

An Bord Pleanála

64 Marlborough Street,

Dublin 1,

D01V902

14.01.2025

Mr. Dermot Butler

Cam,

Brideswell,

Athlone,

Co. Roscommon

Re: Planning application for a 110 kilovolt electricity substation, approximately 7.5 kilometres of underground electricity line and all associated works at Moyvannan, Feamore, Lisbaun, Carrownolan, Carrowncloghan, Carrowkeeney, Ardmullan, Curraghboy, Gortnasythe, Derryglad, Eskerbaun, and Brideswell, County Roscommon

Ref. No. 321238

Dear Sir/Madam,

I attach a report by Ms. R. Burke, Chartered Engineer which contain my observations on the above application for your consideration. I also wish to request an Oral Hearing.

The fee of €50 is included

Yours faithfully

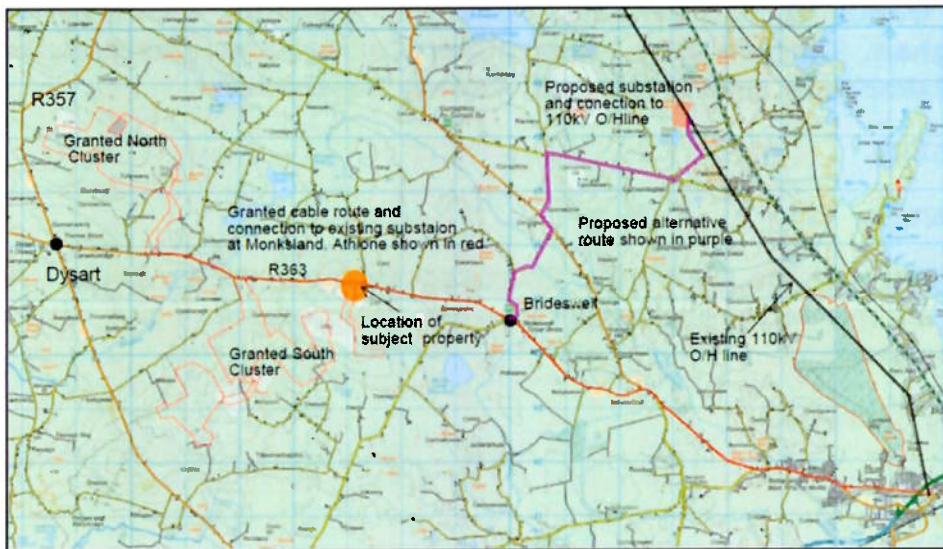


1.0 Introduction

This report was prepared for Mr. Dermot Butler of Cam, Brideswell, Athlone, Co. Roscommon. It examines the potential effects on Mr. Butler's property (the subject property) of the planning permission application to An Bord Pleanála (the Board) ABP-321238-24 alone and in combination with the granted permission ABP-313750-22.

On the 23rd of Nov 2023 the Board granted Energia Developments permission, AB-313750-22, to construct a 17 turbine wind farm with a connection to the grid at an existing substation in Monklands Athlone.

On the 25th of Nov. 2024 Energia applied to the Board under s182A of the PDA for planning permission, for the development of a 110 kV electricity substation at Moyvannan, Co. Roscommon, approximately 7.5 km of underground electricity line and all associated works including a connection to the existing 110kV overhead line at Moyvannan – ABP-321238-24.



The location of the subject property, the granted and proposed developments are shown in Figure 1.

1.0 Figure 1: Site Layout (From MKO Drg. 190907-1)

2.0 Description of the subject property

Mr. Butler is the registered owner of the subject property, shaded green and blue, as shown in an extract from Land Direct maps -Figure 2. The subject property fronts on to the R363. Area 1 is agricultural land, the private residence of Mr. Butler's son and his family is located in Area 2.

The subject property abuts the new access road onto the R363 granted by Board Order ABP-313750-22. Figure 3 shows an extract from the planning drawings submitted to the Board in June 2022 as part of SID application ABP-313750-22.



