



Our Ref: 20046/052621/mh

Administrative Officer,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1

26th May 2021

AN BORD PLEANÁLA	
LDG- <u>040242-21</u>	
ABP- _____	
27 MAY 2021	
Fee: € <u>220</u>	Type: <u>cheque</u>
Time: _____	By: <u>Reg Post</u>

Re: Section 5(3)(a) - Review of Declaration by An Bord Pleanála

'Whether the development of a telecommunications mast, associated telecommunications infrastructure, and an access route on an elevated site (94m ASL) at Ballinknockane, Camp, Tralee, Co. Kerry with access off the N86 is 'development' and is not 'exempted development'.

Planning Authority Reference No. EX907

Dear Sir/Madam,

HRA Chartered Town Planning Consultants has been retained by Mr Joseph O'Dwyer and Ms Aine O'Dwyer Camp Cross, Tralee, Co. Kerry to refer a Declaration made by Kerry County Council on the 14th May 2021 for review by An Bord Pleanála under Section 5(3)(a) of the Planning & Development Act 2000 as amended (the Act).

Please find attached a cheque in the sum of €220.00 in respect of the referral fee and a copy of the Declaration issued under Section 5 of the Act.

1.0 GROUNDS FOR REVIEW

The purpose of the Section 5 Declaration was to seek confirmation from Kerry County Council that certain works undertaken by the developer in relation to the above mentioned telecommunications development constitutes 'development' and is not 'exempted development' as defined by the provisions of Section 2 and Section 3 of the Planning and

Development Act 2000 as amended, and with consideration to the Planning and Development Regulations 2001 (as amended). The Querist requested that Kerry County Council make a determination on a specific development that is currently undergoing construction and has been on site since earlier this year. The facts of the case specifically relate to the works on site including the extent and scope of works.

It is submitted to the Board that Kerry County Council did not make a Declaration based on the facts of the case before them. Rather Kerry County Council sought to make a Declaration by confirming that the proposed works constitute development which is exempted development on the proviso that the width of the hardstanding access road would not exceed 3 metres. Yet, in response to a further information request issued by Kerry County Council on the 20th April, the Querist had already advised the planning authority that the access road ranged in width from 3 – 5m. Notwithstanding such information, and as confirmed by the planning authority following a site visit, Kerry County Council issued a Declaration on the basis that the works were exempted development, subject to amendments including a reduction on the width of the road to 3m. On this fact alone, it is submitted to the Board that the decision of the Council is ultra vires.

It is further submitted to the Board that there is no class of development under Schedule 2 which exempts the permanent construction of a private access road. Therefore, irrespective of the construction details and width of the road, it is respectfully submitted to the Board, contrary to the opinion of the planning authority, that the access road constitutes development.

2.0 BACKGROUND

2.1 Site Location and Context

The village of Camp is located 16km west of Tralee, 9km east of Castlegregory and is within a *'strategic location on the gateway to the Dingle Peninsula'* as detailed in the Tralee Municipal District Local Area Plan 2018-2024. The village is a small settlement, offering a limited range of local goods and community services.

The site which is the subject of this Declaration is located to the west of Camp village and is accessed off the N86 national secondary road. The greenfield site rises in a south west direction away from the public road. There is an unusual access configuration into the site, as shown in Figure 1.0, delivered as part of the upgrade works to the N86. The entrance is parallel to a traffic calming island with two continuous white lines.



Figure 1.0 Subject Site Showing Extent of Existing Access Road



Figure 2.0 Existing entrance onto N86

The site is located in a sensitive and scenic landscape area on an important tourist route in the county. The planning site immediately adjoins a Rural Prime Special Amenity Area in the Kerry County Development Plan 2015 – 2021, with the designation surrounding the site to the south and the west. It is an objective of the Plan ZL-3 to "Determine the zoning

of lands in rural areas having regard to the sensitivity of the landscape as well as its capacity to absorb further development". The Development Plan states that:

"Rural Prime Special Amenity Areas are those landscapes which are very sensitive and have little or no capacity to accommodate development. In these areas all development will be prohibited, other than normally exempted development in accordance with Section 4, Planning and Development Act 2000-14, Schedule 2 of the Planning & Development Regulations 2001-2013 and Chapter 3.3.2, which will be open to consideration, subject to satisfactory integration into the landscape and compliance with the proper planning and sustainable development in the area".

2.2 Development Works

Cellnex Telecom are in the process of constructing a telecommunications mast and have constructed associated telecommunications infrastructure on the subject site. Whilst the provision of physical telecommunication infrastructure does appear to fall within the exemption thresholds as provided for in Class 31 of the Planning and Development Regulations 2001-2021 (the Regulations), although a query does arise as to whether these works are in fact exempt having regard to the provisions under Article 9 of the Regulations.

