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	12th August 2021
Inspector	Hugh D. Morrison

Contents

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 ought 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.

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

bounding the curtilage of a house, of any gate or gateway.	
Class 11 *The construction, erection, lowering, repair or replacement, other than within or bounding the curtilage of a house, of –* *(a) any fence (not being a hoarding or sheet metal fence), or* *(b) any wall of brick, stone, blocks with decorative finish, other concrete blocks or mass concrete.*	*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.* *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.*
Class 13 *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.*
Temporary structures and uses *Class 16* *The erection, construction or placing on land on, in, over or under which, or on land adjoining which, development*	*Such structures, works, plant or machinery shall be removed at the expiration of the period and the land*

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.	*shall be reinstated save to such extent as may be authorised or required by a permission under the Act.*
Development for industrial purposes *Class 31* *The carrying out by a statutory undertaker authorised to provide a telecommunications service of development consisting of the provision of—* *(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),* *(b) overhead telecommunications including the erection of poles or other support structures or the use of existing poles or other support structures,*	*1. Poles or other support structures carrying overhead lines shall not exceed 12 metres in height.* *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*

	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. *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.*
(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) any cable (including fibre optic cable), wire, tube, pipe, duct or similar thing (including its casing or coating) or*	*The dimensions of any such device should not exceed 0.50 cubic metres measured externally.*

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,	*The dimensions of any such device should not exceed 0.25 cubic metres measured externally.*
(c) telephone kiosks or other telephone facilities in a public place not being on, over or along a public road,	*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.*
(d) equipment for transmitting or receiving signals from satellites in space,	*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.*
(e) permanent telecommunications exchange and radio station containers, including containers for electronic equipment required for transmitting,	*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*

	metres in height and 2 metres in width at its widest point. *2. The installation may only be used—* *(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,* *(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* *(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.* *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.*

(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.*

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

	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. *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.*
(j) an antenna support structure in place of an existing antenna support structure,	*1. The replaced structure shall be removed no later than 4 weeks following its decommissioning.* *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).*

	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 384 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.*

(k) antennae, including small cell antennae, attached to the following existing structures— *(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;* *(ii) electricity pylons;* *(iii) agricultural storage buildings;* *(iv) water towers.*	*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.* *2. In the case of a structure with a flat roof, a supporting fixture may be used provided that–* *(a) the fixture does not exceed the height of any existing parapet or railing on the roof by more than 3 metres, and* *(b) access to the roof is not available to any person other than a person authorised by the statutory undertaker.* *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.* *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.* *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*

	undertaker in writing of the proposed location of any such structure at least 4 weeks before such attachment. *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.*
(l) small cell antennae attached to the following existing structures– *(i) electricity poles, telegraph poles, lamp posts, lighting structures, flag poles, CCTV poles;* *(ii) phone kiosks and bus shelters.*	*1. The small cell antennae shall be attached directly to the structure and not by way of a supporting fixture.* *2. In the case of structures with a flat roof, the small cell antennae shall be attached directly to the roof.* *3. No more than 2 small cell antennae may be attached to one structure.* *4. The colour of any small cell antennae shall match and blend with the colour of any structure to which it is attached.* *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.*

	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.

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 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). 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

An Bord Pleanála

Board Direction
ABP-310362-21

The submissions on this file (including the Occupier's response to the Board's Section 132 Notice) and the Inspector's report were considered at a Board meeting held on 21/03/2022.

The Board decided, as set out in the following Order, that

Board Order as follows:-

WHEREAS a question has arisen as to whether the erection 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 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 Joseph & Aine O'Dwyer referred this declaration for review to An Bord Pleanála on the 27th day of May 2021:

AND WHEREAS following receipt of the Occupier's response to its Section 132 Notice, An Bord Pleanála has rephrased the question to whether the erection of a telecommunications mast, associated telecommunications infrastructure,

the provision along part of the access route of a temporary access track until the development has been completed, and the reinstatement of the land thereafter, 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 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 temporary access track is exempted development under Class 16 of Part 1 of Schedule 2 to Article 6 of the Planning and Development Regulations, 2001, as amended.

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, the provision along part of the access route of a temporary access track until the development has been completed, and the reinstatement of the land thereafter, 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 exempted development.

