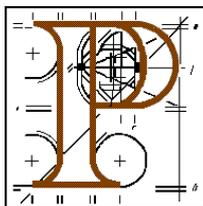


An Bord Pleanála



Inspector's Report

Referral Question: Whether the construction and/or upgrade of a number of roads for the construction of wind turbines and the use of these roads for the purpose of ongoing access to and maintenance of the wind farm is or is not development and is or is or is not exempt development.

Site Address: Dromoda Windfarm, Clash South, Co. Limerick.

Referral to Planning Authority

Planning Authority: Limerick City and County Council

PA Reg. Ref.: EC15/60

Referrer: Dennis Cremins

Owner/Occupier: Dromoda Windfarm (Rol)

Case type: Referral on Exempted Development under Section 5(1) of the PDA 2000 (as amended)

PA Decision: Is development and is exempted development.

Referral to Board

Referrer: Dennis Cremins

Case type: Referral on Exempted Development under Section 5(3) of the PDA2000 (as amended)

Observers: None

Date of Site Inspection: 17th January 2016

Inspector: G. Ryan

1.0 SITE

- 1.1 The site consists of an upland windfarm in rural West Limerick, near the border with Kerry. The turbines on site are operational and are accessed by a series of tracks to the north and south of an east-west local road. The area is characterised by a patchwork of forestry, bog, agricultural land, and dispersed dwellings.

2.0 REFERRAL QUESTION

2.1 AS PUT TO THE BOARD FOLLOWING THE PLANNING AUTHORITY'S DECISION

2.1.1 Background to the referral

- 2.1.2 The referral to the board, along with an accompanying report, sets out positions on the issues at hand. It was submitted by HRA Planning on behalf of the referrer Dennis Cremins of Knocknagoshel, Co. Kerry, which is around 15-20km southwest of the subject site.

- 2.1.3 The referrer is seeking this review of the planning authority's declaration as a concerned landowner on which the permitted windfarm (in part) is located.

2.1.4 The referral question

- 2.1.5 The 4 items of the referral question as put to the board are set out in Section 5 of the submission and are worded as follows.

1. *Whether the construction of a private road and new vehicular access, or the upgrading of an existing road and vehicular access located within the Stack's To Mullaghareirk Mountains, West Limerick Hills And Mount Eagle designated Natura 2000 SPA [Site Code 004161]) for the construction of turbines T14 and T23 constituted 'development' and not 'exempted development' and;*
2. *Whether the use of a private road located within the Stack's To Mullaghareirk Mountains, West Limerick Hills And Mount Eagle designated Natura 2000 SPA [Site Code 004161]) for the ongoing access to and maintenance of turbines T14 and T23 constitutes 'development' and not 'exempted development' and;*
3. *Whether the construction of other roads for the purpose of construction of the Windfarm between permitted turbines T2-T3, T11-T12, and T22-T29 located within the Stack's To Mullaghareirk Mountains, West Limerick Hills And Mount Eagle*

designated Natura 2000 SPA [Site Code 004161]) constituted 'development' and not 'exempted development' and;

4. *Whether the use of other roads for the purpose of ongoing access to and maintenance of the Windfarm between permitted turbines T2-T3, T11-T12, and T22-T29 located within the Stack's To Mullaghareirk Mountains, West Limerick Hills And Mount Eagle designated Natura 2000 SPA [Site Code 004161]) constituted 'development' and not 'exempted development'.*

2.1.6 Effectively, Points 1 and 2 relate to the construction/use of a roadway running north from the public road to T14/T23, whereas Points 3 and 4 relate to the construction/use of a number of roadways running between the turbines within the site.

2.1.7 Supporting information

2.1.8 Appendix 2 of the submission includes a map submitted by the applicant by way of further information under PA Ref. 09/7000 which shows the permitted access tracks and as-built access tracks in yellow and blue respectively.

2.1.9 The referrer asserts that PA Ref 10/101 sought regularisation of only some of the as-built modifications, and referred solely to 3 of the access tracks, 2 hard standings, and one relocation (T1). Appendix 4 shows the tracks for which retention was sought.

