



An
Bord
Pleanála

Inspector's Report ABP-302895-18

Question

Whether a Medium Voltage Grid Connection for a permitted Solar Farm is or is not Development and/or Exempted Development

Location

Dysart, Johnstownbridge County Kildare

Declaration

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

ED00656

Applicant for Declaration

Power Capital Renewable Energy Ltd

Planning Authority Decision

Is not exempted development

Referral

Referred by

Power Capital Renewable Energy Ltd

Owner/ Occupier

Power Capital Renewable Energy Ltd

Date of Site Inspection

N/A

Inspector

Colin McBride

1.0 Site Location and Description

1.1. The site is located in the townland of Dysart, Johnstownbridge, Co. Kildare. The site is located to the south of the Enfield, Co. Meath and to the west of Kilcock. The site is a short distance to the south of the M4. The site includes a site access road to a permitted windfarm development granted under ref no. 16/1265 (11.5 hectares of agricultural land) and a c.1.3km stretch of the L1004. The Dunfirth ESB substation is located on the northern side of the L1004 and to the south west of the approved solar farm.

2.0 The Question

2.1. Whether the medium voltage grid connection between the solar farm development permitted under ref no. 16/1265 and the Dunfirth ESB substation is or is not development or is or is not exempted development.

3.0 Planning Authority Declaration

3.1. Declaration

A section 5 declaration was submitted to Kildare County Council on the 15th of February 2018. A determination was issued on the 18th of October with it determined that the medium voltage grid connection between the solar farm development permitted under ref no. 16/1265 and the Dunfirth ESB substation would be development but would not be exempted development.

3.2. Planning Authority Reports

3.2.1. Planning Reports

Planning report (29/03/18): Further information required including submission of a letter which clearly states that the applicant has been appointed as an undertaker to carry out the proposed works by the ESB.

Planning report (29/09/18): It is noted that the works may be exempt under the provision of Schedule 2, Article 6, classes 26 and 27 however the applicant has

failed to demonstrate that they are a statutory undertaker. The grid connection was determined to be development and would not constitute exempted development.

3.2.2. Other Technical Reports

Roads, Transportation & Public Safety (02/08/18): Further information required regarding cable routes, haul roads and details of proposed entrances.

Roads, Transportation & Public Safety (17/08/18): Based on the nature of the works it is considered such would endanger public safety by reason of traffic hazard and are not exempted development.

4.0 **Planning History**

16/1625: Permission granted for construction of a solar PV farm on a 11.5 hectare site in the townland of Dysart, Johnstownbridge, Co. Kildare.

5.0 **Policy Context**

5.1. **Development Plan**

The relevant Development Plan is the Kildare County Development Plan 2017-2023.

5.2. **Natural Heritage Designations**

Designated sites within 10km include...

Ballynafagh Lake SAC (Site Code: 001387) 9.6km to the south of the site.

6.0 **The Referral**

6.1. **Referrer's Case**

A submission has been received from IMG Planning on behalf of Power Capital Renewable Energy Limited.

- The referrer contends that the proposed works are development and are exempted development. The referrer notes the main issue concerns the determination of whether the works are exempted development or not.
- The referrer notes the provisions of Class 26 or Part 1, Schedule 2 which allows for a development consisting of the laying of underground...of cables...for the purposes of the undertaking subject to the development being carried out by an undertaker authorised to provide an electricity service.
- The referrer notes Article 3(3) of the Regulations state that electricity undertaking means “an undertaker authorised to provide an electricity service”.
- The referrer notes the definition of ‘electricity undertaking’ under the Electricity Regulation Act 1999 (Section 2(1)). It is noted that the definition does refer to any holder of a licence or authorisation under this Act does include the term including and any person mean it could include any person engaged in generation, transmission, distribution or supply of electricity.
- It is noted that the ESB are not the only entity authorised to provide an electricity service. It is noted that the applicants must have authorisation to construct from the Commission for Energy Regulation of Utilities under Section 14 of the Electricity Regulation Act. In order to generate electricity it must have to obtain both authorisation and a licence prior to the construction of the proposed development and upon obtaining same will be categorised as an electricity undertaker as defined in the Electricity (Supply) Act, 1927. It is noted that when the development is commenced including construction of the grid connection, the applicants will be an undertaker authorised to provide an electricity service satisfy the provision of Class 26.
- The grid connection does not fall within a class of development for the purposes of EIA. Section 4(4) of the Act does not apply.
- In regards to Appropriate Assessment it is noted that the application associated with the permitted solar farm included screening reports demonstrating that the proposal would have no impact on designated sites. The grid connection follows the existing access road and the L1004 and would have no ecological impact.

