



An
Bord
Pleanála

Inspector's Report ABP-308071-20

Question

Whether the laying underground cables in an SPA from Mauricetown Windfarm, Mauricetown, Ashford, Ballagh, Co. Limerick to the substation at Dromdeeveen for grid connection purposes is or is not Development or is or is not Exempted Development.

Location

Mauricetown Windfarm, Mauricetown, Ashford, Ballagh, Co. Limerick.

Declaration

Planning Authority

Limerick City and County Council

Planning Authority Reg. Ref.

ED34/20

Applicant for Declaration

Liam Lenihan.

Planning Authority Decision

Is development and is permitted development.

Referral

Referred by

Liam Lenihan.

Owner/ Occupier

Mauricetown Windfarm.

Observer(s)

Highfield Energy on behalf of
Mauricetown Windfarm .

Date of Site Inspection

6th November 2020.

Inspector

Sarah Lynch

Contents

1.0 Site Location and Description	5
2.0 The Question	5
3.0 Planning Authority Declaration.....	5
3.1. Declaration.....	5
3.2. Planning Authority Reports	5
4.0 Planning History.....	6
5.0 Policy Context.....	6
5.1. Development Plan.....	6
5.2. Natural Heritage Designations	7
6.0 The Referral.....	7
6.1. Referrer's Case	7
6.2. Planning Authority Response	7
6.3. Owner/ occupier's response (where not the referrer) ...	Error! Bookmark not defined.
6.4. Further Responses.....	Error! Bookmark not defined.
7.0 Statutory Provisions.....	8
7.1. Planning and Development Act, 2000	8
7.2. Planning and Development Regulations, 2001	9
7.3. Other (as appropriate).....	Error! Bookmark not defined.
8.0 Assessment.....	10
8.1. Is or is not development	11
8.2. Is or is not exempted development	Error! Bookmark not defined.
8.3. Restrictions on exempted development	Error! Bookmark not defined.
9.0 Recommendation.....	14

1.0 Site Location and Description

- 1.1. The site is located to the south east of Ballagh in Co. Limerick within the rural townland of Mauricetown. The works subject to this referral are located within the roadside of a local road (L-790982) south of the R515 which is partially located within the Stacks to Mullaghareirk Mountains West Limerick Hills and Mount Eagle SPA. The use of the surrounding lands is mainly agricultural with rural housing interspersed along the cable route.
- 1.2. A previously permitted turbine development is located to the north of the site and is accessed to the west of the works. The topography of the surrounding lands rise in a northerly direction and

2.0 The Question

- 2.1. Whether the laying of underground cables in an SPA from Mauricetown Windfarm, Mauricetown, Ashford, Ballagh, Co. Limerick to the substation at Dromdeeven for grid connection purposes is or is not Development or is or is not Exempted Development.

3.0 Planning Authority Declaration

3.1. Declaration

The Declaration issued by the planning authority concluded:

That the laying of underground cables in an SPA from Mauricetown Windfarm, Mauricetown, Ashford, Ballagh, Co. limerick to the substation at Dromdeeven for grid connection purposes is development and is permitted development under planning permission reference PL.13.240910.

3.2. Planning Authority Reports

3.2.1. Planning Reports

The planners report states the following :

- The site map with the application showed the site 22.8ha of the proposed site outlined in red.
- The proposed grid connection was not included within the site outlined.
- An EIS and NIS were submitted with the planning application and both deal with the grid connection as does the planners report dated 3rd July 2012.
- The planner is satisfied having reviewed the EIS, NIS and planners report that the grid connection formed part of the planning application.
- The said works are considered to be permitted development.

3.2.2. Other Technical Reports

None

4.0 Planning History

- PI.240910 Permission granted for a ten year planning permission for the following development

‘Retention and completion permission for the construction, operation and decommissioning of up to 6 number wind turbine generators with a blade tip height of up to 132 metres (hug height of up to 85 met and rotor diameter of up to 93 m) and crane hardstandings for each turbine, the construction of a meteorological mast, electrical substation, underground electrical cabling, access tracks, borrow pit, temporary construction compound, retention and completion of access tracks and ancillary services at this site’.

