



An  
Bord  
Pleanála

## Inspector's Report ABP-306604-20

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<b>Question</b>	Point of Detail, Condition 7 of An Bord Pleanála Grant of Permission Reference: PL92.248107
<b>Location</b>	Timoney, Knock, Roscrea County Tipperary
<b>Planning Authority</b>	Tipperary County Council
<b>An Bord Pleanála Appeal No.</b>	PL92.248107 (Condition No. 7) (P.A. Reg. Ref. 16600653)
<b>Referred by</b>	Three Ireland Services (Hutchison) Ltd.
<b>Referral Type</b>	Point of Detail (Financial Contribution)
<b>Date of Site Inspection</b>	No Inspection Required
<b>Inspector</b>	Paddy Keogh

## 1.0 Introduction

- 1.1.1. The subject matter of this referral to the Board concerns Condition No. 7 attached to a previous Board decision to grant planning permission to Three Ireland Services (Hutchison) Ltd. for a telecommunications support structure carrying antennae and transmission dishes (Appeal No. PL92.248107 (Tipperary Co. Council Reg. Ref. 16600653) refers). The referral raises matters relating to (i) Section 34(5) of the *Planning and Development Act, 2000*, as amended ('the Act') and (ii) the clause included within Condition No. 7 facilitating details of the application of the planning authority Development Contribution Scheme to be referred back to the Board in default of agreement between the parties.

## Site Location and Description

- 1.2. The subject site is located in the townland of Timoney, Co. Tipperary, c.150m south of the M7 motorway and c.5km due east of the N62 Regional Road. It is c.7km south-east of Roscrea. The River Nore runs to the north-west and the Nore Bridge is c.1.8km from the site. The area is rural in character and there are a small number of dwellings and farm buildings along the road leading to the subject site. The site is accessed from a minor county road which is very narrow and in poor condition in places.

## 2.0 Background

- 2.1.1. Tipperary County Council decided to refuse planning permission for a development consisting of Construction of a 27m high telecommunications support structure, carrying antennae and transmission dishes, and associated equipment for 2 reasons. Following a first party appeal against the decision of the planning authority, the Board per Order dated 25<sup>th</sup>, July 2017 (PL92.248107) decided to grant planning permission for the proposed development subject to 7 conditions.
- 2.1.2. Condition No. 7 was a standard S. 48 development contribution condition worded as follows:

The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme.

**Reason:** It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.

### 3.0 Referrer's Case

3.1.1. A submission was made Three Ireland (Hutchinson) Ltd. to the Board on 31<sup>st</sup>, January 2020. The referrer's case includes:

- A previous dispute (relating to the same matter as the current case) was submitted to the Board on 26<sup>th</sup>, June 2019 for determination. However, the case was deemed to be invalid by the Board in circumstances where the Board considered that there was no evidence of a dispute between the applicant and the planning authority in relation to Condition No. 7. Evidence (as set out in Appendix A of the referrer's submission) has now been attached in respect of the dispute between the referrer and the planning authority. Appendix A includes a letter dated 22<sup>nd</sup>, October 2019 from Tipperary Co. Council to Three Ireland (Hutchinson) Ltd. stating that the financial contribution is payable on

foot of a condition (No. 7) imposed by An Bord Pleanála and that the planning authority have no jurisdiction to consider an appeal in relation to the merits of the Board's decision. The planning authority calculate the financial contribution liable on foot of Condition No. 7 and in accordance with the terms of the Tipperary Co. Council Development Contribution Scheme 2015 - 2019 in the sum of €29,700.00.

