

Derek Kelly

Sorcha.

From: Bord
Sent: Wednesday 29 June 2022 16:01
To: Appeals2
Subject: FW: Substitute Consent Application SU04.307939
Attachments: 29.06.2022 Submission to ABP.pdf; Enc.1 15.02.2019 - Email Letter to Anne Foley Solicitor.pdf; Enc.2 Schedule of Scientific and Technical Materials Previously Provided to the Board.pdf

From: Joe Noonan <jnoonan@nlcc.ie>
Sent: Wednesday, June 29, 2022 3:52 PM
To: Bord <bord@pleanala.ie>
Cc: Pippa Willows <pippawillows@nlcc.ie>
Subject: Substitute Consent Application SU04.307939

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TO: The Secretary, An Bord Pleanála

FROM:

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The Secretary
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~ By Email – bord@pleanala.ie ~

29 June 2022
Our ref: 101-20/JN/PW

RE: Our Clients: Klaus Balz and Hanna Heubach, Bear na Gaoithe, Inchigeelagh.

Substitute Consent Application SU04.307939: Townlands of Reananerree, Cloontycarthy, Cleanrath North, Derrineanig, Cleanrath South, Milmorane, Coombilane, Rathgaskig, Augeris, Gorteenakilla, Carrignadoura, Gurteenowen, Gurteenflugh, Lyrenageeha and Lackabaun, Co. Cork

Applicant: Cleanrath Windfarm Limited ("Cleanrath")

Dear Sir/Madam,

We refer to your letter of 5th May 2022 giving our clients an opportunity to make a comment on the material the Board has received from Cleanrath on the existence of exceptional circumstances. The Board letter indicated that our clients could comment within a five week period which would begin when the Board had received copy Notices from Cleanrath. We are advised by the Board that the notices in question were received on 27th May 2022. Accordingly our clients may make their comments up to and including 30th June 2022.

The Application for Substitute Consent

The Board has received an application for Substitute Consent from Cleanrath seeking to retain 9 no. turbines it constructed while the litigation on the validity of the 2017 Board planning permission was under way. The construction works continued and were only completed *after* the Supreme Court had found the permission decision by the Board to be invalid. The submission made on behalf of Cleanrath omits that crucial fact.

The submission also mischaracterises the fundamental nature of the Supreme Court's findings.

JOE NOONAN BCL COMM FOR OATHS MARY LINEHAN BCL EAMONN CARROLL BCL LLM PHILIP COFFEY BCL LLM CLAIRE COLEMAN BCL

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Further, the submission relies on a misleading assertion made on behalf of Cleanrath that *'the decision by the Board was fully informed by a detailed EIA and AA which was completed by the Board in its consideration of the application'*, omitting to acknowledge that the decision in its entirety including the Board's EIA and AA findings has been quashed by the Supreme Court.

Section 177K(1A)(a) and 177D(2)

The law provides that the Board shall not grant substitute consent unless it is satisfied that exceptional circumstances exist *that would justify a grant* of such consent (our emphasis added). See Section 177K(1A)(a).

A non-exhaustive list of matters the Board is to have regard to when considering whether exceptional circumstances exist is given in Section 177D(2). There are seven in all, in Section 177D(2)(a)-(g). We will comment on each of these in turn below.

(2) In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

(a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;"

We submit that it would circumvent the purpose and objectives of both the Environmental Impact Assessment Directive and the Habitats Directive in this case. Our reasons are as follows.

Having carried out its own assessments under the EIA and Habitats Directives, Cork County Council refused permission for this scale of development on grounds of likely environmental damage on each of the two occasions an application was made to it by Cleanrath.

The purpose of the Directives is to ensure that assessment takes place before development. This did not happen here. The Board failed to take relevant considerations relating to environmental impacts into account and as a result the Supreme Court quashed the permission including the Board's EIA and AA findings. The Board decision said that it had completed an EIA and AA. However that decision no longer stands. The Board's decision was quashed in its entirety by the Court. It is surprising therefore that the argument is now made on behalf of Cleanrath that *'the decision of the Board was fully informed by a detailed EIA and AA...'*. That decision has been quashed. It has neither effect nor relevance.

