



An
Bord
Pleanála

Inspector's Report

ABP-307920-20

Development	Wind Farm comprising 1 no. turbine with an overall tip height of up to 150 metres, crane hardstanding area and 20kv substation, ancillary plant and underground cabling.
Location	Knockanattin and Broomhill, Ballingarry, Co. Tipperary.
Planning Authority	Tipperary County Council
Planning Authority Reg. Ref.	19601392
Applicant(s)	Knockanattin Windfarm Limited
Type of Application	Permission (Current Application with Planning Authority – PA Ref. 19/601392)
Type of Appeal	EIAR Exemption Request under s.172(3) of the Act
Appellant(s)	Knockanattin Windfarm Limited
Date of Site Inspection	29 th January, 2021
Inspector	Stephen Kay

1.0 Introduction

- 1.1. This report relates to an application made by Knockanattin Windfarm Limited for an exemption from the requirement to submit an EIAR. The request has been submitted under S.172(3) of the Planning and Development Act, 2000 (as amended) which provides for the issuing of a determination by the Board as to whether an exemption from a requirement to prepare an EIAR should be granted.

2.0 Site Location and Description

- 2.1. The site of the proposed development which is the subject of the request under s.172(3) is located c.3.5km to the north east of the Killenaule and 5km to the west of Ballingarry in County Tipperary. Cashel is located c.18km to the south west of the site.
- 2.2. The site is accessed via an existing agricultural entrance off the southern side of the R691 which is a shared entrance with an adjoining commercial and agricultural premises. The access to the site comprises a narrow agricultural track that is characterised by a number of sharp turns. The environs of the access and the proposed development site comprise open agricultural grasslands.
- 2.3. The site is located at an elevation of approximately 30 metres above the R691. Levels also rise on the northern side of the road and there are currently two individual turbines (permitted under separate applications) located in this area to the north of the R691. Details on file indicate that these two existing turbines have a combined output of 4.9MW.

3.0 Proposed Development and Planning Authority Assessment to Date

- 3.1. Under Planning Authority Ref. 19601392, Knockanattin Windfarm Limited applied to Tipperary County Council for the construction of a Wind Farm comprising a single wind turbine, crane hardstanding area and 20kv substation, ancillary plant and underground cabling.

- 3.2. The turbine structure is stated to have a hub height of 81 metres, a rotor diameter of 138 metres and an overall height of c.150 metres. The output of the turbine is stated to be up to 4.2 MW.
- 3.3. The application was accompanied by an Environmental Report prepared by Jennings O'Donovan and Partners Consulting Engineers and an AA Screening Report, also prepared by Jennings O'Donovan and Partners.

4.0 Planning Authority Decision

4.1. Request for Further Information / Request Under Art.103

Dated 13th February, 2020 the Planning Authority requested the applicant to submit the following:

- Under Art. 103, the applicant was requested to prepare and submit a sub threshold EIAR to be prepared in accordance with the requirements of Schedule 6 of the Act.

Separately, and also dated 13th February, 2020, the applicant was requested to submit the following items of further information:

- Submission of a revised site layout map that indicates sightlines and forward stopping distances of 160 metres at the proposed access to the site from the public road,
- Design drawings showing silt traps and attenuation ponds proposed and drawings showing a means of preventing surface water runoff to the public road.

The response to these requests includes the following:

- Drawings of permanent and temporary site accesses,
- Letter of consent from the necessary landowners,
- Surface water management plan,
- Letter from Alan Dodds BL setting out how the Planning Authority are in error in the request for a sub threshold EIAR,

- Noise impact Assessment Report which includes the results of a noise survey and a cumulative noise impact assessment arising from the proposed and existing developments.
- Additional photomontages submitted,
- That an indicative grid connection route has been indicated in the environmental report submitted.

