



An
Bord
Pleanála

Inspector's Report ABP-306995-20

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| Question | Whether the provision by SIRO of an overhead rather than an underground broadband connection to No. 9 Rossbrook would contravene Condition 7 of TP 13908/87 and would not be exempted development under Article 9(1)(a)(i) of the Planning Regulations. |
| Location | No. 9 Rossbrook, Model Farm Road, Cork |
| Planning Authority | Cork City Council |
| Planning Authority Ref. | R559/19 |
| Referral | |
| Referred by | Brian & Clare McCutcheon |
| Owner/Occupier | Brian & Clare McCutcheon |
| Date of Inspection | 17 th June, 2020 |
| Inspector | Kevin Moore |

1.0 Introduction

1.1 On 24th March 2020, Brian and Clare McCutcheon made a submission to the Board, under section 5 of the Planning and Development Act, seeking a review of Cork City Council's decision on the question:

“whether the provision by SIRO of an overhead rather than underground broadband connection to No. 9 Rossbrook would contravene Condition 7 of TP 13908/87 and would not be exempted development under Article 9(1)(a)(i) of the Planning Regulations.”

2.0 Site Location / Description

2.1 No. 9 Rossbrook is a detached two-storey house within an estate of detached houses located to the south of Model Fam Road in the western suburbs of Cork City.

3.0 The Question

3.1 The question before the Board is:

Whether the provision by SIRO of an overhead rather than underground broadband connection to No. 9 Rossbrook would contravene Condition 7 of TP 13908/87 and would not be exempted development under Article 9(1)(a)(i) of the Planning Regulations.

4.0 The Referrer's Submission

4.1 The following is submitted from Brian and Clare McCutcheon:

- No reasons or considerations were given by the planning authority for its rewording of the question posed to it.
- The reworded question failed to adequately consider:

- Whether SIRO is deemed to be a statutory undertaker for the purposes of the Planning Regulations,
 - The fact that SIRO has the option of providing either an overground or an underground service having regard to the existing network of telecommunications ducts serving Rossbrook housing estate and the company policy set out on the SIRO website; or
 - The mandatory nature of Condition 7 of TP 13908/87 in the context of Article 9(1)(a)(i) of the Planning Regulations.
- The planning authority's declaration is based on Class 31 of Part 1 of Schedule 2 of the Regulations. This only applies to works by a statutory undertaker. It is requested that the Declaration issued by the Board explicitly refers to works being carried out by a statutory undertaker.
 - It appears that the planning authority has entered into an agreement with SIRO to allow overground connection to be made to the Council's housing stock even where an underground connection is technically feasible and preferable from a planning policy viewpoint. The purpose of the request to the planning authority was to ensure that the use of overground lines would be subject to public consultation through the planning application process.
 - Condition 7 of TP 13908/87 was as follows:

"All E.S.B., P&T and cable TV services shall be laid underground.

Reason: In the interests of the amenities of the area."

It is noted that the Planner's report claims that Condition 7 only referred to services which the developer directly installed at the construction stage and does not apply to the subsequent installation of broadband services by SIRO. It is also implied that the exempted status of an overground broadband connection could only be removed if Condition 7 included a specific reference to Class 31. This position is legally incorrect for the following reasons:

- The purpose of Condition 7 was to ensure that *all* telecommunications services, which are provided within the estate, are laid underground and the restriction therefore applies to the installation of broadband services by SIRO. The term “all services” must include “future services” as well as “existing services”.
- The scheme permitted by the planning authority required the developer to provide the service *infrastructure* with the actual services being provided by the relevant statutory undertaker. Condition 7 was imposed to ensure that any statutory undertakers providing services within the estate would be compelled to use the ducts which were installed by the developer. This is consistent with the history of the development of the estate.
- It is established in case law that the interpretation of a condition should have regard to the reason stated for the imposition of the condition. It is unreasonable to suggest that protection of the amenities required the services by the developer to be laid underground but there would be no adverse impact on the same amenities if overground services were provided at a later date by a statutory undertaker.
- There is no planning reason to distinguish between the provision of phone, television, internet and broadband services as they can all be provided by the same statutory undertaker using a single fibre optic cable.
- The planning authority implies that the wording used in Condition 7 of 13908/87 is obsolete and unenforceable and that works proposed under Class 31 may only be de-exempted if there is explicit reference to that class in the relevant planning condition. There are two options for excluding exempted development by planning condition and the wording used for Condition 7 is one that reflects the fact that the planning authority has consistently sought to exclude the use of overground cables in the interests of the visual amenities of the area.