Figure 2

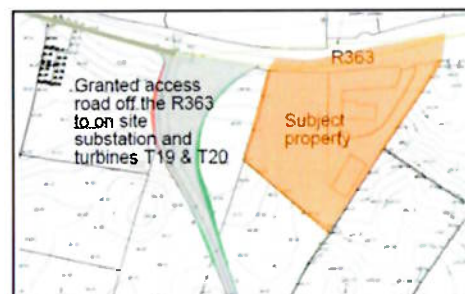


Figure 3: From MWP Drg. No. DR-C-3001 P02

3.0 Board Order ABP-313750-22

*Having regard to the nature and scale of the work required to erect the windfarm (which would involve substantial excavations and the installation of tall structures), and the results of the extensive bird survey results that were submitted by the applicant as part of the original application, **and as unsolicited and solicited FI**, it is possible that the proposed development could have an adverse effect on the these SPAs, their SCI species and/or their Conservation Objectives.¹*

Page 1 of the Board Order ABP-313750-22 states

*Application for ten-year planning permission under section 37E of the Planning and Development Act 2000, as amended, in accordance with plans and particulars, including an Environmental Impact Assessment Report and Natura Impact Statement, **lodged with An Bord Pleanála on the 7th day of June 2022** by Energia Renewables ROI Ltd care of MKO, Planning and Environmental Consultants, Tuam Road, Galway, Co. Galway as amended by the **further information received by An Bord Pleanála on the 10th day of July 2023.***

Condition No. 1 of the order states

- 1. The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, **including the further information received by the Board on the 31st day of March 2023 and on the 10th day of July 2023**, except as may otherwise be required in order to comply with the following conditions. (emphasis added throughout)*

The further information received by the Board on the 31st of March 2023 included approximately sixty drawings which had been revised from those submitted with the original application of the 7th of June 2022. The Board had not requested any such revised drawings, nor had any observation made in the five week period after the 7th of June 2022 lodgement made any reference to the original drawings. It is assumed that these sixty revised drawings are the unsolicited FI as referred to by the Inspector in page 153 of their report.

*It is acknowledged that there are some drawing drafting errors noted in that the background layout originally showed a 15-metre diameter foundation, as is also included in drawing 190907-54 Wind Turbine Elevation & Plan. **As such, the applicant has taken this opportunity to revise the drawings as follows**, including a turbine foundation diameter of 29m.² (emphasis added)*

The submitted drawings are bespoke for the project and the site. However, a drafting error was noted in some of the drawings in relation to the turbine foundation diameter and this has been amended from 15m to 29m (amended drawings attached). The original EIAR impact assessments were mainly undertaken for the 29m diameter and the applicant's assessment of any additional potential adverse environmental impacts, are summarised below. The information submitted did not give rise to any material changes to the proposed development and the EIAR and NIS conclusions were also not materially altered by the response submission.³

¹ ABP-313750-22 Inspectors Report Page 153

² ABP-313750-22 MKO- 'Response to Observations received' – Received by the Board on 31st March 2023

³ ABP-313750-22 Inspectors Report Page 32

However, the unsolicited revised drawings contained more than a *drafting error*. The revised drawings included a change to the red line application boundary. Figure 4 shows an extract from drawing No. 190907-18 as lodged with the application on the 7th of June 2022. Figure 5 shows an extract from drawing No. 19099-18 Rev A lodged as part of the FI of the 31st of March 2023.



Figure 4: Drg. No. 190907-18 (07.06.22)

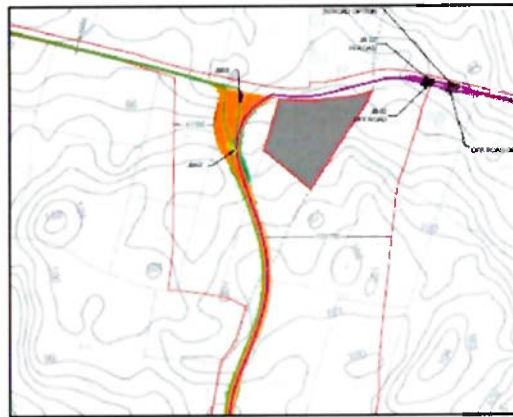


Figure 5: Drg. No. 190907-18 Rev A (31.03.23)

The red line on the June 2022 planning drawings included the subject property, the unsolicited drawings of March 2023 excluded the subject site area.

To be clear Mr. Butler never gave Energia Ltd permission to include his property in the plans for the development of the Seven Hills Wind Farm, neither does he propose to do so in the future

Mr. Butler was never made aware of the inclusion or exclusion of his property from the development plans of Energia.

An email dated 9th Dec 2024 to the Board requested 'In the interest of clarity could you please confirm to which plans the grant of permission applies.' The Board replied on the 11th of Dec 2024.

