Inchincurka,
Dunmanway,
Co. Cork.
P47 H308
☎ 023 8856896

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

24th May 2022

Your Ref.: ABP-307939-20

Planning Submission – Substitute Consent

Dear Sir/Madam,

I wish to make the following submission with respect to the application under Case Number ABP-307939-20 by Cleanrath Windfarm Limited for substitute consent for the constructed wind farm in the townlands of Reananerree, Cloontycarthy, Cleanrath North, Derrineanig, Cleanrath South, Milmorane, Coombilane, Rathgaskig, Augeris, Gorteenakilla, Carrignadoura, Gurteenowen, Gurteenflugh, Lyrenageeha and Lackabaun, Co. Cork.

I respectfully request that the subject development be refused substitute consent for the substantive and comprehensive reasons set out in this submission in the interests of the proper planning and sustainable development of West Cork.

Yours faithfully,

Nigel de Haas

CONTENTS

100 INTRODUCTION

101 Subject of this submission

102 This submission addresses the "informational material" provided by MKO on behalf of their Client, Cleanrath Windfarm Ltd., Lissarda Industrial Estate, Lissarda, Co. Cork, in response to the correspondence received from An Bord Pleanála ("the Board") dated 13th July 2021 (13.07.2021).

103 MKO specifically reference Section 177K(1A) of the Planning and Development Act 2000 (as amended by the Planning and Development and Residential Tenancies, Act 2020) which now states in relation to the substitute consent process and, in particular, in relation to the consideration of exceptional circumstances as part of the overall decision making process that *"The Board shall not grant substitute consent (whether subject to conditions or not) unless it is satisfied that exceptional circumstances exist that would justify the grant of such consent by the Board"*.

104 The stated purpose of the material provided by MKO is to enable the Board to satisfy itself *"on the question of the existence of exceptional circumstances that would justify a grant of substitute consent for the constructed Cleanrath Wind Farm development (SU04.307939)"* pursuant to Section 177K (1C)(a) of the 2000 Act which provides that *"The Board shall, in relation to an application referred to in paragraph (b) of subsection (1B), invite the applicant concerned to give to the Board such information as the applicant considers material for the purposes of the Board's satisfying itself as to the matter referred to in paragraph (a) of subsection (1A), and any such information shall be given to the Board by the applicant within such period as is specified in the invitation concerned"*.

105 It is asserted by MKO that such exceptional circumstances clearly exist in the context of the information set out in their response. This submission will show that in fact they do not.

106 Cleanrath wind farm planning history

107 The planning history of the Cleanrath wind farm dates back 11 years, during which there have been 2 Planning Applications, 2 appeals to An Bord Pleanála, 2 Judicial Reviews and a Supreme Court appeal prior to the current application for substitute consent, which is perhaps indicative of the level of dispute between the prospective developer and the local community.

108 The first Planning Application was for a wind farm of 11 wind turbines having a maximum tip height of 126 metres lodged with Cork County Council under Pl. Ref. 11/5245 and refused permission by the Planning Authority on 8th June, 2011. This decision was appealed to An Bord Pleanála under Case No. PL04.240801 and granted conditional permission by the Board on 23rd April, 2013.

109 Leave for a Judicial Review was granted under [2016] IEHC 134 where the decision by the Board was quashed by the Judgment of Mr. Justice Bernard J. Barton on 25th February 2016 where he concluded with:

> *"238. Accordingly, it is not possible for the Court to determine whether the AA which the Board purported to carry out met the legal test required by the judgements of the CJEU and the decisions of this court. In the absence of the Inspector making and recording complete, definitive and precise findings and conclusions necessary to meet the standard required, which the Board would have been entitled to expressly accept, it was necessary and open to the Board to do so in its decision in a way which makes it plain that the obligations placed upon it in relation to the carrying out and completion of an AA were satisfied.*
>
> *239. For all of these reasons and upon the conclusions reached the Court finds that an AA was not carried out by the Board in accordance with law."*

110 The second Planning Application was for a wind farm of 11 wind turbines having a maximum tip height of 150 metres lodged with Cork County Council on 22nd December 2015, (some two months prior to the judgement of Mr. Justice Barton with respect to the previous application) under Pl. Ref. 15/6966 and granted conditional permission by the Planning Authority with a reduced number of wind turbines on 3rd June 2016. This decision was appealed to An Bord Pleanála under Case No. PL04.246742 and granted conditional permission by the Board on 19th May 2017.