4.2. Planning Authority Reports

4.2.1. Planning Reports

The report of the Planning Officer on file notes the content of internal reports received and the single third party objection. Noted that the site is in an area that is open for consideration for wind energy development under the South Tipperary County Development Plan, 2009. The cumulative output of the existing and proposed turbines (4.9 plus 4.2 MW) is noted and a EIA sub threshold screening report attached with the report concludes that an EIAR should be requested under Art. 103 having particular regard to the impact on surface water and cumulative impacts with other existing developments, visual impacts and shadow flicker. Second report subsequent to submission of further information response notes the continued absence of an EIAR as requested and that the applicant is required to prepare and submit a sub threshold EIAR.

4.2.2. Other Technical Reports

Area Engineer – report recommends further information on surface water issues and visibility at the junction with the R691. Second report subsequent to the submission of further information identifies a number of requirements that could be addressed by way of conditions attached to a grant of permission.

Environment Section – Further information including requirement for a background noise survey and surface water flows.

5.0 Legislative Provisions

The following parts of s172(3) are particularly noted (full text attached with this report):

(a)(i) At the request of an applicant or of a person intending to apply for permission, the Board may take the action specified in subparagraph (ii) after having afforded the planning authority concerned an opportunity to furnish observations on the request and where the Board is satisfied that—

(I) exceptional circumstances so warrant,

(II) the application of the requirement to prepare an environmental impact assessment report would adversely affect the purpose of the proposed development, and

(III) the objectives of the Environmental Impact Assessment Directive are otherwise met.

(ii) Subject to subparagraph (iii), the Board may grant in respect of the proposed development an exemption from a requirement of or under regulations under this section to prepare an environmental impact assessment report.

6.0 Planning History

The following previous applications are specifically noted:

- Tipperary County Council Ref. 13/231; ABP Ref. PL23.243357 – Permission refused by the Planning Authority, but decision overturned on appeal to the Board.
- Tipperary County Council Ref. 15/600561; ABP Ref. PL95.245874 – Permission refused by the Planning Authority, but decision overturned on appeal to the Board.

The above applications are stated to share a grid connection and have a combined output of 4.9MW. Neither of these applications were accompanied by environmental impact statements.

7.0 Policy Context

7.1. Development Plan

The operational development plan is *South Tipperary County Development Plan, 2009 – 2015*.

The following policies are specifically noted:

Policy AEH5 – Protect views of special amenity value as set out in Appendix 6.

Policy CEF4: relates to Wind Energy Policy and states that:

'It is the policy of the council to facilitate wind energy developments where it is demonstrated to the satisfaction of the council that they comply with the Wind Energy Development Guidelines (DEHLG 2006) and any review thereof and the Wind Energy Strategy set out in Appendix 6 and any review thereof.'

Appendix 6 sets out guidance in relation to 'Wind Energy Development'. in accordance with the Wind Energy Policy Maps. Map 10 indicates that the appeal site is located within a 'Preferred Area for Wind Energy Development'.

Appendix 6 sets out list of protected views. The regional road to the north of the site (R607) is identified as having protected views (Ref. V052).

7.2. Natural Heritage Designations

The closest European site to the application site is the River Barrow and River Nore SAC site (site code 002162) which is located c.4.2km to the south east of the appeal site at the closest point.

8.0 Submissions Regarding Granting of Exemption Under s.172(3) of the Act from the Requirement to Submit an EIAR

8.1. Request by Applicant – Knockanattin Windfarm Limited

8.1.1. The following is a summary of the main issues raised in the request received from the applicant for the Board to grant an exemption from the requirement to submit an EIAR:

- That the issue of the requirement for an EIAR was discussed during the course of pre application consultations with the Planning Authority held in June 2019.
- That the application for permission was accompanied by a comprehensive Environmental Report
- That the request for further information was replied to in full and included a reasoned legal opinion as to why an EIAR was not required. A copy of this opinion is submitted, and the main issues raised in this opinion can be summarised as follows:
 - That the pre application consultation indicated that the submission of an EIAR was not required, that the submission of an environmental report would suffice, and the applicant proceeded on this basis. The purpose of a s.247 consultation would lack any purpose if it was open to the planning authority to later undertake a ‘volte face’.
 - That a failure on the part of the planning authority to properly consider the submitted documentation led to the incorrect request for the submission of a sub threshold EIAR.
 - The wording of Art. 103 requires the planning authority to undertake a preliminary assessment of the nature, scale and location of the development and to conclude either that there is no real likelihood of significant effects in which case the conclusion is that an EIAR is not required; that there is significant and realistic doubt regarding the effects on the environment in which case the applicant shall be required to submit the information set out in Schedule 7A; or thirdly that there is a real

likelihood of significant effects in which case the planning authority shall require the submission of an EIAR.

- Noted that the wording of the Article 103 request makes reference to ‘*a real likelihood of significant effects*’ in circumstances where a sub threshold EIAR should be requested, whereas the wording of the request issued states that ‘*the proposed development has the potential to give rise to significant effects on the environment*’. The Planning Authority should therefore have relied on Art.103(b)(iii).
- That the purpose of the EIA directive is to ensure that projects that are likely to have significant effects on the environment are subject to an assessment of their likely impacts
- That the contents of the Environmental Report submitted were not considered, or not fully considered in the decision reached by the Planning Authority. The Environmental report specifically set out to consider environmental impacts, including cumulative impacts. Specifically, the issue of noise and potential cumulative noise impacts is specifically addressed in the Environmental Report, (paragraph 7.3.6).
- Specifically noted that in the case of Refs. PL95.245874 and PL23.243357, neither the Planning Authority nor the Board considered that the submission of an EIAR / EIS was required. Noted that in the case of Ref. PL92.245874, there is a memo from the inspector to the Board which clearly considered the proposed development under the headings of Characteristics of the Project, Location of the Project, The Extent of Impact which concluded that the submission of an EIS was not required. This opinion was specifically noted and accepted in the Board Direction.
- Submitted that the nature of the development the subject of this request for an exemption is broadly in line with the above case.

8.2. Planning Authority Response

Details of the request for an exemption were referred to the Planning Authority for comment. There is no record on file of a response to this referral being received from the Planning Authority.

9.0 Assessment

9.1. Introduction

- 9.1.1. The wording of s.172(3) of the Planning and Development Act, 2000 (as amended) sets out three specific requirements that the Board must be satisfied are present for it to grant an exemption from the requirement to prepare an EIAR. All three requirements need to be met and the wording of the section is as follows:

(I) exceptional circumstances so warrant,

(II) the application of the requirement to prepare an environmental impact assessment report would adversely affect the purpose of the proposed development, and

(III) the objectives of the Environmental Impact Assessment Directive are otherwise met.

9.2. Exceptional Circumstances

- 9.2.1. The application for an exemption submitted by the first party does not clearly address these requirements, and specifically does not in my opinion clearly set out what might be considered to constitute 'exceptional circumstances' in the assessment of this case. In An Bord Pleanála case Ref. 59.EA2001, I note that the report of the inspector considered 'exceptional circumstances' in the context of the size of the development relative to the relevant EIA threshold. In that case, it was noted that the proposed development was very significantly below the threshold set out in the Fifth Schedule of the Planning and Development Regulations, and it was also noted that the part of the development the subject of the request was only part of a larger overall development which had already been granted. For these reasons,

it was considered that the test of exceptional circumstances had been met and this rationale was accepted and cited in the Reasons and Considerations cited by the Board in the Board Direction.

9.2.2. In the case of the development which is the subject of the current exemption request, the proposed number of turbines is one and the stated output is up to 4.9 MW. The scale of development is therefore only slightly below that set out in Class 3 of Part 2 of the Fifth Schedule of the Planning and Development Regulations, 2001 (as amended) which requires that an EIAR be prepared in respect of the following class of development:

(i) Installations for the harnessing of wind power for energy production (wind farms) with more than 5 turbines or having a total output greater than 5 megawatts.

