



An
Bord
Pleanála

Inspector's Report ABP-301738-18.

Question

Whether the deviation from the permitted blade length of 45m (90. Diameter) to the constructed blade length of 51.5 (103m diameter) is or is not development and is or is not exempted development as relating to planning permission PD11/400.

Location

Barranafaddock Wind Farm, Co. Waterford.

Declaration

Planning Authority

Waterford City & County Council

Planning Authority Reg. Ref.

PD11/400.

Applicant for Declaration

Waterford City & County Council.

Referral

Referred by

Waterford City & County Council.

Owner/ Occupier

Barranafaddock Sustainable Electricity Ltd.

Observer(s)

None.

Date of Site Inspection

30th August, 2018.

Inspector

A. Considine.

1.0 Site Location and Description

- 1.1. The subject site is located in the north western area of Co. Waterford, close to the border with Counties Cork and Tipperary. The closest village to the site is Araglin, approximately 1.5km to the north of the existing windfarm, with the towns of Kilworth, 10km and Fermoy 14km to the west, all located in Co. Cork. Ballyduff, Co. Waterford, is located approximately 3km to the south east of the wider windfarm site.
- 1.2. There is an existing windfarm erected on the site, comprising 12 turbines. These turbines were permitted with 9 permitted under PD11/400 and 3 permitted under PD13/32.
- 1.3. The permissions provided for 11 turbines with hub heights of 80m and with rotor diameter of 90m – an overall tip height of 125m and 3 turbines with hub heights of 80m and with rotor diameter of 103m – overall tip height of 130.5m

2.0 The Question

- 2.1. Whether the deviation from the permitted blade length of 45m (90. Diameter) to the constructed blade length of 51.5 (103m diameter) is or is not development and is or is not exempted development as relating to planning permission PD11/400, all at Barranafaddock Wind Farm, Co. Waterford.

3.0 Planning Authority Declaration

3.1. Declaration

The Planning Authority, as the referrer in this case, has not issued a declaration with regard to the question.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The Senior Planner prepared a report which sets out the planning history of the site, the main complaints received in relation to the windfarm as well as responses to said issues including elements of compliance with planning conditions.

4.0 Planning History

ABP ref PL24.213290 (PA ref PD04/1559): Permission sought for 12 no. turbines (80m hub height and 80m blade diameter), a 40m wind measuring anemometer pole, 110kV sub-station including control building, construction and upgrading of site entrances, site tracks and associated works.

The proposed development was altered during the PAs assessment whereby the turbine no. 12 was omitted, the height of 3 turbines was reduced to 60m hub heights and blade diameter of 80m giving an overall height of 100m. An EIS was submitted with this application.

PA ref PD10/371: Permission granted for a 5 year extension of duration of PD04/1559, to construct 11 turbines.

PA ref PD11/400: Permission granted for modifications to the permitted Barranafaddock Wind Farm including a proposed increase in turbine hub height to 80m of three permitted turbines, an increase in rotor diameter of all turbines to 90m (from 80m) and the micro-siting of ten of the permitted turbines.

PA ref PD13/32: Permission granted for an extension to the permitted Barranafaddock Wind Farm, comprising 3 no. turbines with a tip height of up to 130.5m and associated site access tracks and site works. An EIS was submitted with this application.

Condition 7 of this permission stipulated that the maximum blade tip height of the proposed wind turbines shall be 130.5m.

This application was appealed to the Board, ABP ref PL24.241887, but was dismissed.

5.0 Policy Context

5.1. Development Plan

The Waterford County Development Plan 2011-2017, as extended, is the relevant policy document pertaining to the subject site. The subject site is located within lands zoned for 'Agriculture', where it is the objective 'to provide for the development of

agriculture and to protect and improve rural amenity.’ The site is located within a preferred area for wind energy developments.

5.2. Natural Heritage Designations

The site is not directly affected by any designated site. The Blackwater River SAC is located approximately 2.3km to the north and the south of the site.

