Mark Kielty

From: Bord
Sent: Thursday 17 September 2020 14:56
To: Appeals2
Subject: FW: Substitute Consent Application: PL04.307939
Attachments: 17.09.2020 - Submission to ABP.pdf; 1. Photograph.jpg

Importance: High

From: Joe Noonan <jnoonan@nlcc.ie>
Sent: Thursday 17 September 2020 13:20
To: Bord <bord@pleanala.ie>
Cc: Pippa Willows - Legal Secretary <pippawillows@nlcc.ie>
Subject: Substitute Consent Application: PL04.307939
Importance: High

Noonan Linehan Carroll Coffey LLP

SOLICITORS
www.nlcc.ie

TO: The Secretary, An Bord Pleanála

FROM:

Joe Noonan
NOONAN LINEHAN CARROLL COFFEY LLP
Solicitors
54 North Main Street
Cork.
T12 WY2D

Tel 021 4270518 Fax 021 4274347
www.nlcc.ie

[Evolve:83323b4c-209b-4b90-9fe1-1adf62f0a948]

Noonan Linehan Carroll Coffey LLP

SOLICITORS
54 North Main Street
Cork

T12WY2D
www.nlcc.ie
DX 2044 Cork

Telephone: 021 4270518
Fax: 021 4274347
Email: jnoonan@nlcc.ie

The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin
D01 V092

~ By Email – bord@pleanala.ie ~

17 September 2020
Our ref: 101-20/JN/PW

RE: Substitute Consent Application
PL04.307939: 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 act on behalf of Klaus Balz and Hanna Heubach of Bear na Gaoithe, Inchigeela, County Cork. The development site lies immediately adjacent to our clients' land holding where they have their family home, their workshop and the base for their family horticulture nursery/florist and gardening business.

Our clients object to the application for substitute consent on the following grounds.

History of unlawful Board decisions in favour of Cleanrath: (1) The 2013 Decision
Cleanrath's first application was for 11 no. turbines, roads, and ancillary works. Cork County Council refused that application in June 2012.

The Council's reasons for refusal were:

1) "The proposed development would be premature by reference to the existing deficiency in the road networks serving the area of the proposed development; details of which were set out and

as a result of which the Council concluded that the proposed development would be contrary to the proper planning and sustainable planning of the area.

2) The proposed development would be partly located within habitats of high conservation value, which included habitats listed on Annex 1 of the Habitats Directive, such as active Blanket Bog, Dry Heath, North Atlantic Wet Heath and *Erica Tetralix* which were key features of the County ecological network. The County of Cork Development Plan 2009 has a stated objective under ENV 19 to minimize the impact of new developments on habitats of natural value that are key features of the ecological network in the County. For reasons which were set out, the Council considered that the proposed development would materially contravene the stated objective of the county development plan and, hence, be contrary to the proper planning and sustainable development of the area.

3) The site of the proposed development was located within the zone of influence of areas of ecological sensitivity, which included lands designated as Special Areas of Conservation (SAC) and Special Protection Areas (SPA). On the basis of the information submitted the Council was not satisfied that the proposed development would not have significant negative impacts on habitats of ecological value designated for conservation and protection and on the integrity of any Natura 2000 site. In its view the NIS lacked sufficient information to enable an Appropriate Assessment to be completed in accordance with the requirements of the Planning and Development Act 2000, as amended, and accordingly the development would conflict with the conservation objective of the development plan and would be contrary to the proper planning and sustainable planning of the area."

Board granted permission unlawfully

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 also 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. We refer to Judgment of Mr Justice Barton which can be found here. The Court found that the Board had acted unlawfully in two separate respects namely:

1) failing to discharge its obligations under the EIA Directive; and

2) failing to discharge its obligations under the Habitats Directive.

As a result the Court quashed the permission outright and did not exercise its discretion to send the matter back to the Board.

The judgment referred to the unsatisfactory approach taken by the Board to its functions in respect of assessing environmental impacts and in respect of its function as competent authority with regard to Appropriate Assessment as well as in failing to give reasons for its conclusions. The Board did not appeal the judgment.

