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**The Secretary,
An Bord Pleanála,
64 Marlborough Street,
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D01V902.**

20th May 2021

By Hand

AN BORD PLEANÁLA	
LDG-	_____
ABP-	_____
21 MAY 2021	
Fee: €	_____ Type: _____
Time: <u>9.25</u>	By: <u>Hand</u>

Description of Development:

Substitute Consent application in relation to the Derrybrien Wind Farm Project located at Coppanagh, Slieveanore, Loughatorick North, Boleyneendorrish, Kilbeg, Toormacnevin, Funshadaun, Derrybrien North, Derrybrien South, Bohaboy, Derrybrien West, Derrybrien East, Derreenamucka, County Galway.

Applicant:

Gort Windfarms Limited

ABP Case Number

ABP-308019-20

A Chara,

We refer to yours of 7th May 2021, and the invitation in accordance with Section 177K(1C)(a) of Planning and Development Act, 2000 (as amended) (hereafter referred to as 'the Act'), from An Bord Pleanála to Gort Windfarms Limited to submit information in relation to the Derrybrien Wind Farm Project considered material for the Board to satisfy itself that exceptional circumstances apply that would justify a grant of substitute consent by the Board.

1.0 Context for this Submission

The application for substitute consent for the Derrybrien Wind Farm Project was made to An Bord Pleanála following the service of a Notice under S.177B of the Act by Galway County Council.

That Notice was issued in-light of the two judgments of the Court of Justice of the European Union (CJEU) –

- Case C-215/06, the July 2008 case wherein the CJEU delivered a judgment against the Irish State referencing Derrybrien Wind Farm, and
- Case C-261/18 from November 2019, where, in a further judgment, the CJEU found that the Irish State had failed to take measures necessary to comply with Case C-215/06 and to fulfil a number of obligations arising from the Environmental Impact Assessment (EIA) Directive.



In order to comply with the CJEU judgments, Galway County Council gave notice to Gort Windfarms Ltd, the developer of the Derrybrien Wind Farm Project, pursuant to section 177B of the Act directing it to seek Substitute Consent for development associated with that project. That notice issued on 9th June 2020 and was confirmed on 23rd July 2020.

The application for substitute consent was submitted to An Bord Pleanála on 20th August 2020 under ABP Ref. ABP-308019-20. The application has been the subject of public consultation and 8 submissions or observations have been received from members of the public. In addition, Galway County Council has made observations on the application. A response to those submissions was made by Gort Wind Farms Ltd on 4th December 2020. The Board will also note that the existence of exceptional circumstances was addressed in the Planning Report submitted with the application for substitute consent.

2.0 The Exceptional Circumstances that Apply to the Derrybrien Wind Farm Project

The Applicant notes the requirement of Section 177K(1A)(a) of the Act that the Board must not grant substitute consent unless it is satisfied that exceptional circumstances exist that would justify the grant of consent. It is submitted that exceptional circumstances *do* exist justifying the grant of consent in this case.

In determining the information relevant to that assessment, regard has been had to the definition of exceptional circumstances in section 177A of the Act and the factors listed in Section 177D(2) of the Act, namely:

- whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;
- whether the applicant had or could reasonably have had a belief that the development was not unauthorised;
- 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;
- 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;
- the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;
- whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;
- such other matters as the Board considers relevant.



a) Regularisation of the development concerned would not circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive

The original applications for planning permission¹ that facilitated the development of the Derrybrien Windfarm Project were accompanied by assessments - including environmental impact statements (EISs) - prepared in order to facilitate the completion of an environmental impact assessment and appropriate assessment by the appropriate national authorities. These applications complied with all of the prevailing requirements for such developments.

In assessing those applications, the decision-making authorities, Galway County Council and An Bord Pleanála, carried out their assessments having regard to the plans and particulars submitted (including the EISs), and concluded that the development proposed would not have a significant adverse impact on the environment and should be granted permission. Those decisions were taken in accordance with the requirements of national law.

In Cases C-215/06 and C-261/18 *Commission v. Ireland*, the Irish State was criticised for failing to take steps to ensure that an environmental impact assessment was undertaken in relation to the Derrybrien Wind Farm. Insofar as the assessments had not taken place following the decision in Case C-215/06, the CJEU noted the provisions of national law, in particular sections 177B and 177C of the Act, which could facilitate an assessment. Galway County Council has relied on those provisions in directing the Applicant to apply for substitute consent.

The application for substitute consent submitted to An Bord Pleanála under ABP-308019-20 – the subject application - is accompanied by a comprehensive remedial Environmental Impact Assessment Report (rEIAR) and remedial Natura Impact Statement (rNIS) which will enable the Board to complete a remedial environmental impact assessment and a remedial appropriate assessment thereby ensuring that the requirements of the Environmental Impact Assessment Directive and the Habitats Directive are met. Therefore, a grant of substitute consent, which would regularise the status of the development, will ensure that the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive are achieved.

b) The applicant had, or could reasonably have had, a belief that the development was not unauthorised

Gort Windfarms Limited acted in good faith implementing planning permissions granted in respect of the Derrybrien Wind Farm. As noted above, the applications were submitted in full compliance with the prevailing legislation and there was no attempt by Gort Windfarms to circumvent either the Environmental Impact Assessment Directive or the Habitats Directive.

The development consents granted in respect of the Derrybrien Wind Farm were not subject to any challenge in accordance with relevant national law.

¹ Planning applications made under: GCC Reg. Ref. 97/3470, GCC Reg. Ref. 97/3652, GCC Reg. Ref.00/4581 and GCC Reg. Ref. 99/2377



The development was completed in early 2006 and has been operational since that date. No enforcement proceedings have been taken by the relevant planning authority, Galway County Council, in that time that would have indicated that the County Council, as the enforcement authority, considered the development to be unauthorised.

