



An
Bord
Pleanála

Inspector's Report ABP-304496-19.

Question

Whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28th April 2014 under planning ref 11/510251 is or is not development and is or is not exempted development.

Location

Castlewaller, Newport, County Tipperary.

Declaration

Planning Authority

Tipperary County Council

Planning Authority Reg. Ref.

S51931.

Applicant for Declaration

Tipperary County Council.

Referral

Referred by

Stephen & Denise Walsh.

Owner/ Occupier

Castlewaller Woodland Partnership

Observer(s)

None.

Date of Site Inspection

22nd August, 2018.

Inspector

A. Considine.

1.0 Site Location and Description

■ The subject site is located in the western area of Co. Tipperary, close to the border with Counties Clare and Limerick. The closest town to the site is Newport, approximately 3.5km to the west of the windfarm site. The southern boundary of the site lies approximately 1km to the north of the Newport / Rearcross Regional Road, the R503. Access to the site is via the local road network, and ultimately the L60111, which is a cul-de-sac.

■ The planning permission for the windfarm on the site provided for 16 turbines, each with a maximum hub height of 100m, maximum rotor diameter of 90m, and with a total tip height of 145m, as per the development description.

2.0 The Question

■ Whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28th April 2014 under planning ref 11/510251 (an extension of the duration of planning permission for which permission was granted under planning reference 16/600472) is or is not development and is or is not exempted development, all at Castlewaller, Newport, County Tipperary.

3.0 Planning Authority Declaration

■ Declaration

The Planning Authority issued a declaration with regard to the question posed and declared that the alterations to the wind turbine specification and locations is not development.

■ Planning Authority Reports

3.2.1. Planning Report

The report concludes that the alterations to the turbines could only constitute works if the structures were in place and therefore, the alterations to the turbine specification are not deemed to constitute development.

4.0 Planning History

PA ref 11/51/0251: Permission granted, subject to 17 conditions, for the development of a wind farm consisting of 16 turbines (each with a maximum hub height of 100m, maximum rotor diameter of 90m, and with a total tip height of 145m), one permanent meteorological mast, 2 borrow pits, a sub-station including a control building, new internal access roads, upgrading of existing internal access roads, expansion of drainage system, turbine hardstands, wastewater holding tank, underground cables and ancillary works. An Environmental Impact Statement accompanies this application, all at Castlewaller, Newport, Co. Tipperary.

In 2014, the applicant submitted details of minor amendments to the permitted development to include, alterations to the rotor diameter from 90m to 97m (and therefore, increasing the overall height from 145m to 148.5m. Additional amendments included the relocation of 11 of the 16 turbines within the 20m micro-siting allowance provided for in the 2006 Guidelines. The Planning Authority issued a letter of compliance for the above amendments stating that the amendments 'can be treated as a minor variation of planning permission 11/51/0251'.

PA ref 16/60/0472: Unconditional permission granted for a 5 year extension of duration of PA ref 11/51/0251, to construct 16 turbines.

5.0 Policy Context

Wind Energy Guidelines, 2006

Section 6.6 of the Guidelines deals with spacing and the position of turbines relative to one another and the gaps between turbines. This section states:

Some flexibility in spacing should be integral to a planning permission to allow for necessary on-site fine-tune adjustment of turbine placing due to such considerations as geological support for foundation or archaeological remains, etc (see paragraph 7.3 and 7.4).

Section 7.3 of the Guidelines deals with Flexibility in Turbine Location and states:

As the precise location of turbines may need to be modified in the course of development due to matters such as the wind regime, ground conditions, or

heritage concerns, etc. It may be helpful as referred to in paragraph 6.6 in the design of a layout and in framing conditions to allow for a degree of flexibility in the final siting of turbines. Where this flexibility is agreed upon details of final specification should be submitted to and agreed in writing with the planning authority prior to commencement of development.

Section 5.3 of the Guidelines deals with Ground Conditions/Geology. This section refers to 'minor adjustments to turbine location' and states:

Provision must be made for carrying out site-specific geo-technical investigations in order to identify the optimum location for each turbine. These investigations may suggest minor adjustments to turbine location. In order to accommodate this practice there should be a degree of flexibility built into the planning permission and EIS. The extent of flexibility will be site specific but should not generally extend beyond 20 metres. Any further changes in location beyond the agreed limits would require planning permission.