111 Leave for a Judicial Review was refused under [2018] IEHC 309 where the decision by the Board was upheld by the Judgment of Mr. Justice Robert Haughton on 30th May, 2018 where he concluded with:

> *"100. With regard to the recording complaint, in Ratheniska v An Bord Pleanála [2015] IEHC 18 this court was similarly concerned with whether there had been compliance with the obligation to record the AA conducted. As in that case, I am satisfied that the AA is properly recorded in the impugned decision. The Board deals with this in a separate section headed "Appropriate Assessment" and relates it to the two sites which were screened and required AA – namely the Gearagh SAC and SPA. It recites the information that it considered, which as I have earlier stated includes all the documents and information that it was required to consider. It was entitled, having considered the Inspector's report, to concur with his analysis. The Board records that it considered it had adequate information to carry out the AA. It expressly states its conclusion that the proposed development "would not adversely affect the integrity of these European sites, in view of those sites' conservation objectives, or of any other European sites." That is a sufficient record of the Board's considerations, deliberations and decision.*
>
> *101. Accordingly this application for judicial review is dismissed."*

112 An application was made to the High Court for Leave to Appeal under [2018] IEHC 535 which was refused in the Judgment of Mr. Justice Robert Haughton on 1st October, 2018 where he concluded *"As no points of law of exceptional public importance have been raised the application for a certificate is refused".*

113 An application was made to the Supreme Court for Leave to Appeal under [2019] IESC DET 39 on 23rd November, 2018 and leave was granted on 14th February, 2019. The decision by the Board was quashed by the Judgment of Mr. Justice J. O'Donnell under [2020] IESC 67 on 12th December, 2019 and a Stay of Certiorari was granted by the Judgment of Mr. Justice J. O'Donnell on 5th May, 2020

114 An application for Leave to Apply for Substitute Consent was made to An Bord Pleanála under Case No. ABP LS04.306272 on 20th December 2019 and granted on 5th May 2020, the same date that the Stay of Certiorari (see para. 113) was granted.

115 **Continuous stream of planning applications, appeals and court hearings**

116 It is apparent from the above that there has been no gap between planning applications, appeals to An Bord Pleanála, judicial reviews by the High Court and appeals to the Supreme Court since the first planning application was lodged by Cleanrath Windfarm Limited on 9th June, 2011.

117 There can be no doubt that Cleanrath Windfarm Limited and their agents, MKO, were well aware that each decision in their favour would be immediately challenged by the local community to the full extent of the law.

118 It is in this context that it is not possible that the applicants could have been under the impression that no further legal remedy remained after the Judgment of Mr. Justice Robert Haughton on 1st October, 2018 when the perfection date was 30th October, 2018 and time remained within which leave to appeal to the Supreme Court could be sought, as it was on 23rd November, 2018.

200 CLEANRATH WINDFARM DEVELOPMENT BACKGROUND

201 The timeline put forward by MKO

202 In setting out the Cleanrath Windfarm development background, MKO states:

> *"The decision of the Board to grant permission for this project subject to 22 no. conditions issued on the 19th May 2017. Judicial review proceedings were instituted in July 2017 challenging the decision of the Board to grant permission. In May 2018, the High Court refused the application for judicial review. However, in a further judgment delivered on the 12th December 2019, the Supreme Court allowed the appeal and stated (at paragraph 57 of its judgement): "it is necessary to quash the decision of the Board granting permission". The Supreme Court judgment is attached to this correspondence for ease of reference."*

203 This timeline omits several events and associated dates that are fundamental to the consideration of exceptional circumstance as set out in paragraphs 112 and 113 of this submission, namely:

30 Oct 2018 Perfection of refusal of leave to appeal by Mr. Justice Robert Haughton.

23 Nov 2018 Application for Leave to Appeal to the Supreme Court.

14 Feb 2019 Leave to appeal to the Supreme Court granted. (Decision by the Board quashed by the Supreme Court Judgment of Mr. Justice J. O'Donnell on 19th December 2019).

