S. 37

File With _____

SECTION 131 FORM

Appeal NO: ABP 310789-21

Defer Re O/H

TO:SEO

Having considered the contents of the submission ~~dated~~/ received 10-8-21 from 3rd Party Wind Aware. I recommend that section 131 of the Planning and Development Act, 2000 be/not be invoked at this stage for the following reason(s): No New planning issues

E.O.: Lisa D Date: 20/8/21

To EO: _____

Section 131 not to be invoked at this stage. ☐

Section 131 to be invoked – allow 2/4 weeks for reply. ☐

S.E.O.: _____ Date: _____

S.A.O: _____ Date: _____

M _____

Please prepare BP _____ - Section 131 notice enclosing a copy of the attached submission

to: _____ Task No: _____

Allow 2/3/4weeks – BP _____

EO: _____ Date: _____

AA: _____ Date: _____

File With _____

CORRESPONDENCE FORM

Appeal No: ABP 310789-21

M Sutton

Please treat correspondence received on 10-8-21 as follows:

1. Update database with new agent for Applicant/Appellant _____
2. Acknowledge with BP 20
3. Keep copy of Board's Letter ☐

1. RETURN TO SENDER with BP _____
2. Keep Envelope: ☐
3. Keep Copy of Board's letter ☐

Amendments/ Comments

Response from 3rd Party Wind Farm in relation to other appeals

4. Attach to file
(a) R/S ☐ (d) Screening ☐
(b) GIS Processing ☐ (e) Inspectorate ☐
(c) Processing ☐

RETURN TO EO ☐

	Plans Date Stamped ☐ Date Stamped Filled in ☐
EO: Sarah Dale	AA: Peter Burn
Date: 12/8/21	Date: 13/8/21

A Doherty

Rory Kelledy

From:	Jack O'Sullivan <jackosullivan2006@gmail.com>
Sent:	Tuesday 10 August 2021 17:08
To:	Appeals2
Subject:	Observations by Wind Aware Dromahair on other appeals received -- An Bord Pleanála Case Reference No PL12.310789
Attachments:	WAD-140 Complete Observations on appeals against Leitrim Co Co, ABP-310789, 10-Aug-2021.pdf

The Secretary,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1,
D01 V902

Dear Sir,

Appeals Against the Decision by Leitrim County Council to Grant a Ten-year Planning Permission to Coillte CGA for an 8-Turbine Wind Farm, Electrical Substation, Grid Connection, Partial Demolition and Alteration of Agricultural Buildings, Upgrading of Existing Tracks and Roads, Construction of New Site Access Roads, and Associated Works in the townlands of Bargowla, Boleymaguire, Braudphark, Derreens, Derrybofin, Derrycullinan, Derrycullinan Beg, Drummanacappul, Garvagh, Garvagh Glebe, Glassalt, Lisfuiltaghan, Seltan, Sheena and Tinnybeg, County Leitrim

Leitrim County Council Planning Reference No. 20 / 120

An Bord Pleanála Case Reference No PL12.310789

OBSERVATIONS ON BEHALF OF WIND AWARE DROMAHAIR ON TWO OTHER APPEALS RECEIVED BY AN BORD PLEANÁLA

In response to the Board's letter dated 14 July 2021, enclosing copies of two other appeals sent to us by the Board for comment, I am attaching observations on these appeals, on behalf of the Wind Aware Dromahair community group.

Wind Aware Dromahair trusts that An Bord Pleanála will refuse to grant planning permission for the proposed wind farm for reasons based on the grounds of our appeal and on the grounds of the other appeals received by the Board, and for other reasons which the Board may consider appropriate for refusing permission.

An acknowledgement that our observations have been received would be much appreciated.

Yours faithfully,

Jack O'Sullivan.

Jack O'Sullivan

Environmental Management Services

****

An Tinteán Nua,
Ballymanus,
Castlepollard,
County Westmeath,
Ireland.

Loc8 Code: MJQ-56-27G Eircode N91 PP76
Telephone +353 44 966 2222
Mobile +353 86 381 9811
E-mail jackosullivan2006@gmail.com

****

Environmental Management Services
Comhairleoirí Comhshaoil
Environmental and Planning Consultants

Appeals against the Decision by Leitrim County Council to Grant a Ten-year Planning Permission to Coillte CGA for an 8-Turbine Wind Farm, Electrical Substation, Grid Connection, Partial Demolition and Alteration of Agricultural Buildings, Upgrading of Existing Tracks and Roads, Construction of New Site Access Roads, and Associated Works in the townlands of Bargowla, Boleymaguire, Braudphark, Derreens, Derrybofin, Derrycullinan, Derrycullinan Beg, Drummanacappul, Garvagh, Garvagh Glebe, Glassalt, Lisfuiltaghan, Seltan, Sheena and Tinnybeg, County Leitrim

Leitrim County Council Planning Reference 20 / 120

An Bord Pleanála Case Reference No PL12.310789

OBSERVATIONS ON BEHALF OF WIND AWARE DROMAHAIR ON TWO OTHER APPEALS RECEIVED BY AN BORD PLEANÁLA



10 August 2021

Environmental Management Services
Comhairleoirí Comhshaoil
Environmental and Planning Consultants

An Tinteán Nua, Ballymanus, Castlepollard, County Westmeath
An Tinteán Nua, Baile Mhánais, Bailena gCros, Co. an Iarmhí, N91 PP76.
Telephone 044 966 2222 Mobile 086 381 9 811 E-mail jadkosullivan2006@gmail.com