In this condition the exemption is removed by Article 9(1)(a)(i) rather than by the condition and there is no indication that permission might be granted for the works. This has the effect of removing the exempted status of the works in question.

In conclusion, it is submitted that Article 9(1)(a)(i) applies to any exemption under Article 6 which would contravene a condition attached to a planning permission. Condition 7 of TP 13908/87 is mandatory rather than discretionary and it requires *all* services to be laid underground.

5.0 The Planning Authority's Considerations

5.1 The planning authority's declaration, dated 11th March 2020, concluded that the provision of an overground broadband connection to No. 9 Rossbrook is development and is exempted development, having regard to:

- the nature of the proposal,
- the definition of works, alteration and development as outlined in sections 2 and 3 and Part 1 of the Planning and Development Act,
- Class 31 of Part 1 of Schedule 2 of the Planning and Development Regulations, and
- the wording of Condition 7 attached to 13908/87 and Condition 5 attached to 14678/88, which did not de-exempt the provision of future overground services.

5.2 The declaration followed the recommendation set out in the Planner's report before it was made. The following is noted from the Planner's report:

- The question placed before the planning authority was reworded to:
'whether the provision of an overground broadband connection to No. 9 Rossbrook, Model Farm Road is or is not development and is or is not exempted development.'

- Planning Permissions T.P. 12082/84, T.P. 13908/87 and T.P. 14615/88 were acknowledged.
- The proposal involves stringing an overhead fibre optic cable between No. 9 Rossbrook and Nos. 8 and 10 as part of the roll out of a new broadband service by SIRO, a jv company between ESB and Vodafone.
- From the SIRO website it is noted:
‘SIRO fibre-optic cables are laid alongside the existing electrical line into each home. If the electrical line is overhead, the fibre is strung just underneath it. Where the electrical line is underground, fibre is laid alongside it in the duct.’
- The stringing of fibre optic cabling could be said to fall under the definition of works and as such constitutes ‘development’.
- The works are exempt under Class 31 of Part 1 of Schedule 2 of the Planning and Development Regulations.
- Condition 7 of T.P. 13908/87 and the attachment of same to T.P. 14678/88 are noted. The condition related to undergrounding of services at the time of building of the housing estate and was complied with at that time. Given the wording of the condition, it cannot be said that it was intended to ensure that all future services for the estate would be placed underground.

6.0 Statutory Provisions

6.1 Planning and Development Act 2000 (as amended)

PART I – Preliminary and General

Section 2(1)

In this Act, except where the context otherwise requires—

“statutory undertaker” means a person, for the time being, authorised by or under any enactment or instrument under an enactment to –

- (a) construct or operate a railway, canal, inland navigation, dock, harbour or airport,
- (b) provide, or carry out works for the provision of, gas, electricity or telecommunications services, or
- (c) provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking.

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

Section 3

3.—(1) In this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

6.2 Planning and Development Regulations, 2001 (as amended)

PART 2 - Exempted Development

Article 6(1)

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in

column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Article 9(1)

Development to which article 6 relates shall not be exempted development for the purposes of the Act –

- (a) if the carrying out of such development would – ...
 - (i) contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act, ...

Schedule 2

Part 1 Exempted Development – General

| Column 1 Description of Development | Column 2 Conditions and Limitations |
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| <p><i>Development by statutory undertakers</i> Class 31</p> <p>The carrying out by a statutory undertaker authorised to provide a telecommunications service of development consisting of the provision of—</p> <p>(a) underground telecommunications structures or other underground telecommunications works (including the laying of mains and cables and the installation underground of any apparatus or equipment),</p> <p>(b) overhead telecommunications including the erection of poles or other support structures or the use of existing poles or other support structures,</p> | <p>1. Poles or other support structures carrying overhead lines shall not exceed 12 metres in height.</p> <p>2. Poles or other support structures carrying other equipment shall not exceed 12 metres in height and 0.6 metres in diameter measured at</p> |