Board Member: _____ **Date:** 21/03/2022

John Connolly

An Bord Pleanála

Inspector's Report
ABP-312012-21

Question	Whether the proposed development that will consist of the construction of a 12m pole with 1np. Antenna attached, and equipment cabinets, to form part of Eircom Ltd existing telecommunications and broadband network at Eircom Exchange, Ballyclerihan, Co. Tipperary, is or is not development, or is or is not exempted development. .
Location	Eircom Exchange, Ballyclerihan, Co. Tipperary.

Declaration

Planning Authority	Tipperary County Council
Planning Authority Reg. Ref.	S5/21/98
Applicant for Declaration	Eircom Ltd.
Planning Authority Decision	Is development and is not exempted development.

Referral

Referred by	Eircom Ltd..

Owner/ Occupier	Eircom Ltd..
Observer(s)	None.
Date of Site Inspection	16th July 2022.
Inspector	L.W. Howard.

1.0 Site Location and Description

1.1. The application site is located within the existing Eircom Exchange Compound, which is located within the north-western edge of the Village of Ballyclerihan (see location map attached).

1.2. The Eircom Exchange Compound fronts directly onto the R688 public road Ballyclerihan to Cashel. The Compound has been an established communications installation locally for over 25 years. The compound has a frontage onto the R688 of approximately 18m and a depth away from the R688 of approximately 12.5m. The Compound boundaries are marked by solid block walls on all 4 sides, with a single pedestrian entrance on the R688 frontage.

1.3. The current 3.2m x 3.2m application site is located within the Northern corner of the Compound, and is wholly contained within it.

1.4. No vehicular access is apparent from the R688 onto the Eircom Exchange Compound. A single modest gated pedestrian entrance exists along the frontage, enabling pedestrian access onto the Compound. An enlarged concrete surfaced space exists along the frontage of the compound, which appears used for parking, by Eircom vehicles when using the Exchange Compound. No road markings are apparent, clearly designating this space.

The R688 is marked with 2-solid white lines throughout its length, in the vicinity of the Eircom Exchange Compound. The outside edges of the R688 are both marked with a broken yellow line (see photographs attached taken at the time of physical inspection)..

2.0 The Question

2.1. A question has arisen as to whether the construction of a 12m pole with 1np. Antenna attached, and equipment cabinets, to form part of Eircom Ltd existing

telecommunications and broadband network at Eircom Exchange, Ballyclerihan, Co. Tipperary, is or is not development, or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority Declaration refers to the receipt of a Section 5 application from Eircom Ltd. , under the terms of Exempted Development Class 31(b) and Class 31(f) of the Planning and Development Regulations 2001.
The development will consist of the construction of a 12m pole with 1no. antenna attached and 2no. equipment cabinets, all to form part of Eircom Ltd. Existing telecommunications and broadband network, and located within the existing Eircom Exchange Compound, Ballyclerihan, Co. Tipperary.

The Declaration is that the said construction of a 12m pole with 1no. antenna attached and 2no. equipment cabinets, is development and is not exempted development.

The Declaration indicates that the following legislative provisions were taken into account :

(a) Sections 2, 3, and 4 of the Planning and Development Act, 2000, as amended, and
(b) Articles 6 of the Planning and Development Regulations, 2001, as amended, and
(c) Class 31(b) and 31(f) of Part 1 of Schedule 2 of the Planning and Development Regulations 2001, as amended, and .
(d) Article 9(1)(a)(ii) and (iii) of the Planning and Development Regulations 2001, as amended.

Having regard to the drawings and documentation before it as part of the Declaration application, the Planning Authority concluded that the proposed development

"constitutes development within the meaning of the Planning and Development Act 2000, as amended, and is not exempted development".

The Declaration indicates that the Planning Authority consider that the 'planning exemptions' under Class 31(b) and 31(f) are restricted under Article 9(1)(a)(ii) and (iii) of the Planning and Development Regulations 2001, as amended. The Planning Authority is not satisfied that :

- the development would not involve the formation of a vehicular entrance to the site from the R688.
- the development would not endanger public safety by reason of traffic hazard, or obstruction of road users".