- Tipperary Co. Council are resolute in their opinion that a contribution is payable in accordance with Condition No. 7.
- The referrer is of the view that the provisions of the Tipperary County Development Contribution Scheme 2015-2019 includes an exemption for *'masts and antennae, dish and other apparatus/equipment for communication purposes which form part of the National Broadband Plan or a subsequent government endorsed initiative as defined by the Department of Communications, energy and Natural Resources (DCENR)'* and that this exemption should be applied to the proposed development.
- The referrer considers that the argument in favour of the application of this exemption is bolstered by decisions of the Board in two previous (precedent) cases. The Board determined that development contributions were not payable on this type of infrastructure under the terms of the Tipperary Co. Council Development Contribution Scheme (see Appeal No. ABP-300853-18 and PL92.303180). The development proposed constitutes a mast, antennae and other apparatus/equipment for communication purposes that forms part of a subsequent endorsed initiative as defined by the Department of Communications, Energy and Natural Resources (i.e. the *Report of the Mobile Phone and Broadband Taskforce and the delivery of the National Broadband Plan*). Furthermore, the infrastructure will be made available to other service providers in accordance with the telecommunications guidelines and Three's usual practice of sharing infrastructure in accordance with the telecommunications guidelines.

- The exemptions for masts as provided in the Tipperary Co. Council Development Contribution Scheme should, therefore, be applicable in this instance.

## 4.0 Planning Authority Response

- 4.1.1. A submission from the planning authority per Order dated 24<sup>th</sup>, February 2020 highlights the fact that the financial contribution obligation in relation to this development has been imposed by a decision of the Board (per Condition No. 7 attached to PL92.248107).
- 4.1.2. A submission from the planning authority to the Board per letter dated 17<sup>th</sup>, February 2020 includes copies of correspondence (including invoices etc.) between the planning authority and the referrer in relation the levying of a financial contribution in the sum of €29,700.00 pursuant to the Tipperary Co. Council Development Contribution Scheme and in accordance with Condition No. 7 imposed by the Board.
- 4.1.3. I note that correspondence from the planning authority to the referrer includes a hand written note from S. Reidy of the planning authority dated 28<sup>th</sup>, January 2020 indicating that in a conversation with the referrer of the same date the referrer had been advised (i) that the requirement to pay a financial contribution was imposed by a decision of the Board, (ii) no change has been made in the recently published 2020 Development Contribution Scheme in relation to contributions for telecommunications masts and (iii) the referrer has the option of making a fresh application to the planning authority (*I take the latter comment to imply that a financial contribution might not be levied by the planning authority in the context of a fresh application for planning permission*).

## 5.0 Tipperary Co. Council Development Contribution Scheme 2020

- 5.1.1. The Tipperary Co. Council Development Contribution Scheme 2020 was adopted on the 9<sup>th</sup>, December 2019, replaces the Tipperary Co. Council Development

Contribution Scheme 2015-2019 and applies from 1<sup>st</sup>, January 2020 until the scheme is amended or replaced.

5.1.2. Section 10.0 refers to 'Exemptions & Reductions' and includes:

In accordance with Department of Housing, Planning and Local Government Circular Letter: PL 03/2018, this scheme provides a 100% waiver for telecommunications infrastructure, both mobile and broadband, to support the provision of mobile and broadband services throughout County Tipperary.

## **6.0 Tipperary Co. Council Development Contribution Scheme 2015 – 2019**

6.1.1. Tipperary Co. Council Development Contribution Scheme 2020 was adopted on the 9th, December 2019, and was operative from 1<sup>st</sup>, March 2015 until 31<sup>st</sup>, December 2019.

6.1.2. Section 6.0 of the Scheme indicates classes of development that will be subject to Development Contribution levies under the terms of the scheme. These include:

***Class 22*** *The provision of a telecommunication mast.*

***Class 23*** *The provision of telecommunications antennae, dish and other apparatus/equipment for communication purposes.*

6.1.3. Section 12.0 of the Contribution Scheme includes a 'Schedule of Contributions' indicating applicable levies. These include:

***Class 22*** *€17,200.00 per Communications Mast*

***Class 23*** *€2,500.00 per item of Communications Equipment*

6.1.4. Section 10.0 of the Contribution Scheme includes 'Exemptions'. These include:

*Where masts and antennae, dish and other apparatus/equipment for communication purposes form part of the National Broadband Plan or a subsequent Government endorsed initiative as defined by the Department of Communication, Energy and Natural Resources (DCENR) they will not be subject to development contributions*

## 7.0 Circular Letter PL 03/2018

This Circular Letter issued by the Department of Planning, Housing and Local Government on 3<sup>rd</sup>, July 2018 seeks to ensure that a consistent approach is applied by all local authorities in the levy of financial levies in respect of masts and telecommunications equipment consistent with action 3 of the Report of the Mobile Phone and Broadband Task Force – jointly chaired by the Minister for Communications, Climate Action and the Environment and the Minister for Regional and Community Development. This recommendation was that waivers be provided in Development Contribution Schemes in respect of both mobile phone and broadband infrastructure. In this regard, the Circular Letter provides that *'waiver shall apply to any telecommunications infrastructure, both mobile and broadband, being deployed as part of a Government endorsed telecommunications strategy, plan or initiative. Where mobile or broadband operators demonstrate to the satisfaction of the planning authority that their infrastructure provides services to customers who would not otherwise be able to avail of an adequate mobile or broadband service, such infrastructure shall not attract development contributions. Furthermore, the waiver applies to masts, antennae, dishes and other apparatus or equipment being installed for such communication purpose'*.

## 8.0 Legislation

8.1.1. Section 34(5) of the Planning and Development Act, 2000, as amended, states:

*The conditions under subsection (1) may provide that points of detail relating to a grant of permission may be agreed between the planning authority and the person to whom the permission is granted and that in default of agreement the matter is to be referred to the Board for determination.*

8.1.2. Section 48 'Development Contributions' includes:

8.1.3. Section 48(1) provides:

*A planning authority may, when granting a permission under section 34, include conditions for requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the area of the*

*planning authority and that is provided, or that it is intended will be provided, by or on behalf of a local authority (regardless of other sources of funding for the infrastructure and facilities).*

8.1.4. Section 48(2) provides:

*(a) Subject to paragraph (c), the basis for the determination of a contribution under subsection (1) shall be set out in a development contribution scheme made under this section, and a planning authority may make one or more schemes in respect of different parts of its functional area.*

*(b) A scheme may make provision for payment of different contributions in respect of different classes or descriptions of development.*

*(c) A planning authority may, in addition to the terms of a scheme, require the payment of a special contribution in respect of a particular development where specific exceptional costs not covered by a scheme are incurred by any local authority in respect of public infrastructure and facilities which benefit the proposed development.*

8.1.5. Section 48(3) provides:

*(a) A scheme shall state the basis for determining the contributions to be paid in respect of public infrastructure and facilities, in accordance with the terms of the scheme.*

*(b) In stating the basis for determining the contributions in accordance with paragraph (a), the scheme shall indicate the contribution to be paid in respect of the different classes of public infrastructure and facilities which are provided or to be provided by any local authority and the planning authority shall have regard to the actual estimated cost of providing the classes of public infrastructure and facilities, except that any benefit which accrues in respect of existing development may not be included in any such determination.*

*(c) A scheme may allow for the payment of a reduced contribution or no contribution in certain circumstances, in accordance with the provisions of the scheme.*