9.2.3. I also note the fact that the proposed development would be located in close proximity (within c.1.4 – 1.8km) to existing turbines to the north on the opposite side of the R691 and such that potential cumulative impacts particularly with regard to environmental impacts, specifically noise and visual impacts, may arise.

9.2.4. The legal opinion submitted on behalf of the first party notes the fact that the likely requirement of a sub threshold EIAR was not raised during the course of pre application consultations undertaken as part of the application. This is noted, however under s.247(3) of the Act the carrying out of such consultations shall not prejudice the performance by a planning authority of any of its functions under the Act or any regulations made under the Act I do not consider the fact that the submission of an EIAR was not specifically raised as a requirement in the pre application consultations to constitute 'exceptional circumstance' for the purposes of s.172(3).

9.2.5. No other 'exceptional circumstances' with regard to the nature of the proposed development or particular circumstances around timelines or other specific issues are put forward by the first party that in my opinion clearly support the granting of an exemption under this criteria.

9.3. Impact of the Requirement on the Purpose of the Proposed Development

- 9.3.1. As with 'exceptional circumstances' there is no clear indication in the legislation as to what situations are envisaged where the requirement to prepare an EIAR would have an adverse impact on the purpose of the development. From a review of previous Board cases the issue has not been specifically addressed in Inspector reports or Board decisions.
- 9.3.2. No specific case is put forward by the applicant as to how the preparation of an environmental impact assessment report would adversely ***affect the purpose of the proposed development*** as identified in sub paragraph (ii). Specifically, no issues regarding project timelines or viability are presented which I consider could reasonably be seen to comply with the requirements of this section.

9.4. Objectives of the EIA Directive are Otherwise Met in the Assessment

- 9.4.1. Finally, under the heading of sub paragraph (iii) the Board is required to be satisfied that the ***objectives of the Environmental Impact Assessment Directive are otherwise met*** in the assessment of the application. This forms the basis of the submission received from the first party which sets out in detail how the assessment undertaken by the Planning Authority under Article 103 of the Regulations had not concluded that the proposed development would be likely to have '*a real likelihood of significant effects*' such as would justify the request for the submission of an EIAR under Art. 103. The submission received also sets out how the environmental report submitted with the application contains a detailed assessment of the likely environmental impacts of the proposed development, including cumulative impacts arising with other projects in the vicinity, notably the existing two turbines to the north.
- 9.4.2. Firstly, with regard to compliance with the requirements of Article 103, the screening assessment undertaken by the Planning Authority (attached with the first report of the Planning Officer on file) concludes that '*an EIAR is required for the development*'. This assessment has been undertaken on foot of the information submitted with the application, including the submitted Environmental Report, and also having regard to the submitted EIA Screening Report prepared by Jennings O'Donovan and Partners (dated November, 2019). I note that this screening report includes the information

specified in Schedule 7A information of the regulations at Table 5.1 of that document. I also note that the wording used by the Planning Authority in the request for further information issued does make reference to the development having '*the potential to give rise to significant effects on the environment*', however on the basis of the information presented and on file it is not evident to me that a clear error has been made by the Planning Authority in its assessment of the need for an EIAR. In any event, this is not the central issue of relevance to sub paragraph (iii) relating to an assessment of whether the objectives of the EIA Directive are otherwise met in the assessment of the application.

- 9.4.3. On this issue of the objectives of the EIA Directive being met, I note the content of the Environmental Report submitted with the application. Specifically, I note that this report includes consideration of what I consider to be the main environmental issues in this case, these being visual impact, noise, shadow flicker and the potential impacts on hydrology. I also note that this initial information was supplemented by further details submitted as part of the response to further information and specifically the submission of additional photomontages and additional details on noise including survey results. On the basis of the information available on file, I consider that a strong case could be made that this information is such that any decision made on foot of such information could reasonably be said to satisfy the objectives of the EIA Directive, in particular that the likely significant environmental impacts of the development are identified as assessed prior to the making of a decision.

