

From: Bord
Sent: Thursday 25 October 2018 16:31
To: procbordemail
Subject: FW: Appeal: ABP-302441-18 Section 5 Determination on the Erection of a Telecommunications Mast on Monkstown Road
Attachments: Cover LettertoBordPleanal-Ref-ABP-302441-18.pdf; ABP-Submission 25thOctober 2018.pdf

From: John Ryan [mailto:john@cprarchitects.ie]
Sent: Thursday 25 October 2018 15:25
To: Bord <bord@pleanala.ie>
Subject: Appeal: ABP-302441-18 Section 5 Determination on the Erection of a Telecommunications Mast on Monkstown Road

Appeal: ABP-302441-18 Section 5 Determination on the Erection of a Telecommunications Mast on Monkstown Road

Dear Sir or Madam

Please find attached our response to your letter of the 5th of October containing a submission form CMC Planning Consultants who are acting on behalf of Cignal Infrastructure Ltd the developers of this mast. We enclose:

- Cover Letter to the Board
- Submission in response to the the CMC submission

We would appreciate confirmation of the receipt of this submission.

Regards,

John Ryan Architect MRIAI

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25th October 2018

RE: ABP-302441-18

**APPLICATION TO DETERMINE A SECTION 5 DECLARATION ON THE
ERECTION OF A TELECOMMUNICATIONS MAST ON MONKSTOWN ROAD AT
THE JUNCTION OF ALMA ROAD AND MONTEPELIER PARADE**

Dear Sir/Madam:

I am writing in response to your letter dated 5th of October 2018. This enclosed a submission dated the 28th of September 2018 from CMC Planning Consultants acting on behalf of Cignal Infrastructure Ltd who have erected this telecommunication mast.

As a starting point we would refer to our Section 5 Declaration Application cover letter and submission to DLRCC dated the 2nd of August 2018. This sets out our case that the erection of this mast is not exempt development under the Planning & Development Regulations.

I enclose a full and detailed response to the 28th of September submission from CMC Planning Consultants. This has been prepared by the applicant Angela O'Flóinn and myself acting as both joint applicant and agent for this submission.

In summary we would note the following key points regarding this development:

1. Cignal Infrastructure did not have the necessary licence or authority to take down the existing lamp post and erect this new telecommunication structure and equipment.
2. The development by its detail, scale and nature does not meet the requirements for exempted development as allowed for in the Planning Acts and Regulations.
3. The development is not consistent with the Council's Development Plan and by its detrimental impact on a historic residential neighbourhood is a clear breach of the Council's objectives and policies for proper and sustainable development.
4. The development if permitted to proceed without planning permission or licence will set a harmful precedent potentially allowing a random and completely uncontrolled and unregulated replacement of street lamp posts with telecommunication masts without any public oversight or the benefit of proper due process through the planning system.

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ctd...

Accordingly, we request that the Board in their deliberations rule that this development is not exempt development. This structure should then either be removed by the developer or be the subject of a planning application allowing due and proper public consultation.

Please do not hesitate to contact the undersigned if you require any further information.

Yours faithfully.

A handwritten signature in black ink, appearing to read 'JR' followed by a flourish.

JOHN RYAN Architect MRIAI

**Reply to the Submission lodged on the
27th of September 2018 ("the Signal Submission")**

1.0. Background

1.1. Significantly, the local authority have not lodged a submission. In evaluating what Signal contend for, the understanding of DLRCC as to what happened in this case, should influence the evaluation of the submissions by the Board.

1.2. The Signal Submission was lodged in response to the case made by residents in the vicinity of what is alleged to be an unauthorised development ("the Residents' Submission"). It will be recalled that the Residents Submission said :

(a) the development at issue in these proceedings cannot be an exempted development pursuant to Part 1 of Schedule 2 (Class 31) of the Planning and Development Regulations 2001 because only a "statutory undertaker" can rely on Class 31 and Signal is not a "statutory undertaker".

