



An
Bord
Pleanála

Inspector's Report

ABP.310523-21.

Development

Retain an existing telecommunications support structure (previously granted under Reg. Ref. 10/472 and ABP Ref. PL08.237225) together with associated ground equipment, security fencing and access track at Gortbreagoge, Annascaul, Co. Kerry

Planning Authority

Kerry County Council

Planning Authority Reg. Ref.

21/326

Applicant(s)

On Tower Ireland Ltd.

Type of Application

Permission

Planning Authority Decision

Grant s.t. conditions

Appellant(s)

On Tower Ireland Ltd.

Observer(s)

None.

Inspector

Mary Kennelly

1.0 Site Location and Description

- 1.1 The appeal site is located at Gortbreagoge, Annascaul, Co Kerry, which is a rural area approx. 5km to the northeast of the village of Annascaul. It is situated in the rural townland of Gortbreagoge, which is located approx. 500m to the north of the N86, Dingle Road, near the turn-off for Inch Beach. The site with a stated area of 0.0093ha is in an elevated position near the summit of a Flemingstown Mountain and consists of an existing telecommunications site where it accommodates a 15m high telecommunications support structure with attached equipment and an associated compound. The site is located at the northern edge of a wooded area. The surrounding area is rural in nature and comprises a rural undulating landscape. The prevailing land use is agriculture and forestry with scattered rural housing. However, there is an existing telecommunications tower on the adjoining site to the east.
- 1.2 The site is accessed by means of a right-of-way, which is over an existing agricultural track and a forestry road. The existing tower carries antennae and transmission dishes and is set within a secure compound. Cabinets and related ancillary equipment are located within the compound. It was erected by Esat Digiphone Ltd. following a grant of permission by the P.A. on a temporary basis (01/2693) and was subsequently granted retention permission (again on a temporary basis) by the Board in 2010 to Telefonica O2 Ireland Ltd. (PL08.237225)
- 1.3 The existing tower is in a prominent position but is well set back from the public roads, and is well screened by the existing forestry from the N86 to the south.

2.0 Proposed Development

- 2.1. This is an application for the retention of a 15-metre-high monopole tower telecommunications support structure carrying antennas and link dishes together with associated equipment units and security fencing. The proposed

telecommunications support structure, antennae and equipment are situated within a secure compound and are accessed by means of an existing access track, which comprises a right-of-way over an existing agricultural access and extends westwards along the northern edge of the forest. The proposed compound measures 9.79m x 9.60m and is set well back from the public road. The palisade fencing is 2.4m in height.

- 2.2. The application was accompanied by a cover letter and a letter from Ontower Ireland Ltd. (parent company Cellnex) setting out the background to the case and justification for the need for the development. It is stated that the application represents an investment commitment by Ontower Ltd. to continue to maintain and operate the site which currently provides space to the operators Eir and Three Ireland (Hutchinson) Ltd. which form part of its telecommunications networks in the area. Currently, Eir and Three provide good 3G and 4G services in the area. In addition, Ontower will offer other operators space to co-locate services on the site, thereby providing a choice of good quality wireless mobile and broadband telecommunications infrastructure to the local community.

- 2.3. Ontower considers the site as essential to its telecommunications operations in Ireland and states that it is vital to secure a permanent planning permission to guarantee future investment in telecommunications infrastructure by means of a long-term investment strategy. There is also scope for further improvements and expansion of availability of services by other operators. The 5-year planning permission to retain the tower has expired and it is necessary to regularise the planning status of the structure.

3.0 Planning Authority Decision

- 3.1. Kerry County Council decided to grant planning permission subject to 4 conditions. Condition No 2, the subject of this appeal, relates to a financial contribution and reads as follows:

Within 3 months of the receipt of this decision, the developer shall pay a contribution of EUR 15,000.00 to Kerry County Council (Planning Authority) in respect of community infrastructure, environmental amenities and facilities benefitting the development.

