

Appeal No: VA19/5/0579

**AN BINSE LUACHÁLA
VALUATION TRIBUNAL**

**NA hACHTANNA LUACHÁLA, 2001 - 2015
VALUATION ACTS, 2001 - 2015**

RONALD McGRANE

APPELLANT

AND

COMMISSIONER OF VALUATION

RESPONDENT

In relation to the valuation of

Property No. 2117501 Mast at Corraweelis, Enniskeen, Bailieboro, County Cavan.

B E F O R E

Carol O'Farrell - BL

Chairperson

Fergus Keogh - MSCSI, MRICS

Member

Martin Connolly - M.Agrs. M.Sc. MSCSI FCInstArb

Member

**JUDGMENT OF THE VALUATION TRIBUNAL
ISSUED ON THE 3RD DAY OF OCTOBER 2022**

1. THE APPEAL

- 1.1 By Notice of Appeal received on the 14th of October 2019 the Appellant appealed against the determination of the Respondent pursuant to which the net annual value '(the NAV)' of the above relevant Property was fixed in the sum of €15,660.
- 1.2 The sole ground of appeal advanced by the Appellant is that the Property ought not to be included in the valuation list because the Appellant "*No longer uses the mast for commercial activity; mast connection ceased in September 2014.*"
- 1.3 The Appellant contended for a zero valuation on the basis that the Property is incapable of beneficial occupation.

2. REVALUATION HISTORY

- 2.1 On the 29th of March 2019 a copy of a proposed valuation certificate was issued in relation to the Property indicating a valuation of €15,660.

- 2.2 No representations were made to the valuation manager as the Appellant did not receive the proposed valuation certificate. A final valuation certificate issued on the 10th of September 2019 stating a valuation of €15,660.
- 2.3 The date by reference to which the value of the Property was determined is the 15th of September 2017.

3. THE HEARING

- 3.1 The Appeal proceeded by way of an oral hearing held remotely on the 23rd of August 2022. At the hearing, the Appellant was represented by Mr. Paul Mooney MSCSI, MRICS (Hons) Dip Rating of Avison Young and the Respondent was represented by Mr David Dodd B.L. instructed by the Chief State Solicitor who called Mr. Liam Diskin B.Sc. (Property Management & Investment) of the Valuation Office to give evidence.
- 3.2 In accordance with the Valuation Tribunal Rules 2019, the parties' valuers filed their respective précis of evidence prior to the commencement of the hearing and at the oral hearing, each valuer, having taken the oath, adopted his précis as his evidence-in-chief in addition to giving oral evidence.

4. FACTS

- 4.1 From the evidence adduced by the parties, the Tribunal finds the following facts.
- 4.2 The appeal Property comprises a mast 30.5 metres high and a concrete services building measuring nine square metres built on a concrete slab foundation. It is situated on a parcel of unfenced land on the side of Loughanleagh mountain at Corraweelis, Bailieborough in County Cavan, bordered by agricultural lands and forest, approximately 4km southeast of Bailieborough and 6km southwest of Kingscourt.
- 4.3 The parcel of land upon which the mast and services building are erected is comprised in Folio CN10089F and the Appellant is registered on the Folio as a joint owner since the 8th of June 1992.
- 4.4 The mast can be accessed on foot through Coillte owned and managed pine forested lands through a gate which is approximately 0.5km south of the mast or alternatively by the Appellant through neighbouring farmlands, owned by the person who sold the mast site to the Appellant. This alternative access route facilitates vehicular access proximate to the mast, the short uphill section having to be traversed on foot.
- 4.5 The mast is 30.5 metres in height. The main frame is constructed with 6-millimetre steel tubing in 10-foot segments. It is supported by three guy wires approximately four metres apart that are secured to three cable anchors which have a concrete base. There is also a small ancillary concrete building which houses the services to the mast. It was constructed in 1992 and used to provide two-way radio communications.