05 May 2020 Stay of Certiorari was granted by the Supreme Court Judgment of Mr. Justice J. O'Donnell.

204 Period during which the wind farm was constructed

205 The period during which construction took place is defined by MKO as:

> *"In the period between the permission being granted and the opening of the leave for substitute Consent procedure for the Cleanrath Wind-Farm Development in the current case (December 2019, Ref.: ABP-306272-I9), the development authorised by that permission has been constructed in accordance with the planning permission."*

206 This frames the construction period as being between 19th May 2017 (date of permission from the Board) to 20th December 2019 (opening of the leave for substitute consent procedure for the Cleanrath Wind Farm Development).

207 By their own word, MKO and by extension, the applicant, commenced construction in full knowledge that the local community was:

- Engaged in a judicial review of the Board's decision to grant conditional permission (Judicial Review ExParte granted 10th July 2017, Balz & Anor -v- An Bord Pleanála 2017/558 JR, refused on 30th May, 2018).
- Engaged in seeking leave to appeal the judgment of the judicial review (Refused 1st October 2018, perfected on 30th October 2018).
- Engaged in seeking leave to appeal to the Supreme Court (Lodged 23rd November 2018 and granted on 14th February 2019).
- Engaged in an appeal by the Supreme Court (decision of the Board quashed on 19th December 2019).
- Engaged in submissions to the Supreme Court on the question of remittal to the Board (Stay of Certiorari on 5th May 2020).

208 Regularising the planning status

209 In their submission, it is the contention of MKO that as the works authorised by the permission have been carried out, and as EIA and AA are necessary in relation to the Cleanrath Wind Farm Development the only means of regularising the planning status of those works is to obtain substitute consent pursuant to the provisions of Part XA of the 2000 Act.

210 This is not necessarily the case, and may arise from the omission in the submission by MKO of reference to the legal argument that was considered by the Supreme Court and gave rise to the Judgment of O'Donnell J. delivered on the 5th day of May, 2020 [2020 IESC 22] (S:AP:IE:2018:000167).

211 The judgement is clear that it was open to submissions in para. 7, where:

> *"The court indicated that it would invite submissions from the parties on the final order to be made and, in particular, the possibility of remittal of the matter to the Board, and, if so, at what stage of the process."*

212 It records in para. 8 of the judgement that remittal to the Board was considered as an alternative to substitute consent as a legal means of regularising the planning status of the constructed works but that this was rejected by the developer:

> *"The developer has taken the view that remittal is neither possible nor desirable. It is apparent from further correspondence and debate in this court that the developer does not maintain that remittal is not possible as a matter of law. Rather, the developer anticipates the possibility of further challenges to the validity of any decision which might issue after remittal to the Board. Instead, the developer decided to immediately initiate an application for substitute consent pursuant to Part XA of the PDA 2000 (as inserted by the Planning and Development (Amendment) Act 2010 ("the 2010 Act")).*

> *"The regime for substitute consent contemplates a two-stage process: first, an application to the Board for leave to seek substitute consent, and second, if leave is granted, a decision on the merits of the application. One factor which may permit the Board to grant leave to seek substitute consent is if a developer considers that, in the light of a final decision of a court, the permission granted for the development "may be in breach of law, invalid, or defective in a material respect" (PDA 2000, s. 177C (Emphasis added))."*

213 Para. 8 of the further records that having asserted that substitute consent to be the only means of regularising the planning status, the developer initiated the application for substitute consent in the immediate aftermath of the judgment and before any order of certiorari quashing the permission had been made:

> *"Accordingly the developer relied on this provision to initiate the application for substitute consent in the immediate aftermath of the judgment, and, as it happens, before any order of certiorari quashing the permission had been made."*

214 Para. 8 of the judgement further records that having asserted that substitute consent to be the only means of regularising the planning status, the developer initiated the application for substitute consent in the immediate aftermath of the judgment and before any order of certiorari quashing the permission had been made.