Granting substitute consent to this development in these circumstances may encourage other developers to proceed similarly in future while judicial review proceedings are underway. That would undermine the integrity of the system of prior assessment that is at the heart of both the EIA Directive and the Habitats Directive.

(b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;

Cleanrath argues that it could reasonably have had such a belief. We say that it could not. The Supreme Court told Cleanrath on 12th December 2019 that it did not have a valid permission while the development was still underway. Please see the Supreme Court Judgment of December 2019 [here](#).

Despite that, Cleanrath carried on with the works.

Cleanrath had decided at its own risk to clear the site and commence works including starting to erect turbines while it knew an appeal was pending before the Supreme Court. Cleanrath was a Notice Party to the appeal in which it participated and was legally represented.

Cleanrath was fully aware of all aspects of the appeal including the fact that the appeal challenged the validity of the EIA conducted by the Board because of the failure to consider certain aspects of the likely environmental impact.

While the planning permission was extant at the time of commencing construction and erection of the turbines, Cleanrath was aware that the likely outcome of a successful appeal would be to quash the planning permission outright with retrospective effect. This is well established law and this is what occurred. The company was not taken by surprise. Cleanrath gambled on the outcome of the appeal and lost. These are not 'exceptional circumstances' that would justify the granting of substitute consent. They are instead a failed gamble.

In their latest submission Cleanrath do not address the fact that the company continued works after the Supreme Court ruling that the permission was invalid on 12 December 2019. This fact is recited and criticised by the Supreme Court in a second judgment in the case delivered on 5th May 2020 which is available [here](#).

As the Court says in that judgment (para. 16) – “Turbine No. 6 was completed on the 16th and 17th of December, and further necessary site clearance works were carried out up until the 20th of December”.

That sets the context for what the Court says at paragraph 44 (emphasis added by us):

"The fact that a court delivers judgment and then offers the parties an opportunity to make submissions in relation to the terms of the order to be made and the relief to be granted, together with the fact that, normally, the formal order of the court dealing with the proceedings will not issue until all matters are concluded, is one more illustration of the requirement of fair procedures and that parties are given the opportunity to make submissions before orders are made affecting them. The opportunity given is not, and has never been understood as, an opportunity to press on with works and seek to achieve something that might not be permitted or be lawful if the order is made in terms of the judgment already delivered. All parties are obliged to respect the decisions of the court, and if one party does not do so, and attempts to obtain some advantage, justice may require that the court takes steps to ensure that a party does not benefit thereby. Where a person carries on with work in the face of proceedings, a court may take the unusual step of granting a mandatory injunction to require the works to be reversed, and that position must apply with, if anything, greater force when such steps are taken in the light of an adverse judgment of the court, but before a formal order."

There is therefore no credibility to Cleanrath's claim that it had a 'reasonable belief' that the development was not unauthorised. The Supreme Court had told Cleanrath it was unauthorised. The Board, like a Court, must not confer a benefit on Cleanrath in these circumstances.

(c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;

Both elements here have been substantially impaired. The turbines are in place. The roads and cables are laid. The damage to our clients' residential and business amenity has taken place and is irreversible unless the source is removed. Similarly the works posing risk of damage to the habitat feared by the local authority have taken place. Public participation has been rendered all but futile.

(d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;

We refer the Board again to the expert assessments carried out by Cork County Council in relation to the two previous planning applications both of which concluded that the development of the scale now proposed were unacceptable on environmental grounds. We also refer the Board once again to the scientific and technical materials we submitted to the Board on behalf of our clients in relation to the planning permission quashed by the Supreme Court. See Schedule attached.

This development has had and, if permitted, would continue to have significant adverse impacts. There are exceptional circumstances under this heading which would justify a grant of substitute consent.

(e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;

Removal of the turbines and associated infrastructure would to a considerable degree remediate the significant effects and adverse effects already sustained.

(f) Whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development.

We have already given details of the unauthorised development works carried out by Cleanrath at this site.

(g) such other matters as the Board considers relevant.

We ask the Board to consider the entirety of the circumstances in this case which we submit militate against the grant of substitute consent to Cleanrath for this development.

Board History

This history of repeated unlawful conduct by the Board in dealing with the two Cleanrath planning applications that have come before it to date is unfortunately a factor that must be highlighted at this stage.

