

*Ashley*

**Mary Tucker**

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**From:** Graeme Thornton <Graeme.Thornton@mwp.ie>  
**Sent:** Monday 4 September 2023 11:53  
**To:** Appeals2  
**Subject:** Submission for ABP-317245-23  
**Attachments:** 21992 ABP 2nd Submission 20230831 Final.pdf; ABP 317245 receipt.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

Dear Sir / Madam

Please find attached a submission on behalf of Cloncant Renewable Energy Ltd. in relation to case number ABP-317245-23 which is also linked with case number ABP-317239-23. A hard copy was delivered into ABP this morning and the receipt is also attached.

Regards,

**Graeme Thornton**

B.Sc. Dip OS&H

Senior Environmental Scientist

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**MWP**

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Planning Ref: ABP-317245-23  
4<sup>th</sup> September 2023.

The Secretary,  
An Bord Pleanála,  
64 Marlborough Street,  
Dublin 1  
BY HAND

Planning Reference: ABP-317245-23

Re: Whether the increase in the Megawatt (MW) output from 49.5MW to 59.4MW at a permitted wind farm development, using a new (6.6MW) machine in Ballykilleen, Shean, Kilcumber, Cloncant, Cushaling and Rathmore, Edenderry, Co. Offaly is or is not development and is or is not exempted development.  
Ballykilleen, Shean, Kilcumber, Cloncant, Cushaling and Rathmore, Edenderry, Co. Offaly.

Dear Sir / Madam,

Malachy Walsh and Partners have been engaged by Cloncant Renewable Energy Limited, Cork Airport Business Park, Cork ("the Applicant") to make a submission to An Bord Pleanála (hereinafter "the Board") as part of case number ABP-317245-23, as requested by letter dated 15 August 2023 pursuant to section 131 of the Planning and Development Act 2000, as amended ("the 2000 Act"). The request relates to an application by the Applicant under Section 5(1) of the 2000 Act and the declaration now requested of the Board as to whether the increase in the MW output at a permitted wind farm development, without increasing the size and scale of any works, layout or plans at Ballykilleen, Shean, Kilcumber, Cloncant and Cushaling, Edenderry, County Offaly ("the Proposal") is or is not development and is or is not exempted development.

## Background

On 19 March 2021, the Applicant submitted a request to Offaly County Council for a declaration pursuant to Section 5 of the 2000 Act on the question of whether the increase in MW output from 45.9 MW to 59.4 MW at a permitted wind farm development, using a new (6.6MW) machine at Ballykilleen, Shean, Kilcumber, Cloncant and Cushaling, Edenderry, County Offaly, is or is not

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WIRE-325682741

development and is or is not exempted development. Pursuant to section 5(4) of the 2000 Act, Offaly County Council referred the question to the Board on 12 April 2020.

The subsequent declaration by the Board dated 8 October 2021 was made pursuant to section 5(3)(a) of the 2000 Act under its reference ABP – 309940-21, that the increase in the MW output of a permitted windfarm development, without increasing the size and scale of any of the works, layout or plans, at Ballykilleen, Shean, Kilcumber, Cloncant and Cushaling, Edenderry, County Offaly is development and is not exempted development. This declaration was subsequently quashed by Court Order dated 20 June 2022 (2021/1001 JR) (**“the Quashed Declaration”**) and remitted back to the Board for determination.

The matter involves the permitted Cushaling Wind Farm in counties Kildare and Offaly. (**“the Permitted Development”**) The Permitted Development was permitted under two planning permissions (ABP-306748-20 and ABP-306924-20). A corresponding submission has also been provided for ABP-306748-20 and this submission relates to ABP-306924-20 (**“the Planning Permission”**) for one (8) consented turbines in Co. Offaly, forming part of a wind farm of up to nine (9) wind turbines and all associated infrastructure, including an underground cable connection, an off-site substation, a battery energy storage facility and an amenity trail. One (1) of the consented turbines is in Co. Kildare, with a further eight (8) in Co. Offaly. The consented turbines have a tip height of up to 187m.

Both planning permissions contained conditions relating to design, but only in respect of colour of the wind turbines, which had to be approved by the local planning authority. However, neither planning permission contained a condition expressly limiting the output or installed capacity of the turbines.

## Submission Overview

This submission has been prepared to inform the Board as to why the increase in MW output at the Permitted Development is not development within the meaning of section 3 of the 2000 Act.

## Reasons for Proposal

It is widely recognised that wind energy development is a dynamic area with ongoing technological advances. Turbines of increased efficiency consistently emerge to the market, sometimes of a larger dimension and sometimes within the same dimension parameters contained and assessed within a planning application, as is now the case with the Permitted Development. While there is no change required to the dimensions of the permitted turbines, or to the associated hardstands or infrastructure, there are now 6.6 MW turbines available which comply with the permitted dimensions, including the tip height of up to 187m. The Permitted Development can therefore now be developed in accordance with the plans and particulars and in compliance with the Conditions of

the Planning Permission with an increased output of 59.4 MW. For clarity, the Permitted Development can be constructed and operated as described in the Environmental Impact Assessment Report (EIAR), Natura Impact Statement (NIS) and the Planning Drawings.

At the time of the application for planning, a turbine candidate of up to 5.5 MW was available and with 9 turbines, the expected yield was 49.5 MW. At the time of writing, machines are available that are at the same size and scale as the permitted turbines, but due to advancements in technology, the internal generator has a capacity up to 6.6 MW which would increase the output of the wind farm to 59.4 MW.