215 Para. 15 of the judgment characterises the period of construction as:

> *"It is clear that in the period between October 2018 and December 2019, considerable work was carried out to the point where the windfarm was largely constructed."*

216 This is precisely the period during which hearing of the Supreme Court case was awaited; a case to which Cleanrath Windfarm Limited was a Notice Party.

300 CONSIDERATION OF EXCEPTIONAL CIRCUMSTANCES

301 Submission from MKO on behalf of the applicant

302 The submission from MKO on behalf of the applicant reiterates the provisions of the Planning And Development Act (2000) as amended to 2021 where, in considering whether exceptional circumstances exist, subsection 177D(2) sets out the matters which must be considered by the Board, including (b) "whether the applicant had or could reasonably have had a belief that the development was not unauthorised", and continues by asserting that:

- "The decision of the Board to grant permission for the Cleanrath Wind Farm Development subject to 22 no. conditions issued on the 19th May 2017."
- "Judicial review proceedings were instituted in July 2017 challenging the decision of the Board to grant permission. In May 2018, the High Court refused the application for judicial review." It ignores the fact that leave to appeal was then sought and that the applicant was a Notice Party, with a perfection date for the refusal of leave of 30th October, 2018.
- "In a later judgment, delivered on the 12th December 2019, the Supreme Court allowed the appeal and stated 'it is necessary to quash the decision of the Board granting permission'". It ignores the fact that leave to appeal to the Supreme Court was lodged on 23rd November 2018 and that the applicant was a Notice Party.
- "In the interim, however, as the planning permission was in place and in effect the development of the Cleanrath Wind Farm Development had commenced and been largely constructed in accordance with the relevant conditions."

303 The submission then draws on the assertions above to contend that:

"The works that were carried out were therefore authorised by a decision to grant planning permission made following an Environmental Impact Assessment (EIA) and Appropriate Assessment (AA) being carried out by An Bord Pleanála. In circumstances where both an EIS and NIS accompanied the planning application, there was no omission of either document nor did either the High Court or Supreme Court consider that the EIS or NIS submitted with the planning application inadequate. In these circumstances, the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive were adhered to and were not circumvented."

304 It concludes with a curious statement that on the face of it appears to attribute the blame for the current state of affairs on the Board and to declare that there was no fault of the applicant:

"Thus, the Supreme Court identified an error of law or procedural error in the decision-making process, which culminated in the decision to grant permission. This error did not arise from any fault of the applicant, which had proceeded to construct the Cleanrath Wind Farm after obtaining a grant of planning permission."

305 **Contention from MKO and the applicant to the Board**

306 MKO and the applicant have steadfastly contended in submissions to the board that they were firmly of the belief that the works were fully authorised, as set out in Section 5.2 of the Inspector's Report (ABP 306272-19) on the application for leave to appeal for substitute consent under section 177C of the Planning and Development Acts, 2000-2018.

307 The question of whether the applicant had or could reasonably have had a belief that the development was not authorised is set out in Section 7.3.2 of the report where the Inspector states:

"The works were carried out on foot of permission granted on appeal under ref. PL04.246742. On this basis I accept that the applicant could reasonably have held the belief that the works carried out were not unauthorised."

