New Appeal Form 244439

Section 26 Appeal		Section 37 Appeal	✓

Lodged: 9/2/15. Dev. Type: 08. No:

Case Type: 3rd -v- Grant. Class: 20.

EO: H.M. Category:

Development: Construction of a sub-station to replace sub-station previously granted under Pl.04.219620 and all ancillary site development works.

Barnadivane, Kneeves, Terelton, Co. Cork.

PA Code: 04. Reg.Ref: 14/557. Applic. Type: 03. Applic. Lodged: 26/9/14.

PA Dec: 05. PA Dec Date: 13/1/15. OH Request Date: —

Issue Code: — Priority No: 9 NIS: Y/N EIS: Y/N Size: —

Correct Fee: Y/N Fee Type: S. (m) to (x) Name/Address Appellant: ✓ 3rd Party Ack: ✓

Appellant: Stephaine Larkin & Others, (Address Provided)

Address/Agent: Noonan Linehan Carroll Coffey, Solicitors, 54 Main Street, Cork.

Applicant: Arran Windfarm Ltd.,

Address/Agent: Fehilly Timoney Ltd., Core House, Pouladuff Rd, Cork.

MR. Stephen Sutton,

PA notified by phone

Yes ✓ EO: of -

No Date: 10/2/15.

PA Contact: Ann Kordan.

Appeal on Surfboard: ✓

EO: M. Stevenson. Date: 9/2/15.

1. Acknowledge with: BP01.

Merge: (1) psplit ☐ (2) msplit ☐ (3) revplan ☐ (4) omitdoc ☐ (5) info ☐ (6) xmas ☐

2. Issue appeal to: (a) PA: BP07. (b) Applicant: BP05.

3. Return appeal with:

4. Return to prepare exp.ltr:

Appeal Number on Surfboard: ✓

AA: L. Stoney Date: 11/02/15.

Comments:

Pl.04.219620.

Updated Aug. 2013

Noonan Linehan Carroll Coffey

SOLICITORS

54 North Main Street
Cork
Ireland
www.nlcc.ie

Telephone 021 4270518
Fax 021 4274347
Email info@nlcc.ie
DX 2044 Cork

Addressee

The Secretary,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1.

6th February 2015
Our ref: 26310-14/JN/PW

RE: Cork Co Council Planning Register Reference – 14/557 Barnadivane Kneeves Terelton Co. Cork
Permission for construction of an electricity substation compound; this is said to be intended to replace the substation already granted permission under PL04.219620 (05/5907) and subsequently extended under 11/6605. The electricity substation layout includes 3 no. control buildings, associated electrical plan and equipment, security fencing and ancillary works. This application is seeking a 10 year planning permission.

Applicants – Arran Windfarm Limited

Our clients –

1. **Stephanie Larkin of Moneygaff East, Castletown, Enniskeane, County Cork**
2. **Michael O'Donovan of Moneygaff East, Castletown, Enniskeane, County Cork**
3. **Denis Buckley of Moneygaff East, Castletown, Enniskeane, County Cork**
4. **Noelle Sheehan of Moneygave, Coppeen, Enniskeane, County Cork**
5. **Pat Sheehan of Moneygave, Coppeen, Enniskeane, County Cork**
6. **Nora Sheehan of Moneygave, Coppeen, Enniskeane, County Cork**
7. **Aisling Connolly of Moneygaff East, Enniskeane, County Cork**
8. **Gerard Connolly of Moneygaff East, Enniskeane, County Cork**
9. **Dan Galvin of Gurranreigh, Lissarda, County Cork**
10. **Patrick Manning of Barnidivane, Terelton, Macroom, County Cork**
11. **Sabrina Hurley of Moneygaff East, Enniskeane, County Cork**

Dear Sir/Madam,

Our clients wish to appeal the decision of Cork County Council herein. We enclose cheque in the sum of €220 being your fee herein together with original Cork County Council acknowledgement of receipt of Submission dated 30th October 2014.

The grounds for our clients' appeal and the materials supporting those grounds are set out below and are further contained in the **enclosed** letter by Michael O'Donovan and Stephanie Larkin dated 23rd October 2014. While that letter was originally addressed to Cork County Council, its contents were not addressed satisfactorily by the Council. It is therefore to be read as part of this appeal submission.

Stated justification for enlargement of substation

The application is stated to relate to a previously permitted wind farm development incorporating an electricity substation. The relevant planning authority register reference numbers are cited in the heading to this letter. Figure 1.2 of the Applicant's Environmental Report helpfully shows the comparative size of the permitted and the proposed substations. The proposed substation site is substantially greater in area.

The following explanation is offered by the Applicant for the necessity to seek permission for the present substation:

> *'The original wind farm planning application included for a substation, however, since receiving the original planning consent new Eirgrid standards have been adopted which require 110kV substations to have a larger development footprint which includes available land for potential future expansion. As a consequence, a new planning application is required for this substation.'*

We submit that no convincing reason has been given for the enlargement of the substation in the context of the permitted turbine development. The permitted development could proceed with the permitted substation. The present application only makes sense if it is being enlarged to facilitate multiple future windfarm connections, of which no details have been presented. That this is the *de facto* intention is supported by remarks attributed to the parent company of the applicant in the local newspaper the Southern Star published on 10th January 2014, copy **enclosed**. Their spokesperson is reported as stating that the intended new substation is designed to facilitate connections from other potential windfarms up to 25km distant.

The present substation is considerably larger in scale than the previously permitted substation. It is also being moved to a more visually prominent location. The existing site is said to be unsuitable as it is 'constrained' to the east (by the road) and to the west (by a 110kv line). However it is not constrained to the north or to the south. In addition so far as the eastern 'constraint' goes, proximity to the 110kv line is an advantage, not a constraint. As the Applicant says in the Environmental Report (p.20)

> *'Proximity to transmission system:*
> *The substation site needs to be capable of connecting directly to the existing 110kV overhead cable traversing the site, and therefore needs to be along the line of the cable.'*

None of the elements of the previously permitted development has yet been constructed. Indeed permission was about to lapse when an application for extension to the original five year term was made. This was duly granted under reference no. 11/6605.

10 year permission issue
Without prejudice to our other grounds of appeal, it is noted that the applicant asks for a ten year permission. It is not made clear why construction of a substation requires a ten year permission. Normally, planning permission is for a five year period. That makes eminent sense for reasons which the Board is well aware of. A longer duration is in principle undesirable as it creates uncertainty and risks creating planning blight. The Applicant says that Barnadivane Wind Farm is scheduled for a connection to the national grid in 2015. There is no reason for a ten year permission for the substation.

EIS needed but not submitted
The substation is an integral part of a yet to be built wind farm. The related wind farm is one which is subject to the mandatory EIA provisions under Irish and European Law and to mandatory requirements arising under the Habitats Directive including the carrying out of an appropriate assessment. Despite that, the Applicant, who has submitted an Environmental Report, asserts in his planning application form (at Question 22) that the application does not require an EIS. We disagree.

In addition to being an integral part of a permitted windfarm, it is clear from the scale of the enlarged substation and from the reported words of the developer's parent company spokesperson, that the substation is in fact an integral part of a much larger series of windfarms, entailing as yet unknown and therefore completely unassessed connection infrastructure. The only disclosed information on those windfarms is that they are to be within a 25km radius.

Multiple planning applications
Two further planning applications are pending in relation to the project of which this substation forms part. They are in relation to a new private road linking two existing public roads, and in relation to a windfarm on the site with 6no. 131 metre high wind turbines each having a power output of 3 megawatts. We **enclose** our submission on behalf of clients to Cork County Council in relation to the windfarm application. Please treat that letter as part of the material relied on in relation to this appeal. Viewed objectively, we submit that it would be hard to imagine a more blatant case of project splitting.

Application invalid
The European Court of Justice has made it clear that there can be no piecemeal approval of elements of a larger EIA type development which when taken together with the remaining elements would require EIA or AA. Trying to obtain so-called salami style development consents, where an overall development is broken down into smaller elements which of themselves appear not to trigger the EIA or Habitats Directive obligations and so which would defeat the purpose of the directives is legally impermissible as well as contrary to proper planning and sustainable development principles. Ireland has been condemned by the Court for failing to ensure that this approach is respected in its planning legislation, as you will be aware.

That principle has recently been upheld by the High Court in the case of *Ó Grianna v. An Bord Pleanála*. We rely on that judgment, copy of which is **enclosed**.

A project cannot be sliced and diced with the intent that only fragments of it are put forward for assessment by a planning authority at any one time. Plainly this salami style approach is what is happening here. Legally, the proposed substation cannot be considered in isolation, yet that is how it has been presented.

We submit accordingly that the application is invalid.

Habitats Directive

The Applicant has presented a limited Appropriate Assessment Screening Report. We submit that this is wholly inadequate and fails to enable the Board to meet the mandatory test laid down under the Habitats Directive. The obligations on planning authorities in relation to appropriate assessment have recently been helpfully clarified in the **enclosed** High Court Judgement of Finlay Geoghegan J. in *Kelly v. An Bord Pleanála* delivered 25th July 2014 Record Number: 2013/802JR. We refer the Board to that decision and we rely upon it.

The decision of the High Court in the Kelly case establishes that the previous practice of planning authorities, including the Board, did not meet the legal standard required under the Habitats Directive.

Board ought not give persuasive weight to previous planning permission

That fact also means that the Board can place no reliance on the previous planning permission when considering the present application. It was granted under a procedure now seen to be unlawful, and it related to a 14 turbine windfarm that may be unlikely to bear much resemblance to what is intended for this site.

True scope and extent of the project unknown

The Applicant has submitted an Environmental Report, prepared with, it is claimed, some regard to EIA guidance, but the Report tells the public nothing at all about the impact of the turbines that will be connected to the new substation. The inference is that those turbines will be as already permitted, but nowhere is that expressed in any binding way. Our clients do not accept that they will be the same turbines (in terms of number, size, scale or power output) as those that were the subject of a planning permission sought almost ten years ago. The Board and the public are entitled to know what is proposed. At present, only the Applicant has that knowledge. That is legally unacceptable by reference to the EIA Directive, the Habitats Directive and the Aarhus Convention as incorporated into EU and Irish Law.

Further observations

The following additional observations relate some further specific physical planning issues and policy issues of concern to our clients. Some of these are elaborated on further in Mr O'Donovan and Ms Larkin's enclosed letter:

1. Though it may be the case, there is a lack of clarity on whether this development is intended to replace and therefore make obsolete, the previously permitted substation. This must be clarified.

2. Visual intrusion on landscape. This development is on a very prominent hillside location. The site is the size of a GAA pitch and it is on the brow of a hill. It will be highly visually obtrusive over the area. It is industrial in nature and therefore entirely at odds with its rural surroundings. Of itself and in terms of precedent, it is not in keeping with the proper planning and sustainable development of the area.

3. There is a lack of clarity on the necessity for having two control buildings with the same layout: offices, staff facilities, toilets and both with control rooms. According to the planning application there will be no onsite staff. These facilities mean extra development has to take place to accommodate all these extra buildings but also for water and waste water treatment. The nature of these buildings seems to be very much at odds with the idea of an electrical substation which would be unmanned. They increase the size of the site unnecessarily and pose the question of what other activities might be envisaged for this site by the Applicant.

4. This is a scenic walk route and an important amenity in the area. Putting this huge industrial site on it will detract massively from the scenic and rural nature of the route both for visitors to our area and for locals. This is in conflict with the relevant provisions of the County Development Plan, both in its current form and in its latest Draft form.

5. The field of the proposed substation is a wintering ground for Golden Plover, Curlew, flocks of Red Wing and Fieldfare. The data presented is utterly deficient in this regard. This again underlines the necessity for appropriate assessment of all likely significant environmental impacts arising under the overall development. That is of course only feasible when the nature of the overall project is known, which is not the case now.

6. As the site is sloping excavation will have to take place to level it. This will produce a lot of traffic from large vehicles. The one lane road infrastructure will be unable to cope. The conditions in the planning permission notification from the local authority are inadequate to address this fact and unenforceable.

7. The application is said to be consistent with certain national energy policies. On national energy needs, Ireland's peak electrical power demand is about 5GW. Installed wind power generation capacity is already about 2GW. There is no need either in terms of EU policy on renewables or in terms of national economic benefit, for increasing the proportion of wind

generation connected to the grid. On power station capacity and other sources such as interconnectors, as UCD Economist Colm McCarthy has observed:

> *'The new gas units were planned before the bust. There is now 3300 MW of modern gas capacity, plus 880 of peaking plant. Plus 500 MW of new interconnection to Wales. Plus almost 900 MW at coal-fired Moneypoint. Plus hydro at about 500 MW, plus peat at about 340, plus oil - the total dispatchable is 7400 MW. Non-dispatchable, mainly wind, adds 2400, grand total 9800, twice peak demand.'*

Our clients' established sustainable way of life and their enjoyment of reasonable residential amenities in this quiet rural area are significant factors to be considered, respected and protected within the planning system. The purported policy and technical justifications offered in support of the present application do not stand up to scrutiny. Reasonable planning balance is best preserved by refusing this application.

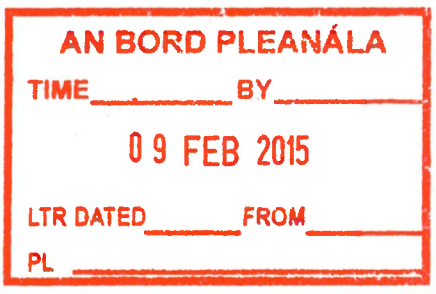
We ask the Board to refuse the application as it is invalid in the absence of adequate information as required under the EIA and Habitats Directives and on the basis that the development is in conflict with the proper planning and sustainable development of the area.

Yours faithfully,

Joe Noonan,
NOONAN LINEHAN CARROLL COFFEY

List of Enclosures:

1. Cheque in the sum of €220.
2. Original Cork County Council Acknowledgement of Receipt of Submission, dated 30th October 2014.
3. Copy Submission of Michael O'Donovan & Stephanie Larkin dated 23rd October 2014 with enclosures.
4. Southern Star Newspaper Article "Wind farm a second power-related blow to Lee Valley resident over 50 years on" by Catherine Ketch.
5. Copy Noonan Linehan Carroll Coffey Submission to Cork County Council under Planning Register Reference 14/6760 dated 2nd February 2015.
6. High Court Judgment of Mr Justice Michael Peart, *Ó Grianna & Others v. An Bord Pleanála,* 12th December 2014.
7. High Court Judgment of Ms Justice Finlay Geoghegan, *Kelly v. An Bord Pleanála*, 25th July 2014.



Comhairle Contae Chorcaí
Cork County Council

Rannóg Pleanála, Teach Norton,
Bóthar Chorcaí, An Sciobairín,
Co. Chorcaí.
Fón: (028) 40340 • Faics (028) 21660
Suíomh Greasain: www.corkcoco.ie
Planning Section, Norton House,
Cork Road, Skibbereen,
Co. Cork.
Tel: (028) 40340 • Fax: (028) 21660
Web: www.corkcoco.ie

Joe Noonan
c/o Noonan Linehan Carroll Coffey
Solicitors
54 North Main Street
Cork

30/10/2014

APPLICANT: Arran Windfarm Ltd
DEVELOPMENT: Construction of an electricity substation compound, this application is intended to replace the substation already granted permission under PL04.219620 (05/5907) and subsequently extended under 11/6605. The electricity substation layout includes 3 no. control buildings, associated electrical plant and equipment, security fencing and ancillary works. This application is seeking a 10 year planning permission

AT: Barnadivane, Kneeves, Terelton, Co. Cork
FOR: Permission

31 OCT 2014

PLANNING REGISTRATION NO: 14/00557

A Chara,

I wish to acknowledge receipt of your submission/observation on 30/10/2014 concerning this application. I enclose herewith receipt no. PLG0008203 in respect of correct fee paid. I wish to confirm that your submission/observation has been received within the period of five weeks beginning on the date of registration of the application and is therefore considered a valid submission/observation.

Copies of site map/plans and particulars submitted in connection with the application will be available for inspection at this department during office hours (9.00 a.m. to 4.00 p.m., Monday to Friday) until the application, or any appeal thereon, is finally determined. The applicant shall be given your name and content of the submission/observation should it be requested.

Your letter will form part of the documentation available for inspection by the public. You will be notified when a decision is made on the application.

This letter should be retained. If you wish to appeal such decision a copy of this acknowledgement together with the attached official document must accompany your appeal to An Bord Pleanála.

AN BORD PLEANÁLA
TIME_____ BY_____
09 FEB 2015
LTR DATED_____ FROM_____
PL_____

Yours faithfully,

Claire O'Donovan
Clerical Officer

Recycled

Form no. 3 Articles 28 and 35

ACKNOWLEDGEMENT OF RECEIPT OF SUBMISSION OR OBSERVATION ON A PLANNING APPLICATION

THIS IS AN IMPORTANT DOCUMENT

KEEP THIS DOCUMENT SAFELY. YOU WILL BE REQUIRED TO PRODUCE THIS ACKNOWLEDGEMENT TO AN BORD PLEANÁLA IF YOU WISH TO APPEAL THE DECISION OF THE PLANNING AUTHORITY. IT IS THE ONLY FORM OF EVIDENCE WHICH WILL BE ACCEPTED BY AN BORD PLEANÁLA THAT A SUBMISSION OR OBSERVATION HAS BEEN MADE TO THE PLANNING AUTHORITY ON THE PLANNING APPLICATION.

PLANNING AUTHORITY NAME **Cork County Council**

PLANNING APPLICATION REFERENCE NO. 14/00557

A submission/observation, in writing, has been received from:

Joe Noonan
c/o Noonan Linehan Carroll Coffey
Solicitors
54 North Main Street
Cork

ON 30/10/2014 in relation to the above planning application.

The appropriate fee of €20 has been paid.

The submission/observation is in accordance with the appropriate provisions of the Planning and Development Regulations, 2001 and will be taken into account by the Planning Authority in its determination of the planning application.

Claire O'Donovan
Clerical Officer

Local Authority Stamp

CORK COUNTY COUNCIL
PLANNING AUTHORITY
NORTON HOUSE
SKIBBEREEN
AN BORD PLEANÁLA
TIME BY
09 FEB 2015
LTR DATED FROM
PL

Date: 30/10/2014

AN BORD PLEANÁLA
TIME
BY
0 9 FEB 2015
LTR DATED
FROM

Concer Residents
c/o Noonan Linehan Carroll Cof
54 North Main Street
Cork

30-OCT-2014
12:43:24

Cork County Council
County Hall
Cork
Tel - 021 427 6891
VAT Registration No - 0007458M

Receipt : PLG0008203

Header Details

Receipt Reference:	PLG0008203
Received From:	Concerned Residents
Billing Address:	c/o Noonan Linehan Carroll Cof 54 North Main Street Cork
Account No.:	POS 7000004
Amount Paid (EUR):	20.00
Type:	CHEQUE
Comments:	Submission 14/557
Receipt Issued By:	DWHELTON
Receipt Date:	30-Oct-2014
Site:	0300 : Planning Applications/Submiss
D/N/U:	D
Invoice Reference:	9000057341 : CHEQUE

Line Details

From Reference	To Reference	Transaction Date	Remarks	Amount
PLG0008203	9000057341	30-Oct-2014	Submission 14/557	20.00

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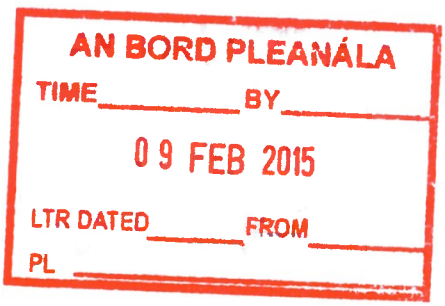
ISSUED ON BEHALF OF
Planning Applications/Submiss,
Planning Front Office, Floor 1,
,



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AN BORD PLEANÁLA
TIME
BY
09 FEB 2015
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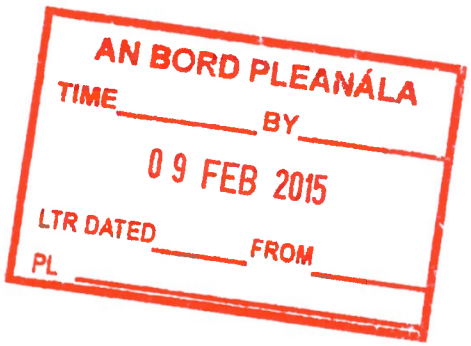
FROM

Michael O'Donovan & Stephanie Larkin

Moneygoff East,
Castletown,
Enniskeane
Co Cork



Planning Department
Cork County Council
Western Division
Norton House
Cork Road
Skibbereen
Co. Cork

23 Oct 2014

Planning application no. 14/557, Substation Compound at Barnidivane, Kneeves, Co. Cork

To whom it may concern,

We the undersigned object to planning application no. 14/557 of a Substation Compound at Barnidivane, Kneeves, Co. Cork for the following reasons.