Therefore, while an increased capacity is positive in terms of energy output, it does not require an increase in the size or scale of the development and the permitted wind farm can be developed in accordance with the plans and particulars originally submitted and the conditions of the Planning Permission.

## Whether the Proposal is or is not development and is or is not exempted development.

The Proposal and the question of whether this increase in MW is considered development or exempt development, has been remitted to the Board for determination by High Court Order dated 20 June 2022.

### What is *Development*?

Section 3(1) of the 2000 Act defines development -

*except where the context otherwise requires, "development" means—*

*(a) the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land, or*

*(b) development within the meaning of Part XXI (inserted by section 171 of the Maritime Area Planning Act 2021).*

Only Part (a) requires consideration for the purposes of the Permitted Development. It is therefore necessary to consider the Proposal as follows -

1. Whether this will result in additional "works" that have not been provided for in the Permitted Development; and
2. Whether the increase in MW will result in a "material change in use" for the purposes of Section 3(1)(a).

## Works

Section 2 of the 2000 Act defines Works as –

*“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.*

It is evident from the application and as set out in this submission, there will be no increase in the size and scale of any works, layout or plans at the Permitted Development through the use of the 6.6 MW WTGs as these are of the same size and scale as those assessed and provided for in the plans and particulars of the Permitted Development.

This was accepted by the Board in their original Section 5 determination, the Quashed Declaration.

## Material Change of Use

As the Proposal does not constitute *works*, a determination that the increase in MW could be considered Development for the purposes of section 3(1) of the 2000 Act can only be founded on the basis that this amounts to a material change in the use of any land or structures situated on land.

In order to consider in full whether there has been a ‘material change of use’ it is necessary to consider first, that there is a change in use and secondly, the change must be material, that being material for planning purposes. Not every change or increase or intensification in use will in itself amount to a material change of use<sup>1</sup>. This must be considered in accordance with current planning considerations for the relevant area and the factual circumstances pertaining.

For the purposes of section 3(1)(a) of the 2000 Act, a material change of use means material in planning terms and there are no planning considerations arising that could lead to a conclusion in this instance that could be a material intensification and / or change in use.

As set out in *Cork County Council v Slattery Pre Cast Concrete Ltd [2008]*, the assessment of whether an intensification of use amounts to a sufficient intensification to give rise to a material change in use must be assessed by reference to planning criteria. As clarified by Clarke J in that case, if the changes are such that they have an effect on the sort of matters which would properly be considered from a planning or environmental perspective, it might be said that there was a material change of use.

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<sup>1</sup> Cork County Council v Slattery Pre Cast Concrete Ltd [2008] IEHC 291 at paras 2.6 and 9.5.

Significant changes in vehicle use (and in particular heavy vehicle use that might not otherwise be expected in the area) are one such example, changes in the visual amenity or noise are others.<sup>2</sup>

The proposed increase in MW output will not result in any increase in the size and scale of the Permitted Development. In these circumstances, the Proposal would not have an effect on planning or environmental matters, such as noise, increase in scale, traffic movement or other matters which would give rise to material planning or environmental considerations. The visual impact of the constructed development will remain as indicated on the planning drawings approved by the Board in granting Planning Permission.

## Permitted Development

It is also necessary to consider what has been authorised under the terms of the existing Planning Permission.

The description of the development sought, as advertised in the public notices, set out in the planning application and reflected in the Board Order makes no mention of 49.5 MW or any particular make or type of turbine. No specific condition of the planning permissions limits the windfarm to 49.5 MW and/or the use of particular turbines.

To further consider what has been permitted by the Planning Permission it is necessary to consider Condition 1 of the permission;

*"The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars received by An Bord Pleanála on the 19th day of March, 2020, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.*

*Reason: In the interest of clarity"*

In order for a matter to constitute a "particular" for the purposes of Condition 1, a matter contained in the application must be specific and/or involve a clear commitment. *Lanigan v Barry [2016]*<sup>3</sup> makes clear that for a particular to be of a binding nature, it must be in the form of a "clear commitment". Whilst detail regarding megawatt output is provided in the planning documentation, no clear commitment is provided which would have the effect of limiting the megawatt output to 49.5MW.

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<sup>2</sup> [2008] IEHC 291 at para.7.5

<sup>3</sup> 1 IR 656

When the planning documentation is considered as a whole, there is no basis for contending that any clear commitment was given that the output of the nine turbines would be limited to 49.5MW. In fact, the extracts from the EIAR, set out below, positively demonstrate that there was an express absence of commitment and that the type of turbines had not been chosen. The development description is entirely silent in this regard and there is nothing in the drawings which refers to the output.