2.1.10 The section 5 referral to the planning authority sought clarification in relation to the remainder of the 'as built' modifications to the roads, which were identified by the applicant, but not regularised under PA Ref. 10/101.

2.1.11 Appendix 6 consists of a map, prepared by the referrer, which shows a range of information which can be summarised as follows.

Table 1

Map Item	Description	depicted	Permitted?	Constructed?	Asserted unauthorised
A	Roads permitted but not constructed	Yellow	Yes	No	
B	Road serving T14/T23	Red dash	No	Yes	Yes
C	Other roads illustrated by the developer as constructed, but with no permission	Red	No	Yes	Yes
D	As-built roads authorised by 10/101	Black dash	Yes	Yes	
E	Turbines not constructed (T13, T15, T16)	Yellow/black	Yes	No	
F	SPA	Red hatch			

2.1.12 The referral notes that 3 turbines (T13, T15, T16) and their associated track infrastructure were not constructed.

2.1.13 The referral cites excerpts from Sections 3 and 4 of the Planning and Development Act 2000 (as amended) and Article 9 of the Planning and Development Regulations 2001 (as amended)

2.1.14 Exemptions for forestry related development

2.1.15 In relation to the development/use of the road serving T14/T23 (Points 1 and 2 of the referral question), the appellant provides comparative aerial photography from the present day and from 2000, highlighting the junction with the public road. This shows that there has been widening of the road and of the entrance. Google streetview imagery from July 2009 is also included, which shows a wide splayed entrance, apparently during the construction phase of the windfarm.

2.1.16 Any assumption that the windfarm is utilising an existing road is immaterial as that road, including access arrangements, has been modified by development works in terms of its width, connection with the windfarm base, and the entrance detail with the public road.

2.1.17 Notes the board's recent decision under RL04.RL3323, which found that a similar track could not avail of the exemption under 4(1)(a)(ia) *"because the works carried out were primarily to facilitate the*

development of this wind farm and not forestry". In that case, it was considered that the use of the tracks for delivery of turbine components, and the subsequent use for maintenance, was materially different to forestry use.

2.1.18 Restrictions on exemption where EIA and AA arise

- 2.1.19 The council previously determined that the modified 'as built' roads would require EIA.
- 2.1.20 The T14/T23 access road is located entirely within the SPA. The works should be subject to Appropriate Assessment.
- 2.1.21 As such, there are restrictions on exemption [cites legislation – likely typos].

2.2 AS PUT TO THE PLANNING AUTHORITY IN THE FIRST INSTANCE

- 2.2.1 The referrers submission to the planning authority is largely comparable to the referral submitted to the board, as summarised above.

3.0 SUMMARY OF REPORTS TO THE PLANNING AUTHORITY

3.1 PA INSPECTOR'S REPORT

- 3.1.1 A report on file from one of the PA's technicians addresses the 4 specific questions as presented in the referral, and can be summarised as follows. There are no departmental reports on file.

<p>Point 1 – construction of road and access for construction of T14 and T23</p>	<p>Constitutes development. However, this roadway was in place prior to the construction of the turbines and the [designation] of the SPA in 2007. Any works were merely for maintenance and are therefore Exempted Development.</p>
<p>Point 2 - Use of road above for access/maintenance</p>	<p>The use of a roadway does not constitute development</p>
<p>Point 3 - Construction of other roads for construction of windfarm between T2-T3, T11-T12, T22-29.</p>	<p>The majority of these roadways were in place prior to construction and do not constitute development. A number of small tracks were constructed outside of the permitted works, but were covered under the retention application 10/101</p>

Point 4 – Use of above roads for access/maintenance	As per Point 2, the use does not constitute development
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Table 2

4.0 PLANNING AUTHORITY DECISION

The planning authority decided that the items listed in the referral question comprised development which is exempted development, citing the 4 points as set out in the Section 5 referral, which mirror those of the PA's Inspector's Report, and can be summarised as follows