The contribution is broken down as follows:

Roads & Transport: €7,500.00

Community & Amenity: €7,500.00

The amount of this contribution is calculated in accordance with the Council's prevailing Development Contribution Scheme and may be increased from January 1st, 2022, and annually thereafter (unless previously discharged), in line with the Wholesale Price Index for Capital Goods, Building and Construction as published by the Central Statistics Office unless the Scheme is superseded by a further Development Contribution Scheme adopted by the Council.

Reason: It is considered appropriate that the Developer should contribute towards the cost of public infrastructure and facilities benefitting the development, as provided for in the Council's prevailing Development Contribution Scheme, made in accordance with Section 48 of the 2000 Planning and Development Act (as amended) and that the level of contribution payable should increase at a rate in the manner specified in that Scheme.

3.2. **Planning Authority Reports**

The Local Authority Planner recommended that planning permission be granted subject to 4 conditions, including Condition 2 requiring the payment of a Development Contribution in accordance with the GDCS. However, it was noted that in relation to a previous permission granted by the Board (PL08.237225), which had required the payment of a development levy under Condition 2 of that permission, the levy was not paid. On this basis, the Area Planner recommended that a condition requiring the payment of a levy in accordance with the current GDCS be attached to the permission for retention of the tower. As the Scheme requires levies for retention permission to be charged at 150% of the standard rate, the amount to be paid was calculated as €7,500 for Roads and Transport and €7,500 for Community and Amenity.

3.3. **Other Technical Reports**

None recorded on the file.

3.4. **Third Party Observations**

None recorded on the file.

4.0 **Planning History**

Reference is made in the appeal to the following decisions by the P.A. and the Board in respect of financial contribution conditions for the erection and subsequent retention of the telecommunications structures:

Reg. Ref. 01/2693 – Planning permission granted by Kerry County Council to Esat Digiphone Ltd. for development comprising the erection of a 15-metre monopole mast together with associated telecommunications equipment enclosed by palisade fencing and the extension of an access track.

PL08.237225 (Reg Ref 10/472) – This was an appeal by Telefonica O2 Ireland Ltd. against the decision by Kerry County Council in respect of the decision to refuse permission for the retention of the tower and associated equipment and access track at the site. In its decision to grant permission for a period of 5 years, (October 2010), the Board attached a Section 48 condition.

5.0 Policy Context

5.1. Development Plan

The operative plan for the area is the **Kerry County Development Plan 2015 – 2021**. The site is zoned Rural General. Policies and objectives relating to Information and Communication Technology, including telecommunications and broadband are set out in Chapter 7 (Section 7.5). Further guidance is set out in Section 13.14. Policy Objectives ICT-1, ICT-2, ICT-3, ICT-4 and ICT-5 are relevant. In general, these objectives support the sustainable delivery of ICT infrastructure, broadband networks and digital broadcasting as well as a modern efficient telecommunications network in the County.

Kerry County Council **Development Contributions Scheme 2017** was adopted on the 25th of July 2017. There is a requirement to pay €10,000 in respect of telecommunications infrastructure, which is to be split 50/50 between Roads & Transport and Community and Amenity. In respect of telecommunications infrastructure, it is further stated -

“Masts and antennae, dish and other apparatus/equipment for communication purposes which form part of the National Broadband Scheme (as defined by DCENR) shall receive 100% reduction in development contributions”.

Reductions are set out in Section 5 and Exemptions in Section 7. There are no specific reductions in respect of telecommunications infrastructure. There are several provisions for exemptions and/or reductions in respect of permission relating to

development which has already been granted, including specific provisions for temporary permissions, modification of permitted development and retention of development. These will be discussed further in the Assessment section of this report. However, it is worth noting that no reductions or exemptions shall apply to Retention permissions which are to be charged at 150% of the standard rate.

5.2. **Telecommunications Antennae and Support Structures – Guidelines for Planning Authorities (1996) –**

These guidelines generally advocate improvements in the country's telecommunications infrastructure, subject to a range of considerations and limitations. Conditions restricting planning permissions to temporary periods (normally 5 years) were recommended.

