



An  
Bord  
Pleanála

## Inspector's Report ABP 306272-19

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**Development**

Windfarm

**Location**

Cloontycarthy, Cleanrath North,  
Cleanrath South, Derreennacarton,  
Derrineanig, Turnaspidogy,  
Milmorane, Coomlibane, Rathgaskig,  
Derragh, Augeris, Gorteenakilla,  
Carrignadoura, Gurteenowen,  
Gurteenflugh, Lyrenageeha and  
Lackabaun, Co. Cork

**Planning Authority**

Cork County Council

**Applicant**

Cleanrath Windfarm Ltd.

**Type of Application**

Leave to appeal for substitute consent  
under section 177C of the Planning  
and Development Acts, 2000-2018

**Date of Site Inspection**

03/03/20

**Inspector**

Pauline Fitzpatrick

## 1.0 Site Location and Description

The wind farm site, with a stated overall area of 111.7ha, is located some 2.5km northwest of the village of Inchigeelagh, in Co. Cork. The site straddles Derrineanig Hill (304m) which forms the divide between the Toon River valley to the north and the Lee River valley to the south. Derrineanig Hill forms part of a range of hills north of the Lee River valley – extending from higher ground to the west on the Cork/Kerry border. The site, for the most part, comprises undulating rough grazing land (heath/peatland/exposed rock). There is a block of semi-mature and mature coniferous forestry within the northern and eastern parts of the site, with newly-planted and semi-mature coniferous forestry in smaller parcels across the middle section of the site.

9 no. wind turbines have been erected on the site. The main access is from local road L74332 to the north with localised road widening and new access tracks to facilitate construction traffic along same.

There is a separate windfarm comprising 6 turbines at Derragh to the west of the subject site.

There is a grid connection along forestry tracks and local roads to the south of the site connecting to the Derragh windfarm substation and onwards to the Grousemount/Coomataggart substation in County Kerry.

## 2.0 Proposed Development

A windfarm comprising of 9 no. wind turbines and ancillary works has been constructed.

It is proposed to seek substitute consent to retain the works that have been carried out.

## 3.0 Planning History

### 3.1. *Subject Site*

**PL04.246742** – permission granted on appeal in May 2017 for a windfarm. The permission allowed for 11 no. turbines up to a height of 150 metres. The

development consisted of the upgrading of existing and provision of new internal access roads, anemometry mast, borrow pits, underground electrical cabling, underground grid connection cable, construction compound, electricity substation and associated works.

The application was accompanied by an EIS and NIS.

**Supreme Court Appeal No:167/18** – judgement delivered in December 2019.

Board's decision to grant permission under ref. PL04.246742 quashed.

**18/4458** – permission granted in April 2018 for amendment to underground electrical cabling and provision of an additional operational access/inspection road.

### 3.2. **Other Relevant Permissions**

**15/1164** – permission granted for the c.2km of underground electrical grid connection works within the functional area of Kerry County Council.

**PL04.245082** – permission granted on appeal in June 2016 for a windfarm at Derragh comprising of 6 turbines. The windfarm has been constructed.

**17/5126** – permission granted for revised electricity substation at the Derragh wind farm.

*Note 1:* the substation permitted as part of the Cleanrath windfarm subject of this application was not constructed on the basis of proposed connection to the above permitted revised substation at the Derragh wind farm. The two windfarms share a portion of the grid connection to the ESB substation at Grousemount/Coomataggart.

*Note 2:* 9 of the 11 turbines in the Cleanrath windfarm subject of this application, only, have been erected. In addition, the met mast, access roads and underground cabling which were not required were also not constructed.

## 4.0 **Legislative Context**

**Section 177B(9)** of the Planning and Development Act 2000, as amended states

– for the purposes of this section and section 177C, a judgement shall be deemed to be a final judgement where

- (a) the time within which an appeal against the judgement may be brought has expired and no such appeal has been brought,

- (b) there is no provision for appeal against such judgement, or
- (c) an appeal against the judgement has been withdrawn.

**Section 177C**, states *inter alia*

(1) A person who has carried out a development referred to in subsection (2) .... may apply to the Board for leave to apply for substitute consent in respect of the development.

