



An
Bord
Pleanála

Inspector's Report ABP-310362-21

Question

Whether the development of a telecommunications mast, associated telecommunications infrastructure, and an access route on an elevated site (94m ASL), just west of the village of Camp, Tralee, Co. Kerry with access off the N86 is “development” which is not “exempted development”.

Location

Ballinknockane, Camp, Tralee, Co. Kerry.

Declaration

Planning Authority

Kerry County Council

Planning Authority Reg. Ref.

EX907

Applicant for Declaration

Joseph & Aine O'Dwyer

Planning Authority Decision

Development which is exempted development

Referral

Referred by	Joseph & Aine O'Dwyer
Owner/ Occupier	Sean & Mary Ellen Barry
Observer(s)	None
Date of Site Inspection	12 th August 2021
Inspector	Hugh D. Morrison

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1.0 Site Location and Description

- 1.1. The site is located 15.6 km to the west of Tralee on the northern side of the Dingle Peninsula. This site lies to the west of the village of Camp and to the south of the N86, on land that rises in a southerly direction. It is accessed off the N86 via a ramp and a pair of agricultural gates.
- 1.2. The site lies within an agricultural field. A road finished in hardcore runs from the gateway to the field along its northern and western boundaries to a point towards its south-western corner where the proposed mast and accompanying compound would be constructed.

2.0 The Question

- 2.1. The question asked by the referrer is as follows:

Whether the development of a telecommunications mast, associated telecommunications infrastructure, and an access route on an elevated site (94m ASL), just west of the village of Camp, Tralee, Co. Kerry with access off the N86 is “development” which is not “exempted development”.

- 2.2. I consider that the question should be reworded slightly to avoid any confusion over the repeated use of the word development:

Whether the erection of a telecommunications mast, associated telecommunications infrastructure, and the provision of an access route on an elevated site (94m ASL), just west of the village of Camp, Tralee, Co. Kerry with access off the N86 is “development” which is not “exempted development”.

3.0 Planning Authority Declaration

3.1. Declaration

Following receipt of further information, the Planning Authority declared that the development in question is “development”, which is “exempted development”.

3.2. Planning Authority Reports

3.2.1. Planning Reports

Further information was sought on the following points:

- Details of the ownership of the site,
- Details of the on-site road, and
- Details of all the elements comprised in the proposed telecommunications infrastructure.

3.2.2. Other Technical Reports

None

4.0 Planning History

None

5.0 Policy Context

5.1. Development Plan

Under the Kerry County Development Plan 2015 – 2021 (CDP), the site is shown as lying within an area zoned “Rural General”. Adjacent lands to the south and west are zoned “Rural Prime Special Amenity”.

5.2. Natural Heritage Designations

- Tralee Bay and Magharees Peninsula, West to Cloghane SAC (002070)
- Slieve Mish Mountains SAC (002185)
- Tralee Bay Complex SPA (004188)

6.0 The Referral

6.1. Referrer's Case

The referrers challenge the Planning Authority's declaration that the development in question is "exempted development". In doing so, they draw attention to the works that have commenced on site to construct a road to where the mast would be erected. They make the following points:

- Under Section 3 of the Act, the works entailed in erecting the telecommunications mast and constructing its compound and on-site access road would come within the definition of "development".
- Under Article 6(1) of the Regulations the above cited development may be "exempted development" if it comes within any of the Classes set out in Part 1 of Schedule 2 to this Article and if it is not de-exempted by Article 9.
 - From the information available to the referrer from the developer, the proposed telecommunications mast, including the equipment that would be mounted upon it, and its compound would be "exempted development" under Class 31.
 - However, attention is drawn to Article 9(1)(vi), which de-exempts development that "interferes with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan in the area in which the development is proposed." In this respect, the field within which the site is situated would, along its southern and western boundaries, abut/overlap with an area zoned "Rural Prime Special Amenity" in the CDP. This zoning encapsulates landscapes "which are very sensitive and have little or no capacity to accommodate development" and within them "all development will be prohibited, other than normally exempted development".
 - Attention is also drawn to the County's Landscape Character Assessment, which informs its Renewable Energy Strategy. Under this Assessment, the site is shown as lying within the Tralee Bay and North Slieve Mish