The application as amended by the FI is probably the correct one, but I will have to check the other conditions to make sure. I will get back to you later this week to confirm

A second email from the Board dated 13th Dec 2024 states

I have been asked by An Bord Pleanála to refer to your email received on 9th December 2024.

Please be advised that the response to the submissions and the further information received from the applicant by the Board, supersedes the documentation submitted in the planning application, or part thereof, and the grant of permission is based on this documentation as received by the Board.

The inspector's report notes the changes referred to in applicant's submissions and these changes formed part of the Board's decision.

Where in the Board Order is the 'response to submissions' included? Condition No.1 stands as is and is not superseded by anything. Condition No. 1 includes two FIs received by the Board, one nine months and a second thirteen months after the application date.

ABP -313750-22 Board Order Condition 1 effectively gives the applicant in ABP-321238-24 permission for two different developments on the same site and permits them to include the subject property within the permitted development site without the consent of the person who holds the legal interest in the subject site.

4.0 Kennedy v An Bord Pleanála [2024] IEHC 570

Both the 31st of March further information and the 10th of July further information were the subject of much discussion in the High Court case *Kennedy v An Bord Pleanála* [2024] IEHC 570. Figure 7 shows Paragraph 22 of the Board's Outline Written Legal Submissions of the 6th of Sept. 2024

22. The Inspector then prepared a Memorandum dated 12th July 2023. The Memorandum, states, *inter alia*, as follows:

“The Board decided that there was sufficient written evidence on the file to enable an assessment of issues raised and that an Oral Hearing should not be held, at a meeting held on 24th January 2023.

However,

(a) The Applicant was requested to make a submission on the observations received by the Board in relation to the application, in a letter which was issued by the Board on 25th January 2023. We received a response to this request from the Applicant on 31st March 2023. This response contains the results of further field surveys which were undertaken after the application had been submitted to the Board.

(b)

The Applicant's response also referred to the submission received by the Board from the Department of Housing, Local Government and Heritage, Development Application Unit (DAU) on 2nd August 2022. This submission referenced the availability of additional data in relation to Greenland white-fronted goose, Whooper swan and Black-headed gull, which may assist the Board with its assessment. We requested further information from the application in a letter which was issued by the Board on 13th June 2023, which required the applicant to liaise with the DAU in relation to acquiring copies of the additional survey data held by it in relation to the bird species. We received a response to this request from the Applicant on 10th July 2023, which contained the requested DAU bird survey data.

I consider the information received in relation to (a) and (b) above to be significant and recommend that it is re-advertised and circulated to Observers in the interest of natural justice. The Observers should be given 5 weeks to make submissions.”

(Emphasis added)

Figure 7

Paragraph 23 of the same document states

23. The Board then wrote to the Notice Party by letter dated 19th July 2023, *inter alia*, requesting that the additional information received by the Board should be advertised on the basis that it contained significant additional data. Notably, the letter was not confined to the response received by the Board on or about 10th July 2023 but clearly encompassed all the additional information submitted by the Notice Party (which included the response received on or about 31 March 2023).

At the hearing of the case the Board's arguments did not diverge from its Outline Written Legal Submissions of the 6th of Sept. 2024.

The Board **requested** the Notice Party (Energia) to advertise the *significant additional data*, the advertisement was to include *the response received on or about 31 March 2023* i.e. reference to the revised drawings was to be included.

The 19th of July 2023 letter from the Board contained instructions regarding the wording to be used in the advertisement

*I refer to the additional information received by the Board in relation to the likely effects on the environment of the above-mentioned proposed development. Please be advised that the Board considers that this additional information contains significant additional data in relation to the effects on the environment of the proposed development and it therefore **requires** you in accordance with sub- section 2(b) of 37F of the Planning and Development Act 2000, as amended, to:*

- (a) *publish in one or more newspapers circulating in the area in which the proposed development would take place a notice stating that significant additional information in relation to the said effects has been furnished to the Board, that the additional information will be available, for inspection or for purchase (upon payment of a specified fee not exceeding the reasonable cost of making a copy), at a specified place and at specified times during a specified period, and that submissions or observations in relation to the additional information may be made in writing to the Board before a specified date (emphasis added)*⁴

Sub- section 2(b) of 37F of the Planning and Development Act 2000, as amended is shown in Figure 8. This sub-section clearly states the Board **shall** give notice that the information, particulars, plans or **drawings** are so available.