- 4.6 By letter dated the 21st of September 2014 Kells Electrical Services Limited informed the Commissioner for Communication Regulation that it wished to discontinue Licence No. CR 5795 in respect of the mast.
- 4.7 The electricity services provided by Electric Ireland to the Property were disconnected on or about the 9th of July 2015.
- 4.8 The Appellant ceased the use of the mast in or about September 2014.
- 4.9 The Appellant has derived no pecuniary benefit from the mast since in or about September 2014.
- 4.10 There is rust evident on the guy wires.
- 4.11 The mast is structurally sound.
- 4.12 The mast is suitable only for hosting two-way radio equipment.

5. ISSUES

- 5.1 The sole issue for determination is whether at the valuation date the Property was a relevant property within the meaning of section 3 and Schedule 3 of the Valuation Act 2001. In determining this issue, the Tribunal is bound by the authorities as to the essential ingredients of rateable occupation which include the requirement of beneficial occupation.

RELEVANT STATUTORY PROVISIONS:

- 6.1 By virtue of section 3 of the 2001 Act, “relevant property” must be construed in accordance with Schedule 3 which, in material part, provides:
1. Property (of whatever estate or tenure) which falls within any of the following categories and complies with the condition referred to in *paragraph* 2 of this Schedule shall be relevant property for the purposes of this Act:
 - (a) buildings,
 - (b) lands used or developed for any purpose (irrespective of whether such lands are surfaced) and any constructions affixed thereto which pertain to the use of that development. ...
 2. The condition mentioned in paragraph 1 of Schedule 3 is that the property concerned –
 - (a) is occupied and the nature of that occupation is such as to constitute rateable occupation of the property, that is to say, occupation of the nature which, under the enactments in force immediately before the commencement of this Act (whether repealed enactments or not), was prerequisite for the making of a rate in respect of occupied property, or

(b) Is unoccupied but capable of being subject of rateable occupation by the owner of that property.

7. APPELLANT'S CASE

- 7.1 At the outset Mr Mooney drew the Tribunal's attention to some errors in the Notice of Appeal, which both the Tribunal and the Respondent accepted were unfortunate but not, in any event, misleading as to the basis upon which the appeal had been made.
- 7.2 Mr Mooney describes the mast and its location. He said the mast is in poor condition but remains securely attached to the site. He confirmed that the Appellant had ceased operations in 2014, when he discontinued the licence held under the Wireless Telegraphy Act, 1926 and that the electricity supply was disconnected in 2015.
- 7.3 Mr Mooney confirmed no right of way had been granted over the vendor's lands to facilitate access to the mast and in his view the absence of a registered right of way to the mast site was a disability affecting the property which would render it unattractive to the hypothetical tenant. Since the anti-mast protests held in the early 2000s Coillte will only facilitate pedestrian access to the appeal Property through their adjoining forest lands. He explained that the Appellant also has permissive access to the Property over the farmlands of the person from whom he bought the site.
- 7.4 In Mr Mooney's opinion, the mast is in poor, if not derelict, condition and would be replaced by any incoming tenant who, he said, would also have to acquire an operating license and establish an electricity connection. Mr Mooney contended that the mast is not capable of beneficial occupation because it is not occupied by the Appellant, is no longer operational, does not benefit from an operating license or an electricity connection and is overgrown by heather. He said one of the three essential ingredients of rateable occupation identified by the High Court decision in *Telecom Eireann v Commissioner of Valuation [1994] 1 IR 96* was absent, namely, that the Property must be of benefit to the owner. He expressed the view that no alternative use could be made of the mast site in its present state. He further cited para. 27 of the judgement of the High Court in *Fibonacci Property ICAV v Commissioner of Valuation [2020] IEHC 31*. At paragraph 27 where the Court stated:
- "...it is common case that in deciding whether an owner is in beneficial occupation, one does not look only at the question of pecuniary benefit or whether a profit may be made but may also look at the wider question as to whether it is in "immediate use and enjoyment of the land" ..."*
- 7.5 Under cross examination Mr Mooney accepted that he is not an expert in structural engineering and that the Appellant had decided to cease the use of the mast for his own business reasons. He also accepted that acquiring an operating license and re-establishing a power connection would not be difficult and that at the valuation date there were two access routes to the mast.