Mountains, which is described as being “Very scenic landscape with no capacity for wind development. The N86 is an important tourist route in the county. The mountains to the south and the coast to the north are both in close proximity to the road”. The said landscape includes the site and the adjoining lands to the south and to the west, which are zoned “Rural Prime Special Amenity” and so it regards them as homogenous in character.

- Objective ICT-4 of the CDP states that telecommunications masts should be located in non-scenic areas and Objective ZL-1 seeks to “Protect the landscape of the County as a major economic asset and an invaluable amenity which contributes to the quality of people’s lives.”
- In the light of the site’s location in a very scenic landscape, Objectives ICT-4 and ZL-1 and the site’s situation either in or beside an area zoned “Rural Prime Special Amenity”, the development in question, which would otherwise be “exempted development” is effectively de-exempted under Article (1)(vi).
- The construction of a road is not “exempted development” under the Regulations. In this respect, the referrer discusses Class 13 of Part 1 of Schedule 2 to Article 6. This Class distinguishes between the repair or improvement of any private street, road or way and the construction of any private footpath or paving. The on-site access road is c. 110m long and it varies in width between 3 and 5m. Contrary to the view of the Planning Authority, its provision does not involve “the repair or improvement” of an existing road and so, as a new construction, it is not “exempted development” under Class 13. Furthermore, this road, while capable of being used by pedestrians, is clearly intended for use by vehicles.
- The Planning Authority’s declaration is conditional on the width of the access road being no more than 3m. Such conditionality disregards the “facts on the ground” as reported by the referrer under further information, i.e. the width of the road is between 3 and 5m. As such it is *ultra vires*.

6.2. Planning Authority Response

None

6.3. Owner/ occupier's response

None

6.4. Further Responses

None

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 3(1): Development

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.

Section 2(1): Interpretation

"public road" has the same meaning as in the Roads Act, 1993, i.e. under Section 2(1) of the Roads Act, 1993, "public road" means a road over which a public right of way exists and the responsibility for the maintenance of which lies on a road authority.

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...

Section 4(1): Exempted development

The following shall be exempted developments for the purposes of this Act –

(e) development consisting of the carrying out by a local authority of any works required for the construction of a new road or the maintenance or improvement of a road;

(ia) development (other than development consisting of the provision of access to a national road within the meaning of the Roads Act 1993) that consists of –

(i) the construction, maintenance or improvement of a road (other than a public road) that serves a forest or woodland, or

(ii) works ancillary to such construction, maintenance or improvement;

Section 5: Declaration and referral on development and exempted development

(1) *If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter...*

(3) (a) *Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.*

7.2. Planning and Development Regulations, 2001

Article 6(1): Exempted Development

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.

<i>Column 1 Description of Development</i>	<i>Column 2 Conditions and Limitations</i>
<i>Sundry Works Class 9 The construction, erection, renewal or replacement, other than within or</i>	<i>The height of any such structure shall not exceed 2 metres.</i>

<p><i>bounding the curtilage of a house, of any gate or gateway.</i></p>	
<p><i>Class 11</i></p> <p><i>The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –</i></p> <p><i>(a) any fence (not being a hoarding or sheet metal fence), or</i></p> <p><i>(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.</i></p>	<p><i>1. The height of any new structure shall not exceed 1.2 metres or the height of the structure being replaced, whichever is the greater, and in any event shall not exceed 2 metres.</i></p> <p><i>2. Every wall, other than a dry or natural stone wall, constructed or erected bounding a road shall be capped and the face of any wall of concrete or concrete blocks (other than blocks of a decorative finish) which will be visible from any road, path or public area, including a public open space, shall be rendered or plastered.</i></p>
<p><i>Class 13</i></p> <p><i>The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving.</i></p>	<p><i>The width of any such private footpath or paving shall not exceed 3 metres.</i></p>
<p><i>Temporary structures and uses</i></p> <p><i>Class 16</i></p> <p><i>The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development</i></p>	<p><i>Such structures, works, plant or machinery shall be removed at the expiration of the period and the land</i></p>