(2) A development in relation to which an applicant may make an application referred to in subsection (1) is a development which has been carried out where an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required, and in respect of which—

(a) the applicant considers that a permission granted for the development by a planning authority or the Board may be in breach of law, invalid or otherwise defective in a material respect, whether pursuant to a final judgment of a court of competent jurisdiction in the State or the Court of Justice of the European Union, or otherwise, by reason of—

- (i) any matter contained in or omitted from the application for permission including omission of an environmental impact assessment report or a Natura impact statement or both that report and that statement, as the case may be, or inadequacy of an environmental impact assessment report or a Natura impact statement or both that report and that statement, as the case may be, or
- (ii) any error of fact or law or a procedural error,

or

(b) the applicant is of the opinion that exceptional circumstances exist such that it may be appropriate to permit the regularisation of the development by permitting an application for substitute consent.

**Section 177D** states –

(1) Subject to section 261A(21), the Board shall only grant leave to apply for substitute consent in respect of an application under section 177C where it is

satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment, was or is required in respect of the development concerned and where it is further satisfied—

(b) that exceptional circumstances exist such that the Board considers it appropriate to permit the opportunity for regularisation of the development by permitting an application for substitute consent.

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

(a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;

(b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

(e) the extent to which significant effects on the environment on the integrity of a European site can be remediated;

(f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;

(g) such other matters as the Board considers relevant.

## 5.0 The Application

The case made which is accompanied by a legal opinion, can be summarised as follows:

No notice from the planning authority under the provisions of Section 177B in relation to the matter has been served since the judgement of the Supreme Court was delivered on 12/12/19.

### 5.1. **Section 177C(2)(a)(ii) - Procedure**

- Following the Supreme Court judgement it is considered that the permission granted by the Board is in breach of law, invalid or otherwise defective by reason of an error of law. The Court in its decision has solely found that there was a procedural error in the decision undertaken by the Board.

### 5.2. **Section 177C(2)(b) and Section 177D(2) – Exceptional Circumstances**

- The works were carried out following permission granted under ref.PL04.246742. EIA and AA were carried out.
- The applicant was firmly of the opinion that the works were fully authorised.
- Public participation was facilitated by way of the statutory planning process. The public was fully engaged throughout the application process as evidenced in the submissions and appeals lodged.
- The construction and continuance of the development fully incorporate the mitigation measures set out in the EIS and the planning permission conditions. All environmental impacts arising from the construction and operational phase of the project have been mitigated against ensuring that significant effects have not, and will not arise.
- In granting permission the Board agreed with the Inspector's AA Screening. As part of its decision it conducted an AA and concluded, beyond reasonable scientific doubt that the proposal, including the grid connection, either individually or in combination with other plans and projects would not adversely affect the integrity of specified European Sites, in view of the sites' conservation objectives or of any other European sites. As the project was constructed in accordance with the terms and conditions of the permission

and all associated mitigation measures, adverse significant effects on the environment and/or on any European sites have been avoided. Accordingly, significant effects on the environment have not arisen and do not need remediation.

- In carrying out the works the applicant has complied with the conditions which were imposed on the permission. Cleanrath Windfarm Ltd. has not previously carried out any unauthorised development.

## 6.0 Planning Authority Submission

It does not have a view or observation to make as to whether there are exceptional circumstances in relation to the application.

## 7.0 Assessment

The proposal pertains to the windfarm as constructed on the subject site, the grid connection to the administrative boundary with Kerry and the ancillary works associated with same. 9 of the 11 turbines, only, have been constructed. The original permission allowed for a substation. This was subsequently reviewed with connection to a substation which was developed as part of an adjoining windfarm. Both windfarms share a portion of the grid connection route to the ESB substation at Grousemount/Coomataggart. In the interests of clarity the section of the grid connection within the administrative area of Kerry feeding into the Grousemount/Coomataggart substation was subject of a separate application and grant of permission under ref. 15/1164. It was not subject of appeal or judicial review. The revised substation arrangements on the adjoining wind farm site was subject of a separate application and grant of permission under ref. 17/5126. Again, it was not subject of appeal or judicial review.