In addition to telecommunications infrastructure, the works also include construction of a circa 110m access track from the gate on the existing access road to the site compound. The access road extends in a westerly direction parallel to the N86, before turning and extending southwards along the western field boundary to the site compound. It is considered that this access is not covered by any exempted development provisions and does not fall within the exemptions provided for under Class 13 of the Planning & Development Regulations 2001 as amended (the Regulations).

The Querist was provided with a number of drawings by Cellnex, which were provided to the planning authority for consideration and to inform their decision making. The drawings articulate the nature and extent of ongoing and proposed development works. Whereas the drawings reference an 'existing access route' in yellow, the Board will note from the photograph provided in Figure 1.0 that no such access route exists / existed and that the development works comprise construction of a new access road (See Figure 3.0).

It is noted from the Planning Report attached to the file that 4Site claims an 'existing access track' is being used to facilitate construction and installation. However, the Planners Report attached to the planning file also confirms that a new roadway has been constructed of broken stone. The Planners Report queries whether the access road is of a temporary nature. Notwithstanding that being of a temporary nature or otherwise is irrelevant in the context of this Declaration and exempted development provisions, it is noted that telecommunications antennae, in general, do necessitate repair and maintenance and as a result necessitate a permanent means of access.



Figure 3.0 Construction of access Roadway to Compound

3.0 MATERIAL CONSIDERATIONS UPON WHICH THE QUERIES ARE BASED

3.1 Is or Is Not Development

Section 3 of the Planning and Development Act, 2000, as amended, defines "development" as 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.

It is thus submitted to the Board that construction of the telecommunications mast and substation along with the access road on site has clearly involved an act of development having regard to Section 2(1) of the Act where "works" are defined as: any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior to exterior of a structure.

Accordingly, having established that the telecommunication infrastructure and construction of the access road constitutes development, the question arises as to whether or not these works constitute exempted development.

3.2 Is or is not Exempted Development

Article 6(1) of the Planning and Development Regulations, 2001, as amended, states that 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.

3.2.1 Telecommunications Infrastructure

It would appear from the information to hand and the drawings provided by Cellnet to the Querist that the telecommunications infrastructure and associated compound fall within the exempted development parameters provided for under Class 31 of the Regulations.

However, the main consideration relates to whether or not the development in question is subject to any of the restrictions imposed on the relevant exemption under Article 9(1) of the Regulations.

Article 9(1)(vi) effectively de-exempts any 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 for the area in which the development is proposed".

The Kerry County Development Plan 2017 – 2021 designates sensitive landscape areas, and zones certain areas as a Rural Prime Special Amenity Area. The relevant map in this instance is Map 12.1e from Volume 3 of the Plan. As the Board will note it is particularly difficult to determine the exact boundary of the Rural Prime Special Amenity Area and how it affects the subject site. Figure 4.0 below provides a graphical representation of Map 12.1e downloaded from the Kerry County Council website and overlaid on an aerial map using Photoshop.