- 1 The private roadway was in place prior to the construction of the turbines and the designation of the area as an SPA. The works carried out on the existing roadways were works necessary for the maintenance and upkeep of the road, and are therefore exempted development.
- 2 The use of the private roadway for the ongoing maintenance of [the turbines at Point 1 above] is not development
- 3 The construction of other roads for the purpose of construction of the windfarm between T2-T3, T11-T12, and T22-T29, the majority of these roadways were in existence prior to construction of the turbines apart from those granted under PA Ref 10/101. Therefore, the construction of these new roadways are development and are permitted development.
- 4 The use of these roads for the purpose of ongoing access to and maintenance of the windfarm between [the turbines at Point 3 above] is not development.

5.0 HISTORY

5.1 PARENT PERMISSION

PA Ref. 03/1343

Permission granted for 23 turbines, substation including control building, construction and upgrading of site entrances, site tracks and associated works. This application was accompanied by an EIS

Documentation on file indicates that due to grid connection constraint issues, the construction phase did not start until October 2008, with an Extension of Permission sought in December 2008, which was subject to a request for further information.

This application was accompanied by an EIS, but was not subject to AA.

5.2 EXTENSION OF DURATION OF PERMISSION

PA Ref 09/7000

The applicant sought an extension of duration in January 2009. Further information was requested in respect of the numbers and positions of turbines and how they differed from that permitted. Also submitted by way of further information was an EIA screening statement concluding that EIA was not required for the track changes. The applicant was informed that the changes required a retention application¹

5.3 ENFORCEMENT CASE

Planning Enforcement Notice DC-040-09

I note that there is correspondence on file of the parent permission dating from May 2009 relating to the divergence between the permitted access road network and the 'as built' access road network, and a statement by the County Council that the constructed works may not comply with the planning permission and that an application for retention could be required. A report prepared by Fehily Timony and Company on behalf of the applicant concerns itself with the question of whether EIA is required, in light of Departmental Circular PD6/08 which states that applications for retention permission, where an EIS is required, are to be returned as invalid. The applicant asserts that EIA is not required.

5.4 RETENTION OF AS-BUILT CHANGES

PA Ref. 10/101

Retention permission was granted for 3 access tracks, 2 hard standings, and relocation of turbine T1.

I note that this application included a Stage 2 Appropriate Assessment due to potential impacts on the SPA.

5.5 DECLARATION IN RESPECT OF USE OF FORESTRY TRACKS

PA Ref. D.D. 25/10

The planning authority issued a declaration to the effect that the use of existing forestry tracks to access existing turbines for the maintenance and upkeep does not constitute a material change of use, and is therefore not development.

The submitted drawings with the application show the current access road to T14/T23 and the accompanying form states that this track is used for either forestry or agricultural activities and also for access to the erected turbines.

¹ See Appendix 3 of referral to the board.

5.6 SIMILAR REFERRAL CASES

RL04.RL3323

Whether works and change of use to an existing forestry road is or is not development or is or is not exempted development at Meentinney West/East, Rockchapel, Kanturk, Co. Cork [the site of a windfarm].

The board found that these works were development and were not exempted development. The works were not considered to come within the scope of the exempted development provisions of section 4(1)(a)(ia) of the PDA2000

This case was cited by the referrer.

RL21.RL2974

Whether the construction of a road is or is not development or is, or, is not exempted development at Cloonkeelaun Td, Enniscrone. Co. Sligo [the site of a windfarm]

The board found that these works were development and were not exempted development. The works were not considered to come within the scope of the exempted development provisions of section 4(1)(a)(ia) of the PDA2000

6.0 POLICY

6.1 NATURAL HERITAGE DESIGNATIONS

6.1.1 **Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle SPA (site code 004161)**

6.1.2 The site lies within this SPA, as do most of the surrounding lands aside from pockets of farmland and associated housing along the public roads.

6.1.3 Conservation Objectives for this site are published in a document available online, and dated 13th February 2015. The conservation objectives are to maintain or restore the favourable conservation condition of a single species, the Hen Harrier.