5.3. **Development Contributions Guidelines for Planning Authorities (2013) -**

These guidelines require planning authorities in reviewing their development contributions schemes to include waivers for broadband infrastructure (masts and antennae). The Guidelines further state that the practice of “double charging” is inconsistent with both the primary objective of levying development contributions and with the spirit of capturing “planning gain” in an equitable manner. Authorities are reminded that any development contribution already levied and paid in respect of a given development should be deducted from the subsequent charge so as to reflect that this development had already made a contribution.

5.4. **Circulars amending Development Contribution Guidelines 2013**

Prior to the publication of the Development Contribution Guidelines, **Circular PL07/12** was issued by the Minister for the Environment, Community and Local Government to update certain sections of the Telecommunications Antennae and Support Structures Guidelines (1996). It states, inter alia, that all future Development Contribution Schemes must include waivers for broadband infrastructure provision

and these waivers are intended to be applied consistently across all local authority areas. The restriction of permissions to temporary periods was required to cease. Subsequent to the publication of the Development Contribution Guidelines (2013), a further series of Planning Circular Letters were issued under Section 28 of the Planning and Development Act 2000 (as amended) as follows -

Circular PL.3/2013 – Addendum to Development Contribution Guidelines for Local Authorities (26th March 2013). This related to enforcement action in respect of multi-unit developments.

Circular PL18/2013 – Further Addendum to Development Contribution Guidelines for Local Authorities (12th November 2013). This addendum clarified the options for reduced development contributions available in order to promote the development of renewable energy development for commercial energy supply purposes for either the domestic or export market. Essentially it encouraged the reduction or waiver of charges in respect of renewable energy development which is not supplying energy to the national grid.

Circular PL03/2018 – Revision of Development Contribution Guidelines in respect of Telecommunications Infrastructure (3rd July 2018). This circular was mandatorily required to be applied by planning authorities. Reference was made to the previous Circulars (as outlined above) and specifically to the requirement for L.A.s to include waivers and reductions in their Development Contribution Schemes, including the application of a specific waiver for broadband infrastructure (masts and antennae). It was noted that whilst this waiver was primarily aimed at facilitating the roll-out of broadband infrastructure, most local authorities had extended it to include mobile phone infrastructure for the purpose of improving mobile phone coverage in their areas. The Circular requires those local authorities who have not yet done so, to ensure that their Development Contribution Schemes are updated to include such waivers in respect of both mobile phone and broadband infrastructure. Specifically, it is stated –

This 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 purposes.

6.0 The Appeal

6.1. Grounds of Appeal

The first party appeal is against Condition No. 2 only (development contribution of €15,000). It has been prepared and submitted by 4Site on behalf of the applicant, On Tower Ireland Limited who request that the condition be removed.

The grounds of appeal may be summarised as follows:

1. Kerry County Development Contribution Scheme 2017

The terms of the Kerry Co. Co. Development Contributions Scheme have not been properly applied. The current Scheme requires payment of a development contribution in respect of telecommunications masts, antennae, dishes and other apparatus/equipment for communication of €10,000. The contribution is broken down into €5,000 for Roads and Transport and €5,000 for Community and Amenity. It is further stated that if a development contribution has previously been charged for a mast, then it shall be exempt from additional contributions. It is further stated -

“Masts and antennae, dish and other apparatus/equipment for communication purposes which form part of the National Broadband

Scheme (as defined by DCENR) shall receive 100% reduction in development contributions. A 100% reduction also applies to infrastructure provided in support of the Community Broadband Scheme.”

It is clear, therefore, that the development contribution has been erroneously applied as the proposed telecommunications infrastructure includes the provision of both mobile phone and wireless broadband services and potentially the services of smaller broadband operators. This is in accordance with the waivers provided for in the current GDCS for Kerry. In addition, a charge has previously been made under PL08.237225 which has been paid, and as such, the current proposal should be exempt from a further contribution.

