



An
Bord
Pleanála

Inspector's Report ABP-310107-21

Question

Whether the increase in the Megawatt (MW) output at a permitted wind farm development, without increasing the size and scale of any of the works, layout or plans at Ticknevin, Carbury, Co. Kildare is or is not development and is or is not exempted development.

Location

Ticknevin, Carbury, Co. Kildare and also Co. Offaly

Declaration

Planning Authority

Kildare County Council

Planning Authority Reg. Ref.

ED/00849

Applicant for Declaration

Cloncant Renewable Energy Ltd.

Planning Authority Decision

Is development and is not exempted development

Referral

Referred by

Cloncant Renewable Energy Ltd.

Owner/ Occupier

1. Anne Schnittger
2. Brian Farrell

3. Declan Behan
4. Ellen Leonard
5. Frank Eugene McGuinness Snr.
6. Frank James McGuinness Jnr.
7. Irene Farrell
8. James O'Brien
9. John Bosco Guinan
10. John Wyre & Sister Mary Farrell
11. Michael Behan
12. Pdraig Dolan
13. Sean Evans
14. Thomas Grady

Observer(s)

1. Dept. of Defence

Date of Site Inspection

07.09.2021

Inspector

Anthony Kelly

1.0 Introduction

- 1.1. This is a referral by Cloncant Renewable Energy Ltd. The referral relates to whether a proposed increase in megawatt (MW) output at a permitted windfarm (Cushaling Windfarm) would be considered development, and if so, whether it would be considered exempted development.
- 1.2. The purpose of this referral is not to determine the acceptability or otherwise of the proposed increase in MW output in respect of the proper planning and sustainable development of the area, but rather whether or not the matter in question constitutes development and, if so, whether it falls within the scope of exempted development.

2.0 Site Location and Description

- 2.1. The overall site, including nine turbines, access roads, substation etc. is approx. 5.5km in width. It is generally located approx. 3.5km north east of Clonbulloge and approx. 4km south of Edenderry. The vast majority of the overall site is located in east Co. Offaly with a very small area (one turbine) located in west Co. Kildare. This referral relates to the single turbine within the jurisdiction of Kildare Co. Co.
- 2.2. The overall site primarily comprises bogland and agricultural land. A poorly maintained roadway and the Cushaling River runs generally along the route of the proposed turbine locations from the R401 regional road and across the local road (L3001) connecting Rathangan and Edenderry.

3.0 The Question

- 3.1. The cover letter attached to the application received by Kildare Co. Co. states that the submission seeks to determine 'if an increase in Megawatt (MW) output at a permitted wind farm development is or is not development; and, if development, would it be considered exempted development'. Elsewhere in the cover letter, and the application form, it is stated that the applicant is applying to the planning authority 'to determine if

the increase in the output at the permitted wind farm would be considered development?'

- 3.2. Kildare Co. Co. in its decision on the application phrased the question as follows; *Whether the increase in the Megawatt (MW) output at a permitted wind farm development, without increasing the size and scale of any of the works, layout or plans at Ticknevin, Carbury, Co. Kildare is or is not development and is or is not exempted development.*
- 3.3. I consider the phrasing used by the planning authority is appropriate.

4.0 Planning Authority Declaration

4.1. Declaration

The Declaration issued by Kildare Co. Co. concluded that the proposal comprises development to which the following provisions apply:

- (a) Sections 3, 4 and 5 of the Planning & Development Act 2000 (as amended),
- (b) Article 6 and Article 9 of the Planning & Development Regulations 2001 (as amended), and,
- (c) The nature, extent, and purpose of the development.

Therefore the Council, in exercise of the powers conferred on it by Section 5(2)(a) of the Planning & Development Act 2000 (as amended), decided that the proposed increase in MW output at the permitted windfarm development is development and is not exempted development.

4.2. Planning Authority Reports

- 4.2.1. The Planning Report forms the basis of the planning authority's Declaration. The report states that there is no provision for exemptions for alterations to turbine MW output 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). The report notes that Condition 1 of the parent permission requires that the development

'shall be carried out and completed in accordance with the plans and particulars lodged ... as amended by the further plans and particulars received by An Bord Pleanála ...' The permission approved is for 5.5MW turbines and the proposed revision is for 6.6MW turbines, which would represent a 20% increase in output.