<p><i>consisting of works (other than mining) is being or is about to be, carried out pursuant to a permission under the Act or as exempted development, of structures, works, plant or machinery needed temporarily in connection with that development during the period in which it is being carried out.</i></p>	<p><i>shall be reinstated save to such extent as may be authorised or required by a permission under the Act.</i></p>
<p><i>Development for industrial purposes</i></p> <p><i>Class 31</i></p> <p><i>The carrying out by a statutory undertaker authorised to provide a telecommunications service of development consisting of the provision of—</i></p> <p><i>(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),</i></p> <p><i>(b) overhead telecommunications including the erection of poles or other support structures or the use of existing poles or other support structures,</i></p>	<p><i>1. Poles or other support structures carrying overhead lines shall not exceed 12 metres in height.</i></p> <p><i>2. Poles or other support structures carrying other equipment shall not exceed 12 metres in height and 0.6 metres in diameter measured at the widest point, where “other equipment” means 2 transmitting or receiving dishes (the diameter of which shall not</i></p>

<p><i>(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—</i></p> <p><i>(i) any cable (including fibre optic cable), wire, tube, pipe, duct or similar thing (including its casing or coating) or</i></p>	<p><i>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.</i></p> <p><i>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.</i></p> <p><i>The dimensions of any such device should not exceed 0.50 cubic metres measured externally.</i></p>
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any device containing any of the foregoing,

(ii) any other equipment or apparatus used for telecommunications purposes, which is exempted development for the purposes of Article 6 and this Class,

(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,

(c) telephone kiosks or other telephone facilities in a public place not being on, over or along a public road,

(d) equipment for transmitting or receiving signals from satellites in space,

(e) permanent telecommunications exchange and radio station containers, including containers for electronic equipment required for transmitting,

The dimensions of any such device should not exceed 0.25 cubic metres measured externally.

No such kiosk or facility shall be situated within 10 metres of the curtilage of any house, save with the consent in writing of the owner or occupier thereof.

1. No such equipment shall exceed 10 metres in height

2. The diameter of any antenna shall not exceed 2 metres.

3. No such equipment shall be situated within 10 metres of the curtilage of any house save with the consent in writing of the owner or occupier thereof, or within 10 metres of the window of a workroom of any other structure.

1. The equipment housed in the container shall be used exclusively for the purposes of concentrating and re-

receiving and processing telecoms data for both wireless or wired networks,

routing calls or for transmitting, receiving and processing telecoms data for both wireless or wired networks and the container shall not have attached to it or within it, whether visible or not, any antennae for the direct transmission or reception of mobile telephony or other telecommunications signals in such a way that the container would act as an antennae support structure.

2. No such container shall exceed 10 metres in length, 3 metres in width or 3 metres in height.

3. No such container shall be situated within 10 metres of the curtilage of a house save with the consent in writing of the owner or occupier thereof, or within 10 metres of the window of a workroom of any other structure.

4. The field strength of the non-ionising radiation emissions from the radio station container shall not exceed the limits specified by the Director of Telecommunications Regulation.

(f) cabinets forming part of a telecommunications system,

The volume above the ground-level of any such cabinet shall not exceed 2 cubic metres measured externally.