In this regard, we submit that the Board should have full regard to the planning application documentation, in particular, we would draw the Board's attention to the following: -

- (i) There is no mention of megawatt output in any of the planning drawings;
- (ii) There is nothing in the project description which makes reference to megawatt output;
- (iii) Section 1 (Introduction) of the EIAR states:

*"This Environmental Impact Assessment Report (EIAR) has been prepared on behalf of Cloncant Renewable Energy Ltd. (CREL) for the development of a wind farm and associated development in the townlands of Ballykilleen, Shean, Kilcumber, Cloncant, Cushaling and Rathmore, Edenderry, Co. Offaly; Ballina, Geashill, Co. Offaly and Ticknevin, Carbury, Co. Kildare. CREL are seeking a 10-year permission to construct the development, which, when commissioned, would have an operational life of 30 years".*

- (iv) The EIAR makes clear that no specific turbine has been identified for the purposes of the planning application. Chapter 2 of the EIAR – (Description of the Proposed Development) states as follows:

*"In the case of wind farm developments, many elements of final engineering design, for example foundation solutions, hardstands, internal services roads, are completely reliant upon the choice of wind turbines. There are a number of makes and models of turbines which are expected to be suitable for this site, however the final choice of the turbines that would be installed will be subject to a competitive tendering procedure. Therefore, such decisions cannot be finalised either prior to or at the time of the planning application. As such it is normal practice to undertake the EIA based on the identified 'worst case scenario' for individual development components. Accordingly, the descriptive discussion on these project elements, as set out in this EIAR, provides for the anticipated maximum physical characteristics and various options as appropriate. For the purposes of this EIA, nine (9) candidate wind*



turbines with a blade tip height of up to 187 metres and a rotor diameter of up to 163 metres have been considered". [emphasis added]

There is therefore no reference to capacity input in the project description and what has been assessed for the purposes of the EIAR is "nine (9) candidate wind turbines with a blade tip height of up to 187 metres and a rotor diameter of up to 163 metres".

- (v) Similarly, Section 2.4.4.1 of the EIAR (Turbine Model) states as follows:

"The proposed turbine model will not be specified; however, the project has been designed using worst case models, including the noise and visual impact assessments. A tendering procedure will be undertaken for the supply of the turbines. The turbine ultimately selected will be certified under the International Electrotechnical Commission IEC 61400-1 safety standards and designed to withstand the environmental conditions encountered on site".

- (vi) Section 15.4.2 of the EIAR (Operational Phase) in relation to shadow flicker states as follows:

"The impact assessment has been completed by calculating the potential shadow flicker from turbines at the proposed locations using a turbine specification that represents a worst-case scenario for the project, i.e. a maximum rotor diameter of 163m and hub heights of 105.5m (T1 to T4) and 103.5m (T5 to T9). The exact turbine type will not be known until after the contract has been awarded under a competitive tender. The model was generated using industry-standard simulation software WindFarm™. The results are presented in Appendix 10."

The EIAR therefore does not specify the turbine that will be used to allow for a level of flexibility but states that what will be assessed is the worst-case scenario for the project, i.e. "a maximum rotor diameter of 163m and hub heights of 105.5m (T1 to T4) and 103.5m (T5 to T9)".

- (vii) The only reference in the EIAR to specific turbines MW and/or the overall megawatts is in the context of identifying a worst-case scenario for the purposes of assessment of environmental impacts of noise and also in the context of considering emissions savings. Section 3.6 of the EIAR (Alternative Sources of Energy) states as follows:

"The proposed development will contribute approximately 49.5MW of renewable energy to the grid. Should it not be developed, non-renewable energy sources will continue to be the main energy generation process to meet current energy demands. This will further contribute to greenhouse gas



*and pollutant production, and impede Ireland's commitment to meet its EU and national emissions targets and to strive towards sustainable development."* [emphasis added]

- (viii) Section 9.3.2.2 (Climate and CO2 Emissions) of the EIAR states as follows:

*"The impact of an operational wind farm on global warming and climate change would be considered positive. The electricity produced by wind turbines offsets the CO2 emissions that would otherwise have been generated from fossil fuel powered generators. One of the main drivers for renewable electricity generation is the need to reduce greenhouse gas emissions, including CO2.*

*For the sake of this calculation if we assume an installed rated capacity of 5.5MW each per turbine and a capacity factor of 30%, then the minimum estimated annual MWh electricity generation is  $2 \times (5.5 \times 9 \times 365) \times (0.3) = 10,840.5$  MWh. Therefore the annual CO2 emissions savings is estimated to be 5802.6 tCO".*

- (ix) Section 10.1 of the EIAR (Noise) refers to an appropriate turbine model to be selected later.

*"Ultimately, the most appropriate turbine model and operating modes will be selected in order to achieve the noise limits set down in the current DoEHLG Wind Energy Development Guidelines, 2006 or imposed by way of planning condition."*

- (x) Section 10.3.2.1 of the EIAR (Noise) refers to a 5.5MW turbine and this is what has been assessed as the worst-case scenario in terms of the loudest turbine.

*"The maximum operating sound power level of the candidate turbine, namely the Siemens Gamesa 155 is 107.8dB(A)."*

- (xi) Section 3.6 of the inspector's report for both planning permissions stated that: *"The proposed windfarm will generate approx. 49.5MW of energy"*, indicating that in the context of the consideration of the planning applications, the reference to energy production was regarded in approximate terms and was not considered a maximum.

As demonstrated by these extracts, the terms of the planning permission do not restrict installed capacity and therefore allow for installed capacity to 59.5MW. The language used in the EIAR is "approximately" 49.5MW and this is "assumed" in section 9.3.2.2, and this were used on a purely indicative basis solely for the purposes of calculating greenhouse gas emission savings.