(b) the development at issue in these proceedings cannot be an exempted development pursuant to section 4 (1) (f) of the Planning and Development Act 2000 (as amended) (as stated by DLRCC Planning) because it was not carried out, as required by section 4 (1) (f) (i) "*pursuant to a contract*" entered into by DLRCC (ii) "*on behalf of, or jointly or in partnership with* " the relevant party. Further, it was not carried out in compliance with article 81 of Part 8 of the Planning Regulations 2001 which requires a notice to be posted and a consultation process to be carried out unless the cost of the development does not exceed 126,000 euro.

(c) even if the requirements of section 4 (1) (f) had been met (which is not the case) the courts have held that a local authority is a creature of statute and can only carry out functions conferred on it by statute. Local authorities have not been given any statutory function to provide telecommunications infrastructure : so DLRCC would have had no authority to enter into a contract under s 4(1)(f) with Signal to erect this development even if it sought to do so. Neither can DLRCC facilitate private development of this kind under s 4(1)(f).

(d) DLRCC, in promoting this development, is acting in contravention of its Development Plan in light of the fact that the development was carried out on the boundary of an architectural conservation area where planning permission had been refused for similar development on an adjoining light

stanchion in 2015 on conservation grounds. Despite the greater visual intrusiveness of this development, in comparison with the previous one, and its impact on the ACA, no consideration was given to this fact by DLRCC.

1.3. In response to the above, the Cignal Submission contends :

(a) Cignal is a statutory undertaker and the development is exempted under Class 31(k) and (f);

(b) the replacement of the lamppost is not relevant to Cignal's reliance on Class 31;

(c) the local authority's determination that the development falls under s 4(1)(f) should be disregarded in favour of Cignal's reliance on Class 31;

(d) the previous planning application (15 A/0373) was located within the ACA and the impugned development is outside the ACA and no issue of visual intrusiveness arises; and

(e) the antennae and supporting cabinets in this development should not be referred to as a telecommunications mast but rather telecommunications equipment.

1.4. The Board will immediately appreciate that these are not answers to the points made in the Residents' Submission.

2.0. Cignal as Statutory Undertaker

2.1. Cignal asserts they are a statutory undertaker for the purposes of Part 1 of Schedule 2 (Class 31) of the Planning and Development Regulations, 2001, but even if they establish that they are, it misses further points that they also need to establish, namely :

- (a) Cignal's compliance with any authorisation granted to it as statutory undertaker (which will govern the planning controls applicable to this development) and
- (b) even if the scope of Cignal's authorisation permitted them to assert that the development is exempted under Class 31, they would need to establish that the development meets the criteria laid down in Class 31

Cignal's Alleged Authorisation

2.2. Cignal's Submission refers to section 4 (1) of the *EC (Electronic Communications Networks and Services) (Authorisation) Regulations 2011* ("the ECNS Regulations") whereby any person

intending to provide an electronic communications network or service shall, before doing so, notify Com Reg of its intention to provide such a service.

2.3. Under Regulation 5 of the ECNS Regulations, Com Reg is empowered to issue a declaration to undertakings that have given it notice of an intention to provide a network or service. The declaration issued to Cignal states that Cignal Infrastructure Limited is "*deemed to be authorised to provide an electronic communications network or electronic communications service subject to the terms and conditions of a general authorisation issued by the Commission for Communications Regulation*" (emphasis added).

2.4. This reflects Regulation 8(3) of the ECNS Regulations which provides that : "*(a)n authorised undertaking shall comply with the conditions attaching to the general authorisation applicable to it.*"

2.5. The terms of the general authorisation are available on the Com Reg website (Document 03/81R5– "*General Authorisation....Conditions for the provisions of Electronic Communications Networks and Services*"). This sets out (in paragraph 2. 5) that

"nothing in this Authorisation shall absolve the Authorised Person from any requirement in law to obtain such additional consents, permissions or Authorisations as may be necessary for the provision of Authorised Services and for the exercise of its rights or discharge of its obligations under the Authorisation..."

2.6. The general authorisation sets out (in paragraph 2. 1) that an Authorised Person may :

- provide the electronic communications networks or services it has described in its notification to Com Reg subject to the conditions attaching to the general authorisation,
- apply for a consent under section 53 of the Communications Regulation Act 2002, and
- apply for a licence under section 254 (1) after Planning and Development Act 2000 for the establishment of overground electronic communications infrastructure and any associated physical infrastructure.