- EC16/59 Section 5 referral –the laying of an underground MV ducting and cabling linking existing and proposed substations at Glenduff, Domdeeven and Mountplummer Co. Limerick is exempted development.

5.0 Policy Context

5.1. Development Plan

Limerick County Development Plan 2010-2016 is the operative plan. Relevant provisions include:

- Section 10.13.2.1 Large wind turbines and wind farms – Design Guidelines
- Section 10.14.2.4 Ancillary Developments

5.2. Natural Heritage Designations

- The site is located within the Stacks to Mullaghareirk Mountains West Limerick Hills and Mount Eagle SPA.
- Lower River Shannon is located c. 5km north west of the site.
- Blackwater River (Cork/Waterford) SAC is located c. 4km south of the site.

6.0 The Referral

6.1. Referrer's Case

Liam Lenihan has referred a Section 5 Declaration from Limerick County Council the issues raised can be summarised as follows:

- Cables were laid in lands outside of the planning permission that are within an SPA.
- Maps provided with referral indicate location of cables.
- Cable were laid after road widening under the SPA, site code 004161.
- Works were carried out on lands without consent.

6.2. Planning Authority Response

- None

6.3. Limerick County Council were requested to submit details of the a previous Section 5 referral to the Board, ref EC 16/59, all details including an Appropriate Assessment Screening document were submitted to the Board in December 2020.

7.0 Statutory Provisions

7.1. Planning and Development Act, 2000

- Section 2(1), the following interpretation of works:

“...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.....”
- Section 3(1) of the Act states the following in respect of ‘development’:

“In this Act, ‘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.”
- Section 4 (1) (a) – (l) sets out what is exempted development for the purposes of this Act and includes (g) “development consisting of the carrying out by any local authority or statutory undertaker of any works for the purpose of inspecting, repairing, renewing, altering or removing any sewers, mains, pipes, cables, overhead wires, or other apparatus, including the excavation of any street or other land for that purpose.”
- Section 4(1)(h)(i) development consisting of the thinning, felling or replanting of trees, forests or woodlands or works ancillary to that development, but not including the replacement of broadleaf high forest by conifer species;
- Section 4(4) Notwithstanding paragraphs (a), (i), (ia) and (l) of subsection (1) and 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 4 (2) provides for the making of the Regulations, Planning and Development Regulations, 2001.
- Section 5 (3) (A) states the following:

“Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such a fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of issuing the declaration.”

- It is stated under Section 177U(9) that “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.”
- **Section 138.—(1)(b)(ii) The Board shall have an absolute discretion to dismiss an appeal or referral—**
(b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to— (ii) any previous permission which in its opinion is relevant.

7.2. Planning and Development Regulations, 2001

7.3. Article 6 (1) of the Planning and Development Regulations states as follows: “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.”

7.4. The following classes of development are listed:

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.

Class 27

The carrying out by any undertaker authorised to provide an electricity service of development consisting of the construction of over-head transmission or distribution lines for conducting electricity at a voltage not exceeding a nominal value of 20kV.

7.5. Article 9(1)(a) sets out restrictions on exemptions for development to which Article 6 relates. The following sub-articles are listed:

(viiC) consist of or comprise development which would be likely to have an adverse impact on an area designated as a natural heritage area by order made under section 18 of the Wildlife (Amendment) Act 2000.

(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,

7.6. Article 9(1)(c) states that development to which Article 6 relates shall not be exempted development “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 procedures for the purpose of giving effect to the Council Directive.”

7.7. **Relevant Case Law**

2019/16/JR – Narconon Trust v ABP – case dismissed, the developer had acted on the decision on an unchallenged S.5 determination

8.0 **Assessment**

8.1. It should be noted that the purpose of this referral is not to determine the acceptability or otherwise of the proposed grid connection and associated works but whether the matter in question constitutes development, and if so, falls within the scope of exempted development.

8.1.1. In advance of an assessment of the merits of this particular question, I consider it prudent to draw the Boards attention to Section 138(1)(b)(ii) of the Planning and Development Act 2000, as amended, in which it is stated that the Board shall have an absolute discretion to dismiss an appeal or referral— (b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to— (ii) any previous permission which in its opinion is relevant.