## 9.0 Assessment

- 9.1.1. The question that is the subject matter of the current referral pursuant to Section 34(5) of the *Planning and Development Act, 2000* ('the Act') was previously submitted to the Board for determination (Appeal No. 304760-19). However, prior to determination of the matter by the Board the appeal was determined to be invalid on the grounds that there was no evidence submitted of a dispute between the applicant and the planning authority in relation to Condition No. 7. The referrer was written to and advised accordingly per letter dated 15<sup>th</sup>, August 2019.
- 9.1.2. The current referral is accompanied by documentation (Appendix A of referrer's submission) highlighting details of the dispute between the planning authority and the referrer. In short, the planning authority have issued an invoice in the sum of €29,700.00 levied in accordance with the terms of Condition No. 7 of the Board's decision in Appeal No. 92.248107. The sum of €29,700.00 has been calculated in accordance with the terms of the Tipperary Co. Council Development Contribution Scheme 2015-2019 [€17,200.00 for one communications mast in accordance with Class 22 plus €12,500.00 for 5 items of telecommunications equipment @ €2,500.00 per unit in accordance with Class 23]. The Tipperary Development Contribution Scheme 2015 – 2019 was in place at the time of the Board decision on Appeal No. 92.248107 (July 2017) and the time that the mast was erected.
- 9.1.3. The referrer's case in the submission to the Board dated 31<sup>st</sup>, January 2020 is relatively short and concise. It is submitted that no financial levy is payable under the terms of the Development Contribution Scheme in circumstances where Section 10.0 of the scheme provides for an exemption from the payment of any financial contribution '*where masts and antennae, dish and other apparatus/equipment for communication purposes form part of the National Broadband Plan or a subsequent Government endorsed initiative as defined by the Department of Communication, Energy and Natural Resources (DCENR)*'. It is submitted that the proposed development complies with this requirement. The referrer has also highlighted two precedent cases concerning appeals against Development Contribution Conditions

attached (by the planning authority) to grants of planning permissions for masts for Three (Hutchinson) Ireland Ltd. (both in Tipperary) where the Board directed that financial contributions levied by the planning authority be removed on the grounds that the terms of the Tipperary Co. Council Development Contribution Scheme 2015 – 2019 which includes an exemption for ‘masts and antennae, dish and other apparatus/equipment for communication purposes form part of the National Broadband Plan or a subsequent Government endorsed initiative as defined by the Department of Communication, Energy and Natural Resources (DCENR)’ had not been properly applied (Appeal No. 300853 & Appeal No. 303180).

- 9.1.4. The planning authority consider that they have no jurisdiction to consider an appeal relating to a Condition imposed by the Board. The planning authority also point out that the Board’s condition specifically directs that the developer ***shall pay a financial contribution***.
- 9.1.5. In my opinion, the current referral essentially amounts to a request by the referrer that the Board reconsider the appropriateness of Condition No. 7 attached to the Board’s decision in Appeal No. 92.248107 and to remove this condition in order to ensure consistency with other Board decisions, in particular, Appeal No. 300853 & Appeal No. 303180. On procedural grounds, I consider that a question arises as to whether or not this is an appropriate matter for determination pursuant to Section 34(5) of the Act. This section makes provision for the Board to determine disputes relating to ‘points of detail’ in the interpretation of the requirements of a condition that has been imposed (by the planning authority) where the planning authority and the developer cannot agree in relation to the interpretation of the condition. Strictly speaking this is not the case in the current instance. The Board’s condition states that ***‘the developer shall pay a financial contribution’***. The referrer has not highlighted any ‘point of detail’ that requires clarification (for example, in relation to the quantum of contribution to be levied). Rather, the referrer seeks to have the terms of the condition removed in its entirety. This is not a ‘point of detail’.

9.1.6. However, the submission from the referrer does not, in fact, include a request that the matter is to be determined pursuant to Section 34(5). The referrer has highlighted the provision in the wording of Condition No. 7 attached by the Board which provides that *'details of the application of the terms of the (Development Contribution) Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme'*. In my opinion, it is on the basis of this wording and the power reserved to the Board under the provision of this condition that they Board can determine the matter.

9.1.7. Having regard to the arguments presented in the submission from the referrer, I consider that the referrer's case for the removal of Condition No.7 has considerable merit. In this regard, I note in particular:

- (i) The provisions of Section 10.10 of the Tipperary Co. Council Development Contribution Scheme 2015 – 2019 Scheme provide for a waiver in respect of contributions otherwise levied under Class 22 and Class 23 of the Scheme for the proposed development.
- (ii) This waiver reflects the approach advocated in Circular Letter 03/2018.
- (iii) A similar waiver is provided for under Section 10.0 of the Tipperary Development Contribution Scheme 2020.

