

Appendix 9

Derrybrien
Loughrea
Co Galway

29/7/2003

Mr Noel Burke
Enforcement Officer
Planning Section
Galway Co Council
Prospect Hill
Galway

Dear Mr Burke

I have made a number of unsuccessful attempts to contact you since our conversation by phone on 24/7/2003.

As you are aware from my initial contact with you on 16/7/2003 I am requesting information from the planning section of Galway Co Council as to whether or not development work adjacent to windfarm sites at Derrybrien North, Toormacnevin and Bohaboy are authorised or unauthorised.

The planning reference numbers for the developments referred to are 97/3470, 97/3652 and 00/4581.

It is my understanding that Galway County Council and An Board Pleanala decided to "grant permission for the said development in accordance with the said plans and particulars, subject to the conditions specified in the second schedule".

I would be grateful to you if you could clarify and make the following information available to me as soon as possible.

Is the entry exit roadway currently under construction approximately 2 km north of the original access roadway authorised or unauthorised?

Is the quarry, which is in operation authorised or unauthorised?

Is the site compound authorised or unauthorised?

What is the status of the 5-year grant of permission given on 12/10/1998 as the construction is likely to take approximately 18 months to complete?

What steps have been taken to monitor water quality before and since construction started?

Has the developers requested changes to roadways, control house or turbine locations since the grant of permission?

Has the survey of the Hen Harrier population been properly undertaken?

Who will monitor the hundreds of thousands of tonnes of excavated peat and rock, which will be disturbed during construction?

Is there a suitably qualified archaeologist at all times on the site?

Has the roads and bridges in this area been assessed and upgraded where necessary in light of the fact that construction has started?

All of the above questions are in the interest of proper planning and development of the community in which I live.

The integrity of both the planning and democratic processes are at stake here so therefore it is of critical importance that openness, transparency and accountability principals are rigidly adhered to.

I may be contacted at the above address or by phone at [REDACTED] or E- mail: [REDACTED]

Yours sincerely,


Martin Collins

REGISTERED POST

ITEM NO. RR 3784 5381 51E

TO

ADDRESS

Mr Noel Burke
Planning Sec.
Galway Co. Council
Pratt Hill
Galway

LIFT

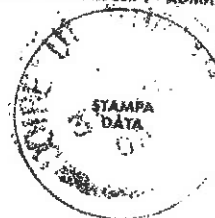
VALUE OF CONTENTS
(in words & figures)

ACCEPTING
OFFICER'S
INITIALS

REG FEE

in words

CUSTOMER RECEIPT - ADMHAN



Unapproved

THE HIGH COURT

[number.]

BETWEEN

DERRYBRIEN DEVELOPMENT SOCIETY LIMITED

APPLICANT

AND

GALWAY COUNTY COUNCIL

RESPONDENT

AND

GORT WINDFARMS LIMITED

NOTICE PARTY

JUDGMENT delivered by Mr. Justice Declan Budd on the 14th day of Nov. 2008

This matter comes before the court by way of judicial review made pursuant to O. 84, r. 22 of the Rules of the Superior Courts ("RSC"). The applicant for judicial review is the Derrybrien Development Society Limited which I shall refer to as "the applicant". Galway County Council is "the respondent". I shall refer to Gort Windfarms Limited, as "the developer" or "the notice party" so as to avoid any confusion which might arise by reason of the fact that the notice party developer was the successful applicant for planning permission for a 71 wind turbine farm in the Slieve Aughty mountains near the western seaboard of Ireland. Part of the mountain range is in County Galway, the southern part with the highest peak of 1312 feet being southwest of Lough Graney in County Clare. While one might be forgiven for regarding the project as one entity, in fact the developer chose to apply for three planning permissions, which were referred to as "phases" despite the fact that phases

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1 and 2 were in fact concurrent and phase 3 may have been consecutive, but it was not far behind in time. I note from the report of Dr. Trevor Orr F.I.E.I., an eminent soil expert, that this practice of dividing up a project for the purpose of planning permission is known as "salami-slicing".

As put by Senior Counsel for the applicant Society, this application for judicial review concerns two matters in respect of which the applicant contends that the respondent County Council has acted in excess of jurisdiction and erred in law in such a way that the error of law appears on the face of the record. Counsel submits that the phraseology set out in the recommendations in the Senior Planner's two reports which were accepted on 30th March, 2005 by the Decision Maker indicated that irrelevant considerations were taken into account and also that the correct criteria were not applied. Furthermore he submits that it has also or alternatively erred by acting outside its jurisdiction in relation to the exercise of its powers pursuant to the Planning and Development Acts, 2000 to 2002 ("the 2000 Act") in respect of:

1. The decisions by the respondent to grant extensions of the appropriate period for the planning permissions reference Nos. 05/316 and 05/317, on the 30th March, 2005 in respect of each of two developments described in the revised public notices as each comprising a wind farm of 23 wind turbines and associated development work; the first 05/316 in the townland of Derrybrien West, Co. Galway; and described as 03/5637 in the application form for further extension in respect of Derrybrien West and Boleynneendorrish, Co. Galway and in the original Planning Register Reference No. 97/3470 (Reg. Ref. No. 97/3652); and the second 05/317 in the townland of Derrybrien North, Co.

Galway, Planning Register No. 97/3470 and 03/5642 in notification/decision dated 30th March 2005. "Reg. Ref. No. 97/3652".

It turned out that the townlands, reference numbers and cesser date of 31st March, 2005 required correction by managerial orders. Accordingly, on 14th April, 2005 a Manager's Order 7365 was made in respect of Planning Ref. No. 05/316 to grant an extension of the appropriate period to read "to 31/03/2006" and townland to read "Derrybrien North". Similarly, on 20th April, 2005 a second Manager's order 7538 was made in respect of Planning Ref. No. 05/317; date of receipt of application to read "04/02/2005" and townland to read "Boleyneendorrish and Derrybrien West".

I suspect that much of the confusion stems from a failure to stick to "the anchor", in respect of each of the "phases", of the original planning permission numbers, which is what I understand to be the usual practice. Unfortunately there seems to have been a chain of errors and there appeared to be no planning official or informed person from the respondent County Council in court from whom I could seek practical guidance as to how to trace the way through the labyrinth of inconsistent reference numbers and confused descriptions of relevant townlands. However, despite the plethora of errors, the nub of the matter is clear: the applicant Society is challenging both further extensions granted by way of notifications, purporting also to be decisions, dated 30th March, 2005 under Planning Ref. Nos. 05/316 and 05/317 on the basis that the Senior Planner and Decision Maker both misconstrued s. 42(3) and applied incorrect criteria; and also that they failed to analyse the material circumstances in question over the apposite timespan prescribed (or rather not prescribed) in the statute and did not assess the pros and cons of the vital circumstances as to the crucial question of whether the relevant development had

not been completed due to circumstances beyond the control of the developer.
(emphasis added)

2. The failure of the respondent to respond to the applicant's correspondence and/or to make a decision on enforcement in respect of the notice party's wind farm development at Derrybrien, Co. Galway.

Senior Counsel for the applicant tried in opening to keep the case being made concise and with a narrow focus on the legal issues. The second leg of the applicant's case at (2) above is based on the failure of the County Council to reply to correspondence from Martin Collins who wrote a number of careful and measured letters in his personal capacity as a local resident and as a member of the applicant Society, particularly in respect of his concerns about the instability of the bog in the light of the construction work which was being carried out by the developer. There was also a string of letters from the applicant's solicitor complaining about the lack of any reply from the local authority. He pointed out that under the enforcement provisions in Part VIII that a warning letter under s. 152 of the Act of 2000 making a representation in writing to the Galway County Council that unauthorised development may have been or is being or may be carried out, has been received, as it was by the Respondent, then the Respondent should have reacted. He stressed that if it appears to the planning authority that the representations received are not vexatious, frivolous, without substance or without foundation, or it otherwise appears to the respondent authority that unauthorised development may have been, is being or may be carried out, then the authority shall issue a warning letter to the developer and may give a copy, at that time or thereafter, to any other person who in its opinion may be concerned with the matter to which the letter relates. Notwithstanding this, where the development in question is of a very trivial or minor nature, the planning authority

may decide not to issue a warning letter. However, in this instance the Respondent chose to ignore the letters from the applicant Society and also the letters from the solicitor acting for the Society and made no such finding that the representation was vexatious or frivolous or without substance or foundation but simply did not reply at all to many letters for months.

Under § 152 (3):-

"a planning authority shall issue a warning letter under subsection (1) as soon as may be but not later than 6 weeks after receipt of the representation under subsection (1)."

While this lack of response to such a seemingly measured representation about unauthorised development was very much a live issue at an earlier stage of these proceedings, the passage of time which has occurred since the Galway County Council was notified of the alleged unauthorised development means that this particular warning and complaint has been to an extent overtaken by the contentious propositions and basic criticisms that the respondent County Council has misconstrued the extension provisions in s. 42 and also that the suggested mistaken interpretations by the respondent are most germane to the issue of the misconstruing of s. 42. Furthermore the failure by the respondent Council to reply to the measured and reasonable letters from Mr. Collins and the solicitor for the applicant, for letter after letter for month after month, seems inexplicable and inexcusable. At this stage, on this leg of the case, it seems that the local authority failed to respond in a timely way to a string of letters, despite the time limit of six weeks for dealing with such a representation in writing. This allegation was clearly not vexatious, frivolous or without substance or foundation, and there was for many months a failure to reply to the letters at all, much less either accepting the applicant Society's representation or

else refuting the representation and explaining why the local authority does not accept the validity of the matters raised in the representation.

Having made these observations on this perhaps now somewhat peripheral aspect at this stage in the proceedings, I propose to leave over further consideration of this topic particularly in relation to the costs of this leg of the case until the factual history of this saga has been set out, by which time the fair and just outcome of this particular aspect, which especially concerns the applicant's claim for costs, will have become clarified and be simpler to assess in the overall context of these proceedings.

Factual Background

I propose to set out a description of the terrain involved and a short history of the relevant chronological development of this 71 wind turbine farm development. For this background is important to understand the reality or otherwise of contentions submitted by the Respondent and the Notice Party.

Location and description of the development property

The lands, the subject of this application for judicial review includes a wind farm site on the summit of Cashlaundrumlahan Mountain in the Slieve Aughty range. The 71 turbine site is on a property of some 345 hectares, which is some 14 kilometres south east of Gort and 3 kilometres north of Derrybrien, Co. Galway. Until recently the mountain area was partly under forest of Lodge Pole Pine and Sitka Spruce which had been planted over the past thirty years or thereabouts by Coillte Teoranta.

In December 1997 a company, Saorgus Energy Limited, the developer's predecessor in title, applied for two planning permissions under the Local Government (Planning and Developments) Acts, 1963 to 1993 ("The 1963 Act") to

the planning authority Galway County Council, for developments described in the revised public notices each of which comprised:-

- (a) A wind farm of 23 wind turbines;
- (b) Service roadways;
- (c) A control house and
- (d) An anemometer.

The first of these planning applications was described as being in the townland of Boleynceendorrish and Derrybrien West, Co. Galway, Planning Register Reference No. 97/3470, ("Ref. No. 97/3470"). The second application was described as being in respect of the townland of Caheranearl, Derrybrien, Loughrea, Co. Galway, Planning Register Reference No. 97/3652, ("Ref. No. 97/3652"). Following appeals to An Bord Pleanála by the Derrybrien and District Concerned Residents Group, the applicant Society's predecessor, against the decisions of the planning authority to grant both permissions on the 12th March, 1998, An Bord Pleanála by two decisions dated 12th October, 1998 decided to grant permission for each of the two developments in accordance with the plans and particulars lodged with the planning authority subject to thirteen conditions each, under Planning Reference No. PL07.106290 and PL07.106292.

On or about 20th September, 1999 permission was granted by Galway County Council by Planning Register Reference No. 99/2377 ("Ref. No. 99/2377"), for development comprising the installation of a 110kV electricity transmission line between wind farm at Derrybrien North and 110kV ESB transmission line at Lough Atorick North in the townlands of Derrybrien North and East and Lough Atorick North.

On or about 5th October, 2000 Saorgus Energy Limited applied under the 1963 Act to the planning authority for permission for development comprising an extension to the Derrybrien wind farm consisting of 25 wind turbines, service roadways, transformer compounds and an anemometry mast, an increase in the permitted hub height of 46 turbines to 60m and also to extend the permitted blade length of these turbines to 30m at a site in the townlands of Toormacnevin, Rohaboy and Derrybrien North, Derrybrien, Co. Galway: Planning Register Reference No. 00/4581 ("Ref. No. 00/4581"). This application was refused by the planning authority on 1st December, 2000. Saorgus Energy Limited then appealed this decision to An Bord Pleanála which granted permission on 15th November 2001 for the proposed 25 turbines in accordance with plans and particulars which were lodged with the planning authority subject to thirteen conditions (according to An Bord Pleanála Reference No. PL07.122803.)