6.0 The Referral

6.1. Referrer’s Case

The Planning Authority has submitted this referral, on the 23rd of May, 2018. It is submitted that the turbines erected on the site have a hub height of 73.5m, which is a reduction of 6.5m from that granted and the blade length on each of the 9 no. turbines permitted under PD11/400 was increased by 6.5m (13m diameter). The reasons for the referral are summarised as follows:

- The deviations as described were brought to the attention of the PA over the last 2 years, with the issue of the increased blade length being identified in the past year.
- A survey of the windfarm confirmed that the location of the turbines on site are correct and the blade lengths changed.
- It is submitted that the change in the blade length of Turbine no. 20 is now within the 2 rotor diameter lengths of third party land boundary and consequently is not in compliance with Section 7.17 ‘Wind Take’ of the Wind Energy Development Guidelines 2006.
- It is noted from the developer that the increased blade size does not change the fundamental matters such as noise, shadow flicker, avian monitoring.

The referral includes a number of enclosures, including submissions from residents, developer reports and correspondence.

6.2. Owner/ occupier's response

The owner / occupier has submitted a response to the PA referral request which provides for a summary of the planning history associated with the wind farm development. The submission also note that Waterford City & County Council issued a compliance response in December, 2013 indicating that the turbine erected on the site was noted and agreed. The response questions the appropriateness of the Section 5 Referral with regard to the particular question raised by WCCC in the context of the planning compliance agreed.

It is further considered that the statement under the heading 'Reason for Referral' may give the incorrect impression that WCCC was not aware of the change in blade length before 2016. It is submitted that the Section 5 process is not intended to address the question of whether something is or is not 'unauthorised development' or whether something is in compliance with a planning permission or not, case law *Heatons Limited v Offaly County Council (2013)* is cited. It is therefore submitted that the most appropriate mechanism for addressing the change in rotor diameter is through an assessment of planning compliance rather than by way of a question as to whether such a change 'is or is not development' and 'is or is not exempted development'. Should the Board be minded to consider the referral question, it is asked that the question be expanded to recognise that the installed turbines have a tip height of 125m which is in accordance with the consented tip height of the 2011 permission.

The response to the referral is summarised as follows:

- With regard to turbine no. 20, it is submitted that compliance with Wind Energy Guidelines 2006, Section 7.17, is not a material consideration in determining whether or not the change in rotor diameter 'is or is not development' and 'is or is not exempted development'.
- Turbine 20 has been constructed at the permitted location and was considered appropriate in terms of third party lands.
- The third party has not demonstrated an intention to develop a windfarm on his lands and therefore, compliance with Section 7.17 is not required.

- There is no guidance in legislation as to what is meant by a ‘material alteration’ but it is noted that immaterial variations to permitted development will not require further planning permission, case law, *Cork County Council v Cliftonhall Ltd.* is cited.
- The change in the rotor diameter at Barranafaddock can be clearly distinguished from the decision in *Bailey v Kilvinane* in that:
 - The turbines are located in accordance with the PP
 - The site is much larger than Kilvinane site
 - The change in rotor diameter is 14% as opposed to 40%
 - The tip height will be 125m as permitted – Kilvinane increased from 122m to 140m
- Condition 3 of the 2011 permission required the developer to agree details of the proposed turbines, including design, height and colour. This was complied with, and agreed with the PA in advance of construction. It is the view of the developer that the turbines as constructed comply with said conditions of permission.
- Other conditions to be complied with include
 - No. 7 in relation to shadow flicker. The developer has confirmed that a Shadow Flicker Control System was proposed for the site. Two reports, covering the periods July 2015 to June 2016 and July 2016 to December 2017, demonstrate that the installed turbines are being operated in full compliance with condition 7. In addition, a zero shadow flicker policy has been offered.
 - Condition 10 in relation to noise. In relation to condition 10, a report in June 2016 and February 2018 demonstrates that the turbines comply in full with condition 10 and concludes that the installed turbines produce lower noise emissions than the candidate turbines used to model noise impact at application stage.
- In order to determine if the installed turbines have resulted in an increase in the environmental impacts of the windfarm, a ‘Comparative Environmental

Analysis of Different Turbine Specifications installed at Barranafaddock Wind Farm, Co. Waterford'. This report concludes that there are no significant changes in environmental impacts arising as a result of the increased rotor diameter.