10 August 2021

The Secretary,
An Bord Pleanála,
64 Marlborough Street,
Dublin 1,
D01 V902

Dear Sir,

Appeals Against the Decision by Leitrim County Council to Grant a Ten-year Planning Permission to Coillte CGA for an 8-Turbine Wind Farm, Electrical Substation, Grid Connection, Partial Demolition and Alteration of Agricultural Buildings, Upgrading of Existing Tracks and Roads, Construction of New Site Access Roads, and Associated Works in the townlands of Bargowla, Boleymaguire, Braudphark, Derreens, Derrybofin, Derrycullinan, Derrycullinan Beg, Drummanacappul, Garvagh, Garvagh Glebe, Glassalt, Lisfuiltaghan, Seltan, Sheena and Tinnybeg, County Leitrim

Leitrim County Council Planning Reference No. 20 / 120

An Bord Pleanála Case Reference No PL12.310789

OBSERVATIONS ON BEHALF OF WIND AWARE DROMAHAIR ON TWO OTHER APPEALS RECEIVED BY AN BORD PLEANÁLA

We have been requested by the **Wind Aware Dromahair** community group to submit the attached observations on two appeals made to An Bord Pleanála in response to the above decision by Leitrim County Council, made on 15 June 2021, to grant planning permission to Coillte Cuideachta Ghníomhaíochta Ainmnithea (Coillte CGA) for a proposed wind farm consisting of 8 turbines, electrical substation, grid connection, partial demolition and alteration of agricultural buildings, upgrading of existing tracks and roads, construction of new site access roads, installation of land drains across the proposed site, and removal of trees to facilitate construction and operation of the proposed wind farm.

We are also submitting observations on two other appeals lodged with An Bord Pleanála in response to an equivalent decision made by Sligo County Council to grant planning permission for a concurrent application by the same applicant for a smaller portion of the same wind farm which would be located in County Sligo, including two wind turbines, a meteorological mast, underground cabling, access tracks and roads, provision of amenities and other works (Sligo County Council planning reference **20 / 251**; An Bord Pleanála case reference **310788**).

The **Wind Aware Dromahair** community group is a locally based unincorporated group, representing the interests of residents, farmers, small business owners, ecotourism operators, and other persons living in and around the area where the proposed wind farm would be located. Members of Wind Aware Dromahair have collectively, and also in many cases individually, a "*direct and vital interest*" in the result of this appeal, as they would be directly affected by the wind farm if it were to be granted permission and if it were to be constructed.

The address of Wind Aware Dromahair is:

c/o Dr Brigitte Christoph,
Beagh,
Dromahair,
County Leitrim.

Have considered in some detail the two appeals sent to us by An Bord Pleanála for comment and observations, we wish to emphasise to the Board our belief that one of these appeals – a first party appeal made on behalf of the applicant – is most extraordinary and unusual in that it requests the Board to undertake an action which would, in effect, allow a significant change in the description of the turbines and certain other components of the proposed development, for the sole purpose of escaping the consequences of the High Court judgment in *Sweetman -v- An Bord Pleanála* (2020 / 557 JR).

It is our observation that the first party appeal is an admission that the original planning application is seriously deficient in terms of the detail provided, i.e., the applicant's appeal is an admission of deficiency in the planning application.

The applicant's appeal must also be considered bizarre and unprecedented, as it requests the Board to consider, at the request of the applicant, two possible ways in which these deficiencies may be remedied.

Our observation is that the Board simply cannot accede to the applicant's suggestions or requests; for if the Board were to do so, it would be seen as unduly interfering with the statutory process established under the Planning and Development Regulations, 2001 (as amended), acting contrary to the intention of the legislation, and assisting the applicant to remedy a defective planning application; and such a course of action would be in conflict with the Board's statutory duty, and would leave the Board's action open to legal challenge.

The attached "observations" document sets out the reasoning on which our observations are based, and we trust that the Board will find them relevant and appropriate. That document, together with this letter, constitutes the entirety of our observations.

The members of Wind Aware Dromahair trust that An Bord Pleanála will refuse to grant planning permission for the proposed wind farm for reasons based on the grounds of our appeal, on the conclusions of the attached observations, and for any other reasons which the Board may consider appropriate for refusing permission.

Yours faithfully,

Jack O'Sullivan.

Jack O'Sullivan

Environmental Management Services

Appeals against the Decision by Leitrim County Council to Grant a Ten-year Planning Permission to Coillte CGA for an 8-Turbine Wind Farm, Electrical Substation, Grid Connection, Partial Demolition and Alteration of Agricultural Buildings, Upgrading of Existing Tracks and Roads, Construction of New Site Access Roads, and Associated Works in the townlands of Bargowla, Boleymaguire, Braudphark, Derreens, Derrybofin, Derrycullinan, Derrycullinan Beg, Drummanacappul, Garvagh, Garvagh Glebe, Glassalt, Lisfuiltaghan, Seltan, Sheena & Tinnybeg, County Leitrim

Leitrim County Council Planning Reference 20 / 120

An Bord Pleanála Case Reference No PL12.310789

OBSERVATIONS ON BEHALF OF WIND AWARE DROMAHAIR ON TWO OTHER APPEALS RECEIVED BY AN BORD PLEANÁLA

CONTENTS

		Page
1.	**Introduction and background**	1
2.	**Wind Aware Dromahair**	3
3.	**Observations on the appeal by Peter Sweetman and Associates**	4
3.1	Key issues raised in the appeal	4
3.2	Our observations on the appeal by Peter Sweetman and Associates – recent High Court judgment	6
3.3	Further observations on the appeal by Peter Sweetman and Associates – Articles 22 and 23 of the Planning and Development Regulations, 2001 to 2020	8
4.	**Observations on the first party appeal by MKO on behalf of the applicant, Coillte CGA**	10
4.1	Summary of key issues raised in the applicant's appeal ..	10
4.2	Preliminary observations on the first party appeal by MKO on behalf of Coillte CGA	12
4.3	Observations on the first party appeal by MKO on behalf of Coillte CGA – the applicant's request to change the text of condition No. 1	13

Contd.

CONTENTS, CONTD.