- The decision of the Council is based on its view that the proposed development would endanger public safety by reason of traffic hazard or obstruction of road users and such de-exempts the development based on Article 9(1)(a)(iii). The referrers do not accept this view and note that although the grid connection includes c1.3km of public road, the construction will be carried out in sections of no more than 100m at any one time and traffic flow will be managed. It is noted a road opening licence is required and a Traffic Management Plan will be agreed with the Council prior to commencement.
- It is noted that the development is not de-exempted under any of the other provision of Article 9(1).

6.2. Planning Authority Response

Response by Kildare County Council

- The Planning Authority have no further comments to make.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

Section 2(1)

““works” includes any act or operation of construction, excavation, demolition, extension, alterations, repair or renewal and

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 structures or other land.

“statutory undertaker” means a person, for the time being, authorised by or under any enactment of instrument under an enactment to –

- (a) Construct or operate a railway, canal, inland navigation dock, harbour or airport,
- (b) Provide, or carry out works for the provision of, gas, electricity or telecommunications services, or
- (c) Provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking.

Section 4(2)(a)(i)

“The Minister may by regulations provide any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that –

- (i) By reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or”

Section 4(4)

Notwithstanding..... any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required”

Section 172(1)

“An environmental impact assessment shall be carried out by a planning authority or the Board, as the case may be in respect of an application for consent for –

- (a) Proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which exceeds a quantity area, or other limit specified in that Schedule, and
- (b) Proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which does not exceed a quantity, area or other limit specified in that Schedule but which the planning authority or the Board determines would be likely to have significant effects on the environment.”

7.2. **Section 177U(9)**

“In deciding upon a declaration or a referral under section 5 of this Act a Planning Authority or the Board, as the case may be shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section”.

7.3. **Planning and Development Regulations, 2001**

Article 3(3)

“electricity undertaking” means an undertaker authorised to provide an electricity service”.

Article 6(1)

“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.”

Schedule 2, Part 1

Development by Statutory Undertakers

Class 26

“the carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking” ,.

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) Contravene a condition attached to a permission under the Act or be inconsistent with any use specified in a permission under the Act.

- (iii) endanger public safety by reason of traffic hazard or obstruction of road users,
- (vii) consist of or comprise the carrying out under a public road of works other than a connection to a wired broadcast relay service, sewer, watermain, gas main or electricity supply line or cable, or any works to which class 25, 26 or 31(a) specified in Column 1 of Part 1 of Schedule 2 applies.
- (vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest the preservation, conservation or protection of which is an objective of a development plan or local area plan for the area in which the development is proposed or, pending the variation of a development plan or local area plan, or the making of a new development plan or local area plan, in the draft variation of the development plan or the local area plan or the draft development plan or draft local area plan,
- (viiA) comprise of or comprise the excavation, alteration or demolition of any archaeological monument included in the Record of Monuments and Places, pursuant to section 12(1) of the National Monuments (Amendment) Act 1994, save that this provision shall not apply to any excavation or any works, pursuant to and in accordance with a consent granted under section 14 or a licence granted under section 26 of the National Monuments Act 1930 (No 2 of 1930) as amended.
- (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 the procedures for the purposes of giving effect to the Council Directive.”

7.4. Case Law

7.4.1 O Grianna (and others) v An Bord Pleanála (and others) Record L 2014 No 2014 No 19 JR; 20114 No 10 COM.

High Court judgement on judicial review of a permission granted on appeal by the Board for a development comprising 6 wind turbines and associated infrastructure in County Cork. The High Court judgement, quashing the Board's decision, was based on the conclusion that the windfarm and grid connection constitute one single project and that both elements together would have to be subject to EIA in order to comply fully with the terms of the Directive.

7.5 Relevant Cases

RL3503 The Board determined that the provision of a connection between the 110kv substation of the Yellow River Windfarm granted under PA0032 & the National Grid is development and is exempted development at Rhode, Co. Offaly.