2.7. The declaration granted to Cignal by Com Reg echoes the provisions of the general authorisation and as contemplated by Regulation 7 of the ECNS Regulations says that Cignal may (a) provide the service notified subject to the general authorisation and may

"(b) apply for a consent under section 53 of the Act of 2002 to commence or carry out road works. Applications for such consent shall be made to the

authority in whose functional area in the Authorised Person proposes to carry out the roadworks

(c) apply for a licence under section 254 (1) of the Planning and Development Act 2000 for the establishment of overground electronic communications infrastructure and any associated physical infrastructure on under, over or along a public road. Applications for such a licence shall be made to the planning authority in whose functional area of the Authorised Person proposes to establish the infrastructure (emphasis added)"

2.8. Section 53 of the Communications Regulation Act 2002, referred to above, is concerned with the consents to be obtained for the "opening of public road for the establishment of underground electronic communications infrastructure" and from the limited information available to the residents, would not appear to be relevant in the instant case.

2.9. However, section 254 of the Planning Act 2000 (as amended) would appear to apply to Cignal. This section is concerned with the establishment of "overground electronic communications infrastructure and any associated physical infrastructure on, under, over or along a public road" (emphasis added).

2.10. Cignal has not provided evidence that it is licensed under section 254 and on the face of it, is in breach of that statutory requirement. Section 254 (1) provides, *inter alia*, that a person shall not erect, construct, place or maintain "overground electronic communications infrastructure and any associated physical infrastructure" on, under, over or along a public road "save in accordance with a licence granted by a planning authority under this section."¹

2.11. Applying for such a licence might have mitigated some of the deficiencies noted in the Residents' Submission since section 254 (5) provides that, before such a licence is granted :

"(i)n considering an application for a licence under this section the Planning Authority, or the Board on appeal, shall have regard to –

¹ Section 254 (3) provides that "a person applying for a licence under this section shall furnish to the Planning Authority such plans and other information concerning the position, design and capacity of the appliance, apparatus or structure as the Authority may require"

Section 254 (4) provides that a licence may be granted under the section by the Planning Authority "for such period and upon such conditions as the Authority may specify, including conditions in relation to location and design, and where in the opinion of the Planning Authority by reason of the increase or alteration of traffic on the road or of the widening of the road or of any improvement of or relating to the road, the appliance, apparatus or structure causes an obstruction becomes dangerous, the Authority may by notice in writing withdraw the licence and require the licensee to remove the appliance apparatus or structure at his or her own expense".

- (a) the proper planning and sustainable development of the area,*
- (b) any relevant provisions of the development plan, or a local area plan*
- (c) the number and location of existing appliances, apparatuses or structures on, under, over or along the public road, and*
- (d) the convenience and safety of road users including pedestrians."*

2.12. Section 254 (9) provides, *inter alia*, that any person who erects, constructs, places or maintains an appliance, apparatus or structure referred to in subsection (1) on, under, over or along any public road without having a licence to do so under section 254 shall be guilty of an offence.

2.13. The development which is being challenged by the residents would appear to fall within the category of overground telecommunications infrastructure on, under over or along a public road and thus can only take place subject to a licence under section 254. Failure to obtain such a licence is an offence and is sufficient ground to allow the appeal.

2.14. The importance of the controls over telecommunication development along a public road cannot be overemphasised. It is the reason that the Oireachtas made special provision for specific licensing under section 254.

2.15. In *Guidance on the Potential Location of Overground Telecommunications Infrastructure on Public Roads (Department of Communications, Energy and Natural Resources 2015)* ("the Guidance") the licensing requirements for electronic communications infrastructure on public roads are addressed.

2.16. The Guidance notes that "*It should also be noted that licences under section 254 of the Planning and Development Act 2000 are granted by the planning authority for set periods of time, can be withdrawn at any time with removal at the developer's expense and involves a fee and/or a bond.*" Licence fees under section 254 appear to be addressed in Regulation 202 and Schedule 12 of the Planning and Development Regulations 2001 - 2018.