		Page
4.3.1	Can condition number 1 be amended by the Board ?	14
4.4	Observations on the first party appeal by MKO on behalf of Coillte CGA – the applicant's request to the Board to issue a Request for Further Information	15
4.5	Observations on the First Party Appeal by MKO on behalf of Coillte CGA – is the proposed wind farm development truly sustainable	16
5.	**Concluding observations**	18

Environmental Management Services
Comhairleoirí Comhshaoil
Environmental and Planning Consultants

An Tinteán Nua, Ballymanus, Castlepollard, County Westmeath
An Tinteán Nua, Baile Mhánais, Baile na gCros, Co. an Iarmhí, N91 PP76.
Telephone 044 966 2222 Mobile 086 381 9811 E-mail jackosullivan2006@gmail.com

Appeals against the Decision by Leitrim County Council to Grant a Ten-year Planning Permission to Coillte CGA for an 8-Turbine Wind Farm, Electrical Substation, Grid Connection, Partial Demolition and Alteration of Agricultural Buildings, Upgrading of Existing Tracks and Roads, Construction of New Site Access Roads, and Associated Works in the townlands of Bargowla, Boleymaguire, Braudphark, Derreens, Derrybofin, Derrycullinan, Derrycullinan Beg, Drummanacappul, Garvagh, Garvagh Glebe, Glassalt, Lisfuiltaghan, Seltan, Sheena and Tinnybeg, County Leitrim

Leitrim County Council Planning Reference 20 / 120

An Bord Pleanála Case Reference No PL12.310789

OBSERVATIONS ON BEHALF OF WIND AWARE DROMAHAIR ON TWO OTHER APPEALS RECEIVED BY AN BORD PLEANÁLA

1. INTRODUCTION and BACKGROUND

On 29 July 2020, McCarthy Keville O'Sullivan Ltd., t/a MKO, applied to Leitrim County Council on behalf of Coillte Cuideachta Ghníomhaíochta Ainmnithea (Coillte CGA) for planning permission for a proposed wind farm consisting of 8 turbines and other ancillary works described in the application and supporting documents; and consisting of:

i) Eight conventional three-blade wind turbines with a maximum overall blade height of up to 170 metres;

ii) Installation of reinforced concrete foundations for the turbine towers;

iii) Associated hardstanding areas;

iv) Upgrading of approximately 10.9 kilometres of existing forest roads and tracks, and construction of approximately 6.9 kilometres of new access

roads, and a new link road between the R280 regional road and the L4282 local road;

v) A 38 kV permanent electricity substation and a wind farm control building;

vi) A proposed permanent meteorological mast with a maximum height of up to 100 metres;

vii) Underground electrical (20 or 33kV) and communications cables;

viii) Connection of the proposed wind farm to the national electricity grid;

ix) Partial demolition and alteration of two agricultural buildings and the use of agricultural land for road construction;

x) Felling and permanent loss of some 55.1 hectares of commercial forestry, and replanting of the same area of forestry on one or more alternative sites;

xi) Recreation and amenity works;

xii) Permanent site drainage; and,

vii) Other associated site works not specifically mentioned above.

The application is for a ten-year permission, with a 30-year operational life (from the date of commissioning), and was accompanied by an Environmental Impact Assessment Report (EIAR), a Natura Impact Statement, supplementary plans for the management of construction, and for the extraction, removal and disposal of peat and soil, and by indicative drawings and maps.

On 15 June 2021, Leitrim County Council decided to grant planning permission for the relevant portion of the proposed wind farm, subject to 34 conditions; and on 12 July 2021, the Council's decision was appealed to An Bord Pleanála by Wind Aware Dromahair (An Bord Pleanála Case Reference No. **310789**). Two other appeals against that decision were made to the Board:

i) a third party appeal by Peter Sweetman and Associates (Wild Ireland Defence CLG); and,

ii) a first party appeal by MKO on behalf of the applicant, Coillte CGA.

The Board's letter, dated 14 July 2021, acknowledged receipt by the Board of the appeal by Wind Aware Dromahair, and the letter also invited submissions or observations on these two other appeals.

We have now been requested by the Wind Aware Dromahair to submit observations on these appeals.

It is relevant to our observations that a concurrent application was lodged by the same applicant with Sligo County Council for those portions of the wind farm which would be located in County Sligo, including two wind turbines, a

meteorological mast, underground cabling, access tracks and roads, amenity works and other associated works (Sligo County Council planning reference **20 / 251**). A decision made by Sligo County Council to grant planning permission for this portion of the wind farm has also been appealed to the Board (An Bord Pleanála case reference **310788**).

The entire wind farm, if permitted by the Board, would consist of 10 turbines, an electrical substation, grid connection, partial demolition and alteration of agricultural buildings, upgrading of existing tracks and roads, construction of new site access roads, installation of land drains across the proposed site, and removal of trees to facilitate construction and operation of the proposed wind farm. The greater proportion of the wind farm site (80% approximately) is located close to the western boundary of County Leitrim, with a smaller proportion of the site (20%) in County Sligo.

2. WIND AWARE DROMAHAIR

The observations which follow are being made on behalf of **Wind Aware Dromahair**, a community-based environmental protection group which was formed in response to proposals by Coillte CGA for construction of a large wind farm consisting of ten 170metre-high turbines, spread across a site of approximately 670 hectares, comprising upland blanket bog and commercial forestry plantations over fifteen townlands in counties Sligo and Leitrim.

On 01 September 2020, Wind Aware Dromahair made submissions to Leitrim and Sligo County Councils in response to the planning application dated 29 July 2020; and, on 25 May 2021, Wind Aware Dromahair submitted to Leitrim and Sligo County Councils detailed and lengthy observations on the further information provided to both planning authorities by the applicant. When Leitrim and Sligo County Councils decided to grant planning permissions for the relevant portions of the proposed wind farm, Wind Aware Dromahair appealed both of these decisions to An Bord Pleanála.

