



An
Bord
Pleanála

Board Order
04.RL.3531

Planning and Development Acts 2000 to 2019

Planning Authority: Cork County Council

Planning Register Reference Number: D266/16

WHEREAS a question has arisen as to whether the provision of a 20kV underground electrical connection, between Glentanemacelligott wind farm at Glennakeel South, Newmarket, County Cork and Knockacummer wind farm at Meentinnny West and Meentinnny East, Rockchapel, Kanturk, County Cork; a 110kV underground electrical connection between Knockacummer wind farm and Glenlara sub-station at Curraduff, County Cork; and a 110kV underground electrical connection between Glenlara sub-station and Ballynahulla sub-station, Ballynahulla, County Kerry is or is not development or is or is not exempted development:

AND WHEREAS this question was referred to An Bord Pleanála by Cork County Council, County Hall, Carrigrohane Road, Cork on the 23rd day of December, 2016:

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

- (a) sections 2(1), 3(1), 4(4), 172(1), 177U(9) and 182A of the Planning and Development Act, 2000, as amended,

- (b) articles 3, 6 and 9 of the Planning and Development Regulations, 2001, as amended,
- (c) Classes 16 and 26 of Part 1 of the Second Schedule to those Regulations,
- (d) Schedules 5 and 7 of those Regulations,
- (e) the decision of the High Court in *Daly v Kilronan Windfarm Limited*, and, by Order, *Derrysallagh Windfarm Limited*, [2017] IEHC 308,
- (f) the decision of the European Court of Justice in Case C-823/17 *People over Wind v Coillte*, ECLI:EU:C:2018:244, and
- (g) the documentation on file and the reports of the Senior Planning Inspector, which included screening for Environmental Impact Assessment and Appropriate Assessment.

AND WHEREAS An Bord Pleanála has concluded that -

- (a) The laying of the subject underground cables constituted the carrying out of works, and therefore constitute development as defined in the Planning and Development Act 2000, as amended;
- (b) The documentation submitted on file (including the submission by RPS Group Limited, on behalf of Brookfield Renewables) confirmed that the content of the previous submissions seeking Section 5 declarations in relation to the subject grid connections, under planning authority file reference numbers D238/15, D257/10 (An Bord Pleanála reference number 04.RL.2789) and D247/16, had included Appropriate Assessment Screening Reports (also cited in the documentation submitted as Natura Impact Statements) that concluded, on the basis of the implementation of mitigation measures, that the development in question would not have significant effects on certain European sites;

- (c) Having regard to the judgement of the European Court of Justice in case C-323/17, such measures appear to the Board to be measures that were intended to avoid or reduce the harmful effects of the development on the European sites concerned, and accordingly could not be taken into account in screening for Appropriate Assessment, and in so far as they had been taken into account in previous referral determinations, were incorrectly so taken into account;
- (d) In the absence of these measures, An Bord Pleanála cannot be satisfied beyond reasonable scientific doubt, that the development that is the subject matter of this referral would not have had significant effects on the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area (Site Code:004161), the Lower River Shannon Special Area of Conservation (Site Code:002165) and the Blackwater River (Cork/Waterford) Special Area of Conservation (Site Code:002170) in the light of the conservation objectives and qualifying interests of these European sites, and accordingly considers that appropriate assessment is required in relation to the development the subject of this referral. Therefore, the provisions of section 4(4) of the Planning and Development Act, 2000, as amended, apply, and the development is not exempted development.

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (4) of the 2000 Act, hereby decides that the provision of a 20kV underground electrical connection, between Glentanemacelligot wind farm at Glennakeel South, Newmarket, County Cork and Knockacummer wind farm at Meentinnny West and Meentinnny East, Rockchapel, Kanturk, County Cork; a 110kV underground electrical connection between Knockacummer wind farm and Glenlara sub-station at Curraduff, County Cork; and a 110kV underground electrical connection between Glenlara sub-station and Ballynahulla sub-station, Ballynahulla County Kerry is development and is not exempted development.

In not accepting the recommendation of the Inspector that the development in question is exempted development, the Board did not concur with his appropriate assessment screening. The Board noted that the three sections of the grid connection to which this referral refers were the subject of previous determinations by the planning authority and, in one case, also on appeal by An Bord Pleanála. In all of these cases, the submissions included Appropriate Assessment Screening reports or Natura Impact Statements, which took into account the provision of mitigation measures which were intended to avoid or reduce the impacts of the development on a number of European sites - that is, the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area (site code 004161), the Lower River Shannon Special Area of Conservation (site code 002165) and the Blackwater River (Cork/Waterford) Special Area of Conservation (site code 002170).

These determinations were based on, and took into account, the submitted measures. Accordingly, these determinations must be considered to be in breach of the judgement of the European Court of Justice, which judgement is declaratory of the law as it always had been, since the enactment of the Habitats and Birds Directives, and does not solely apply to the period subsequent to the making of that judgement. Accordingly, the Inspector's conclusion that the grid connections did not require Appropriate Assessment, as they were carried out prior to the ECJ judgement in question, is incorrect. Furthermore, as the previous exempted development declarations were similarly incorrect, the Board is not bound by them in reaching a different conclusion in the current case.

Board Order Quashed
by order of the High Court

Dated 7.6.22

Signed: Secretary
C. Clarke

Matters Considered

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions.

Philip Jones

Philip Jones
Member of An Bord Pleanála
duly authorised to authenticate
the seal of the Board.

Dated this 27th day of July 2020

DECISION

Board Order Quashed
By order of the High Court

Dated 7.6.22

Signed Secretary

C. Clarke

DECISION QUASHED