2.17. In conclusion, having regard to the ECNS Regulations referred to by Cignal, the Declaration issued by Com Reg to Cignal, the statutory framework and the various government publications referred to above, it would appear that Cignal (even if they are a statutory undertaking, have not established that the impugned development was erected in accordance with the mandatory licensing requirement. On the face of it, an offence has been committed.

Does the Impugned Development meet the Requirements of Class 31?

2.17. The Guidance suggests that Class 31 only applies to telecommunications development at locations other than public roads :

"(o)utside of public roads, all development requires planning permission, unless it is an exempted development. All exempted developments are listed in the Planning and Development Regulations 2001 ... See Appendix C for the full list of exempted developments in Class 31."

2.18. This of itself casts doubt on Cignal's Submission.

2.19. Even if Section 254 did not apply to the Cignal development, Cignal could not rely on Class 31 because the development does not meet the requirements of Class 31.

2.20. In its submission, Cignal asserts that the impugned development falls within the class of exempted development described at Class 31 (k) and (f).

2.21. Class 31(k) refers to the attaching of antennae to "*existing structures*". The antennae in the impugned development were not attached to an existing structure. They were part of a new mast structure to which the streetlight was reattached. The photographs exhibited in the Residents' Submission clearly show that the original structure was completely replaced. If Class 31 (k) had been intended to cover replacement structures it would have explicitly so provided. In this regard, it might be noted that the scope of Class 31 (k) is illustrated by the description in column 2 (point 4) which provides for antennae to be hidden inside chimney pots, specifically provides that "*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...*" If it had been intended that lamp-posts could be replaced then Class 31 would have explicitly so provided given that it is explicitly so provided in relation to chimney pots.

2.22. The maxim of statutory interpretation '*expression unius et exclusio alterius*' applies in that the explicit mention of 'replacement' in one part of Class 31 means 'replacement' is excluded in the rest of Class 31 where it is not mentioned.

2.23. While Cignal's Submission contends that there are very many designs of lamp-post, it cannot be the case that Class 31(k) allows private developers to erect replacement light stanchions, or that these stanchions can be of any size or variety on a public road. In fact, in 2017, Class 31 (b) required that poles carrying overhead lines or "*other equipment*" should not exceed 10 metres in height and 0.6 metres in diameter. In this case, even the luminescence of the replacement is an entirely different colour and intensity to that of the original lamppost and the adjacent lampposts on either side.

2.24. In the reply on behalf of Cignal to the Warning letter from DLRCC Planning, it is admitted that the pre-existing structure had been "*installed by the local authority under their powers*" However, the Memorandum of Understanding (a copy of which was furnished with the Residents' Submission) makes it clear that

"Cignal propose to manufacture a replicate streetlight which will incorporate the necessary Technical Elements ... Cignal propose to replace the existing streetlight with the replica street light solution. The Council's approval will be required in the design of the replicate streetlight. The replicate solution will be gifted by Cignal to the Council and for the avoidance of doubt the Council will own and maintain the replicate streetlight solution. Cignal will own and maintain the Technical Elements and will be responsible for their maintenance."

2.25. Another limitation in Class 31(k) is that the planning authority in whose functional area the structure on which the 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 four weeks before such attachment. This is a legal requirement under the regulations. The Cignal submission of 12 February 2018 sets out that "*notification was sent to both the public lighting section and the roads department within DLRCC ... As the site was developed in conjunction with the local authority, it was considered that the local authorities internal processes were sufficient to comply with the notification requirement*".

2.26. This failure to notify in accordance with the Planning Regulations may explain why DLRCC Planning, when examining this matter upon receipt of complaints and considering enforcement, sent internal emails seeking details of any provider given permission by DLRCC Public Lighting to attach telecom equipment to DLRCC's lighting pole "*[a]s they did not notify the Planning Authority prior to installation in accordance with the Planning Regulations for such installation*" (email 13th of December 2017 at Tab D of Residents' Submission).

2.27. It is not open to Cignal to choose its method of notification. The Planning and Development Regulations are specific about an obligation on the statutory undertaker to notify in writing **the planning authority** of the proposed location of the structure.