9.1.8. Having regard to the above matters, I agree with the case made by the referrer. I consider that 'the proper application' of the Tipperary Co. Council Development Contribution Scheme 2015 – 2019 would allow the referrer to avail of the exemption and waiver provide pursuant to Section 10.0 of the Scheme. Thus, I consider that the referrer is liable for a 'nil' contribution under the terms of the Scheme.

9.1.9. Other than pursuant to Section 146(A) the Act does not provide a mechanism whereby the Board is entitled to order the 'removal' of a condition that was imposed by the Board itself. It appears that no submission has been received by the Board requesting that the original Board Order be amended to omit Condition No. 7 pursuant to the provisions of Section 146(A). In these circumstances, I consider that the appropriate course of action would be to order that Condition No. 7 be interpreted to reflect the

fact that the exemption provided under Section 10.0 can be availed of by the referrer and that a 'nil' contribution be levied.

## 10.0 Recommendation

I recommend that the Board determine this referral in accordance with the following Draft Order.

### *DRAFT ORDER*

**WHEREAS** by Order dated the 25<sup>th</sup>, day of July 2017 An Bord Pleanála under appeal No. 92.248107 granted, subject to conditions, planning permission to Three Ireland (Hutchison) Ltd. care of Peadar McQuaid of 28 to 29 Sir John Rogerson's Quay, Dublin for development comprising of the Construction of a 27 metres high telecommunications support structure carrying antennas and transmission dishes with associated equipment units, security fencing and access track all at Timoney, Knock, Roscrea, Co. Tipperary

**AND WHEREAS** condition number 7 attached to that permission required the developer to pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended, and the condition required that the contribution be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment, and that details of the application of the terms of the Scheme were to be agreed between the developer and the planning authority or, in default of agreement, the matter was to be determined by An Bord Pleanála:

**AND WHEREAS** the developer and the planning authority failed to agree on the details of the application of the terms of the Scheme in compliance with the terms of the condition and the matter was referred by the developer to An Bord Pleanála on the 31<sup>st</sup>, day of January, 2020 for determination:

**NOW THEREFORE** An Bord Pleanála, pursuant to the imposition and wording of Condition No. 7 attached to the Board's decision in Appeal No. PL 92.248107 and based on the Reasons and Considerations set out below, hereby determines that the outstanding amount payable to Tipperary County Council is NIL.

### **Reasons and Considerations**

The Board granted planning permission under appeal reference number PL 92.248107 (planning register reference number 166006563) for the development the subject of this request for a determination, and imposed condition number 7 requiring the payment of a contribution under the provisions of the Tipperary County Council Development Contribution Scheme 2015-2019. Section 10.0 of the Development Contribution Scheme provides for certain exemptions from development levies that might otherwise apply including a 100% waiver from contributions otherwise payable under Class 22 and Class 23 of the Development Contribution Scheme where (as in the current instance) *'masts and antennae, dish and other apparatus/equipment for communication purposes form part of the National Broadband Plan or a subsequent Government endorsed initiative as defined by the Department of Communication, Energy and Natural Resources (DCENR)'*. The Board has had regard to the submissions made in relation to the application under planning register reference number 166006563 (Appeal No. PL 92.248107), the material submitted by the referrer and the planning authority in this request for a determination. The Board is satisfied that the referrer is entitled to the benefit of the full waiver provided for in Section 10.0 of the Development Contribution Scheme and that the amount payable to Tipperary County Council under the terms of the Development Contribution Scheme is NIL.

## **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.

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Paddy Keogh

Planning Inspector

3<sup>rd</sup>, July 2020