- We believe that there is a lack of transparency with regards to the planning intentions of the applicants. They already have planning permission for a substation. The increase in structures / buildings in this new application is in our opinion to facilitate a future change to the original wind farm planning that has been granted by the authorities. This so called Salami Slicing approach to planning is underhanded and illegal under European law.

- Visual Impact- The site location on a hill top is directly visible from our house being only a few hundred metres away. This new location is in fact much more visible to the general public than the original location and cannot be effectively screened in any way because of the elevation. It will be clearly visible from the main road (R585 Bantry Line)and all the way across towards Newcestown and to a huge amount of houses in the area. We are firmly against the relocation of the compound as an Industrial Site of this nature would be an eyesore and an unacceptable blight on the landscape.

The applicants keep referring to a document that describes the 'landscape value as being of the lowest level, being monotonous with only a local level of natural or cultural heritage' as if it were a gospel cast in stone. The local in habitants would argue strongly against this designation, see the website www.coppenheritage.com, when it is possible to stand on the proposed site and see the mountains of WestCork including the SugarLoaf on the Beara, the Paps, Reeks and Mangerton to name a few and at night to watch the lights of the Oldhead,

Galley and Mizen Lighthouses while the surrounding area has sites of National Importance like, Beal na Blath, Kilmichael, Castltownkinneigh Round Tower, Cahervagliar Stone Fort and Leabaowen Wedge Tomb.

- The proposed compound is huge compared to the original planning. It is now the size of a football pitch and is totally unsuited to the new location.

- The buffer zone map of 1km radiating from the site cleverly puts at least 29 dwellings just outside it, including our own house. This illustrates much of the bias in the application which at no point is willing to encompass the local community.

- The new site will be visible from the only Designated Walks in the community (see maps attached). The walks are widely used by locals and tourists alike and local children cycle the routes and some children ride their ponies along here almost every day. Apart from the visual impact which will spoil the beauty and spirit of these walks, the construction phase poses an unacceptable and unnecessary health and safety risk to the public, especially children who have no voice in this matter. The statement of a 'Negligible impact on amenities' is nonsense.

- It is our belief that the reasons given for the relocation of the site are spurious and reflect economic interests rather than the stated restrictions which we failed to see on examination of the site.

- The local community has worked hard to promote the local Archaeology, History and Culture of the area (see notes attached). This development goes directly against this Community Initiative who see the area as an Amenity for all and not as something to be exploited by a few for whatever reasons.

We believe that the EIS carried out with regard to birdlife in particular is biased and furthermore has been engineered to facilitate the planning needs of the applicants. We would refer the planners to the Scottish National Heritage website and in particular (www.snh.gov.uk/doc/c278917.pdf) which the applicants claim to have been following as best practice but on examination it can be clearly seen that they have cherry picked their guidelines to suit their own agenda. Firstly there was no consultation with the public with regards any noteworthy birds. This process would have delivered the preparatory information needed as no reliable data(<5years old exists) which forms a key part of the basis for identifying target species. If they had done so they would have found that Cuckoo breeds in some years(2014 being the best in a while) and a rare and declining species in Cork, that Woodcock winters along the river Bride(red data species, that snipe is a common breeder(notoriously difficult to survey according to www.birdwatchireland)and that Kneeves is important during migration and wintering waders especially but also to roving passerine flocks like Meadow Pippits, Skylarks, Redwings and fieldfares to name but a few. One of the main reasons that the birds were missed was that the target species were ludicrously small in number and the guidelines for observation times greatly reduced. Guidelines also state that observations should cover all seasons(only 2 days in summer and 36 hours in winter were carried out, no Spring or migration periods were observed) and that the period should be of a minimum of 2-5 years in duration as birds can alternate the use of traditional sites. The area of the search was also far smaller than recommended. Also no reference was made to the elevation of the site and the strategic location with regard to the Gearagh and Bandon river SACs that have many threatened birds commuting back and forth

AN BORD PLEANÁLA
TIME BY
09 FEB 2015
LTR DATED FROM

(Connectivity of sites). It is not just the habitat that matters and in any case grassland is favoured by many wading species. The cumulative impact of sites was also ignored.

- The applicants stated in the original windfarm planning that there would be no more environmental damage to the site and gave assurances of this. Clearly this proposal is in contradiction of these promises.

- The amount of soil etc to be removed from the site is also a concern, where is it going to go? If put somewhere else on the site will it cause further ecological damage? The site is above a river which will be put at risk from sedimentary pollution and possibly other unforeseen contaminants from the site. Does the development pose a threat to ground water? For these reasons and many more an EIS is essential.

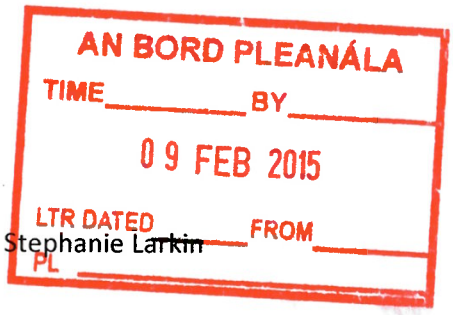
- We would also like to point out that as ordinary tax paying citizens of the state we do not have access to Consultants to draw up documents supporting our argument. This costs money. The windfarm which has planning permission is being imposed on us by the State. It cost us money to object to that. This further application is imposing further cost on us. The Environmental Reports attached to this application are provided by the applicants. Therefore, the responsibility is on Cork County Council and the State to ensure what is being claimed is complete, correct and unbiased. Any doubt over this should result in refusal of the application. If these basic principals cannot be upheld then this is not a democratic process but a mere charade which will leave a physical scar on our landscape for a very long time.

Signed

_____

_____

Michael O'Donovan



Stephanie Larkin

AN BORD PLEANÁLA
TIME BY
0 9 FEB 2015
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Coppeen Waymarked Walks

More info at coppeenheritage.com

Heather Walk

9.3 KM (5.7 Miles), 150m climb, 2 hours clockwise

This project was conceived and developed by Coppeen Archaeological, Historical & Cultural Society. For more information visit our web site or email info@coppeenheritage.com

Designed by Solas Nua Digital Media www.solasnua.com

Coppeen Waymarked Walks

More info at coppeenheritage.com

Fern Walk

8.3 KM (5.1 Miles), 130m climb, 2 hours clockwise

This project was conceived and developed by Coppeen Archaeological, Historical & Cultural Society. For more information visit our web site or email "info@coppeenheritage.com"

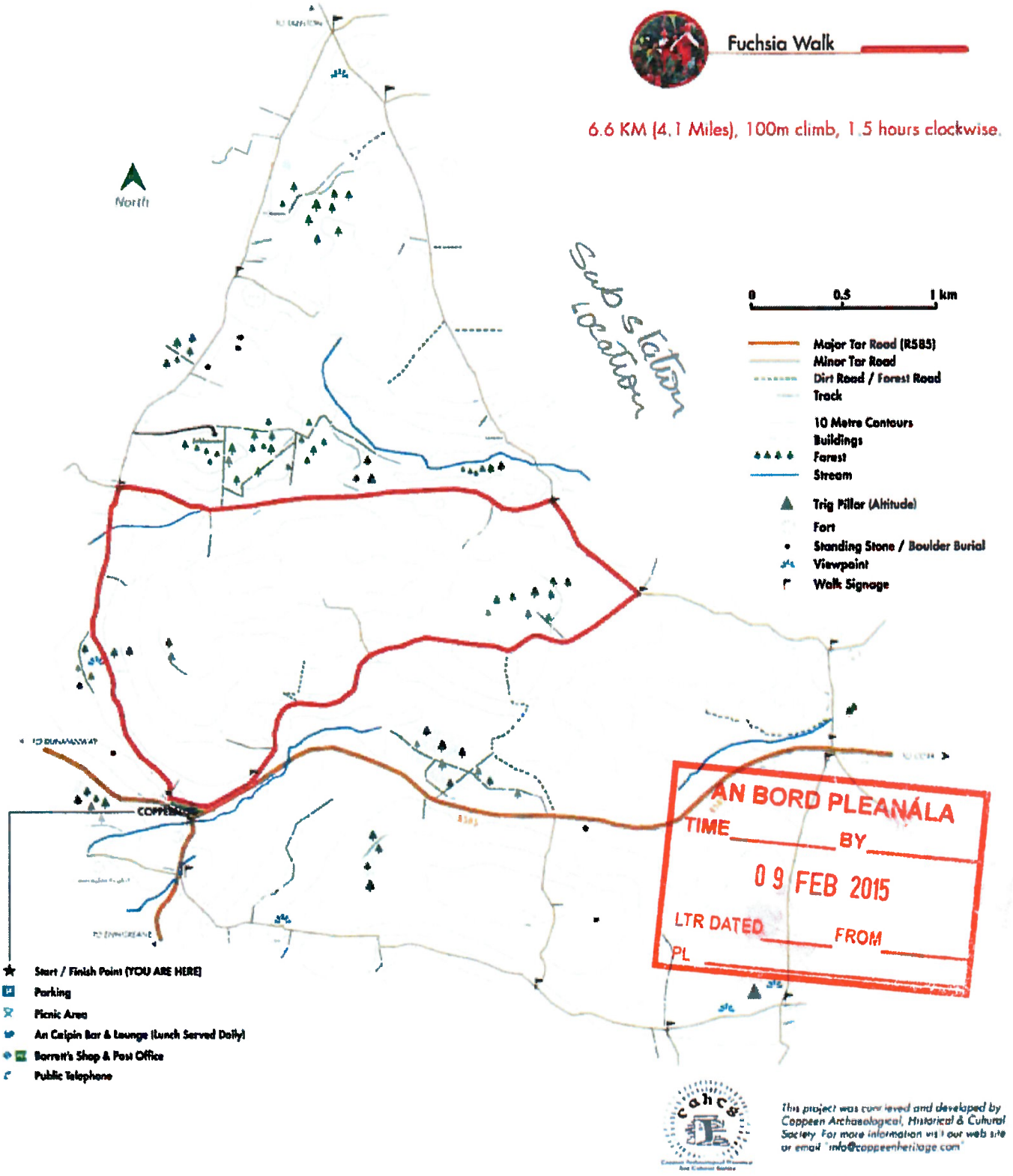
Designed by Solas Nua Digital Media (www.solasnua.com)

Coppeen Waymarked Walks

More info at coppeenheritage.com

Fuchsia Walk

6.6 KM (4.1 Miles), 100m climb, 1.5 hours clockwise.



cahc&s

This project was conceived and developed by Coppeen Archaeological, Historical & Cultural Society. For more information visit our web site or email "info@coppeenheritage.com"

Coppeen Waymarked Walks

More info at coppeenheritage.com

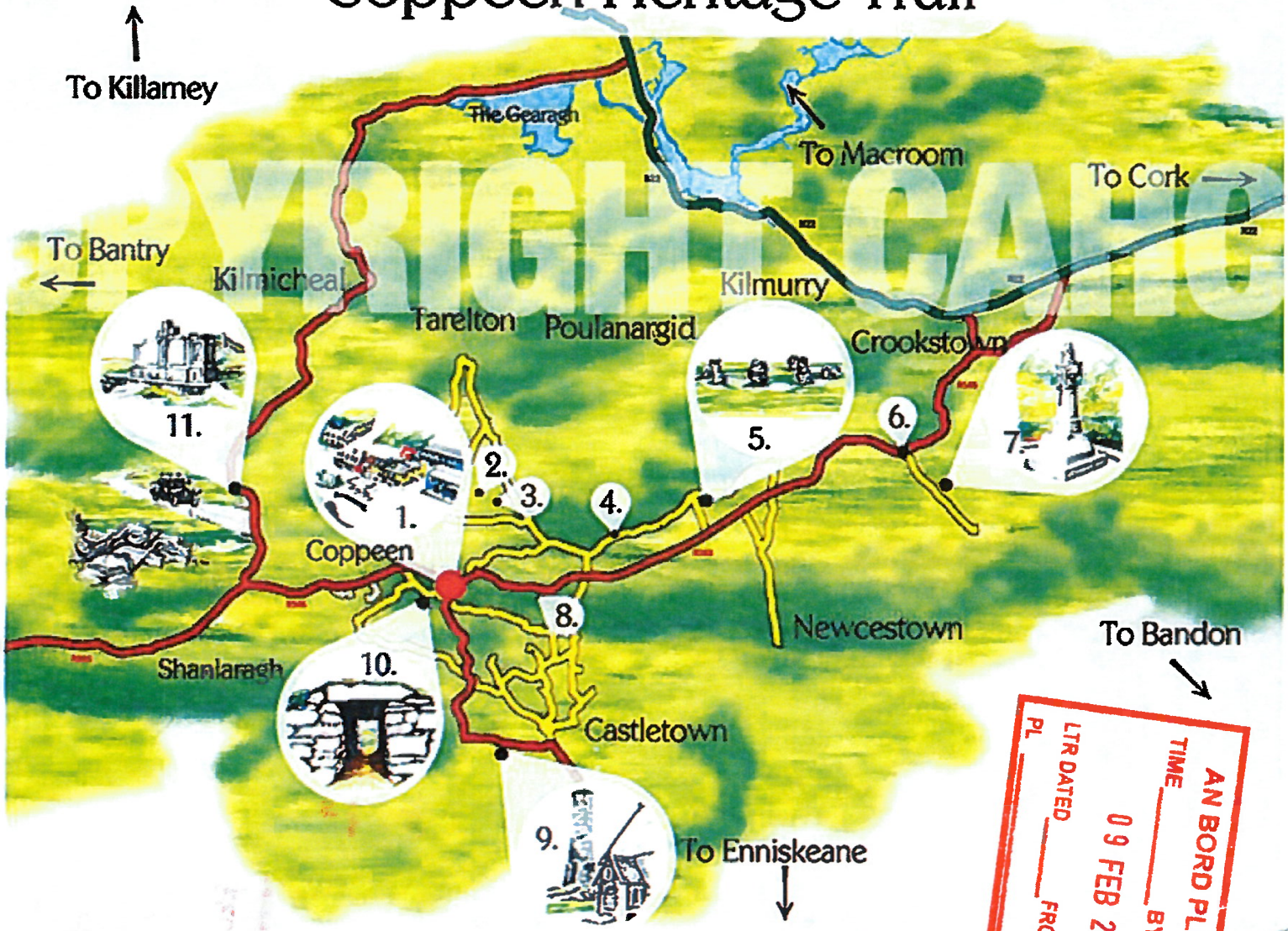
Gorse Walk

12.4 KM (7.75 Miles), 150m climb, 3 hours anti-clockwise

This project was conceived and developed by Coppeen Archaeological, Historical & Cultural Society. For more information visit our web site or email "info@coppeenheritage.com"

Designed by Salas Nua Digital Media (www.salasnua.com)

Coppeen Heritage Trail



1. Coppeen Village

Starting point for the Coppeen Heritage Trail and Waymarked Walks.

2. Boulder Burial

Sieveowen Boulder Burial consists of an impressive large round stone, which rests on a number of smaller stones, dating 2,400 – 500BC. Note deep cup marks/solution pits on top.

3. Wedge Tomb

Located in a state-owned forest, Sieveowen Wedge Tomb (Labbaowen) measures 7m long, X 1.4m wide. This structure represents the earliest man made construction on our local landscape, dating from between 5,000 and 3,500 years ago.

4. Famine Monument

Gortaroreigh Famine Monument is a grim reminder of the savage devastation which befell a village that stood close to this monument, totally wiping out its entire population during the Irish Potato Famine (1845-1850)

5. Hornhill Stone Circle

Stone Circles are believed to date from 1200 to 2000BC. Knockaneark Lower (Hornhill) Stone Circle consists of seven stones, with (probably) 2 stones missing. Orientation is likely to be towards the Winter Solstice.

6. Beal na Bláth

7. Micheal Collins Ambush Site

A Celtic Cross memorial marks the spot near where General Michael Collins was shot dead during an ambush on Tues. 22nd Aug. 1922.

8. Wedge Tomb

9. Kinneigh Round Tower

The original monastery at Kinneigh was located approx. half a mile west of the present location. According to the Annals of Cork, it was founded in 619AD by St Mocolomóg.

10. Cahirvagliair Ringfort

Cahirvagliair Ringfort is said to have been a Royal Residence. Dating from approx. 1000AD, its unique stone lintelled entrance is of particular interest.

11. Kilmicheal Ambush

On 28th Nov 1920, IRA commander General Tom Barry led a bunch of hastily trained, mostly farmers sons, to this site where they ambushed two lorries of elite British Auxiliaries, imposing a crushing defeat. The monument was unveiled by Tom Barry in 1966.

Wind farm a second power-related blow to Lee Valley resident over 50 years on

BY CATHERINE KETCH

ONE resident of the Lee Valley could find himself the victim of two separate power generation developments half a century apart.

Patrick Manning of Barnadivane, Terelton, was just three years and nine months when his family had to move from the Gearagh near Macroom when the Lee was flooded for hydroelectricity by the ESB in 1957.

'Thirteen families had to leave that area at that time and we came up to my mother's home place which is where I am now,' Patrick said.

It's here at Barnadivane that Patrick is now faced with a wind farm development less than 600m from his house. He is particularly concerned about the noise and unsightliness.

'You live in the country for a bit of peace and quiet. I'm 61 now since June and, in a few years, I would be hoping to retire. With that noise you couldn't open a window,' Patrick claimed.

'I might have to move again on account of these and it's all pertaining to power,' he added wearily.

Four existing turbines at Gurranereagh shocked locals when they were erected. 'They look horrible on the landscape. I don't know what it's like for people living near them,' Peter Kelleher, Knockane, said. The proposed unrelated turbines will be taller and more visible, he believes.

'Visually it's very intrusive. I will be looking straight at it, so it will devalue my property. It's ugly. It's totally inappropriate in the setting,' Stephanie Larkin, Moneygave East, said.

Barna Wind Energy (part of Enerco Energy, Lissarda) has permission for 14 turbines of 105m max at Barnadivane with planning for an 110kv substation. They applied on December 19th last to replace these with six larger turbines of 131m max.

Aran Wind Energy (also part of Enerco) applied in September for planning permission for a new 110kv substation in the same location. The Gate 3 connection is approved for 60MW.

A representative of Enerco Energy responded to queries this week, saying that the new substation Enerco says will replace that already permitted, fulfilling new EirGrid requirements regarding size, spacing and orientation.

The change in turbine number and size is down to economics with newer, more efficient machines suited to particular sites, they say. 'The new application and the new wind farm layout will give us a more efficient investment'.

Two companies are involved Enerco, he says, because the Barnadivane development, ongoing for 20 years, was originally owned by a number of farmers and Michael Murnane of Enerco. Enerco has more recently secured ownership of the entire project.

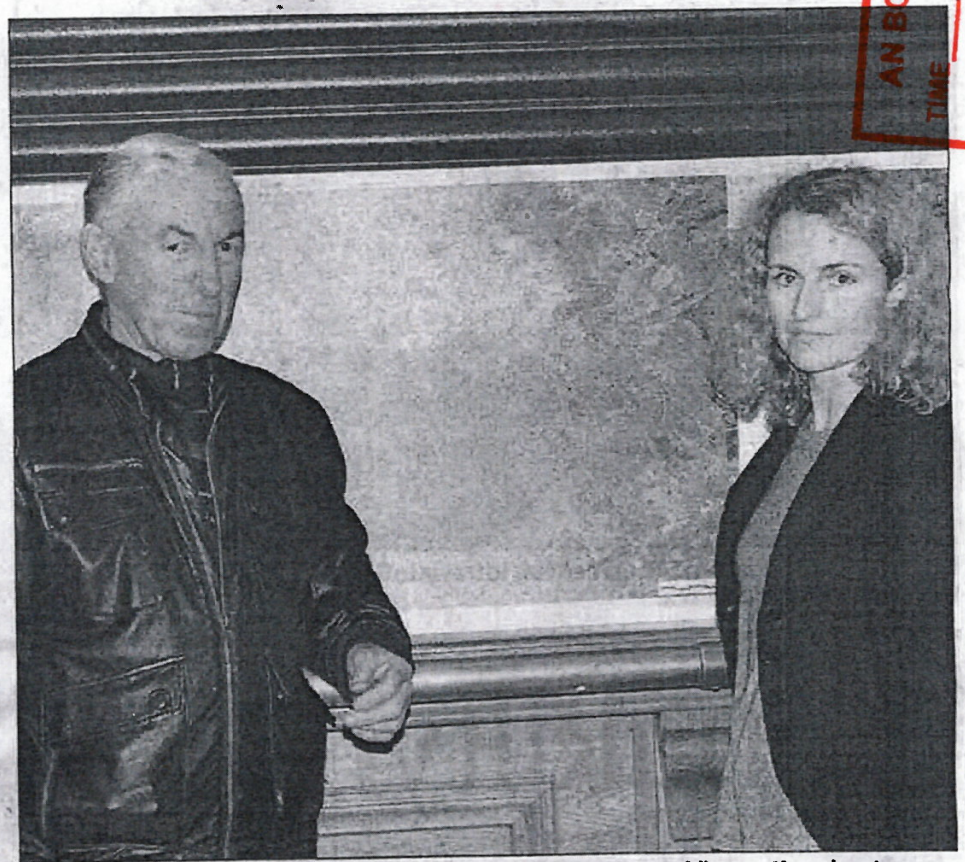
The proposed wind farm if built will be connected to the grid via the existing 110kv Clashavoon to Dunmanway power line which crosses the site. Enerco says they have no plans for further phases at the site. The 60MW Gate 3 connection (6 x 2.3MW yielding max 13.8MW) will, Enerco says, facilitate the connection of other potential developments within 25km of Barnadivane, via underground roadside cables.