8.1.2. Having regard to the foregoing provisions of the Act and taking into account the details of a recent judgement 2019/16/JR – Narconon Trust v ABP, it is important to firstly consider the planning status and relevant planning history of the development works.

8.1.3. Planning permission was granted, reference ABP.240910, for the development of a 10 year permission for retention and completion for the construction, operation and decommissioning of up to 6 no. wind turbines and ancillary works at lands connecting to the cable route. Arising from this development the applicants of the development

sought a Section 5 declaration (ref EC16/59) from Limerick County Council in 2016, in relation to the laying of an underground MV ducting and cabling linking the windfarm to existing and proposed substations at Glenduff, Domdeeven and Mountplummer Co. Limerick.

- 8.1.4. Limerick County Council determined on the 2nd February 2017, that the works described and identified in the plans submitted with the S. 5 referral were exempt development. This determination went unchallenged and works were carried out as described after the appropriate period following the determination.
- 8.1.5. Having reviewed the history file of referral reference EC16/59, it is clear that the referrer of the current S.5 subject to this assessment, is seeking a determination in relation to the same works that are identical in substance to those outlined in EC16/59.
- 8.1.6. I therefore draw the Boards attention to 2019/16/JR – Narconon Trust v ABP, in which a determination by the Board of a S.5 of identical substance to a previous unchallenged S. 5 determination was quashed.
- 8.1.7. It was considered within this judgement that to permit a challenge to a previously unchallenged S.5 declaration via the route of questions, identical in substance, despite no change in planning facts or circumstances is unreasonable and would set at naught the requirements of S. 50 of the Planning and Development Act 2000, as amended.
- 8.1.8. It is stated that to permit such practice would undermine the concept of legal certainty.
- 8.1.9. I have reviewed the details of the both the current S.5 referral and those of the previously determined S.5 EC16/59 and am satisfied that no change in planning facts or circumstances have arisen since the determination of EC16/59. It is therefore at the discretion of the Board whether to determine or dismiss the current Section 5 before it.
- 8.1.10. Notwithstanding the foregoing, the following is an assessment of the status of the development in the context of the Act and Regulations, should the Board determine to decide the question before them.

8.2. **Is or is not development**

- 8.2.1. The works consist of the following:

- Laying of underground cables within an SPA to facilitate the grid connection of a permitted windfarm via a substation at Dromdeeven.

- 8.3. Section 2(1) of the Planning and Development Act 2000, (as amended) includes the definition of works as “...includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal.....”
- 8.4. Section 3(1) of the Act states the following in respect of ‘development’, “in this Act, ‘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.”
- 8.5. The works to be carried out in the laying of cables require excavation and removal of vegetation and constitute development within the meaning of the Act. The question that is relevant in this instance is whether the works are or are not exempted development.

9.0 The Question as to whether or not the development is exempt

- 9.1. Article 6 (1) of the Planning and Development Regulations states that “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.”
- 9.2. Under Class 26 of Part 1 of Schedule 2, “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” is exempted development subject to Article 9.
- 9.3. The development carried out comprised the laying of an underground cable to facilitate the grid connection of a permitted windfarm via a substation at Dromdeeven. The works were carried out within the Stacks to Mullaghareirk Mountains West Limerick Hills and Mount Eagle SPA and as aforementioned the works are subject to the provisions of Article 9. It is important to note that the proposed works are largely within the existing road verge and a limited area of hedgerow was set back to facilitate the works and had recovered at the time of my site inspection.