## Environmental Considerations of Proposal

Neither the NIS nor the EIAR specify the MW output from the wind farm as the WTG to be installed is subject to change. However, a number of calculations and assumptions on MW output were used in the EIAR in order to complete the comprehensive assessment. In order to show these assumptions are still within the worst-case scenario and that the 6.6MW WTGs that are proposed for the Permitted Development are still within the parameters assessed within the EIAR we request that the Board consider the following;

1. Noise modelling in the EIAR had to assume a WTG noise input in order to reach a conclusion within the assessment. Section 10.3.2.1 within the EIAR outlined the inputs that were used were for the Siemens Gamesa SG155 5.5MW that had a maximum operating sound power level of 107.8dB (A). See below Table 10-8 from the EIAR showing the sound power levels used in the model (note 2dB are added within the model to the manufacturers values to account for various uncertainties in accordance with the Institute of Acoustics Guidelines).

**Table 10-8. Siemens SG 155 – Total Sound Power Levels**

Wind Speed (m/s)	dB LwA	dB LwA (+2dBA)
4	98.5	100.5
5	103.8	105.8
6	107.8	109.8
7	107.8	109.8
>10	107.8	109.8

The Section 5 determination now before the Board requires consideration of the Siemens Gamesa SG 155 6.6 MW being adopted for the Permitted Development. The maximum noise emission from the SG 155 6.6 MW is 105dB (A) with the below table showing the sound power levels.

Wind speed (m/s)	3	4	5	6	7	8	9	10	11	12	Up to cut-out
AWD	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-1	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-2	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-3	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-4	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-5	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-6	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-7	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-8	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
N1	92	92	94.8	98.8	102.1	104.0	104.0	104.0	104.0	104.0	104.0
N2	92	92	94.8	98.8	102.1	103.5	103.5	103.5	103.5	103.5	103.5
N3	92	92	94.8	98.8	102.0	102.0	102.0	102.0	102.0	102.0	102.0
N4	92	92	94.8	98.8	101.0	101.0	101.0	101.0	101.0	101.0	101.0
N5	92	92	94.8	98.8	100.0	100.0	100.0	100.0	100.0	100.0	100.0
N6	92	92	94.8	98.8	99.0	99.0	99.0	99.0	99.0	99.0	99.0

As can be seen the SG 155 6.6 MW WTG maximum noise output is 2.8dB(A) lower than the 5.5MW WTG that was modelled and assessed within the EIAR. The new WTGs are quieter and are within the parameters as modeled and assessed within the EIAR. It is concluded that the reduction of noise levels will lessen any potential impact on the local environment.

2. The Air and Climate impact assessment within the EIAR uses an assumed MW to estimate the CO<sub>2</sub> emissions savings by the use of a renewable energy versus a fossil fuel powered generator. For the sake of the calculation a 5.5MW WTG was used. The use of a 6.6MW WTG will only increase the CO<sub>2</sub> savings calculated and is therefore within the worst-case scenario assessed of the EIAR.
3. The Material Assets Impact Assessment within the EIAR addressed the potential impact of nine turbines (no specific MW was given as it was considered and deemed not necessary for the assessment). As part of early planning and consultation with EirGrid the project identified that a new 110kV substation would be required and this was included in the design of the Permitted Development. The permitted substation (now called Philipstown 110kV substation) created the capacity for the national grid to take MW output from the wind farm. Indeed, there was sufficient capacity left over for additional projects in the future to be able to join the grid at this new substation. This was part of the project description included in the impact assessment on material assets that concluded a positive impact on the national grid through the addition of infrastructure and increased MW of renewable energy.

The use of the 6.6MW turbines is within the parameters of the impact on material assets assessment and will not change the conclusion.

The WTG dimensions will remain the same as permitted. The 6.6MW WTG is within the parameters assessed in the EIAR and NIS, and the Conditions of the Planning Permission will be complied with.

## Further Considerations

These submissions have addressed the request from the Board pursuant to section 131 of the 2000 Act. In light of the prevailing circumstances, for completeness, we intend to briefly address items raised in the Quashed Declaration. These are matters which we consider to be outside of the Board's consideration under section 5(1) of the 2000 Act, as to "*what, in any particular case, is or is not development or is or is not exempted development*" and cannot be lawfully considered in this Section 5 determination.

Firstly, the consideration of the strategic infrastructure development (SID) procedure does not affect whether the proposal is development, as defined in section 3(1) of the 2000 Act, or exempted development, as defined in section 4 of the 2000 Act or in the Planning and Development Regulations 2001 – 2023 and is not a relevant matter in determining the question referred under section 5. It has

no bearing on the question of whether a matter is or is not development for the purposes of a section 5 declaration.

In terms of the grid connection and grid capacity, it is respectfully submitted that these do not fall for consideration by the Board in their determination under Section 5 as included in the Quashed Declaration. For clarity, that the grid connection does not form part of the Planning Permission.

In terms of Grid Capacity, the 6.6MW WTGs that are proposed for the Permitted Development will have an installed capacity of 59.4MW. However, capacity allocation is, in this case, within the remit of EirGrid as Transmission System Operator (TSO) and is not a lawful consideration under a section 5 declaration. In this respect, under its current Grid Connection Agreement with EirGrid, the Applicant is limited to exporting 50 MW from the wind farm. The 50 MW maximum export capacity was allocated to the Applicant in accordance with the terms of EirGrid Enduring Connection Policy Stage 2 (ECP-2.1).

Moreover, an increased output capacity from 49.5MW to 59.4MW will have no impact on the size or scale of the Permitted Development.