I refer to this section of the Guidelines as it is depended upon by the developer with regard to the micro-siting of 11 of the permitted turbines on the site.

Development Plan

The North Tipperary County Development Plan 2010, as varied, is the relevant policy document pertaining to the subject site.

Natural Heritage Designations

The site is located within the Slieve Felim to Silvermines Mountains SPA, Site Code 004165. A small area in the north eastern area of the subject site is also located within the Bleanbeg Bog NHA, Site Code 002450. The Lower River Shannon SAC, Site Code 002165 is located approximately 1km to the north and 1.5km to the west of the site.

6.0 The Referral

Referrer's Case

Connellan & Associates, on behalf of their clients Stephen & Denise Walsh, submitted this referral, on the 17th of May, 2019. The submission presents a background to the referral question, including details of the permission granted, and subsequently extended. It is submitted that it is the opinion of the referrers that 'the amendment works involved 'development', are not 'exempted development' and finally cannot be deemed to be encompassed within the four walls of planning permission 11/51/0251 (as extended) so to benefit from a letter such as that sent by the Council, date stamped 12/05/2014.'

The referenced letter relates to a request from the applicant, on the 28/04/2014, to the Planning Authority seeking 'minor amendments to the permitted development' and compliance with the planning permission granted. These amendments include the increase of the rotor diameter and the relocation of 11 of the permitted turbines. The reasons for the referral are summarised as follows:

- The provisions of condition 3 of the grant of planning permission refers only to the 'final specification' of the turbine and makes no reference to any allowance regarding any increase in height.
- A normal understanding of the word would cover such matters as the final composition of materials involved, final performance expected, finishes etc.
- The public notices and description of the development were clear that the maximum rotor diameter was to be 90m and not 97m, with a total tip height of 145m and not 148.5m. It is
- There is precedent in this regard including Bailey v Kilvinane Wind Farm Ltd (Sept 2013), where deviations were permitted by the Council and subsequently decided by An Bord Pleanala that the modifications did not come within the scope of the permission.
- The assessments of the EIS and NIS are tightly prescribed and are not open to be circumscribed by later amendments.

- The location of the site within the SPA and within 10km of 18 other designated sites would lean to a very narrow interpretation of the word 'specification'. No updated AA screening was carried out and no managers order backing up the Council letter.
- The increase in the blade diameter will increase the total swept area which will lead to a significant increase in bird and bat fatalities.
- In terms of the declaration issued, it is submitted that no information is given relating to the 'main reasons and considerations on which its decision is based', as required.
- The Planning Report interpretation of the definition of 'works' serves to sidestep the essence of the question. To state that a Council cannot decide the question because the original development is not in place would defeat the purpose of the Section 5 process.

It is considered that what is involved is development, is not exempted development and is not covered by the provision of any extant planning permission.

Owner/ occupier's response

The owner / occupier has not submitted a response to the third-party referral request.

Further Responses

None

7.0 Statutory Provisions

Planning and Development Act, 2000

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

Planning and Development Regulations, 2001

Articles 6 and 9, Planning and Development Regulations 2001.

8.0 Assessment

The question posed is as follows:

‘Whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28th April 2014 under planning ref 11/510251 (an extension of the duration of planning permission for which permission was granted under planning reference 16/600472) is or is not development and is or is not exempted development, all at Castlewaller, Newport, County Tipperary.’

- 8.1.1. The Board will note that planning permission for the windfarm development relates to turbines with a stated maximum hub height of 100m, maximum rotor diameter of 90m and a total tip height of 145m. The Board will also note that the PA has, in a letter confirming compliance with condition 3(g) of the grant of planning permission, considered the alterations to the rotor diameter from 90m to 97m and the tip height from 145m to 148.5m, were acceptable. The same letter considered the micro-siting of 11 of the permitted 16 turbines within 20m of the original proposed locations as being acceptable.
- 8.1.2. The Section 5 determination issued by the Planning Authority concluded that as no development has taken place on the site, the alterations referred to in the referral question could only constitute works ‘in the event that the structures were in place. The matter is therefore deemed not to constitute development.’ The assessment also concludes that the legislation does not provide for the determination to consider whether or not the development is subject to consent and that ‘consented development under Section 34 of the Act is not exempted development.’ The report ultimately concludes that the question asked in ‘inextricably associated with a live consent process whereby permission was sought and conditionally granted and whereby correspondence relates to compliance with said permission was entered into and received the written agreement of the Planning Authority. No development has occurred in relation to this permission and therefore no alteration to any structure or land has occurred.’
- 8.1.3. Condition 1 of the grant of planning permission requires that the development be carried out in accordance with the drawings and documentation submitted with the