Section 177D(1)(b) of the Planning and Development Act specifies that the Board can only grant leave to apply for substitute consent in respect of an application under section 177C where it is satisfied that an environmental impact assessment, a determination as to whether an environmental impact assessment is required, or an appropriate assessment was or is required in respect of the development concerned. It must then be satisfied that its decision to grant permission may be in breach of

law, invalid or otherwise defective or that exceptional circumstances exist such that it is appropriate to permit the opportunity for regularisation of the development.

## **7.1. Qualifying Development**

### *7.1.1. Environmental Impact Assessment*

The original application for the windfarm permitted under ref. PL04.246742 was accompanied by an EIS. The Board conducted an EIA.

As per class 3 (i), Part 2 of the Planning and Development Regulations, 2001, as amended, windfarms with more than 5 turbines or having a total output greater than 5 megawatts are subject to EIA. In the context of any application for substitute consent for which leave may be granted there will be a requirement for it to be accompanied by a remedial Environmental Impact Assessment Report for the Board to carry out an EIA.

### *7.1.2. Appropriate Assessment*

The original application for the windfarm permitted under ref. PL04.246742 was accompanied by a NIS.

The Board agreed with the Inspector's AA – Screening that the only European sites with the potential for significant effects were the Mullaghanish SPA (site code 004162), the Gearagh SPA (site code 004109) and the Gearagh SAC (site code 00108). It subsequently conducted an Appropriate Assessment in which it concluded beyond reasonable scientific doubt, that the proposed development (including the grid connection) either individually or in combination with other plans and projects, would not adversely affect the integrity of these European sites, in view of those sites' conservation objectives, or of any other European sites.

On the basis of the above it is reasonable to conclude that the application for substitute consent will be required to be accompanied by a remedial Natura Impact Assessment for the Board to carry out an AA.

### *7.1.3. Conclusion*

On the basis of the above I submit that the development consisting of a windfarm and ancillary works carried out by the applicant are capable of coming within section 177C(2) of the Act if the conditions at either (a) or (b) are satisfied. The first requires



a conclusion that the permission granted by the Board may be in breach of law or otherwise defective in a material respect. The second requires a conclusion by the Board that exceptional circumstances exist after having had regard to the criteria described in section 177D(2).

## **7.2. Breach of Law – Section 177C(2)**

The decision to grant permission made by the Board under ref. PL04.246742 was subject of judicial review. The High Court dismissed the challenge on each of the grounds cited and refused certificate of leave to appeal to the Court of Appeal. The Supreme Court subsequently granted leave to appeal on one issue only, relating to the question of the application of the Windfarm Guidelines under Section 28 of the Planning and Development Act, 2000, as amended. The judgement in December 2019 largely centres on information provided by appellants with respect to noise and consideration given to same by the Inspector and the Board in their assessments. It concluded that relevant submissions should be addressed, and an explanation given why they are not accepted. The Court in its judgement quashed the Board's decision to grant permission. This is the judgement of a court of competent jurisdiction in the State from which there is no appeal.

On this basis it can be concluded that Section 177C(2)(a)(ii) applies in that the decision to grant permission made by the Board is in breach of law, invalid or otherwise defective in a material respect pursuant to a final judgement of the Supreme Court on the basis of a procedural error.

## **7.3. Exceptional Circumstances – Section 177D(2)**

I propose to address each in turn:

### **7.3.1. *Whether the regularisation of the development would circumvent the purposes and objectives of the EIA Direction or the Habitats Directive***

The application for the windfarm and related electrical infrastructure granted under PL04.246742 was accompanied by an EIS and the Board undertook an EIA. Should leave be granted a rEIAR will be submitted with the substitute consent application which will provide for an environmental assessment of the project.

The application was accompanied by a NIS. The Board carried out AA - Screening and conducted an AA. Should leave be granted a rNIS will be submitted with the substitute consent application

I am therefore satisfied that the application would not circumvent the purpose and objectives of the EIA Directive or the Habitats Directive.