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Planning Officers report (26/10/2021) sets out the basis for the Planning Authority's 'Declaration', and is summarised as follows :

- Clarification of –
  - detail of request made for a Declaration under Section 5 of the Planning and Development Act 2000, as amended
  - detail of works proposed
  - the site location

- Relevant Statutory Provisions

Planning and Development Act 2000, as amended

Section 3(1) states as follows – "*In this Act, 'development' means, except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structure or other land*"

Section 2(1) defines 'works' as –

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

Section 4(1)(a)-(l) sets out what is exempted development for the purposes of this Act, and includes at (h) "*development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure, or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures*".

Planning and Development Regulations 2001 (as amended)

Article 6 Identifies exempted development for the purposes of the Act. Exemptions are enabled through the provisions of the Regulations 2001 (as amended) as follows :

Class 31 The carrying out by a Statutory Undertaker authorised to provide a telecommunications service of development consisting of the provisions of –

(b) overhead telecommunications including the erection of poles or other support structures of the use of existing poles or other support structures.

This Exemption is subject to the following limitations –

1. Poles or other support structures carrying overhead lines shall not exceed 12m in height.
2. Poles or other support structures carrying other equipment shall not exceed 12m in height and 0.6m in diameter measures at the widest point, where other equipment means 2 transmitting or receiving dishes (the diameter of which shall not exceed 0.6m), or 1 panel antenna (the

dimensions of which shall not exceed 0.85m in length **x** 0.65m in width **x** 0.2m 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..

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.

Class 31 **(f)** cabinets forming part of a telecommunications system.

This Exemption is subject to the following limitations –

1. the volume above ground level of any such cabinet shall not exceed $2m^3$ measures externally.

Article 9 Identifies circumstances where development identified under **Article 6** loses its exempted development status.

Article 9(1)(a) the instances where development, to which Article 6 relates, shall not be exempted development for the purposes of the Act, if the carrying out of works would –

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

(iii) endanger public safety by reason of traffic hazard or obstruction of road users

(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.

- Assessment :
  - Clarify application site location within the existing Eircom Exchange Compound, Ballyclerihan, Co. Tipperary.
  - No relevant planning history on record.
  - **"'Is' or 'Is Not' Development"**
    - Consider the proposal constitutes "works" as understood by the Planning & Development Act 2000, as amended and therefore constitutes "development" within the meaning of the Planning & Development Act 2000, as amended.
  - **"'Is' or 'Is Not' Exempted Development"**
    - Consider that the proposal meets the planning exemption under Class 31(b) and 31(f) of the Planning & Development Regulations 2001, as amended, and Conditions attached to these exemptions.
  - **"Restrictions under Article 9"**
    - having regard to the nature and scope of the proposal, reference considerations under Article 9(1)(a)(ii),(iii) & (vi) as relevant.
    - Having regard to the 'Further Information' (F.I.) documentation, the Planning Authority consideration it is not satisfied that the development would not involve the formation of a vehicular entrance to the site from the R688.
    - Regard given to information submitted detailing the method of construction, the plant and machinery involved, the physically restricted nature of the site and proximity to the public road – R688.

- Having regard to the above detail and information, Planning Authority conclude it is not satisfied that the development proposed "would not endanger public safety by reason of traffic hazard or obstruction of road users".
- Accordingly, conclude that "the planning exemption under Class 31(b) and 31(f) are restricted under Article 9(1)(a)(ii) & (iii) of the Planning & Development Regulations 2001, as amended".

- **Requirement for 'Appropriate Assessment (AA)' & 'Environmental Impact Assessment (EIA)'**
  - Confirm proposal screened as to the requirements for AA.
  - The screening assessment shows that the proposal does not impact on any Natura 2000 site.
  - A copy of the 'Habitats Directive Assessment Screening Report for Planning Applications', attached as pages no.06-09 to the Planning Officers report.
  - Further, the proposed development subject to a preliminary examination to determine the requirement for EIA. EIA is not required in respect of the development (reference 'Preliminary Examination' section at end of above referenced 'Screening Report').

- **Recommendation**

A Question has arisen as to whether the following development on lands at Eircom Exchange Compound, Ballyclerihan, Co. Tipperary, is or is not development and is or is not exempted development.