6.1.4 The accompanying Site Synopsis (2007) notes that this SPA is

“a stronghold for Hen Harrier and supports the largest concentration of the species in the Country. A survey in 2005 resulted in 40 confirmed and 5 possible breeding pairs, which represents over 29% of the national total.”

and goes on to state that

“Hen Harriers will forage up to c. 5 km from the nest site, utilising open bog and moorland, young conifer plantations and hill farmland that is not too rank.”

Interestingly, the Site Synopsis states that

“The main threat to the long-term survival of Hen Harriers within the site is further afforestation, which would reduce and fragment the area of foraging habitat, resulting in possible reductions in breeding density and productivity. The site has a number of wind farm developments but it is not yet known if these have any adverse impacts on the Hen Harriers.”

6.2 LIMERICK COUNTY COUNCIL DEVELOPMENT PLAN 2010-2016

The policies of the county plan are not relevant to the circumstances and applicable legislation in this case.

7.0 LEGISLATION

7.1.1 The following excerpts from planning legislation are relevant to his referral.

7.2 2000 PLANNING AND DEVELOPMENT ACT (AS AMENDED)

S.2(1) *“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal...*

S.3(1) *In the 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.*

S.4(1) *The following shall be exempted development for the purposes of the Act*

(a)

(i) *development consisting of the thinning, felling and replanting of trees, forests, woodlands, the construction, maintenance and improvement of non-public roads serving forests and woodlands and works ancillary to that development.*

(ia) *development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road) or works ancillary to such road development, where the road serves forests and woodlands.*

S.4(2)(a) *The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act...*

S.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.*

7.3 2001 PLANNING AND DEVELOPMENT REGULATIONS (AS AMENDED)

A.6(1) *Subject to article 9, development of a class² 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.*

A.8G. *Development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road), or works ancillary to such road development, where the road serves forests and woodlands, shall be exempted development.*

A.9 (1) *Development to which article 6 relates shall not be exempted development for the purposes of the Act*

(a) *if the carrying out of such development would –*

(ii) *consist of or comprise the formation, laying out or material widening of a means of access to a public road the surface carriageway of which exceeds 4 metres in width.*

(vi) *interfere with the character of a landscape, or a view or prospect of special amenity value or special interest, the preservation of which is an objective of a development plan for the area.*

(viiB) *comprise development in relation to which a PA or the Board is the competent authority in relation to Appropriate Assessment and the development would require an AA because it would be likely to have a significant effect on the integrity of a European Site.*

² There is no class of development that would approximate to the items covered in the subject referral.

8.0 CASE LAW

In the case of **Galway County Council v. Lackagh Rock** Justice Barron held

that it was not sufficient for the council to establish an intensification of use had taken place. It had to prove that the intensification of activity amounted to a change of use which was material i.e. had given rise to fresh planning considerations.

To test whether or not the use are materially different it seems to me that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use. If they are materially different, then the nature of use must be equally materially different.

9.0 FIRST PARTY RESPONSE TO 3RD PARTY REFERRAL

- 9.1.1 A submission to the board from SSE – Dromada Windfarm (ROI) Limited counters the assertions made in the referral.

9.2 PERMITTED VERSUS AS-BUILT LAYOUT

- 9.2.1 Appendix 3 shows the permitted (green) and as-built (red) layouts superimposed on each other, with the Turbine numbers listed.