On proximity, noise and visual intrusion Enerco says they design a project to show compliance with guidelines and leave it to the public and the planning authorities to assess, grant or refuse permission. If guidelines change, 'it would come down to whether the application was granted or not,' the spokesperson said.

Addressing concerns why a public meeting was held after submissions closed for the new substation Enerco said it would be normal to have public information meetings for wind farms, but not for substations.

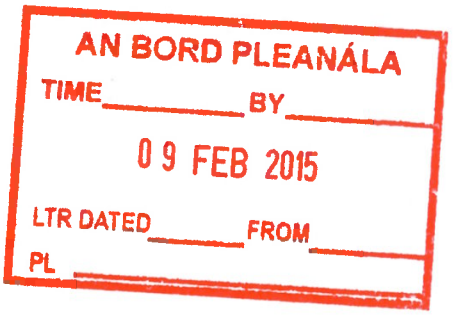
In operation for over ten years and producing 230MW of generating capacity equal to 10% of Ireland's total, Enerco stresses they are a Macroom company, employing 20 locally, plus similar in the field.

They are currently accepting proposals for a community fund; €100,000 during the construction period, with €20,000 per annum during operation.



Patrick Manning and Stephanie Hawkins pictured at a recent public meeting about new plans for the Barnadivane Wind Farm at the Riverside Park Hotel, Macroom.
(Photo: Catherine Ketch)

The Secretary,
Planning Department,
Cork County Council,
County Hall,
Cork.



2nd February 2015
Our ref: 26310-14/JN/PW

RE: Planning Register Reference 14/6760
The construction of six wind turbines, with a maximum tip height of up to 131m and associated turbine foundations and hardstanding areas, 1 no. permanent meteorological mast up to 90m in height, upgrade of existing and provision of new site tracks and associated drainage, new access junction and improvements to public road to facilitate turbine delivery, 1 no. borrow pit, underground electrical and communications cables, permanent signage and other associated ancillary infrastructure. This application is said to be *'intended to replace'* development already granted permission under PL04.219620 (05/5907) and subsequently extended under 11/6605. This application is seeking a 10-year planning permission.
Development Address – Lackareagh and Garranereagh, Lissarda, and Barnadivane (Kneeves) Terelton, County Cork
Applicants – Barna Wind Energy (BWE) Ltd
Our clients – Denis Buckley and others known as Barna Wind Action Group, c/o Denis Buckley, Moneygoff East, Castletown, Enniskeane, Co Cork

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Dear Sir/Madam,

We act on behalf of Denis Buckley and others, known collectively as Barna Wind Action Group, c/o Denis Buckley, Moneygoff East, Castletown, Enniskeane, County Cork. Our clients wish to make an observation in relation to this planning application. We **enclose** the appropriate observation fee of €20. Please acknowledge safe receipt.

We also **enclose** a number of petition forms signed by local residents who are part of the community and who wish to be associated with this observation. We would ask you to note the extent of the concern in the locality as evident from the number of people signalling opposition to the planning application.

This is directly relevant to the claim made on behalf of the applicant that this development is in some way a *'community partnership model'*. This claim is put forward at page 1 of the EIS Non-Technical

Summary. Contrary to that claim, the reality is that the community is not in partnership with the developer. Some individual property owners may well be in a form of commercial partnership with the developer, which would be an entirely different relationship.

1. The application is invalid

Remarkably the application is one of a series of at least three applications all dealing with individual elements of the same project. Based on public statements attributed to the developer, the project is designed to facilitate still more developments, the details of which are not yet disclosed to the public.

The developer applied on 26 September 2014 for permission for a large substation on the site – see your file PA Reg. Ref 14/00557. This was subject of an Order to grant permission made by Cork County Council on 13 January 2015, and that decision will be the subject of an appeal to An Bord Pleanála.

The developer is also seeking permission for a private road joining the R585 to the L6008 intended to facilitate the present application.

Finally the developer's parent company is quoted in the Southern Star (January 10. 2015) as stating that the greatly enlarged substation is designed to facilitate connections from other potential windfarms up to 25km distant. No further details are known to the public at this time however.

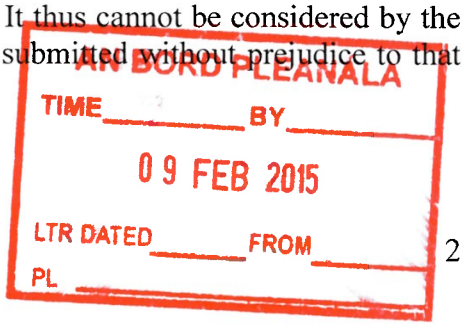
It is self-evident and undeniable that this is a classic case of project splitting.

The EIA Directive as implemented under domestic legislation obliges a planning authority to assess the likely significant environmental impacts (including impacts on local residents) of a project. In these circumstances, no assessment of the project is possible as the extent of the project is unknown. The project has been split to an exceptional degree: elements of it are spread across multiple planning applications, three of which are in the public domain so far, and other elements are as yet a mystery. Those unknown elements involve future windfarm developments and connection works over a huge area, up to a distance of 25 kilometres in all directions from this site.

Project splitting in the context of wind farm planning applications has been recently considered by the High Court.

In *Ó Grianna and others v An Bord Pleanála* [2014] IEHC 632 the Court quashed a permission granted in the absence of an EIA of the project in its entirety. Only impacts arising at the site of the proposed windfarm had been considered. The Board and developer claimed they were not obliged to consider impacts of the connection route running from the site of the windfarm development to the national grid, because that was not yet finalised and because the exact nature of the connection was not yet known. The Court rejected that defence. Both the windfarm and the connection to the grid were a single project. The entirety of the project had to be assessed at the earliest possible stage. If the developer had to wait to gather more information on the other element of the project, that was what he had to do. To do otherwise would be unlawful.

The present application is for a part of a larger project. It is not accompanied by an EIS for the entire project. The application before the Council is therefore invalid. It thus cannot be considered by the County Council. Everything that follows in this observation is submitted without prejudice to that overriding objection.



In conclusion on this point we refer to the Planner's Reports on the Council file regarding the substation application. We made a written observation dated 29 October 2014 on our clients' behalf alerting the Council to the project splitting issue. Nowhere is that issue mentioned, much less addressed, in the Planner's reports, the last of which is dated 12 January 2015, one day before the Council order approving the application was made.

Project splitting is not just a breach of the EIA Directive. It also poses practical problems. This approach makes it more difficult and more expensive for members of the public to participate in the assessment of the overall project. Apart from that, there is a serious difficulty for the local authority, as it is expected to make a decision on this application and on associated applications in a very short time frame, working with limited resources and in circumstances where it simply may not be possible for it to assess the accuracy and reliability of the claims put forward by or on behalf of the developer.

We acknowledge those constraints but they cannot be used as a reason for the mandatory legal rules that govern the assessment of the project to be set aside, lost in the blizzard of technical material or simply bypassed. The Council has to conduct and publish an EIA, identifying, describing and assessing the likely significant environmental impacts (including impacts on the people of the area) of the project. It cannot do so in this case.

2. No reliable planning precedent

The developer places considerable stress on the existence of a planning permission for 14 turbines and for a smaller substation on the site, which permission was sought in 2005, issued in 2007 and was extended in 2011.

Subsequent EU Court of Justice and Irish High Court judgements however have found that the assessment system in place at those times was legally unsound. The legal standards for assessment were not met, with the result that the 2005/2011 permission should not now be relied on as a valid planning precedent.

Specifically we refer to the judgement of the Court of Justice of the European Union in *Commission v. Ireland* case C-50/09. In its judgment delivered on 3 March 2011 the CJEU ruled that Ireland had failed properly to transpose the obligations under Article 3 of the EIA Directive. This was because it had failed to make it obligatory for any single body to conduct an EIA. The Court expressly rejected the State's defence that the system then in use was lawful. It was under that system that the site was approved for 14 turbines.

It follows that no lawful EIA was ever conducted in respect of development for which planning permission was granted in 2007. The extension fared no better in this context. No EIA was even claimed to be carried out at the time the Council extended the permission in 2011. Those decisions must therefore be viewed in the light of current awareness of their legal infirmity. They cannot be given planning precedent value.

We also rely in the judgment of the High Court in the case of *Kelly v. An Bord Pleanála* [2014] IEHC 400 delivered by the Court on 25th July 2014. That judgment emphasised (once again) the mandatory nature of the Habitats Directive obligations on planning authorities in relation in particular to the conduct of Appropriate Assessment.

The developer's EIS and AA Screening Report only address one aspect of what is clearly a larger project. As well as rendering the present planning application invalid for the reasons described above, this approach also fails to equip the Council and its Officials to meet the assessment requirements under the Habitats Directive. If the full project is not considered, then no proper Appropriate Assessment is possible. For that reason also the Council is legally prohibited from giving planning permission.

Separately, it is clear from an examination of the planning history that the developer's predecessor had originally sought planning permission for a far greater number of turbines at this location. It first intended to erect 27 turbines in its 2003 application. This was reduced to 23 in an attempt to assuage planner's concerns. See the Inspector's report **enclosed**. That application was refused by the Board.

The next application was for 18 turbines in 2005. The Board's Inspector recommended refusal *inter alia* on visual impact grounds. See report **enclosed**. She believed it would adversely affect local residential amenity. The Board gave permission for 14 turbines, going against that recommendation, saying that it was satisfied that the reduction in number and size of the turbines had addressed its reasons for the previous refusal. The present application is said by the applicant to be *'intended to replace'* the present permission. (That statement of intent is not legally binding of course and could change at any time.)

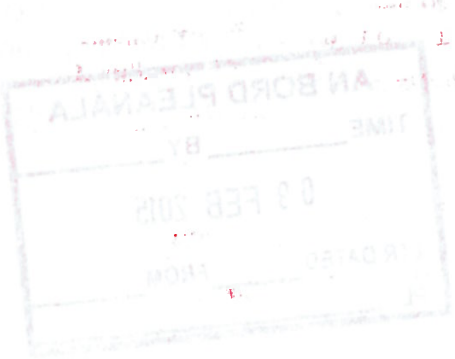
While the number of turbines proposed this time is reduced from the number sought in all previous applications, their height is dramatically increased from a maximum tip height of 105m to a maximum tip height of 131m. There is a major consequent increase in bulk, weight, footprint and foundation mass of the supporting tower, as can be seen in the **enclosed** illustration. It follows that the visual impact will be far greater at any given distance. It will in fact be overwhelming in the locality. Each one of these six turbines is roughly twice the height of County Hall.

3. Planning policy and related issues

Our clients have had the benefit of reading a submission filed with the Council dated 15th January 2015 by Mr Anthony Cohu, C. Arch, Ecological Planning, Landscape & Design, of Borlin, Bantry, County Cork. We respectfully endorse the content of Mr Cohu's submission and wish it to be adopted and considered as part of our clients' observation to avoid unnecessary repetition here.

The developer places great reliance on selected national policies in relation to renewable energy. He ignores other fundamental national policies supportive of people in rural Ireland, including the rights of citizens to respect for their bodily integrity, their family life and their property. Those policy principles derive from the State's ultimate policy document, Bunreacht na hÉireann. We suggest the Council should not be as selective as the developer in choosing which policy framework it applies. And even if it were only to have regard to renewable energy policy, it would have to take account of the recent step back at EU level from previous policy commitments, as well as considering the inordinate concentration of wind turbines in County Cork, and the growing awareness of the unsound economics underpinning the sector in Ireland.

Ireland's peak electrical power demand at any one time is about 5GW. Installed wind power generation capacity is already about 2GW. There is no need either in terms of EU policy on renewables or in terms of national economic benefit, for increasing the proportion of wind generation connected to the grid. On power station capacity and other sources such as interconnectors, as UCD Economist Colm McCarthy pointed out in Cork in October 2014:



'The new gas units were planned before the bust. There is now 3300 MW of modern gas capacity, plus 880 of peaking plant. Plus 500 MW of new interconnection to Wales. Plus almost 900 MW at coal-fired Moneypoint. Plus hydro at about 500 MW, plus peat at about 340, plus oil - the total dispatchable is 7400 MW. Non-dispatchable, mainly wind, adds 2400, grand total 9800, twice peak demand.'

So notwithstanding the claims made on behalf of the developer, neither Ireland nor Cork actually need this extra plant generating 6 x 3MW of electricity (and more) in order to meet energy policy goals.

4. Noise

Cork County Council is aware of serious unresolved noise nuisance complaints in various parts of the County, which arose despite the Council imposing certain noise conditions on wind turbine operators. Serious noise nuisance issues have arisen in other parts of the country also. The Planning Authority is obliged to have regard to that fact when assessing any such development. The steadily emerging problems of noise nuisance explains in part why the Government felt it necessary to review Windfarm Planning guidelines issued nine years ago at a time when turbines were smaller and less extensively promoted, and when their noise signature and its effect was less well understood. The departmental review is still underway, and is seeking to find new and appropriate measures of balancing competing interests, particularly focussing on separation distances, noise nuisance and nuisance from shadow flicker.

We refer to our submission to that review (copy **enclosed**) and ask you to treat that submission as part of this observation.

There is patently an emerging problem, with some exceptionally serious consequences in certain areas. The Council is bound to have regard to that fact when considering assurance put before it by or on behalf of this developer.

We refer to the **enclosed** Shirley Windfarm Study in this regard. This was unusual in that it was a study prepared on an agreed co-operative basis by a team of four independent acousticians, some of whom had mainly worked for wind turbine promoters, some of whom had worked more often for residents reporting adverse affects from turbine operation. The study found that noise limits in vogue currently do not adequately protect the public.

5. Other EIS issues

The EIS is unreliable as a basis for an informed assessment. It makes reassuring claims which do not stand up to being tested against current scientific knowledge. Noise nuisance is one important example. Residential property values will be adversely affected. We refer to the **enclosed** material from Keane Mahony Smith in this context. That is not acknowledged at all in the EIS but it is a profound immediate interference with third party property rights.

Another example to illustrate the point is its assessment of impact on bats. A more realistic objective picture of the likely impact emerges from the recent scientific study on that topic by Cryan *et al*, published in the Proceedings of the National Academy of Sciences, a copy of which is **enclosed**.

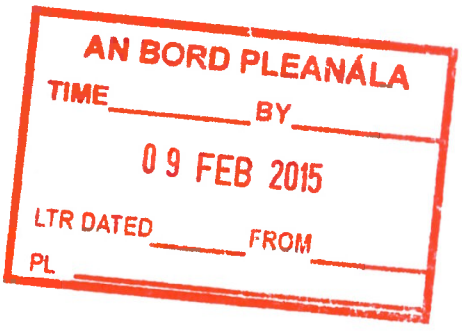
The 2003 EPA Guidelines on Environmental Impact Statements say that an EIS should identify describe and assess what impacts are likely if all mitigation measures fail. The developer's EIS does not do this.

The Council should view each section of the EIS critically and methodically, rendering its own description and assessment of all relevant environmental effects including effects on residents, visitors, and workers within the area.

We ask the Council to refuse permission.

Yours faithfully,

Joe Noonan,
NOONAN LINEHAN CARROLL COFFEY



AN BORD PLEANÁLA
TIME
BY
0 7 FEB 2015
LTR DATED
FROM

Neutral Citation: [2014] IEHC 632

THE HIGH COURT

JUDICIAL REVIEW

Record Number: 2014 No. 2014 No.19 JR; 2014 No. 10 COM

IN THE MATTER OF AN APPLICATION UNDER SECTION 50 AND 50A OF THE PLANNING AND DEVELOPMENT ACT, 2000 (AS AMENDED)

BETWEEN:

POL O GRIANNA, GERALDINE UI DHUINNIN, AOIFE NI DHUINNIN, CLIODHNA NI DHUINNIN,BERNADETTE COTTER, TIM O'CONNELL, CAOIMHGHIN O BUACHALLA, PADRAIG D. KELLEHER, ALAN KING, XAK AROO

APPLICANTS

AND

AN BORD PLEANALA

RESPONDENT

AND

CORK COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

FRAMORE LIMITED

SECOND NAMED NOTICE PARTY

JUDGMENT OF MR JUSTICE MICHAEL PEART DELIVERED ON THE 12th DAY OF DECEMBER 2014:

1. The applicants all live close to an area in County Cork where Framore Limited, the second named notice party are proposing to erect 6 wind turbines and associated buildings and infrastructure for which it obtained a planning permission from An Bord Pleanala ("the Board") subject to 17 conditions on the 14th November 2013.

2. Cork County Council ("the Council") had previously decided to grant permission on 18th June 2013 subject to 28 conditions. The applicants, who had lodged observations with Cork County Council outlining their concerns regarding noise and visual impact in July 2012, appealed that grant of permission to An Bord Pleanala, which on the 14th November 2013 made a decision to grant permission for the development subject to a number of conditions.

3. This application for planning permission is one which had to be accompanied by an Environmental Impact Statement ("EIS"), since the Board was required to carry out an Environmental Impact Assessment ("EIA") under to the provisions of section 172(1) of the Planning and Development Act, 2000, as amended ("the Act of 2000"), the

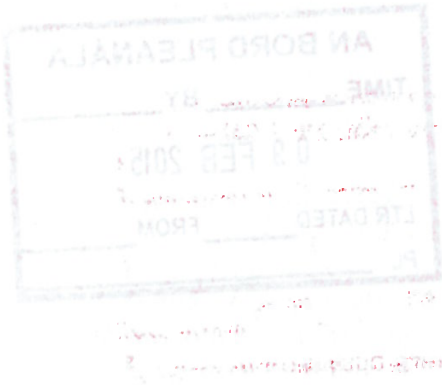
development being one which fell within the scope of Part 2, Schedule 5 of the Planning and Development Regulations 2001, as amended.

4. In their 'Abridged Statement of Grounds' dated 14th February 2014 the applicants seek a Declaration that in making its decision the respondent failed to carry out a proper EIA in accordance with the provisions of Section 172 of the Planning and Development Act, 2000, as amended ("the Act of 2000"), as interpreted in accordance with the obligations imposed by Article 3 of Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment. A number of different complaints are made, but, essentially, all (except that related to 'project-splitting') are directed towards establishing that the EIA stated by the Board to have been carried out is a flawed assessment which is not in accordance with its obligations under the Act.

5. Section 171A(1) defines "environmental impact assessment" as "*an assessment, which includes an examination, analysis and evaluation, carried out by a planning authority or the Board, as the case may be, in accordance with this Part and regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in the light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following: (a) human beings, flora and fauna, (b) soil, water, air, climate and the landscape, (c) material assets and the cultural heritage, and (d) the interaction between the factors mentioned in paragraphs (a), (b) and (c)"*(emphasis added). The applicants place considerable emphasis on the words "in the light of each individual case".