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| <p>(bb) The attachment to a pole or other support structure referred to in paragraph (b) above of any bracket, clamp or other fixture required for the carrying or support of any cable (including fibre optic cable), wire, tube, pipe, duct or similar thing, or required for the carrying or support of any device containing any such cable, wire, tube, pipe, duct or similar thing, and the attachment to such fixture of—</p> <p>(i) any cable (including fibre optic cable), wire, tube, pipe, duct or similar thing (including its casing or coating) or any device containing any of the foregoing,</p> <p>(ii) any other equipment or apparatus used for telecommunications purposes, which is exempted development for the purposes of Article 6 and this Class,</p> <p>(bbb) the attachment to any cable (including fibre optic cable), wire, tube, pipe, duct or similar thing of any device containing any such cable, wire, tube, pipe, duct or similar thing,</p> | <p>the widest point, where “other equipment” means 2 transmitting or receiving dishes (the diameter of which shall not exceed 0.6 metres), or 1 panel antenna (the dimensions of which shall not exceed 0.85 metres in length x 0.65 metres in width x 0.2 metres in depth) used for the provision of a specific telecommunications service and the provision of which would otherwise require an additional pole route carrying overhead wires.</p> <p>3. Where a pole or poles or other support structures carry radio transmitting or receiving apparatus, the field strength of the non-ionising radiation emissions from that installation shall not exceed the limits specified by the Commission for Communications Regulation.</p> <p>The dimensions of any such device should not exceed 0.50 cubic metres measured externally.</p> <p>The dimensions of any such device should not exceed 0.25 cubic metres measured externally.</p> |
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7.0 Planning History

7.1 I note the following planning history relating to the site:

P.A. Ref. T.P. 12082/84

Outline permission was granted for the erection of houses at Cloverfield, Model Farm Road.

P.A. Ref. T.P. 13908/87

Permission was granted for the development of a housing estate at Cloverfield, Model Farm Road. Condition 7 of the permission was as follows:

“All E.S.B., P&T and cable TV services shall be laid underground.

Reason: In the interests of the amenities of the area.”

P.A. Ref. T.P. 14615/88

Permission was granted for modifications of house design at site No. 9 Rossbrook, Model Farm Road subject to one condition that all conditions of 13908 apply to that permission, in so far as they effect the application.

8.0 Assessment

8.1 Introduction

8.1.1 It is not known why the planning authority changed the wording of the referrer’s question to it. In doing so, as the referrer has pointed out to the Board, the planning authority’s considerations failed to address a number of the issues which the referrer sought to be resolved. The Board will seek to answer the question asked by the referrer.

8.2 The Question of Development

8.2.1 The provision of an overhead broadband connection within a residential estate would include the installation of cables and associated components on external walls of houses. In doing so it would include stringing a fibre optic cable between

adjoining houses and across the front elevations of houses, as well as providing connection boxes. Such works would include acts of construction and alteration in accordance with the definition of ‘works’ as set out in section 2 of the Planning and Development Act. The carrying out of these works would occur on, in, and over land and would, therefore, constitute ‘development’ in accordance with the meaning of ‘development’ as set out in section 3 of the Planning and Development Act.

8.3 The Question of Exempted Development

8.3.1 *Statutory Undertaker*

The first issue that requires clarification is to determine whether SIRO is a ‘statutory undertaker’ for the purposes of the Planning Act. According to section 2(1) of the Planning and Development Act, “statutory undertaker” means:

a person, for the time being, authorised by or under any enactment or instrument under an enactment to –

- (a) construct or operate a railway, canal, inland navigation, dock, harbour or airport,*
- (b) provide, or carry out works for the provision of, gas, electricity or telecommunications services, or*
- (c) provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking.*

According to SIRO’s website and the letter sent to residents of Rossbrook in November 2019 by Cork City Council, SIRO is a joint venture company owned by ESB and Vodafone. ESB is a statutory corporation set up under the Electricity (Supply) Act 1927. ESB is, therefore, a ‘statutory undertaker’ for the purposes of the Planning and Development Act. Vodafone is a private telecommunications

company. It would be reasonable to ascertain that the joint venture established between the two separate operations authorised, for the time being, Vodafone to provide services with ESB.