308 There is no reference in the Inspector's report to any consideration of whether the works granted on appeal were the subject of a judicial review or a legal appeal, the existence of which the Inspector was seemingly unaware. The Inspector concluded by recommending that leave be granted to apply for substitute consent for several reasons listed in Section 9 including 9.0(c):

"That exceptional circumstances exist by reference, in particular, to the following ... that the applicant could reasonably have had a belief that the development was not unauthorised;"

309 This understanding was duly replicated in the Direction and Order issued by the Board.

310 The judgment of O'Donnell J. delivered on 5th May 2020 in the matter of In the Matter of SS. 50, 50A, and 50B of the Planning and Development Act 2000 between Klaus Balz and Hanna Heubach, Appellants, and An Bord Pleanála, Respondent, [S:AP:IE:2018:000167] with Cork County Council and Cleanrath Windfarm Limited as Notice Parties provides much information that is central to the issue of exceptional circumstances, and which is absent from the submission from MKO to An Bord Pleanála and is not even mentioned in it.

311 This is a major deficiency, for much of the information in the judgment arises from sworn testimony to the Supreme Court and furthermore, since the date of the judgment is 5th May 2020, it predates the submission from MKO dated 4th August 2021, and as such, MKO could have reasonably been aware of this since their client was a notice party and a participant in depositions to the Supreme Court.

400 **BELIEF OF APPLICANT THAT DEVELOPMENT WAS AUTHORISED**

401 **Whether the applicant has or could reasonably have had a belief that the development was not unauthorised**

402 The submission by MKO responds to this key "exceptional circumstances" criterion of "whether the applicant has or could reasonably have had a belief that the development was not unauthorised" by stating:

> *"The works were authorised pursuant to a planning permission that was subsequently determined by the Supreme Court to have been invalidly granted. Accordingly, the applicant did, and reasonably had, a belief that the development was authorised."*

403 This ignores the fact that judicial review proceedings to which the applicant was a notice party were instituted within the prescribed time limit in July 2017 immediately after the grant of planning permission and continued within the time limits prescribed by law culminating in the Supreme Court judgment quashing the planning permission.

404 **Conflict between commercial profit and legal prudence**

405 The "Facts" section of the Supreme Court judgment of 5th May 2020 sets out the following in paras.17 to 20:

> *"17. An affidavit was sworn by Mr. David Murnane, a director of the developer, for the purposes of verifying the statements made in the correspondence. He explained that the development had the benefit of the REFIT 2 Scheme. He further exhibited a REFIT 2 letter of offer dated the 17th of October, 2018. Provision 4 of that letter provided:-*

'Full planning permission is required at all times in respect of your project in order to remain compliant with REFIT 2 terms and conditions. Planning permission for the merged site must remain valid.'

The reference to the merged site was the merging of the Cleanrath and Derragh windfarms, both of which were owned by the developer.

18. *The REFIT Scheme is a price support scheme devised by the State, which guarantees certain prices for electricity generated, for a fixed period up until 2032, and thus, it is to be assumed, renders the generation of electricity through renewable energy commercially viable. The applicants exhibited the full terms of the REFIT Scheme originally issued in 2012, and updated thereafter. Paragraph 7.4 provides that a "letter of offer" will not be made in any case unless "(i) in the case of proposed projects planning permission has been obtained for the construction and this is demonstrated to the Minister in the application or it is demonstrated that planning permission is not required in any individual case".*

19. *Paragraph 9.2 of the conditions of offer in the scheme provides that, inter alia:-*

'[V]alid planning permission must continue to be held by the applicant until the plant has been constructed. In cases where planning permission expires prior to construction, evidence of the grant of a planning permission extension in time or evidence of new planning permission grant must be submitted without delay to the Minister. Where a project that has not yet been constructed is not capable of demonstrating valid planning permission or proving that it is not required, the Minister may withdraw any offer of REFIT 2 support for that project.'

20. *Mr. Murnane stated that the total investment in the merged project including the related Derragh windfarm amounted to almost €72 million, and that*

the loss of the guaranteed minimum price that would be available under the REFIT 2 offer "would have commercially catastrophic consequences for the project in terms of losing the guaranteed minimum price up to 2032". Mr. Murnane also stated that the Minister for Communications, Climate Action and Environment had extended the required "connected date" from the 31st of December, 2017 to the 31st of December, 2019, and furthermore extended the requirement of having a power purchase agreement in place from the 30th of September, 2018 to the 31st of March, 2020.