Unlawful Board decisions in favour of Cleanrath

No. 1 - The 2013 Decision

Cleanrath's first planning application at the site was for 11 no. turbines, roads, and ancillary works. Cork County Council refused that application in June 2012 on environmental grounds and by reason of deficiency in the road network.

The Council's reasons for refusal were *inter alia*:

1. that the development was premature due to deficient road networks
2. that the development would be partially located within habitats of high conservation value under Annex 1 of the Habitats Directive
3. that the development was located within areas of ecological sensitivity, including Special Areas of Conservation (SAC) and Special Protection Areas (SPA) and that the NIS lacked sufficient information to enable an Appropriate Assessment to be completed.

Cleanrath appealed the refusal.

The Board gave permission on 29 April 2013 (Reg. Ref. PL04.240801). The Board rejected our clients' submissions and the views of the Local Authority in reaching its decision to give permission. It even rejected the recommendation of its own Inspector to permit only 7 no. turbines and to omit 4 no. turbines on environmental grounds.

Our clients took judicial review proceedings. The High Court held in our clients' favour, quashing the Board's decision on 25 February 2016 on environmental grounds. We refer to the detailed Judgment of Mr Justice Barton which can be found [here](#). The Court found that the Board had acted unlawfully in:

1. failing to discharge its obligations under the EIA Directive; and
2. failing to discharge its obligations under the Habitats Directive.

The Court quashed the permission outright. The judgment referred to the unsatisfactory approach taken by the Board to assessing environmental impacts and with regard to Appropriate Assessment as well as in failing to give reasons for its conclusions. The Board did not appeal the judgment.

Unlawful Board decisions in favour of Cleanrath

No. 2 The 2017 Decision

Before the High Court had delivered its judgment in the judicial review of the 2013 permission, Cleanrath had lodged a second application for 11 no. turbines, roads and ancillary works. The turbine tip heights were to be increased to 150 metres from the previously sought 126 metres.

Cork County Council refused permission for 5 no. turbines and gave permission for 6 no. turbines only. The Council reason for refusing permission for 5 no. turbines, their ancillary construction roads and hardstanding areas was stated to be:

“In the interests of minimising negative impacts on habitats and species of high biodiversity value within the site.”

Cleanrath appealed that decision.

The Board gave permission on 19 May 2017 (Reg. Ref. PL04.246742) for all 11 no. wind turbines. The Board gave this permission despite our clients' submissions and contrary to the reasoned views of the Local Authority in relation to adverse environmental impacts.

Our clients again took judicial review proceedings. On 12 December 2019 the Supreme Court unanimously found in favour of our clients. The Court quashed the planning permission decision made by the Board. It found that the Board had unlawfully failed to take our clients' submissions into account at all when considering the application. Please see the Supreme Court Judgment of December 2019 [here](#).

We refer in particular to the following remarks of Mr Justice O'Donnell who delivered judgment on behalf of the Court:

“57. [...] It is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case. This is fundamental not just to the law, but also to the trust which members of the public are required to have in decision making institutions if the individuals concerned, and the public more generally, are to be expected to accept decisions with which, in some cases, they may profoundly disagree, and with whose consequences they may have to live. [...]”

The latest submission on behalf of Cleanrath caricatures the Supreme Court Judgment as having quashed the Board's decision by reason of 'a procedural error'. The Court found that the Board had failed to take material given to it by our clients (material which was relevant to the EIA and AA as well as to the planning assessment) into account. The Supreme Court viewed that failure as a serious legal

failure. The Court regarded it as so substantial that it warranted quashing the planning permission decision. The Board had failed in its fundamental duty of fairness. The Board cannot accept any reductive claim that this was ‘a procedural error’.

The exceptionality test

We refer to the decision of the Court of Justice in Case C-215/06 *Commission v Ireland*, and in particular whether there was sufficient compliance with the exceptionality test as set out by the Court of Justice in its case law. A link to this judgment can be found [here](#).

In *Commission v Ireland*, the Court of Justice, re-affirming the principles set out in Case C-287/98 *Linster* and Case C-486/04 *Commission v Italy*, decided that Member States were permitted to introduce measures relating to projects which had been constructed and commissioned without an EIA in order to render such projects compliant by retrospective means. However, it was emphasised that these measures had to be introduced with certain conditions:

- A) these measures could not encourage or act as an incentive for Applicants to bypass the EIA Directive, in other words “*national measures cannot act as an inducement to avoid EIA compliance*”, and
- B) resort to these measures should remain the exception.