2. Circular Letters PL07/12 and PL03/2018 – Revision of Development Contribution Guidelines in respect of Telecommunications Infrastructure

These Government Circulars, which advised revisions to the Development Contribution Guidelines 2013, introduced waivers from the requirement to pay development contributions for broadband infrastructure. The Circulars further required that waivers for broadband infrastructure (masts and antenna) be extended to include mobile phone infrastructure. Local authorities were (mandatorily) required to amend their Development Contribution Schemes accordingly. As such, the waiver should be applied to the proposed development.

3. Development Contributions Guidelines for Planning Authorities

These Government guidelines (2013) seek to ensure that the Schemes adopted by local authorities reflect the reduced costs of infrastructure provision. In this context, the practice of “double charging” is clearly considered to be unacceptable and it is stated: -

“The practice of ‘double charging’ is inconsistent with both the primary objective of levying development contributions and with the spirit of

capturing ‘planning gain’ in an equitable manner... Planning authorities should ensure that the necessary monitoring and control procedures are in place to prevent double charging.”

A development contribution has already been paid for the existing mast on the site under Ref. 10/472 (PL08.237225). A development contribution should not therefore be charged for the existing telecommunications structure on the site.

In conclusion, the imposition of the charge is not in accordance with the terms of the current Development Contribution Scheme for County Kerry and is also against the advice outlined within the Department of Environment “Development Contribution Guidelines for Planning Authorities” as amended by Circular PL07/12 and Circular PL03/2018 regarding the inclusion of waivers for the provision of broadband and mobile phone infrastructure.

6.2. Planning Authority Response

The Planning Authority responded to the grounds of appeal on the 21st of July 2021. It was reiterated that the development levy charged under ABP Ref. PL08.237225 was not paid and as such, it was recommended that a levy based on the retention of the mast (at a rate of 150%) be charged in accordance with the terms of the GDSCS.

7.0 Assessment

7.1. Legislation and Guidance

Section 48 (10)(b) of the Planning and Development Act 2000, as amended, provides that an appeal may be brought against a development contribution condition where the applicant considers that the terms of the General Development Contribution Scheme have not been properly applied. As the appeal is solely against Condition 2 of the planning permission, relating to a Financial Contribution, Section 48 (10)(c) applies. This requires that the Board shall not determine the relevant

application as if it had been made in the first instance but shall determine only the matters under appeal.

Condition 2 requires the payment of a development contribution of **€15,000.00** in respect of public infrastructure and facilities benefitting development in the area in accordance with the terms of the adopted Kerry County General Development Contribution Scheme, made under Section 48(2)(a) of the Act. Further guidance on the matter is provided in the Development Management Guidelines, 2007 (Section 7.12) and in the Development Contribution Guidelines 2013, as amended by Planning Circulars 07/12 and 03/2018.

I consider that it is therefore appropriate that this appeal should be confined to the consideration of whether or not the terms of the Kerry County Council Section 48 Development Contribution Scheme were properly applied in this instance.

7.2. Compliance with the terms of the General Development Contribution Scheme and the Government Circulars regarding Telecommunications Infrastructure

The GDCS adopted by Kerry County Council in 2017 requires the payment of a development contribution in respect of masts, antennae, dish and other apparatus/equipment for communication purposes at a rate of €10,000. However, where such structures and equipment form part of the National Broadband Scheme (NBS) as defined by the Dept. of Communication, Energy and Natural Resources (DCENR), a reduction of 100% will be applied. The Planning Authority has not made any comment on whether it considers that the development is being provided in connection with the NBS, or as a consequence, whether the reduction applies or does not apply in this case.

The National Broadband Scheme has since been replaced by the National Broadband Plan. This is described on the Dept. of Environment Climate and Communications (formerly DCENR) website as follows:

“The National Broadband Plan is the government’s initiative to deliver high speed broadband services to all premises in Ireland. This will be delivered through investment by commercial enterprises coupled with intervention by the state in those parts of the country where private companies have no plans to invest”

Circular 03/2018 makes reference to outdated terms contained in local authority Development Contribution Schemes including the ‘National Broadband Service’ and required local authorities to update such references at the next available opportunity.