On or about 9th September, 2002 Saorgus Energy Limited sought permission from the planning authority for development comprising a change of turbine type from 25 Vestas V47 turbines to 25 Vestas V52 turbines involving a reduction in hub height of 3m and an increase in blade length of 3m, the same maximum height as that permitted for the turbines of 73m in the townland of Toormacnevin or Derrybrien. On 6th January, 2003 the planning authority granted permission for the change of turbine type in respect of the 25 turbines per Planning Register Reference No. 02/3560 ("Ref. No. 02/3560"). These had been the subject of the grant of permission by An Bord Pleanála, dated 15th November, 2001, Ref. No. PL07.122803, subject to fourteen conditions.

In the second Schedule of both planning permissions granted by An Bord Pleanála the following two conditions were included along with eleven others:-

Condition 3. rock and soil excavated during construction shall not be left stockpiled on site following completion of the construction works. Details of disposal of excavated rock and soil shall be submitted to and agreed with the planning authority prior to the commencement of work on site (my underlining added). The reason given for the first 4 conditions was for each: in the interest of visual amenity.

Condition 9. Before development commences on the site, the developer shall submit to the planning authority for written agreement detailed proposal for the control of "silt-laden discharges" from the site arising from construction activities.

Reason: In the interest of environmental protection (my underlining added)

In due course it will become clear what importance, or lack thereof, the developer and the respondent attached to compliance with Condition 9 when we examine if and when such written agreement came into existence about detailed proposals for the control of silt-laden discharges from the site arising from construction work, and also what supervision took place to ensure compliance with such proposals for disposal of arisings as required on the part of the notice party developer.

On or about 12th January, 2003 Saorgus Energy Limited applied for a felling licence in respect of 263 hectares of forestry lands under the Forestry Act, 1946. A licence to fell these trees, some 115,613 trees with the deforestation of the 263 hectares was granted by the Minister for Communications, Marine and Natural Resources on the 20th May, 2003 to Coillte Teoranta subject to six conditions.

By transfer dated 26th June, 2003, the lands forming part of Folios 27229, 17176F, 34119, 52971, and 54674F of the register of Freeholders Co. Galway comprising in total some 345 hectares were transferred by Coillte Teoranta to Saorgus Energy Limited. At about this time the notice party took a 21 year lease of the wind farm from Saorgus Energy Limited.

On or about 2nd July, 2003 work, including the deforestation, commenced on the windfarm site. This late start is significant in the time frame. 11 = MS

On or about 1st October, 2003 the notice party, Gort Windfarms Limited, applied to the planning authority for extensions of the duration of the planning permissions for the two wind farms of 23 turbines being "phase 1" under Ref. No. 97/3470 and "phase 2" under Ref. No. 97/3652 by some eighteen months up to 31st March, 2005. These were granted on the 24th November, 2003 by the planning authority and are under Reg. Ref. Nos. 03/5642 and 03/3470 respectively. I pause at this point to note that the two planning permissions for these two "phases" of the project, were granted on 12th October, 1998 but construction work on the site only began on 2nd July, 2003, despite the fact that the life of each of the two five year periods of the planning permissions was due to expire on 11th October, 2003. The developer could have applied to the local authority, the respondent, under s. 41 for a longer period than the five year period and if the local authority were to refuse an application for such longer period then the developer could have applied to An Bord Pleanála for the longer period. However, the developer in this case chose not to seek a variation of "the appropriate period" under s. 41. The limits of duration of a planning permission is dealt with in s. 40 and is to the effect that, subject to subsection 2, which is not in point, permissions granted under this Part, (being Part III in respect of control of development):

"... shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards –

- (a) in case the development to which the permission relates is not commenced during that period, the entire development, and
- (b) in case the development is commenced during that period, so much of the development as is not completed within that period."

Section 40(3) becomes significant in this case and reads:-

- 3. "In this section and in section 42, 'the appropriate period' means –
 - (a) in case in relation to the permission a period is specified pursuant to section 41, that period, and
 - (b) in any other case, the period of five years beginning on the date of the grant of permission."

In the context of this case, it accordingly is clear that "the appropriate period" is the period of five years beginning on the date of the grant of the permissions which was on 12th October, 1998. Accordingly, the life of these two salient permissions was due to cease to have effect on 11th October, 2003, less than three and a half months after the start of construction work on the site. There is a singular dearth of information as to why the development work only began after nearly four and three quarter years of the five year period had expired, when, on or about 2nd July, 2003, work, which included the cutting of trees, began on the development area.

On or about 1st October, 2003 the notice party, Gort Windfarms Limited applied to the planning authority for extensions of the durations of the planning permissions by some eighteen months up to 31st March, 2005 for the two wind farm "phases" of 23 turbines each, being Ref. No. 97/3470 and 97/3652. These

extensions were granted on the 24th November, 2003 by the planning authority under Register References 03/5642 and 03/3470 respectively.

I should mention for completeness that on or about 9th September, 2004 the notice party applied to the planning authority for an extension of the duration for the permission for the 110kV line, Ref. No. 99/2377 by some nine months up to 30th June, 2005 which extension was granted by the planning authority.

On 2nd October, 2003 there was a small peat slide at the turbine base of T17. This was the small peat slide which is referred to in the AGEC Report which was sent in to the respondent by ESB International as agent for the developer and which report was before the Senior Planner and the Decision Maker. This first failure of the stability of the blanket bog, especially since it came during and after a period of fine weather and low rainfall, might have been expected to serve as warning to the developer, its various consultants and contractors, about the effect of their construction activities and methods on the fragility and instability of the bog, despite the dry weather. Apparently no heed was paid to this warning.

On 16th October, 2003 a massive bog slide occurred on the southern side of Cashlaundrumlahan Mountain. This landslide began at the base of turbine T68 and contained an estimated 450,000 cubic metres of peat. The initial slide stopped further down the mountain on the 19th October, 2003 some 2.45 kilometres from the initial failure. However, on 28th October, 2003 following heavy rain the peat slide began to move again crossing the Black Road and it continued on to the Owendalulleagh River. From this river it went on into the Derrywee River and then meandered for some twenty miles or thirty two kilometres to Lough Cutra, south east of Gort. This lake is the source of the water for Gort's water supply. Apparently the acidification of the water caused a fish kill of an estimated 50% of the fish in the lake involving some

100,000 fish of all species and age groups. This serious environmental pollution and damage resulted in the construction work being halted on the wind farm site, while geotechnical investigations were carried out. There is a consensus among the reports obtained by the notice party developer and by the respondent County Council that the destabilisation of the blanket bog was caused by the construction work and in particular by the methods used such as the depositing of arisings, the spoil from excavations at the turbine foundations, on the blanket bog and from the construction of roads and the movement of heavy equipment on the fragile, soggy and wobbly surface of the bog.

On 24th November, 2003 the two applications for extension of the permissions were granted until 31st March, 2005. Such an application for an "extension" is made under the provisions of s. 42 of the 2000 Act, and in particular the provisions of s. 42(1) are germane to such a first extension and must be compared and contrasted with the provisions in respect of a "further extension" as to which s. 42(3) has particular significance.

Tree felling began again in or about July 2004, and work on the construction of the wind farm began again in or about November, 2004. On or about 14th January, 2005 the applicant began proceedings for an injunction under s. 160 of the 2000 Act, involving a planning injunction being sought against the notice party and by this the applicant Society sought to restrain the developer's deforestation of the lands including the wind farm at Mount Cashlaundrumlahan, Derrybrien, Co. Galway. Following a three day hearing before Ms. Justice Elizabeth Dunne on 19th, 20th and 21st April, 2005 she, in a reserved judgment delivered on 3rd June, 2005 refused the applicant Society leave by way of an injunction but did hold that the "deforestation" constituted development within the meaning of s. 3 of the 2000 Act.

On or about 4th February, 2005 the notice party developer made two applications for "further extensions" of the appropriate period of the planning permission for the two "phases" of the wind farm development of 23 turbines, Reference No. 97/3470 and 97/3652 for a further year up to 31st March, 2006. Notifications dated 30th March, 2005 of decisions to grant extension of the appropriate periods as defined in s. 40(3) of the 2000 Act, were issued, in the case of Register Reference No. 05/316 (Boleyneendorrish and Derrybrien West) and Register No. 97/3470 to the 31st June, 2006 and in the case of Register Reference No. 05/317 (Derrybrien North) – Reg Ref No. 97/3652 to the 31st March, 2006. Surprisingly there appears to be no managerial order made by either the manager or his deputy in respect of either of these decisions. I was informed by counsel for the respondent that as there was no provision for objection from the applicant society or any appeal from the respondent local authority's "decision to extend, or further extend" the respondent local authority did not regard it as necessary to make a formal decision or managerial order. This certainly seems very surprising indeed since such an order is manifestly required by statute and this is underlined particularly in the light of s. 42(4) of the very section which is in contention in this case. I propose to refer to the relevant sections in the text setting out each of the sections which has a bearing on the contentious issues confronting the court in this case, as this should assist a reading and understanding of the various constructions and alleged misconstructions of the issues in conflict.


Alleged delay on part of Applicant

Before setting out to deal with the crucial issues involving the applicant's contention that the Senior Planner and Decision Maker of the respondent County Council misconstrued the provisions of s. 42 and then going on to deal with the submissions of

Mountain was carried out at the instigation of and under the control of the developer, and its agents for whom the developer was responsible. They made quarries and built roads and cut drains and made excavations in the blanket bog from which they then placed the added weight of heavy arisings and spoil on the fragile and unstable envelopes of the blanket bog. Counsel for the applicant society submitted that in the light of this lacuna in respect of the giving of the requisite particulars, the notice party faced a formidable hurdle in trying to show that the delay in completing the project was due to circumstances beyond the control of the developer. He submitted that for the notice party to make the assertion in the reports submitted by Hibernian Wind Power and ESB International on its behalf that:-

"The peat slip and subsequent delays could not have been anticipated at the time of the application for extension to the planning permission and were outside the control of Gort Wind Farms Ltd"

seems the height of absurdity since the notice party was the developer and the paymaster and from the point of view of the planning authority one would have thought that those who prepare plans for the project, and adopt the methodologies and safety precautions to be used, are responsible for the development, not least on the basis of common sense and the old adage "he who pays the piper calls the tune". Anyone who has walked the blanket bog on top of the mountains of Ireland, or who has read of bog slides in the literature on blanket bogs, a necessary and obvious precaution for those planning a project of a massive wind farm of 71 turbines, should at least have been to read about the propensity of blanket bog to burst and slide. The bland and manifestly incorrect assertions in the notice party's report to the effect that the peat slip and subsequent delays could not have been anticipated at the time of the application for extension is obviously incorrect. Even more to the point, neither the




developer nor its agent ESBI in the application form gave the required particulars in compliance with s. 42(3) and Article 43. The application form and the attached report simply did not meet the statutory requirements set out in Article 43(d) of the 2001 Regulations. Thus the planning authority never had the requisite information for its consideration, nor was the mind of the Decision Maker applied to the correct criteria.

The decisions on these applications were based on the applications made to the respondent planning authority on 4th February, 2005, and the planning reports thereon prepared by its Senior Executive Planner, which reports are both dated 23rd March, 2005 and stamped "recommendation accepted 30 MAR 2005". In her two planning reports under the heading "Assessment of Application" the Senior Executive Planner states:-

"The applicants have provided a comprehensive report on the reasons for the delay in completing the project under the permitted time in the previous Grant of Extension of Duration of the original Planning Permission.

On the date of inspection of the site, there were bases constructed for 19 No. turbines, all site roads are in place and the borrow pit/quarry on site is fully operational. This is considered to be substantial works on foot of the permissions granted."

Nowhere in the report and recommendations does the Senior Planner refer to the correct criteria to be applied in respect of a further extension as provided under s. 42(3) of the 2000 Act, nor does she draw attention to or make the distinction between the onus of proof and standards of proof required or explain this aspect and the big differences between s 42(1) and s 42(3). Nor did she draw attention to or note that the substantial works, requisite in an extension application under s. 42(1), has no longer any relevance when it comes to s. 42(3). At the very least one would have



this court. The court's function is to review the manner in which the respondent concluded that substantial works had not been carried out pursuant to the 1981 permission within that period, having regard to the material which was before the respondent when the decision was made on the applicant's application".

Finnegan P. drew on this to say:-

"Thus, I am not concerned as to whether the conclusion arrived at by the respondent, that the dwelling under construction is significantly different from that for which planning permission was granted, is correct: that is a matter which can only be determined, it seems to me, in plenary proceedings or in proceedings under Part VIII of the Act of 2000. My function is to review the manner in which the decision was arrived at and determine whether the same accords with the requirements of s. 42".

For the present, I forbear to comment on the penultimate sentence and will return to this in due course.

The particular passage which counsel emphasises from the judgment of the learned President quoting Laffoy J. in *Littondale* at p. 536 is preceded by another instructive passage in which Laffoy J. says that she has quoted extensively from the judgment of the Supreme Court in *O'Keeffe v. An Bord Pleanála* for the purpose of emphasizing the parameters of the court's function on an application such as the judicial review before her.