Section 172 contains a number of subsections dealing with the requirement that certain applicants must provide an EIA to the planning authority or the Board, as the case may be, and that either of the latter may seek further information from an applicant. Of some relevance to the present application is what is provided for in subsections (1G) to (1J) of section 172 which provide as follows:

> *"(1G) in carrying out an environmental impact assessment under this section the planning authority or the Board, as the case ~~may be,~~ shall consider – (a) the environmental impact statement; (b) any further information furnished to the planning authority for the Board pursuant to subsections (1D) or (1E); (c) any submissions observations validly made in relation to the environmental effects of the proposed development; (d) the views, if any, provided by any other Member State under section 174 or Regulations made under that section.*
>
> *(1H) in carrying out an environmental impact assessment under this section the planning authority or the Board, as the case may be, may have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers.*
>
> *(1I) where the planning authority or the Board, as the case may be, decides to grant consent for the proposed development, it may attach such conditions to the ground as it considers necessary, to avoid, reduce and, if possible, offset the major adverse effects on the environment (if any) of the proposed development.*
>
> *(1J) when the planning authority or the Board, as the case may be, has decided whether to grant or to refuse consent for the proposed development, it shall inform the applicant for consent and the public of the decision and shall make the following information available to the applicant for consent and the public: (a) the content of the decision and*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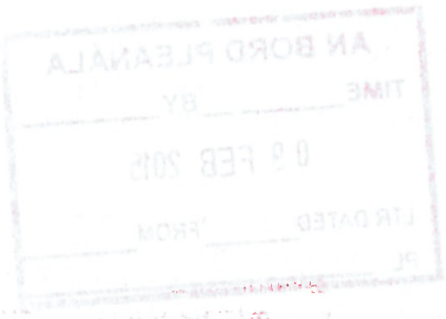
any conditions attached thereto; (b) the evaluation of the direct and indirect effects of the proposed development on the matters set out in section hundred and 171A; (c) having examined any submission or observations validly made (i) the main reasons and considerations on which the decision is based, and (ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions observations made by a member of the public; (d) where relevant, a description of the main measures to avoid, reduce and, if possible, offset the major adverse effects; (e) any report referred to in subsection (1H); (f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and (g) the views, if any, furnished by other Member States of the European Union pursuant to section 174."

6. The various grounds upon which the applicants rely for seeking an order of certiorari and a declaration that the Board failed to carry out an EIA in accordance with the requirements of section 172 of the Act of 2000 are set forth in their Abridged Statement of Grounds at paragraph E.1 and its various sub-paragraphs.

Failure to comply with obligations in relation to the Environmental Impact Assessment:

7. The applicants submit that the it is evident from the decision of the Board that in so far as it purports to have carried out an EIA as required by section 172 of the Act of 2000, it failed to do so "in the light of each individual case" as required by both Article 3 of Council Directive 2011/92/EU (the "EIA Directive") and as reflected in the definition of an EIA in section 171A of the Act of 2000 set forth already. It seems to be suggested by the applicants that instead of correctly examining, analysing and evaluating this particular case as far as the effect of noise levels on human beings are concerned, the Board effectively fettered its discretion by simply applying noise limits or other standards recommended under the 2006 Guidelines. In particular they say that the Board in its decision imposed noise limits without carrying out any assessment of the significance of the increase in noise over background noise at this location on human beings living in the vicinity of the proposed turbines.

8. The applicants submit also that in so far as the Board may have relied upon the assessment carried out by the appointed inspector who prepared a report for the Board, and agreed with it for the purpose of its own EIA, the inspector's assessment itself is flawed since he did not carry out an assessment of the significance of the increase in noise over background noise levels at the location of this particular proposed development. They complain that the inspector, and by extension the Board since it "generally adopted" the inspector's report, based his recommendations upon a statement in the 2006 Guidelines to the effect that noise will not "generally" be a problem where the separation distance between turbine and house is greater than 500m, and without having carried out any assessment of the actual anticipated noise impact on existing houses by reference to background noise levels, and that this constitutes a failure to comply with the Board's obligations under section 172 of the Act of 2000 to carry out an EIA in the light of the particular case at hand. In so far as it is argued by the Board that it relied upon the inspector's assessment and generally agreed with it, the applicants submit that that report contains no assessment of the significance of the increase in noise over background noise levels that would affect human beings residing in the vicinity as a result of noise emitted from the turbines, and therefore there has been no conclusion reached by the inspector or the Board as to whether the level of increase in noise would be significant or acceptable, and accordingly there has been no analysis or evaluation by the Board of the direct effects of the proposed development in the context of noise impact on human beings, as is required to be carried out by reference to the



definition of "environmental impact assessment" contained in section 171A of the Act of 2000 already referred to.

9. The applicants also maintain that the inspector made a fundamental error in his report, and that this error has carried through to the Board's decision. The error they allege is in relation to what I shall refer to as Location 2. They say that the inspector failed to recognise that Location 2 is a 'low noise environment' according to the noise measurements set forth in the EIS. They state that the background noise levels recorded in relation to Location 2 bring it within the definition of a 'low noise environment' for the purpose of the 2006 Guidelines since the LA90 noise level at that location was measured at less than 30dB(A). That measurement for Location 2 was recorded at 29dB(A). They consider that the Board failed to have regard to the correct noise level measurement (LA90) for the purpose of determining both the background noise levels and the appropriate noise limits to be applied, and instead, erroneously relied upon what are referred to as the LAeq measurements in respect of both Location 1 and Location 2. The LAeq is a measurement which gives an averaged noise level whereas the LA90 measurement gives the noise level found at a location for at least 90% of the period monitored. The 2006 Guidelines recommend that daytime noise levels for a low noise environment should be limited to an absolute level within the range of 35-40 dB(A)LA90, whereas the Board has specified in Condition 12 of the permission that the noise from the wind turbines should not exceed the greater of 43dB(A) LA90, or 5dB(A) above background levels when measured externally.

10. The applicants accordingly submit that, in error, noise levels up to the greater of those two alternatives is permitted, and that either would exceed the 2006 Guidelines level of 29dB(A) LA90 for Location 2 (low noise environment), and therefore that a fundamental error has occurred in relation to the EIA carried out by the Board.

11. Complaint is also made about the failure to apply separate noise limits for day-time and night-time which again is said to be contrary to the Guidelines which state in that regard "*Separate noise limits should apply for day-time and for night-time*". In so far as the inspector has stated in his report that "*in conditions attached to wind farm permissions the Board as a matter of practice uses a fixed night time limit of 43dB(A) or 5 dB(A) above background levels (whichever is the greater)",* the applicants submit that this is contrary to the Guidelines which recommend the 43dB(A) level on its own for night time noise, and they refer to the fact that in relation to day time levels the Guidelines recommend "*a lower fixed limit of 45dB(A) or a maximum increase of 5dB(A) above background noise at nearby noise sensitive locations*" which the applicants say means it is the lower of the two limits which applies.

Board's submissions:

12. In relation to this ground of complaint the Board makes the point that it is an expert body, and that it reached its decision following an assessment of proper planning and sustainable development, and having carried out a proper EIA in accordance with its statutory obligations. In so far as the applicants are saying that the Board failed to carry out an EIA in relation to this "individual case", the Board says that this assertion is manifestly incorrect, and points to the very detailed EIS that was before the Board, as well as the further information that was sought by the Board and which it received, each of which addressed, inter alia, the issue of noise in relation to this particular proposed development. It refers in particular to Request 6 in the Request for Further Information relating to noise which requested further information under six different separate paragraphs (a) to (f), the penultimate of which reads:

> *"(e) the background noise assessments at identified nearest noise sensitive locations should quantify over 10 minute periods the existing background noise levels having due regard to wind speed, wind direction*

and rainfall over the same time periods. Wind speed should be measured at, or derived for, the hub height of the proposed turbines. The applicant should also clarify the periods of noise data that were excluded from analysis due to periods of rainfall. Background noise levels as it varies with hub height wind speed should be quantified separately for daytime, evening time and night-time periods with sufficient data present in a wind direction downwind from the proposed turbines to the identified sensitive locations covering a range of wind speeds from the turbine cut-in speed to its rated power. Hub height wind speed should be converted to standardised 10m height wind speed before comparison with predicted and cumulative noise levels at sensitive locations."

13. Framore's detailed response of April 2013 to this Request includes a response to the above request at (e). Relevant to the question of whether the Inspector in his report, and the Board by generally agreeing with and adopting the inspector's report, failed to carry out an EIA because it failed to take proper account of the fact that Location 2 (otherwise referred to as H13) came within the category of a 'noise sensitive location' is part of the response to (e) which appears at page 24 of 62 of that response. It is there stated:

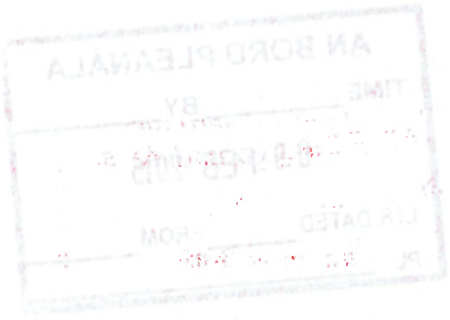
"The noise impact assessment contained in the EIS concluded that there was no negative operational impact expected from the Derragh Windfarm when assessed against the noise limits contained within the Department of Environment Heritage and Local Government (DoEHLG) 2006 Wind Energy Guidelines. The predicted noise levels at the modelled noise sensitive locations (NSLs) or receivers (all dwellings in this assessment) were less than 40 dB LA90 for fourteen of the eighteen locations, and indeed, as such, were less than the fixed daytime and night-time fixed limits. At the nearest NSLs (H1,H13,H14, and H18) all the predicted noise levels were less than the daytime fixed limit of 45 dB(A) and where baseline monitoring identified periods of 'quiet background noise' i.e. LA90 levels less than 30 dB, the predicted levels were less than the 35–40 dB LA90 fixed limit range. The night-time fixed limit of 43 dB(A) was exceeded at NSLs H13, H14 and H18 for a single modelled wind speed of 8 m/s.

It is worth noting that the exceedance at this wind speed was only 1 dB greater than the 43 dB LA90 limit.

More importantly, these NSLs will never experienced the predicted noise emission of 43dB(A) at 8 m/s or indeed, the other predicted noise levels at the other wind speeds. The noise prediction standard, ISO 9613 Attenuation of Sound during Propagation Outdoors, models all NSLs as if they were downwind of all noise sources at the same time. In reality, the turbine layout requires a range of wind directions from north–north westerly through to easterly for the NSLs to be downwind of all the turbines simultaneously which cannot occur." [emphasis added]

14. This is a point taken up by Tim Cowhig on behalf of the second named notice party (Framore Limited) in his verifying affidavit sworn on 7th March 2014 where at paragraph 18, having referred to certain noise level measurements in relation to Location 1 and Location 2, and in particular the fact that the LA90 noise level at Location 2 was measured at 29dB, he refers to what isstated in the EIS in relation to Location 2, namely:

"the predicted noise levels are compliant except at 8 m/s wind speed of where turbine noise is predicted at 44 dB(A) and the limit is 43 dB(A). While this does indicate that a non-compliance could occur at a wind speed of 8 m/s (standardised to 10m), it is unlikely that such a non-compliance



will occur as the predicted noise level assumes all turbines running a maximum rated power and all upwind of the respective receiver. It is not possible for receiver H13 [i.e. Location 2] to be downwind of all the turbines simultaneously due to its location relative to the turbines, therefore this location will never be subject to the full noise emission at 8 m/s as predicted in the model. Similarly, receivers H14 and H18 will not exceed 44 dB(A) at 8 to 9 m/s for the same reason."

15. The Board has submitted, as has Framore Limited, that it clear from a consideration of all the material which was before the Board including the EIS, the Further Information received, the submissions made and responses thereto, when taken together, that the Board's consideration of this material for the purposes of its EIA was in relation to this individual development, and that no evidence has been adduced to establish that the Board has not carried out an EIA in accordance with its obligations. The Board in its decision has stated that it carried out an EIA. The onus is on the applicants to establish that this is not a correct statement, and in my view they have failed to do so. There is ample evidence from within the materials before the Board and in the Board's own decision that a proper EIA was carried out..

16. The Board has not erred by generally adopting the inspector's report for the purpose of its own EIA. In fact it has not adopted it in its entirety, as can be seen by the variation in a couple of the conditions. There is no evidence to support the contention made that the Board erred in relation to its assessment in relation to Location 2 (H13). Even though the inspector's report refers to the LAeq measurement and not the LA90, as pointed out by the applicant, when addressing the level of background noise, and on the face of it therefore failed to consider Location 2 on the basis that it was a low noise environment (being less than 30 dB(A) LA90, and even though the inspector's report was generally adopted by the Board, it is entirely insufficient to indicate the sort of fundamental error on the part of the Board which should result in the Board's decision being quashed, when all the material is taken into account. The Board was entitled to take into account in its EIA the matters referred to in paragraphs 13 and 14 for example. It cannot in my view be said that the Board failed in its statutory duty in this regard by not slavishly adhering to the Guidelines recommendation in relation to a low noise environment. It was entitled to see the Guidelines as just that, i.e. guidelines. It is entitled to take other matters into account in relation to its consideration of the Guidelines, and how to apply them or not as the case may be, and to agree with what was stated in the EIS, namely that as a matter of actual fact the levels cannot not be exceeded because as Mr Cowhig has averred by reference to the EIS and the Franore response to the request for Further Information: *"it is not possible for receiver H13 [i.e. Location 2] to be downwind of all the turbines simultaneously due to its location relative to the turbines, therefore this location will never be subject to the full noise emission at 8 m/s as predicted in the model."*

Having read and considered the material that was before the Board, and having considered also the affidavits filed by the parties, and considered the legal submissions made in relation to this Ground put forward for quashing the decision of the Board, I am satisfied that the ground does not succeed.

Failure to have regard to the 2006 Guidelines in breach of Section 28 of the Act of 2000:

12. Section 28(1) and (2) of the Act of 2000 provide:

"(1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions.

(2) where applicable, the Board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions." (emphasis added)

The applicants submit that the Board was therefore required to have regard to the 2006 Guidelines when making its decision, and they say that it failed to do so since it either disregarded the Guidelines or misinterpreted them, and in either case cannot be properly said to have had regard to them. They say that the Board failed to have regard to the Guidelines because (a) it failed to have regard to the specific absolute daytime noise limit of 35-40 dB(A) recommended in the Guidelines in respect of a "low noise environment" for the reasons which I have already set forth above, and (b) the Board failed to have regard to the LA90 noise measurements to which the Guidelines refer as the relevant descriptor for the purposes of determining both the background noise levels and the appropriate noise limits to be applied, and instead, relying on the inspector's report, the Board relied upon the LAeq noise measurements for Location 1 and Location 2.

13. It is the LA90 measurements which, according to the 2006 Guidelines, are relevant for determining the existing background noise levels and the existing noise environment. In that regard, the applicants have referred to page 29 of the Guidelines. Having discussed the aerodynamic noise (swish) caused by rotator blades passing through the air, and purely mechanical noise created by the generator, the gear-box and other mechanical elements within a cover or housing (the nacelle), the advances in design and technology which have reduced noise emissions, and the effect of higher and lower wind speeds in masking to a greater or lesser extent (as the case may be) noise caused by the wind turbines, the Guidelines state as follows:

"Noise impact should be assessed by reference to the nature and character of noise sensitive locations. In the case of wind energy development, a noise sensitive location includes any occupied dwelling house, hostel, health building or place of worship and may include areas of particular scenic quality or special recreational amenity importance. Noise limits should apply only to those areas frequently used for relaxation or activities for which a quiet environment is highly desirable. Noise limits should be applied to external locations, and should reflect the variation in both turbine source noise and background noise with wind speed. The descriptor, which allows reliable measurements to be made without corruption from relatively loud transitory noise events from other sources, should be used for assessing both the wind energy development noise and background noise. Any existing turbines should not be considered as part of the prevailing background noise.

In general, a lower fixed limit of 45dB(A) or a maximum increase of 5dB(A) above background noise at nearby noise sensitive locations is considered appropriate to provide protection to wind energy development neighbours. However, in very quiet areas, the use of a margin of 5dB(A) above background noise at nearby noise sensitive properties is not necessary to offer a reasonable degree of protection and may unduly restrict wind energy developments which should be recognised as having wider national and global benefits. Instead, in low noise environments where background noise is less than 30dB(A), it is recommended that the daytime level of the LA90, 10min of the wind energy development noise be limited to an absolute level within the range of 35–40dB (A).

Separate noise limits should apply for day-time and for night-time. During the night the protection of external amenity becomes less important and

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the emphasis should be on preventing sleep disturbance. A fixed limit of 43 dB(A) will protect sleep inside properties during the night.

In general, noise is unlikely to be a significant problem where the distance from the nearest turbine to any noise sensitive property is more than 500 metres. Planning authorities may seek evidence that the type(s) of turbines proposed will use best current engineering practice in terms of noise creation and suppression"(my emphasis).

14. I note in passing, and as noted by Ellen Morrin in her affidavit in support of the Board's Statement of Opposition, that the first named applicant, Pol O Grianna, in his grounding affidavit sworn on his own behalf and on behalf of all the other applicants and with their authority, has sworn in paragraph 4 thereof that "*the applicants are all residents in the townlands of Derragh, Eachros, Gortnabinne and Rathgaskig, Ballingeary, County Cork whose properties are located at distances between 527m and 1800m from the proposed turbine development …"* (my emphasis).

15. Finally under this ground, the applicants submit that where the Board departed from the 2006 Guidelines, it was obliged to give its reasons for doing so.

16. The onus is on the applicants to establish that the Board failed to have regard to the 2006 Guidelines. In my view they have failed to discharge that onus. Firstly, the materials before the Board, including the inspector's report were replete with references to the Guidelines. Secondly, The Board's decision itself on page 2 thereof specifically states that it had regard to those Guidelines. I accept of course that a Board cannot simply in some purely formulaic way recite that it had regard to the Guidelines when there is clear evidence from the Decision that it cannot have done so, and still be considered to have complied with its obligations under section 28 of the Act of 2000. But we are not dealing with such an extreme and improbable situation as that. The Board in this case has stated that it had regard to the Guidelines, and it is evident from the materials before it, including the inspector's report relied upon heavily by the Board, and the Decision itself, that it did so. The fact that it has not slavishly followed the Guidelines does not indicate that it has not had regard to them as it is required to do.

17. The second limb of the applicant's ground in relation to section 28 is that the Board has misinterpreted the Guidelines, and in so far as that is so, should be considered to have had regard to them. The applicants say that the inspector in his report used the LAeq measurement for Location 1 and Location 2 instead of the LA90 measurement, and that this led to the Board ignoring the Guidelines in relation to the fixing of a noise limit recommended for a low noise environment in relation to Location 2. In fact it is apparent from the Board's decision that it considered the Guidelines when including Condition 12 in relation to any noise sensitive location, and I note that the limit is set by reference to the LA90 measurement and not the LAeq. I do not regard the fact that the inspector referred to the LAeq measurement rather than the LA90 measurement as indicating such a misinterpretation of the Guidelines as to compel a conclusion that proper regard cannot have been had to the Guidelines. I have dealt with the reality of that issue in relation to the previous ground considered.

18. The parties have referred to the judgment of Quirke J. in *McEvoy v. Meath County Council* [2003] 1 I.R. 208. That was a case where the applicant had sought to quash the respondent's decision to make and adopt a development plan for County Meath on the basis that the council had failed to have due regard to the strategic planning guidelines for the greater Dublin area as required by law. Section 27 of the Act of 2000 at the relevant time required the council to have regard to those strategic planning guidelines when making and adopting its development plan, but Quirke J. held that the phrase "have regard to" did not require it to rigidly follow the Guidelines, and that it could even

depart from them for bona fide reasons consistent with the proper planning and development of its functional area. He also went on to state that "*if it had been the intention of the Oireachtas that section 27(1) should be construed as imposing upon planning authorities an obligation to 'comply' with regional planning guidelines then the enactment rendered subs. (2) of the same section superfluous*". Subs. (2) at the time provided that "*the Minister may, by order, determine that planning authorities shall comply with any regional planning guidelines in force for their area, or any part thereof, when preparing and making a development plan ……*". One can see in relation to the present case that while the Oireachtas had required that Guidelines be had regard to, it has not gone further and required that they be adhered to in every respect. It clearly could have done so if it had so wished. I am satisfied that despite the matters relied upon and argued by the applicants, it is clear from the evidence that the Board had regard to the 2006 Guidelines in accordance with its obligations under section 28.

19. The applicants have also argued that the Board's decision is flawed because neither the inspector nor the Board gave any reason for departing from the 2006 Guidelines, and that the Board was obliged to do so. However, I do not consider the Board's decision departs in any material or significant way from the Guidelines. I have already held that the Board is not obliged to slavishly or rigidly follow and apply the Guidelines, and it follows that it may exercise some discretion in relation to the Guidelines. This is consistent with the requirement that regard be had to them. But secondly, there is no statutory obligation on the Board to give reasons for not following a particular guideline even if it was the situation that they had been departed from. Section 28 imposes no requirement to give any such reasons. Other sections of the same Act do provide that where an authority or the Board is departing from a recommendation of a delegated person such as an inspector, it must include a statement of the main reasons for having done so – see for example section 34(10(b), and also section 37(2) (c) where the main reasons and considerations must be given where the Board decides to grant a permission even though it materially contravenes the development plan. The obligation under section 28 does not go that far.