7.6 In response to a question from the Tribunal as to what he meant by 'poor condition' Mr Mooney said the site had become overgrown, with rust evident on the guy wires. He went on to clarify, however, that this was a valuer's view, and that he was not contending that it was structurally unsound. He confirmed that the use of the mast had ceased because the Appellant's business had ceased to be viable due to the limited market for two-way communications. He pointed out that modern lattice masts can accommodate not only two-way radio equipment but also mobile phone and broadband equipment, whereas the Appellant's mast by virtue of its lighter construction, is limited to use for two-way radio equipment.

8. RESPONDENT'S CASE

8.1 Mr Diskin provided a summary of his case, his response to the Appellant's case, the valuation history, a location map, floor plan, block plan and photographs in support of his description and condition of the mast on the Property.

8.2 Mr Diskin disagreed with Mr Mooney's evidence in one important respect. While accepting that rust is evident on the guy wires and that he too is not a structural engineer, he said that the guy wires are taut and neither the mast nor its supports showed signs of corrosion or obvious defects when he inspected the Property.

8.3 Mr Diskin stated that in his opinion the mast remains capable of beneficial occupation notwithstanding its non-use by the Appellant and the absence of an operating licence or electricity supply did not, in his view, render the mast incapable of functioning as a telecommunications mast and supporting the necessary equipment.

8.4 Mr Diskin pointed out that no evidence had been adduced on behalf of the Appellant in respect of the costs of restoring power or of obtaining a new operating license and in the absence of such evidence he assumed such costs were not prohibitive.

8.5 When cross-examined Mr Diskin maintained his position that on his visual inspection of the mast the rust evident on the guy wires was at a level to be expected in a 30-year-old structure and did not prevent the mast from functioning as a telecommunications mast.

8.6 When it was put to him by Mr Mooney that there was no alternative use for the mast given its non-viability due to the fall in demand for two-way radio services with the advent of mobile phones, Mr Diskin responded that what is relevant is the question of whether vacant property is capable of beneficial occupation in accordance with Schedule 3 of the Act and not whether the property is capable of alternative use. He did not accept that there is no longer demand for two-way radio services as those services were being provided from the nearby NET1 mast at the valuation date. He did not accept the proposition put to him that the mast had become economically sterile given that the mast is being maintained in situ by the Appellant and pointed out that the area around the concrete base of the mast is kept clear of vegetation overgrowth, which indicated that the mast continues to be of benefit to the Appellant.

9. SUBMISSIONS

- 9.1 Counsel for the Respondent submitted that the issue is whether the mast is a relevant property within the meaning of the Valuation Act 2001 Schedule 3 thereof. Referring to paragraph 1 (a) of Schedule 3, Counsel pointed to the fact that aside from the mast, there is a services building on the Property to facility the operation of the mast and the absence of any evidence to establish that the services building was unfit for purpose. Referring to paragraph 1(b) of Schedule 3, Counsel submitted that the appeal Property fell to be considered as ‘*lands used or developed for any purpose*’ and that the appeal Property comprises land developed for use as a two-way radio mast, which constitutes a beneficial us, there being no evidence that the Property cannot be used for this purpose.
- 9.2 Counsel submitted that paragraph 2(b) of Schedule 3 requires an unoccupied property to be capable of rateable occupation by the owner of the property. He argued that the appeal Property is capable of being used and that neither the fact that the market for two-way radio equipment has shrunk nor that the use of the mast was no longer profitable for the owner does not imply that it is not capable of rateable occupation. He pointed also to the fact that the owner of a vacant commercial property could apply for vacancy rates relief and that paragraph 2(b) of Schedule 3 is a sufficiently clear indication of the Oireachtas’ intention that vacant property should continue to be rateable if it is capable of beneficial occupation.
- 9.3 As to the issue of access to the Property, Counsel contended that a right of way by necessity arises if there is no express grant of a right of way for a parcel of land that is otherwise landlocked. He argued that the factual position is that the Appellant has two means of access to the Property.