12m pole with 1no. antenna and 2no. equipment cabinets.

Tipperary County Council, in considering this referral, had regard particularly to ::

(a) Sections 2, 3, and 4 of the Planning and Development Act, 2000, as amended, and

(b) Articles 6 of the Planning and Development Regulations, 2001, as amended, and

(c) Class 31(b) and 31(f) of Schedule 2, Part 1 of the Planning and Development Regulations 2001, as amended, and

(d) Article 9(1)(a)(ii) and (iii) of the Planning and Development Regulations 2001, as amended.

Tipperary County Council conclude that the proposed development as presented on the Drawings provided with the Declaration application, constitutes development within the meaning of the Planning and Development Act 2000, as amended, and is not exempted development.

The Planning Authority consider the 'planning exemptions' under Class 31(b) and 31(f) are restricted under Article 9(1)(a)(ii) and (iii) of the Planning and Development Regulations 2001, as amended. The Planning Authority is not satisfied that :

- the development would not involve the formation of a vehicular entrance to the site from the R688.
- the development would not endanger public safety by reason of traffic hazard, or obstruction of road users.

3.2.2. Other Technical Reports

4.0 Planning History

No relevant planning history apparent.

5.0 Policy Context

5.1. Development Plan

5.1.1. The new 'Tipperary County Development Plan 2022-2028, for the entire County of Tipperary, was made on the 11th July 2022, and became effective on the 22nd August 2022.

5.1.2. Volume 2 : 'Settlement Guide & Settlement Plans' designates Ballyclerihan as a "2(a) Service Centre (Population over 400)", and for which a "Settlement Plan" has been completed (see copy attached).

5.1.3. The Application Site located within Ballyclerihan, is designated with the "Existing Residential" Zoning Objective – "To preserve and enhance existing residential development and residential amenity and provide for additional facilities where gaps are identified".

5.2. Natural Heritage Designations

None

6.0 The Referral

6.1. Referrer's Case

6.1.1. The referral was lodged by 'Focusplus' on behalf of Eircom Limited. Having particular regard to the Planning Authority's stated reasons, the main grounds of the referral can be summarised as follows :

6.1.2. The existing Eircom Exchange Compound has been an established communication installation for over 20years.

6.1.3. The addition of the proposed 12m structure would be an upgrade to the existing installation.

6.1.4. Once completed, the upgraded installation would not result in an increase in the number of persons visiting the Compound. It will only be used 2 or 3 times per year to access the equipment.

6.1.5. Therefore, the proposed development would have no impact on the traffic of the R688 main road.

6.1.6. Reference this opinion as consistent with An Bord Pleanala decisions under :

PL18.241306 "traffic generated by the proposal post the construction stage would be minimal and so I raise no objection to the proposed means of access", and

ABP-308491-20 "the issue of potential traffic hazard, having regard to the nature of the development, the level of traffic generated during the operational period is likely to be minimal, and during the construction period standard traffic management measures would be appropriate".

6.1.7. Clarify that all vehicles will use the existing parking area that Eir regularly uses for their large maintenance vehicles. Reference 'Image-1' included in the documentation as illustrative of such use.

6.1.8. This has been an established parking area used by 'Eir employees' for over 20-years, and is more than capable to accommodate all constructive vehicles. Reference 'Image-2' included in the documentation as illustrative of such historical use.

6.1.9. The proposed Eir Ltd development would not cause any traffic hazard or obstruction of road users. There is an established access for maintenance vehicles to the existing Compound.

6.1.10. Having regard to the Information submitted in these documentation, request that An Bord Pleanala "overturn the decision of Tipperary County Council and deem the development as exempt".

6.2. Planning Authority Response

6.2.1. No direct response apparent to the "Grounds for Appeal" submitted by 'Focusplus' on behalf of Eircom Limited.

6.2.2. In response to request made by An Bord Pleanala dated 23rd November 2021, the Planning Authority respond as follows (25/11/2021) :

- Confirm no record of previous planning decisions on the application site.
- Date of Section 5 application to the Planning Authority was 26th August 2021.