## Conclusion

In conclusion, the proposal of the 6.6MW WTG for the Permitted Development does not constitute works. An increase in energy use does not amount to a material change in use, as there are no planning considerations which could lead to a conclusion of a material change in use.

An examination of the plans and particulars, including the EIAR and the inspector's reports on the planning application confirms that no defined commitment to specific limits of installed capacity could be taken to have been incorporated into the Planning Permission by virtue of a general condition such as condition 1 of the Planning Permission. 49.5MW is not a defined commitment in the Planning Permission.

In conclusion, it is submitted the Proposal is not '*development*' for the purposes of section 3 of the 2000 Act.

Yours sincerely,



Graeme Thornton MWP

On behalf of Cloncant Renewable Energy Ltd.

Planning Ref: ABP-317245-23  
4<sup>th</sup> September 2023.

The Secretary,  
An Bord Pleanála,  
64 Marlborough Street,  
Dublin 1  
**BY HAND**

AN BORD PLEANÁLA	
LDG-	_____
ABP-	_____
04 SEP 2023	
Fee: €	Type: _____
Time: 10:18	By: <u>Hand</u>

Planning Reference: ABP-317245-23

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Ballykilleen, Shean, Kilcumber, Cloncant, Cushaling and Rathmore, Edenderry, Co. Offaly.

Dear Sir / Madam,

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## Background

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Registered Office: Park House, Bessboro Road, Blackrock, Cork, Ireland



development and is or is not exempted development. Pursuant to section 5(4) of the 2000 Act, Offaly County Council referred the question to the Board on 12 April 2020.

The subsequent declaration by the Board dated 8 October 2021 was made pursuant to section 5(3)(a) of the 2000 Act under its reference ABP – 309940-21, that the increase in the MW output of a permitted windfarm development, without increasing the size and scale of any of the works, layout or plans, at Ballykilleen, Shean, Kilcumber, Cloncant and Cushaling, Edenderry, County Offaly is development and is not exempted development. This declaration was subsequently quashed by Court Order dated 20 June 2022 (2021/1001 JR) (**“the Quashed Declaration”**) and remitted back to the Board for determination.

The matter involves the permitted Cushaling Wind Farm in counties Kildare and Offaly. (**“the Permitted Development”**) The Permitted Development was permitted under two planning permissions (ABP-306748-20 and ABP-306924-20). A corresponding submission has also been provided for ABP-306748-20 and this submission relates to ABP-306924-20 (**“the Planning Permission”**) for one (8) consented turbines in Co. Offaly, forming part of a wind farm of up to nine (9) wind turbines and all associated infrastructure, including an underground cable connection, an off-site substation, a battery energy storage facility and an amenity trail. One (1) of the consented turbines is in Co. Kildare, with a further eight (8) in Co. Offaly. The consented turbines have a tip height of up to 187m.

Both planning permissions contained conditions relating to design, but only in respect of colour of the wind turbines, which had to be approved by the local planning authority. However, neither planning permission contained a condition expressly limiting the output or installed capacity of the turbines.

## Submission Overview

This submission has been prepared to inform the Board as to why the increase in MW output at the Permitted Development is not development within the meaning of section 3 of the 2000 Act.

## Reasons for Proposal

It is widely recognised that wind energy development is a dynamic area with ongoing technological advances. Turbines of increased efficiency consistently emerge to the market, sometimes of a larger dimension and sometimes within the same dimension parameters contained and assessed within a planning application, as is now the case with the Permitted Development. While there is no change required to the dimensions of the permitted turbines, or to the associated hardstands or infrastructure, there are now 6.6 MW turbines available which comply with the permitted dimensions, including the tip height of up to 187m. The Permitted Development can therefore now be developed in accordance with the plans and particulars and in compliance with the Conditions of

the Planning Permission with an increased output of 59.4 MW. For clarity, the Permitted Development can be constructed and operated as described in the Environmental Impact Assessment Report (EIAR), Natura Impact Statement (NIS) and the Planning Drawings.

At the time of the application for planning, a turbine candidate of up to 5.5 MW was available and with 9 turbines, the expected yield was 49.5 MW. At the time of writing, machines are available that are at the same size and scale as the permitted turbines, but due to advancements in technology, the internal generator has a capacity up to 6.6 MW which would increase the output of the wind farm to 59.4 MW.

Therefore, while an increased capacity is positive in terms of energy output, it does not require an increase in the size or scale of the development and the permitted wind farm can be developed in accordance with the plans and particulars originally submitted and the conditions of the Planning Permission.

Whether the Proposal is or is not development and is or is not exempted development.

The Proposal and the question of whether this increase in MW is considered development or exempt development, has been remitted to the Board for determination by High Court Order dated 20 June 2022.

What is *Development*?

Section 3(1) of the 2000 Act defines development -

*except where the context otherwise requires, "development" means—*

*(a) the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land, or*

*(b) development within the meaning of Part XXI (inserted by section 171 of the Maritime Area Planning Act 2021).*

Only Part (a) requires consideration for the purposes of the Permitted Development. It is therefore necessary to consider the Proposal as follows -

1. Whether this will result in additional "works" that have not been provided for in the Permitted Development; and
2. Whether the increase in MW will result in a "material change in use" for the purposes of Section 3(1)(a).