An application for relief under Section 160 of the 2000 Act in respect of the Derrybrien Wind Farm was dismissed by the High Court and the Supreme Court (see *Derrybrien Development Society Limited v. Saorgus Energy Limited & Ors* [2005] IEHC 060301 and [2015] IESC 77).

The State, when defending Case C-261/18, *Commission v Ireland* took the view that notwithstanding the decision of the CJEU in Case C-215/06, there was no necessity to require that there be an application to regularise the status of the Derrybrien Wind Farm (see §48 – 56 of the judgment).

In the circumstances, it is submitted that the Applicant had, and reasonably had, a belief that the development was not unauthorised.

c) 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 not been substantially impaired

The documents submitted with the application made under ABP-308019-20 provide a comprehensive and robust assessment of all stages of the project development including of the works which took place in response to the peat slide.

While the rEIAR sets out minor difficulties encountered in terms of gathering information, it is clearly stated that these did not prevent an assessment of environmental impacts.

As set out in the application documentation submitted to An Bord Pleanála, there is an extensive history of planning consents and environmental assessment associated with this development which facilitated, through the planning application and planning appeals process, robust public participation in decision-making and the assessment process. This Substitute Consent process provides further opportunities for public participation, including on the current question of exceptional circumstances. As noted above, there has already been a public consultation process in respect of this application, in the course of which eight submissions were received from members of the public and one from Galway County Council. Further, section 177K(1D) of the Act provides for further public consultation in respect of the information provided in response to a request made under section 177K(1C) of the 2000 Act. Therefore, the public will have a further opportunity to make submissions on the issue of exceptional circumstances.

In these circumstances it is submitted that the ability to carry out environmental impact assessment and appropriate assessment and to provide for public participation in this process, has not been substantially impaired.



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

The rEIAR and rNIS accompanying the application for substitute consent provide a robust and comprehensive assessment of the environmental impacts arising due to the development. Those assessments consider the full life-cycle of the development – from construction to operation and ultimate decommissioning which will be carried out at a later date - and include the peat slide event which occurred and the works which took place in response to this.

The rEIAR concludes that, while there were significant effects on the environment these were short-lived, and that there are no actual or likely significant effects on the environment resulting from the carrying out or continuation of the development.

The rNIS similarly concludes that the project has not had and will not have - with the continued implementation of mitigation measures for future operation and decommissioning – adverse effects on the integrity of any European site resulting from the carrying out or continuation of the development.

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

Again, the rEIAR and rNIS accompanying the application for substitute consent provide a full assessment of the significant effects on the environment and impacts on European sites resulting from the development.

In terms of the significant effects on the environment it is clear that the most significant effect – the peat slide – has been substantially remediated, and that all other significant effects have been, or can be remediated by the measures set out in the rEIAR.

In terms of the adverse effects on the integrity of any European site, as clearly set out in the rNIS, while mitigations measures are set out, there are no such adverse effects requiring remediation.

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

Gort Windfarms Limited has substantially complied with the terms and conditions attached to the grants of planning permission made in respect of the Derrybrien Wind Farm.

No enforcement proceedings have been taken by the relevant planning authority, Galway County Council

As referred to above, an application for relief under Section 160 of the 2000 Act in respect of the Derrybrien Wind Farm was dismissed by the High Court and the Supreme Court (see *Derrybrien Development Society Limited v. Saorgus Energy Limited & Ors* [2005] IEHC 060301 and [2015] IESC 77).

Arising from the foregoing, Gort Windfarms Limited has complied with previous planning permissions granted and has not previously carried out an unauthorised development.



g) such other matters as the Board considers relevant.

In considering whether exceptional circumstances apply, the Board may also consider that Gort Windfarms Limited was not a party to the proceedings before the CJEU in either Case C-215/06 *Commission v. Ireland* or Case C-261/18 *Commission v. Ireland* and therefore did not have any opportunity to influence the outcome of those cases.

The current application for substitute consent made under ABP-308019-20, is the first opportunity afforded to Gort Windfarms Limited to address the status of the Derrybrien Wind Farm Project and its compliance with the Environmental Impact Assessment Directive and the Habitats Directive.

The occurrence of the peat slide gave rise to a need to carry out emergency works to ensure the safety and stability of the development site and to mitigate against any impacts caused by the peat slide. In carrying out those works, Gort Windfarms Limited engaged with relevant authorities including Galway County Council and Inland Fisheries Ireland on the nature of the works and the manner in which they should be carried out in order to minimise the impacts on the receiving environment. As described in detail in the rEIAR and rNIS, the peat slide was an exceptional event in itself, and the investigation of it and the measures to address it have dramatically increased the understanding regarding construction of wind farms on peat and informed best practice guidelines and the assessments contained in the application documentation.

For these reasons set out above, Gort Windfarms Ltd. submits that the Board can be satisfied that exceptional circumstances exist justifying the grant of substitute consent and that it is therefore not precluded by section 177K(1A)(a) of the Act from granting substitute consent in respect of the Derrybrien Wind Farm Project.

4.0 Concluding Remarks

We appreciate the Board's consideration of this submission and trust that it addresses points raised.

We will engage with the Board on the publication of any public notices deemed appropriate and look forward to acknowledgement of this submission and receipt of your decision in due course.

Is mise le meas,

Helen O'Keeffe, BE MRUP MSC MIEI MIPI
Senior Planner, EMP ESB, acting on behalf of Gort Windfarms Limited
Email: [REDACTED] Tel: [REDACTED]