- Description on the Section 5 application confirmed as follows – "the development will consist of the construction of a 12m pole with 1no. antenna attached and 2no. equipment cabinets. The development will form part of Eircom Ltd. Existing telecommunications and broadband network".
- Further Information requested on 28/09/2021, received on 06/10/2021 and the Section 5 Declaration issued on 27/10/2021.
- Confirm Eircom Ltd. is the owner.

6.3. Owner / Occupier's Response

Not relevant in this case.

6.4. Further Responses

None.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000 (as amended)

Section 2(1) *"'Works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal ...".*

Section 3(1) *"'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 structure or other land".*

Section 4(1) Identifies exempted development for the purposes of the Act.

7.2. Planning and Development Regulations, 2001

Article 6 Identifies exempted development for the purposes of the Act.

Article 9 Identifies circumstances where development identified under article 6 loses its exempted development status.

7.3. Other

None.

8.0 Assessment

8.1. Having regard to the terms of the 'referral' as stated to the Board, and to the terms of the 'Declaration' as issued by the Planning Authority, and bearing in mind that a 'referral' to the Board under Section 5 of the Act is for a review of the 'Declaration', I express the understanding that the purpose of this 'referral' is not to determine the acceptability or otherwise of the proposed construction of a 12m pole with 1no. antenna attached and equipment cabinets, in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes 'development', and if so falls within the scope of 'exempted development'.

8.2. Is or Is Not Development

8.2.1. The first matter for the Boards attention is to determine whether or not the construction of a 12m pole with 1no. antenna attached and equipment cabinets, constitutes 'development'. Development is defined in the Act as the carrying out of any 'works' on, in, under or over land or the making of any material change of use in any of the structures or other land. 'Works' includes the act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.

8.2.2. Having regard to all of the information available, I believe the intention of Eircom Ltd. as stated, is the construction of a 12m pole with 1no. antenna attached and equipment cabinets, on a presently undeveloped portion of its lands within the existing Eircom Exchange Compound at Ballyclerihan, County Tipperary (see attached copies of relevant drawings and site layout plan included in the current 'referral' documentation, Google-Earth Satellite & Streetview Imagery, and photographs taken at the time of physical inspection).

8.2.3. In my view therefore, the construction of the 12m pole with 1no. antenna attached and equipment cabinets, clearly involves 'works', as defined in Section 2(1), and as such is 'development' within the meaning at Section 3(1) of the Act. While the development may not yet have commenced, I am satisfied that the 'proposed works' constitute 'works' and therefore 'development'.

8.2.4. I note that this is not disputed by Eircom Ltd. the owner / operator at the existing Eircom Exchange Compound, and who have made the current 'referral' to the Board under Section 5 of the Act.

8.3. Is or is not exempted development

8.3.1. Whereas in the Section 5 'referral' application documentation, Eircom Ltd. do not dispute the terms of the Declaration as issued by the Planning Authority that the 'proposed works' constitute 'works' and therefore 'development', Eircom Ltd. does clarify their appeal is against the Declaration made by the Planning Authority that the proposed development is not 'exempted development'. Specifically, Eircom Ltd. reference the exemption relief enabled under Class 31(b) and 31(f) of Part 1 of Schedule 2 of the Planning & Development Regulations 2001, as amended, as being relevant and applicable to their application.

8.3.2. Having regard to the information available, I share the view understood of both of the Planning Authority and Eircom Ltd. that the proposed "12m pole with 1no. antenna attached and equipment cabinets" meets the planning exemption under Class 31(b) and 31(f) of Part 1 of Schedule 2 of the Planning & Development Regulations 2001,

as amended, and the Conditions attached to these exemptions, limiting their application.

8.3.3. In this regard it is apparent that Eircom Ltd. had regard to these limitations in their definition of the scope of the proposed development (ie. Poles not to exceed 12m height and volume of cabinets above the ground level, forming part of a telecommunications system, not to exceed 2m³ measured externally).