8.3.2 Condition 7 of Planning Permission T.P. 134908/87

Condition 7 of Planning Permission T.P. 134908/87, which is the planning permission governing the development of the estate of Rossbrook, is as follows:

“All E.S.B., P&T and cable TV services shall be laid underground.

Reason: In the interests of the amenities of the area.”

Condition 7 constitutes an obligation on electricity, telecommunications (P&T), and cable TV service providers to lay their services underground within the Rossbrook housing scheme in the interest of protecting the estate’s amenities. The developer of the estate was not, and is not, the service provider of electricity, telecommunications or cable television within Rossbrook. In assisting compliance with this condition, the developer provides the ducting to allow for the relevant infrastructure of all service providers providing the ESB, telecommunications (P&T) and cable TV services to be placed underground. Condition 7 is a restriction on how such services are to be provided in this estate.

Condition 7 does not state that all E.S.B., P&T and cable TV services shall be laid underground by the developer. It expressly states all services shall be laid underground. This is the responsibility of the service provider, which the developer of this estate was not and is not. The condition clearly relates to the service providers providing the ESB, telecommunications (P&T), and cable TV services. With ducting provided by the developer to facilitate the provision of such services underground, the service provider is obligated to use such infrastructure to provide its service.

Finally, I note that it is a requirement of Condition 7 that “*All E.S.B. ... services shall be laid underground.*” The E.S.B. is jointly responsible for the telecommunications service proposed to be provided in Rossbrook. It is required, by way of this condition, to provide all of its services underground in Rossbrook.

8.3.3 *Planning and Development Regulations*

I note the following from the Planning and Development Regulations:

PART 2 - Exempted Development

Article 6(1)

Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.

Article 9(1)

Development to which article 6 relates shall not be exempted development for the purposes of the Act –

- (b) *if the carrying out of such development would – ...*
 - (ii) *contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act, ...*

It is apparent that the provision by the ESB, under a joint venture with Vodafone (referred to as SIRO), of an overhead rather than underground broadband connection to No. 9 Rossbrook would contravene Condition 7 of TP 13908/87, having regard to the above considerations. It, thus, would not constitute exempted development for the purposes of the Planning and Development Act and it could not avail of the exempted development provisions under Class 31 of Part 1 of Schedule 2 of the Planning and Development Regulations.

9.0 CONCLUSION AND RECOMMENDATION

WHEREAS a question has arisen as to whether the provision by SIRO of an overhead rather than underground broadband connection to No. 9 Rossbrook would contravene Condition 7 of TP 13908/87 and would not be exempted development under Article 9(1)(a)(i) of the Planning Regulations:

AND WHEREAS the said question was referred to An Bord Pleanála by Brian and Clare McCutcheon on the 24th day of March, 2020:

AND WHEREAS An Bord Pleanála, in considering this referral, had particular regard to:

- (a) sections 2 and 3 of the Planning and Development Act 2000 (as amended),
- (b) articles 5-11 of the Planning and Development Regulations 2001 (as amended), with particular reference to articles 6(1) and 9(1)(a)(i),
- (c) Part 1 of Schedule 2 *Exempted Development – General* of the Regulations, with particular reference to Class 31,

- (d) The planning history of the site, with particular reference to Condition 7 of Planning Permission T.P. 13908/87, and
- (e) the submissions of the parties to the referral,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the provision of an overhead broadband connection to No. 9 Rossbrook constitutes 'development' for the purposes of the Planning and Development Act, and
- (b) the provision of an overhead broadband connection to No. 9 Rossbrook would contravene Condition 7 of Planning Permission T.P. 13908/87, which requires all E.S.B. and P&T (telecommunications) services to be laid underground:

NOW THEREFORE the Board, in exercise of the powers conferred on it by section 5 of the 2000 Act, has decided that the provision by SIRO of an overhead rather than underground broadband connection to No. 9 Rossbrook constitutes development and development that is not exempted development.

Kevin Moore
Senior Planning Inspector
1st July, 2020