History of unlawful Board decisions in favour of Cleanrath: (2) The 2017 Decision

Cleanrath 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 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 the refusal.

The Board grants permission unlawfully again

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 views of the Local Authority.

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 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. [...]"*

This history of persistent unlawful conduct by the Board in dealing with the two planning applications is disturbing.

The Application for Substitute Consent

The Board has now received an application for Substitute Consent from the Applicant which wishes to retain 9 no. turbines it constructed during the time when the litigation on the validity of the permission given in 2017 was still under way.

The Board has received this application and is apparently proceeding to consider it despite the Supreme Court Judgment in the joined cases of *An Taisce v An Bord Pleanála, An Taisce v An Bord Pleanála & Ors, Sweetman v An Bord Pleanála & Ors* [2020] IESC 39 issued on 1 July 2020 which found that the legislation in relation to Substitute Consent was unlawful and in breach of Ireland's obligations under the EIA Directive. A link to this judgment can be found here.

Against that background, our clients are extremely disturbed at the prospect of the Board once again failing to carry out its functions in accordance with law. This is a short summary of their views on the situation brought about by the Board and by the Applicant:

> *"We want to say how deflated we feel about the whole process. After fighting this wind farm for seven years, winning a High Court and a Supreme Court case, we find ourselves living right next to a gigantic industrial site.*
>
> *We had planned to possibly retire in time, which might not happen now, because our property is probably unsellable, according to an estate agent and valuer, who halved the value of our property after seeing the wind farm.*
>
> *Even the nights are not dark anymore, even though there seems to be an easy solution to get rid of the red lights on top of the turbines.*
>
> *It all seems to be stacked in favour of the Applicant and it's not a very satisfying arrangement for the little people."*

Substitute Consent cannot lawfully be given in this case

The substitute consent legislation under which Cleanrath have made this application was recently condemned by the Supreme Court in *An Taisce v An Bord Pleanála, An Taisce v An Bord Pleanála & Ors, Sweetman v An Bord Pleanála & Ors* [2020] IESC 39.

This decision confirms that the procedure set out in the Planning and Development Act 2000 ("the 2000 Act") is in breach of Ireland's obligations under EU law, specifically Directive 2014/52/EU on Environmental Impact Assessment (EIA Directive).

The two issues relating to substitute consent dealt with by the Supreme Court *per* McKechnie J in the judgment delivered on behalf of the Court are as follows:

1. The exceptionality test

The issue here was whether the provisions of the 2000 Act dealing with substitute consent sufficiently implement the EIA Directive, having regard to the decisions of the Court of Justice of the European Union (Court of Justice) including 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: "*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.*"

The factors set out in order to consider whether exceptional circumstances exist in Irish law failed, according to the Supreme Court, to satisfy the exceptionality requirement and thus failed to comply with relevant Court of Justice case law:

> *"These factors, in the context under discussion, are relatively general and ordinary, are undeniably broad and widely drawn and have a commonality to them which is immediately recognisable on inquiry. It is therefore, exceedingly difficult to assign "exceptionality" to such matters.*
>
> *The fact that only limited number of projects might be able to benefit from this provision, is not the point. The point is the broadness or generality of the parameters which are applicable to this pathway (s. 177C(2)(a) and D(1)(a)). Such are unlikely to have the dissuasive effect which is a key objective of the [EIA] Directive."*

2. Public participation
The issue here was the scope, extent and meaning of the public right to participate under the EIA Directive, in particular in relation to a right to participate at the leave stage of substitute consent applications.

McKechnie J was satisfied that European law "*requires that the public be entitled to participate at the application for leave stage of the substitute consent process.*"

He described this stage of the process as "*not a mere technical or box-ticking exercise*" but instead as a "*highly significant aspect of the overall process*" as the outcome of this application "*will determine whether the substantive application can or cannot be made.*"

The underlying purpose of public participation in environmental matters was highlighted by McKechnie J as being "*to facilitate good, fully informed decision making*" where a decision maker has the relevant information before it.