8.4. **Restrictions on exempted development**

8.4.1. However, whereas Article 6 identifies exempted development for the purposes of the Act, Article 9 identifies circumstances where development identified under Article 6 loses its exempted development status. In the current case, the Planning Authority reference Article 9(1)(a)(ii) & (iii) as being relevant, setting the instances where development to which Article 6 relates, shall not be exempted development for the purposes of the Act, if the carrying out of works 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 4m in width", and

"(iii) endanger public safety by reason of traffic hazard, of obstruction of road users".

8.4.2. I have had regard to all of the information on file, and with particular reference to the information and project details submitted to the Planning Authority as 'Further Information F.I.', and to my own observations made at the time of physical inspection (see photographs attached). Firstly, I am not satisfied that the proposed development would not involve the formation of a vehicular entrance onto the Eircom Exchange Compound, within which the application site is located. Relevant drawings and site layout plans submitted, together with the Photographs attached, clearly show that excepting for the modest gated pedestrian entrance onto the Compound, all of the remainder of the approximately 18m frontage to the R688 compromises of a solid block wall.

8.4.3. Noting Eircom Ltds. clarification as F.I. that construction machinery and plant will be required to complete construction in accordance with the programme of works submitted as F.I., I am inclined to consider as reasonable that even a modest breach of the compound road frontage onto the R688 must be affected in order to facilitate effective movement of necessary machinery, plant, materials and personal onto and off the Compound during works undertaken. In my view this is unavoidable. In fact, Eircom Ltd. (c/o Focusplus) appear to concede this in their F.I. response to Issue No.1 raised by the Planning Authority, wherein they state – "Vehicular access will be required ...".

The fact that Eircom Ltd. commit as part of their 'Program of Works' and in F.I. response to Issues raised for clarification by the Planning Authority, to storage and parking of construction materials, machinery, plant and personnel vehicles within the Eircom Exchange Compound and the existing lay-by further substantiates the need for creation of a new opening within the compound boundary frontage directly onto the R688.

8.4.4. Secondly, Eircom Ltd. have submitted details both in their original 'Referral' submission to the Planning Authority, their subsequent F.I. submission to the Planning Authority and in their current Section 5 'Referral' application to the Board, detailing clarifying and substantiating vehicular access, construction methodology and '-program of works', the construction compound, construction machinery, plant and personal vehicles parking, construction traffic management, the duration of the period of construction and the parking of maintenance vehicles and frequency of maintenance visits to the site once the installation is operational.

8.4.5. In addition to onsite development works, Eircom Ltd. weight reference to their active use through the duration of the construction phase, of the existing 'lay-by' along the Compound frontage onto the R688. Assert that this has been an established parking area for over 20-years (see 'Images-1 and -2' included in the appeal documentation, as well as the photographs attached, taken at the time of physical inspection). As seen in photographs, this space compromises an enlarged concrete surfaced area along approximately 3/4's of the compound frontage onto the R688, half of which covers the R688 'hard shoulder' and the other half the pedestrian sidewalk through the length of

the R688 in this vicinity and serving the established residential estate behind the Eircom Exchange Compound. I note that pedestrian movement is only facilitated by a 'sidewalk' along this one side of the R688.

8.4.6. Notwithstanding the conviction argued by Eircom Ltd., and having particular reference to the proposed construction methodology, the 'program of works', the plant, materials and machinery involved and their movement onto and off the compound, the physically restricted nature of the site, itself located within the Eircom Exchange Compound, the potential for threat to an established local pedestrian route, and the close proximity to the R688 public road (ie. Ballyclerihan to Cashel), and to my observations made at the time of physical inspection (see photographs attached), I am not satisfied that the proposed development and associated site works would not endanger public safety by reason of traffic hazard or obstruction of road users. I share the opinion of the Planning Authority in this regard.

8.4.7. Under Article 9(1)(a)(ii) & (iii) therefore, the instances where development to which Article 6 relates (ie. current Eircom Ltd. proposed development), shall not be exempted development for the purposes of the Act, if the carrying out of works 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 4m in width", and

"(iii) endanger public safety by reason of traffic hazard, of obstruction of road users".

8.4.8. Whereas Eircom Ltd. in their submissions distinguish between the 'construction phase', and the ongoing 'operational phase' of the development, emphasising that during 'operational phases' levels of traffic generated "would be minimal", I express the understanding that the scope of the Boards attention and consideration under Article 9(1)(a)(ii) & (iii) is restricted to "the carrying out of works".