Additional details of Wind Aware Dromahair; including membership, committee members, aims and activities, are provided in the submissions mentioned above. Members of Wind Aware Dromahair have collectively, and also in many cases individually, a "*direct and vital interest*" in the decision to be made by An Bord Pleanála, as they would be directly affected by the wind farm if it were to be granted permission and if it were to be constructed.

3. OBSERVATIONS ON THE APPEAL BY PETER SWEETMAN AND ASSOCIATES

3.1 Key Issues Raised in the Appeal

The appeal by Peter Sweetman and Associates, on behalf of Peter Sweetman himself and also on behalf of Wild Ireland Defence CLG, states that An Bord Pleanála has certain legal tasks when dealing with a planning application such as the present application:

i) These tasks are derived from legal requirements under the Planning Acts, the Environmental Impact Assessment Directive, and Assessment under the Habitats Directive;

ii) The Board must examine the application to ascertain if the contents of the application comply with the Planning Regulations, in particular Articles 22 and 23 of the 2001 Regulations; and he referred to the Judgement of Humphries J, in *Sweetman v An Bord Pleanála* 2020 No. 557 JR;

iii) The Board must also assess the merits of the planning application in accordance with the Planning and Development Act 2000 (as amended) to ensure that the proposed development is in accordance with the proper planning and sustainable development of the area;

iv) The Board must examine the Environmental Impact Assessment Report (EIAR) furnished by the applicant, to ensure that it complies fully with Article 4(4) of the EIA Directive, especially including:

   (a) a description of the physical characteristics of the whole project and, where relevant, of any demolition works;

   (b) a description of the location of the project, with particular regard to the environmental sensitivity of areas likely to be affected;

   (c) a description of the aspects of the environment likely to be significantly affected by the project; and,

   (d) A description of any likely significant effects of the project on the environment resulting from the expected residues and emissions, the production of waste, and the use of natural resources, in particular soil, land, water and biodiversity.

v) The Board is required to form and record a view as to the environmental impacts of the development, considering the **EIA Report** (EIAR) furnished by the applicant, the views of the public concerned, and applying its own expertise or, if no EIAR is submitted, to screen the development for EIA;

vi) An Bord Pleanála is the competent authority having responsibilities under the **Habitats Directive**, and must therefore undertake a Screening Report

> for Appropriate Assessment of the proposed development as required by Article 6(3) of the Habitats Directive 92/43/EEC; and the Board must then make a decision, also required by Article 6(3) of the same Directive, about whether or not the proposed development would adversely affect the integrity of any Natura 2000 site, after having obtained the views of the public concerned.

The appeal by Peter Sweetman cites case law (Irish High Court and the CJEU) which sets out the legal case for screening, the requirement for appropriate assessment, and the legal and scientific standard to which an appropriate assessment must conform.

The appeal by Peter Sweetman then asserts that, because of the total lack of certainty in the information submitted by the applicant, it is not possible for An Bord Pleanála to make a decision to grant permission which would comply with the requirement that:

> *"the assessment carried out under Article 6(3) of the Habitats Directive ... 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."*

and he asserts that "*this is a strict standard and An Bord Pleanála does not have legal jurisdiction to give permission if it is not met*".

Peter Sweetman's statement of grounds includes:

- the application does not comply with the requirements of the Planning Regulations;
- the EIAR is not compliant with the EIA Directive;
- the Planning Authority failed to carry out a proper Environmental Impact Assessment, if at all;
- the Planning Authority failed to carry out a proper Appropriate Assessment according to the caselaw of the CJEU, if at all; and,
- it is not possible for An Bord Pleanála, having carried out its legal functions *de novo*, to grant permission for this development.

Finally, Peter Sweetman submitted that this appeal and his appeal in An Bord Pleanála case reference **310788** are based on the same EIAR and Natura Impact Statement and therefore constitute one development; and he concludes that the Planning Authority failed to publish the Environmental Impact Assessment and/or the Appropriate Assessment contrary to EU and Irish law, and the planning authority also failed to inform submitters about the authority's decision and the reasons for the decision.

3.2 Our Observations on the Appeal by Peter Sweetman and Associates – Recent High Court Judgment

Having considered carefully the issues raised in the appeal by Peter Sweetman, it is our observation that the facts stated in the appeal are correct, the legal cases cited are relevant and appropriate, and the assertions are robust.

In his appeal, Peter Sweetman drew the attention of the Board to the lack of definite or precise information about certain aspects of the proposed wind farm development; and in our appeal to the Board we provided a similar argument in section 3.2 (page 10), together with more detail about uncertainties and gaps in the information provided by the applicant.

Peter Sweetman's appeal also mentioned very briefly his own case, *Sweetman -v- An Bord Pleanála* (**2020 /557 JR**), neutral citation ***[2021] IEHC 390***, in which Judgment was delivered by Mr. Justice Humphreys on 16 June 2021.

The Board will be aware of this High Court Judgment, in which the applicant challenged the legality of a decision by An Bord Pleanála to grant planning permission to Bórd na Móna Powergen Ltd (a Notice Party in the case) for a 24-turbine windfarm on a 1,908 hectare site in the Mountdillon group of peat extraction bogs, County Longford.

The case, frequently referred to as the Derryadd Wind Farm case, concerned a proposed wind farm, for which the applicant sought planning permission directly from the Board under the Planning and Development (Strategic Infrastructure) Act, 2006. Even though this case was not an appeal to the Board from a decision by a planning authority, it is our observation that the result of this case directly affects the way in which the Board must approach the current appeals which are the subject of our observations (see especially point (c) immediately below).

The decision of the High Court was that providing typical details of certain aspects of the proposed wind farm, which the Board had accepted as adequate, did not amount to the legal requirement to provide "*plans and particulars*" of a proposed development. Specifying particulars of the works for which permission is sought is a statutory obligation.