## Works

Section 2 of the 2000 Act defines Works as –

*“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.*

It is evident from the application and as set out in this submission, there will be no increase in the size and scale of any works, layout or plans at the Permitted Development through the use of the 6.6 MW WTGs as these are of the same size and scale as those assessed and provided for in the plans and particulars of the Permitted Development.

This was accepted by the Board in their original Section 5 determination, the Quashed Declaration.

## Material Change of Use

As the Proposal does not constitute *works*, a determination that the increase in MW could be considered Development for the purposes of section 3(1) of the 2000 Act can only be founded on the basis that this amounts to a material change in the use of any land or structures situated on land.

In order to consider in full whether there has been a ‘material change of use’ it is necessary to consider first, that there is a change in use and secondly, the change must be material, that being material for planning purposes. Not every change or increase or intensification in use will in itself amount to a material change of use<sup>1</sup>. This must be considered in accordance with current planning considerations for the relevant area and the factual circumstances pertaining.

For the purposes of section 3(1)(a) of the 2000 Act, a material change of use means material in planning terms and there are no planning considerations arising that could lead to a conclusion in this instance that could be a material intensification and / or change in use.

As set out in *Cork County Council v Slattery Pre Cast Concrete Ltd [2008]*, the assessment of whether an intensification of use amounts to a sufficient intensification to give rise to a material change in use must be assessed by reference to planning criteria. As clarified by Clarke J in that case, if the changes are such that they have an effect on the sort of matters which would properly be considered from a planning or environmental perspective, it might be said that there was a material change of use.

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<sup>1</sup> *Cork County Council v Slattery Pre Cast Concrete Ltd [2008]* IEHC 291 at paras 2.6 and 9.5.

Significant changes in vehicle use (and in particular heavy vehicle use that might not otherwise be expected in the area) are one such example, changes in the visual amenity or noise are others.<sup>2</sup>

The proposed increase in MW output will not result in any increase in the size and scale of the Permitted Development. In these circumstances, the Proposal would not have an effect on planning or environmental matters, such as noise, increase in scale, traffic movement or other matters which would give rise to material planning or environmental considerations. The visual impact of the constructed development will remain as indicated on the planning drawings approved by the Board in granting Planning Permission.

## Permitted Development

It is also necessary to consider what has been authorised under the terms of the existing Planning Permission.

The description of the development sought, as advertised in the public notices, set out in the planning application and reflected in the Board Order makes no mention of 49.5 MW or any particular make or type of turbine. No specific condition of the planning permissions limits the windfarm to 49.5 MW and/or the use of particular turbines.

To further consider what has been permitted by the Planning Permission it is necessary to consider Condition 1 of the permission;

*"The development shall be carried out and completed in accordance with the plans and particulars lodged with the application, as amended by the further plans and particulars received by An Bord Pleanála on the 19th day of March, 2020, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars.*

*Reason: In the interest of clarity"*

In order for a matter to constitute a "particular" for the purposes of Condition 1, a matter contained in the application must be specific and/or involve a clear commitment. *Lanigan v Barry [2016]*<sup>3</sup> makes clear that for a particular to be of a binding nature, it must be in the form of a "clear commitment". Whilst detail regarding megawatt output is provided in the planning documentation, no clear commitment is provided which would have the effect of limiting the megawatt output to 49.5MW.

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<sup>2</sup> [2008] IEHC 291 at para.7.5

<sup>3</sup> 1 IR 656

When the planning documentation is considered as a whole, there is no basis for contending that any clear commitment was given that the output of the nine turbines would be limited to 49.5MW. In fact, the extracts from the EIAR, set out below, positively demonstrate that there was an express absence of commitment and that the type of turbines had not been chosen. The development description is entirely silent in this regard and there is nothing in the drawings which refers to the output.

In this regard, we submit that the Board should have full regard to the planning application documentation, in particular, we would draw the Board's attention to the following: -

- (i) There is no mention of megawatt output in any of the planning drawings;
- (ii) There is nothing in the project description which makes reference to megawatt output;
- (iii) Section 1 (Introduction) of the EIAR states:

*"This Environmental Impact Assessment Report (EIAR) has been prepared on behalf of Cloncant Renewable Energy Ltd. (CREL) for the development of a wind farm and associated development in the townlands of Ballykilleen, Shean, Kilcumber, Cloncant, Cushaling and Rathmore, Edenderry, Co. Offaly; Ballina, Geashill, Co. Offaly and Ticknevin, Carbury, Co. Kildare. CREL are seeking a 10-year permission to construct the development, which, when commissioned, would have an operational life of 30 years".*

- (iv) The EIAR makes clear that no specific turbine has been identified for the purposes of the planning application. Chapter 2 of the EIAR – (Description of the Proposed Development) states as follows:

*"In the case of wind farm developments, many elements of final engineering design, for example foundation solutions, hardstands, internal services roads, are completely reliant upon the choice of wind turbines. There are a number of makes and models of turbines which are expected to be suitable for this site, however the final choice of the turbines that would be installed will be subject to a competitive tendering procedure. Therefore, such decisions cannot be finalised either prior to or at the time of the planning application. As such it is normal practice to undertake the EIA based on the identified 'worst case scenario' for individual development components. Accordingly, the descriptive discussion on these project elements, as set out in this EIAR, provides for the anticipated maximum physical characteristics and various options as appropriate. For the purposes of this EIA, nine (9) candidate wind*

turbines with a blade tip height of up to 187 metres and a rotor diameter of up to 163 metres have been considered". [emphasis added]

There is therefore no reference to capacity input in the project description and what has been assessed for the purposes of the EIAR is "nine (9) candidate wind turbines with a blade tip height of up to 187 metres and a rotor diameter of up to 163 metres".