McKechnie J. stated when considering that decision in the [An Taisce case](#) [2020] IESC 39 at para 89:

“the relevant provisions of domestic law cannot permit, allow or facilitate a situation whereby the obtaining of, as in this jurisdiction, a retention permission becomes in any way standard, typical or routine.”

Leave to seek substitute consent should not be given in this case, where the Applicant made a conscious and deliberate decision to begin construction of 9 no. wind turbines, access roads and ancillary works while the validity of the planning permission issued by the Board was still under scrutiny before the Courts and continued the works even after the Supreme Court had declared that the planning permission decision had to be quashed. The decision to carry out the development carried with it a risk voluntarily and freely taken by the Applicant as we pointed out to Cleanrath on behalf of our clients at that time. See our copy letter to Cleanrath dated 15 February 2019.

The Applicant chose to take that risk and to proceed with the development. The development permission has been shown to be invalid. The development is unauthorised. The Applicant brought this situation on itself, knowing exactly what the consequences might be.

This situation cannot be described as the sort of exceptional circumstance envisaged by the Court of Justice in its Judgment in [*Commission v Ireland*](#) Case C-215/06 which sets strict limits on the scope within which a grant of substitute consent may be contemplated.

Board has no legal basis to grant consent

The Board has no legal basis on which to grant the substitute consent application. There are no exceptional circumstances that would justify such consent. The Court of Justice has made the position quite clear. Any exceptions to the requirement for prior Environmental Impact Assessment must be for the purpose of ensuring environmental protection and avoidance of nuisance. Exceptions based on the convenience or financial position of an Applicant who made a deliberate decision to build a development while the validity of the relevant planning permission was still in dispute before the Courts are impermissible.

As outlined in our letter of 17 September 2020, the unauthorised development as constructed has already had adverse environmental and other impacts. Three examples were cited as follows.

The photograph taken by our client at the clients' family property shows the array of prominent intrusive bright red aviation warning lights on the turbines near their home. These are designed to attract attention.

This was a dark skies area until these turbines were made operational. That has been destroyed.

Secondly, the exceptionally quiet rural soundscape has been adversely affected. The turbines are currently restrained from operating by virtue of an undertaking given by Cleanrath to the Supreme Court. They have limited permission to operate for maintenance purposes only. When they do operate the noise is evident.

Thirdly, the presence of the turbines has had a devastating impact on property values. Our clients have been advised that the value of their home and associated outbuildings and workshop, into which they had invested decades of work as well as their savings, has been reduced by half. It had been their intention to retire in the near future and they had intended to sell the property which would normally have generated a reasonable pension fund for them. That possibility has been taken from them.

In addition, the precautions against potential environmental damage which Cork County Council had tried repeatedly to implement have been circumvented.

Conclusion

In our letter of 17 September 2020 we drew the Board's attention to relevant case-law of the Court of Justice. We remind the Board that in the [*Workplace Relations Commission*](#) case C-378/17, the Court of Justice made a very clear statement about how bodies such as An Bord Pleanála are obliged to uphold relevant EU legal requirements, even where there may be a conflicting rule of national law:

“EU law, in particular the principle of primacy of EU law, must be interpreted as precluding national legislation, such as that at issue in the main proceedings, under which a national body established by law in order to ensure enforcement of EU law in a particular area lacks jurisdiction to decide to disapply a rule of national law that is contrary to EU law.”

In the present case, EU law and Irish domestic legislation preclude the Board from granting Substitute Consent.

Yours faithfully,

Joe Noonan

Joe Noonan

NOONAN LINEHAN CARROLL COFFEY LLP

Encl. (1) Letter dated 15 February 2019 from NLCC to Cleanrath’s Solicitor.
(2) Schedule of Scientific and Technical Materials given to the Board in PL04.246742.

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Ms Anne Foley,
Solicitor,
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~ By Email – annefoley@turnkeydev.com ~

15th February 2019
Our ref: 32611-18/JN/PW

Re: High Court Record No. 2017/558JR & 2017/144COM
Supreme Court Record No. S:AP:IE:2018:000167
Klaus Balz and Hanna Heubach v An Bord Pleanala & Cork County Council and Cleanrath
Windfarm Limited (Notice Parties)

Dear Ms Foley,

You will have received notice from the Supreme Court Office today that the Supreme Court has given our clients leave to appeal in this matter.