(g) transportable radio installation,

1. The height of the structure for such an installation shall not exceed 15

	<p><i>metres in height and 2 metres in width at its widest point.</i></p> <p><i>2. The installation may only be used—</i></p> <p><i>(a) to provide anticipated additional coverage at a sporting, social or other event, provided that the structure is not in place for more than 2 weeks before the event or for a period exceeding 8 weeks which shall include assembly and dismantling,</i></p> <p><i>(b) for demonstration or simulation purposes, whether to demonstrate the visual effects of such structure in a particular location or to measure the output, and such structure shall be in place for a period of not more than 12 weeks, or</i></p> <p><i>(c) as a temporary replacement for a structure, which has been accidentally or otherwise incapacitated, and such structure shall be in place for a period of not more than 16 weeks.</i></p> <p><i>3. The planning authority in whose functional area the installation is placed shall be notified by the statutory undertaker in writing of the provision and purpose of such installation before it is made operational.</i></p>
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(h) the attachment of additional antennae to an existing antenna support structure,

1. (a) For structures under 15 metres antennae to an existing in height, the total number of antenna support structure, such antennae shall not exceed 12, of which not more than 8 antennae shall be dish type (whether shielded or not).

(b) For structures 15 metres or over in height, the total number of antennae shall not exceed 18, of which not more than 12 antennae shall be dish type (whether shielded or not).

2. (a) The dimensions of any such antenna provided shall not exceed the greatest length, width or depth of any antenna for mobile telephony of corresponding type already attached to the structure.

(b) In any other case, the dimensions of any such antenna provided shall not exceed—

(i) in the case of any panel type antenna, 3 metres in length x 0.6 metres in width x 0.2 metres in depth,

(ii) in the case of any co-linear type antenna, 5 metres in length x 0.1 metres in diameter, and

(iii) in the case of any dish type antenna (whether shielded or not), 1.8 metres in diameter.

(i) antennae for high capacity transmission links by way of attachment to existing high capacity antennae support structures,

3. The attachment of such antennae shall not result in the field strength of the non-ionising radiation emissions from the site exceeding limits specified by the Commission for Communications Regulation.

4. The attachment of such antennae may be carried out by way of a platform only where the antenna support structure already incorporates a platform.

5. The height of the existing structure (including any antenna thereon) shall not be exceeded.

1. The addition shall be of the dish type antennae used for the sole purpose of point to point communication.

2. The additional antennae shall not exceed the number provided for in the existing design capacity of the support structure.

3. No new member shall be added to the structure save by way of brackets or other fixing systems used for the attachment of the additional antennae.

4. The maximum diameter of any added antenna shall not exceed the width of the support structure at the point at which the additional antenna is attached.

<p><i>(j) an antenna support structure in place of an existing antenna support structure,</i></p>	<p><i>5. The planning authority in whose functional area the support structure exists shall be notified by the statutory undertaker in writing of the attachment of any such additional antennae at least 4 weeks before the antenna or antennae are attached.</i></p> <p><i>6. The attachment of such antenna shall not result in the field strength of the non-ionising radiation emissions from the radio installations on the site exceeding the limits specified by the Director of Telecommunications Regulation.</i></p> <p><i>1. The replaced structure shall be removed no later than 4 weeks following its decommissioning.</i></p> <p><i>2. Where, for reasons of the integrity of the network or other operational reasons, the structure to be replaced remains in use during the construction of the replacement structure, the replacement structure shall be located as near as possible to the existing structure having regard to construction activity and safety requirements and, in any case, no replacement structure shall be located more than 20 metres from the replaced structure (measured from the base).</i></p>
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3. (a) *The height of the replacement structure shall not exceed the height of the replaced structure.*

(b) (i) *Subject to sub-paragraph (ii), the width of the replacement structure shall not exceed the width of the replaced structure.*

(ii) *Where the replaced structure was 2 metres or less in width, the width of the replacement structure may not be more than twice the width of the replaced structure, all measurements to be taken at the widest point.*

(c) *Where the replaced structure did not incorporate an antenna platform, the replacement shall not incorporate such a platform.*