- In terms of the submission from adjacent property owners, the following comments are submitted:
 - Noise Assessment Reports demonstrate that the windfarm is operating in compliance with day time and night time limits imposed under planning permission conditions.
 - Economic gain is not a planning issue.
 - There is no statutory requirement that an agreement be put in place to require a turbine to be sited in proximity to adjacent third-party lands. No environmental concerns have been raised in this regard.
 - The information in relation to the turbines erected on the site have been in the public domain since 2013.
 - Third parties reference an EIS dated 2016. There is no such report and the only EIS was for the original permission, superseded by the Environmental Report for the 2011 permission.
 - The Planning Authority has not issued any Section 152 or Section 154 enforcement proceedings and have been aware of the turbines constructed since December 2013.

The submission includes a number of enclosures.

6.3. Further Responses

The PA has responded to the owner / occupier response to the referral advising that the PA is not using the Section 5 process to determine unauthorised development, nor as a means to pursue enforcement action on the site. It was decided to make the Section 5 application to expediate a final determination on the materiality of the changes undertaken to the windfarm, specifically in relation to the changes in the blade length from 45m to 51.5m. With regard to compliance with condition 3, the tip height of 125m not being exceeded was accepted by the PA as being compliant.

However, the PA did not assess the implications of the changes which may result in greater windswept area which is significant in relation to Section 7.17 of the Wind Energy Guidelines, 2006.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Sections 2,3 and 4, Planning and Development Act 2000.

7.2. Planning and Development Regulations, 2001

Articles 6 and 9, Planning and Development Regulations 2001.

8.0 Assessment

8.1. The question posed is as follows:

‘Whether the deviation from the permitted blade length of 45m (90. Diameter) to the constructed blade length of 51.5m (103m diameter) is or is not development and is or is not exempted development as relating to planning permission PD11/400, all at Barranafaddock Wind Farm, Co. Waterford.’

8.2. The turbines have been constructed on the site in the locations as permitted. The Board will also note that planning permission relating to 3 turbines, PD13/32 refers, in particular condition 7, permits the maximum blade tip height of 130.5m.

8.3. The Board will note that the PA has not sought this Section 5 to determine unauthorised development or essentially non-compliance with conditions of planning permission. In addition, the PA accepts that the tip height of 125m as permitted has been complied with. The issue in relation to the increased blade length – from 45m to 51.5m – seems to arise with regard to the implications of the increased rotor blade length and the potential to result in greater windswept area.

8.4. In this regard, the Board will note that Section 5.13 of the Wind Energy Guidelines, 2006, deals with Windtake and advises that this issue should be dealt with at scoping stage and/or during pre-application discussions, ‘in order to take into account the development potential of an adjoining site for similar development.’ The

PA refers to Section 7.17 of the Guidelines as a potential concern, but this section relates to the inclusion of conditions of permission with regard to windtake. The Board will note that no such conditions have been included in planning permission PD11/400. There is no indication that this issue was raised as a concern at pre-planning stage either.

- 8.5. The purpose of section 5 is not to determine whether something is unauthorised development. This was confirmed by the High Court in *Heatons Limited v Offaly County Council* (2013) in relation to a section 5 referral by the planning authority to the Board. This case established that:

“the Board’s single function under s.5 (4) is to determine whether in any given case there has or has not been development or, as the case may be, exempted development. Questions as to whether a particular use is unauthorised is not a function of the Board under s.5 (4) and, indeed, it may be observed that the Board has no enforcement role at all. This was the very point made by Finlay Geoghegan J. in her very careful and comprehensive judgment in *Roadstone Provinces Limited v An Bord Pleanála* [2008] IEHC 210 when she said:

“The respondent has no jurisdiction on a reference under s.5 (4) of the Act to determine what is or is not “unauthorised development”... It may only determine what is or is not “development”. Hence, a planning authority, such as the notice party, cannot refer a question under s.5 (4) as to whether the works or proposed works or use constitutes unauthorised works or use and hence unauthorised development. Determination of what is or is not “unauthorised development” will most likely be determined by the Courts where a dispute arises on an application under s.160 of the Act”.