- 9.4. Of significant relevance to the consideration of this Section 5 is the Appropriate Assessment Screening of the works which was submitted with the previous Section 5 referral to Limerick County Council (ref EC16.59). I have reviewed this screening document and considered it in the context of the current Section 5 the subject of this assessment. I am satisfied that the works described within the Appropriate Assessment are identical in substance to the those described within the current Section 5 and no changes in terms of planning facts or circumstances have arisen since the consideration of this previous Section 5 referral. It is concluded within this Screening document that the proposed works (those which have been carried out) would not give rise to potential significant effects on the surrounding European Sites and there was not likely to be any significant effects on the Natura 2000 network including the Stacks to Mullaghareirk Mountains West Limerick Hills and Mount Eagle SPA.
- 9.5. I have considered the foregoing Appropriate Assessment Screening submitted with the previous Section 5 to Limerick County Council in the context of the works carried out and the potential for impacts to arise in relation to the Hen Harrier, which is the single qualifying interest of the tacks to Mullaghareirk Mountains West Limerick Hills and Mount Eagle SPA. These birds nest in conifer plantations and occasionally in tall heather of unplanted bogs and heath whilst their foraging areas include open bog and moor land, young conifer plantations and hill farmland.
- 9.6. I note that the majority of the works have been carried out within the road verge with limited removal/setting back of hedgerows and the cable has not been laid in any area of significant ecological value in terms of the site synopsis for the proposed Special Protection Area. The area subject to the works has been substantially returned to its pre-existing state, with the regrowth of roadside hedging where it has been removed or cut back.
- 9.7. Thus, notwithstanding that the carrying out of the proposed development entailed an element of excavation and removal of roadside vegetation, the laying of the underground electricity cable is not likely to have resulted in any significant effect, in terms of disturbance of habitats or species, on the ecology of the proposed Special Protection Area.

- 9.8. Whilst the subject referral has not been accompanied by Natura Impact Statement I am satisfied that in terms of appropriate assessment, given the nature and extent of the works carried out, they are unlikely to have given rise to any significant effects on the SPA.
- 9.9. Accordingly, I am inclined to conclude that given the limited spatial extent of the proposed works, the temporary nature of the works, and as the area excavated was of no ecological value in terms of the site synopsis for the Special Protection Area, the subject works would have no significant effect, in terms of disturbance of habitats or species, on the ecology of the Special Protection Area, and that by applying a purposive interpretation of the provisions of Article 9(1)(a) (vii) of the Planning and Development Regulations, 2001, as amended, the laying of the underground electricity cable within the SPA is not affected by the restrictions on exempted development set out at the said Article 9(1)(a)(vii) of the Regulations and comes within the exempted development provisions of Class 26 of Part 1 of schedule 2 of the Regulations.

10.0 Recommendation

- 10.1. 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 laying underground cables in an SPA from Mauricetown Windfarm, Mauricetown, Ashford, Ballagh, Co. Limerick to the substation at Dromdeeven for grid connection is or is not development or is or is not exempted development:

AND WHEREAS Liam Lenihan requested a declaration on this question from Limerick County Council and the Council issued a declaration on the day of 14th of August, 2020 stating that the matter was development and was permitted development:

AND WHEREAS referred this declaration for review to An Bord Pleanála on the 31st day of August, 2020:

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

- (a) Section 2(1) of the Planning and Development Act, 2000, as amended,
- (b) Section 3(1) of the Planning and Development Act, 2000,
- (c) Section 4(1)(h)(i) of the Planning and Development Act, 2000, as amended,
- (d) Section 4(2) of the Planning and Development Act, 2000, as amended,
- (e) Section 4(4) of the Planning and Development Act, 2000, as amended,
- (f) Section (5)(3) of the Planning and Development Act, 2000, as amended,
- (g) 138 (1)(b)(ii) of the Planning and Development Act, 2000, as amended,
- (h) article 6(1) and article 9(1) of the Planning and Development Regulations, 2001, as amended,
- (i) Class 26, Part 1, Schedule 2 of the Planning and Development Regulations, 2001, as amended,
- (j) Parts 1 and 3 of Schedule 2 to the Planning and Development Regulations, 2001, as amended,
- (k) the planning history of the site,
- (l) 2019/16/JR – Narconon Trust v ABP

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the provision of the underground electricity connection and associated works involves the carrying out of works and, therefore, constitutes

development, under sections 2 and 3 of the Planning and Development Act, 2000, as amended,

(b) the works specifically would come within the scope of Class 26 of Part 1 of the Second Schedule of the Planning and Development Regulations, 2001, as amended and constitute exempt development.,

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (3) (a) of the Planning and Development Act 2000, as amended, hereby decides that the laying underground cables in an SPA from Mauricetown Windfarm, Mauricetown, Ashford, Ballagh, Co. Limerick to the substation at Dromdeeveen for grid connection purposes is development and is exempted development.

Sarah Lynch
Senior Planning Inspector

26th February 2021.