The Court ruled that on foot of those findings, the Board's decision should be quashed.

While the importance of this Judgment is self-evident, particularly in the context of the first party appeal by MKO on behalf of Coillte CGA, it is not necessary for us to spell out in these observations the full details of the Judgement by Mr Justice Humphreys; but there is a number of points which are explicitly relevant to our observations which can be summarised as follows:

(a) The crux of the Respondent's arguments was the reliance on the industry concept of "design envelope" — a process which was borrowed from the British cases of *R. v Rochdale MBC ex parte Milne* (No. 1), *R. v Rochdale MBC ex parte Tew* [1999] and *R. v Rochdale MBC ex parte Milne* (No. 2) [2000], and referred to by Mr Justice Humphreys at paragraph 61 of his Judgement as the "Rochdale envelope". This allowed developers a range of flexibility in the submission of plans and particulars which allowed them to finalise details at the construction stage, in accordance with the most up-to-date technologies.

(b) However, Mr Justice Humphreys concluded that "*the facts in Rochdale are a world away from the facts here*" (para 70), this concept was of industry design, it was derived from UK Law, it had no basis in Irish Planning Law, and for the Court to endorse the principle of the "Rochdale envelope" would amount to an impermissible modification of the relevant Irish enactments. As such, it could not be used to circumvent the strict requirements of Articles 22 and 23 of the Planning and Development Regulations 2001 (as amended).

(c) Much of the contention in the above cited case taken by Peter Sweetman against the Board centred on the relevance of Articles 22 and 23 of the Planning and Development Regulations 2001 (as amended) to Strategic Infrastructure Development (SID). Ultimately, it was concluded that Article 214 (relating to SID) should be interpreted in the light of Articles 22 & 23. No such contention arises in relation to the appeals against the planning authority's decision to grant planning permission for the proposed wind farm, where the application in question is not SID. As such, there is **no question** but that the strict requirements of Articles 22 & 23 in relation to the specificity of Plans and Particulars should apply in full.

3.3 Further Observations on the Appeal by Peter Sweetman and Associates – Articles 22 and 23 of the Planning and Development Regulations, 2001 to 2020 (as amended)

In his appeal, Peter Sweetman asserted that the Board must examine the application to ascertain if the contents of the application comply with the Planning Regulations, in particular Articles 22 and 23 of the 2001 Regulations, and the same regulations were cited by Mr Justice Humphreys in *Sweetman -v- An Bord Pleanála* (**2020 /557 JR**).

Article 22 specifies the content of planning applications generally; while **Article 23** specifies the requirements for particulars to accompany an application under Article 22.

The importance of **Article 23** is that it states precisely that:

> *"(1) Plans, drawings and maps accompanying a planning application in accordance with article 22 shall all be in metric scale and comply with the following requirements:*
>
> *(a) site or layout plans shall be drawn to a scale (which shall be indicated thereon) of not less than 1:500 or such other scale as may be agreed with the planning authority prior to the submission of the application, the site boundary shall be clearly delineated in red, and buildings, roads, boundaries, septic tanks and percolation areas, bored wells, significant tree stands and other features on, adjoining or in the vicinity of the land or structure to which the application relates shall be shown,*
>
> *(b) other plans, elevations and sections shall be drawn to a scale of not less than 1:200 (which shall be indicated thereon), or such other scale as may be agreed with the planning authority prior to the submission of the application in any particular case,*
>
> *(c) the site layout plan and other plans shall show the level or contours, where applicable, of the land and the proposed structures relative to Ordnance Survey datum or a temporary local benchmark, whichever is more appropriate,*
>
> *(d) drawings of elevations of any proposed structure shall show the main features of any buildings which would be contiguous to the proposed structure if it were erected, whether on the application site or in the vicinity, at a scale of not less than 1:200, as may be appropriate, and where the development would involve work to a protected structure or*

proposed protected structure, shall show the main features of any buildings within the curtilage of the structure which would be materially affected by the proposed development,

...

(f) plans and drawings of floor plans, elevations and sections shall indicate in figures the principal dimensions (including overall height) of any proposed structure and the site, and site or layout plans shall indicate the distances of any such structure from the boundaries of the site".

Article 26 is of equal importance, as it describes the exact procedure which a planning authority must follow on receipt of a planning application; and, apart from requirements such as stamping and acknowledging receipt of the planning application, the planning authority must:

"(1) ... consider whether the applicant has complied with the requirements of articles 18, 19(1)(a) and 22 and, as may be appropriate, of article 24 or 25.

(3) Where, following consideration of an application under sub-article (1), a planning authority considers that –

(a) any of the requirements of articles 18, 19(1)(a) or 22 and, as may be appropriate, of article 24 or 25 has not been complied with, or

(b) the notice in the newspaper or the site notice, because of its content or for any other reason, is misleading or inadequate for the information of the public,

the planning application shall be invalid.

(4) Where, on inspection of the land to which the application relates, the planning authority considers that the requirements of articles 17(1)(b), 19 or 20 have not been met, or the information submitted in the planning application is substantially incorrect or substantial information has been omitted, the planning application shall, notwithstanding the fact that an acknowledgement has been sent to an applicant in accordance with sub-article (2), be invalid".

The applicant's First Party Appeal asserts that the plans and particulars provided in the planning application were not *" '..open at one end...', as the lower ranges*

(minimum) parameters of the critical turbine components were described and considered within the application documentation".[1]

One of Peter Sweetman' statements of grounds is that the application does not comply with the requirements of the Planning Regulations, and our observation above confirms that this statement is correct; and, as stated in section 3.2 above, the strict requirements of Articles 22 & 23 of the Planning and Development Regulations, in relation to the specificity of Plans and Particulars, must apply in full.