Circular PL03/2018, which was issued in July 2018 under section 28(1C) of the Planning and Development Act 2000 (as amended), states that it is mandatorily required to be applied by planning authorities. The main purpose of PL03/2018 was to extend the waivers required by Circular 07/12 in relation to broadband infrastructure to include mobile phone infrastructure and services. Specifically, it was stated that the waiver shall apply to any telecommunications infrastructure, both mobile and broadband, being deployed as part of a Government endorsed telecommunications strategy, plan or initiative. The extension of the waiver to include mobile phone infrastructure arose from the Report of the Mobile Phone and Broadband Task Force which had recommended that the Development Contribution Guidelines be revised accordingly. In light of this, the Circular states that, those local authorities who have not yet done so should now ensure that their Development Contribution Schemes are updated accordingly as soon as possible. Thus, where a developer can demonstrate that their infrastructure provides services to customers who would not otherwise be able to avail of an adequate mobile or broadband service, it was stipulated that such infrastructure shall not attract development contributions.

I am satisfied that the nature of the proposed development and the infrastructure that is to be provided would satisfy these requirements and can be considered to be in accordance with the Government endorsed initiative, the National Broadband Plan. It is considered that the proposed development is one which qualifies for the 100% reduction as set out in the planning authority’s GDCS and should not therefore

attract a development contribution charge. In this respect, it is considered that the planning authority has failed to correctly apply the terms and conditions of the Development Contribution Scheme.

There have been several Board decisions where the requirement to pay a development contribution in similar such circumstances was waived. I would refer the Board to the decisions in respect of ABP.308859, ABP.300904 and ABP.300853 in particular, where the Board decided to remove such conditions. It is considered that the application of the 100% reduction in this instance would be consistent with previous decisions regarding similar matters.

7.3. Requirements of Development Contribution Guidelines and Double Charging

Notwithstanding the conclusions reached above in respect of the need for a waiver for telecommunications infrastructure, the planning authority has stated that the requirement to pay a levy in this instance is justified on the basis that the levy required under the previous permission (10/472, PL08.237225) was not paid. The first party, however, has stated that this levy was paid under that permission, and therefore that no further levies should be charged as this would amount to 'double charging'. The Development Contribution Guidelines (2013) strongly discourage the practice of 'double charging' in respect of development contribution levies. In order to assess whether 'double charging' is involved in the current case, it is necessary to look at the terms of the Kerry Co. Co. General Development Contribution Scheme 2017.

The GDCS states in respect of Telecommunications that

“If Development Contributions have been charged previously on a mast then they shall be exempt under this scheme from additional contributions.”

It is clear that a development contribution in respect of the mast has been charged previously, in the Board's decision Ref. PL08.237225. However, the P.A. disputes

that it has been paid and the first party has not provided evidence that it was paid. It should be noted that it is open to the planning authority to pursue the developer for payment of the levy that was required under the permission granted in 2010 (237225), by means of enforcement action. This approach is recommended in Planning Circular Letter PL.3/2013 (issued on 26/03/13) which states that

“Planning authorities should ensure through appropriate enforcement action that any development contribution or other condition attached to a permission is complied with.”

However, I do not agree that issuing a second charge in order to rectify the situation is appropriate in this instance, as the planning authority could potentially seek to enforce the payment of both levies, which would amount to double charging and would clearly contravene the terms of the GDCS.

The current application for retention of the mast and associated equipment was granted without a temporary time restriction, which is in accordance with the advice in Circular 07/12. According to the terms of the GDCS in respect of temporary permissions followed by a permanent permission for the same development, in such circumstances, any amount already paid as a levy in respect of the same development should be deducted from the levy required in respect of the current development proposal. This seems to be consistent with the advice in the General Development Contribution Guidelines regarding double charging, where it is stated that

“Authorities are reminded that any development contribution already levied and paid in respect of a given development should be deducted from the subsequent charge so as to reflect that this development had already made a contribution.”