Project-Splitting:

15. The applicants submit that the Board has failed to carry out an EIA in relation to the overall project of which the construction of the wind turbines is only the first stage, since there is a necessary second phase, namely the works necessary to connect the wind farm to the national grid. It is submitted by the applicants that the cumulative effect of the entire development on the environment should have been the subject of the Board's EIA, and that an impermissible 'project-splitting' has occurred thereby invalidating the decision-making process. They make the point that the connection to the national grid is a fundamental part of the overall development as, without such connection, the wind farm cannot operate, and that the two stages should be considered as a single project and be assessed as such on a cumulative basis before it can be seen as complying with the EIA Directive.

16. The EIS submitted with the planning application by the developer made reference at paragraph 3.1.2 thereof to the fact that a connection to the national grid would in due course be necessary, including the statement that "*it is not possible to determine the line or form (overhead or underground) of the grid connection at this stage as the design will be undertaken by ESB Networks*". The applicants say that whatever form the connection takes, whether overhead or underground, there are inevitable and significant consequences for the environment, and that the Board was required to consider these when considering the first stage of the development, in order to avoid the possibility of 'project-splitting', which in the applicants' submission is contrary to both Irish and EU law. They say that because the EIS did not contain any information as to the environmental impact of the second stage relating to the connection to the national grid,

the Board was prevented from giving any consideration to that factor, or the cumulative effect of both stages of the development, as is required under the Directive.

17. In so far as the Board and Notice Party may argue that the impact of the second stage can be considered at some later stage and that it was unnecessary for its impact to be considered by the Board when considering the present application, the applicants have made the point that it is quite possible that the connection to the national grid would constitute exempted development under Part 1, Schedule 2 of the Planning and Development Regulations 2001, as amended, and therefore there may well be no opportunity available for an EIS to be submitted in relation to the cumulative effects of the development under challenge and its connection to the national grid, as no further planning application would be required. They say that it is not sufficient for the developer in its EIS to simply state that the line and form of the connection is not yet known, and therefore cannot be assessed, and that the Board ought not to be permitted to treat the works related to the grid connection as an entirely separate project, but rather as an integral part of the subject development.

18. The EIS submitted by the developer stated the following regarding the connection of the proposed turbines to the national grid:

> *"The grid connection from the proposed turbines will be via underground cable connections to the on-site substation. The cables will be buried adjacent to the site tracks where possible. The location of the proposed substation is shown on Figure 3.1. The developer has a grid connection offer as part of the Commission for Energy Regulation (CER) Gate 3 processing group. It received a connection offer (DG418 and DG419) on 30th June 2011 from ESB Networks. The connection offer states that the electricity generated at Derragh Wind Farm will connect to the national grid at a 110 kV substation at Coomataggart. The grid connection will operate at 20 kV. It is not possible to determine the line or form (overhead or underground) of the grid connection at this stage as the design will be undertaken by ESB Networks. A 20 kV overhead line is usually constructed with a single wooden pole and does not typically require steel lattice masts. It is of relatively low impact and does not normally require planning permission."*

19. The Inspector merely notes in this regard at para. 9.13.9 of his report:

> *"Having regard to the scale of the project and the need to obtain a connection to the national grid (something that may be beyond the control of the applicant), it would be appropriate to allow a 10-year planning permission as sought by the applicant. This is not unusual in relation to wind farm applications."*

20. In its submissions, the Board refers to the fact that it addressed the issue of the connection to the national grid at Condition 4 of the Board's decision which states: *"This permission shall not be construed as any form of consent or agreement to a connection to the National Grid. Reason: in the interest of clarity."* The second named Notice Party pleads that the precise grid connection that will be available to it is outside its control and will be the subject of further consideration, including with regard to its environmental impact, at some stage in the future when the plans and specifications for that connection have become clear. The Court has not been provided with any evidence of any attempt which may have been made to get a design for the grid connection from ESB Networks, so it can be presumed that there has been no such attempt as yet.

21. The Board accepts that so-called 'project-splitting' must be avoided so as to ensure that objectives of the EIA Directive are not frustrated. But central to the Board's

argument is that in the present case the subject development and the later connection of that development to the national grid do not constitute one project, but rather are separate projects in respect of which their respective environmental impacts may be assessed at the relevant time. It says that when the separate project in relation to the grid connection becomes the subject of a consent application, the cumulative effects of that development will be assessed, including by reference to its cumulative effect with the subject development, and in that way, even if the entire project is considered to be a single project, the effects of both will be assessed. The Board makes the additional point that no development requiring an EIA can be exempted development by virtue of the amendment (by substitution) of section 4 of the Act of 2000 which now provides:

> *"(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".*

22. Accordingly, it is submitted, any connection to the national grid would have to be assessed so that consideration was given to the direct and indirect effects of the connection to the national grid, both in and of itself as well as cumulatively with the subject development, and where there was likely to be a significant environmental effect an EIA would be required under Part X of the Planning and Development Regulations 2001, as amended. It makes the point that if it was not considered that there would, even cumulatively, be any significant environmental effects from the second phase, then no environmental prejudice would exist. In this way, it is submitted that the objectives and provisions of the EIA Directive will be fulfilled in relation to the future connection of the subject development to the national grid, notwithstanding that at the present time the plans and details relating to the future connection are not yet known, and therefore have not as yet been the subject of an EIA.

23. Notice Party (Framore) supports the submissions made on behalf of the Board. It refers to the fact that where no proposals have yet been formulated by ESB Networks for the grid connection design, it simply was not possible for it to include a consideration of same in its EIS, and consequently it was not possible for the Board to assess the potential environmental impact of the works associated with that phase of the development. Framore also refers to the Planning Guidelines which at para. 4.3 state in this regard that "*the planning authority should note that it may not be possible, due to reasons outside the applicant's control, to provide information on indicative grid connections at the pre-planning consultation or planning application stage of the wind energy development*". One should note, however, the context of that statement which appears from the following paragraph which states: "*It is therefore inappropriate for the planning authority or An Bord Pleanala on appeal to attach conditions to planning permissions for wind energy developments in regard to the location of the connection to the grid. In these instances, a separate application for grid connection will be necessary*" [my emphasis]. It refers to the fact that the inspector in his report noted that the connection to the national grid is a matter outside the control of the developer, and that accordingly by generally adopting the inspector's report, the approach taken by the Board in relation to the environmental impact of the connection to the national grid was appropriate, and in accordance with the Guidelines.

24. Framore have referred to the Opinion of Lord Hodge in the Outer House, Court of Session, Scotland in *Skye Windfarm Action Group Limited v. Highland Council* [2008] C.O.S.H.19 in support of its submission that where there are two phases involved in a development, even where the second is integral to the overall project, it will not always be the case that the EIA must encompass the cumulative environmental effects of the overall project, and that each case must be considered on its own particular facts in order to decide whether those cumulative effects are such that the matters should be

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considered together. In Skye, Lord Hodge noted that it was not disputed between the parties that certain 'borrow pits' from which aggregate was to be extracted to provide on-site roads, and for which a separate planning application was lodged, were part of the overall wind farm project, and that normally their cumulative impact should have been considered as part of the EIA. However, he went on to state that he was not satisfied that it was illegal to separate the borrow pits from the assessment of the wind farm, noting that previous assessments carried out in 2002 and 2006 had not identified any significant environmental effects of the borrow pits whether considered alone or cumulatively with the wind farm. In those circumstances he saw "*no practical reason for an environmental impact assessment of the borrow pits other than in the context of the wind farm application.*" He noted that his approach was consistent with the approach taken by Advocate General Gulmann in *Bund Naturschutz in Bayern v. Freistaat Bayern* (Case C-396/92) [1994] ECR 1 – 3717, namely that each case will be fact-sensitive as to whether the case must be considered cumulatively with a related application.

25. It is worth noting that in Skye the initial wind farm application had included within its scope certain proposals to excavate stone but that the developer at that point had made no decision as to the source of material for the construction of the site words. The initial planning permission granted contained a condition which required the developer, before the development commenced, to submit detailed proposals for the sourcing of materials including any necessary planning applications. Thereafter, two separate planning applications for the borrow pits were lodged, but the developers asked for what is referred to as a "screening opinion" as to whether the applications for the borrow pits would require an EIA. The developer was informed that the planning authority "*opined that such an assessment would not be required*". Lord Hodge noted that no challenge had been taken to that screening opinion. Three years later, a second amended proposal was lodged by the developer which included an assessment of the cumulative impact of the wind farm and the borrow pits. In their amended proposal, the developer give a summary of the cumulative impacts of the wind farm and the borrow pits and concluded by stating that they had not identified any likely significant cumulative environmental effects over and above the assessed environmental effects of the wind farm. That conclusion was not challenged by the petitioners in the case. Lord Hodge in those circumstances indicated that there had been no breach of the Regulations in relation to the borrow pits as anybody entitled to do so, had not been deprived of an opportunity to comment on the environmental assessment in relation to the borrow pits, and he concluded also that "*because of the screening opinion, the borrow pits were not EIA applications".* But one should note that at paragraph 76 of his opinion, Lord Hodge stated:

> "*[76] It is undisputed that the borrow pits formed an integral part of the wind farm development and Swale Borough Council and BAA plc support the view that part of a development in such circumstances should not normally be considered in isolation. But I am not satisfied that it was illegal to separate the borrow pits from the assessment of the wind farm. The initial assessment end 2002 and the August 2006 assessment did not identify any significant environmental effects of the borrow pits whether considered alone or cumulatively with the wind farm. It is consistent with Advocate General Gulmann's approach in Bund Naturschutz that the court should look at the particular circumstances of each case in deciding whether a cumulative assessment is needed to fulfil the purposes of the Directive. While, as Mr Campbell argued, the cumulative effects of the wind farm and the borrow pits are cumulative, I see no practical reason for an environmental impact assessment of the borrow pits other than in the context of the wind farm application.*

[77] In any event the problem, if such it was, was remedied. Having received legal advice and reconsidered to the matter, the respondents appear to have encouraged AMEC to present a cumulative assessment in the second amended proposal. AMEC presented that assessment. The respondents were able therefore to consider the cumulative impact of the wind farm and the borrow pits before the grant of planning permission to the wind farm.

.....

[79] The 1999 Regulations are concerned with achieving a proper environmental assessment in which the public have the opportunity to participate. In this case, in contrast with the circumstances in BAA plc, the unchallenged conclusion of the cumulative impact assessment was that the borrow pits would not give rise to any significant environmental effects beyond those identified in the assessment of the wind farm. I am not satisfied that there has been any failure to assess cumulative environmental effects or that democratic participation in the assessment has been thwarted in any way. The challenge appears to be a technical one rather than one with substantive content and I am not persuaded that the technical challenge is justified. The 1999 regulations are not designed to create an obstacle course for a developer or a planning authority. This ground of challenge fails."

26. I consider that the decision in Skye is distinguishable from the present case in so far as there was in fact an assessment made at an earlier screening stage that there were no significant environmental impacts deriving from the borrow pits such that a cumulative assessment was required, and that opinion was not challenged. But Lord Hodge was able to take comfort also from the fact that the authority requested the developer to provide a cumulative assessment, and that was provided and considered. I do not think it is authority for any general proposition that even though one development is integral to a second there is nothing illegal about separating one from the other, and thereby avoid a cumulative assessment of significant environmental effects of both. Each case will have to be considered in the light of its own specific facts, and as I have said, the Skye facts are very different from the facts in the present case where it has been stated by the developer, and apparently accepted by the inspector and the Board, that it was not possible at the time the application was being considered for the potential environmental effects of the works required in order to make the connection to the national grid to be included in an EIS and then assessed, as the route/design for that connection was not known precisely at the time, and in any event it was a matter outside the control and knowledge of the developer at the time, being a matter for ESB Networks to determine. Therefore, unlike the Skye case, there has not been any assessment of the potential environmental impact of that second phase of the wind farm development at all. There have been some views expressed that it is unlikely that there would be any significant impact to the environment by the works required for the connection to the national grid, but it cannot be said that there has been an assessment as such, since the details have not yet been made available.

27. I am satisfied that the second phase of the development in the present case, namely the connection to the national grid, is an integral part of the overall development of which the construction of the turbines is the first part. This is not a case such as in *R (Littlewood) v. Bassetlaw District Council* [2008]'s E.W.H. C. 1812 where the development in question was a stand-alone project within a larger Master Plan development, the full details of which had not yet been finalised. In that case it was held that phase 1 was not dependent or reliant upon the completion of any other part of the master plan, and therefore the cumulative effects of the entire master plan did not need

to be assessed. The present case is different. The wind turbine development on its own serves no function if it cannot be connected to the national grid. In that way, the connection to the national grid is fundamental to the entire project, and in principle at least the cumulative effect of both must be assessed in order to comply with the Directive. In this regard the applicants have referred to the judgment of Clarke J. in*Arklow Holidays Limited v. An Bord Pleanala and others* [2006] IESC 15, albeit a judgment on the question only as to whether the applicants had established substantial grounds for their challenge to a decision to grant permission for the development of a waste water treatment plant, inter alia on the ground that "*the environmental impact statement submitted by the Urban District Council in support of its application for planning permission omitted from its considerations any potential impact on the environment of all aspects of the project other than those directly connected with the waste water treatment plant itself*". What had been omitted was any assessment of the environmental impact of certain aspects of the project which were outside the waste water treatment plant itself, the inspector taking the view in his report that by virtue of the fact that the rising mains and pumping stations were not located in environmentally sensitive areas, they were unlikely to have a significant environmental impact and therefore did not consider that the Board should require a new E.I.S. In deciding that a substantial ground had been raised in this regard by the applicants, Clarke J. stated:

> *"It may well have been within the competence of the Board to take the view that the potential environmental impacts of those aspects of the project outside the waste water treatment plant itself were much less significant than those from the plant. It may well also have been within the competence of the Board to take the view that the impacts that might be associated with those aspects outside the waste water treatment plant itself were not, of themselves, significant. However, what is required to be assessed is the totality of the impact of the project taken as a whole. It is, therefore, at least arguable sufficient for the purposes of leave, that aspects of a project which might not have impacts which would be significant in themselves might, when taken on a cumulative basis, and when added to the impacts of other aspects of the same project, give rise to an overall view that the environmental impacts taken as a whole were such as should lead to a refusal of development consent or, indeed, the imposition of more stringent conditions."*

28. It seems to me that the fact that the developer is at the mercy of ESB Networks as far as the details of the plans for that connection to the grid is concerned, cannot absolve the developer from compliance with the Directive in every respect. Presumably at some future date all of the grid connection details will be ascertained, so that a decision can be made as to whether there will or will not be any significant environmental impact either on its own, or cumulatively with the wind turbine development itself. The question is whether that cumulative assessment, or even a decision as to whether any such cumulative assessment is required at all, should be made prior to permission being granted for the first stage of the development (i.e. the construction of the turbines), or whether the construction of the turbines can be allowed to proceed, and then in due course when the details of the connection to the national grid are known, a cumulative assessment of the environment mental impact of both can be carried out – running the risk from the developer's point of view, that in the event that he proceeds with the construction of the turbines, it would be all in vain should there be a negative cumulative assessment when it comes to considering the connection to the national grid.

29. If, in the latter event, where a decision is made by the authority to refuse permission for the connection to the national grid in view of a perceived significant environmental impact cumulatively, and the first phase had at that stage already been completed and was ready to be operated once the connection to the national grid was completed, there

would be a significant prejudice to the developer such that it would probably make no commercial sense to proceed with the completion of the turbines until such time as a connection to the national grid was guaranteed by a relevant permission. For that reason, Framore submits that in reality there is nothing to prevent a cumulative assessment of the environmental impact of the connection to the national grid being carried out later when the details are known. They point also to the fact that the planning permission itself, which they have already obtained, makes it clear that the granting of that planning permission is not to be taken as any assurance that a connection to the national grid will be permitted. But, it must be borne in mind that Condition 4 is not a condition which makes the construction of the turbines conditional upon the consent being given for the connection to the national grid.

30. The applicants on the other hand fear that if the turbines are erected pursuant to the present permission, it would be more difficult for the authority to refuse permission in respect of the connection to the grid. In other words, the fear is that Framore would be seen to have "*a foot in the door*" such that any objections that the applicants might raise in relation to the second phase would be less likely to succeed than if the project was assessed cumulatively now before the developer has invested heavily in phase 1. In this regard, the applicants also refer to the fact that in the EIA Directive at recital 2 thereof that is stated:

> *"pursuant to Article 191 of the Treaty on the Functioning of the European Union, Union policy on the environment is based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should, as a priority, be rectified at source and that the polluter should pay. Effects on the environment should be taken into account at the earliest stage in all the technical planning and decision-making processes" [Emphasis added].*

The applicants submit that the "earliest stage" is now, and prior to permission being granted for phase 1, and that otherwise there a risk that the requirements of the Directive will be avoided by no cumulative assessment of the overall project being carried out, particularly where it is probable that phase 2 on its own will be seen as exempted development requiring no planning consent.

31. The respondent in its written submission has stated:

> *"57. For the Applicants" case to have any merit, it must ~~be on the~~ basis that the development and the national grid connection constitute the one "project" and thus, that such a project has been granted development consent in defiance of the EIA Directive because such has arisen prior to a complete EIA.*
>
> *58. If, of course, the subject matter development and the future connection to the national grid are viewed as one project, then it stands to absolute reason that development consent has not been given for that project. Indeed, Condition 4 is clear on this."*

32. In that regard, I have already concluded that in reality the wind farm and its connection in due course to the national grid is one project, neither being independent of the other as was the case on *R (Littlewood) v. Bassetlaw District Council* [supra] for example. The Board's submissions are very much predicated on the contrary argument, and on the fact as submitted also by Framore that at this point in time there have been no proposals formulated by ESB Networks for the design and route of the connection to the national grid. That argument does not, it seems to me, justify treating phase 1 as a stand-alone project when in truth it is not. Rather, it points to a prematurity in the seeking of permission for the construction of the wind farm ahead of the detailed

AN BORD PLEANÁLA
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proposals for its connection to the national grid from ESB Networks. I appreciate that Framore have indicated that it simply is not possessed of the necessary information in this regard and could not include it in its EIS. But that does not mean that given more time and further contact with ESB Networks it could not be achieved so that it could be included in an EIS which addressed the impact of the environment of the total project "at the earliest stage". It may mean that the developer must wait longer before submitting its application for planning permission. But it seems to me likely at least that even if a phase 1 permission is granted with a condition such as Condition 4 contained therein, no sensible developer would complete phase 1 of the development without having been granted permission for the connection to the national grid, or without having been assured that the connection phase is exempted development. In that way, it is difficult to see any real prejudice to the developer by having to wait until the necessary proposals are finalised by ESB Networks so that an EIS for the entire project can be completed and submitted, and so that a cumulative assessment of the likely impact on the environment can be carried out in order to comply with both the letter and spirit of the Directive.

33. I will therefore grant the reliefs at D1 and D2 of the Abridged Statement of Grounds dated 14th February 2014.

AN BORD PLEANÁLA
TIME BY
LTR DATED FROM

THE HIGH COURT

[2013 No. 802 J.R.]

BETWEEN

EAMON (TED) KELLY

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

ROSCOMMON COUNTY COUNCIL, GALETECH ENERGY DEVELOPMENTS LIMITED, SKY VALLEY CONCERNED RESIDENTS GROUP, WIND TURBINE ACTION GROUP SOUTH ROSCOMMON, THE DEPARTMENT OF ARTS, HERITAGE AND THE GAELTACHT, SKY VALLEY WIND COMPANY, THE HERITAGE COUNCIL AND THE COMMISSION FOR ENERGY REGULATION, PAUL DONOHUE, JAMES FRANCIS FALLON, THOMAS BURKE, MARIA DONNELLY, TOM AND FIONA FARRELL, LIAM KILDEA SKY VALLEY CONCERNED RESIDENTS GROUP, THE HERITAGE COUNCIL AND THE COMMISSION FOR ENERGY REGULATION

NOTICE PARTIES

JUDGMENT of Ms. Justice Finlay Geoghegan delivered on the 25th day of July 2014.

1. The applicant, supported by one notice party, namely, the Department of Arts, Heritage and the Gaeltacht ("the Department") in this judicial review, seeks, by way of primary relief orders of *certiorari,* to quash two decisions of the respondent to grant planning permission for wind turbine developments in County Roscommon. The challenged decisions are:

> "(1) A decision made on the 9th of September, 2013, to grant permission for a development comprising sixteen wind turbines with a hub height of 85m,

rotor diameter of 100m at Croan, Gortaphuill, Mullaghardagh, Dysart, County Roscommon (Appeal Reference PL20.239759 Planning Register Ref. 10/541) ("Phase 1 Decision").

(2) A decision made on the 13th of September, 2013, to grant planning permission for a development comprising nineteen wind turbines with a hub height of 85m, rotor diameter of 100m and overall height of 135m and 85m anemometer mass and 110kv substation a Milltown, Skeavally, Tawnagh, Tobermacloghlin, County Roscommon (Appeal ref. PL20.241069 Planning Register Ref. 11/273) ("Phase 2 Decision").