- 8.6. In terms of *Kenny v. Dublin City Council* IESC 9; *Cork County Council v. Cliftonhall Ltd.* IEHC 85; and *Cork County Council v. Slattery Pre-cast Concrete Ltd.* IEHC 291, the Courts found that the question of material/non-material deviations from the terms of an existing permission should be approached from a practical and common sense perspective - is the deviation of such materiality that it would realistically impact on

the rights or interests of third parties or be such as would affect planning considerations?

8.7. The Board will note a similar Section 5 request in relation to the Kilvinane Wind Farm, PL88.RL2891 refers, whereby the developer of that windfarm received confirmation from the PA that a number of changes made, including a reduction in turbine hub heights, increased rotor blade lengths, reduction in the number of turbines installed and a change of location of turbines within 20m of the permitted locations, were not material and complied with the permission granted. The Board, following a Section 5 request from a third party, concluded that -

- (a) the erection of the turbines comes within the scope of the definition of development contained in Section 3 of the Planning and Development Act 2000,
- (b) the relocation of and alterations to turbines, including the modification to the overall height of the turbines and the length of the rotor arms/blades do not come within the scope of the permission granted,
- (c) there is no provision for exemption for the said relocation and alterations to turbines provided for in either Section 4, as amended, of the said Act or Article 6 of the Planning and Development Regulations 2001, and
- (d) therefore, the construction of the wind turbines as currently erected on site including alterations and modifications to the turbines height and rotor arms/blades is development and is not exempted development.

8.8. Is or is not development

It is clear that the construction of the windfarm, and the erection of the turbines, involved works, as defined, and as such is development within the meaning of the Act.

8.9. Is or is not exempted development

While I would have no objections in principle to the alterations to the blade length as constructed, given that the hub heights have been reduced and the overall tip height

has complied with the specific condition of planning permission, in light of the determination in relation to PL88.RL2891, a precedent might be considered as having been set. In this regard, I refer to the Boards consideration of the physical alterations to turbines - in particular the alterations to blade length and the overall height of the turbines - did not come within the scope of the relevant planning permission, it is possible to conclude in this case that the reduction in the hub height and the increased length of the rotor length, notwithstanding the fact that the permitted tip height of 125m has been maintained, do not come within the scope of the planning permission granted.

In addition, the Board will note that there is no provision for exemption for the alterations to turbines provided for in either Section 4 of the Planning & Development Act 2000, as amended or Article 6 of the Planning & Development Regulations, 2001, as amended. As such, the development is not exempted development.

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 deviation from the permitted blade length of 45m (90. Diameter) to the constructed blade length of 51.5m (103m diameter) is or is not development and is or is not exempted development as relating to planning permission PD11/400, all at Barranafaddock Wind Farm, Co. Waterford, is or is not development or is or is not exempted development:

AND WHEREAS Waterford City & County Council requested a declaration on this question An Bord Pleanála on the 24th day of May, 2018:

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) Articles 6 and 9 of the Planning and Development Regulations, 2001, as amended,

- (c) Previous planning permission, PD11/400,
- (d) Submissions made during the course of the referral, and
- (e) The physical alterations to the turbines, in particular the alterations to the blade length and overall height of turbines:

WHEREAS An Bord Pleanála has concluded that:

- (a) the erection of the turbines comes within the scope of the definition of development contained in Section 3 of the Planning and Development Act 2000,
- (b) the relocation of and alterations to turbines, including the modification to the overall height of the turbines and the length of the rotor arms/blades do not come within the scope of the permission granted,
- (c) there is no provision for exemption for the said relocation and alterations to turbines provided for in either Section 4, as amended, of the said Act or Article 6 of the Planning and Development Regulations 2001, and
- (d) therefore, the construction of the wind turbines as currently erected on site including alterations and modifications to the turbines height and rotor arms/blades is development and 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 deviation from the permitted blade length of 45m (90m diameter) to the constructed blade length of 51.5m (103m diameter) as relating to planning permission PD11/400, all at Barranafaddock Wind Farm, Co. Waterford, is development and is not exempted development.

A. Considine
Planning Inspector
30/08/2018