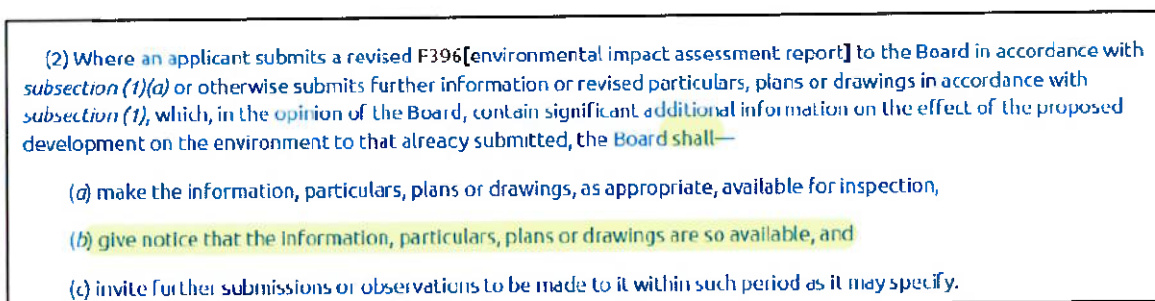


Figure 8

Energia duly complied with the Board's requirements and placed an advertisement in *The Roscommon Herald*, dated 1st August 2023 and in *The Irish Examiner*, dated 1st August 2023. The heading of the advertisement is shown in Figure 9. Revised site notices containing the same wording were also put in place.



Figure 9

Neither the newspapers notice nor the revised site notices advising of the significant additional information included notification of the submitted revised drawings.

⁴ 19th of July 2023 ABP Letter to MKO Planning and Environmental Consultants(Energia's agent)

5.0 Extracts from the Judgement of Humphreys J. delivered on Monday the 7th of October 2024 - [2024] IEHC 570

138. Ultimately, while the terms of the notice are sub-optimally unspecific as to the date or nature of the additional information (a consequence of the board's failure to decide itself on the wording of the public notice, leaving all of that to the developer), they are sufficient to put a reasonably diligent person on inquiry. So even if hypothetically the applicants were disadvantaged, they were not unfairly disadvantaged.

139. We then come to the merits question as to **whether there was non-compliance with s. 37F**, or in other words, is the board lawfully allowed by s. 37F to simply pass on its statutory obligations to a private law actor by requesting them to give notice? Not only is this not what the section says, but permissively re-writing the section to allow such a transfer of functions involves a significant loss of public law accountability which is inherent in the section. For good measure, the board is in a quasi-judicial position **required** to act even-handedly in relation to the various stakeholders with their necessarily varying points of view. Any given developer is one interested party, so requesting such a participant in the process to carry out statutory functions of the board is capable of creating understandable apprehensions on the part of other participants, such as the applicants here – apprehensions which they were diligent to articulate in oral submissions. For the avoidance of doubt we are talking here about the optics of the situation, not actual bias.

141. Saying that s. 37F(2) means the board has to make the information available doesn't mean it has to do so on its own website, although one might say that that is probably the best way to do so. The means aren't specified in the section, so that is up to the board to some extent, but the section does envisage this being something to be done by the board itself and thus being something over which the board has control and in respect of which the board makes the decisions. The lack of control by the board over the first named notice party's endeavours is illustrated in a number of respects. outlined at para. 147 below.

143. For all of these reasons I conclude that there was non-compliance with s. 37F as in effect pleaded in ground 111. That doesn't automatically determine the question of what relief should be granted.

147. As regards **whether the non-compliance is one that warrants any other relief**, it seems to me that there is a clear public benefit in clarification of this issue, and formally marking it with a declaration, especially where there isn't anything about the situation here that provides sufficient comfort that the problem would be rectified going forward without being marked in some appropriate way. As noted above, I agree with the opposing parties that in the absence of prejudice it would be inappropriate to grant *certiorari* on the basis of a non-compliance that didn't affect the particular applicants. But in all the circumstances, a declaration is a proportionate and reasonable relief without any undue or indeed any particular impact at all on the first named notice party's rights, something which the first named notice party didn't disagree with. The case for a declaration isn't lessened by the existence of cases in the double figures now where the board in recent years hasn't complied with notification requirements. Maybe the fact that this issue isn't some sort of meaningless side-note is best illustrated by listing the various problems here:

- (i) the board didn't itself carry out the statutory functions entrusted to it;
- (ii) it purported to issue what it called a requirement under s. 37F to the first named notice party to take various steps, but the section confers no power to issue a requirement to an applicant for permission;
- (iii) the published notice mis-spelled the council's address;
- (iv) when the first named notice party wrote back to the board as to the steps taken, it incorrectly stated in a covering letter that notice had been published in the *Irish Examiner*;
- (v) the board had asked that the notice be published in the newspapers in which the original application was advertised, so should have picked up the inconsistency between the request and the cover letter referring to the *Irish Examiner*, but didn't;
- (vi) nor did the board pick up the inconsistency between the cover letter and the actual enclosure which on its face was from the *Irish Times*;
- (vii) when the first named notice party wrote to consultees such as the council it only enclosed a copy of the July 2023 information, but not the March 2023 information, contrary to the wording of the letter;
- (viii) the board did not appear to pick this problem up either; and
- (ix) that omission would have naturally had the effect of rendering incorrect the statement in the public notices to the effect that the additional information (insofar as it related to the March information) would be available in the council's offices – even if all other "delegation" to the developer was permissible, the one thing that can't be gainsaid is that the sort of making available of information that the board has envisaged did not in fact happen due to the failure to include both sets of enclosures with the notifications to the council and others – and such a failure to implement the board's decision regarding notification can't constitute compliance with the section on any view.]

6. 0 Response to Planning application ABP-321238-24

ABP-313750-22 Board Order Condition 1 effectively gives the applicant in ABP-321238-24 permission for two different developments on the same site and permits them to include the subject property within the permitted development site without the consent of the person who holds the legal interest in the subject site.

How then should that person respond to a planning application which is in effect an alteration to a two granted developments, and not a stand-alone section 182A as claimed by the applicant? How indeed when one of the two developments impinges severely on their rights as a property owner.

The answer is they simply cannot. ABP-313750-22 is a legal mess and any attempt to address ABP-321238-24 would be futile.

7.0 Discussion

The Applicant explained the revised drawings of March 2023 as a 'drafting error' due to incorrect foundation sizes shown on the planning application drawings. The applicant failed to include or explain the alteration to the red line boundary. The Inspector and the Board accepted the explanation of a 'drafting error' and by the Inspector's own admission these revised drawings were unsolicited FI.

In the March 2023 submission by Energia to the Board MKO note

MKO have been instructed by the applicant, Energia Renewables ROI Ltd of Mill House, Ashtown Gate, Navan Road, Dublin 15 to prepare a response to the request issued by An Bord Pleanála (the Board) on the 25th of January 2023.... The Board did not request responses to specific submissions made to the planning application; rather they invited the applicant to make a submission on the observations received to the application.

The 25th of January 2023 letter is not on the Board's file or the Roscommon Co. Co. file but from MKO's description it appears it was an invitation/ request. A request made seven months after the planning application had been lodged.

The Planning Regulations (Article 33) provide that a request for further information must be made within 8 weeks of the receipt of the application: such a request cannot therefore be made outside this period even where the applicant has consented to an extension of time under section 34(9) of the Act.

A request for further information should clearly indicate all the information required, as the Planning Regulations do not permit a second request save where this is necessary to clarify matters raised in the applicant's response.

Further information may only be sought where it is necessary for the determination of the application. Requests for further information may not be used to seek changes to aspects of the proposed development.

Paragraph 22 of the Board's Outline Written Legal Submissions of the 6th of Sept. 2024 notes that

The Board decided that there was sufficient written evidence on the file to enable an assessment of issues raised and that an Oral Hearing should not be held, at a meeting held on 24th January 2023.

Why then did the Board write to Energia on the 25th of January 2023 inviting *the applicant to make a submission on the observations received to the application.*

How did this request, made seven months after the application was lodged, morph into the Further Information cited in Condition No. 1 of Board Order ABP-313750-22?

A further information which was used not just to seek changes to aspects of the proposed development but changed the red line boundary of the development itself.

8.0 Conclusions and Recommendations

The Court found that there was non-compliance with s. 37F but there was also non-compliance with section 33. A non-compliance that allowed the Applicant to alter the red line boundary so as to exclude the subject property from the application.

For now Mr. Butler should submit this report as an observation on planning application ABP-321238-24 but he should also seek legal advice on the unprecedented and bizarre Board Order ABP-313750-22.

Rose Burke

Rose Burke BScEng. CEng

15.01.2025