4. (a) *Subject to sub-paragraphs (b) and (c), the antennae to be attached to the replacement structure shall not exceed the number of antennae on the replaced structure.*

(b) *For structure under 15 metres in height, an additional 12 antennae for mobile telephony may be attached to the replacement structure, of which not more than 8 of the additional 12 antennae shall be of the dish type (whether shielded or not).*

(c) *For structures of 15 metres or over in height, an additional 18 antennae for*

mobile telephony may be attached to the replacement structure, of which not more than 12 of the additional 18 antennae shall be of the dish type (whether shielded or not).

5. (a) The dimensions of any additional antenna for mobile telephony shall not exceed the greatest length, width or depth of any antenna for mobile telephony of corresponding type on the replaced structure.

(b) In any other case, the dimensions of any antenna provided shall not exceed:

(i) in the case of any panel type antenna, 3 metres in length x 0.6 metres in width x 0.2 metres in depth,

(ii) in the case of any co-linear type antenna, 5 metres in length x 0.1 metres in diameter, and

(iii) in the case of any dish type antenna (whether shielded or not), 1.8 metres in diameter.

6. The replacement of an antenna support structure together with any replaced or additional antenna shall not result in the field strength of the non-ionising radiation emissions from the radio installations on the site exceeding the limits specified by the Commission for Communications Regulation.

<p><i>(k) antennae, including small cell antennae, attached to the following existing structures—</i></p> <p><i>(i) public or commercial buildings (other than education facilities, childcare facilities or hospitals) by way of attachment to roofs, facades, chimneys, chimney pots or vent pipes;</i></p> <p><i>(ii) electricity pylons;</i></p> <p><i>(iii) agricultural storage buildings;</i></p> <p><i>(iv) water towers.</i></p>	<p><i>1. The antenna shall be attached directly to the structure (other than a structure with a flat roof) and not by way of a supporting fixture.</i></p> <p><i>2. In the case of a structure with a flat roof, a supporting fixture may be used provided that—</i></p> <p><i>(a) the fixture does not exceed the height of any existing parapet or railing on the roof by more than 3 metres, and</i></p> <p><i>(b) access to the roof is not available to any person other than a person authorised by the statutory undertaker.</i></p> <p><i>3. Where an antenna is attached to the façade of a building or the exterior of a chimney or vent, the colour of the antenna shall match and blend with the colour of such façade, chimney or vent pipe.</i></p> <p><i>4. Where the antenna is hidden inside a chimney pot the existing chimney pot may be replaced by a chimney pot in a suitable material which shall be the same colour, size and shape as the replaced pot, and the antenna shall not protrude beyond the top of the chimney pot.</i></p> <p><i>5. The planning authority in whose functional area the structure on which the antennae will be attached is situated shall be notified by the statutory</i></p>
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<p><i>(l) small cell antennae attached to the following existing structures–</i></p> <p><i>(i) electricity poles, telegraph poles, lamp posts, lighting structures, flag poles, CCTV poles;</i></p> <p><i>(ii) phone kiosks and bus shelters.</i></p>	<p><i>undertaker in writing of the proposed location of any such structure at least 4 weeks before such attachment.</i></p> <p><i>6. The field strength of any such antenna shall not result in the field strength of the non-ionising radiation emission from the radio installations on the site exceeding the limits specified by the Commission for Communications Regulation.</i></p> <p><i>1. The small cell antennae shall be attached directly to the structure and not by way of a supporting fixture.</i></p> <p><i>2. In the case of structures with a flat roof, the small cell antennae shall be attached directly to the roof.</i></p> <p><i>3. No more than 2 small cell antennae may be attached to one structure.</i></p> <p><i>4. The colour of any small cell antennae shall match and blend with the colour of any structure to which it is attached.</i></p> <p><i>5. The planning authority in whose functional area the structure on which the small cell antennae will be attached is situated shall be notified by the statutory undertaker in writing of the proposed location of any such structure at least 4 weeks before such attachment.</i></p>
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	<p><i>6. The field strength of any such small cell antenna shall not result in the field strength of the non-ionising radiation emission from the radio installations on the site exceeding the limits specified by the Commission for Communications Regulation.</i></p>
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Article 9(1): Restrictions on exemption

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 –

(ii) consist of or comprise the formation, laying out or material widening of a means of access to a public road the surfaced carriageway of which exceeds 4 metres in width.