She then said that it follows that a very considerable body of evidence on affidavits which was adduced by the applicant on that application, for instance, affidavits from two quantity surveyors, costing the works which the applicant

contents were carried out pursuant to the 1981 permission, which was not before the County Manager when he made his decision, has no relevance to the issues which arise on this aspect of the case. As Laffoy J. had already indicated, the recommendation of Ms Curley that the extension sought by the applicant should not be granted, was based on her conclusion that the only works which had been carried out pursuant to the 1981 permission were the construction of seven chalets and the installation of the roads and necessary services on the southern section of the site. While some of the views expressed in Ms Curley's memorandum in relation to factual matters and the application of the planning code to the facts were erroneous, in broad terms, her conclusion as to the nature and extent of the works which had been carried out pursuant to the 1981 permission was correct. "The question for this court is not whether the determination that the works carried out were not *"substantial works"*, within the meaning of paragraph c(ii), was correct, but whether that determination flew in the face of reason and common sense. Whether one adopts the approach which Ms Curley adopted of comparing the works which were carried out and the works which had been permitted by the 1981 permission but were not carried out, or adopts the approach of assessing the works carried out as a proportion or percentage of the works authorised, both approaches in essence being the same, in my view, it cannot be said that the conclusion that the works carried out were not substantial works, flies in the face of reason and common sense and was irrational." I would comment that Laffoy J. was here discussing the general test for judicial review in applying the touchstones of unreasonableness and irrationality.

The first point to make about the application of this to Derrybrien is that counsel for the applicant has made it perfectly clear that he has based his case on error of law because he submits that the Senior Planner and Decision Maker clearly

misconstrued the provisions of s. 42 (3) and adopted wrong criteria and misunderstood and misapplied the actual pertinent criteria. If they did consider the question of whether delays were caused by circumstances beyond the control of the developer, which certainly is not apparent, either because of the lack of relevant particulars given in both the application forms and in the reports submitted by Hibernian Wind Power on behalf of the developer, then in any case, the criteria were scrutinised over the wrong time span as there was no grounds for suggesting that such circumstances should only be examined during the period of the previous extension in view of the wording of article 43 in respect of additional particulars sought at article 43 (d). I should add for completeness, that when I asked to see the two actual "decisions", in order to ascertain whether they indicated any reasons as a basis for the decision, or had referred to any parts of the report from the planning officer, I was then told that no formal "decision" had been signed by the manager or his deputy and it transpired that one had to try to work out what the reasoning might have been from the cryptic wording of Delphic obfuscation on the two notifications. I have already explained why the "reasoning" set out is unhelpful as it states the obvious in noting that 'this application complies with the requirements of s 42' but fails to indicate what criteria were applied and how there had been compliance with the additional particular requirements in Article 43 especially at (a) and (d). Moreover s. 7 (2) (i) of the 2000 Act requires that particulars of any application made under s. 42 to extend the appropriate period of a permission should be noted in the planning register. S.7(3) clearly states that the planning authority shall make the entries and corrections as soon as may be after the receipt of any application, the making of any decision or agreement or the issue of any letter, notice or statement, as appropriate.

In Environmental and Land Use Law, Professor Yvonne Scannell, at p.177, says that a planning decision made by the planning authority or An Bord Pleanála must state the main reasons and considerations on which the decision is based. "The duty to give reasons for planning decisions has been described as the third principle of natural justice (*Boland v. An Bord Pleanála* [1996] 3 I.R. 435 and 472. It is imposed to ensure that decisions are made having regard to proper considerations. It provides a mechanism for the courts to check the quality of administrative decision making. It also ensures confidence in the decision making process, transparency, and, in theory at least, a greater acceptance of the integrity and propriety of a decision. It is an indispensable aspect of the right to fair procedures and it exists, *inter alia*, to facilitate an applicant or other party who wishes to appeal the decision or to re-frame an unsuccessful planning application and to assist the court in assessing the legality of the decision. (*State [Swaney] v Minister for the Environment* 1979 ILRM 35) Reasons for decisions must be proper, adequate and intelligible, and deal with the substantial grounds that have been raised. The statutory obligation is not merely to give the main reasons for the decision, but also to state the considerations on which the decision is based." It is not clear whether the duty to state considerations adds to the duty to give reasons.

Regrettably, it appears that no entry was made in the register, nor was any formal Order embodying either further extension decision brought into existence, and apparently the record of the decision is to be regarded as being embodied in the two notifications which I shall describe in due course.

Nature of the jurisdiction under s 42

second event occurred in the southern part of the range (County Clare) in October 1934 and has been associated with high antecedent rainfall".

This was the bog slide investigated by Frank Mitchell for the RDS. Cursory research firstly should have alerted the developer to the need for care when planning to construct huge turbines on blanket bog because of the perils of fragility and instability. The necessity to research and plan and devise, institute and maintain safe methodologies for the construction on the jelly-like terrain had to be obvious and clear to the developer, its experts, advisers and employees.

As for the weather they comment that the twelve month period preceding the bog slide produced one the lowest cumulative rainfall totals in the record. Their report also contains a digest of each of the other reports. At p. 210 under the heading "The bog burst of 16th October, 2003 – part of a pattern?" they say:-

"Had the bog slide of October 2003 been an event that occurred in complete isolation with no similar instances before or after, it might reasonably be regarded as something quite extraordinary that arose from a unique set of circumstances, and that a recurrence was most unlikely. This is not the case however.

11.4.1 Evidence of peat movement within the wind farm site.

Within the wind farm site itself there are several examples of peat instability associated with construction work. The most striking of these is a bog slide that occurred two weeks before 16th October at turbine 17. This involved collapse of the peat down slope for a distance of almost 150m and across a width of something over 20m. It is reported to have happened with the same abruptness as the major

bog slide, and is also associated with construction work around a turbine base and road.

One of the most remarkable facts about this failure is that, despite its substantial and dramatic nature, the event was not seen as an urgent reason to suspend work while the causes were determined. Instead then it seems to have been looked on as something curious and quite out of the ordinary – an exceptional event with little or no relevance to the remainder of the operations at Derrybrien. Had the original EIA report highlighted the dangers of peat instability and bog slides, it is likely that the event at T17 would have been taken much more seriously than it apparently was.

11/11/03

Indeed there is evidence of peat movement in a great many places at Derrybrien, not all of it necessarily linked with construction work, but revealed by, for example drainage carried out as part of road construction and maintenance.

At p. 229 at 11.5:-

"The accumulated evidence for movement and instability points to the fact that the large bog slide of 16th October, 2003 was by no means a unique event. It forms just one example within an obvious pattern of behaviour that involves greater or lesser instances of peat movement and instability.

11.6 Finally, rainfall patterns at Cashlaundrumlahan since October 2002 have produced the driest set of conditions ever recorded in the last fourteen years. The impact of this on the peat fissures in the plantation forestry is likely to increase the sensitivity of the peat system to impacts. If the climate is shifting to more long dry spells and periods of intense rain, this, too, will heighten sensitivity to impacts."

The report has an impressive bibliography which includes the archaeological report of K. Wiggins 2001 "Proposed Wind Turbine Development at Derrybrien, Co. Galway: Archaeological Report, Limerick: Michael Punch and Partners". This report was commissioned on behalf of the developer by consultant engineers Michael Punch and Partners and was sent in to the planning authority under cover of a letter from Michael Punch & Company and is on the planning file. I shall return to this report when discussing what documents would appear to be both relevant and germane and available to be consulted when it was there to be read on the planning file. For the present I confine myself to the remark that clearly the Senior Planner and the Decision Maker had the AGECE report as part of the ESBI report tendered by the notice party developer with the Application Form and the BMA Geo Services report and the reports of Dr. Rodgers and Mr. Mulqueen of University College, Galway, together with the respondent's own reports from their senior engineer and their own report about the incident. It suffices to say that nothing in these reports which must have been before the Senior Planner and the Decision Maker detracts from the clear conclusions of all experts that the cause and trigger of the bog slide was the mode of construction work being carried on under the auspices of the developer, particularly the deposit of arisings and pumping of water onto the fragile blanket bog. This was happening at various turbine bases in October 2003 and, not surprisingly added to the fragility and instability of the blanket bog and led to the ensuing bog flows.

The two Applications for Further Extension.

The developer's application for further extension of effective permission 03/5642 (originally 97/3652) was sent in on Wednesday 2nd February, 2005 on the headed writing paper of Hibernian Wind Power to the planning section of Galway

County Council and was stamped "received" on the 4th February, 2005. The letter says that it encloses:

- Completed application form
- Cheque for application fee payable (€62)
- Report detailing delays experienced by the project, works completed to date and works expected to be complete by expiry of current planning permission (title: Report on delays to completion and Works Completed to Date pursuant to planning permission 03/5642 (Original Planning Permission ref No. 97/3652)).

The writer asks that receipt of the application be acknowledged and by letter dated 07/02/2005, receipt of the application was acknowledged by Galway County Council under the heading "Re: Application for extension of duration for wind farm of 23 wind turbines in the townland of Derrybrien North, received on 4/2/2005" which likewise appears to be in respect of phase 2. Under 1 INTRODUCTION, this report from ESB International dated 28th January, 2005 *inter alia* states:-

"Derrybrien wind farm near Gort, County Galway, will consist of 71 Vestas V52850KW wind turbines capable of generating 60.35MW of sustainable energy."

Further down the page it states:-

"The Derrybrien wind farm project is currently being developed by owners Gort Wind Farms Limited in Co. Galway, in the jurisdiction of Galway County Council. The project consists of three phases each of which is covered by a separate planning permission."

Planning approval for phase 2 of the Derrybrien wind farm was granted by An Bord Pleanála on 12th October, 1998 (An Bord Pleanála ref No. 97/106292 Galway

County Council planning register ref. Nos. 97/3652). The original approval expired on 11th October, 2003 and Gort Wind Farms Limited (GWL) applied for extension to the planning permission in early October 2003. Galway County Council granted extension to the planning permission on 24th November, 2003 for the period to 31st March, 2005. The Galway County Council planning register No. of the planning extension is 03/5642.

"ESBI Engineering Ltd, Renewables Division, and Aertech, are acting as project managers for Gort Wind Farms Limited on the Derrybrien project. ESBI has compiled this report to detail the exceptional events which have delayed the project and the measures that have been put in place to safely manage the completion of the development. The report also describes works completed to date and those that are expected to be completed before the expiration of the current planning permission."
(underlining added)

A first comment on this passage is that this is a clear acknowledgement that Gort Wind Farms Limited is the developer and this is clearly stated in the application form and in this report compiled by ESBI. This does not sit well with the sidling away from responsibility in this case for the bog slide on 16th October, 2003. This process of distancing itself from responsibility on the part of the Notice Party was commented on by counsel for the applicant.

To escape culpability in respect of the cause of the bog slide would appear to be a tough task for the developer but this should have been a matter for the Planning Authority provided they apply correct criteria.

This report contains a description of the peat slip on 16th October, 2003 and how after heavy rain on the 29th October, 2003 the peat slip-mass mobilised in the vicinity of Black Road Bridge and how the movement of peat resulted in large

deposits of material on private lands above the Black Road Bridge and pollution to the Owendelluleagh river, with a significant loss of fish. During the incident the peat overflowed the Black Road and damage occurred to the Black Road Bridge and to the downstream Flaggy Bridge on the R353 regional route between Gort and Portumna. In response to the incident all works on the site were suspended while an investigation was undertaken into the cause of the incident and its environmental impact and implications for the safe completion of the project. It goes on to explain that the developer through their project managers ESBI Engineering engaged the services of Applied Ground Engineering Consultants, independent geotechnical experts with specialist expertise in land stability issues to undertake a geotechnical assessment of the site and identify the possible causes of the peat slip. AGECE produced two reports (appendix 1) detailing their findings:

- Report on Derrybrien wind farm final report on landslide of October 2003
- Report on Derrybrien wind farm: the final report on post landslide site appraisal.

The ESBI report then refers to three reports commissioned by Galway County Council:

- Final report assessment of landslides at Derrybrien wind farm site BMA Geo Services Limited, 2004
- NUI Galway report on Derrybrien wind farm site, Co. Galway by Dr. Michael Rodgers and Mr. John Mulqueen
- Derrybrien landslide: assessment of environmental impact Moira Ní Chionna Senior Engineer Galway County Council, 13th February 2004.

The AGECE reports determine that construction on the site could resume but put forward six key recommendations with a further seventeen detailed

documented therein were serious breaches, particularly in the context of s. 152 and s. 153 of the Planning and Development Act, 2000 and that the failures on the part of the planning authority had the effect of negating the "watchdog" element being envisaged for members of the community and the public in that part of the Act by the legislature. As for the sixth paragraph dealing with deforestation and the environmental impact statements, my understanding is that these matters no longer remain alive in these proceedings.