9.5. Conclusion

- 9.5.1. The issue at question however is the application of the three tests set out in section 172(3) of the Act and, based on the information on file, the Planning Authority undertook a comprehensive screening assessment which concluded that the submission of an EIAR was required. I note that in previous Board decisions, notable Ref. 09.EA2005, the Board Direction specifically notes the undertaking of a screening exercise by the Planning Authority and that it '*did not consider it appropriate or necessary to revisit this exercise in the context of a request under section 172 (3) of the planning and development act 2000 (as amended)*'. In my

opinion the same situation pertains in the subject case, and the purpose of s.172(3) is not to revisit the merits or otherwise of the screening assessment undertaken by the Planning Authority. In this instance the Planning Authority has determined that EIA is required and as such it is not the function of the Board to revisit the merits or otherwise of this determination. The applicant contends that the contents of the Environmental Report submitted were not considered, or not fully considered in the decision reached by the Planning Authority. Given the screening assessment undertaken by the Planning Authority and contained on file, given the output of the proposed development relative to the EIA threshold (4.9MW relative to the 5MW threshold) and to the potential for cumulative impacts to arise I do not consider that it is appropriate or necessary to revisit the decision of the Planning Authority to request the submission of an EIAR. Similarly, the references by the applicant to the previous Board decisions on Refs. PL95.245874 and PL23.243357 where neither the Planning Authority nor the Board considered that the submission of an EIAR / EIS was required is not in my opinion directly relevant to the consideration of the current application under s.172(3) of the Act.

- 9.5.2. The applicant has sought an exemption under section 172(3) of the Planning and Development Act, and I therefore consider that the Board is constrained by the considerations of this section of the Act which require that there are '*exceptional circumstances*' to warrant an exemption, or that the requirement to submit an EIAR would '*adversely affect the purpose of the proposed development*'. While the applicant has submitted significant information regarding the nature of proposal, and a detailed environmental report supplemented by a response to further information that addresses relevant environmental considerations in the assessment of the case, for the reasons set out above, I do not consider that the applicant has put forward a clear case or presented information that would constitute '*exceptional circumstances*' justifying why they should be granted an exemption from the requirement to submit EIA. Similarly, no specific case is put forward by the applicant as to how the preparation of an environmental impact assessment report would adversely affect the purpose of the proposed development. For these reasons, it is my opinion that the Board cannot be satisfied that the requirements of s.172(3) of the Act have been met in the circumstances of this case and cannot therefore grant an exemption from the requirement to prepare an EIAR.

10.0 Recommendation

Having regard to the above, it is recommended that the Board refuse to grant the exemption sought based on the following reasons and considerations.

11.0 Reasons and Considerations

Having regard to:

- the nature and scale of the proposed development, in particular the fact that it would have an output very close to the 5MW threshold specified in Class 3 of Part 2 of the Fifth Schedule of the Planning and Development Regulations, 2001 (as amended),
- the potential for cumulative environmental impacts to arise with other existing developments, in particular the 2 no. existing turbines located to the north of the application site,
- the case made by the applicant with regard to the exemption sought and to the specific requirements of s.172(3)(a)(i) of the Act,
- the information on file, and
- the report of the Planning Inspector

the Board was not satisfied that the developer in this instance has clearly demonstrated exceptional circumstances pertaining to this development, or that the requirement to prepare an environmental impact assessment report would adversely affect the purpose of the proposed development as required under s.172(3) of the Planning and Development Act, 2000. It is not therefore open to the Board to grant an exemption from the requirement to prepare an environmental impact statement in this case.

Stephen Kay
Planning Inspector

16th February, 2021