9.3 ALLEGED WORKS (POINTS 1 AND 3)

- 9.3.1 The developer asserts that the construction and/or upgrading and use of each of the access tracks identified in the reference is covered within the terms of the original planning permission granted under PA Ref. 03/1343
- 9.3.2 That the routes taken by certain of the tracks differ somewhat from the planning permission was done for particular reasons, and in accordance with sound development standards having regard to the environment. It is not required, or even feasible, for the works carried out to constitute a mirror image of the plans submitted as part of the planning application process. The differences constitute immaterial deviations rather than unauthorised development. The retention application [PA Ref. 10/101] covered the material deviations.
- 9.3.3 The developer notes that there was no standard ‘Condition 1’ under PA Ref 03/1343 requiring the development to be constructed ‘as per the plans and particulars’, and asserts that the permission deliberately left some flexibility in relation to the precise routes to be taken. On the issue of immaterial variations, the developer cites

O'Connell v Dungarvan Energy Ltd. (Unreported, High Court, 27 February 2001) and Wicklow County Council v Forest Fencing Ltd trading as Abwood Homes and George Smullen ([2008] 1 I.L.R.M 357).

- 9.3.4 The developer notes that Condition 5 of PA Ref. 03/1343 required that *“The specification for the access roads to the turbines shall be in accordance with details to be agreed with the Planning Authority prior to the commencement of development”*.
- 9.3.5 Part of the reason for the deviation from the submitted layout was an inability to build out part of the development due to the fact that Folio 3305F was sold by the original landowner to the referrer, Mr Cremins, with whom it was not possible to agree terms. Section F of the submission expands on this matter.
- 9.3.6 The developer asserts that issues around the limitations of mapping accuracy should be considered.
- 9.3.7 Appendix 5 consists of a report prepared by Fehily Timony and Company which assess the ecological impact of the originally planned layout against the ecologic impact of the as-built layout. The developer contends that the as-built layout reduces habitat loss of ecologically significant habitats.
- 9.3.8 The developer asserts that the track serving T14 and T23 is ‘pre 64’.

9.4 ALLEGED CHANGE OF USE (POINTS 2 AND 4)

- 9.4.1 On the question of the materiality of the change of use of the access tracks, the developer cites Westmeath County Council v Quirke and Sons, Monaghan County Council v Brogan, and Esat Digifone v South Dublin County Council. The referrer has not identified any additional impacts arising from the fact that the track is now used to access wind turbines as well as for its former purpose.

9.5 ALLEGED RESTRICTION ON EXEMPTION DUE TO AA

- 9.5.1 If it is accepted that the deviations are immaterial, then it follows that they fall within the scope of the original planning permission. The requirement for AA cannot be retrospectively applied to development prior to the designation of an area as an SPA.
- 9.5.2 Hen Harrier surveys conducted on the lands between 2008 and 2015 indicate that the impact of the development on the SPA is not significant. Refers to Appendix 5 – Fehily Timony report – in this regard.

9.6 FEHILY TIMONY REPORT

- 9.6.1 This report is titled ‘Examination of Discrete Environmental Impacts of Dromada Wind Farm, Co. Limerick on European Sites’.
- 9.6.2 This report refers to Hen Harrier activity in and around the windfarm site, with a nesting site just outside the site boundary.
- 9.6.3 The report asserts that the ‘as built’ layout has a lower impact on habitats than the permitted layout, with a smaller footprint in terms of track length.

10.0 REFERRERS RESPONSE TO FIRST PARTY RESPONSE TO 3RD PARTY REFERRAL

- 10.1.1 This submission was again prepared by HRA Planning on behalf of the referrer, Mr Cremins. It makes the following additional points of note.
- 10.1.2 The existence of the works are not disputed by the developer, who has acknowledged them, but attempts to validate them as being insignificant and/or covered by the permission. The deviations were, however, a conscious decision by the windfarm developer to depart from the terms of the permission, with differences of up to 35m in some instances.
- 10.1.3 Due to Section 4(4) of the PDA2000 (AA), no exemption may apply.

11.0 ASSESSMENT

Having inspected the site and reviewed the file documents, I consider that the issues raised by this appeal can be assessed under the following broad headings:

- Whether the items 1 and 3 constitute development
- Whether items 1 and 3 constitute exempted development
- Whether items 2 and 4 constitute development
- Whether items 2 and 4 constitute exempted development
- Whether restrictions in respect of EIA or AA would apply
- Other exemptions from the 2001 Regulations

11.1 WHETHER THE ITEMS 1 AND 3 CONSTITUTE DEVELOPMENT

- 11.1.1 The question before the board relates to 4 items, as set out in Section 2.1.4 above. Items 1 and 3 of the question relate to 4 sections of roadway that deviate from the footprint of the permitted development. These deviations are shown at a number of junctures on file, but perhaps the clearest collection can be found in Appendix 3 of the first party response to 3rd party referral.