8.4.9. As set out above, I am therefore not satisfied that "the carrying out of works" would not involve the formation of a vehicular entrance to the site from the R688 (Article

9(1)(a)(ii)), and would not endanger public safety by reason of traffic hazard or obstruction of road users (Article 9(1)(a)(iii)).

8.4.10. Accordingly, I conclude that the planning Exemption under Class 31(b) and 31(f) are restricted under Article 9(1)(a)(ii) and (iii) of the Planning & Development Regulations 2001, as amended. In my view therefore, the proposed development is not 'exempted development'.

8.5. Appropriate Assessment

Having regard to the nature and scale of the proposed 12m pole with 1no. antenna attached and equipment cabinets, on a portion of lands within the existing Eircom Exchange Compound at Ballyclerihan, County Tipperary, to the location of the application site within a fully serviced urban receiving environment, and to the separation distance and absence of a clear direct pathway to any European site, no Appropriate Assessment issues arise and it is not considered that the proposed development would be likely to have a significant effect individually or in combination with other plans or projects on a European site

9.0 Recommendation

9.1. 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 construction of a 12m pole with 1no. antenna attached and equipment cabinets, on a portion of lands within the existing Eircom Exchange Compound at Ballyclerihan, County Tipperary 'is or is not development' or 'is or is not exempted development':

AND WHEREAS Eircom Ltd. requested a 'declaration' on this question from Tipperary County Council and the Council issued a 'declaration' on the 27th day of October, 2021 stating that the matter 'was development', and 'was not exempted development':

AND WHEREAS Eircom Ltd. referred this 'declaration' for review to An Bord Pleanála on the 23rd day of November, 2021:

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

(a) Sections 2, 3 and 4 of the Planning & Development Act, 2000, as amended, and

(b) Article 6 of the Planning & Development Regulations, 2001, as amended, and

(c) Class 31(b) and 31(f) of Schedule 2, Part 1 of the Planning and Development Regulations 2001, as amended (ie. the Exempted Development regulations including the Conditions and Limitations associated with Class 31(b) and 31(f)), and

(d) Article 9(1)(a)(ii) and (iii) of the Planning & Development Regulations, 2001, as amended, and

(e) The provisions of the 'Tipperary County Development Plan 2022-2028', and

(f) Existing use and layout of development within the Eircom Exchange Compound, the location of the proposed development within the existing Compound, all proximate to the R688 public road along the length of the Compounds NE-facing boundary frontage, and the established residential neighbourhood to the rear (west), and

(g) The documentation and submissions received from the parties to the 'referral' on file, and the report of the Planning Inspector.

AND WHEREAS An Bord Pleanála has concluded that:

The construction of a 12m pole with 1no. antenna attached and 2no. equipment cabinets comes within the scope of the definition of development contained in Section 3, Planning & Development Act, 2000 (as amended).

There is no relevant express exemption provided for in either Section 4, Planning & Development Act, 2000 (as amended) or Article 6, Planning & Development Regulations, 2001 (as amended).

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 construction of a 12m pole with 1no. antenna attached and 2no. equipment cabinets, all to form part of Eircom Ltd. existing telecommunications and broadband network, and located on land within the existing Eircom Exchange Compound, at Ballyclerihan, County Tipperary, 'is development' and 'is not exempted development'.

LW Howard
Planning Inspector
16 December 2022

An Bord Pleanála

Board Direction
ABP-312012-21

The submissions on this file and the Inspector's report were considered at a Board meeting held on 09/06/2023.

The Board decided, as set out in the following Order, that

Board Order as follows:-

WHEREAS a question has arisen as to whether the construction of a 12 metre pole with one number antenna attached and two equipment cabinets that form part of Eircom Ltd. Existing telecommunications and broadband network at Ballyclerahan, Clonmel, County Tipperary is or is not development or is or is not exempted development.