RL3375 Board determined that 220m of 20kv underground cable forming part of grid connection at Raragh, Kingscourt, Co Cavan is development and is exempted development.

RL3408 RL3409 RL3410 RL3411 The Board determined that the development of grid connection from Croy / Lodgewood substation to Ballycadden windfarm is development and is not exempted development. I note that this determination found that the development came within the scope of Article 9(1) (a) of the Regulations as their construction contravened a condition of the planning permission for the relevant windfarms.

RL 2789 The Board determined that the laying of a 110kv underground electricity cable forming the grid connection to windfarm at Knockacummer Co Cork is development and is exempted development.

RL2778 The Board determined that the provision of 10.2km of underground cable forming the grid connection of windfarm at Loughaun North, Tulla, Co Clare to existing substation at Tooreen Ennis Co Clare is development and is exempted development.

RL2786 The Board determined that the undergrounding of two sections of 38kV line of which planning permission was granted under planning ref. no. 06/2278 to lay overhead is or is not development or is or is not exempted development from windfarm at Glenmore East to ESB 38kV station at Newcastlewest, Co. Limerick

RL3377 RL3401 The Board determined that the provision of a 20kv electrical connection between Cnoc windfarm and Ballybeagh 38kv substation, Tullaroan, Co Kilkenny is development and is exempted development.

8.0 **Assessment**

8.1. **Is or is not development**

8.1.1. The question before the Board is whether a Medium Voltage Grid Connection for a permitted Solar Farm is or is not Development and/or Exempted Development. The relevant statutory provisions in the case are set out at section 7 above. In addressing the primary question of whether the works are development, I note that having regard to the nature of the proposal, namely the installation of underground cable connecting the the solar farm development permitted under ref no. 16/1265 and the Dunfirth ESB substation, it is evident, by reference to the broad definition of works set out in Section 2(1) and 3(1) of the Act that the proposal does constitute development for planning purposes. The focus, therefore, is on whether or not the proposed development constitutes exempted development.

8.2. **Is or is not exempted development**

8.2.1. As regards Section 4(2)(a)(i) of the Act, and the Regulations made thereunder, the relevant class of development is Class 26, Part 1 Schedule 2 of the Planning and Development Regulations, as amended. This refers to *“The carrying out by any*

electricity undertaking of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking. I am satisfied that the proposal is “a development consisting of the laying underground of cables for the purposes of the undertaking”.

8.2.2. On the requirement for the development to be carried out by an “*undertaker authorised to provide an electricity service*” I refer to Article 3(3) of the regulations which states that an electricity undertaking means an undertaker authorised to provide an electricity service. The Electricity Regulation Act 1999 provides a definition as follows:

“electricity undertaking” means any person engaged in generation, transmission, distribution or supply of electricity, including any holder of a licence or authorisation under this Act, or any person who has been granted a permit under Section 37 of the Principal Act.”

8.2.3 I note the broad definition of “statutory undertaker” provided within the Planning and development Act 2000 as follows

“statutory undertaker” means a person, from the time being, authorised by or under any enactment or instrument under an enactment to-

(b)Provide, or carry out works for the provision of, gas, electricity or telecommunications services,” .

In light of these definitions, I am satisfied that Power Capital Renewable Energy Ltd. falls within the category of statutory undertaker on foot of its authorisation under the Planning Act to construct a solar farm that is a project for the provision of electricity. On this basis I am satisfied that the proposed development falls within the scope of Class 26.

8.2.4 I would note that there are a number of cases which are listed above that are relevant. In these cases the fact that the applicants have been granted permission for an electricity generating development have been determined to be sufficient to classify the applicants as coming under Class 26, Part 1 Schedule 2 of the Planning and Development Regulations.

8.3. Restrictions on exempted development

8.3.1 Section 4(4) of the Act essentially de-exempts any development which attracts a requirement for Environmental Impact Assessment (EIA) or Appropriate Assessment (AA). In relation to EIA, the development of a connection between the medium voltage grid connection between the solar farm development permitted under ref no. 16/1265 and the Dunfirth ESB substation is not a prescribed class of development for the purposes of EIA. In consideration of screening for EIA, I note that by reference to the criteria set out in Schedule 7 of the Planning and Development Regulations 2001, as amended, having regard to the limited nature and scale of works involved, the provision of the medium voltage grid connection between the solar farm development permitted under ref no. 16/1265 and the Dunfirth ESB substation is not likely to have significant effects on the environment. In the context of the O’Grianna judgement, I would note that the original solar farm application was not subject to EIA and is not a prescribed class of development for the purposes of EIA.