- 11.1.2 There is no dispute between the parties as to the existence of these roads, and I do not propose to consider an alternative to this proposition. On the basis of the information available, photography, inspection of the site, planning history, material on file, and aerial photography, I am in no doubt but that these roadways were built with the express purpose of providing for the construction and subsequent maintenance of the Dromada windfarm.
- 11.1.3 It is a matter of law that the construction, alteration, or repair of roadways, private or otherwise, constitutes development under the terms of Section 3(1) of the PDA2000, as informed by Section 2(1) of the Act. Indeed, the fact that the Act expressly contains exemptions in the case of some roads substantiates this position.
- 11.1.4 As such, it is my opinion that the elements set out in items 1 and 3 of the referral question constitute development

11.2 WHETHER ITEMS 1 AND 3 CONSTITUTE EXEMPTED DEVELOPMENT

11.2.1 Relevance of extent planning permissions

- 11.2.2 In the first instance, it is necessary to consider the extent to which the parent permission, or subsequent retention permission, have a bearing on the referral question, as much attention is focussed on this issue by the parties to the referral. In my opinion, this matter is wholly irrelevant. The question before the board must be determined within the terms of Section 4 of the PDA2000 which opens with *“If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act”*.
- 11.2.3 It is entirely reasonable and feasible for the board to come to a position that something constitutes ‘development and not exempted development’ while it simultaneously benefits from an extant planning permission. Indeed, it would be somewhat incongruous for the board to determine an item to not be development, or to be exempted development, where an extant permission applied. This would imply that the applicant had needlessly sought and obtained planning permission.
- 11.2.4 As such, I intend to set aside the extent to which the roadways in question may or may not be subject to an extant planning permission, and indeed all arguments surrounding this issue such as whether the deviations are ‘immaterial’, ‘de minimis’, or otherwise. These are matters for planning enforcement, to be dealt with by the planning authority and the courts as necessary. The board has not been conferred any jurisdiction by legislation in this area.

11.2.5 Whether the development can avail of any exemptions

11.2.6 Section 4(1)(a) of the PDA2000 sets out a range of developments that are 'exempted development' for the purposes of the act. The closest development types to the subject proposal are set out in items (i) and (ia) which can be summarised as

(i) "...the construction, maintenance and improvement of non-public roads serving forests and woodlands..."

and

(ia) "development (other than where the development consists of provision of access to a public road) consisting of the construction, maintenance or improvement of a road (other than a public road) or works ancillary to such road development, where the road serves forests and woodlands."

11.2.7 Subsection (ia) would appear to be more restrictive than (i), and a number of the road sections would appear to potentially fall foul of the exclusion of roads that include access to a public road. Subsection (i) would appear to be more useful to the applicant, and warrants further consideration.

11.2.8 This exemption makes provision for the construction and/or improvement of non-public roads, which is the case in this instance. However, it only applies where the road in question 'serves forests and woodlands'. The exemption hangs on the interpretation of this question.

11.2.9 It is clear that there is forestry in the vicinity, peppered within and adjacent to the subject site. It is clear to me that the roads in question were constructed and/or improved in order to provide construction and maintenance access for the windfarm development. Everything about the layout and scheduling of these works – as evident from comparative aerial photography – points to this conclusion. As such, I do not consider that it would be reasonable to allow a windfarm developer to avail of an exemption that was clearly intended to benefit forestry development.

11.2.10 A more permissive interpretation of this provision might be to allow for the exemption if the roads in question provide secondary access to forests and woodlands, even if their clear intention was for windfarm development. I note that there are indeed areas of forestry within and adjacent to the site. However, there is no evidence to suggest that there is any functional connection between the 3 sections of road in question and any adjacent forestry operations, which appear to benefit from an independent road and access track network. In any event, I do not consider that such a permissive interpretation would be consistent with the intention of the legislation.