- 4.2.2. The report states that alterations of a minor nature may be permissible if they are generally in accordance with the permission granted or so minor as to not have implications outside the site. The planning authority considers the 20% increase in output is significant and could have potential downstream impacts for the grid, including nature and type of grid connection and grid receiving capacity. The proposed increase in output is considered to be a material departure from that granted.
- 4.2.3. The seventh schedule of the Act identifies the relevant threshold for strategic infrastructure development (SID) as having an output greater than 50MW. If originally proposed at 59.4MW the applicant would have been required to engage with the Board. Section 37A(2)(c) is particularly relevant where the Board must determine whether the development would have a significant effect on the area of more than one planning authority, and this development is within the jurisdiction of Kildare and Offaly Co. Cos.
- 4.2.4. The planning report concludes that to issue a section 5 declaration would subvert mandatory requirements of the Act and as such is a material departure from the permission granted.

5.0 Planning History

5.1. On Site

- 5.1.1. There has been one previous planning application on site.

P.A. Reg. Ref. 19/1323 / ABP Reg. Ref. ABP-306748-20 – In 2020, following a first party appeal of the decision by Kildare Co. Co. to refuse permission, the Board granted permission for one wind turbine with a tip height of up to 187 metres. The site is part of a larger windfarm development. The application was accompanied by an Environmental Impact Assessment Report (EIAR) and a Natura Impact Statement (NIS).

5.1.2. Other relevant applications are within Co. Offaly.

P.A. Reg. Ref. 19/606 / ABP Reg. Ref. ABP-306924-20 – In 2020, following first and third party appeals of the decision of Offaly Co. Co. to refuse permission, the Board granted permission for 8 no. wind turbines with a tip height of 187 metres, approx. 4.75km of new internal access roads, upgrade local roads, recreation trail, substation etc. The application was accompanied by an EIAR and a NIS.

P.A. Reg. Ref. DEC/21/6 / ABP Reg. Ref. ABP-309940-21 – This is a current application. Offaly Co. Co. has sought a declaration from the Board for the same proposed development as that subject of this report i.e. an increase in MW output.

5.2. **Relevant Referrals**

5.2.1. None.

6.0 **Policy Context**

6.1. **Kildare County Development Plan 2017-2023**

6.1.1. Wind energy is referenced in Section 8.5 (Wind Energy) of Chapter 8 (Energy & Communications). The Plan is generally supportive of wind energy development.

6.2. **Natural Heritage Designations**

6.2.1. The closest heritage area is The Long Derries SAC and pNHA (Site Code 000925) approx. 1.7km to the north.

7.0 **The Referral**

7.1. **Referrer's Case**

The main points made can be summarised as follows:

- Turbines of increased efficiency have emerged within the same dimension envelope permitted. While there is no change required to the dimensions of the permitted turbines, or to the associated hardstandings or infrastructure, 6.6MW turbines are now available. The windfarm can be developed with an output of 59.4MW and constructed and operated as described in the EIAR and planning drawings, and in compliance with the conditions of ABP-306748-20.
- At the time of the planning application a candidate turbine of up to 5.5MW was available with a combined nine-turbine expected yield of 49.5MW. While an increased capacity is positive in terms of energy output, it does not require an increase in the size or scale of the development and the windfarm can be developed in accordance with the plans and particulars originally submitted.
- The EIA considered the worst-case scenario. Turbine dimensions and all requirements in terms of the layout, dimensions of hardstanding and roads, all represented a worst-case dimension which can now accommodate a 6.6MW machine of the same scale previously assessed. The generator, an interior component, will be changing in size but the turbine dimensions will remain as permitted. The applicant does not consider this to be development as the environmental assessment considered a worst-case scenario, and the conditions of the permission will be met.

7.2. Planning Authority Response

7.2.1. Kildare Co. Co. has nothing further to add.

7.3. Owner/Occupier's response

7.3.1. None.

7.4. Observations

7.4.1. An observation has been received from the Dept. of Defence in relation to the referral. It is clear from the content of the observation that the Department is under the impression that this referral relates to the proposed development of a windfarm and is objecting to this. However, as this is a referral relating to power output and is not a

planning application for a windfarm, the Department's observation is not relevant in this instance.