2. Galetech Energy Developments Ltd. ("Galetech"), a notice party, is the applicant for the planning permissions that are the subject of the Phase 1 and Phase 2 Decisions. It supports the respondent, An Bord Pleanála ("the Board") in opposing the present application.

3. As appears, the applications for planning permission relate to two developments of wind turbines in County Roscommon. The applicant is resident in Dysart, County Roscommon, is the Chairman of a group of local residents called the Wind Turbine Action Group South Roscommon and was an appellant before the Board in relation to each appeal.

Background

4. In 2010, Galetech applied for planning permission for a development comprising 16 wind turbine at Dysart, County Roscommon. In 2011, it applied for permission for the development of 19 wind turbines at Milltown, Skeavalley, County Roscommon. The two developments are in the same vicinity and are contended by the applicant to comprise two phases of the same development. They will be referred

to as Phase 1 and Phase 2 in this judgment. Roscommon County Council granted permissions for the two developments and appeals were made to the Board.

5. The proposed developments are in the vicinity of a number of European sites, both Special Areas of Conservation (SAC) and Special Protection Areas (SPA). There are ten conservation sites within 10km of the Phase 1 site. These include three Natura 2000 sites, Loghcroan SAC, Four Road Turlough CSAC and the River Suck Callows SPA. Those sites have important numbers of wetland and water birds, including Whooper Swan, Golden Plover and Greenland White Fronted Geese, all Annexe 1 species. Within 15km of the Phase 2 site, there are 14 Natura sites including the three Natura 2000 sites already mentioned.

6. The Board appointed a Planning Inspector to prepare a report on the appeal in relation to Phase 1, Ms. Kelly. Ms. Kelly reported on 11th March, 2012. She recommended refusal of planning permission.

7. The Board appointed Ms. MacGabhann as Inspector in relation to the Phase 2 appeal. Ms. MacGabhann reported on 6th February, 2013. She also recommended refusal of planning permission.

8. The Board considered each of the appeals at a meeting of the Board held on 8th August, 2013, and decided by a majority of 4:1 to grant permission for each of the proposed developments in accordance with reasons, considerations and decisions set out in the respective written decisions. It is those decisions, and the procedure leading to them, that are the subject matter of the present application for judicial review.

Grounds of Challenge

9. The applicant has delivered a lengthy and detailed statement of grounds. Pursuant to directions of the Court, it summarised the legal grounds upon which relief is sought as follows:

> "(1) The Environmental Impact Statements (EIS) accompanying the applications for planning permission were inadequate and did not meet the requirements of national and European law. The Board erred in law in considering the statements to be adequate and proceeding to grant permission.
>
> (2) The Natura Impact Statements (NIS) accompanying the applications for permission were inadequate and did not meet the requirements of national and European law. The Board erred in law in considering the statements to be adequate and proceeding to grant permission.
>
> (3) The Board failed to carry out a proper environmental impact assessment of the proposed development as is required under Irish and European law.
>
> (4) The Board failed to carry out a proper appropriate assessment of the proposed development as is required under Irish and European law.
>
> (5) The Inspectors in each appeal recommended a refusal of permission for the proposed development, the Board erred in failing to have any or any proper regard to these recommendations and in particular the scientific doubt expressed in these recommendation.
>
> (6) The Board failed to properly or at all record its conclusions or to give any or any proper statement of its reasons or considerations contrary to national and European law.

(7) The Board erred in applying an incorrect test in its purported appropriate assessment.

(8) The Board's decision was irrational."

10. At the hearing, counsel indicated that the applicant was not pursuing grounds (1) and (2).

11. The Department supports the applicant on his grounds of challenge which relate to compliance with the requirements of the Council Directive 92/43/EEC (as amended) (the "Habitats Directive") and the relevant implementing national legislation identified in grounds (4), (5), (6) and (7) above.

12. As appears, the primary ground relied upon by both the applicant and the Department is that the decisions of the Board to grant each planning permission were made in breach of the requirements of Article 6(3) of the Habitats Directive as transposed into national law by Part XAB of the Planning and Development Act 2000 (as amended) ("the PDA"). The main contention is that the Board, as competent authority, failed to carry out an appropriate assessment in either appeal in accordance with Article 6(3) and the decisions of the Court of Justice of the European Union (CJEU), or to give reasons for the determination made in the course of the purported appropriate assessments.

13. The applicant pursued ground (3) in relation to the alleged failure by the Board to carry out an environmental impact assessment as required by Directive 2011/92/EU ("EIA Directive") as implemented by the PDA.

14. Whilst I propose, initially, considering the grounds which relate to the alleged breach of the requirements of Article 6(3) of the Habitats Directive, as transposed into Irish law, it is necessary to set out in summary all relevant parts of the Statutory

Scheme which applied to the challenged decisions taken by the Board to consider appropriately the Board decisions.

Statutory Framework

15. The ultimate decisions taken by the Board on the appeals were whether or not to grant planning permission for the developments that were the subject of each of the appeals pursuant to s. 37 of the PDA. In taking those decisions, by reason of the nature and location of the proposed developments, there were three separately identifiable requirements deriving from Statute (in part enacted to give effect to EU obligations) with which the Board had to comply:

(i) Consideration of what might be termed normal or general planning requirements under the PDA and compliance with its procedural requirements; and

(ii) The carrying out of an environmental impact assessment required by the EIA Directive as implemented by Part X of the PDA; and

(iii) The carrying out of an appropriate assessment as required by Article 6(3) of the Habitats Directive implemented by Part XAB of the PDA including making a determination.

Planning Requirements

16. The Board assigned an Inspector to report to it on each appeal pursuant to s. 146(1) of the PDA. The Inspector's Report must include a recommendation to the Board, which it is obliged to consider before determining the appeal (s. 146(2)).

17. In accordance with s. 34(10) of the PDA, the Board must state the main reasons and considerations on which the decision is based. Also, as where, in this case, the decision on the appeal is different to the recommendation in the Inspector's

Report, the decision of the Board must "indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission".

Environmental Impact Assessment

18. Where, as on the facts of these appeals, the Board is also obliged to carry out an environmental impact assessment (EIA), the obligations imposed on it by the EIA Directive, as implemented, are set out in Part X of the PDA. Section 171A(1) defines an environment impact assessment, for the purposes of Part X, as:

> "An assessment which includes an examination, analysis and evaluation carried out by . . . the Board . . . in accordance with this Part and Regulations made thereunder, that shall identify, describe and assess in an appropriate manner, in light of each individual case and in accordance with Articles 4 to 11 of the Environmental Impact Assessment Directive, the direct and indirect effects of a proposed development on the following:
>
> (a) human beings, flora and fauna;
>
> (b) soil, water, air, climate and the landscape;
>
> (c) material assets and the cultural heritage and
>
> (d) the interaction between the factors mentioned in paragraphs (a), ~~(b)~~ and (c)."

19. Section 172(1H) permits the Board, in carrying out an EIA, to "have regard to and adopt in whole or in part any reports prepared by its officials or by consultants, experts or other advisers". This includes its Inspector's Reports.

20. Section 172(1J) obliges the Board, when it has decided whether to grant or refuse consent for the proposed development, to inform the applicant and the public of the decision and to make the following information available to them:

> "(a) The contents of the decision and any conditions attaching thereto;

(b) an evaluation of the direct and indirect effects of the proposed development on the matters set out in section 171A;

(c) having examined any submission or observation validly made:

(i) the main reasons and considerations on which the decision is based and

(ii) the main reasons and considerations for the attachment of any conditions, including reasons and considerations arising from or related to submissions or observations made by members of the public;

(d) where relevant, description of the main measures to avoid, reduce and, if possible, offset the major adverse effects;

(e) any report referred to in sub-section (1H);

(f) information for the public on the procedures available to review the substantive and procedural legality of the decision, and

(g) the views, if any, furnished by other Member States of the European Union pursuant to s. 174."

21. The definition of an EIA as being "an examination, analysis and evaluation" carried out by the Board and the obligation of the Board pursuant to s. 172(1J)(b) to make available to the public its evaluation of the direct and indirect effects of the proposed development on the matters set out in s. 171A are of particular relevance to the matters in dispute.

<u>Appropriate Assessment</u>

22. In these appeals, the third statutory requirement imposed on the Board relates to its obligations and in particular the carrying out of an appropriate assessment

pursuant to Article 6 of the Habitats Directive as implemented by Part XAB of the PDA. There is some dispute as to the extent of the obligations imposed and in particular the nature of the reasons which must be given by the Board.

23. Whilst the provisions of Part XAB are more detailed than Article 6 of the Habitats Directive, it was common case between the parties at the hearing that they are intended to and do impose similar obligations on the Board to those imposed by Article 6(3) of the Habitats Directive as construed by reference to the case law of the CJEU.

24. Article 6 of the Habitats Directive, insofar as relevant, provides:

> "2. Member States shall take appropriate steps to avoid, in the special areas of conservation, the deterioration of natural habitats and the habitats of species as well as disturbance of the species for which the areas have been designated, in so far as such disturbance could be significant in relation to the objectives of this Directive.
>
> 3. Any plan or project not directly connected with or necessary to the management of the site but likely to have a significant effect thereon, either individually or in combination with other plans or projects, shall be subject to appropriate assessment of its implications for the site in view of the site's conservation objectives. In the light of the conclusions of the assessment of the implications for the site and subject to the provisions of paragraph 4, the competent national authorities shall agree to the plan or project only after having ascertained that it will not adversely affect the integrity of the site concerned and, if appropriate, after having obtained the opinion of the general public.

4. If, in spite of a negative assessment of the implications for the site and in the absence of alternative solutions, a plan or project must nevertheless be carried out for imperative reasons of overriding public interest, including those of a social or economic nature, the Member State shall take all compensatory measures necessary to ensure that the overall coherence of Natura 2000 is protected. It shall inform the Commission of the compensatory measures adopted."

25. As appears Article 6(3) envisages a two-stage process which is implemented in greater detail by ss. 177U and 177V of the PDA:

(i) a screening for appropriate assessment in accordance with s. 177U;

(ii) if, on a screening, the Board determines that an appropriate assessment is required then it must carry out an appropriate assessment in accordance with s. 177V.

26. There is a dispute between the parties as to the precise obligations imposed on the Board in relation to the stage 1 screening by s.1777U but its resolution is not strictly necessary in these proceedings. There is agreement on the nature and purpose of the screening process which is well explained by Advocate General Sharpston in Case C-258/11 *Sweetman* at paras 47-49:

"47. It follows that the *possibility* of there being a significant effect on the site will generate the need for an appropriate assessment for the purposes of Article 6(3). The requirement at this stage that the plan or project be likely to have a significant effect is thus a trigger for the obligation to carry out an appropriate assessment. There is no need to *establish* such an effect; it is, as Ireland observes, merely necessary to determine that there *may be* such an effect.

48. The requirement that the effect in question be 'significant' exists in order to lay down a *de minimis* threshold. Plans or projects that have no appreciable effect on the site are thereby excluded. If all plans or projects capable of having *any* effect whatsoever on the site were to be caught by Article 6(3), activities on or near the site would risk being impossible by reason of legislative overkill.

49. The threshold at the first stage of Article 6(3) is thus a very low one. It operates merely as a trigger, in order to determine whether an appropriate assessment must be undertaken on the implications of the plan or project for the conservation objectives of the site [. . .]"

27. The applicant submitted that s. 177U is mandatory and obliges the Board to carry out a screening and make a formal determination as to whether or not an appropriate assessment is required in all cases, and that it did not do so in the appeals, the subject matter of these proceedings. The Board in response does not assert that it conducted a stage 1 formal screening but disputes that it was under an obligation to carry out a screening and issue a formal determination in circumstances where the planning applications were accompanied by a Natura impact statement. It referred to s. 177U(6)(c) and submitted that this is intended to reflect the practical reality of the situation which pertains in these appeals where the requirement to carry out a full appropriate assessment had been established before the planning authority.

28. Sub-sections 177U(1) and (2), in their terms, impose a mandatory obligation on a competent authority, such as the Board, to carry out screening for appropriate assessment before consent is given for a proposed development. These sub-sections, insofar as relevant, provide:

"177U. - (1) A screening for appropriate assessment of . . . [an] application for consent for proposed development shall be carried out by the competent authority to assess, in view of best scientific knowledge, if that . . . proposed development, individually or in combination with another plan or project is likely to have a significant effect on the European site.

(2) A competent authority shall carry out a screening for appropriate assessment under subsection (1) before-

(a) . . ."

Sub-section (3) permits the competent authority to request information from the applicant to enable it carry out the screening. Sub-sections (4) and (5) set out the determinations which may be made by the Board in that screening process in the following terms:

"(4) The competent authority shall determine that an appropriate assessment . . . of a proposed development, . . . is required if it cannot be excluded, on the basis of objective information, that the . . . proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site.

(5) The competent authority shall determine that an appropriate assessment of . . . a proposed development, . . . is not required if it can be excluded, on the basis of objective information, that the . . . proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site."

29. Sub-section (6) then provides for the notification of a determination made by a competent authority. However, it only expressly requires notification to be given where a competent authority makes a determination that an appropriate assessment is

required. When it does so, it must give notice of the determination, including reasons for the determination to the applicant, persons who have made submissions or observations and a party to an appeal. However, sub-section (c) then provides "paragraph (a) shall not apply in a case where the application for consent for the proposed development was accompanied by a Natura impact statement".

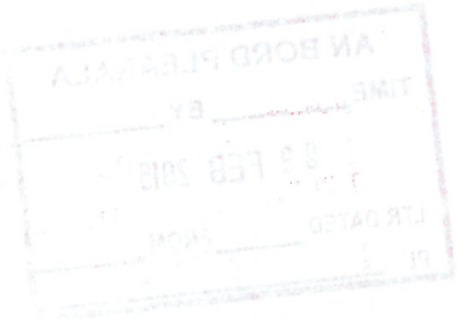
30. Whilst the above statutory scheme appears in its express terms to impose a mandatory obligation under sub-sections (1) and (2) on the Board to carry out a screening for appropriate assessment prior to giving consent for a all proposed developments, sub-section (6), in its express terms, only appears to require notice of its determination with reasons to be given to certain persons where it reaches a positive conclusion that an appropriate assessment is required and then relieves the Board of giving notice of its determination in circumstances where the application for consent was accompanied by a Natura impact statement. As I have already observed, it is not necessary, for the determination of this judicial review application, to decide the proper construction of these provisions as the Board accepted an appropriate assessment was required. It is, however, relevant to the subsequent issues in dispute in relation to the nature of the full appropriate assessment which must be carried out and the reasons which must be given therefor, to note that an appropriate assessment is the second stage of a two-stage process and only arises where the first stage or screening process has either determined (or it was at least implicitly accepted) that the proposed development, alone or in combination with other plans or projects, is likely to have a significant effect on a European site within the meaning of the low threshold set out by Advocate General Sharpston in *Sweetman*.

31. Unlike, in the case of an environmental impact assessment, s. 177V does not contain a stand alone definition of an "appropriate assessment". Sub-section 177V(1)

provides that "An appropriate assessment carried out under this Part shall include a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not a . . . proposed development would adversely affect the integrity of a European site". The Board is the competent authority for the purposes of Part XAB in relation to a planning appeal. If as expressly required by s.177V(1) the determination to be made as part of the appropriate assessment is to meet the requirements of Article 6.3 of the Habitats Directive, it follows that the full appropriate assessment must meet the requirements of Article 6.3 of the Habitats Directive as construed in CJEU case law.

32. Sub-section 177V(1) also expressly requires the appropriate assessment to be carried out before consent is given for a proposed development. Further Sub-section (3) provides that "Notwithstanding any other provision in this Act [and other named Acts] the Board shall give consent to a proposed development"only after having determined that the . . .or proposed development shall not adversely affect the integrity of a European site". Sub-section (4) then "subject to the other provisions of the Act" permits consent to be given where modifications or conditions are attached and the Board has determined that "the proposed development would not adversely affect the integrity of the European site if it is carried out in accordance with the consent and the modifications or conditions attaching thereto. On the facts herein no such determination was made in either appeal and s.177V(4) is not relevant to the issues to be determined.

33. As appears, the respective effects on the decision making process of the Board of the environmental impact assessment and the appropriate assessment (where both have to be carried out by the Board prior to taking its planning decision) are quite different. In carrying out an environmental impact assessment, the Board is required



to conduct an examination, analysis and evaluation of and identify the direct and indirect effects of the proposed developments on the matters specified in section 171A(1). However, the outcome of that examination, analysis, evaluation and identification informs rather than determines the planning decision which should or may be made. The Board has jurisdiction in its discretion to grant consent regardless of the outcome of the EIA though of course it impacts on how it should exercise its discretion.

34. In contrast, the Board, in carrying out an appropriate assessment under Article 6(3) and s.177V, is obliged, as part of same, to make a determination as to whether or not the proposed development would adversely affect the integrity of the relevant European site or sites in view of its conservation objectives. The determination which the Board makes on that issue in the appropriate assessment determines its jurisdiction to take the planning decision. Unless the appropriate assessment determination is that the proposed development will not adversely affect the integrity of any relevant European site, the Board may not take a decision giving consent for the proposed development unless it does so pursuant to Article 6(4) of the Habitats Directive. It is agreed that the decisions made by the Board herein were not taken pursuant to Article 6(4) of the Habitats Directive. Hence, for the purposes of these appeals, the Board was precluded from granting consent for the proposed developments unless, having conducted an appropriate assessment in accordance with Article 6(3), as construed by the CJEU, it reached a determination that the proposed development will not adversely affect the integrity of the European sites.

Nature of Appropriate Assessment

35. The requirements of an appropriate assessment and of the legal test that the proposed development "will not adversely affect the integrity of a European site"

have been considered by the CJEU in a number of cases. In *Waddenzee (Case C-127/02)* [2004] E.C.R. I-7405, at para. 61 of its judgment, it stated:

> ". . . under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all the aspects of the plan or project which can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities, taking account of the appropriate assessment of the implications of mechanical cockle fishing for the site concerned in the light of the site's conservation objectives, are to authorise such an activity only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects."

36. This formulation as to the nature of the obligations imposed under Article 6(3) of the Habitats Directive has been affirmed and expanded upon in subsequent decisions of the CJEU. In *Commission v. Spain (Case C-404/09)* [2011] E.C.R. I-11853, the CJEU referred again to the obligation to identify the affects of the proposed development on the European sites conservation objectives "in the light of the best scientific knowledge in the field" and referred again to the test that "no reasonable scientific doubt remains as to the absence of such effects". At paras. 99 and 100, the CJEU stated:

> "99. Under Article 6(3) of the Habitats Directive, an appropriate assessment of the implications for the site concerned of the plan or project implies that, prior to its approval, all aspects of the plan or project which

can, by themselves or in combination with other plans or projects, affect the site's conservation objectives must be identified in the light of the best scientific knowledge in the field. The competent national authorities are to authorise an activity on the protected site only if they have made certain that it will not adversely affect the integrity of that site. That is the case where no reasonable scientific doubt remains as to the absence of such effects (see, in particular, *Commission v Ireland*, at paragraph 243).

100. An assessment made under Article 6(3) of the Habitats Directive cannot be regarded as appropriate if it contains gaps and lacks complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the SPA concerned (see, to that effect, Case C-304/05 *Commission v Italy* [2007] ECR1-7495, paragraph 69."

37. More recently, the CJEU, in *Sweetman (Case C-258/11)*, provided further guidance as to what is required of an appropriate assessment at para. 44 where it stated:

"44. So far as concerns the assessment carried out under Article 6(3) of the Habitats Directive, it should be pointed out that it cannot have lacunae and must contain complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the works proposed on the protected site concerned (see, to this effect, Case C-404/09 *Commission v Spain*, paragraph 100 and the case-law cited). It is for the national court to establish whether the assessment of the implications for the site meets these requirements."

38. Whilst all parties accepted for an appropriate assessment to be lawful it must comply with the requirements set out by the CJEU, as summarised in the above extracts from the relevant judgments, there was some dispute as to what was required by reason, in particular, of the wording of s. 177V(1) which only provides that it shall "include" a determination by the competent authority under Article 6.3 of the Habitats Directive as to whether or not ". . . a proposed development would adversely the integrity of a European site" and the absence of any provision analogous to the definition of an environmental impact assessment as contained in section 171A(1) that such an assessment must include "an examination, analysis and evaluation carried out by . . . the Board".

39. Section 177V(1) must be construed so as to give effect to Article 6(3) of the Habitats Directive, and hence, an appropriate assessment carried out under the section must meet the requirements of Article 6(3) as set out in the CJEU case law. If an appropriate assessment is to comply with the criteria set out by the CJEU in the cases referred to, then it must, in my judgment, include an examination, analysis, evaluation, findings, conclusions and a final determination.