The provisions in Part VII relevant to the correspondence above are s. 151 which states that any person who has carried out or is carrying out unauthorised development shall be guilty of an offence and section 152 which covers a warning letter and states:-

S.152 "(1) Where –

- (a) a representation in writing is made to a planning authority by any person that unauthorised development may have been, is being or may be carried out, and it appears to the planning authority that the representation is not vexatious, frivolous or without substance or foundation, or
 - (b) it otherwise appears to the authority that unauthorised development may have been, is being or may be carried out,
- the authority shall issue a warning letter to the owner, the occupier or any other person carrying out the development and may give a copy, at that time or thereafter, to any other person who in its opinion may be concerned with the matters to which the letter relates.

(2) Notwithstanding subsection (1), where the development in question is of a trivial or minor nature the planning authority may decide not to issue a warning letter.

(3) A planning authority shall issue the warning letter under subsection (1) as soon as may be but not later than 6 weeks after receipt of the representation under subsection (1).

Subsection (4) sets out the required contents of and the procedure for the issuing of warning letters. Section 153 in respect of decision on enforcement states:-

S.153 "(1) As soon as may be after the issue of a warning letter under section 152, the planning authority shall make such investigation as it considers necessary to enable it to make a decision on whether to issue an enforcement notice.

(2)(a) It shall be the duty of the planning authority to ensure that decisions on whether to issue an enforcement notice are taken as expeditiously as possible.

(b) Without prejudice to the generality of paragraph (a), it shall be the objective of the planning authority to ensure that the decision on whether to issue an enforcement notice shall be taken within 12 weeks of the issue of a warning letter.

(3) A planning authority, in deciding whether to issue an enforcement notice shall consider any representations made to it under section 152(1)(a) or submissions or observations made under section 152(4)(b) and any other material considerations.

(4) The decision made by the planning authority under subsection (1) including the reasons for it shall be entered by the authority in the register.

(5) Failure to issue a warning letter under section 152 shall not prejudice the issue of an enforcement notice or any other proceedings that may be initiated by the planning authority.

Thus it is clear that the planning authority shall investigate subsequent to the issuing of a warning letter and shall make a decision as to whether or not to serve an enforcement notice and shall include the reasons for the decision in the planning register entry. These provisions make clear the recognition of the role of the public in alerting the planning authority to concerns about putative unauthorised development and sets out the procedure to be adopted on receipt of a representation which is not vexatious, frivolous or without substance or foundation. I deal with the application of these provisions to the correspondence between Martin Collins and the planning authority when I summarise the history of this correspondence from the affidavits.

The first affidavit of Martin Collins was sworn on the 17th June, 2005 the same day as the grounding affidavit of Stephen Dowds. Mr. Collins said that he was a resident of Derrybrien and is a member of Derrybrien Co-Operative Society Limited and was authorised by the Society to make the affidavit and to do so on its behalf and with its authority. In fact the applicant is Derrybrien Development Society Limited and I think that the name of the proposed friendly society changed shortly before the issue of the application for leave. However, no point has been taken of a serious nature about nomenclature and certainly no one could contest Mr. Collins' statement that he is a longstanding opponent of the wind farm at Derrybrien because of the scale of the development which at 71 turbines, he believes, is more that double the size of

any existing land based wind farm in the country, and also that in the course of the construction of the wind farm he became concerned at the nature of the works being carried out at the site. On foot of his concerns about the development works he wrote to the respondent setting out his concerns regarding enforcement issues by letter dated 29th July, 2003 about two and a half months before the landslide of 16th October, 2003. A reminder was sent on the 8th March, 2004 but he did not receive a response to his letter for nearly a year until his solicitor received a reply on the 16th July, 2004. These letters are exhibited together with the response from V.P. Shields & Son, Solicitors for the applicant, who wrote to the respondent on the 29th July, 2004. No substantive response was ever obtained despite reminder type letters being sent on the 18th August, 2004, 20th September, 2004, 11th November, 2004, 29th November, 2004, 4th January, 2005, 26th January, 2005, 14th February, 2005, 1st March, 2005 and 21st March, 2005. He exhibits this correspondence and also says that the residents of the local area became extremely concerned in 2002 that the entire Slieve Aughty area was designated as suitable for wind farm developments.

His concerns were intensified by the landslide of 16th October, 2003 and his solicitors wrote on 6th September, 2004 to the respondent about this designation, but no response whatsoever has been received to this letter despite reminder letters dealing with this issue dated 11th November, 2004, 26th January, 2005, 14th February, 2005, 1st March, 2005 and 21st March, 2005 each of which failed to elicit a response. Again all these letters are actually exhibited. I summarise this correspondence, which is in exhibits MC1 to MC6. The initial letter dated 29th July, 2003 from Mr. Collins' home address at Derrybrien, Loughrea, Co. Galway was addressed to Noel Burke, the Enforcement Officer in the planning section of the respondent. He stated that he had

made a number of unsuccessful attempts to contact Mr. Burke, since a conversation by phone on the 24th July, 2003, and then said:-

"As you are aware from my initial contact with you on 16th July, 2003 I am requesting information from the planning section of Galway County Council as to whether or not development work adjacent to wind farm sites at Derrybrien North, Toormacnevin and Bohaboy are authorised or unauthorised."

He gave the planning reference numbers for the developments referred to as 97/3470, 97/3652 and 00/4581 and continued:-

"It is my understanding that Galway County Council and An Bord Pleanála decided to grant permission for the said development in 'accordance with the said plans and particulars, subject to the conditions specified in the second schedule'. I would be grateful to you if you could clarify and make the following information available to me as soon as possible.

Is the entry exit roadway currently under construction approximately 2km north of the original access roadway authorised or unauthorised?

Is the quarry, which is in operation, authorised or unauthorised?

Is the site compound authorised or unauthorised?

What is the status of the five year grant of permission given on 12/10/1998 as the construction is likely to take approximately eighteen months to complete?

What steps have been taken to monitor water quality before and since construction started?

Has the developer requested changes to roadways, control house or turbine locations since the grant of permission?

Has the survey of the Hen Harrier population been properly undertaken?

Who will monitor the hundreds of thousands of tonnes of excavated peat and rock which will be disturbed during construction?

Is there a suitably qualified archaeologist at all times on the site?

Have the roads and bridges in this area been assessed and upgraded when necessary in light of the fact that construction has started?

All of the above questions are in the interest of proper planning and development of the community in which I live.

The integrity of both the planning and democratic processes are at stake here so therefore it is of critical importance that openness transparency and accountability principles are rigidly adhered to.

I may be contacted at the above address or by phone"

He gives both telephone number and email address. The letter was signed by Martin Collins and sent to the Enforcement Officer at the planning section. This courteously worded and seemingly perfectly responsible letter received no reply despite the bog slides which occurred in October 2003, which one would have expected would have alerted the respondent to the perils to life and health of Derrybrien residents and indeed to all affected by the environmental debacle and danger to special areas of conservation and the water supply from Lough Cutra to the population of the Gort region. There has been no suggestion that the letter dated 29th July, 2003 was vexatious, frivolous or without substance or foundation, not surprisingly as the letter appears to be a model of careful thought and concise

information, not least in respect of the conditions specified in the second schedule to the planning permission. In view of the provisions of s. 151, 152 and 153, one would have thought at the very least there would have been some written response. After all s. 152 requires the planning authority that has received a representation in writing that unauthorised development is being or may be carried out, when the representation is clearly not vexatious, frivolous or without substance a foundation, as in this case, then the authority shall issue a warning letter to the developer and may give a copy to any other person who in its opinion may be concerned with the matters to which the letter relates. Mr. Collins is clearly such a person as he expressed his concerns about at least ten aspects of the development. His questions were as to the quarry, the status of the five year grants of permission given on the 12th October, 1998 as the construction is likely to take approximately eighteen months to complete and his questions about monitoring water quality, the survey of the hen harrier population and in particular his asking as to who will monitor the hundreds of thousands of tonnes of excavated peat and rock which will be disturbed during the construction. They are all clearly realistic and germane and almost prophetic in the light of the October bog slide cascading down the mountain blocking roads and bridges and polluting the rivers. Despite s. 152(3) requiring the authority to issue the warning as soon as may be but not later than six weeks after receipt of the representation, the planning section seems to have ignored the duty imposed by ss. 152 and 153 which requires that as soon as may be after the issue of a warning letter under s. 152, the planning authority shall make such investigation as it considers necessary to enable it to make a decision on whether to issue an enforcement notice. This should have been done expeditiously with the objective that the planning authority ensures that the decision whether to issue an enforcement notice should be taken within twelve weeks of the issue of a warning

letter. Furthermore the decision made by the planning authority under subs. (1), including the reasons for it, shall be entered by the authority in the register. It seems self evident that the ignoring of the requirements of the legislature with regard to recording such decisions in the register has again led to a further dereliction of duty on the part of the planning authority. One cannot but be sympathetic to planning officials who have to cope with representations from public representatives which must often be pressurising and time consuming and in certain European countries would be forbidden by law, as interfering with planning due process. However it suffices to say that if an investigation had taken place then perhaps both the respondent and the developer would have reacted by ensuring that there was compliance with the planning permission and each of the conditions thereunder, and also attention might have been drawn to the question of safety in respect of the work methods. No apology or explanation has been offered for the system failure which negated the point of the legislation passed by the Oireachtas. Perhaps this is a matter for comment and costs.

By letter dated 8th March, 2004 re Derrybrien landslide, Mr. Collins wrote again to the Enforcement Officer reminding him that it was his understanding unauthorised development had taken place on and adjacent to the windfarm site at Derrybrien. He formally requested the enforcement officer under s. 151 of the Planning and Development Act, 2000 urgently to implement the law according to the Act. He wrote that among the issues of concern to him are quarrying, blasting with explosives, site compound, entry exit roadway, drainage and water quality monitoring, changes to roadways control house or turbine location and the control of excavated material from turbine bases. He enclosed copies of previous correspondence. This letter was dated about six months after the bog slide and one

would have thought that mention of quarrying, blasting with explosives and concern about the control of excavated material from turbine bases would all have stimulated action. By letter dated 16th July, 2004 the enforcement section acknowledged two letters from the applicant's solicitor and these are dated 8th March, 2004 and 29th July, 2003. From Martin Collins there is reference to a previous reply dated 29th March, 2004 and that was a reply from the law agent which did not address any of the issues raised by Mr. Collins in his letter dated 29th July, 2003. This raised serious issues in respect of concerns, which the applicant's solicitor pointed out were unfortunately justified by the subsequent events involving two landslides at the site. He noted that the response from the enforcement section came almost a year after Mr. Collins' letter and some eight months after the landslide had occurred. The solicitor complained about the extreme delay and the failure to address in any substantive way the issues raised by Mr. Collins and pointed out that such responses as had been given were seriously inadequate. The respondents' letter dated 16th July, 2004 referred to

"g. Condition No. 9 of planning register reference No. 02/3560 which dealt with the requirements of a survey of hen harriers. Agreement in relation to this condition was conveyed to the developer by letter dated 11th September, 2003.

h. The question of dealing with excavated material is a matter for the developer and the contractor.

i. Condition No. 10 of planning register reference 97/3470, Condition No. 10 of 97/3651 and Condition No. 13 of 02/3500 deal with archaeological requirements including the employment of a suitably qualified archaeologist. Agreement on these conditions has been conveyed to the developer dated 11th September, 2003."

I have selected these three items as throwing light on the enforcement section's attitude to compliance with the Enforcement provisions in ss. 152 and 153 and I quote the comments on items on g, h and i made by the applicant's solicitor in his letter dated 29th July, 2004 to the planning enforcement section:-

"(g) We note that you entered into your agreement with the developer on this matter on the 11th September, 2003 long after works had commenced. Given that this was a pre development requirement you might please explain how this satisfies the requirements of the planning permission.

(h) This response is completely inadequate.

1. Condition 3 of the permission 97/3470 imposes an obligation on the contractor and developer to dispose of excavated material by way of agreement with the County Council. The County Council are not entitled to ignore this planning permission granted by An Bord Pleanála or the conditions of same. Please furnish us with a copy of the disposal agreement entered into pursuant to this condition and confirm what arrangements have been made by the Council to monitor performance of this agreement.

2. The statement contained in the letter is clearly completely unacceptable in the light of the land slide which has occurred. The material produced from the land slide is in a different category and it is not catered for at all in the planning permission. Accordingly any interference with such materials such as burying it, removing it or otherwise is clearly a concern of the Council under the statutory obligation. We would expect that the County Council or their

appointed experts would have formally examined the landslide material, considered how to deal with it and issued directions to the developer and/or contractor in this regard. Obviously on foot of such directions, arrangements should have been put in place to ensure compliance with same and we will require to know the position as a matter of urgency. As the Council are aware, we are presently awaiting our expert report with regard to the bog slide and the consequences thereof. We believe that it would be appropriate that our expert's views would be taken into account in respect of the dealing with the excavated material and the materials produced by the land slide and we await hearing from you with confirmation that the Council will take those issues into account in due course.

(i) In view of the terms of this reply it would appear that the developer/contractor has not complied with the terms of the planning permission in relation to this pre development condition either.