8.0 Statutory Provisions

8.1. Planning and Development Act, 2000 (as amended)

- 8.1.1. Section 3(1) – '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'.
- 8.1.2. Section 4 sets out exempted developments for the purposes of the Act.
- 8.1.3. Sections 37A and 37B set out the Board's jurisdiction in relation certain planning applications and discussions with the Board before the making of the application. These sections are relevant to this referral given the increase in energy output proposed and are further considered in Section 9.1.

8.2. Planning and Development Regulations, 2001 (as amended)

- 8.2.1. Article 6 also sets out exempted development for the purposes of the Act.

9.0 Assessment

In 2020, the Board granted planning permission for a nine turbine windfarm development. Eight of these turbines are in Co. Offaly and one turbine is located in Co. Kildare. That turbine was permitted under ABP-306748-20. The turbines identified in the application, and permitted, had a capacity of 5.5 Megawatts (MW). Advances in technology mean turbines with a capacity of 6.6MW are now available with the same dimensions as those permitted. Only the interior generator will be changing in size. The applicant is seeking to determine whether the increase in output would be considered development. A similar referral for the eight turbines in Co. Offaly has also been received by the Board (ABP-309940-21).

The issues for the Board to consider are whether the proposal comprises development, whether or not it is exempted development and, if considered to be exempt, whether or not there any restrictions that would de-exempt the development.

9.1. Is or is not development

- 9.1.1. Section 3(1) of the Planning & Development Act, 2000 (as amended) defines development as 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. In this case there are no works proposed. There are also other considerations, some of which were noted in the planning authority's Planning Report.
- 9.1.2. Permission for development on site was granted under ABP-306748-20. Condition 1 states 'The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars received by An Bord Pleanála ...' The reason for the condition was 'In the interest of clarity'. The permission relates to a windfarm with an energy output of 49.5MW, which I consider forms part of the 'particulars' and a core element of the permission. Any material increase in this is beyond the bounds of the granted permission. None of the conditions allow for a deviation in the power output generated. Therefore, increasing the power output by 20% would contravene the terms of Condition 1 and would be contrary to the planning permission.
- 9.1.3. Section 37B (1) of the Planning & Development Act, 2000 (as amended), states that 'A person who proposes to apply for permission for any development specified in the Seventh Schedule shall, before making the application, enter into consultations with the Board in relation to the proposed development'. Schedule Seven (Infrastructure Developments for the Purposes of Sections 37A and 37B) (Energy Infrastructure) relates to, inter alia, development comprising or for the purposes of an installation for the harnessing of wind power for energy production (a wind farm) with more than 25 turbines or having a total output greater than 50 megawatts. Section 37A of the Act states that if, following consultation with the Board, the Board serves on the prospective applicant a notice in writing stating that, in the opinion of the Board, the proposed development would, if carried out, be of strategic economic or social importance to the State or the region in which it would be situate, would contribute

substantially to the fulfilment of any of the objectives in the National Planning Framework or Regional Economic and Spatial Strategy in force in respect of the area or areas in which it would be situated, or, would have a significant effect on the area of more than one planning authority, the application shall be made to the Board and not to a planning authority. In this case, as the development was for nine turbines and 49.5MW, no consultation appears to have been entered into with the Board. However, as a result of the proposed increase in output the applicant would have been obliged to enter into consultations with the Board had it been proposed in the first instance. To permit, as exempted development, a post-approval situation whereby an intensification of development, in this case a significant increase in energy generation, could circumvent strategic infrastructure development (SID) legislation without any robust public participation or appropriate pre-application consultation with the Board, is not considered to be acceptable, envisaged, or consistent with the proper planning and sustainable development of the area. I consider that the windfarm must be considered as a whole in this regard and that, just because the current referral is for one turbine i.e. an increased output of 6.6MW instead of 5.5MW, it avoids the SID legislation.

- 9.1.4. The applicant states that there is no change required to the infrastructure and that it can be constructed and operated as described in the EIAR and planning drawings. The submitted documentation states that only the interior generator will be increased in size. It also states that the EIA considered the worst-case scenario. Notwithstanding, I do not consider, from the documentation submitted with the referral, that sufficient detail has been provided to enable an adequate assessment of the environmental implications, if any, on the grid connection, grid capacity or any environmental issues that could result, including to European sites notwithstanding the relative remoteness of the site from relevant receptors. I consider there is a vacuum of appropriate information in this regard.
- 9.1.5. I note that many of these issues were cited in the planning authority's Planning Report but have not been commented on or challenged by the applicant.
- 9.1.6. I consider that an increase in energy output to 59.4MW would not comply with Condition 1 of the planning permission, would circumvent the SID procedures laid out in the Planning & Development Act, 2000 (as amended), and adequate information has not been provided to enable the Board to assess the impact, if any, on, for

example, the grid or the environment. I consider that the proposal would unacceptably intensify the permitted development and it would comprise 'development'.