(vi) interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area in which the development is proposed or, pending the variation of a development plan or the making of a new development plan, in the draft variation of the development plan or the draft development plan.

(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,

(c) if it is development to which Part 10 applies, unless the development is required by or under any statutory provision (other than the Act or these Regulations) to comply with procedures for the purpose of giving effect to the Council Directive,

7.3. Other

None

8.0 Assessment

8.1. Is or is not development

- 8.1.1. The project in question would entail the erection of a 12m high pole with a diameter of 506mm on which one 0.6m diameter dish would be mounted and, in the future, two 2.5m long antennae would be mounted. The pole would be erected within a gated compound, which would be enclosed by means of 1.2m high stockproof fencing. Three cabinets would be installed in the compound along with ancillary equipment. Power maybe supplied by underground cables (option 1) or overhead cables (option 2).
- 8.1.2. The project in question would also entail an access road. The Planning Authority consulted the prospective developer on the original declaration request who, in a letter dated 19th April 2021, described the access to the site as being “an existing access track from the public road”. The referrers consider this access to be a new road and the Planning Authority appears to do so, too (cf. discussion in the case planner’s final report). I consider it to be a new road, too, for reasons that I discuss under the second heading of my assessment.
- 8.1.3. The project in question would “entail” works, as defined under Section 2 of the Planning and Development Act 2000 – 2021 (hereafter referred to as the Act), insofar as acts or operations of construction and excavation would occur on, in, over, and under the site. Consequently, the project in question would come within the definition of “development” in Section 3(1) of the Act.
- 8.1.4. I conclude that the project in question is “development”.

8.2. Is or is not exempted development

- 8.2.1. The project in question can initially be disaggregated for the purposes of assessing whether or not it would be exempted development.
- 8.2.2. The prospective developer, the Planning Authority, and the referrers all agree that the erection of the proposed pole, antenna and dish and the construction of the proposed compound and installation within it of cabinets and telecommunication equipment is exempted development under Classes 9, 11, and 31 of Part 1 of

Schedule 2 to Article 6 of the Planning and Development Regulations, 2001 – 2021 (hereafter referred to as the Regulations). I will review these aspects of the project.

- The erection of the proposed 12m high pole with a diameter of 506mm on which one 0.6m diameter dish would be mounted is, in the light of relevant conditions and limitations, exempted development under Class 31(b).
- The mounting of two 2.5m long antennae on the said pole in the future is, in the light of relevant conditions and limitations, exempted development under Class 31(h).
- The erection of a gate, which I assume is the same height as the stockproof fencing, is, in the light of the relevant condition and limitation, exempted development under Class 9
- The erection of 1.2m high stockproof fencing is, in the light of the relevant conditions and limitations, exempted development under Class 11.
- The installation of the three cabinets shown on the submitted plans (drawing nos. CIG_01885-005 & 006 GAD (revision B)) is, in the light of the relevant condition and limitation, exempted development under Class 31(f).
- The laying of underground cables (option 1) is exempted development under Class 31(a).
- The erection of overhead cables (option 2) is, in the light of the relevant condition and limitation, exempted development under Class 31(b).

8.2.3. Turning to the means of access to the site, during my site visit, I observed that in conjunction with the upgrade in the N86, which passes to the north of the site, a new access and ramp to an agricultural gateway to the field, which hosts the site, were constructed. I also observed that hardcore has been laid along the northern and western boundaries of the site to form a route to the site of the proposed compound. I measured the width of the hardcore surface to vary between 3.4m and 5m.