The Council were notified in July 2003 that work had commenced on site and yet they only reached agreement with the developer/contractor in September 2003. it would appear to us that further investigations by an archaeologist are required post land slide. The situation requires that the site would be investigated again and you might confirm that this has occurred and what steps the Council have taken to monitor this."

By letter dated 18th August, 20⁰~~14~~ the applicant's solicitor again wrote to the enforcement section expressing surprise that they had received no response: whatsoever to the detailed correspondence and pointed out that the current works

being carried out for the installation of a sub station was unauthorised and requesting that the respondent would revert in accordance with the terms of the Planning Acts with regard to these unauthorised works within the time period specified by the Planning Acts. By further letter dated 20th September, 2004 the applicant's solicitor wrote that there had been ongoing operations and expressing concern that such effort would be made to recommence work at the wind farm site without the planning issues raised having been sufficiently resolved and expressing concern that despite the lapse of time no substantive response had been received to their correspondence. Further letters of reminder were sent on 11th November, 2004 and on 29th November, 2004 extreme concern was expressed that notwithstanding the serious issue raised in the letter dated 29th July, 2004 no response whatsoever had been received to same. Further letters were sent on 4th January, 2005 and 26th January, 2005. 14th February, 2005, 1st March, 2005, 31st March, 2005, in particular warning that the letter would be produced in Court in an application to fix the respondent with all or portion of the costs incurred. I think that the flavour of this correspondence has been sufficiently demonstrated for the purpose of dealing with the question of costs of this aspect, if required, at the same time as dealing with the costs in respect of other more contentious issues.

One further letter dated 13th June, 2005, in this correspondence is worthy of note; the applicant's solicitors wrote to the respondent by letter dated 13th June, 2005 re: planning permissions 97/3470 and 03/5642 extension of time granted under reference No. 05/317 as follows:-

"Dear Sirs,

We refer to previous correspondence in relation to this matter and in particular our letter of the 23rd ult. to which we do not appear to have

received any reply. The issues raised in that correspondence are issues of the utmost seriousness and gravity and require an immediate response

We further note that on inspection of the planning file in relation to this matter that same does not appear to have been considered in accordance with s. 42(3) of the Planning and Development Act, 2000. Specifically in this regard the local authority does not appear to have addressed the issue as to whether the circumstances which arose in the issue were outside the control of the person carrying out the development. Given that Galway County Council have prosecuted the developers for causing the land slide it is abundantly clear that they have failed to consider the application for an extension of time in accordance with the requirements of the Act.

Under the circumstances it appears to us that the extension of time granted was granted *ultra vires* and will require to be judicially reviewed. Unless we hear from you within seven days with an immediate response to all of the matters raised in our correspondence we have no option but to institute such proceedings without further notice to you.

Yours faithfully,

V.P. Shields and Son".

It does seem strange and ironic that the local authority has prosecuted the developer for causing the land slide, yet it is abundantly clear that they have failed to consider the application for an extension of time in accordance with the requirements

of the Act, namely "as to whether the circumstances of the cause of the land slide... were beyond the control of the developer".

Two cases are instructive about such planning matters:

In Henry Boot Homes Ltd v Bassetlaw District Council [2002] All ER (D)

421 some comments are helpful in respect of the nature of planning law reflecting the fact that third parties and the public generally may have interests in any decision. For example, the interests of third parties and the public in such matters greatly reduced the potential for a legitimate expectation to arise, perhaps from discussions between the developer and planning officials, and there is a warning that any expectation that works carried out would be treated as a lawful implementation of an outline permission could not have been legitimate as this was a legal matter to be determined in the last resort by the Courts.

Whitley & Sons v Secretary of State for Wales and Clwyd County Council [1992] JPL 856 is authority for the proposition that enforcement action can be taken against a development which failed to comply with conditions attached to a planning permission and which was unlawful as it did not constitute the development authorised by the planning permission. However on the basis of the factual case that the approval of the Secretary of State to a scheme of working had been obtained before the enforcement notice had been served, the application for approval had been made before the time limit expired and the time limit for taking

Appendix 10



ESB INTERNATIONAL

Stephen Court, 18/21 St. Stephen's Green, Dublin 2, Ireland.
Telephone : +353-1-703 8000. Fax: +353-1-676 4400. Telex: 30691 ESBC EI

MEMORANDUM

To: Ascon Kill Co. Kildare	From : Pierce J. Kirby Construction Manager
Att: Bernard Murphy/ John Murphy	Fax Ref. No.: 03k13
Telephone: 045 877098	File Ref: PO378015
Telefax: 045 877799	Telefax: 353 1 7037185
	Telephone: 353 1 7038255
	E - mail : pierce.kirby@esbi.ie
Date: 11 th June 2003	No. of Sheets: (including this cover sheet) * 12
Project : Gort Wind Farm Subject : Civil Works Contract	

Bernard/John,

Further to our meeting this morning, herewith as requested a copy of the Felling Agreement - Coillte/Gort Wind Farms.

Wrt winning road making materials from borrow pits discovered within the site boundary excluding the turbarry area, we confirm that the civil contractor can develop these borrow pits subject to notifying ESBI Engineering's site management and forwarding location details of these pits in advance.

Yours sincerely,

Pierce J. Kirby

Construction Manager, Aertech Projects

Cc: Con Sheahan, Chief Civil Consultant
Ken Boyne, Project Manager



Power, Civil & Environmental Engineering
Stephen Court, 18/21 St. Stephen's Green, Dublin 2, Ireland.
Telephone +353-1-7038000 Fax: +353-1-6764400



NSAI Reg. No. M664

3. Site Information.

3.1 Main Wind farm Site and Construction Compound Details.

The wind farm will be built on the Site whose location is illustrated on Figures 1 and 2, and whose layout is described on Figure 3.

The site is mountainous and very isolated; bog land with intense tree planting over much of the area, the surface is waterlogged and very difficult to traverse on foot.

Any trees that interfere with the construction and operation of the wind farm will be felled or lopped by an approved timber-felling contractor in good time in advance of the civil works commencing.

3.1.1 Safety Information.

Under no circumstances shall any fire be lit within the Site, with the exception of proprietary gas stoves, which shall be attended at all times, when lit.

The Project Supervisor shall be responsible for all safety matters on Site, and shall ensure that all personnel who work on the Site are given a safety induction prior to commencing work.

Any contractor required to fell or lop trees during the construction of the wind farm shall hold a valid tree-felling license.

3.1.2 Known Hazards.

Existing mobile telephone mast and supporting power generation is located within the eastern third of the site.

The site is isolated and the terrain is difficult, exposed and water logged.

3.2 Access to the Site

Access to the Site by any personnel must be by prior arrangement with the Project Supervisor.

3.2.1 Safety Information.

The site is isolated and the terrain is difficult and exposed and access must not be undertaken by single individuals, but in groups of two or more.

The terrain is difficult and exposed and individuals who wish to access the site should have the appropriate safety equipment

DERRYBRIEN WINDFARM, CO. GALWAY.**CIVIL WORKS TENDER DOCUMENTS****8. SECTION****SITE INVESTIGATION REPORT**

It should be noted that this site investigation report was undertaken January 2002, the turbine arrangements has since been modified with some turbines being relocated, such that the information contained with in this report may not be reflect the prevailing ground conditions for these specific turbines.

The information provided on the tender drawings with regard to these modified turbine locations and the associated ground conditions are to take precedence.

General

Item		Action by:
1.1	The majority of the meeting was based around the special conditions of contract which subsequent to the meeting are to be revised and agreed by both parties.	
1.2	Ascon raised issued of borrow pits outside those shown on existing drawings, ESBI have responded post meeting as per fax of 11-06-03. Proposed start date is 23 rd June 2003, Ascon to submit revised programme.	

General

Item		Action by:
1.1	ESBI stated that they required a lump sum fixed price for the civil works and that no variations or extras would be contemplated	
1.2	Planning permission for Phases I and II (T1-T46) will lapse on 10 th October 2003, 50% of Civil Works for Phases I and II must be complete by this date (i.e 24 bases)	
1.3	Ascon price has not included for pile foundations or for larger type foundations to counteract buoyancy effects.	
1.4	Ascon had envisaged 30 m wide corridor of trees to be felled, subsequent felling when roads constructed, more detailed site investigation was also envisaged.	
1.5	Formation level of foundation will be 3.5 m below ground level to meet planning requirement of hub height not exceeding 73 m.	
1.6	Dr Eric Farrell has visited the site and is confident that floating roads are feasible on site	
1.7	ESBI outlined that bog burst had occurred at nearby Sonnagh Old, Ascon to investigate if this is a potential problem at Derrybrien.	
1.8	Removal of risk from contract discussed, Ascon had not envisaged removal of Clause 12 (other than for on site road construction and winning of stone on site). ESBI advised that if additional costs are required they should be included to cater for unforeseen ground conditions at the turbine locations (ref. Piling etc)	
1.9	ESBI further stated that all risks associated with ground conditions, roads, foundations etc reside with the Contractor and shall be deemed to be included in the lump sum price.	
1.10	Ascon price had assumed start date of 3 rd March 2003, Ascon now to look at start date of 06 th May 2003	

Appendix 11



Michael Punch & Partners

CONSULTING ENGINEERS

LIMERICK

97 Henry Street, Limerick.

Tel: 061 313 877 Fax: 061 319 071

DUBLIN

MPP House, Glenageary Business Park, Co Dublin.

Tel: 01 235 2980 Fax: 01 235 2985

SLIGO

NIB Building, Stephen Street, Sligo.

Tel: 071 50 551 Fax: 071 50 788

CORK

Kiemar House, Shanekiel Road, Sundays Well, Cork

Tel: 021 430 0700 Fax: 021 430 0720

Limerick

Planning Office
Galway County Council
PO Box No. 27, County Hall
Prospect Hill Galway

07.06.02

011188/RT

Date

Our reference

Your reference

Reply to

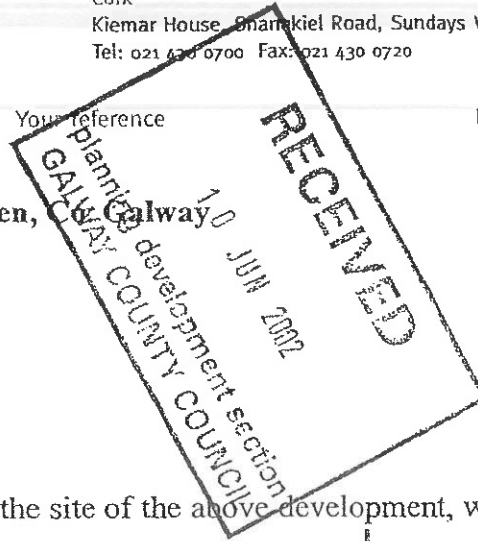
Re: Proposed Wind Turbine Development at Derrybrien, Co. Galway

Dear Sir / Madam

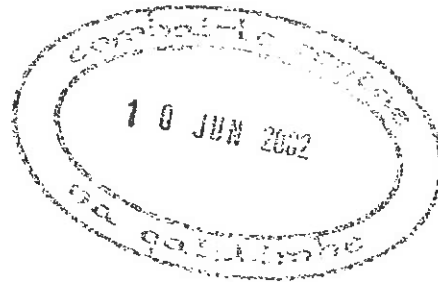
Following the execution of ground investigation works at the site of the above development, we enclose copy of the Archaeologists Report for your information.

Yours sincerely

Robert Tackaberry
Michael Punch & Partners



rechecked



Proposed wind turbine development at Derrybrien, Co. Galway

Angus Energy Ltd, c/o Michael Punch & Partners, Consulting Engineers, 97 Henry Street, Limerick

Galway County Council Planning Ref. No. 97/3470

Archaeological Report

Excavation licence No 01E0763

Kenneth Wiggins

The site

The location of the development is in the townland of Derrybrien North, on the top of the highest peak of the Slieve Aughty mountain range, an area of about 4.5km (east-west) by 2.5km (north-south), ca 10.5km south of Loughrea, and ca 13km east of Gort, Co. Galway (National Grid ref. between 15700/20400 and 16100/20600) (Fig. 1). This upland landscape is monotonous blanket-bog, partially reforested (Plates 1 and 2).

The development

- † The development relates to the construction of a wind turbine plant, with forty-six individual wind turbines proposed in all (Fig. 2). The facility is to be spread across the Cashlaundlahan peak, between the 300m contour and its 365m summit. Access is by means of a bog road which serves a television mast on the site, extending east from a minor road linking the R353 Gort road and the R351 Loughrea road.

Condition No 9 of the schedule to Galway County Council's planning permission No 97/3470 states as follows: '(i) A competent archaeologist shall be retained on site by the developer at his own expense during excavation work; (ii) In the event of any remains of archaeological or historical interest being discovered on the site during the course of the proposed works the developer/applicant shall immediately inform the Planning

Authority/Office of Public Works; (iii) Works affecting these remains shall cease immediately and shall not recommence until the Planning Authority agrees in writing; (iv) A competent archaeologist, nominated by its representative by the Office of Public Works, shall be facilitated in carrying out an archaeological investigation of the site if the Planning Authority so decides. The costs of the investigation shall be borne by the developer'.