- 11.2.11 On the basis of the above assessment, I consider that the construction of the roads relating to T14/T23, T2/T3, T11/T12, and T22/T29 constitute development that is not exempted development.

11.3 WHETHER ITEMS 2 AND 4 CONSTITUTE DEVELOPMENT

- 11.3.1 While items 1 and 3 relate to the construction of the identified roads for the purposes of construction of the turbines, items 2 and 4 relate to the use of these roads for ongoing access and maintenance. On the basis of my above assessment, these roads are development and not exempted development in the first instance, and as such, this is something of a moot point. I will address this question from the perspective of assuming that these roads are forestry roads that are permitted as exempted development under the terms of Section 4(1)(a)(i) of the PDA2000
- 11.3.2 Considering a theoretical change of use from forestry road to road for the use (inter alia) of maintaining turbines, it is necessary to consider whether this change of use is material for planning purposes. The case of Galway County Council v Lackagh Rock (see section 8.0 above) sets a test that is useful in this instance. It asks the question of whether the matters which the planning authority would take into account under Scenario A (in this case forestry) would be different to the matters the planning authority would take into account under Scenario B (windfarm maintenance). If these are materially different, Justice Baron held that the nature of use must be equally materially different.
- 11.3.3 Under Scenario A, large plant and timber transport trucks would travel on these roadways. Under Scenario B, smaller maintenance vehicles would travel on these roadways, and conceivably a mobile crane to provide access to the tower, nacelles, or blades of the turbines. Under both the scenarios, there would be long periods of no activity, with periodic spells of higher intensity.
- 11.3.4 In my opinion, the forestry and windfarm maintenance scenarios are effectively identical in terms of the range of matters that would be considered by the planning authority. As such, I conclude that the change of use is not material for planning purposes, and is therefore not development under the terms of Section 3(1) of the Act.

11.4 WHETHER ITEMS 2 AND 4 CONSTITUTE EXEMPTED DEVELOPMENT

- 11.4.1 It is not necessary to consider this question, as I have concluded that these items do not constitute development.

11.5 WHETHER RESTRICTIONS IN RESPECT OF EIA OR AA WOULD APPLY

11.5.1 Notwithstanding my assessment above, I consider it appropriate to consider this matter in isolation, should the board take a contrary position on the matter.

11.5.2 This question is of relevance given the provisions of S4(4) of the PDA2000, which effectively 'de-exempts' any form of exempted development where EIA or AA is required.

11.5.3 Environmental Impact Assessment

11.5.4 I note the document 'Examination of discrete Environmental Impacts of Dromada Wind Farm, Co. Limerick on European Sites', which was submitted with the developer's response to the referral. While this is intended to be read in conjunction with requirements for AA, it informs the question of EIA also.

11.5.5 Schedule 5 of the Planning and Development Regulations 2001 (as amended) sets out the development types for which EIA is mandatory.

11.5.6 Article 92 defines 'sub-threshold development' as development of a type set out in Schedule 5 which does not exceed a quantity, area or other limit specified in that Schedule in respect of the relevant class of development"

11.5.7 Article 103 of the Regulations set out the circumstances under which EIA is required for Sub-Threshold developments, with Schedule 7 setting out the criteria for determining this question.

11.5.8 Class 10(dd) of Schedule 5 is "*All private roads which would exceed 2000 metres in length.*" As such, a private road which would be less than this length constitutes a sub-threshold development. While the aggregate length of track in this instance is in the order of 2800m, no one section exceeds the mandatory threshold.

11.5.9 Turning back to the considerations set out in Article 103, subarticle 2(a) requires consideration of the fact that the development "*would be located on, in, or have the potential to impact on.. a European Site*". The subject site is located within an SPA.