4. OBSERVATIONS ON THE FIRST PARTY APPEAL BY MKO ON BEHALF OF THE APPLICANT, COILLTE CGA

4.1 Summary of Key Issues Raised in the Applicant's Appeal

The grounds of the first party appeal by MKO on behalf of the applicant, Coillte CGA, and the reasons why the applicant is making this appeal may be briefly summarised as:

1. This appeal fully supports the decision made by Leitrim County Council to grant planning permission for the proposed wind farm, and asserts that the decision complies in full with the provisions of the County Development Plan and is in accordance with the principles of the proper planning and sustainable development of the area;

2. The principal reason for the appeal is because of the recent High Court judgment issued in the judicial review of the Derryadd Wind Farm decision, this judgment having been delivered on 16 June 2021, after Leitrim County Council made its decision on 15 June 2021;

3. The stated purpose of the appeal is to:
   - "allow the provision of greater clarity in relation to the nature of the development",
   - "facilitate the provision of greater clarity in terms of the nature of the consented development",
   - "facilitate the provision of an enhanced definition of the consented development in the interests of clarity",

[1] First Party Grounds of Appeal – Croagh Wind Farm, Leitrim County Council Pl. Ref. 20/120. MKO on behalf of Coillte CGA; Section 2.2, page 5. 09 July 2021.

- "clarify the nature of the development that has been both assessed and consented",
- "ensure clarity in relation to the turbine parameters";
- "*request that the Board amend the decision to include a condition setting out the detailed parameters of the consented turbines to provide the additional clarity and in so doing acknowledge the requirements of the Derryadd judgment while also ensuring the proper planning and sustainable development of the area*";

and for similar purposes throughout the appeal, all of which use the term "clarity", "clarify" or "clarification";

4. A further purpose of the appeal, as stated in section 1.2, the "*First Party Appeal Approach*", is to request An Bord Pleanála to address the consequences of the Derryadd Wind Farm judgment "*through the provision of additional wording in relation to condition no. 1 of the notification of decision that has issued*";

5. The above purpose of the appeal is repeated in section 2.2. "Grounds of Appeal Discussion", which requests An Bord Pleanála "*in light of the findings of the Derryadd judgment*" to "*grant permission for the proposed development similar to the decision of the Planning Authority, however, it is requested that a condition be included specifying the nature and scale of the turbines which have been consented*";

6. This purpose of the appeal is repeated again in section 2.2, in which the applicant requests the Board to "*amend the decision to include a condition setting out the detailed parameters of the consented turbines to provide the additional clarity and in so doing acknowledge the requirements of the Derryadd judgment*";

7. An alternative reason and purpose of the appeal, also as stated in section 1.2, the "*First Party Appeal Approach*", is to request An Bord Pleanála to address the consequences of the Derryadd Wind Farm judgment by the Board requesting "*revised plans or drawings to be submitted under Article 73 of the Planning and Development Regulations (2001) (as amended)*".

By any environmental or legal standards, this is a most extraordinary and unusual appeal, in which the applicant has asked the Board to undertake an action which would, in effect, allow a significant change in the description of the turbines and certain other components of the proposed development, for the sole purpose of escaping the consequences of the High Court judgment in *Sweetman -v- An Bord Pleanála* (2020 / 557 JR).

Our observations on this "strategic" approach by the applicant follow in sections 4.2 and 4.3 below.

4.2 Preliminary Observations on the First Party Appeal by MKO on behalf of Coillte CGA

The first party appeal by MKO on behalf of Coillte CGA is not a "normal" appeal (even if we include in the definition of "normal" an appeal which supports the decision of a planning authority), but is in fact and in essence a request to the Board to intervene in the planning process, in order to facilitate an applicant.

That request, as we have shown in section 4.1 above:

a) asks the Board to issue a decision to grant planning permission, subject to a specific condition which would allow the applicant to escape the consequences of a High Court decision; or,

b) asks the Board to issue a request for further information which, when the applicant complied with the request, would enable the applicant to modify certain details of the planning application, so to assist the applicant and the Board to escape the consequences of a High Court decision.

Our first preliminary observation is that the real intention of the applicant's appeal is not to clarify the nature of the proposed development, or to bring about any of the "clarifications" repeatedly requested in the appeal. The matter of clarification, we suggest, is no more than a smokescreen to cover the obvious intention of the appeal.

Our second preliminary observation is that the Board will be more aware than any other agency that Articles 22, 23 and 26 of the Planning and Development Regulations, 2001 to 2020 (as amended), quoted in section 3.3 above, specify a logical and statutory process which must be followed by all planning authorities, including the Board.

Even though the Regulations allow certain carefully prescribed options which may be availed of by the Board, e.g., to request further information, the legislation was never intended to allow a developer (or a prospective developer) to make a request to interfere with this normal process. For the Board to accede to the applicant's request would be, like the appeal itself, **bizarre and unprecedented**; and it would also, in our opinion, leave the Board open to legal challenge.

Our third preliminary observation on the first party appeal by MKO on behalf of Coillte CGA is that the appeal itself constitutes an admission that the original planning application (and it must be stated that this is the only planning application which the Board is legally obliged to consider) is seriously deficient in terms of the detail provided; or, to state our observation more succinctly: **the applicant's appeal is an admission of deficiency**.

4.3 Observations on the First Party Appeal by MKO on behalf of Coillte CGA – the Applicant's Request to Change the Text of Condition Number 1

In addition to our preliminary observation that the applicant's request to the Board to issue a planning decision with an amended Condition 1, is really intended to enable the applicant to escape the consequences of the High Court judgment in *Sweetman -v- An Bord Pleanála* (2020 / 557 JR), we have also considered whether that request could be carried out by the Board.