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

- 9.2.1. Neither section 4 of the Planning & Development Act, 2000 (as amended), nor article 6 of the Planning & Development Regulations, 2001 (as amended), provide for an exemption relating to energy output from wind turbines. Therefore, the proposal does not comprise exempted development.

9.3. **Restrictions on exempted development**

- 9.3.1. As I do not consider the development to be exempt development, restrictions on exemption do not apply.

9.4. **Conclusion**

- 9.4.1. A windfarm was permitted in 2020 for nine turbines with a combined output of approx. 49.5MW. As it was below 50MW the applicant did not have to engage with the Board initially and separate applications, with EIAR and NIS, were submitted to both Kildare Co. Co. (for one turbine) and Offaly Co. Co. (for eight turbines). Following a refusal of permission for both applications, both were granted following appeals to the Board. Each turbine had an energy output of 5.5MW but now turbines with an output of 6.6MW are available within the same dimension envelope permitted with the only change being the internal generator increasing in size, according to the applicant. The applicant proposes to provide the 6.6MW turbines in lieu of the permitted 5.5MW turbines and is seeking a declaration to this effect from the Board after Kildare Co. Co. considered this would comprise development and would not comprise exempted development.
- 9.4.2. In my opinion there are three issues that result in the proposal comprising development. The particulars of the parent permission(s) relate to 5.5MW turbines and an overall output of approx. 49.5MW. An increase to 6.6MW turbines and an overall output of 59.4MW would contravene Condition 1 of the parent permission. Secondly, the SID legislative procedure was introduced for particular circumstances. An applicant is obliged to engage with the Board if development for wind power energy

production having a total output greater than 50MW is proposed. This would be circumvented by increasing power output above this threshold without appropriate Board involvement. Finally, and notwithstanding the applicant's position that this alteration is covered by the original environmental impact assessment, I consider that there is a significant vacuum of information submitted with the referral to ascertain the impact the proposed alteration may have on grid connection, grid capacity, the environment, and European sites. I consider the substantial increase in energy output would materially intensify the development from that originally envisaged, proposed, and permitted and would comprise development which is not exempted development.

10.0 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 the increase in the Megawatt (MW) output at a permitted wind farm development, without increasing the size and scale of any of the works, layout or plans at Ticknevin, Carbury, Co. Kildare is or is not development and is or is not exempted development:

AND WHEREAS Cloncant Renewable Energy Ltd. requested a declaration on this question from Kildare County Council and the Council issued a declaration on the 13th day of April, 2021 stating that the matter was development and was not exempted development:

AND WHEREAS Cloncant Renewable Energy Ltd. referred this declaration for review to An Bord Pleanála on the 28th day of April, 2021:

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

- (a) sections 3(1) and 4 of the Planning and Development Act, 2000, as amended,
- (b) sections 37A and 37B of the Planning and Development Act, 2000, as amended,
- (c) article 6 of the Planning and Development Regulations, 2001, as amended,
- (d) the planning history of the site,
- (e) the information submitted on behalf of the referrer regarding the increase in energy output proposed, and
- (f) the report of the Inspector.

AND WHEREAS An Bord Pleanála has concluded that:

- (a) the proposed increase in energy output from approx. 49.5MW to 59.4MW would contravene Condition 1 of ABP-306748-20.
- (b) increasing the energy output from approx. 49.5MW to 59.4MW would circumvent the strategic infrastructure development procedure set out in sections 37A and 37B of the Planning & Development Act, 2000, as amended.
- (c) there is an absence of adequate information to enable the Board to ascertain the impact the proposed development may have on, for example, grid connection, grid capacity, the environment, and European sites.
- (d) the substantial increase in energy output would materially intensify the development from that originally envisaged, proposed, and permitted and would comprise development which 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 increase in

the Megawatt (MW) output at a permitted wind farm development, without increasing the size and scale of any of the works, layout or plans at Ticknevin, Carbury, Co. Kildare is development and is not exempted development.

Anthony Kelly

Planning Inspector

09.09.2021