8.2.4. The prospective developer describes, in a letter dated 19th April 2021, the means of access to the site as “an existing access track from the public road”. The referers consider this access to be a new road and the Planning Authority appears to do so, too (cf. discussion in the case planner’s final report). The prospective developer cites Class 16 of Part 1 of Schedule 2 to Article 6 of the Regulations, thereby indicating

that the hardcore has been laid for a temporary period to coincide with the construction period only. The referrers have expressed the view that, during the operational life of the proposed compound, access would continue to be required for the purposes of maintenance of equipment and its periodic replacement and/or augmentation. Class 16 would not apply to such on-going usage.

- 8.2.5. The Planning Authority assessed the means of access to the site under Class 13 of Part 1 of Schedule 2 to Article 6 of the Regulations. This Class states the following:

The repair or improvement of any private street, road or way, being works carried out on land within the boundary of the street, road or way, and the construction of any private footpath or paving.

It is subject to the following condition and limitation:

The width of any such private footpath or paving shall not exceed 3 metres.

The Planning Authority concluded that the means of access would be exempted development under Class 13, "provided the width of the access road would not exceed 3m".

- 8.2.6. The referrers critique the Planning Authority's assessment on the basis that Class 13 makes a distinction between the repair or improvement of by implication a vehicular means of access on the one hand, and the construction of a pedestrian means of access on the other hand. The referrers state that a new vehicular means of access has been constructed and so Class 13 is not applicable. Furthermore, even if this Class was applicable, the width of the means of access exceeds the stated condition and limitation. In this respect, the Planning Authority is not legally in a position to make a declaration conditional on compliance with the 3m width, when the means of access "on the ground" exceeds this dimension. They also state that neither the Act nor the Regulations provide an exemption for the construction of private roads. They conclude that the means of access therefore is not exempted development.

- 8.2.7. During my site visit, I did not see any evidence of a road that pre-exists the recent laying of hardcore, e.g. I did not see any evidence of a road beyond the site of the proposed compound stretching into the south-western corner of the host field. Aerial photographs that I have had sight of do not indicate the existence of a road prior to the laying of the hardcore. In the absence of evidence to the contrary, I therefore consider that this road is a new one and so the possibility of repair or improvement

does not arise. I concur with the referrer that this road would be needed post the construction period and that as a private road it does not benefit from an exempted development Section or Class under the Act or Regulations, respectively.

8.2.8. Notwithstanding the foregoing paragraph, if the laying of hardcore does represent repair or improvement of an existing road, then, insofar as it is wider than 3m, Class 13 is not applicable. In this respect, I concur with the referrers critique of the Planning Authority's conditional declaration.

8.2.9. I conclude that whereas the proposed pole, telecommunications equipment, and compound is exempted development, the means of access to the site is not exempted development. I have considered whether a distinction can be made between the former and the latter aspects of the project. However, I consider that to do so would risk project splitting, as the means of access is ancillary to the remainder of the project. I, therefore, conclude that the project in question is not exempted development.

8.3. Restrictions on exempted development

8.3.1. The prospective developer, the Planning Authority, and the referrer differ on the question of de-exemption under Article 9(1)(a)(vi) of the Regulations, insofar as it may be applicable to the project in question.

8.3.2. The referrer draws attention to Article 9(1)(vi), which de-exempts development that "interferes with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan in the area in which the development is proposed." In this respect, the field within which the site is situated would, along its southern and western boundaries, abut/overlap with an area zoned "Rural Prime Special Amenity" in the Kerry County Development Plan 2015 – 2021 (CDP). This zoning encapsulates landscapes "which are very sensitive and have little or no capacity to accommodate development" and within them "all development will be prohibited, other than normally exempted development".