This report does not cover actual construction work relating the wind turbines, which has yet to take place, but concerns the archaeological monitoring of the investigation by mechanical excavator of a number of the sites proposed for the turbines. At the commencement of work twenty-nine of the forty-six turbine sites were to be investigated by means of mechanical excavation, but due to the adverse conditions of the terrain, only eight of the sites could be tested this way, and the pre-development investigations were completed by means of hand auger, which did not require archaeological monitoring. The digging of the eight test-pits was undertaken over a two-day period, September 25-6th 2001.

Archaeological background

The townland of Derrybrien North belongs to the parish of Killeenadeema, in the barony of Loughrea. The relevant sheet (No. 124) of Recorded Monuments for County Galway (National Monuments Division, Dúchas 1997) contains a total of just three archaeological sites. These are GA 124-002 in the townland of Cullenagh (to the east of the proposed development), which is a standing stone; GA 124-004 in Derrybrien East, an enclosure; and GA 124-005 also in Derrybrien East, which is a graveyard. The last two sites are actually to the south of the mountain, near the village of Derrybrien, just south of the R535 between Gort and Portumna (Fig. 2). There are no known archaeological sites within the limits of the proposed development.

The digging of the investigation pits was directed by Mr Jim Clancy of Irish Geotechnical Services Ltd. The eight excavated trial pits were located in the eastern half of the site and were numbered as follows: Nos 30, 32, 34, 36, 41, 42, 43, 44 (Fig. 2). An Hitachi EX100 digger with a 3-foot bucket was used throughout.

No. 30 measured 2.3m in length (east-west) by 1.10m in width (north-south) by up to 2.7m deep. The sectional profile consisted of 1.3m of peat over a layer of pale grey silty clay ca 40cm thick over basal pinkish sediment up to ca 60cm thick. The cutting was not bottomed (Plate 3).

No. 32 measured 2.5m (east-west) by 1.1m (north-south) by up to 2.5m deep. The section below the sod consisted of 1.7m of blanket bog over 30cm of pale grey mud over 80cm of pinkish silty clay.

No. 34 measured 2.3m (north-south) by 1.1m (east-west) by up to 2.3m deep. The section was 2m of very soft blanket bog over 20–30cm of mid brown sandy sediment deposited on the surface of the natural rock (Plate 4).

No. 36 measured 2.2m (north-south) by 1.1m (east-west) by up to 3.2m deep. The section was 20cm of black sod over 1.8m of brown bog over ca 30cm of pale grey mud over ca 50cm of basal pinkish sediment (Plate 5).

No. 41 measured 4.1m (east-west) by 1.1m (north-south) by 3m deep. The section consisted only of waterlogged peat, which was not bottomed (Plate 6).

No. 42 measured 4.6m (east-west) by 1.1m (north-south) by 2.7m deep. The section was 30cm of blackish sod over very soft peat 2.4m thick over pale grey silty mud. The cutting was not bottomed.

measured 2m in length (east-west) by 1.1m (north-south) by 1.45m deep. The
y layer was very soft waterlogged peat which was too loose for further excavation.

No. 44 was aligned NW—SE and measured 2.3m by 1.1m by 2.2m deep. The cutting's
only layer was soft, waterlogged dark brown peat.

Excavation in the eastern half of the site was discontinued as the jelly-like movement of
the ground under the weight of the machine rendered further digging unsafe. Excavation
in the western half of the site was attempted, but the area was covered in dense ranks of
fir trees, which made it impossible for the machine to reach the testing sites, and work
was abandoned altogether.

Conclusion

Although there are to be forty-six wind turbines constructed at Derrybrien North in total,
and although permission was granted to investigate twenty-nine of the sites, in the end
only eight machine-cut pits were dug within the limits of the development. These reveal
the extent and nature of the blanket-bog on the mountain, but no archaeological features,
such as buried field walls, or artifacts were exposed. As Condition No. 9 of the schedule
to the planning permission specifies that an archaeologist must be retained by the
developer for the duration of excavation works, any further ground disturbance on the
site, whether in the form of investigations by mechanical excavator, the making of
foundations for the construction of the wind turbines, trenching for services and so on,
must be monitored by a suitably qualified archaeologist licensed by the National
Monuments Division of Dúchas the Heritage Service.

Kenneth Wiggins BA MPhil MIAI Consultant Archaeologist

17 Vartry Close, Raheen, Co. Limerick

December 2001

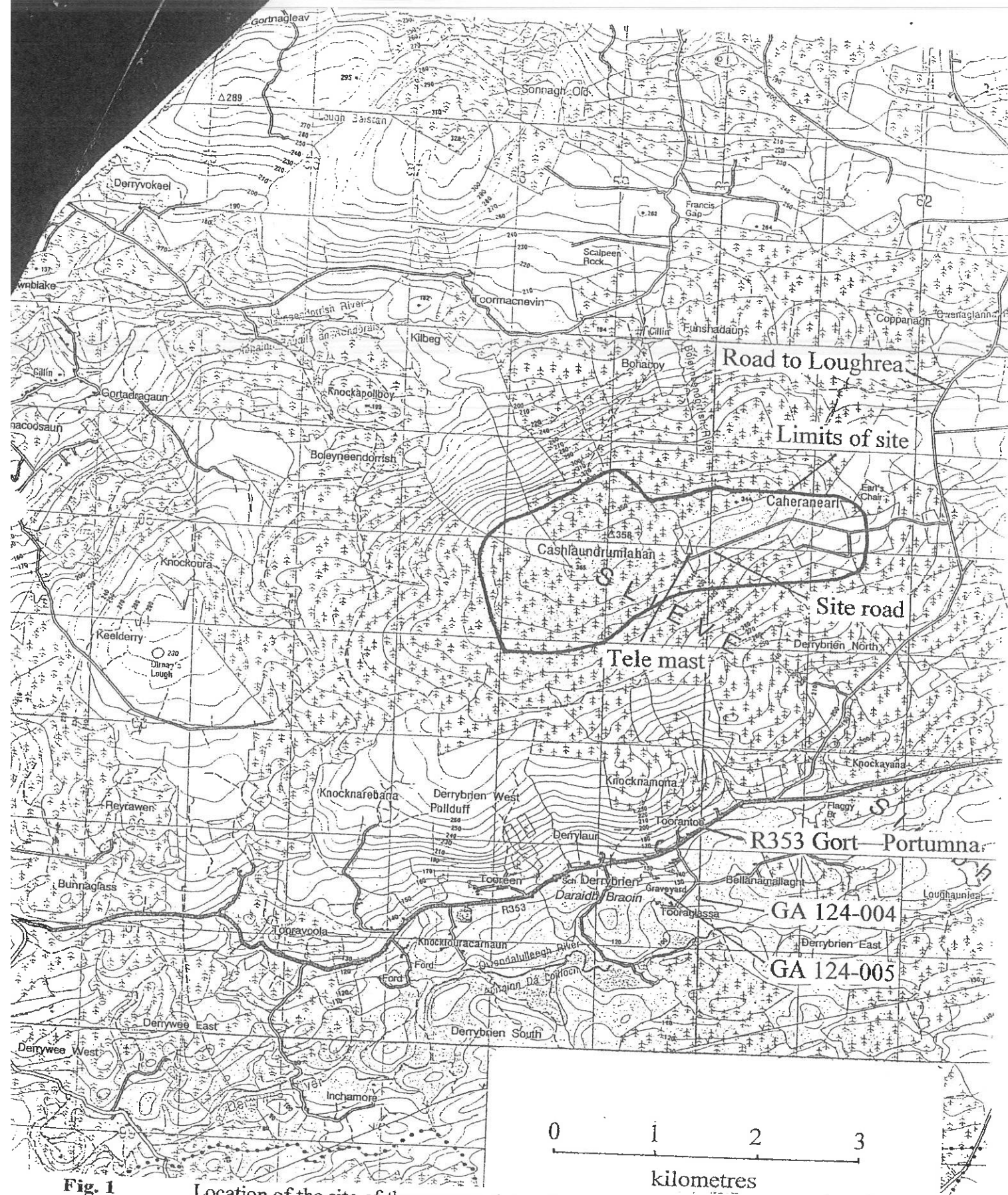


Fig. 1

Location of the site of the proposed development on top of Cashlaundrumlahan, Slieve Aughty Mountains, Derrybrien, Co. Galway

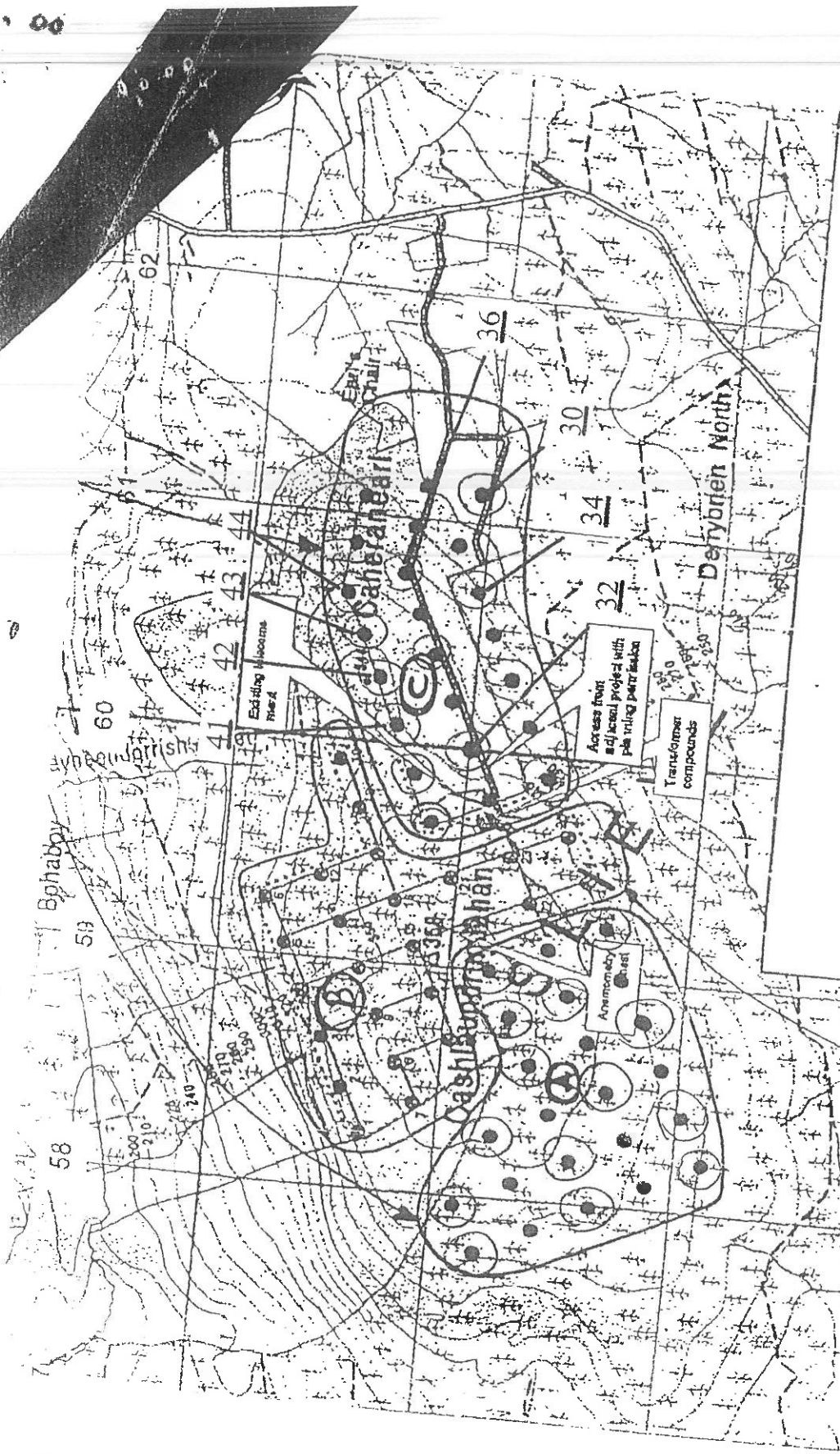


Fig. 2 Location of the proposed wind turbine sites, including the eight that were investigated by mechanical digging

Figure 3
Overall site plan

Turbines and access roads relating to this application shown in red

Date: 12/3/00	Drawn by: Aidan Ford, Saorgus Energy Ltd	Scale: 1:27,30
Version: 2	OS Discovery Series sheet 52	
Saorgus Energy Ltd, Innovation Centre, Institute of Technology, Tralee,	saorgus@indigo.ie	www.saorgus.com
Phone/fax: 066.7729123		
	2	3

as on edges of 50,000 map

not subject to a planning application



Our ref: Plan98

Dúchas The Heritage Service

The Secretary,
Galway County Council,
P. O. Box No. 27,
Liosbán Retail Centre,
Tuam Road,
Galway.