The request is stated in section 1.2 of the appeal as "*to ensure clarity in relation to the turbine parameters … through the provision of additional wording in relation to condition no. 1 of the notification of decision that has issued*"; and a proposed new text is suggested in section 2.2 near the foot of page 8:

> *"(b) The following design requirements shall be complied with in relation to the wind turbines:*
>
> *(i) The total tip heights shall be from 165m minimum to 170m maximum;*
>
> *(ii) The hub heights shall be from 100m minimum to 105m maximum; and,*
>
> *(iii) The blade lengths shall be from 65m minimum to 70m maximum.*
>
> *Reason: In the interests of clarity."*

Our further observation on this proposed request, and our first observation on the text suggested by the applicant, is that the proposed additional text is incapable of remedying the deficiencies in the planning application, as it falls far short of what is required to rectify the planning application and bring it into line with the strict requirements of Planning and Development legislation.

The appeal alleges that the planning application is supported by

> *"… detailed and accurately scaled and comprehensively detailed site layout plans (19 no. layout plans provided, Drawing no.'s 180511-03 to -22 refer). The submitted layouts detail the locations and extent of all proposed site infrastructure (and amenity works) that include the locations of all proposed wind turbines (with grid references) showing the actual locations that each of the proposed turbines are to be erected, as well as the accurate locations, orientation and extent of the proposed hardstand areas, roadways, amenity paths, foundations as well as all associated cut and fill requirements. A detailed suite of comprehensive drawings plans and particulars have been submitted including in relation to drainage, construction compounds, borrow pit, peat and spoil repositories, met mast, roads drawings/sections, visitor car park, boardwalk, watercourse*

crossings, gate details, cable circuits, and all junction arrangements. These drawings show the location and extent of all relevant works associated with the proposed Croagh Wind Farm".

It is our observation that the details, plans, drawings and particulars which the applicant has alleged have been provided to the planning authority, and therefore to the Board, are not capable of meeting the strict requirements of Articles 22 & 23 of the Planning and Development Regulations; for if they were so capable, the applicant would not need to make the above request to An Bord Pleanála.

It therefore follows that the applicant's proposed amendment alone would fall far short of what is required in terms of details of the development to meet the standards required by Articles 22 & 23 of the Planning and Development Regulations.

4.3.1 Can Condition Number 1 be Amended by the Board ?

It is our observation that Condition Number 1 cannot be amended by the Board, or additional text added by the Board, as requested by the applicant, for the following reasons:

The Board cannot (and should not) go into such detail as to identify all of the elements or components of the wind farm for which the descriptions or details are deficient to the extent that appropriate *"plans and particulars"* have not been provided, and to attempt to remedy these deficiencies by means of one or more conditions attached to a grant of planning permission; for the Board to do this would be very damaging to the Board's function as an independent adjudicator, the Board would be seen as assisting the applicant to remedy a defective planning application, such a course of action would be in conflict with the Board's statutory duty, and would leave the Board's action open to legal challenge.

It is therefore our conclusion that the text of Condition Number 1 cannot be amended or extended by the Board in the manner requested by the applicant's appeal, to enable the application, or a decision on the application, to escape the consequences of the High Court judgment cited above.

4.4 Observations on the First Party Appeal by MKO on behalf of Coillte CGA – the Applicant's Request to the Board to issue a Request for Further Information

As we have noted briefly in section 4.1, point 7, above, the applicant's appeal alternatively suggests (in section 1.2 on page 3 of the appeal) that "*the Board can request revised plans or drawings to be submitted under Article 73 of the Planning and Development Regulations (2001) (as amended)*".

The appeal quotes Article 73 of the Planning and Development Regulations (2001), which states that;

> *"The Board may, when considering an appeal under Section 37 of the Act, invite the applicant for the permission concerned to submit to the Board revised plans or other particulars providing for the modification of, the development to which appeal relates and an applicant so invited may submit to the Board such number of plans, drawings or particulars as the Board may specify."*

The appeal then implies that the applicant would be very pleased if such a request were to be made by the Board, and would be further pleased to comply with it:

> *"As stated above, it is fully noted that this is matter for the Board to consider, and should additional plans and/or particulars be required, these can be provided".*

It is obvious that the above suggestion has been made by the applicant in the hope that, if the Board were to accept it, compliance with a further information request would enable the applicant to modify certain details of the planning application, so to assist the applicant and the Board to escape the consequences of the High Court judgment cited above.

It is our observation that, while the Board is empowered to make such requests under Article 73 of the PDR, this power has strict limitations, and cannot be directed at reformulating a clearly flawed planning application. MKO, who have requested that the Board utilise this power of request, would purport to produce revised plans which detail the development far beyond what has been provided thus far.

As with Art 34 of the PDR, which provides the same power to the Planning Authority with regards revised plans, it should be noted that the power is restricted to "modification" of the development. This does not, and cannot, envisage a substantial change to the development. In the case of MKO, the degree of detail required to rehabilitate this entirely substandard application is so vast and wide-ranging in so many respects, that it is impossible for plans and particulars to be furnished at this stage which does not have the effect of creating an entirely new planning application.

As we have stated in section 4.1 above, clarification cannot be sought for details which have yet to be submitted. The introduction of the words "clarity" and "clarification" as euphemisms for introducing large and significant amounts of detail not seen before in the application is an abuse of the planning process.

In addition to the limitations of the power of the Board under Art 73, the wide-ranging supplementation of information which is required to raise MKO's application to acceptable levels would require an entirely new EIAR and AA.

The nature of the requirements of the Habitats and EIA Directive envisage a much greater degree of accuracy and public participation than would occur should the developer be permitted to fundamentally alter, not alone the development at this stage, but to produce, for the first time the level of specificity and detail that should have comprised the application from the outset.

It is our observation that, should the applicant's request be granted (as urged in the firsty party appeal), and if the applicant were to be permitted to alter the Plans and Particulars to such an extent, then this would clearly fall foul of the Reporting and Public Participation requirements envisaged by the EIA Directive (Council Directive 2011/92/EU) and the Habitats Directive (Council Directive 92/43/EEC).

4.5 Observations on the First Party Appeal by MKO on behalf of Coillte CGA – Is the Proposed Wind Farm Development Truly Sustainable?