- (v) Similarly, Section 2.4.4.1 of the EIAR (Turbine Model) states as follows:

"The proposed turbine model will not be specified; however, the project has been designed using worst case models, including the noise and visual impact assessments. A tendering procedure will be undertaken for the supply of the turbines. The turbine ultimately selected will be certified under the International Electrotechnical Commission IEC 61400-1 safety standards and designed to withstand the environmental conditions encountered on site".

- (vi) Section 15.4.2 of the EIAR (Operational Phase) in relation to shadow flicker states as follows:

"The impact assessment has been completed by calculating the potential shadow flicker from turbines at the proposed locations using a turbine specification that represents a worst-case scenario for the project, i.e. a maximum rotor diameter of 163m and hub heights of 105.5m (T1 to T4) and 103.5m (T5 to T9). The exact turbine type will not be known until after the contract has been awarded under a competitive tender. The model was generated using industry-standard simulation software WindFarm™. The results are presented in Appendix 10."

The EIAR therefore does not specify the turbine that will be used to allow for a level of flexibility but states that what will be assessed is the worst-case scenario for the project, i.e. "a maximum rotor diameter of 163m and hub heights of 105.5m (T1 to T4) and 103.5m (T5 to T9)".

- (vii) The only reference in the EIAR to specific turbines MW and/or the overall megawatts is in the context of identifying a worst-case scenario for the purposes of assessment of environmental impacts of noise and also in the context of considering emissions savings. Section 3.6 of the EIAR (Alternative Sources of Energy) states as follows:

"The proposed development will contribute approximately 49.5MW of renewable energy to the grid. Should it not be developed, non-renewable energy sources will continue to be the main energy generation process to meet current energy demands. This will further contribute to greenhouse gas

*and pollutant production, and impede Ireland's commitment to meet its EU and national emissions targets and to strive towards sustainable development."* [emphasis added]

- (viii) Section 9.3.2.2 (Climate and CO2 Emissions) of the EIAR states as follows:

*"The impact of an operational wind farm on global warming and climate change would be considered positive. The electricity produced by wind turbines offsets the CO2 emissions that would otherwise have been generated from fossil fuel powered generators. One of the main drivers for renewable electricity generation is the need to reduce greenhouse gas emissions, including CO2.*

*For the sake of this calculation if we assume an installed rated capacity of 5.5MW each per turbine and a capacity factor of 30%, then the minimum estimated annual MWh electricity generation is  $2 \times (5.5 \times 9 \times 365) \times (0.3) = 10,840.5$  MWh. Therefore the annual CO2 emissions savings is estimated to be 5802.6 tCO".*

- (ix) Section 10.1 of the EIAR (Noise) refers to an appropriate turbine model to be selected later.

*"Ultimately, the most appropriate turbine model and operating modes will be selected in order to achieve the noise limits set down in the current DoEHLG Wind Energy Development Guidelines, 2006 or imposed by way of planning condition."*

- (x) Section 10.3.2.1 of the EIAR (Noise) refers to a 5.5MW turbine and this is what has been assessed as the worst-case scenario in terms of the loudest turbine.

*"The maximum operating sound power level of the candidate turbine, namely the Siemens Gamesa 155 is 107.8dB(A)."*

- (xi) Section 3.6 of the inspector's report for both planning permissions stated that: *"The proposed windfarm will generate approx. 49.5MW of energy"*, indicating that in the context of the consideration of the planning applications, the reference to energy production was regarded in approximate terms and was not considered a maximum.

As demonstrated by these extracts, the terms of the planning permission do not restrict installed capacity and therefore allow for installed capacity to 59.5MW. The language used in the EIAR is "approximately" 49.5MW and this is "assumed" in section 9.3.2.2, and this were used on a purely indicative basis solely for the purposes of calculating greenhouse gas emission savings.

## Environmental Considerations of Proposal

Neither the NIS nor the EIAR specify the MW output from the wind farm as the WTG to be installed is subject to change. However, a number of calculations and assumptions on MW output were used in the EIAR in order to complete the comprehensive assessment. In order to show these assumptions are still within the worst-case scenario and that the 6.6MW WTGs that are proposed for the Permitted Development are still within the parameters assessed within the EIAR we request that the Board consider the following;

1. Noise modelling in the EIAR had to assume a WTG noise input in order to reach a conclusion within the assessment. Section 10.3.2.1 within the EIAR outlined the inputs that were used were for the Siemens Gamesa SG155 5.5MW that had a maximum operating sound power level of 107.8dB (A). See below Table 10-8 from the EIAR showing the sound power levels used in the model (note 2dB are added within the model to the manufacturers values to account for various uncertainties in accordance with the Institute of Acoustics Guidelines).

**Table 10-8. Siemens SG 155 – Total Sound Power Levels**

Wind Speed (m/s)	dB LwA	dB LwA (+2dBA)
4	98.5	100.5
5	103.8	105.8
6	107.8	109.8
7	107.8	109.8
>10	107.8	109.8

The Section 5 determination now before the Board requires consideration of the Siemens Gamesa SG 155 6.6 MW being adopted for the Permitted Development. The maximum noise emission from the SG 155 6.6 MW is 105dB (A) with the below table showing the sound power levels.