8.3.2 As regards Appropriate Assessment, the grid connection is in relation to a permitted development (16/1265). The information submitted with the referral includes a screening report, which identifies one Natura 2000 site within 10km, which is the Ballynafagh Lake SAC (Site Code: 001387) 9.6km to the south of the site. This report concludes that the proposed development would not be likely to give rise to significant effects. In considering the nature of the development subject of the referral the provision of the medium voltage grid connection between the solar farm development permitted under ref no. 16/1265 and the Dunfirth ESB substation and by reason of the intervening distance to the European Sites in the vicinity it can be concluded that the proposed development would not be likely to give rise to significant effects. I consider it reasonable to conclude therefore on the basis of the information provided on file which I consider adequate in order to issue a screening determination, that the proposed development, individually or in combination with other plans or projects would not be likely to have significant effect on European sites in the vicinity and a stage 2 Appropriate Assessment is not therefore required.

On the basis of the foregoing I am satisfied that the development does not fall within the scope of Section 4(4) of the Act.

- 8.3.3 On the issue of Article 9 (1) De-Exemptions, I am satisfied that the development does not fall within the scope of the de-exemptions. The Council's Road's section suggest the development would constitute a traffic hazard. The grid connection is located along an access road the solar farm and along a 1.3km section of L1004. The referrer notes that the connection will be constructed in 100m sections and there will be traffic flow management. In this regard I note that having regard to the limited extent and duration of the works the development will not have an impact on traffic safety and will not give rise to obstruction of road users. 9(1)(a)(iii).
- 8.3.4 I am satisfied that the development does not impact on archaeological or other sites of interest that are subject of preservation / conservation objectives Article 9(1)(a)(vii) and (ViiA)
- 8.3.5 My conclusions in relation to AA and EIA above refer in the context of Article 9(1)(a) (viiB) and 9(1)(c).
- 8.3.6 As regards 9(1)(a)(i) and the matter of conditions attached to permission for the solar farm, the only condition relating to grid connection is no. 9 of ref no. 16/1265, which states that "the selected method of grid connection shall be advise to the Planning Authority in writing, prior to the commencement of such works to facilitate the connection". The referral submitted and works proposed does not impact on compliance with such a condition. On the basis of the foregoing, I am satisfied that the development does not fall within the scope of the Article 9 (1)de-exemptions.

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 medium voltage grid

connection between the solar farm development permitted under ref no. 16/1265 and the Dunfirth ESB substation is or is not development or is or is not exempted development:

AND WHEREAS Power Capital Renewable Energy Ltd requested a declaration on this question from Kildare County Council and the Council issued a declaration on the 08th day of October , 2018 stating that the matter was development and was not exempted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 19th day of November , 2018:

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

- (a) Section 2(1), 3(1), 4(4), 172(1) and 177U(9) of the Planning and Development Act, 2000, as amended,
- (b) Articles 3. 6 and 9 and Class 26, Part 1 Schedule 2 of the Planning and Development Regulations, 2001, as amended,
- (c) Parts 1 and 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,

AND WHEREAS An Bord Pleanála has concluded that:

- (a) The provision of a the medium voltage grid connection between the solar farm development permitted under ref no. 16/1265 and the Dunfirth ESB substation comes within the scope of Sections 2(1) and 3(1) of the Act and constitutes development,
- (b) The said underground cable comes within the scope of Class 26 Part 1, Schedule 2, of the Planning and Development Regulations 2001, as amended,

- (c) The said underground cable does not come within the scope of section 4(4) of the Planning and Development Act, 2000, as amended. In this regard the Board adopts the report of the Inspector in relation to EIA and AA and, thereby has carried out the necessary assessments to conclude that neither EIA nor AA is required,
- (d) The said underground cable does not come within the scope of Article 9(1)(a)(i), (ii), (v), (vii), (viiA) or (viiB) or Article 9(1)(c) of the 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 provision of a medium voltage grid connection between the solar farm development permitted under ref no. 16/1265 and the Dunfirth ESB substation is development and is exempted development.

Colin McBride
Planning Inspector

28th January 2018