10. FINDINGS AND CONCLUSIONS

- 10.1 On this appeal the Tribunal must determine if the Property is relevant property or if it should be removed from the valuation list of relevant rateable properties in the rating authority area of County Cavan by reason of being incapable of beneficial occupation.
- 10.2 An owner of vacant commercial property is not liable for rates if the property is incapable of rateable occupation because such property is not relevant property within the meaning of section 3 and Schedule 3 of the Valuation Act 2001. There is an extensive line of cases on the concept of rateable occupation which incorporates the concept of beneficial occupation. Beneficial occupation does not mean that the property must yield or generate a profit for the owner. In *Fibonacci Property ICAV v Commissioner of Valuation [2020] IEHC 31* the High Court said at paragraph 27:

“...in deciding whether an owner is in beneficial occupation one does not look only at the question of pecuniary benefit or whether a profit may be made but may also look at the wider question as to whether it is in “immediate use and enjoyment of the land” (as characterized in Sinnott v Neale [1984] (IR JUR. REP. 10), even though in that case the defendant was not in occupation of the property) or whether the occupation was of value (O’Malley v The Congested Districts Board 2 [1919] IR 28)”

Accordingly, all that is required is that the Property must provide some benefit or value to its owner. If the Property satisfies this low threshold, then it is relevant property for the purposes of Schedule 3 of the Act and the Respondent has a duty to determine its net annual value to a hypothetical tenant holding under a hypothetical annual tenancy at the valuation date. If the Property is incapable of beneficial occupation, it is not liable to a rate and does fall to be shown in the valuation list.

- 10.3 The Appellant argues that the mast is incapable of beneficial occupation due to
- (i) its poor structural condition,
 - (ii) the fact that the Appellant no longer derives any benefit from the Property, and
 - (iii) the lack of suitable access to the Property.
- 10.4 The Tribunal is of the view that the Appellant's evidence does not contain the necessary particulars to make good the claim that the mast is in poor condition. In his Précis all that was said by Mr Mooney (page 6) is that the mast is in '*poor condition*' and that the mast is "*in poor if not derelict condition*" (page 9). When asked by the Tribunal what he meant by "poor condition", he was unable, apart from saying that there is rust on the guy wires, to provide any precise details to support or establish that the Property was at the valuation date in such poor condition that it had deteriorated to a point where it could be said to be incapable of beneficial occupation unless large scale works of structural repair or replacement were carried out. His evidence falls considerable short of establishing that the mast is structurally unsound or unfit for purpose. A property may be in poor condition or in a state of disrepair but that of itself would not be sufficient for it to be considered incapable of beneficial occupation to warrant exclusion from the valuation list. Further, no evidence was adduced in respect of the structural condition of the services building and in the absence of such evidence it must be assumed that it the building is capable of beneficial occupation.
- 10.5 The fact that the Appellant derives no pecuniary benefit from the Property is not of itself sufficient to satisfy the test that the Property is incapable of beneficial occupation. The subjective intention of an owner of property is not relevant. The situation must be considered and assessed objectively by reference to the physical state of the property at the valuation date. The Tribunal finds on the evidence that there is a market for two-way radio communication services, albeit that market has been reduced with advances in technology. Furthermore, the Tribunal is not persuaded that the Appellant derives no value or benefit from the Property. The mast remains firmly secured to the site and Mr Diskin gave uncontested evidence that the area around the base of the mast continues to be maintained.
- 10.6 In order to enter the Property it is necessary to pass over and through either forest land owned by Coillte or through farmland owned by the person from whom the land was purchased. The Property is effectively landlocked as a right of way was not reserved over the vendor's farmlands in favour of the Property, though there well might be implied rights. However, it would not be appropriate for the Tribunal to make any finding as to whether a way of necessity came into existence upon the transfer of the Property to the Appellant and, if it did so, whether such way of necessity continues to subsist. It is common case that at the valuation date the Appellant could access the Property on foot

through the adjoining forest with the permission of Coillte or alternatively by vehicle and foot through an adjoining farm, with the permission of the farmer who sold the land. In the absence of any evidence that the Appellant has no legally enforceable right to access the Property through those farmlands, the Tribunal cannot make a finding that the Appellant cannot derive any benefit from the Property due to lack of suitable access.

- 10.7 Accordingly, for the above reasons, the Tribunal disallows the appeal and confirms the decision of the Respondent.