8.3.3. I have examined Map 12.1(e) of the CDP. I consider that the "Rural Prime Special Amenity" zoning shown therein extends as far as the southern and western boundaries of the site's host field, i.e. it abuts these boundaries rather than overlaps

with them. The site is thus outside this zoning and subject only to the “Rural General” zoning.

- 8.3.4. The referrer contends that the landscape of the site and the lands to its south and west are homogeneous. Support for this contention arises from their joint inclusion within the same landscape character type, Tralee Bay and North Slieve Mish Mountain, in the County’s Landscape Character Assessment. This landscape character type is described as being “very scenic” and, so the referrer considers that, on this basis, the project in question for the site should be subject to Article 9(1)(vi).
- 8.3.5. I understand the referrer’s position. However, for the purposes of Article 9(1)(vi), a site needs to be literally the subject of the “Rural Prime Special Amenity” zoning in the CDP. As stated above, I do not consider that this pre-condition is met and so I conclude that the de-exemption afforded by Article 9(1)(vi) does not apply.
- 8.3.6. I have considered the other de-exemption provisions of Article 9(1). In particular, I have considered Items (a)(viiB) and (c), which refer to Appropriate Assessment (AA) and Environmental Impact Assessment (EIA), respectively.
- 8.3.7. With respect to AA, the project is a small-scale telecommunications one with an accompanying road, which would be provided on a site that is neither in nor beside a European site. Such sites exist within the surrounding area, e.g. Tralee Bay and Magharees Peninsula, West to Cloghane SAC (002070), Slieve Mish Mountains SAC (002185), and Tralee Bay Complex SPA (004188). However, I am not aware of any source/pathway/receptor routes between the site and these or any other European sites. Accordingly, no AA issues would arise.
- 8.3.8. Having regard to the nature, scale, and location of the proposal, the nature of the receiving environment, and the proximity to the nearest European site, it is concluded that no Appropriate Assessment issues arise as the proposal would not be likely to have a significant effect individually or in combination with other plans or projects on a European site.
- 8.3.9. With respect to EIA, the project is a small-scale telecommunications one, which is not a class of development that the Regulations recognise as being subject to EIA. I conclude that, insofar as the question of de-exemption may arise, the project in question would not be affected by any of the provisions of Article 9(1).

9.0 Recommendation

I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether the erection of a telecommunications mast, associated telecommunications infrastructure, and the provision of an access route on an elevated site (94m ASL), just west of the village of Camp, Tralee, Co. Kerry with access off the N86 is or is not development or is or is not exempted development:

AND WHEREAS Joseph & Aine O'Dwyer requested a declaration on this question from Kerry County Council and the Council issued a declaration on the 14th day of May 2021 stating that the matter was development and was exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 27th day of May 2021:

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to –

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1) of the Planning and Development Act, 2000, as amended,
- (d) Article 6(1) and Article 9(1) of the Planning and Development Regulations, 2001, as amended, and
- (e) Part 1 of Schedule 2 to the Planning and Development Regulations, 2001, as amended:

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The telecommunications elements of the project are exempted development under Class 31 of Part 1 of Schedule 2 to Article 6 of the Planning and Development Regulations, 2001, as amended,
- (b) The site is not zoned “Rural Prime Special Amenity”, and so the telecommunications elements of the project are not de-exempted under Article 9(1)(a)(vi) of the Planning and Development Regulations, 2001, as amended, and
- (c) The means of access across the host field to the site is a new road, which is ancillary to the rest of the project, and so this road, and hence the project in question which it is integral to, is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5 (3) (a) of the 2000 Act, hereby decides that the erection of a telecommunications mast, associated telecommunications infrastructure, and the provision of an access route on an elevated site (94m ASL), just west of the village of Camp, Tralee, Co. Kerry with access off the N86 is development and is not exempted development.

Hugh D. Morrison
Planning Inspector

14th December 2021