In three places, the applicant's appeal refers to sustainable development:

i) "*... the development as proposed complies in full with the provisions of the County Development Plan, is in accordance with the principles of the proper planning and* ***sustainable development*** *of the area*";

ii) the appeal is being lodged "*to facilitate ... the proper planning and* ***sustainable development*** *of the area*"; and,

ii) the Board is requested to "*amend the decision to include a condition setting out the detailed parameters of the consented turbines to provide the additional clarity and in so doing acknowledge the requirements of the Derryadd judgment while also ensuring the proper planning and* ***sustainable development*** *of the area*".

While not asserting that the proposed wind farm is intrinsically a form or type of sustainable development, the appeal considers that it is in accordance with the principles of proper planning and sustainable development, and that a decision to grant planning permission for it would also be in accordance with the principle of sustainable development. At the same time, it is clear from the application and the applicant's EIAR that the life-span of the wind farm would be no more than 20 to 30 years at maximum, after which some or all of the major components

would have to be replaced, or the wind farm would have to be decommissioned and removed (with the exception of the turbine tower bases or foundations and the site roads).

It is therefore necessary to consider whether this proposed development is really sustainable.

From the applicant's perspective, the wind farm may be economically viable in the short term, but that does not mean that the proposed development is environmentally sustainable. In order to determine whether the proposed wind farm is sustainable in the environmental sense, we need a robust definition of sustainability such as:

> *"Sustainability does not mean a continuation of the current economic activities, or "business as usual", even with some reduction of the resources we use, greater availability of renewable energy, more wind farms, more electric vehicles and more recycling. Real sustainability goes far beyond these measures, and requires that all human societies must live within the carrying capacity of planet Earth, guided by environmental and ecological principles, recognising that we live on a planet of finite resources, and doing no long term damage to the natural ecosystems and biodiversity on which we depend for our existence".*

Under this definition, a wind farm which would have to be dismantled in 30 years, leaving a damaged landscape, with turbine bases, areas of hardstanding, borrow pits and roads left in place, cannot be considered really sustainable. The use of very significant quantities of raw materials, and the recognised difficulty of reusing or recycling end-of-life components (especially turbine blades), contribute to the long-term unsustainability of sourcing renewable energy from the current types of wind farms.

It is therefore stretching the definition of sustainability to include wind farming as a type of sustainable development, and any contribution made by a proposed wind farm to the "*sustainable development of an area*" must be considered as either negligible or even negative.

5. CONCLUDING OBSERVATIONS

1. We have considered in some detail two appeals sent to us by An Bord Pleanála for comment and observations:

   i) a third party appeal by Peter Sweetman and Associates (Wild Ireland Defence CLG); and,

   ii) a first party appeal by MKO on behalf of the applicant, Coillte CGA.

2. The third party appeal by Peter Sweetman and Associates is based on information which we have found to be factually correct, the legal cases cited are relevant and appropriate, and the assertions are robust; and we therefore agree with and support the grounds of appeal and the conclusions of this appellant.

3. The first party appeal by MKO on behalf of the applicant, Coillte CGA, is a most extraordinary and unusual appeal, in which the applicant has asked the Board to undertake an action which would, in effect, allow a significant change in the description of the turbines and certain other components of the proposed development, for the sole purpose of escaping the consequences of the High Court judgment in *Sweetman -v- An Bord Pleanála* (2020 / 557 JR).

4. The appeal itself constitutes an admission that the original planning application (and it must be stated that this is the only planning application which the Board is legally obliged to consider) is seriously deficient in terms of the detail provided; or, to state our observation more succinctly: **the applicant's appeal is an admission of deficiency.**

5. The applicant's request to the Board to issue a planning decision with an amended Condition 1 is not for the purpose ensuring greater clarity in the description of certain components of the proposed wind farm, nor to provide an enhanced definition of the development in the interests of clarity, as stated in the appeal, but to enable the application to escape the consequences of the High Court judgment cited in the appeal.

6. The applicant's proposed additional text is incapable of remedying the deficiencies in the planning application, as it falls far short of specifying the details of the development necessary to meet the strict standards required by Articles 22 & 23 of the Planning and Development Regulations; i.e., the necessary "*plans and particulars*".

7. An attempt by the Board to remedy these deficiencies by means of one or more conditions attached to a grant of planning permission would be very damaging to the Board's function as an independent adjudicator, the Board would be seen as assisting the applicant to remedy a defective

planning application, such a course of action would be in conflict with the Board's statutory duty, and would leave the Board's action open to legal challenge.

8. The first party appeal suggests that the Board can request revised plans or drawings to be submitted under Article 73 of the Planning and Development Regulations (2001) (as amended), and the applicant would be able to provide such plans and drawings if so requested.

8. If the Board were to accept this suggestion, it would assist the applicant to escape the consequences of the High Court judgment cited above; and, if the Board were to request further information when asked to do so by a developer, such action would be entirely contrary to the intention of the legislation.

9. There is no appropriate format or text which the Board could use when requesting further information, either generically or specifically; and, if the Board were to issue such a request for further information, it would be seen as an inappropriate interference in a statutory process, and the Board would be seen as aiding the applicant, and damaging its role and responsibility as an independent arbiter of planning issues; and such a course of action would also leave the Board open to a legal challenge.

10. For the Board to accede to any of the requests or suggestions in the applicant's appeal, such an action would be, like the appeal itself, **bizarre and unprecedented**; and it would also, in our opinion, leave the Board open to legal challenge.

11. Finally, we query whether the type of wind farming proposed by the applicant can be considered as environmentally sustainable development under a definition of sustainability which takes into account environmental and ecological principles and the carrying capacity of planet Earth.

We therefore urge the Board to refuse planning permission for the proposed wind farm.

Jack O'Sullivan

Environmental Management Services

10 August 2021