Having regard to the advice in the Guidelines and to the terms of the GDCS referred to above, it is considered that as a development contribution has already been

charged under the permission granted for the retention of the mast in 2010 (PL08.237225), no development contribution should be required to be paid in respect of the current application for permission. Notwithstanding this, as the proposed development relates to telecommunications infrastructure, it is reiterated that a waiver should be applied anyway in accordance with the terms of the GDCS.

7.4. Application of Retention Permission rate of charge

The planning authority's GDCS applies a higher rate of 150% for retention permissions. This is consistent with the Development Contributions Guidelines (2013) which state that

“No exemption or waiver should apply to any application for retention of development. Planning authorities are encouraged to impose higher rates in respect of such applications.”

However, it is questionable as to whether the current proposal falls into the category of “retention of development” in this context. Section 32(b) of the Planning and Development Act 2000 (as amended) refers to retention permission where “permission is required in the case of development, which is unauthorised, for the retention of that unauthorised development”.

The Telecommunications Antennae and Support Structures Guidelines 1996 had recommended the granting of permission for support structures for a period of five years due to the rapidly evolving change in technology and design of the radio equipment/antennae and support structures. It was anticipated that retention of the permitted base stations would be conditional on the replacement of the obsolete technology with more modern technology. However, Circular PL7/12 acknowledged that the masts, antennae and support structures tend to remain in place for many years and will continue to play an important role in the roll out of NGB. As such, planning authorities were advised to cease the practice of attaching conditions

limiting their life to a set temporary period. The planning history on this site is consistent with the evolving policy framework on this issue.

In conclusion, I do not agree with the planning authority's application of a rate of 150% which had been justified on the basis that the application was for 'retention of development'. As the proposal seeks the retention of a development which has been permitted on three previous occasions, it is considered that the application of a 150% rate on the basis that it constitutes a 'retention permission' is inappropriate and is unwarranted in this instance. Notwithstanding this, given that all telecommunications infrastructure should be subject to a 100% reduction in accordance with government policy in any case as outlined in Circular 03/2018 (as discussed in 7.2 above), and that the GDCS makes such a provision, it is considered that no levy is payable in this instance.

8.0 Recommendation

Having regard to the nature of the condition the subject of the appeal and to the information submitted in support of the appeal, I am 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. I recommend that the Board directs the planning authority under S48 of the Planning and Development Act, 2000 to REMOVE Condition No 2 and the reason therefor for the reasons and considerations set out below.

9.0 Reasons and Considerations

Having regard to the:

- a) Kerry County Council Development Contribution Scheme 2017 which includes a reduction of 100% for 'masts and antennae, dish and other apparatus/equipment for communications purposes which form part of the

National Broadband Scheme as defined by the Department of Communication, Energy and Natural Resources (DCENR)'

- b) Circular Letter 07/12 issued from the Department of the Environment, Community and Local Government and Circular and PL03/2018 issued by the Department of Housing, Planning and Local Government under Section 28 of the Planning and Development Act 2000 (as amended), which requires that planning authorities revise their development contribution schemes in order that a waiver be provided for broadband and mobile phone infrastructure (masts and antennae) being deployed as part of a Government endorsed telecommunications strategy, plan of initiative from the requirement to pay development contributions and

- c) The information submitted in support of this appeal,

it is considered, based on the evidence submitted, that the proposed development constitutes infrastructure and equipment for communication purposes that form part of a government endorsed telecommunications strategy for the roll out of broadband and mobile services and that the terms of the planning authority's Development Contribution Scheme have not been properly applied. The condition requiring the payment of the contribution should therefore be removed in order to comply with Section 48(2)(c) of the Planning and Development Act 2000, as amended.

Mary Kennelly

Senior Planning Inspector

11th November 2021