*7.3.2. Whether the applicant had or could reasonably have had a belief that the development was not authorised.*

The works were carried out on foot of permission granted on appeal under ref. PL04.246742.

On this basis I accept that the applicant could reasonably have held the belief that the works carried out were not unauthorised.

*7.3.3. Whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or appropriate assessment and to provide for public participation in such an assessment has been substantially impaired.*

As noted above an assessment of the environmental impacts of the windfarm has already been carried out and was subject to public participation.

It is my submission that the provision of information to allow the competent authority to undertake an assessment of the environmental impacts of the development for the purposes of an EIA and an AA has not been substantially impaired. I consider that the submission of an application that includes the relevant level of information to allow the Board to undertake EIA and AA can so be provided to determine whether there were significant impacts on the environment arising from the development. Furthermore, I am satisfied that the making of an application for substitute consent will permit public participation in the assessment process.

*7.3.4. The actual or likely significant effects on the environment or adverse effects on the integrity of a European Site resulting from the carrying out or continuation of the development.*

As noted previously the previous decision by the Board was subject to EIA and AA. The applicant states that the relevant mitigation measures and conditions have been incorporated throughout the construction and operational phases.

There is no evidence to suggest that any significant or adverse effects have arisen to date.

*7.3.5. The extent to which significant effects on the environment or adverse effects on a European Site can be remedied.*

As noted previously the previous decision by the Board was subject to EIA and AA. The applicant states that the relevant mitigation measures and conditions have been incorporated throughout the construction and operational phases.

There are no indicators to suggest that remediation is required

*7.3.6. Whether the applicant has complied with previous planning permissions or previously carried out an unauthorised development.*

In carrying out the development the applicant has complied with the conditions which were imposed on the permission. I am not aware of the applicant having previously carried out unauthorised development.

*7.3.7. Such other matters as the Board considers relevant*

I consider that no further matters need to be considered by the Board in this case.

#### **7.4. Conclusion**

It is my conclusion

(a) by reason of the Supreme Court judgement that the permission granted for the development by the Board may be in breach of law, invalid or otherwise defective in a material respect by reason of a procedural error.

(b) that exceptional circumstances exist in this case. In this I place particular emphasis on the fact that regularisation of the development would not circumvent the purposes or objectives of the EIA Directive or Habitats Directive; that the applicant could reasonably have had a belief that the development was not unauthorised; that the ability to carry out EIA and AA and provide for public participation has not been substantially impaired; and the nature and extent of any actual or significant impacts on the environment resulting from the development.

## 8.0 Recommendation

I recommend that the Board grant leave to apply for substitute consent and direct that the application be accompanied by a remedial Environmental Impact Assessment Report and remedial Natura Impact Assessment.

## 9.0 Reasons and Considerations

Having regard to section 177C and section 177D of the Planning and Development Act, 2000, as amended, the planning history of the site, all documentation on file and the report of the planning Inspector, the Board is satisfied that:

- (a) the development is one where an environmental impact assessment and appropriate assessment are required, and
- (b) that the permission granted for the development by the Board may be in breach of law, invalid or otherwise defective in a material respect pursuant to a final judgement of the Supreme Court by reason of a procedural error.
- (c) That exceptional circumstances exist by reference, in particular, to the following:
  - the fact that the regularisation of the development would not circumvent the purpose or objectives of the Environmental Impact Assessment Directive or of the Habitats Directive
  - that the applicant could reasonably have had a belief that the development was not unauthorised;
  - that the ability to carry out an Environmental Impact Assessment and Appropriate Assessment and provide for public participation in such assessments has not been substantially impaired; and
  - the actual or likely significant effects on the environment or adverse effects on the integrity of a European Site, if any, can be remedied.

The Board decided that it would be appropriate to consider an application for the regularisation of the development by means of an application for substitute consent.

The Notice to the applicant advising of the decision should also direct that:

- (a) The application be made within 12 weeks of the giving of the notice or such longer period as the Board may, on request, consider appropriate, and
- (b) The application includes a remedial Environmental Impact Assessment Report and a remedial Natura Impact Assessment.

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**Pauline Fitzpatrick**  
**Senior Planning Inspector**

**March, 2020**