11.5.10 Item 1 of Schedule 7 of the Regulations references the characteristics of the proposed development, including its size. In this instance, and notwithstanding the environmental sensitivities of the area, I consider that the construction of a small number of minor roadways or access tracks is sufficiently small in extent such that it would not trigger the requirement for a sub-threshold EIS. As such, no 'de-exemption' under S4(4) of the PDA would apply.

11.5.11 I note that under PA Ref. 10/101, the application was not accompanied by an EIS.

11.5.12 Appropriate Assessment

Again, I note the document 'Examination of discrete Environmental Impacts of Dromada Wind Farm, Co. Limerick on European Sites', which was submitted with the developers response to the referral.

11.5.13 The development is located within the Stacks to Mullaghareirk Mountains, West Limerick Hills and Mount Eagle Special Protection Area (site code 004161), the conservation objectives for which relate solely to the Hen Harrier. The development is not directly connected with or necessary to the management of the SPA.

11.5.14 The question becomes whether the project would be likely to have a significant effect, either individually or in combination with other plans and projects, on the European site in view of the site's conservation objectives.

11.5.15 The development consists of the provision of a number of access roadways in connection with a windfarm. The conservation objectives relate to the maintenance and restoration of the favourable conservation condition of the Hen Harrier. While the roads constitute a reduction in the habitats they cross – as documented in Section 4 of the 'Examination of Discrete Environmental Impacts..' document - there is no evidence to suggest that these habitats are of significance to the Hen Harrier. In any event, the footprint of habitat is not significant in quantitative terms for the purposes of AA screening, in my opinion.

11.5.16 On the issue of cumulative effects, I note that these roadways serve a windfarm, and the turbines themselves result in likely significant effects on the SPA. However, given the ancillary relationship between the roadways and the turbines, I do not consider that Stage 2 AA is required in relation to the roadways.

11.5.17 In my opinion, the development identified are not likely to have significant effects on the SPA in light of its conservation objectives. As such, no 'de-exemption' under S4(4) of the PDA would apply.

11.5.18 I note that the retention application under PA Ref. 10/101, which was for 3 access tracks, 2 hard standings, and relocation of T1, included a Stage 2 AA.

11.5.19 OTHER EXEMPTIONS FROM THE 2001 REGULATIONS

11.5.20 I note that Article 9 of the Planning and Development Regulations 2001 (as amended) set out a range of additional restrictions on exemption. However, these only apply to exemptions that flow from Article 6 of the Regulations. No potential exemption for the subject

case arises under Article 6, and therefore Article 9 is not relevant in this instance.

12.0 CONCLUSION AND RECOMMENDATION

12.1.1 It is my opinion that the roadways in question constitute development, and that there is no valid exemption. The theoretical change of use from forestry to windfarm use of these roads would not constitute development in my opinion. Were the board to consider the identified items as being exempted development, I do not consider that the restrictions on exemption on foot of EIA and AA would apply in this instance.

12.1.2 I recommend an order as per the following

DRAFT ORDER

WHEREAS questions have arisen as to whether:

- (i) the construction and/or upgrade of a number of roads for the construction of wind turbines (Items 1 and 3)
- (ii) the use of these roads for the purpose of ongoing access to and maintenance of the wind farm (Items 2 and 4)

at Dromoda Windfarm, Clash South, Athea, Co. Limerick is or is not development: and is or is not exempted development;

AND WHEREAS the said questions were referred to An Bord Pleanála by Dennis Cremins on the 2nd day of October, 2015:

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

- (a) sections 2(1), 3(1), 4(1)(a)(i), 4(1)(a)(ia), and 4(4) of the Planning and Development Act, 2000, as amended,
- (b) the current and historic layout of roads and tracks in the area
- (c) the submissions on file:

AND WHEREAS An Bord Pleanála has concluded that -

- (a) the roads in question were constructed and/or upgraded to facilitate the construction of the associated wind farm, and not to serve forestry and woodlands.

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 construction of a road for forestry related use is development and is not exempted development.

G. Ryan
Planning Inspector
9th March 2016