planning application while Condition 3 of the grant of permission, subsection (g) requires that the final specifications of the proposed turbines shall be submitted to the Planning Authority for written agreement. In order to comply with this condition, the applicant submitted details relating to a turbine with a rotor diameter 7m larger than that permitted – having regard to the description of the development.

- 8.1.4. In terms of the above, it is clear that the applicant sought to comply with conditions set out by the Planning Authority in their decision to grant planning permission for the windfarm. I also note that as part of that compliance process, the PA was satisfied that the amendments to the rotor diameter, and the micro-location of the turbines, fell within the boundaries of the planning permission granted. However, recent legal cases in the context of amendments to wind farms have potentially rendered such letters of compliance or comfort insufficient in the context of compliance with planning permission.
- 8.1.5. In terms of a Section 5 Declaration, I am satisfied that the fact that development works have not commenced on the site would not preclude the Board from making a determination on the question posed. The ‘works’ are proposed and permitted. In my opinion, the issue this Section 5 Referral raises relates to where Planning Authorities provide letters of compliance with a planning permission, where ‘minor’ amendments to the permitted development arise. In this case, permission was granted for a specific size of turbine – as provided for in the description of the development.
- 8.1.6. 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”.

8.1.7. 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?

8.1.8. In the context of a windfarm, the Board will note the 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.

8.1.9. In terms of the proposed relocation of the 11 turbines, the Board will note the reference to the Wind Energy Guidelines, 2006, and the issue of flexibility in turbine locations. The Guidelines provide that some flexibility in spacing should be integral to a planning permission to allow for necessary on-site fine-tune adjustment placing due to such considerations as geological support for foundations or archaeological remains, etc. Indeed, Section 7.3 encourages the framing of conditions of permission to allow for a degree of flexibility in the final siting of the turbines, to be agreed upon when final specifications are submitted and agreed with the Planning Authority. I note from the guidelines, that the '20 metre' flexibility refers to ground conditions / geology.

Is or is not development

It is clear that the construction of the windfarm, and the erection of the turbines, involves works, as defined, and as such is development within the meaning of the Act. While the development has not commenced, I am satisfied that the 'proposed works' constitute works and therefore development.

Is or is not exempted development

In considering the question posed, I refer the Board to the determination in relation to PL88.RL2891, as well as decisions arrived at in terms of legal cases. It is clear that a precedent has been set. The Board has considered that 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. In the context of the amendments currently proposed in this case, I consider that they 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

I recommend that the Board should decide this referral in accordance with the following draft order.

WHEREAS a question has arisen as to whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28th April 2014 under planning ref 11/510251 (an extension of the duration of planning permission for which permission was granted under planning reference 16/600472) is or is not development and is or is not exempted development, all at Castlewaller, Newport, County Tipperary:

AND WHEREAS Stephen & Denise Walsh, through their agent Connellan & Associates, requested a declaration on this question from Tipperary County Council and the Council issued a declaration of the 26th day of April, 2019 stating that the matter was not development:

AND WHEREAS the declaration was referred to An Bord Pleanála for review on the 17th day of May, 2019:

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) Planning permission, 11/51/0251,
- (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 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 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 amendments to the wind turbines proposed to be erected on site, including alterations and modifications to the turbines height and rotor 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 rotor diameter from 90m to 97m and the tip height from 145m to 148.5m, as well as the relocation of 11 of the 16 permitted turbines, as relating to planning permission 11/51/0251, all at Castlewaller, Newport, County Tipperary, is development and is not exempted development.

A. Considine
Planning Inspector
23/08/2019