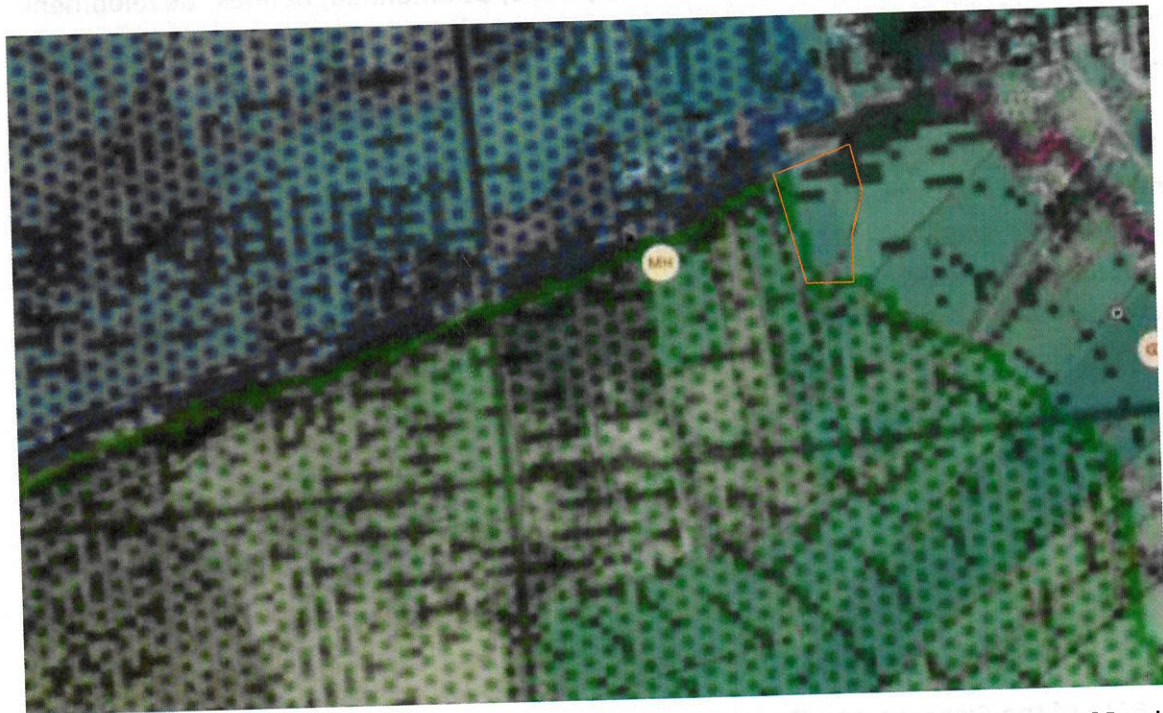


Figure 4.0 Map 12.1e from Volume 3 of the Plan overlaid on Aerial Photo and showing extent of Rural Prime Special Amenity Area.

The designation appears to largely follow the 100m contour line before diverting and extending northwards to the road. Whilst it appears that the majority of the subject site is located outside of the Rural Prime Special Amenity Area, the extent of zoning as it affects the western and southern boundaries is less clear (site outlined in orange).

The planning authority submits that the site is located outside of but adjoins the Rural Prime Special Amenity Area to the south and the west. Figure 5.0 has been extracted from the Planners Report on file. The map is referenced as an "Extract from the Kerry County Development Plan 2015 – 2021 Zoning Map. Site is located in an area zoned Rural General. Adjoining lands to west and south, hatched red on the map, are zoned Rural Prime Special Amenity". The attention of the Board is drawn to the inaccurate representation of the red hatch area in Figure 5.0 in contrast to the representation extracted from the zoning maps in Figure 4.0. It is thus very clear, that the exact and precise boundary of the zone of Rural Prime Special Amenity Area has not been clearly established.

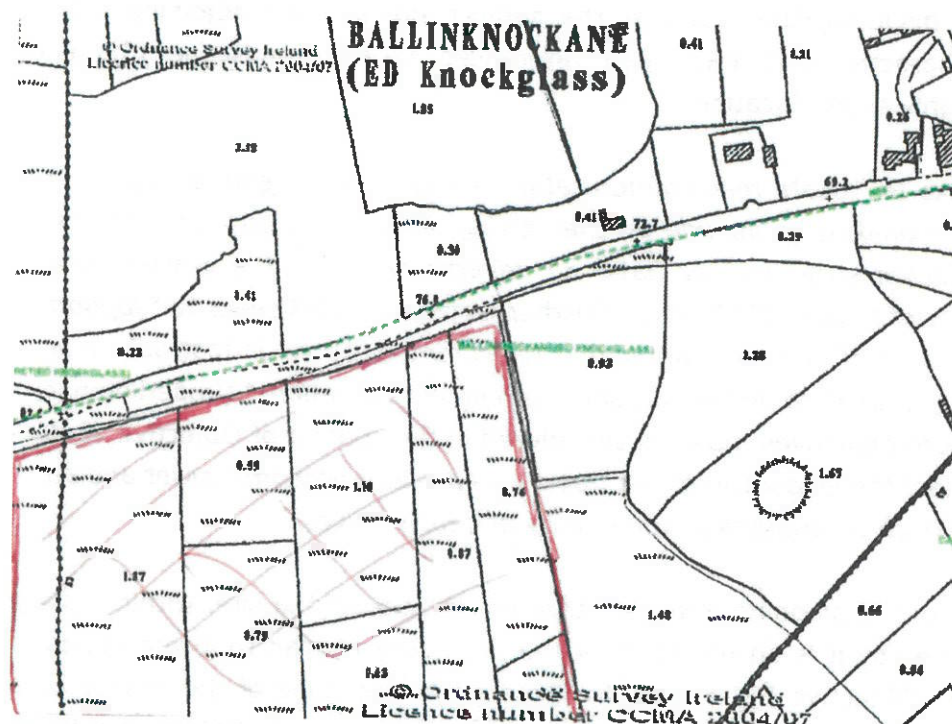


Figure 5.0 Snapshot of map extracted from Planners Report

On the assumption that the zoning provision changes at some point on the southern and eastern boundary of the site (exact location has not been clearly established by the planning authority and Figure 4.0 suggesting it extends into the subject site), the interpretation afforded by the planning authority would appear to suggest that land on one side (west and south) of an existing hedgerow is a special amenity area, whilst land on the other side (north and east) is not. In other words, if the proposed works were located 7m to the west on the opposite side of the hedgerow they would not be exempt, by virtue of the Special Amenity Area zoning, but because they are potentially located just outside of a notional boundary on a map, it is deemed they may be exempt.

