanks to its connectivity, with multiple telecom towers gathering data and calls and feeding them into this site. It is for this reason that the site has a total of 14 dishes attached to it gathering point-to-point data from more remote towers on the mobile networks.

- 6.1.2. The coverage provided by the existing infrastructure provides vital mobile and broadband services to residents and visitors of the area.
- 6.1.3. It is contended that the levying of a financial contribution in the sum of €10,000 by the planning authority runs contrary to the provisions of the Development Contribution Scheme for the area which stipulates that '**broadband infrastructure (i.e. masts, dishes and antennae)**' shall be exempt from contributions altogether.

6.2. Planning Authority Response

The planning authority per communication dated 7th, January 2019 have submitted details of the basis of calculation of the financial contribution levied.

6.2.1. Further Observations from the Applicant

- 6.2.2. A further submission from the applicant per letter dated 21st, January 2019 states that the term broadband is a catch-all phrase to describe the provision of high-speed telecommunications. The speed at which the broadband is provided determines the speed at which the internet can be accessed. The current definition of broadband as set out by the (US) Federal Communications Commission, requires a download speed of a minimum of 25 megabits per second (Mbps). This is the internationally accepted definition of broadband. Historically, the term broadband could be used purely to describe the provision of fixed line telecoms to the home. This has not been the case since the roll out of more recent mobile technologies, notably 4G.

7.0 Assessment

- 7.1.1. The appeal relates solely to Condition No. 2 of the planning authority notification of decision to grant planning permission. This condition levied a financial contribution in the sum of €10,000 pursuant to Section 48 of the *Planning and Development Act, 2000* (as amended). The Applicant alleges that the planning authority have improperly applied the terms of the Waterford City & County Development Contribution Scheme 2015-2021 in failing to allow the development to benefit from

the provisions of Section 7 of the Scheme (exemption from the levying of a financial contribution in the case of broadband infrastructure (masts, dishes and antennae)).

- 7.1.2. Section 6 of the Development Contribution Scheme clearly includes Telecommunications Infrastructure as being liable for the payment of a financial levy. The contribution under the terms of the scheme is for 'Telecommunication Masts' irrespective of whether or not the mast carries dishes, antennae etc.
- 7.1.3. Section 7 of the Development Contribution Scheme provides for an exemption from the payment of any levy that might otherwise arise in the case of the provision of Broadband Infrastructure. This exemption applies to masts, dishes and antennae.
- 7.1.4. The grounds of appeal acknowledge that historically the term 'broadband' was used to refer to the provision of fixed line telecoms but argue that this is no longer the case since the roll out of the recent 4G mobile technologies. It is submitted the site now supports the 4G broadband network serving the area and on this basis the telecommunications infrastructure should qualify for the exemption provided for under Section 7 of the Development Contribution Scheme.
- 7.1.5. The application lodged with the planning authority was accompanied by a 14 page document entitled 'ESB Telecoms Ltd. Waterford Ind Est. 38KV'. Section 2.2 of this document states that 'Due to the expansion and growth of mobile telephony and in particular wireless broadband technology, there is a continued requirement for the telecommunications infrastructure at this site'.
- 7.1.6. Planning permission for telecommunications infrastructure at this site was first granted for a period of 5 years from 2002. Subsequent 5 year planning permissions were granted in 2007 and 2013. The telecommunications mast (and other infrastructure) has supported mobile telephony in the area since 2002. The site has developed in line with technological advances so that the telecommunications mast supports the provision of broadband infrastructure today. However, it clearly supports both mobile telephony and broadband. In these circumstances, I consider that the exemption provided for under Section 7 of the Development Contribution Scheme is limited to the use of the telecommunications mast only insofar as it is used in connection with supporting the provision of broadband. This exemption does not apply to the mast insofar as it has in the past and continues to be used for and support mobile telephony. Furthermore, it appears that there are no other

exemptions provided for under the terms of the Development Contribution Scheme that can be availed of in respect of the telecommunications mast in respect of its use to support mobile telephony and use in connection with any communications other than broadband. In these circumstances, I consider that the applicant cannot avail of the exemption provided for under Section 7 of the Development Contribution Scheme.

- 7.1.7. Notwithstanding the fact that it is not open to the applicant to avail of the exemption provided for under Section 7, I consider that, based on a presumption against double-charging, the payment of a development contribution would not be warranted in this instance in circumstances where a financial contribution has been previously levied and paid. However, the planning authority clearly state that a levy was not levied or paid in respect of this infrastructure in the context of any of the previous planning permissions granted. The applicant cites precedents where the Board have removed conditions attached to planning permissions for telecommunications infrastructure where financial contributions were previously levied and paid. However, these precedents do not relate to the telecommunications mast on the appeal site. The applicant has not submitted any evidence to contradict the planning authorities position in respect of the non-levying or payment of a financial contribution in respect of the appeal site.

8.0 Recommendation

- 8.1. Having regard to the nature of the condition 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 section 48 of the Planning and Development Act, 2000 to ATTACH condition number 2 and the reason therefor.

9.0 Reasons and Considerations

It is considered that the payment of a financial levy in the sum of €10,000 in respect of the development arises pursuant to Section 6, Category (B) 'Other non-residential

Development' of the Waterford City & County Development Contribution Scheme 2015-2021. Having regard, to the nature of the telecommunications mast which serves both mobile telephony and broadband equipment it is considered that the development cannot avail of the exemption from the payment of financial in respect of broadband infrastructure contained within Section 7 of the Development Contribution Scheme which exemption relates solely to broadband. There are no other exemptions or waivers or exemptions that can be availed of by the applicant. Furthermore, based on the submitted documentation, it has not been demonstrated that a financial contribution was previously levied or paid in respect of this infrastructure. Accordingly, the issue of 'double-charging' for the same telecommunications mast and infrastructure does not arise in this instance.

Paddy Keogh
Planning Inspector

25th, March 2019