2.28. A further limitation on Class 31 is that "*the field strength of 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 Director of Telecommunications Regulation*". The Cignal Submission sets out that the field strength of the antennas "*does not exceed*" the limit specified by Com Reg and that "*the results from the emission data taken to date show full compliance with the ICNRP guidelines...*" This bald statement, without accompanying evidence, is not sufficient to demonstrate compliance with the applicable law.

2.29. In RL 2708, a section 5 referral before the Board, it was considered whether a letter from a member of the staff of a statutory undertaker, stating that the relevant development was designed to be in compliance with the ICNIRP Guidelines, could comply with the requirement that the field strength would not result in the field strength exceeding the limits specified by the Director of Telecommunications Regulation. The Inspector said while “... *one might, for example, accept a certification by an independent competent body, such as ComReg, which could measure the output of the installations, as part of its normal monitoring and licensing process,it can hardly have been the intention of the legislature that a mere statement by a proposer that the development is designed to meet ICNIRP would suffice to comply with condition / limitation no. 6*”. It is respectfully submitted that a statement that the field strength of the antennae herein do not exceed the limit specified by Com Reg and that the results from the emission taken to date show full compliance with the guidelines is not sufficient evidence that this condition in Class 31(k) regarding field strength of antennae is met.

2.30. Insofar as the Cignal Submission relies upon Class 31(f) in respect of the cabinets associated with the impugned development, it should be noted that their development exceeds the dimensions permitted by that provision (ie 2 cubic metres measured externally).

3.0. Other Miscellaneous Points raised by Cignal's Submission

3.1. A further limitation in Class 31 is that development under this Class is not exempted if it interferes with the character of a view (Regulation 9 (1) (v) of the Planning and Development Regulations).

3.2. The Residents' Submission noted that the development in this case has been carried out adjacent to and in the vicinity of an ACA and Protected Structures and that a previous planning application for a telecommunications development on an adjoining light stanchion had been refused on conservation grounds by DLRC and on appeal by the Board. The impugned development has an even greater effect on the ACA, given its greater visual intrusiveness, the fact that the replacement of the light stanchion does not match adjoining stanchions, either in appearance or luminescence, the lack of trees to screen the development and the intrusive antennae. In its reply to the Warning letter, it is stated that Cignal consulted with the local authority on the implications of the development on the ACA and the Protected Structures and

"while acknowledging that the Planning Authority would consider any perceived impacts as part of a planning application assessment [the officer consulted] could recall no section of the Act that will impact on the use of exempted development adjacent to an ACA".

3.3. How the impugned development would impact upon the ACA and Protected Structures would have been considered had a planning application been made by Cignal. In the Development Plan prepared by DLRCC, under 'Environmental infrastructure and management' at page 134, it says

"the advantages of a high-quality telecommunications network must, however, be balanced against the need to safeguard the rural and urban environment pertaining in sensitive areas for the impacts on residential amenity and visual amenity of areas need to be adequately assessed."

3.4. The photographs submitted with the Residents' Submission illustrate the visual intrusiveness of the impugned development, as does inspection. Had a planning application been made (as was the case with the adjoining light stanchion) or a licence application under section 254, those using the Monkstown Road would not have had their enjoyment of the historic vistas of Montpelier Parade and Alma Road, marred.

3.5. Under Regulation 9 (1) (v) of the Planning and Development Regulations, a development is not exempted if it consists of or comprises

"the carrying out under a public road of works other than a connection to a wired broadcast relay service, sewer, water main, gas main or electricity supply line or cable, or any works to which class 25, 26 or 31 (a) specified in column 1 of Part 1 of Schedule 2 applies."

3.6. In the instant case, underground cabling from the lamp replacement to exchange cabinets installed in its vicinity involved the opening of the roadway at Montpelier Parade and Shandon Park and this was not exempted development in accordance with Regulation 9(1)(v).

4.0. Conclusion

4.1. For the reasons set out in the original Section 5 Declaration Residents' Submission and this replying submission and arising from the failure of DLRCC to file a submission or support the contentions of Cignal, the Board should make such determinations as would prevent and/or reverse the impugned development

4.2. If necessary, the parties should be invited to expand upon these submissions at an oral hearing.