McKechnie J noted that the provisions of Section 177D "*operate as a sort of a gatekeeper provision to determine whether the applicant should be allowed to apply for substitute consent at all*". He found that there was a failure to provide for effective participation of the public at such an important stage of the process, outlining as follows:

> *"[T]he impact of the development on the environment is, understandably, significant at both the leave and substantive stages. However, it is at the screening point that the Board is expressly asked to have regard to matters such as the applicant's relationship with the planning code, both in terms of the subject development and historically. These, and the other factors referred to in section 177D(2), are matters in respect of which the public may have highly relevant information."*

The lack of a right to participation at leave stage under Irish law was found by the Supreme Court to be "*inconsistent with the requirement that the public be given early and effective opportunities to participation at a time when it is capable of influencing all issues.*"

Conclusion on Substitute Consent: invalid legal basis
The Supreme Court declared the substitute consent procedure under the 2000 Act to be inconsistent with the EIA Directive for the following reasons:

1. Sections 177C(2)(a) and s 177D(1)(a) fail to provide for a proper exceptionality test for substitute consent or one which is consistent with the EIA Directive as interpreted by the Court of Justice. The factors set out to allow applications for substitute consent under planning legislation could not be fairly described as exceptional. [paragraphs 89-93]

2. The substitute consent procedure fails to provide for a right to public participation at the leave stage, making it inconsistent with the EIA Directive. In addition, a right to public participation could not be read into Sections 177C or 177D as there was a clear legislative intention to exclude this right. [paragraph 114] In this respect the State had thus "failed to properly transpose the EIA Directive".

Substitute Consent – Additional Points on this application

Our clients were not afforded an opportunity by the Board to express their view to it on whether or not the Board should give leave to apply to substitute consent in the circumstances of this case.

Leave to seek substitute consent should not have been given under circumstances where the Applicant had made a conscious and deliberate decision to construct 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. That was a risk voluntarily and freely taken by the Applicant and the consequences were pointed out by us on behalf of our clients in writing to it at that time.

The Applicant chose notwithstanding the risk 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 Case C-215/06 *Commission v Ireland* 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 either under the present legislation, condemned by the Supreme Court, or under any conceivable amendment that may be proposed by government. Any amending legislation must remain within the strictly limited scope and constraints laid down in the Court of Justice decision. 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 would be wholly impermissible.

Strategic Environmental Assessment

We now turn to a separate legal prerequisite relevant to the Board's jurisdiction to permit this type of development arising from the requirements of Directive 2001/42/EC ("the SEA Directive") as interpreted by the Court of Justice in the recent case of *A v Others*, in June 2020.

We refer below to the relevant parts of the Court's decision.

***A v Others* C-24/19**

The Court of Justice in this case considered the consequences of a failure to carry out a Strategic Environmental Assessment (SEA) prior to the adoption of a plan or programme and the impact this would have on the relevant plan or programme, as well as subsequent projects based on that plan or programme. A link to this judgment can be found here.

In the case, local residents in Belgium challenged a wind farm development project of five turbines which had been permitted based on conditions outlined in a regional government order from 2006 and a circular on the Assessment framework and conditions for the installation of wind turbines. They argued that the consent granted should be annulled on the basis that the order and the circular should have been preceded by an SEA, and were therefore in breach of Article 2(a) and Article 3(2)(a) of Directive 2001/42 on the assessment of the effects of certain plans and programmes on the environment (SEA Directive).

A) Plans and Programmes

At issue was the interpretation of the above Articles. Article 2(a) defines plans and programmes as:

> *"plans and programmes ...*
>
> *- which are subject to preparation and/or adoption by an authority at national, regional or local level or which are prepared by an authority for adoption, through a legislative procedure by Parliament or Government, and*
>
> *- which are required by legislative, regulatory or administrative provisions"*

Article 3(2)(a) provides that an environmental assessment shall be carried out for all plans and programmes:

> *"(a) which are prepared for agriculture, forestry, fisheries, energy, industry, transport, waste management, water management, telecommunications, tourism, town and country planning or land use and which set the framework for future development consent of projects listed in Annexes I and II to Directive 85/337/EEC"*

The Grand Chamber had to consider whether the order and the circular amounted to a plan or programme and the implications on a development such as the wind farm development should there be a violation of EU law by a Member State.