In view of this, we call upon your client Cleanrath Windfarm Ltd to cease all works on site pursuant to the planning permission immediately and to confirm its agreement in that regard by return please.

Failing a satisfactory response our clients reserve the right to apply to the Supreme Court for any necessary stay and/or injunction.

Kindly note that regardless of whether any such application is made or granted, such works are carried on entirely at your client's risk and in no way to the prejudice of our clients' case.

Yours sincerely,

Joe Noonan

Joe Noonan

NOONAN LINEHAN CARROLL COFFEY

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**Schedule of Scientific and Technical Materials
Previously Provided to the Board in PL04.246742**

Noise Studies

1. ETSU-R-97 Why it is wrong. Dick Bowdler. New Acoustics. July 2005
2. Noise characteristics of 'compliant' wind farms that adversely affect neighbours. Large and Stigwood. Inter Noise 2014.
3. Initial findings of the UK Cotton Farm Wind Farm long term community noise monitoring project. Stigwood et al. Inter Noise 2014.
4. Audible Amplitude Modulation – results of field measurements. Stigwood and Large. Denver 2013.
5. "Low Frequency Noise-Induced Pathology: Contributions Provided by the Portuguese Wind Turbine Case" & "Clinical Protocol for Evaluating Pathology Induced by Low Frequency Noise Exposure" by Nuno Castelo Branco MD, Mariana Alves-Pereria Ph.D, Augusto Martinho Pimenta MD and José Reis Ferreira MD
6. Paper by Møller and Pedersen "Low Frequency Noise from Large Wind Turbines"
7. Soundscape of a Wind Farm – The Cape Bridgewater Experience, Steven E. Cooper, 02-06 November 2015

Health Studies

8. 'Wind Turbine Noise' – British Medical Journal Editorial by Dr Christopher Hanning, Honorary Consultant in Sleep Medicine and Professor Alun Evans, Professor Emeritus
9. "Understanding the Evidence: Wind Turbine Noise" Executive Summary Council of Canadian Academies, 2015.
10. "Effects of Noise from Wind Turbines on Human Health" by Colette Bonner, Deputy Chief Medical Officer in the Department of Health.
11. "Responses of the Ear to Infrasound and Wind Turbines" Alec Salt Ph.D 30th August 2010
12. 'Diagnostic criteria for adverse health effects in the environs of wind turbines' – Clinical Review in the Journal of the Royal Society of Medicine by Robert Y McMurtry and Carmen ME Krogh
13. Waubra Foundation Presentation - What Clinical and Acoustic Clues Can Tell Us About The Causes Of Deteriorating Physical and Mental Health, 21st May 2015
14. "Investigation of Perception at Infrasound Frequencies by Functional Magnetic Resonance Imaging (fMRI) and Magnetoencephalography (MEG)" Martin Bauer, Tilmann Sander-Thömmes, Albrecht Ihlenfeld 12-16 July 2015.
15. EEG Reaction Under Low Frequency Noise Exposure, Mu He, Detlef Krahé, 12-16 July 2015
16. Submission of Dr Christopher Hanning to the Australian Senate – Select Committee on Wind Turbines – February 2015
17. "Good Practice Guide on Noise Exposure and Potential Health Effects reference ISSN1725-2237EEA Technical Report Number 11 / 2010" by the European Environment Agency
18. "Health Aspects Associated with Wind Turbine Noise – Results from Three Field Studies" by Dr Eja Pedersen
19. Noise Sensitivity – Medical, Psychological and Genetic Aspects, Academic Dissertation by Marja Heinonen-Guzejev, Department of Public Health, University of Helsinki, Finland

Public Health and Safety

20. "Problems Related to the Use of the Existing Noise Measurement Standards When Predicting Noise From Wind Turbines and Windfarms" written by Erik Sloth, Vestas

21. *“Operation and Maintenance Manual for Vestas models NM52-900 reference number OUM100000092-03EN”*
22. Vestas *“Mechanical Operating and Maintenance Manual”*, 2007
23. Photographs of recent serious events at turbines in Ireland