40. It must be recalled that the appropriate assessment, or a stage two assessment, will only arise where, in the stage one screening process, it has been determined (or it has been implicitly accepted) that the proposed development meets the threshold of being considered likely to have significant effects on a European site. Where that is the position, then, in accordance with the preceding case law, the appropriate assessment to be lawfully conducted in summary:

(i) Must identify, in the light of the best scientific knowledge in the field, all aspects of the development project which can, by itself or in combination with other plans or projects, affect the European site in the

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light of its conservation objectives. This clearly requires both examination and analysis.

(ii) Must contain complete, precise and definitive findings and conclusions and may not have lacunae or gaps. The requirement for precise and definitive findings and conclusions appears to require analysis, evaluation and decisions. Further, the reference to findings and conclusions in a scientific context requires both findings following analysis and conclusions following an evaluation each in the light of the best scientific knowledge in the field.

(iii)May only include a determination that the proposed development will not adversely affect the integrity of any relevant European site where upon the basis of complete, precise and definitive findings and conclusions made the Board decides that no reasonable scientific doubt remains as to the absence of the identified potential effects.

41. Hence in my judgment the full appropriate assessment required by s.177V(1) must include all of the above elements and not just the determination expressly referred to in the sub-section.

42. In *Sweetman (Case C-258/11)*, the CJEU also gave guidance as to the scope of the expression "adversely affect the integrity of the site". It is unnecessary to consider this in detail save to note that the Board is legally constrained as to how it should address the issue. The Court at para. 39 of its judgment, stated:

"Consequently, it should be inferred that in order for the integrity of a site as a natural habitat not to be adversely affected for the purposes of the second sentence of Article 6(3) of the Habitats Directive, the site needs to be preserved at a favourable conservation status; this entails, as the


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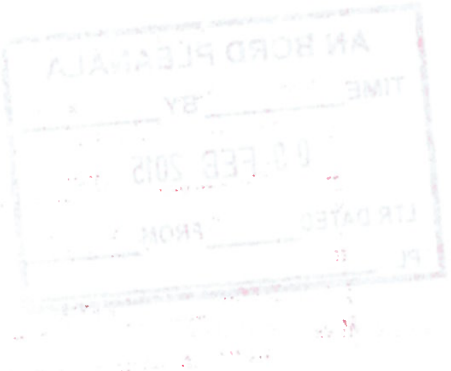
Advocate General has observed in points 54 to 56 of her Opinion, the lasting preservation of the constitutive characteristics of the site concerned that are connected to the presence of a natural habitat type whose preservation was the objective justifying the designation of that site in the list of SCIs in accordance with the Directive."

43. At para56, the Advocate General had stated:

"56. It follows that the constructive characteristics of the site that will be relevant are those in respect of which the site was designated and their associated conservation objectives. Thus, in determining whether the integrity of the site is affected, the essential question the decision-maker must ask is 'why was *this particular site* designated and what are its conservation objectives?' . . ."

Appropriate Assessment and Reasons

44. It is agreed that the Board is under an express obligation pursuant to s. 177V(5) of the PDA to give reasons for the determination made under Article 6(3) of the Habitats Directive as to whether or not the proposed development would adversely affect the integrity of a European site. The dispute relates to the extent or nature of the reasons which must be given. The applicant and the Department submit that where as in these appeals, the determination is that the proposed development would not adversely affect the integrity of any European site in view of the conversation objectives of those sites that the reasons must include complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed development on the European sites in the light of the conservation objectives of the sites. It submits that such reasons are required in order



that the court may, in an application for judicial review, be able to ascertain whether or not an appropriate assessment has been conducted in accordance with the requirements of Article 6(3) of the Habitats Directive, as explained in the case law of the CJEU. They refer by analogy to the purpose of the requirement to state reasons as explained by the CJEU in *Mellor (Case C-75/08)* [2009] E.C.R. I-3799 in relation to an implied duty to give reasons for a negative screening decision under the Environmental Impact Assessment Directive. In that judgment, at paras. 57 to 60, the CJEU stated:-

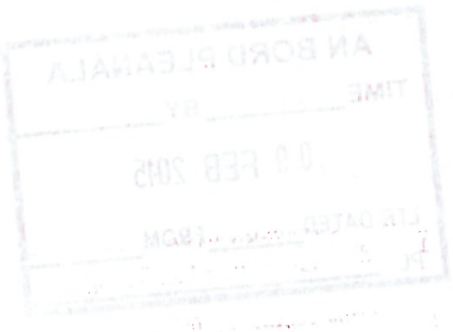
> "57. It is apparent, however, that third parties, as well as the administrative authorities concerned, must be able to satisfy themselves that the competent authority has actually determined, in accordance with the rules laid down by national law, that an EIA was or was not necessary.
>
> 58. Furthermore, interested parties, as well as other national authorities concerned, must be able to ensure, if necessary through legal action, compliance with the competent authority's screening obligation. That requirement may be met, as in the main proceedings, by the possibility of bringing an action directly against the determination not to carry out an EIA.
>
> 59. In that regard, effective judicial review, which must be able to cover the legality of the reasons for the contested decision, presupposes in general, that the court to which the matter is referred may require the competent authority to notify its reasons. However where it is more particularly a question of securing the effective protection of a right conferred by Community law, interested parties must also be able to defend that right under the best possible conditions and have the possibility of deciding, with a full knowledge of the relevant facts, whether there is any point in applying to the courts.

Consequently, in such circumstances, the competent national authority is under a duty to inform them of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request (see Case 222/86 *Heylens and Others* [1987] ECR 4097, paragraph 15).

60. That subsequent communication may take the form, not only of an express statement of the reasons, but also of information and relevant documents being made available in response to the request made."

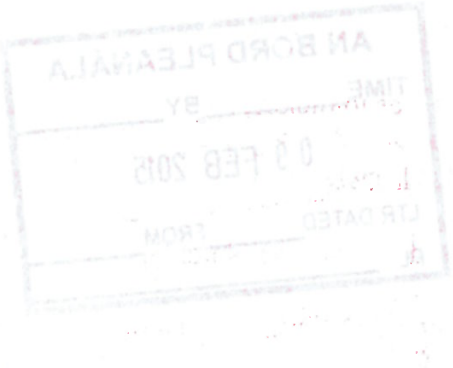
45. They also relied upon the principles stated by Clarke J. in the High Court in *Christian v. Dublin City Council* [2012] 2 I.R. 506, in relation to the extent of the obligation to give reasons in Irish law. The underlying rationale and extent of the obligation as explained by Clarke J. appears to me to be similar if not identical to that explained by the CJEU in *Mellor*. In that judgment at p. 540, para. 78, Clarke J. explained it in the following terms:-

"The underlying rationale of cases such as *Meadows v. Minister for Justice* [2010] IESC 3 (in that respect) and *Mulholland v. An Bord Pleanála (No. 2)* [2005] IEHC 306 is that decisions which affect a person's rights and obligations must be lawfully made. In order to assess whether a relevant decision is lawful, a party considering a challenge, and the court in the event of a challenge being brought, must have access to a sufficient amount of information to enable an assessment as to lawfulness to be made. What that information may be, may vary enormously depending on the facts under consideration or the nature of the decision under challenge. However, the broad and underlying principle is that the court must have access to sufficient information to enable the lawfulness of the relevant measure to be assessed."



46. I note that similar statement s of principle have been repeated by Clarke J in the Supreme Court in judgments with which other members of the Court agreed in relation to the extent or type of reasons which must be given in *Rawson v Minister for Defence* [1012] IESC 26 at para 6.8 , and *EMI Records (Ireland)& Ors v Data Protection Commissioner* 2013 IESC 34 at paras 6.3-6.5.

47. The Board, supported by Galetech, did not dispute the above principles or their applicability to its obligation to give reasons for its determination in the appropriate assessment. It referred, however, to the Irish case law, and in particular, that relating to s. 34 of the PDA and the obligation on the Board where it departs from its inspectors' recommendations to state "the main reasons" for the departure. In particular, the Board noted case law establishing not only the position that the reasons need not be discursive but also that they should be read from the perspective of an intelligent person who has participated in the proceedings and should give sufficient information to enable an appeal of the decision while demonstrating that the decision maker adequately turned his/her mind to the matters in issue (*O'Neill v. An Bord Pleanála* [2009] IEHC 202 at paras. 27 to 34). Also Counsel for the Board tied the interpretative approach urged by the respondent to the judgment of Kelly J. in *Mulholland v. An Bord Pleanála (No.2)* [2005] IEHC 306, [2006] 1 I.R. 453. In particular, he noted the comments of Kelly J. at p. 464, paras. 30 to 32, that while new obligations in respect of when reasons are given were introduced by s. 34 of the PDA, the jurisprudence in respect of the content of reasons given by a planning authority had been left unchanged by the legislature. Counsel submitted this position is indicative of a continuing legal position in Irish law on the content of reasons required to be given by a planning authority and, as such, requires that the same interpretation



should be given to the statutory obligations in respect of reasons arising under s. 177V(5) of the PDA.

48. On this issue I have concluded that the submission made on behalf of the applicant and Department is correct. First, the essential principle is that the reasons must be such as to enable an interested party assess the lawfulness of the decision and in the event of a challenge being brought, the court must have access to sufficient information to enable an assessment as to lawfulness to be made On the facts of this judicial review, the challenged decisions are those to grant planning permissions. However, the grounds of challenge include the failure of the Board to carry out a proper or lawful appropriate assessment under Article 6(3) as implemented in Ireland. For the reasons already stated in this judgment the Board could not make a lawful decision to grant planning permission unless it had reached a lawful determination, in an appropriate assessment lawfully conducted, that the proposed development would not adversely impact on the European sites in question. In accordance with the CJEU decision in *Sweetman*, it is for the national court to determine whether the appropriate assessment (including the determination) was lawfully carried out or reached, and to do so, it appears to me that the reasons given for the Board's determination in an appropriate assessment must include the complete, precise and definitive findings and conclusions relied upon by the Board as the basis for its determination. They must also include the main rationale or reason for which the Board considered those findings and conclusions capable of removing all scientific doubt as to the effects of the proposed development on the European site concerned in the light of the its conservation objectives. In the absence of such reasons, it would not be possible for a court to decide whether the appropriate assessment was lawfully concluded or whether the determination meets the legal test required by the judgments of the CJEU.

49. Secondly it appears to me that whilst the requirement for an appropriate assessment has been implemented in Ireland by amendment of the Planning Acts and requires to be carried out *inter alia* as part of the planning process the determination which must be made by the Board as competent authority it is not a "planning decision" in the sense used in the judgments relating to reasons relied upon by the Board. In such a planning decision the Board is exercising a jurisdiction with a very wide discretion. By contrast the determination it must make as part of an appropriate assessment is significantly narrower and legally constrained as explained in the CJEU cases cited. It also determines the Board's continuing jurisdiction to grant planning consent and therefore a decision which goes to its jurisdiction. The application of the principles set out by Clarke J in *Christian, Rawson* and *EMI* to the different types of decision results as envisaged therein in a requirement for reasons of a different order in relation to the different types of decison.

50. In reaching that conclusion I am not deciding that the findings and conclusions always have to be ones made by the Board itself. Where the Board appoints an inspector to prepare a report and the inspector carries out an appropriate assessment as part of his or her report, it may be that if the Board on consideration accepts the relevant findings made and conclusions reached by its Inspector in his or her report that the production of the report may satisfy some or all of the obligation of the Board to give reasons for its determination. This would depend upon the relevant facts.

51. It is now intended to apply the above principles and consider the lawfulness of the appropriate assessment including the determination made conducted by the Board in relation to each of the challenged decisions and the adequacy of the reasons given for its determinations. It is necessary to consider each decision separately.

Phase 1 Decision and Appropriate Assessment

52. The evidence adduced by the Board in relation to its phase 1 decision and the appropriate assessment conducted in that appeal is primarily the Board decision (PL 20.239759), the Board direction relating to that decision and the Inspector's Report and the documents referred to therein. The Board direction states that the submissions on this file and on the file relating to the phase 2 decision were considered at the same Board meeting of 8th August, 2013. I accept that fact.

53. The structure of the Board's decision is that it commences by stating its planning decision; it then identifies the matters considered; it then appears to include a number of paragraphs relating to the environmental impact assessment, it carried out; and then in two paragraphs identifies the appropriate assessment conducted and its reasons for the determination reached therein before returning to its final planning assessment and then sets out the conditions to be attached to the grant of permisson. Counsel on behalf of the Board submitted that this was the structure of the decision. The two paragraphs expressly referring to the appropriate assessment are in the following terms:-

> "The Board completed an Appropriate Assessment in relation to potential impacts on Natura 2000 sites and having regard to the Natura Impact Statement submitted including mitigation measures proposed and the reports of the Inspector in relation [to] the current file and to file register reference number PL20.241069, the further information submitted to An Bord Pleanála and to other submissions on file the Board concluded that on the basis of the information available that the proposed development either individually or in

combination with other plans or projects would not adversely affect the integrity of any European site in view of the conservation objectives of this sites.

The Board did not agree with the Inspector's conclusions set out in section 32.3.6 of her report regarding the adverse effects of the proposed development on feeding/roosting/commuting area and natural flight lines of certain water birds in the light of the comprehensive additional data in this regard submitted as further information to the Board on the 6th day of June 2013. The Board did not agree with the further conclusion of the Inspector in relation to the adverse effects of the proposed development on the integrity of European sites at Lough Croan SAC (Site No. 000610) and Lough Croan SPA (Site No. 004139). The Board considered that it could not reasonably be concluded on the basis of the information on ground conditions and other material submitted; the nature of the proposed development and the use of normal good construction practice, that the integrity of these sites would be adversely affected by the proposed development."

54. Earlier in its decision, the Board had stated in relation to the Inspector's Report:-

"The Board generally adopted the report of the Inspector except in relation to the following items (see section 44E of the Inspector's Report):

- landscape and visual impacts
- hydrology and groundwater quality and flows, and
- bird movements in the area,

for the reasons set out below."

55. Section 44E of the Inspector's Report forms part of the environmental impact assessment conducted by the Inspector. It is not expressly part of the appropriate assessment conducted by her. The landscape and visual impacts are of no relevance to the appropriate assessment. Both hydrology and groundwater quality and flow and bird movements in the area are of direct relevance. The reasons included by the Board in its decision in the context of the environmental impact assessment as to why it did not adopt the report of the inspector in relation to these items are explained in the following terms:-

> "The Board considered the subject of hydrology and the potential for adverse impact by the proposed development on groundwater quality and flow in this karst area. The Board is satisfied taking into account the information supplied by the applicant including the resistivity test date submitted to the planning authority at further information stage that subject to normal good construction practice turbine foundations can be developed at this location without significant impacts on the hydrology or hydrogeology of the area.
>
> The Board is satisfied on the basis of the survey information submitted to the planning authority (Chapter 8, EIS) and the further information submitted on 6th day of June 2013 to An Bord Pleanála in relation to bird movements in the area that the proposed development is unlikely to have any significant impacts on avifauna including species of water birds of conservation interest. While the Board reached this view independently of the applicant's proposed use of a radar detection system as an additional mitigant it is of the view that this system may be of valued as an aid to minimising impacts on specific bird species in the area."

56. I accept the submission made on behalf of the Board that those two paragraphs in the decision should not be considered as part of the appropriate assessment conducted by the Board but rather form part of the environmental impact assessment. However, that does not assist the Board in relation to the validity of the appropriate assessment conducted, save that it should not be considered as evidence of the application of an incorrect legal test as was submitted by the applicant.

57. The two paragraphs included by the Board in its decision in relation to the appropriate assessment must be considered in the context of that part of the Inspector's Report, which includes the appropriate assessment conducted by her and her findings and conclusion. It assists in identifying the relevant sites, their conservation objectives and potential impacts of the proposed developments.

58. The Inspector set out the appropriate assessment conducted by her at section 32 of her report. It commences by identifying ten Natura 2000 sites in the area of the proposed development. She then gives a short summary of the five nearest conservation sites, their objectives and the impacts on them in the following terms:-

> "32.1.2 The following is a short summary of the five conservation sites nearest the appeal site based on the site synopses.
>
> 1. Lough Croan - part turlough / part floating fen; supports multitude of highly diverse vegetation, including Red Data - Northern Yellow Cress; important ornithological site; species using site include Whooper Swan, Golden Plover, Greenland White-Fronted Goose (River Suck population), Shoveler, Bewick Swan, Wigeon, Gadwall, Teal, Mallard, Pintail, Lapwing, Curlew, Blackheaded Gull; wintering water fowl numbers are large and site is especially useful to dabbling

duck; important site due to its overall size, birdlife and rare plant communities and the species it supports;

2. Four Roads Turlough - very important site as refuge and feeding area for wildfowl and waders; bird numbers variable; can be very large; extensively used by Greenland White-Fronted Goose (River Suck population); other species include Wigeon, Teal, Shoveler; Bewicks Swan, Golden Plover, Lapwing, Curlew; occasional use by Whooper Swan;

3. River Suck Callows - extensive linear site (70km) that floods each winter; important for Greenland White-Fronted Geese (flock of international importance), Whooper Swan, Golden Plover, Wigeon, Lapwing, Mute Swan, Teal, Pintail, Curlew, Black-headed Gull as well as Otter and Hare. There is a wild fowl sanctuary north of Ballyforan;

4. Lough Funshinagh - classified as turlough; water levels fluctuate significantly; important for wintering waterfowl including Whooper Swan, Bewicks Swan, Golden Plover, Wigeon, Teal, Mallard, Shoveler, Pochard, Tufted Duck, Coot, Lapwing and Curlew and also used by River Suck, Greenland White-Fronted Geese;

5. Lisduff Turlough - important for waders and wintering wildfowl; Bewick Swan, Golden Plover, Dunlin, Pintail, Pochard, Lapwing, Curlew, Snipe.

The conservation objectives for these sites are:

- Lough Croan - (i) maintain Annex I habitat - Turlough; (ii) maintain or restore favourable conservation conditions for Shoveler, Golden

Plover and Greenland White-Fronted Geese; (iii) additional conservation interest for Wetlands and Water birds;

- Four Roads - (i) maintain Annex I habitat - Turlough; (ii) maintain or restore favourable conservation conditions for Golden Plover and Greenland White-Fronted Geese; (iii) additional conservation interest for wetlands and water birds;
- River Suck - (i) maintain special conservation interest for Whooper Swan, Greenland White-Fronted Geese, Wigeon, Lapwing, Wetlands and Water birds;
- Louth Funshinagh - (i) maintain Annex I habitat - Turlough;
- Lisduff Turlough - (i) maintain Annex I habitat - Turlough;

32.2 Direct and Indirect Impacts

32.2.1 I consider the main direct impacts will be from

- Displacement of Golden Plover and Lapwing in the short term due to construction noise and loss of habitat and in the long term due to the sight, noise and vibration of turbines;
- Disturbance of feeding/ roosting/ commuting area and interference with natural flight lines of Whooper Swans, Greenland White-Fronted Geese and Golden Plover;
- Bird strikes due to collision with wind turbines;

32.2.2 I consider the main indirect impact in the short and long term will be from

- Change in turlough habitat."

59. The Inspector then assessed the direct and indirect impacts under each of the above headings as follows:-

"32.3 Assessment

32.3.1 Displacement of Golden Plover and Lapwing within and in the vicinity of the site

32.3.2 Both the notes from the Bird Survey and the NIS state that Golden Plover were regularly observed near the site but not in the immediate area of the proposed development. Some 3,000 were observed in a flock at Lough Croan during the winter surveys and Lapwing were observed during the winter surveys including on wet grassland in the region surrounding Lough Croan. Table 8.5.4.1, (Ornithology Section, EIS) lists both species as being observed in and around the survey area but considered that neither species to be at risk. They are not discussed in the NIS. In view of the extensive, alternative habitat available in the area to this species, I consider that there is unlikely to be a significant long-term impact.

32.3.3 Disturbance of feeding/ roosting/ commuting area and natural flight lines of Whooper Swan, Greenland White-Fronted Geese, Golden Plover and Water birds

32.3.4 The conservation areas in the vicinity of the site support a large population of wintering birds, including Whooper Swan; Greenland White-Fronted Geese, Golden Plover and Water birds. All five are noted as using the River Suck, Four Roads Turlough, Lough Croan and Lough Funshinagh, whilst Lisduff Turlough supports Golden Plover and water birds. Greenland White-Fronted Goose are known to be highly faithful to a site. The Synopses describe them as based on the River Suck, but also note that they regularly utilise Four Roads Turlough, Lough Croan and Lough Funshinagh.