Dear Sir/Madam,

RECEIVED

Ráirceanna Náisiúnta &
An Fíadhúlra

51 Faiche Stabhna
Baile Átha Cliath 2
Éire

13 MAR 1998

Planning & Development Section
GALWAY COUNTY COUNCIL

National Parks &
Wildlife

51 St. Stephen's Green
Dublin 2
Ireland
Tel. +353 1 661 3111
LoCall 1890 321 421
Fax +353 1 662 0283
e-mail duchas@indigo.ie

Re: Planning application No. 97/3470 for permission for a wind farm with 23 wind turbines, service roadways, control house and anemometer mast at Boleyneendorrish and Derrybrien West, Co. Galway - Saorgus Energy Ltd.

Planning application No. 97/3652 for permission for a wind farm with 23 wind turbines, service roadways, control house and anemometer mast at Derrybrien North, Co. Galway Saorgus Energy Ltd.

I refer to your letters of 9th February, 1998 regarding the above mentioned applications.

The information provided in the EIS for these proposals was insufficient to allow for a proper assessment of the potential impacts of these developments on the nearby Lough Cutra Special Protection Area (SPA), for the protection of wild birds and their habitat, and on candidate Special Area of Conservation (SAC) No. 252, Coole-Garryland Complex.

There are potential negative impacts on these sites from peat silt emanating from the works and entering the catchment of these lakes. More specific information regarding mitigation measures to avoid siltation impacts is required.

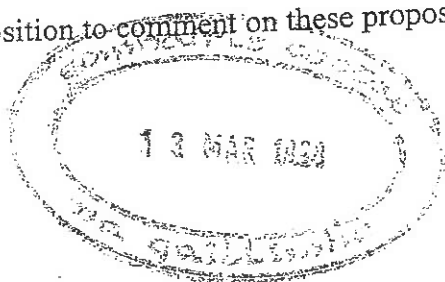
Peat silt poses a threat to flora and fauna in the streams and rivers in the catchment of these developments. They should be checked for *Margaritifera margaritifera*, the Freshwater Pearl Mussel, a species which is protected under the Wildlife Act, 1976 and which is also listed on Annex 5 of the EU Habitats Directive.

We also require information regarding birds of prey, in particular Hen Harriers, in order to allow for a proper assessment of the potential impacts of these proposals on important EU Bird Directive Species, this to include more information on breeding versus migratory birds.

Until this information is received we will not be in a position to comment on these proposals.

Yours sincerely,

Patrick White
National Parks and Wildlife
11th March, 1998.





**An Roinn Ealaíon, Oidhreachta,
Gaeltachta agus Oileán**

Department of Arts, Heritage,
Gaeltacht and the Islands

Dúchas

The Heritage Service

Rannóg na nIarratas Forbartha
Development Applications Section

7 Plás Ely, Baile Átha Cliath 2, Éire
7 Ely Place, Dublin 2, Ireland

Teileafón +353 1 647 3000
Facsimhír +353 1 678 8116
Glao Áitiúil 1890 474 847
E-mail devapps@ealga.ie
Web www.heritageireland.ie

Your Ref: PL 07. 122803
Our Ref: DAS-2000-GA-GA-00/4581

Secretary
An Bord Pleanála
Floor 3, Block 6
Irish Life Centre
Lower Abbey Street
Dublin 1

Re: Planning Application Reg. Ref. No. 00/4581 for an extension to Derrybrien wind farm consisting of 25 mast turbines, service roadways, transformer compounds and anemometry mast, and to increase the permitted hub-height of 46 turbines to 60m and extend the permitted blade length of these turbines to 30m at Toormacnevin, Bonaboy, Derrybrien and Derrybrien North, Co. Galway - Saorgus Energy Ltd.

Dear Sir/Madam,

We refer to the Board's letter of 24 April 2001, and enclosures, regarding the above-proposed development. Due to a large increase in the number of planning and development referrals we were not in a position to meet your deadline and trust that our submission will be considered by the Board.

This Department had concerns, from the point of view of nature conservation in the area of the proposed development, with what is considered to be deficiencies in the Environmental Impact Assessment (EIA) submitted for the proposal. At the time of the application the Council had already made its decision before we were in a position to convey these to them. We therefore now wish to make the following comments.

While the EIA identifies the site as being suitable for Merlin and Hen Harriers, no survey was carried out to determine the presence of breeding birds. This is a significant deficiency and without it we cannot adequately judge the impact of the development on these birds. Both of these species are listed in Annex 1 of EU Birds Directive (Council Directive 79/409/EEC on the conservation of wild birds). A survey of Hen Harriers is considered to be of particular importance since there is suitable habitat in the vicinity and as the Slieve Aughties are known to be a stronghold for the species.

In order to protect Annexed bird species and their habitats it is considered necessary that further work on breeding raptors, be carried out during breeding season (Summer 2002). Until a complete survey of the area for breeding birds, using standard methodologies employed in the Hen Harrier Survey 1998/99, has been carried out and assessed by this Department we are unable to determine the extent of the impact of the proposed development on the protected birds.

Yours faithfully,

Joanna Modzelewska
Development Applications Section
20 September 2001

Appendix 12

V. P. SHIELDS & SON
s o l i c i t o r s

email: dan@vpshields.ie

Our Ref: DJS/DW/ACT0010001

Your Ref: DJS/ACT0010001

Please Reply to our Loughrea office

Date: 02 February 2005

Martin Collins
Derrybrien
Loughrea
Co. Galway

Re: Derrybrien Development Co-operative Society

Dear Martin,

We refer to previous correspondence and enclose herewith copy letter and report received on even date from ESB Legal Services for your attention.

We would be obliged if you would contact the writer herein at your earliest and kind convenience.

Yours sincerely


V.P. Shields & Son

Enc



Legal Services

Electricity Supply Board

27 Lower Fitzwilliam Street, Dublin 2, Ireland.

27 Sráid MacLiam Íochtair, Baile Átha Cliath 2, Éire.

DDE Box No. 219 Phone: 353-1-676 5831 / 677 1821 Fax Litigation: 353-1-702 7959 Website: www.esb.ie

Your Ref:

~~DJS/PL/~~
ACT0010001

AW

31st January 2005

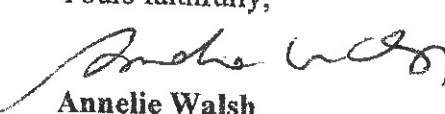
V.P. Shields & Son,
Solicitors,
Westbridge,
Loghrea,
Co. Galway.

Re: Your Clients: Derrybrien Development Co-Operative Society Ltd.

Dear Sirs,

I enclose letter from Hibernian Windpower to your Client dated 25th January 2005. I would be obliged if you would forward same to your Client as soon as ever possible.

Yours faithfully,


Annelie Walsh
SOLICITOR

Encl.



CLIFTON MEWS
LOWER FITZWILLIAM STREET
DUBLIN 2
IRELAND

E info@hibernianwindpower.ie
W www.hibernianwindpower.ie

The Secretary

25 January 2005

Derrybrien Co-Operative Society Ltd

Derrybrien

Co Galway

**Peat Slip Rehabilitation
Environmental Impact Assessment - Consultation Report**

A Chara

Gort Wind Farms Limited is planning to carry out rehabilitation works at the site of a peat slip close to Derrybrien Wind Farm, Co. Galway.

It is intended that an application for planning permission in connection with the proposal be lodged with Galway County Council in the near future and that an application for a waste licence be lodged with the Environmental Protection Agency at the same time.

An Environmental Impact Assessment (EIA) will be undertaken in connection with the proposal and an Environmental Impact Statement (EIS) will accompany the applications.

ESB International has been retained to prepare the EIS and I enclose their Consultation Report in connection with the EIA for the works.

The Report identifies the key issues as they see them.

The purpose of this Consultation Report is to outline the overall approach, provide a focus for the environmental assessment by identifying the key issues of relevance and to agree the scope and approach. As such, the brief document is intended to provide a means for consultation by informing various organisations of the proposal, thereby providing an early opportunity to submit comments or observations relevant to the preparation of the EIS.

Yours faithfully

A handwritten signature in dark ink, appearing to read 'Harry Harbison', written over a horizontal line.

Harry Harbison

Hibernian Wind Power

GORT WINDFARMS LIMITED

**DERRYBRIEN WIND FARM
COUNTY GALWAY**

PEAT SLIP REHABILITATION

**ENVIRONMENTAL IMPACT
ASSESSMENT**

CONSULTATION REPORT

January 2005



ESB INTERNATIONAL

Stephen Court, 18/21 St. Stephen's Green, Dublin 2, Ireland
Telephone: +353-1-7038000 Fax: +353-1-6616000

Contents

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1. INTRODUCTION

Gort Windfarms Limited is planning to undertake works near Derrybrien Wind Farm, Co. Galway in connection with rehabilitation at various locations along the route of a peat slip that occurred in October 2003.

The peat slip area is located at Black Road at a distance of approximately 10 km from the village of Derrybrien. Black Road is accessed from the R353 Regional Road, which originates near Portumna and runs through the village of Derrybrien to join the N66 Loughrea - Gort National Secondary Road near Gort.

The area appears on Ordnance Survey Discovery Series (1: 50,000) map No. 52.

Preliminary proposals are that the displaced peat will be removed and spread as a thin layer on adjacent lands.

It is intended to submit an application for full planning permission to Galway County Council in connection with the works in the near future. An application to the Environmental Protection Agency for a Waste Licence will be made simultaneously.

Engineering consultant ESB International has been retained to provide planning consultancy services in relation to the project.

2. SCOPING

Central to the feasibility of the proposed works will be an assessment of the significant environmental effects likely to arise during the works and thereafter. Identification of suitable mitigation measures is recognised as being a key issue, since by incorporating these in the design any significant potential impacts can be minimised.

The environmental impacts of the proposal will be set down in a written report, the Environmental Impact Statement (EIS), which will accompany an applications for planning permission and a Waste Licence.

The contents and format of the EIS will reflect the Environmental Protection Agency's Advice Note on Current Practice (in the preparation of Environmental Impact Statements) and the Guidelines on the Information to be Contained in Environmental Impact Statements.

Based on the above requirements, the EIS will be organised to provide a description of the proposed development and the existing environment, an assessment of the environmental impacts arising from the proposal and the measures to mitigate adverse impacts.

3. BACKGROUND

The peat slip occurred near the southern boundary of Derrybrien Wind Farm, a development by Gort Windfarms Limited in the townland of Derrybrien North, Co. Galway, on the evening of 16th October 2003.

The peat slip involved disturbance and partial displacement of a large amount of peat and forest debris. Following heavy rainfall on the 29th and 30th of October the slip mass re-mobilised before emergency stabilisation measures were substantially underway.

The main physical impact of the peat slip in the vicinity of the site was the accumulation of the mobilised peat, which occurred predominantly on Coillte owned lands below the Derrybrien Wind Farm site near Black Road bridge. Peat also accumulated between the Black Road bridge and the Flagggy Bridge on the R353 in afforested lands owned by Coillte.

A number of dams were built in an effort to minimise the impact of the peat slide and to ensure the safety of nearby lands and the local population. Construction of two barrages downstream of Black Road bridge formed part of the emergency response in the aftermath of the peat slip to stem the flow of peat and to prevent further slippages. These dams have remained in place for safety reasons.

However, peat has built up behind some of these dams and surveying work has indicated that the depth of this peat build-up exceeds 2 m in some instances.

An area of lands above the Black Road bridge and an access road at Black Road bridge leading to a farmhouse were also affected by accumulation of the mobilised peat.

From a fisheries/aquatic point of view, the peat that has accumulated is a potential source of pollution that needs to be contained. Any large episode of precipitation may mobilise peat into the watercourse leading to the Owendalulleagh River and result in elevated suspended solid loadings, which is detrimental to all aquatic life and stream habitats.

The presence of the accumulated peat prevents the natural streamside vegetation from re-establishing. While removal of peat to aid recovery of the terrestrial habitats is of lesser importance than the other considerations, it is an integral part of restoring the local ecosystem.

4. PROPOSAL

Description

The main aims of the rehabilitation activities include:

- Ensure safety of the area and ensure that all reasonable steps are taken to prevent further peat slippage in the area.
- Ensure that no hazards remain in the wider countryside as a result of the peat slip.
- Restore wildlife habitats of ecological importance, including the river system, in the area that has been affected by the peat slip.

The proposed works involve removing the displaced peat from a number of locations that include the following:

- Upstream of Black Road bridge
- Upstream of dam BD4, the first of the two dams south of Black Road bridge
- Upstream of dam BD5, the second of the two dams south of Black Road bridge

It is currently envisaged that the material removed will be deposited to rehabilitate land that is currently afforested and adjoins the Black Road bridge area. The peat will be excavated by suitable excavators and loaded into trucks that will transport the

material to the deposition site where it will be spread as a thin layer by earth-moving plant.