The Court of Justice found that the order and the circular constituted plans or programmes under the SEA Directive and that an SEA should have been carried out prior to their adoption by the Belgian

government in 2006. Both the order and the circular contained various provisions in relation to the installation and operation of wind turbines, including measures on shadow flicker, safety, and noise levels.

B) Breach of EU law

The Court of Justice outlined the consequences of a breach of EU law:

> (a) Member States are "*required to eliminate the unlawful consequences*" of breaches of EU law. Competent national authorities are "*under an obligation to take all the necessary measures, within the sphere of their competence, to remedy the failure to carry out an environmental assessment*" which can involve "*adopting measures to suspend or annul that plan or programme*".
>
> (b) Only the Court of Justice may, in exceptional cases, temporarily suspend the application of EU law.

The Court of Justice concluded that in cases where an SEA is required but is not carried out, the plan or programme, as well as all permissions for projects based on same, must be annulled. In this case, construction of the wind farm development had not yet commenced. The Court of Justice stated that it was clear that the consent must therefore be annulled as such consent was adopted on the basis of the plan or programme which "*was itself adopted in breach of the obligation to carry out an environmental assessment*". The Court of Justice also held that where installation of a windfarm project "*has commenced, or is even completed*", consent can be annulled (para 89).

There were limited circumstances in which projects would not be annulled:

1. Where there is a risk that the annulment "*could create a legal vacuum that is incompatible with that Member State's obligation to adopt measures to transpose another act of EU law concerning the protection of the environment*".
2. If the consequences of such annulment was "*a genuine and serious threat of disruption to the electricity supply of the Member State concerned which could not be remedied by any other means or alternatives*"; referring to C-411/17 *Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen.*

In Case C-411/17, the Court stated that it was permissible to continue the operation of an energy plant, being two nuclear reactors, where this was necessary for the security of energy supply of the Member State as a whole. In the *A* case, the Court held that the cessation of activity of a limited number of wind turbines was not likely to have significant implications for the supply of electricity for the whole of Belgium, establishing a high threshold.

The National Renewable Energy Action Plan

The Irish policy framework for wind farms is based on the National Renewable Energy Action Plan (NREAP) which was adopted in 2010. Ireland has submitted four progress reports to the European Commission since its adoption of the Plan, with reports delivered in 2012, 2014, 2016 and 2018. A final report is due from all Member States by 31 December 2021.

The adoption of NREAP is a direct consequence of Article 4(1) of Directive 2009/28/EC on the promotion of the use of energy from renewable sources, which required national authorities to develop a national renewable energy action plan. Ireland set an overall target of meeting 16% of its energy requirements from renewable sources by 2020. Article 4(2) required Member States to notify their NREAP to the Commission by 30 June 2010. Ireland did so in July 2010.

The NREAP document is a significant one which *"sets out the Government's strategic approach and concrete measures to deliver on Ireland's 16% target"* under the Directive. It notes that the *"development of renewable energy is central to overall energy policy in Ireland."* It set out the following targets:

- 40% electricity consumption from renewable sources by 2020
- Increases in the use of biofuels with the accelerated development and use of electric vehicles in Ireland, with a target of 10%
- A target of 12% renewable heat by 2020

NREAP is specifically relied on in the applicant's remedial Environmental Impact Assessment Report (see for example p. 2-10 and p. 2-25) and Environmental Impact Assessment Report. It is a central plank in the project justification and policy context as advanced by the applicant.