Wind speed [m/s]	3	4	5	6	7	8	9	10	11	12	Up to cut-out
AM0	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-1	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-2	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-3	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-4	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-5	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-6	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-7	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
AM-8	92	92	94.8	98.8	102.1	105.0	105.0	105.0	105.0	105.0	105.0
N1	92	92	94.8	98.8	102.1	104.0	104.0	104.0	104.0	104.0	104.0
N2	92	92	94.8	98.8	102.1	103.5	103.5	103.5	103.5	103.5	103.5
N3	92	92	94.8	98.8	102.0	102.0	102.0	102.0	102.0	102.0	102.0
N4	92	92	94.8	98.8	101.0	101.0	101.0	101.0	101.0	101.0	101.0
N5	92	92	94.8	98.8	100.0	100.0	100.0	100.0	100.0	100.0	100.0
N6	92	92	94.8	98.8	99.0	99.0	99.0	99.0	99.0	99.0	99.0

As can be seen the SG 155 6.6 MW WTG maximum noise output is 2.8dB(A) lower than the 5.5MW WTG that was modelled and assessed within the EIAR. The new WTGs are quieter and are within the parameters as modeled and assessed within the EIAR. It is concluded that the reduction of noise levels will lessen any potential impact on the local environment.

2. The Air and Climate impact assessment within the EIAR uses an assumed MW to estimate the CO<sub>2</sub> emissions savings by the use of a renewable energy versus a fossil fuel powered generator. For the sake of the calculation a 5.5MW WTG was used. The use of a 6.6MW WTG will only increase the CO<sub>2</sub> savings calculated and is therefore within the worst-case scenario assessed of the EIAR.
3. The Material Assets Impact Assessment within the EIAR addressed the potential impact of nine turbines (no specific MW was given as it was considered and deemed not necessary for the assessment). As part of early planning and consultation with EirGrid the project identified that a new 110kV substation would be required and this was included in the design of the Permitted Development. The permitted substation (now called Philipstown 110kV substation) created the capacity for the national grid to take MW output from the wind farm. Indeed, there was sufficient capacity left over for additional projects in the future to be able to join the grid at this new substation. This was part of the project description included in the impact assessment on material assets that concluded a positive impact on the national grid through the addition of infrastructure and increased MW of renewable energy.

The use of the 6.6MW turbines is within the parameters of the impact on material assets assessment and will not change the conclusion.

The WTG dimensions will remain the same as permitted. The 6.6MW WTG is within the parameters assessed in the EIAR and NIS, and the Conditions of the Planning Permission will be complied with.

## Further Considerations

These submissions have addressed the request from the Board pursuant to section 131 of the 2000 Act. In light of the prevailing circumstances, for completeness, we intend to briefly address items raised in the Quashed Declaration. These are matters which we consider to be outside of the Board's consideration under section 5(1) of the 2000 Act, as to *"what, in any particular case, is or is not development or is or is not exempted development"* and cannot be lawfully considered in this Section 5 determination.

Firstly, the consideration of the strategic infrastructure development (SID) procedure does not affect whether the proposal is development, as defined in section 3(1) of the 2000 Act, or exempted development, as defined in section 4 of the 2000 Act or in the Planning and Development Regulations 2001 – 2023 and is not a relevant matter in determining the question referred under section 5. It has



no bearing on the question of whether a matter is or is not development for the purposes of a section 5 declaration.

In terms of the grid connection and grid capacity, it is respectfully submitted that these do not fall for consideration by the Board in their determination under Section 5 as included in the Quashed Declaration. For clarity, that the grid connection does not form part of the Planning Permission.

In terms of Grid Capacity, the 6.6MW WTGs that are proposed for the Permitted Development will have an installed capacity of 59.4MW. However, capacity allocation is, in this case, within the remit of EirGrid as Transmission System Operator (TSO) and is not a lawful consideration under a section 5 declaration. In this respect, under its current Grid Connection Agreement with EirGrid, the Applicant is limited to exporting 50 MW from the wind farm. The 50 MW maximum export capacity was allocated to the Applicant in accordance with the terms of EirGrid Enduring Connection Policy Stage 2 (ECP-2.1).

Moreover, an increased output capacity from 49.5MW to 59.4MW will have no impact on the size or scale of the Permitted Development.

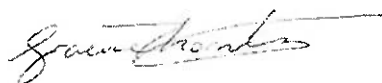
## Conclusion

In conclusion, the proposal of the 6.6MW WTG for the Permitted Development does not constitute works. An increase in energy use does not amount to a material change in use, as there are no planning considerations which could lead to a conclusion of a material change in use.

An examination of the plans and particulars, including the EIAR and the inspector's reports on the planning application confirms that no defined commitment to specific limits of installed capacity could be taken to have been incorporated into the Planning Permission by virtue of a general condition such as condition 1 of the Planning Permission. 49.5MW is not a defined commitment in the Planning Permission.

In conclusion, it is submitted the Proposal is not 'development' for the purposes of section 3 of the 2000 Act.

Yours sincerely,



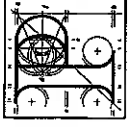
Graeme Thornton MWP

On behalf of Cloncant Renewable Energy Ltd.

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