The Development Plan states that Rural Prime Special Amenity Area zoning, which surrounds the subject site to the south and the west, are particularly sensitive landscapes and have little or no capacity to accommodate development. The Development Plan clarifies that all development is prohibited except for normally exempted development. However, this development is *"only open to consideration, subject to satisfactory integration into the landscape and compliance with the proper planning and sustainable development in the area"*.

The Renewable Energy Strategy – Landscape Character Assessment also confirms the sensitivity of the landscape at this location. Identified as the Tralee Bay & North Slieve Mish Mountains (No.27), the landscape is described as *"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 re both in close proximity to the road..."*

Irrespective of the exact delineating boundary of the Rural Prime Special Amenity Area zoning, there is no disputing the fact that the subject site and the adjoining land is homogeneous in character, and has been referenced in the Landscape Character Assessment as a highly scenic location.

Objective ICT-4 seeks to *"locate telecommunication masts in non-scenic areas, or in areas where they are unlikely to intrude on the setting of, or views of/from, national monuments or protected structures or have an adverse effect on the environment including the integrity of Natura 2000 sites"* Further Objective ICT-3 seeks to *"support the sustainable provision of new and innovative telecommunications infrastructure at appropriate locations, subject to normal proper planning considerations"* (underline our emphasis). Both these objectives must be considered in the context of Objective ZL-1 which 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"*.

It is thus submitted to the planning authority that the location of the site, within a 'very scenic landscape' whereby it is an objective of the development plan to locate masts in non scenic locations (Objective ICT-4) and to protect the landscape of the county as a major economic asset (Objective ZL-1) and its location within and/or adjoining a Rural Prime Special Amenity Area zoning, which prohibits development except for normally exempted development which is open for consideration, effectively de-exempts what would otherwise comprise exempted development under Class 31.

Such development can only advance for consideration under Section 34 of the Planning & Development Act 2000 as amended, whereby it will be assessed on its ability to integrate into the landscape in accordance with the proper planning and sustainable development of the area.

3.2.2 Access Road

There is no class of development under Schedule 2 which exempts the permanent construction of an access road.

Contrary to the opinion of the Planning Authority, it is submitted to the Board that the extension of an access road does not come within the scope of Class 13 of Part 1 of Schedule 2 to the Planning and Development Regulations 2001 which states that,

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

The Board will note that the exemption provides for a clear distinction between a 'private street, road or way' and 'a private footpath or paving'.

In any common sense meaning of the Regulations there must already exist a road or way which can be improved or repaired. Whilst circa 60m of an access roadway already exists, this roadway is terminated with the provision of a gate. A new roadway of circa 110m and 3 – 5m in width has been constructed from the gateway to the infrastructure compound. It is submitted, contrary to the opinion of the planning authority, that the paving in question does not comprise repair or improvement but involves the construction of a new access road. Therefore, the subject works do not fall within Class 13 and are not exempted development.

In relation to the terms, footpath or paving, it is submitted that both these terms are used to describe constructed routes that are intended for use only by pedestrians. In this regard the development as carried out is not intended for pedestrian use but for service vehicles. The development as constructed is not suitable for cars, (it doesn't have a wearing surface, sometimes termed a pavement) and although it is capable of being used by walkers, it is not intended for such use. In any event, the condition attached to the exemption requires that the width of any such private footpath or paving shall not exceed 3 metres. In this case, it is submitted to the Board and confirmed by the planning authority, that the width exceeds 3m and the condition is not met. Therefore, the exemption does not apply.

4.0 DECLARATION ISSUED

Schedule 1 of the Declaration lists the considerations which the Planning Authority had regard to in making its determination. It is respectfully submitted to the Board that consideration no.4 is ultra vires the power of the planning authority as it states that;

"The proposed hardstanding access road would come within the scope of exemption provided at Class 13 of Part 1 of Schedule 2 of the Planning & Development

Regulations 2001 – 2021 provided the width of the access road would not exceed 3 metres”.