NREAP was adopted without carrying out a strategic environmental assessment under Directive 2001/42/EC. That Directive, as noted above in the *A* case, makes it a requirement to carry out an SEA prior to the adoption of certain plans and programmes that set the framework for giving permission for projects which have significant effects on the environment, specifically those requiring an EIA.

The Court of Justice noted in the *A* case that the Belgian Order and 2006 Circular, which fell within the scope of Article 2(a) of the SEA Directive, *"contribute to the implementation of the objectives of Directive 2009/28"*. NREAP also constitutes a 'plan and programme' under Article 2(a), and in addition was introduced directly as a consequence of Member State obligations outlined in that Directive.

NREAP is a national plan which has resulted in the promotion of, and increase in, the use of renewable energy, including wind energy, to meet the national target. The failure to carry out any SEA has significant consequences as are clearly outlined in the *A* decision, as the Court of Justice re-affirmed the rule that project consents are illegal if they are adopted in breach of a Member State's EU law obligations. The Court of Justice will allow consent granted in breach of EU law to stand only in

limited circumstances, such as where there would be a significant impact on national electricity supply if the project was not undertaken or continued, which would not be the case in this instance.

Wind Energy Development Guidelines 2006

For similar reasons, these s.28 Ministerial Guidelines on Wind Energy Development which were expressly published in order to guide planning decision in relation to wind energy development applications, comprise a plan or programme within the meaning of Directive 2001/42.

The status of Wind Energy Development Guidelines as being within the definition of such a plan or programme has been implicitly admitted by the Government. The long running review of the Wind Energy Development Guidelines eventually produced a set of draft revised Guidelines. The Minister confirmed that those draft Guidelines had to be made subject to SEA precisely because they fell within the definition.

We also rely on the decision of the Court of Justice in *D'Oultremont v Region Wallonne* Case C-290/15 in this regard. A link to this judgment can be found here.

The applicant expressly relies on WEDG in support of his application and claims that the development complies with WEDG.

No prior SEA was completed in respect of the 2006 Wind Energy Development Guidelines. In view of the Court of Justice decision, the Wind Energy Development Guidelines cannot be relied on by the Board in this case.

The Board must therefore refuse the application on this ground also.

Present impacts of the development as built

The unauthorised development as constructed has already had adverse environmental and other impacts. We will cite just three examples.

Firstly, please see the **attached photograph** taken by our client at the clients' family property on a recent evening. The photograph shows the array of prominent intrusive bright red aviation warning lights on the turbines near their home. Intended to alert pilots, these are designed to attract attention. They do that very effectively, throughout the hours of darkness, unremittingly.

There is a technical modification which would limit their operation so that they are off until aircraft come within range, in other words until they are actually needed. In Germany this modification will shortly be mandatory for wind turbines above 100m hub height – they will have to be equipped with a need-based light system activated by a transponder on the aircraft. (An example of one such system which has been tested and approved for use in Germany we understand is the Lanthan Safe Sky).

This was always dark skies area until these turbines were made operational. The precious and beneficial dark skies ambience has been destroyed by this development.

Secondly, the exceptionally quiet rural soundscape has been adversely affected, though more intermittently. The turbines are restrained from operating by virtue of an undertaking given by the applicant at the request of the Supreme Court. They have limited permission to operate for maintenance and related purposes only and on those occasions 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 and for practical purposes they have lost a large portion of the value of their life's work. It had been their intention to retire in the near future and to do so they had intended to sell the property which would under normal circumstances have generated a reasonable pension fund for them in the years to come. That possibility has been taken from them by reason of this development.

In addition to these examples, the damage to the habitat which Cork County Council had tried repeatedly to prevent, first by refusing outright and then by requiring a far smaller number of wind turbines, with less road construction, and less interference with the landscape, regrettably has now been done.

Conclusion
The Board has been found by the Courts to have acted unlawfully in making two previous planning decisions in favour of Cleanrath.

Our clients request the Board not to make a third unlawful decision.

Yours faithfully,

Joe Noonan
Joe Noonan
NOONAN LINEHAN CARROLL COFFEY LLP

Encl. (1) Photograph