AND WHEREAS Eircom Limited care of FocusPlus Limited of N3 Arbourfield House, Dundrum Business Park, Dundrum Road, Dublin requested a declaration on this question from Tipperary County Council and the Council issued a declaration on the 27th day of October, 2021 stating that the matter was development, and was not exempted development:

AND WHEREAS Eircom Limited referred this declaration for review to An Bord Pleanála on the 23rd day of November, 2021:

AND WHEREAS An Bord Pleanála reframed the question to be decided as follows: 'whether the construction of a 12 metre pole with one number antenna attached and

equipment cabinets positioned above the ground level, forming part of a telecommunications system, not exceeding two cubic metres when measured externally, on a portion of lands within the existing Eircom Exchange Compound at Ballyclerahan, County Tipperary is or is not development or is or is not exempted development'

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

(a) Sections 2, 3 and 4 of the Planning and Development Act, 2000, as amended,

(b) Article 6 and 9 of the Planning and Development Regulations, 2001, as amended,

(c) Class 31(b) and 31(f) of Schedule 2, Part 1 of the Planning and Development Regulations 2001, as amended and

(d) The documentation and submissions on file and the report of the planning inspector.

AND WHEREAS An Bord Pleanála has concluded that -

(a) The construction of a 12 metre pole with one number antenna attached and two number equipment cabinets comes within the scope of the definition of 'works' and 'development' contained in Section 2 and 3 of the Planning and Development Act, 2000 (as amended),

(b) The construction of a 12 metre pole with one number antenna attached would come within the scope of Article 6 (Exempted Development) and related Class 31(b) of Schedule 2 (Part 1: Exempted Development - General) the said Regulations, noting the development as described would be carried out by a statutory undertaker authorised to provide a telecommunications service and that it would meet the conditions and limitations set out for this class of development for it to be exempted development,

(c) The provision of the ancillary cabinet equipment would come within the scope of Article 6 (Exempted Development) and related Class 31(f) of Schedule 2 (Part 1: Exempted Development - General) the said Regulations, noting the development as described would be carried out by a statutory undertaker authorised to provide a telecommunications service and that it would meet the conditions and limitations set out for this class of development for it to be exempted development,

(d) On the basis of the description of the development, none of the restrictions on exemption as set out in Article 9 arise,

(e) The works which are the subject of this referral are not likely to have significant effects on any European sites,

(f) The works which are the subject of this referral do not fall within a class of development set out in Part 1 or Part 2 of Schedule 5 of the Planning and Development Regulations, 2001, as amended, and therefore, are not subject to Environmental Impact Assessment requirements.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by Section 5(3)(a) of the Planning and Development Act, 2000, as amended, hereby decides that the construction of a 12 metre pole with one number antenna attached and equipment cabinets positioned above the ground level, forming part of a telecommunications system, not exceeding two cubic metres when measured externally, on a portion of lands within the existing Eircom Exchange Compound at Ballyclerahan, County Tipperary, is development and is exempted development.

In deciding not to accept the inspector's recommendation that the subject proposals would not constitute exempted development because it would likely involve the formation of a vehicular access on to the R688 fronting the site and endanger public safety by reason of traffic hazard or obstruction to road users and would therefore fall within the restrictions on exemptions that are set out in Article 9(ii) and (iii) of the said Regulations, the evidence on file, including the description of the works presented by the referrer, does not support this finding. It is expressly stated in the information provided by the referrer in its response to the planning authority's

request for further information and in the appeal received by the Board that vehicular access will be in the existing lay-by which is used at the established Eir exchange. A marked aerial photograph of this layby area was presented with the response to the further information and also furnished with the appeal. Having reviewed this information, the Board concluded that the layby is in existence and the Board was otherwise satisfied that the works described would not involve the formation of any new access or material widening to the existing pedestrian access on to the public road.

The Board also concluded that the development could not reasonably be considered to give rise to a traffic hazard noting the modest scale of the works proposed and the infrequent traffic movements that would likely arise, for access and maintenance purposes only, in addition to noting that no new access onto the public road would be created. Accordingly, the Board was satisfied that the provisions of Article 9 (ii) and (iii) of the said Regulations that were relied on by the inspector to conclude that the development would not constitute exempted development, do not arise and therefore the proposals as described constitute development that is exempted development within the meaning of the Planning and Development Act 2000, as amended.

Board Member: Patricia Calleary **Date:** 09/06/2023

Patricia Calleary