The planning authority is not permitted to confirm that something would / will be exempt if it falls within such a criterion. Instead, the planning authority must issue a Declaration on the facts as they currently exist on the ground and based on the information presented before them. The planning authority issued a further information request seeking information on three separate items pertaining to works on the ground and a response based on the information before the Querist was made. One of those queries specifically sought information on the width of the access road and its construction type. A response was made to the planning authority on the 26th April 2001 based on information received from the Querist and clarifying that the roadway varies in width between 3 – 5m and that the construction type was of hardcore material.

It is respectfully submitted to the Board that the planning authority had adequate information before them to make an informed decision and which was verified on the ground by the planning authority. This information confirmed beyond doubt that the access road constituted development and did not constitute exempted development. Yet the planning authority sought to confirm that the development was exempted development, subject to a proviso that the track does not exceed 3m. It is submitted to the Board that it is this element of the Declaration that the Querist deems to be ultra vires.

5.0 CONCLUSION

Having regard to the siting and nature of the proposed development, it is submitted to the Board, contrary to the opinion of the planning authority, that:

- a. The proposed development is located within a within a 'very scenic landscape' and within and/or adjoining a Rural Prime Special Amenity Area zoning, the preservation of which is an objective of the Kerry County Development Plan 2015-2021 and in accordance with the provisions of Article 9(1)(vi) of the Regulations, the proposed development would not constitute exempted development.
- b. The construction of the circa 110m access road or way into the site is not exempted development as it does not come within the scope of Section 4 of the Planning and Development Act 2000, or Article 6 and Schedule 2 of the Planning and Development Regulations 2001.

We trust that this clarifies matters at this time. We would welcome a review of the Determination by the Board at this time, and a decision that the proposed works comprise development and are not deemed to be exempted development.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'Mary Hughes MPI', written over a horizontal line.

Mary Hughes MPI

Director HRA Planning chartered town planning consultants DAC



COMHAIRLE CONTAE CHIARRAÍ
KERRY COUNTY COUNCIL

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Application No: EX907

Decision Date: 14th May 2021

Registration Date: 25th March 2021 &
26th April 2021

Applicant: Mr Joseph O'Dwyer and Ms Aine O'Dwyer, Camp Cross, Tralee, Co Kerry

Agent: Mary Hughes, HRA Planning, 3 Hartstonge St, Limerick

Development Location: Ballinknockane, Camp, Tralee, Co Kerry

Development Description: (a) The construction of a telecommunications mast and associated telecommunications infrastructure and (b) the construction of a hardstanding access road.

**DECLARATION ISSUED UNDER AND IN ACCORDANCE WITH SECTION 5 OF THE
PLANNING AND DEVELOPMENT ACTS, 2000 – 2020**

In pursuance of its functions under the Planning & Development Acts 2000 to 2020, Kerry County Council, being the Planning Authority for the County Health District of the County of Kerry, has by order dated 14th May 2021 authorised the issue of a declaration under the provisions of Section 5 of the Planning & Development Acts, 2000 -2020 in accordance with plans and particulars submitted on 25th March 2021 and 26th April 2021. I hereby certify that, the Planning Authority considers that the works, the subject of the referral under the said Section 5, namely (a) the construction of a telecommunications mast and associated telecommunications infrastructure and (b) the construction of a hardstanding access road at Ballinknockane, Camp, Tralee, Co Kerry does constitute exempted development under the Planning & Development Acts 2000-2020 having regard to the considerations inserted hereunder:-

Schedule 1

1. The proposed development comprising (a) the construction of a telecommunications mast and associated telecommunications infrastructure and (b) the construction of a hardstanding access road would constitute works that would come within the scope of Section 2(1) of the Planning and Development Act 2000 - 2020,
2. The said works would constitute development that comes within the scope of Section 3(1) of the Planning and Development Act 2000 – 2020
3. The proposed construction of a telecommunications mast and associated telecommunications infrastructure would come within the scope of exemption provided at Class 31(a), (b) and (f) of Part 1 of Schedule 2 of the Planning and Development Regulations 2001 – 2021 and would comply with the conditions and limitations attached to Class 31(a), (b) and (f).
4. The proposed hardstanding access road would come within the scope of exemption provided at Class 13 of Part 1 of Schedule 2 of the Planning and Development Regulations, 2001 - 2021 provided the width of the access road would not exceed 3 metres.
5. The proposed development would comply with Restrictions on Exemption at Article 9 of the said Regulations.

The proposed development would constitute development which is exempted development.

Signed on behalf of Kerry County Council



DAVID O'CONNOR
Date: 14th May 2021