32.3.5 The conservation areas provide a cluster of wetland areas. They are supported by the non-conservation wetland sites in the area, including Thomas Street Turlough, Lough Feacle Loughs Cuilleenirwan and Coolagarry and the Ballyglass Canal, as well as the smaller flooded area adjoining the site. The data submitted refers to the large number of Whooper Swans at Lough Feacle and along the Ballyglass Canal. I am satisfied from my inspection and other appeal submissions that Whooper Swan also use Thomas Street Turlough and the flooded lands east of the site. Together, these wetlands provide an extensive network of feeding and roosting areas for the Whooper Swan and Greenland White-Fronted Goose.

32.3.6 The surveys do not address the interconnections between the conservation sites and provide no information on the movement of Greenland White-Fronted Geese in the area. The 2007/2008 census indicates that there are still significant numbers on the River Suck, notwithstanding a decline in numbers. Overall, I would be concerned that the level of information provided is lacking in detail, is unduly focussed at Lough Feacle, due to the separate application in this area and does not provide a definitive picture of the flight paths of protected species in the area of the site, as they move between the different wetlands in the area. Furthermore, I do not consider the applicant has provided adequate information to prove beyond reasonable scientific doubt that the wind farm will not impact on the feeding/ roosting/ commuting area and natural flight lines of Whooper Swan, Greenland White-Fronted Geese, Golden Plover and Water birds, and would not have an adverse impact on these protected species and on the integrity of the three conservation sites.

River Suck, Lough Croan and Four Roads Turlough, nearest the proposed wind farm.

32.3.7 Bird strikes due to collision with wind turbines

32.3.8 The applicant proposes to install a Merlin Avian Radar System that once trained, will provide constant monitoring of bird movements in the area of the site and eliminate potential bird strike by providing advance warning and allowing necessary turbine shut down. Information submitted (30/01/12) shows that the system is in use at a number of coastal wind farm sites including six in Europe. None of these sites would be similar to the area of the appeal site, which is an inland, moderately undulating site with a-network of wetland systems within a relatively small area, that support important populations of wintering birds. They would also not be similar in terms of weather patterns and topography. A report submitted by Appellant l, which reviews use of the radar system at a site in Sweden, also indicates problems of blind spots, echoes and ground clutter that can mask bird activity. DAHG have also expressed concerns as to the efficacy of the system. . I consider the information provided to date has not demonstrated that the use of a radar system can effectively mitigate bird strikes at the site.

32.3.9 It is argued that Whooper Swan generally fly at heights well below the minimum rotor sweep of 35m proposed and that the risk of collision is therefore very small. A reduction in turbine height and concomitant reduction in rotor sweep will increase the risk of bird strike. I do not consider the proposed turbine height is acceptable in the mixed hilly, flat farmland, where the development is located and consider, therefore that this argument is not acceptable. Overall, I consider the applicant has not proven beyond reasonable

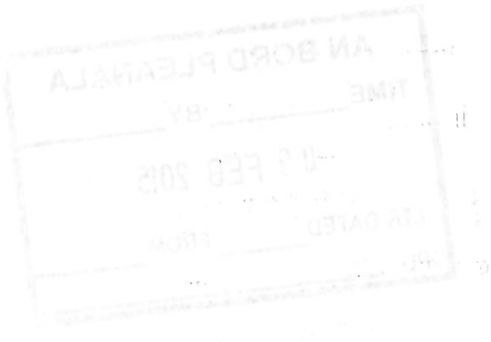
scientific doubt that adverse effects on the integrity of the site with respect to its impact on conservation species in terms of bird strike will not occur.

32.3.10 Changes in turlough habitat

32.3.11 Four of the conservation sites nearest to the appeal site are turloughs. Turloughs are seasonal lakes found in karstified limestone areas where rainfall disappears directly underground through the fissures and conduits in the rock. They fill when the groundwater rises in the autumn and empty as water levels fall in the spring and some are also fed by rivers and streams flowing into them. The water flow rate through karstified rock can be quite rapid and water from a turlough may flow underground to a spring at a rate of l 00m per hour or more. They have a unique flora and can be important bird haunts, in particular Greenland White-Fronted Geese, Whooper Swan, Widgeon, Teal and many waders. Turloughs are priority Annex I habitat (3180) and the habitat is almost unique to Ireland.

32.3.12 There are a number of turloughs on the lower lands immediately below the site as well as the cluster of conservation sites in the wider area. The nearest turlough conservation site is Lough Croan. It is an extensive, linear wetland about l.1k n from the nearest turbine. The turlough habitat, which underpins the conservation species in the area, and the potential impact of the development on the habitat is not discussed in the NIS.

32.3.13 The site is located on karst limestone and all rainwater falling on the site recharges directly to groundwater through the fissures and conduits in the underlying bedrock. The results of 2-D resistivity testing indicate that further investigations are required to determine the depth to competent rock and inform the design of the base, at ten of the turbine sites. At a number of sites,



excavation may extend below groundwater level. The potential to alter the pattern of recharge within the site as a result of the depth of excavation into the karstic layer or by the proposals to discharge surface water throughout the site is not addressed in the application. It is stated that these matters will be addressed following further investigations necessary to determine the detailed design of the turbine base. Turloughs are a relatively shallow habitat. A small alteration in the pattern of recharge has the potential to have a significant impact on the ecology of the area. Furthermore, given that turloughs generally occur in an area with an extensive groundwater system and where water can flow rapidly over significant distances, I consider that a higher burden of proof is required to demonstrate that the development will not have adverse impacts on Lough Croan the nearest conservation site to the proposed development. I consider that the development raises significant concerns. and it has not been established beyond reasonable scientific doubt that adverse effects on the integrity of Lough Croan will not occur.

32.3.14 On the basis of the Appropriate Assessment, I consider it reasonable to conclude, on the basis of the information available, that the proposed development would adversely affect the integrity of the European sites Lough Croan Turlough SAC, Site No. 000610 and Lough Croan Turlough SPA, Site No. 004139 in view of these sites' conservation objectives."

60. As appears from the above, the appropriate assessment conducted by the Inspector cannot be considered as one which includes complete, precise and definitive findings and conclusions that are capable of removing all scientific doubt as to the effects of the proposed development on at least the five closest European conservation sites concerned. On the contrary, her assessments under the headings of

(i) disturbance of feeding/roosting/commuting area and natural flight lines of Whooper Swan, Greenland White Fronted Geese, Golden Plover and water birds;

(ii) bird strikes due to collision with wind turbines; and

(iii) changes in turlough, habitat,

either identify *lacunae* in the information provided in the NIS or reach negative conclusions.

61. Subsequent to the Inspector's Report, the Board obtained further information. That information was a wintering bird survey undertaken between January and March 2013. It was furnished in response to a letter seeking further information from the Board dated 7th December 2012. The survey related to Whooper swans and Greenland white-fronted geese. Whilst, in the course of the hearing, there were submissions made by counsel for the Department and the Board for and against the adequacy of the survey as a response to the request dated 7th December, 2012, and in particular, the absence of any survey of Golden Plover, that issue need not be decided as part of the present consideration of the lawfulness or otherwise of the appropriate assessment conducted by the Board.

62. Returning to the evidence before the Court of the appropriate assessment conducted by the Board, taking into account the appropriate assessment conducted by the Inspector, it consists only of the four sentences in the two paragraphs in the Board Decision, together with what is stated by the Inspector in section 32 of her report, insofar as the Board has not disagreed with same. There is uncertainty as to how much of the appropriate assessment conducted by the Inspector or the findings made or conclusions reached by her is accepted by the Board in its decision by reason of the

general statement of acceptance save in relation to matters the matters specified but not by reference to the appropriate assessment part of the Inspector's report.

63. In the Board's own appropriate assessment, set out in its Decision, the first sentence is simply the statement of its determination and the identification of the material upon which the determination was based. Of the material identified, the only part which may constitute evidence of an assessment made by or on behalf of the Board, as distinct from information which the Board might have taken into account in making its assessment, is the Inspector's Report.

64. One of the consequences of the absence of any formal screening for an appropriate assessment pursuant to s. 177U as to whether the proposed development is likely to have a significant effect on the European site is that there is no identification, in advance of carrying out the appropriate assessment, of the reasons for which it is has been determined that the proposed developments meet the, admittedly low, threshold of being likely to have a significant effect on the European sites, having regard to their conservation objectives and require an appropriate assessment. On the facts herein, the Inspector, in her report, identified the potential direct and indirect effects in relation to wintering waterfowl and waders under the headings of 'Displacement', 'Disturbance of Feeding/Roosting/Commuting Areas and Interference with Natural Flight Lines and Bird Strikes', and in addition, a change in turlough habitat, the latter being by reason, principally, of the karst limestone underlying the site of the proposed development, the extensive ground water system and potential to alter the pattern of recharge.

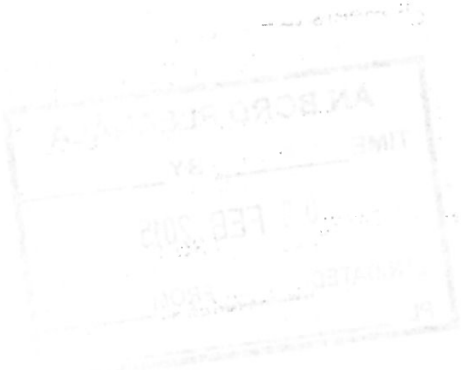
65. In relation to the potential impact on the water fowl and waders by reason of disturbance of feeding/roosting/commuting area and interference with natural flight lines and potential bird strikes, the only evidence of any assessment conducted by the

Board itself is its statement in its decision that it "did not agree with the Inspector's conclusions set out in s. 32.3.6 of her report regarding the adverse effects of the proposed development on feeding/roosting/commuting area and natural flight lines of certain water birds in the light of the comprehensive additional data in this regard submitted as further information to the Board on the 6th day of June 2013". There is no evidence of any analysis or evaluation conducted by the Board of the further information or findings made by it.

66. In relation to the effects of potential changes in the turlough habitat identified by the Inspector in paras. 32.3.11 to 32.3.13 of her report, the Board does not, in its Decision, provide any evidence of any further or different assessment conducted by it and simply states it did not agree with the conclusion reached by the Inspector at para. 32.3.14 of her report that the proposed development would adversely affect the integrity of three of the named sites in the light of those sites' conservation objectives and then adds its conclusion "that it could not reasonably be concluded on the basis of the information on ground conditions and other material submitted; the nature of the proposed development and the use of normal good construction practice, that the integrity of these sites would be adversely affected by the proposed development".

Conclusion on Phase 1 Appropriate Assessment

67. My conclusion is that, on the evidence before the Court, the Board has failed to carry out an appropriate assessment which meets the requirements of Article 6(3) of the Habitats Directive, as explained by the CJEU. There is no evidence before the Court of an assessment conducted by the Board (or through its Inspector) which meets the criteria set out at paragraph 40 of this judgment and identifies, in the light of the best scientific knowledge in the field, all aspects of the proposed development which,



by itself, or in combination with other plans or projects which affect the European sites and contains complete, precise and definitive findings and conclusions which the Board considers capable of removing all reasonable scientific doubt as to the effects of the proposed development on the integrity of a number of Natura 2000 sites close to the site of the proposed development.

68. For the reasons set out earlier in this judgment, the determination made by the Board that the proposed development, individually or in combination with other plans or projects, would not adversely affect the integrity of any European site in view of the conservation objectives of those sites cannot be considered lawful unless such determination is made as part of an appropriate assessment which is lawfully conducted. Further, in the absence of such a lawful determination, the Board did not have jurisdiction to grant planning permission for the proposed development pursuant to s. 177V(3) of the PDA. It follows that the applicant is entitled to an order of *certiorari* of the Phase 1 decision.

69. I have also concluded on the same evidence that the Board failed to give reasons for its determination in the appropriate assessment which meets the requirements set out earlier in this judgment.

Phase 2 Decision and Appropriate Assessment

70. The evidence adduced by the Board in relation to the Phase 2 Decision is primarily the Board Decision (PL20.241069), the Board Direction relating to that Decision, and the Inspector's Report of Ms. Deirdre MacGabhann, which, whilst dated 6th February, 2012, it is agreed was, in fact, finalised on 6th February, 2013 and the documents referred to therein.

71. The Board Decision follows the same format as that in Phase 1. The Department and applicant laid emphasis upon the fact that, unlike the Decision in relation to Phase 1, there is no reference to the additional information by way of bird survey furnished to the Board on 6th June, 2013, either in the list of matters to which the Board had regard or in those paragraphs of the Decision which appear to constitute the appropriate assessment. I will return to this.

72. In relation to the appropriate assessment, the Board stated, in its Decision:

> "The Board completed an Appropriate Assessment in relation to potential impacts on Natura 2000 sites and, having regard to the Natura Impact Statement submitted, including mitigation measures proposed and the reports of the Inspector in relation [to] the current file and to file register reference number PL20.239759, the further information submitted to the planning authority on the 8th day of June, 2012 and to other submissions on file, the Board concluded, on the basis of the information available, that the proposed development, either individually, or in combination with other plans or projects, would not adversely affect the integrity of any European site in view of the conservation objectives of those sites. The Board did not agree with the Inspector's conclusions, as set out in section 11 of her report, regarding the adverse effects of the proposed development on bird species utilising the site in the light of the comprehensive data in this regard submitted with the application as referenced above. With regard to impacts on karst limestone bedrock the Board considered that it could not reasonably be concluded, on the basis of the information on ground conditions and other material submitted, the nature of the proposed development and the use of normal good

construction practice, that the integrity of these sites would be adversely affected by the proposed development. Finally, with regard to the impact of the proposed development on bats, the Board noted the substantial survey work completed prior to the application as well as the further information submitted to the planning authority on the 8th day of June, 2012 and considered that, subject to the implementation of the proposed mitigation measures, the residual impacts of the proposed development on bats would be minimal."

73. Firstly, in so far as relevant to dispose of the question as to whether the Board indicated that it did have regard to the bird survey furnished in relation to the Phase 1 appeal in June 2013, it appears to me that whilst there is no reference to this in the first paragraph above, it may be that it is being referred to in the first sentence of the second paragraph. The further information was provided to the Board in connection with the Appeal Reference No. PL. 20.239759, and this appeal appears to be referred to in the first sentence of the second paragraph as "the application as referenced above". I am accepting, for the purposes of this judgment, that the Board did have regard to that additional data.

74. Similar to Phase 1, there is no formal screening determination. However, also similarly, the Inspector (who was a different Inspector to that appointed in respect of the Phase 1 appeal) conducted an appropriate assessment from paras. 10.124 to 10.163 of her report. The Inspector states at para. 10.128 that she followed the Department of Environment's guidance document on appropriate assessment and the European Commission's advice on appropriate assessment. She also refers to the earlier part of her report which, she states, sets out much of the information required for the appropriate assessment and then summarises the key aspects of the

development as it relates to the appropriate assessment. The Inspector considers in some detail the short and long-term, indirect and cumulative impacts which are likely to arise from the construction and operational phases of the development from paras. 10.136 to 10.153. She then considers certain mitigation issues. It is unnecessary to set these out in full. She identifies the residual impacts and states her appropriate assessment conclusion at paras. 10.160 to 10.163 in the following terms:

> "10.160 Based on my assessment above, I consider that two key residual impacts remain. Firstly, in the absence of:
>
> a. Detailed geo-technical investigations regarding the construction of the proposed turbine bases and sub-station in areas of karstified limestone and
>
> b. Detailed design solutions for the site specific disposal of surface water arising on site,
>
> 10.161 There is a risk that the construction of the wind farm will impact on groundwater flow paths within the karst landscape which may in turn affect the hydrology/hydrogeology of the network of designated wetland systems (notably turloughs) in the vicinity of the site and their associated habitats and species.
>
> 10.162 Secondly, in the absence of detailed survey information on the use of the appeal site by bird species listed of Conservation Interest in the surrounding network of SPA's there is a risk that the proposed development will adversely impact on these species by virtue of disturbance, barrier effects to movement and collision risk arising from the construction and operation of the wind farm. These impacts could disrupt factors which maintain the favourable conditions for the species in the wider environment and in the network of SPAs in particular.

10.163 In view of the above, I consider that it is not reasonable to conclude on the basis of the information available that the proposed development would not individually, and in combination with other projects, adversely affect the integrity of the European sites in the vicinity of the appeal site (Lough Croan Turlough SPA, site code 004139; Four Roads Turlough SPA, site code 004140; River Suck Callows SPA, site code 004097) in view of the site's conservation objectives."

75. The Inspector, finally, in s. 11 of her report, sets out her overall summary and conclusions which, obviously, go beyond the appropriate assessment. Paras. 11.1 to 11.3 and 11.6 relate to the appropriate assessment:

"**11 SUMMARY AND CONCLUSION**

11.1 International and national policies actively support and encourage the growth of renewable energy sources and wind energy development in particular. However, the government's guidelines on wind energy development state that the implementation of renewable energy policies must have regard for the environment, specifically the legally binding requirements of the EU Directives on Birds and Habitats.

11.2 The appeal site lies within 15km of 14 statutorily designated European sites as part of the European Natura 2000 network and the site itself hosts bird species of national Importance and bird species which are listed of Special Conservation Interest in the 3 no. Special Protection Areas in the vicinity of the site. On the basis of the information provided by the applicant, I am not satisfied that the applicant has demonstrated that the proposed development will not adversely impact on bird species

utilising the site, by way of disturbance, barrier effects to movement and collision risk arising from the construction and operation of the wind farm. In particular, these impacts could disrupt factors which maintain the favourable conditions for the species in the wider environment and in the network of SPA's in particular.

11.3 The appeal site is underlain by karstified limestone bedrock and within the same groundwater bodies as the network of designated wetland habitats within 15km of the site. I do not consider that the applicant has adequately demonstrated that the proposed development will not adversely impact on groundwater flowpaths within the karst landscape or indirectly therefore the groundwater regime of the designated wetland habitats in the vicinity of the site.

. . .

11.6 In summary, I consider that the proposed development should be refused for the two above substantive reasons set out above, impact on hydrology/hydrogeology of related designated wetland systems and impact on bird species of Special Conservation Interest occurring on the site and in the surrounding network of Special Protection Areas."

76. The Board, in the Phase 2 Decision, also expressly stated that it:

". . generally adopted the report of the Inspector except in relation to the following items (see section 11):-

(1) hydrology and groundwater quality and flow, and

(2) bird movements in the area,

for the reasons set out below."

77. For the reasons already set out, whilst the Board is entitled to rely upon an appropriate assessment conducted by its Inspector, and whilst it has generally adopted the Inspector's Report, the findings made and conclusions reached by the Inspector in relation to the matters identified as potentially affecting the integrity of the Natura 2000 sites concerned, are such that the appropriate assessment in the Inspector's Report could not support a determination that the proposed development would not adversely affect the European sites concerned, having regard to their conservation objectives when considered by the Court in accordance with established judicial review principles.

78. Again, the first paragraph of the Board's Decision relating to the appropriate assessment is no more than its determination or conclusion that the proposed development, either individually or in combination with other plans or projects, would not adversely affect the integrity of any European site in view of the conservation objectives.

79. In the first sentence of the second paragraph, the Board again simply disagrees with the Inspector's conclusions regarding the adverse effects of the proposed development on the bird species using the conservation sites. There is no evidence of any assessment conducted by the Board which includes complete, precise and definitive findings and conclusions capable of removing all reasonable scientific doubt as to the effects of the proposed development on the Natura 2000 sites concerned, having regard to their conservation objective of supporting the wintering wild fowl and waders identified.

80. In relation to the potential hydrological/hydrogeological impacts of the construction of the proposed development on Natura 2000 wetlands systems in the vicinity of the site, and in particular, certain turloughs, the Board has not conducted

any assessment which includes complete and precise findings and conclusions capable of removing all reasonable scientific doubt as to the effect of the works proposed on the habitat of the Natura 2000 sites in the light of its conservation objectives, having regard, in particular, to the potential indirect effects and *lacunae* in the information supplied identified by its own Inspector.

Conclusion on Phase 2 Decision

81. My conclusion is that on the evidence before the Court the Board has not lawfully conducted an appropriate assessment in accordance with Article 6(3) of the Habitat Directive capable of supporting its determination. It follows, for the reasons already set out, that by reason of its failure to do so, it did not have jurisdiction to grant permission for the proposed development and the applicant is entitled to an order of *certiorari* of the Phase 2 Decision.

82. I have also concluded that it failed to give reasons for its determination in the appropriate assessment in the Phase 2 Decision in accordance with the principles set out in this judgment.

Other Issues

83. By reason of the conclusions reached on the principal issues in dispute, it is unnecessary to consider the further issues raised by the applicant.

Relief

84. There will be orders of *certiorari* of each of the decisions of the Board set out in paragraph 1 of this judgment.

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09 FEB 2015
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