406 The facts as set out in the Supreme Court judgment show that continued qualification for the REFIT 2 Scheme were of paramount importance to the applicant who asserted that the loss of the minimum price guaranteed by the REFIT offer "would have commercially catastrophic consequences for the project in terms of losing the guaranteed minimum price up to 2032".

407 This begs the question of whether the closing deadline for the REFIT 2 guaranteed minimum price had any bearing on the decision by the applicant to commence construction of the wind farm despite the possibility of the planning permission being quashed by the legal actions that were in progress by the local community.

408 The answer to this is summarised in para. 41 of the judgement which states:

"Furthermore, the applicants argue that the difficulties that are now faced by the developer are a consequence of its own conscious decision to proceed with the development in the face of the appeal to this court, and in the knowledge that that appeal might succeed. The present difficulties, in the applicants' view, are therefore no more than the predictable consequences of the risk the developer knowingly took."

409 This is scarcely an endorsement of this condition for "exceptional circumstances".

500 PREVIOUS UNAUTHORISED DEVELOPMENT

501 The submission by MKO as to whether the applicant has complied with previous planning permissions or has previously carried out unauthorised development is as follows:

> *"The works carried out by the applicant, Cleanrath Windfarm Ltd. were authorised by the permission granted by An Bord Pleanála under PL04.246742. Accordingly, when constructed, the development was authorised. The requirement to apply for substitute consent has arisen from the judgment of the Supreme Court to the effect that the permission authorising the development was invalid. In carrying out the works, the applicant complied with the conditions which were attached to the grant of permission. Cleanrath Windfarm Ltd. has not previously carried out any other development."*

502 Compliance with respect to planning by the parent company

503 Section 1.1 of the Remedial Environmental Impact Assessment Report for the Cleanrath Wind Farm (rEIAR-F – 2020.08.12 – 191223-a) describes the applicant as follows:

> *"The applicant for substitute consent for the Cleanrath wind farm development is Cleanrath Windfarm Ltd., Lissarda Industrial Estate, Lissarda, County Cork, which is a subsidiary company of Enerco Energy Ltd. (Enerco). Enerco is an Irish-owned, Cork-based company with extensive experience in the design, construction and operation of wind energy developments throughout Ireland, with projects currently operating in Counties Cork, Kerry, Limerick, Clare, Galway & Mayo."*

504 The statement in para. 501 above is meaningless if Cleanrath Windfarm Limited is detached from the real owner, Enerco Energy Limited of which it is a subsidiary.

600 CONCLUDING STATEMENT

601 I conclude with a quotation from para. 5 of the Judgment of O'Donnell J. of 5th May 2020 with respect to this case, where the learned judge states:

> *"There is an important balance created by the planning system. It is inevitable that there will almost always be a significant imbalance between both the resources available to a developer and those of an applicant wishing to object to the development, and a similar disparity in the economic or other benefit which can be expected to be obtained from a planning decision.*
>
> *The developer stands to benefit, perhaps substantially, if permission is obtained: the applicants are in no better position if the development is refused than they were before the development was mooted.*
>
> *It is accordingly an important part of the development control system that there should be an independent body or bodies which will assess an application for permission and consider whether it is consistent with proper planning and development, and therefore consistent with the public interest."*

602 The judgment in this case shows that applicant's commercial considerations were of paramount importance to MKO and their client, the applicant Cleanrath Windfarm Limited.

603 The *"important balance created by the planning system"* is, in this instance, what is at stake in the application for substitute consent with respect to a wind farm that was constructed whilst legal proceedings were taking their course.

604 In the same way that in its submission MKO contends that *"This error did not arise from any fault of the applicant, which had proceeded to construct the Cleanrath Wind Farm after obtaining a grant of planning permission"*, so the time taken to progress court hearings does not arise from any fault of the appellants.