It is anticipated that the vast majority of the works, including transportation of the excavated peat, will be undertaken within the confines of the site and that significant travelling on the public road will not be required.

A key objective of the work will be to ensure stability along the area of the peat slip, which in turn will create a stable ecological environment. The aim of the works will be to restore a semi-natural habitat along the major part of the peat slip and removal of the peat will allow re-establishment of the natural course of the watercourse leading from the wind farm site to the Owendalulleagh River

Overall, the restoration work in the area of the peat slip is expected to have a positive impact.

No additional services, e.g. water, sewerage, disposal, electricity, telecoms, or developments, e.g. roads, power lines, pipelines, are required for the project. No developments that are likely to occur as a consequence of the proposal have been identified.

There are no known existing or planned developments with which the proposal could have cumulative effects.

Implementation & Safety

Best ecological practice will be implemented at all stages and a key consideration in decision-making will be future ecological value.

Peat spreading areas will be selected carefully, with the preference being for clear felled forestry lands where peat deposition will enhance the ecological value of the lands.

The necessary drainage arrangements, i.e. settlement ponds, silt traps, etc. will be an integral part of the works, at both the peat excavations and the deposition areas. This will ensure that siltation of the local watercourse does not occur.

All works will be undertaken by experienced and qualified personnel. The highest standards of safety will be maintained and all relevant legislation will be fully adhered to during all activities.

The implementation of recognised best safety practice will be used so as to minimise any risks that might be associated with the works.

5. APPROACH TO ENVIRONMENTAL ASSESSMENT

The EIS will provide a comprehensive examination of all aspects of the proposed works and their effects on the receiving environment. At the outset, the need for and objectives of the proposal will be explained.

The nature and location of the proposed works dictates the environmental issues that will be of most significance in the assessment process. Emphasis will be placed on identification of key issues and the identified potential major impacts will be given detailed examination.

The description of the proposal and the description of the existing environment are the two factual foundations upon which the environmental assessment will be made.

An accurate description of the proposed works and the relevant aspects of the existing environment is necessary to predict the likely significant impacts of the proposal.

In consideration of potential impacts, issues that will be examined to include descriptions of the existing environment, assessment of impacts and mitigation measures.

Particular attention in respect of all aspects of the proposal will be paid to the necessity for monitoring during both the execution of the works and thereafter.

6. ENVIRONMENTAL IMPACT STATEMENT

An indicative contents, which is neither a sequence of presentation nor a hierarchy of importance, for the Environmental Impact Statement is as follows:

Non-Technical Summary

A Non -Technical Summary will be prepared within which the information presented in the main EIS, as set out below, will be condensed and summarised in non-technical language.

Introduction

Relevant legislative instruments relating to the proposal will be identified, as well as relevant guidelines. The methodology employed will be described and the personnel involved in the EIS and details of the consultations undertaken as part of the assessment will be outlined.

Description of Project

The location, extent and features of the site will be described, including proximity to habitation, the presence of any significant topographic features and land use in the vicinity.

Attention will be paid to the realistic and genuine alternatives to the proposal and issues examined in selecting the deposition site will be highlighted. The main environmental effects of the alternatives compared with those of the proposal will be evaluated.

The quantity, type and significance of materials excavated and deposited will be outlined. The dimensions and layout of the deposition site will be addressed and the final profile of the site will be described. The extent of any necessary access tracks within the site will be considered, as will perimeter security / control / access.

Other issues to be addressed will include duration and phasing, site preparation, machinery and plant, and traffic.

Human Beings

Issues for consideration will include nuisances and any potential impacts on residential amenity. Proposals regarding safety and hazard control during execution of the works will be addressed. A significant positive impact of the proposal will be to eliminate any potential public safety issues associated with the accumulation of displaced peat.

Noise

Being located in a remote area, noise is not anticipated as being an issue of major concern.

Landscape and Visual Impacts

It is expected that the area in which the excavated peat will be spread will not be visible from the public road. As such and with the deposited peat being spread in a thin layer, visual impact is not currently seen as a significant issue. Nonetheless, the extent of any necessary screening works will be considered.

The works will improve the appearance of the areas from which accumulated peat will be removed.

Ecology

With the site for deposition of excavated peat being a previously afforested area, it is expected to be of low ecological conservation value. In that context the spreading of peat in a thin layer would be expected to be of ecological benefit.

The potential impacts on flora will be examined in terms of the number and type of plant communities that will be affected and species diversity.

Air Quality and Climate

The proposed works will not impact on air and climate, although the necessity for dust control measures while carrying out the works will be considered.

Soils

The geotechnical stability of the deposition site will be addressed, including its suitability to accept the excavated peat.

The soil types present at the deposition site will be described and the long-term stability following spreading of the excavated peat will be assessed.

Water

Issues for consideration will be watercourse contamination by disturbance of the displaced peat during excavation and potential uncontrolled surface run-off from the deposited peat.

The current drainage pattern at the deposition site will be examined with a view to assessing potential impacts of an amended and altered drainage regime arising from the spreading of the excavated peat.

The vulnerability of any underlying groundwaters will also be considered.

Material Assets

Possible impacts on material assets that will be reviewed will be the implications of the proposed works for traffic on the public road.

Cultural Heritage

The location and nature of the site suggests that impacts on cultural heritage in respect of the proposal are unlikely to be of significance. However, reflective of the

overall precautionary approach, the cultural heritage of the area will be examined through an archaeological study.

Current use of the deposition site for commercial forestry indicates that architectural and historical issues are unlikely to be significant.

Interaction of Impacts

The interactions of potential significance between the various issues examined will be described.

7. SUMMARY

The purpose of this brief Consultation Report is to provide a focus for the environmental assessment of the proposal.

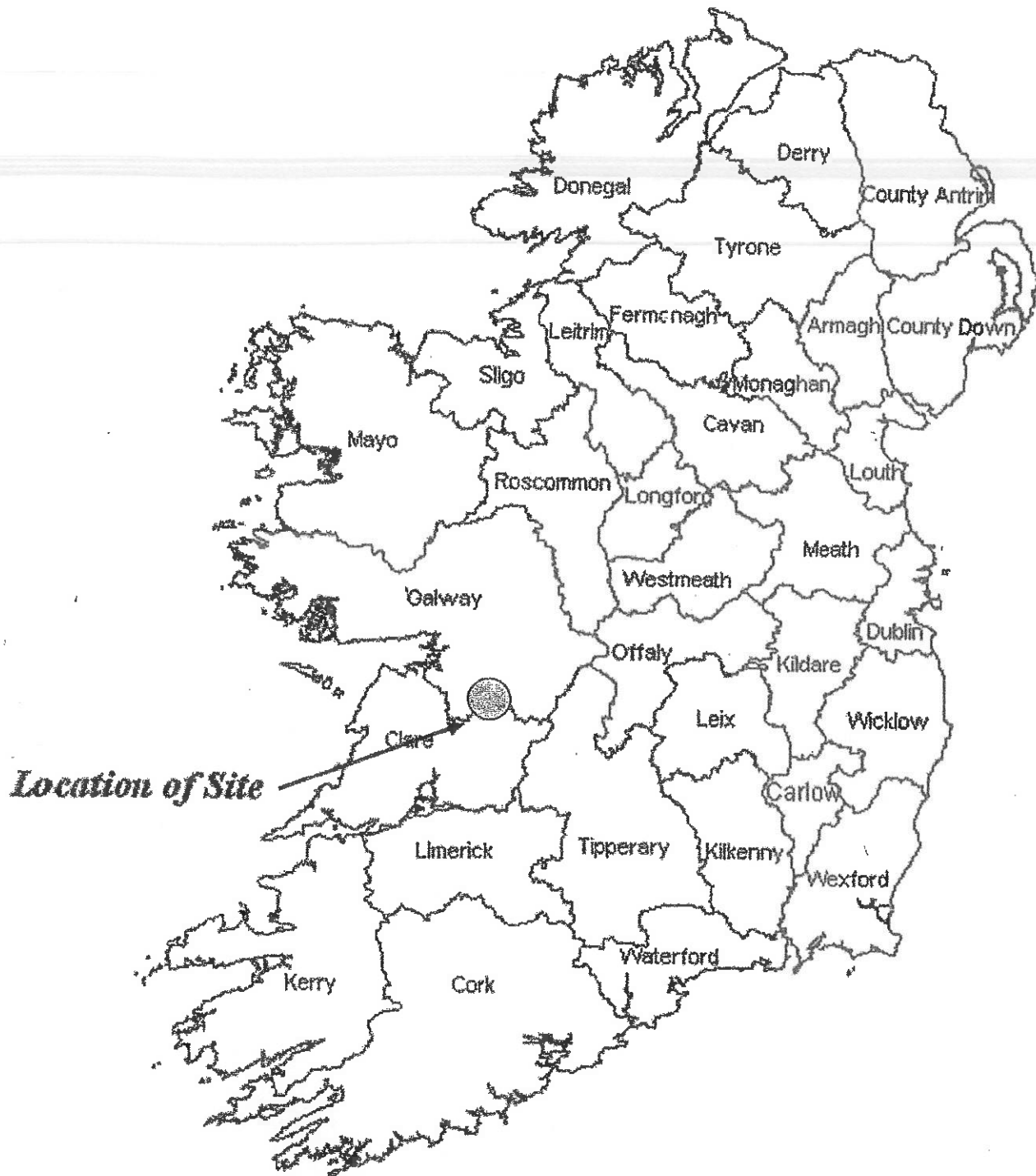
Throughout the assessment the focus will be on the character, magnitude and consequences of environmental impacts that are of significance.

Attention will be paid to significant issues and concerns. Excessive coverage of irrelevant topics or relatively minor issues and inclusion of material that is irrelevant will be avoided.

Appendix: Site Location Plans

Map No. 1 – General Location

Map No. 2 – Site Location



Map No. 1 – General Location



Appendix 13

Received 19/6/14.



Our ref. AIE 14/02

Your ref 13-1003 Derrybrien Windfarm

16th June, 2014

Comhairle Chontae na Gaillimhe
Galway County Council

Stephen Dowds Associates
Town Planning Consultants
5 Mary Street
Galway

RE: Derrybrien Windfarm and the European Communities (Access to Information on the Environment) Regulations 2007 – 2011 Request for Internal Review

A Chara,

I refer to your request under the Access to Information on the Environment Regulations 2007 - 2011, dated 31st March, 2014, to this Council's decision dated 30th April, 2014 and to your request for an internal review of the Council's decision dated 9th May, 2014.

I, Kevin Kelly, Director of Services, am a delegated officer in accordance with Section 11 of the Access to Information on the Environment Regulations 2007 - 2011 and I hereby confirm that I am of a higher grade than the person who made the decision on your original request, i.e. Ms. Eileen Keaveney, Administrative Officer.

I wish to inform you that I have re-examined your request and that I, on this day, 16th June 2014, have made a decision on your request for an Internal Review. My decision is to grant your request and release the following documents;

- Correspondence received from Liam Murphy, ESB Wind Development Ltd. dated Monday 7th November 2011 in response to the substitute consent notice issued on 12th October 2011
- Correspondence received from Louise Cushen, ESB Business Services Centre Legal dated 29th November 2011

Right of Appeal

You may appeal this decision by writing to the Commissioner for Environmental Information, 18 Lower Leeson Street, Dublin 2. If you wish to appeal, you must do so not later than one month after receiving this letter. Should you write to the Information Commissioner making an appeal, please refer to this letter. If an appeal is made by you, the Information Commissioner will review the decision.

Mise le meas,

KEVIN KELLY,
DIRECTOR OF SERVICES.

Mr Kevin Kelly
Director of Service, Planning & Sustainable Development Unit
Galway County Council
County Hall
Prospect Hill
Galway

By email (planning@galwaycoco.ie) & hand-delivered

Monday, 7th November 2011

Re: Derrybrien Windfarm – Substitute Consent Notice

Dear Sir,

We refer to a document entitled:

“Planning & Development Acts, 2000”
“Planning & Development Acts, 2000 – 2010”
“Planning & Development (Amendment) (No.3) Regulations, 2011”
“Part XA
Substitute Consent
Notice Pursuant to Section 177B”



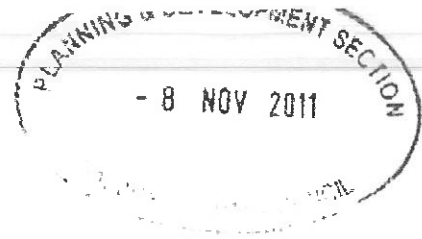
which was sent by registered post to Hibernian Wind Power Ltd at Stephen Court, 18/21 St. Stephen's [sic] Green, Dublin 2.

Introduction

We received the afore-mentioned Substitute Consent notice (attached as Appendix A) on the 13th October last (the notice is dated 12th October). This letter is intended to be a statement of submissions and/or observations within the meaning of Section 177B (2) (d) of the Planning & Development Act, 2000 – 2010. The purpose of this submission is that Galway County Council withdraw this notice with immediate effect for the reasons and considerations set out below.

In the purported Notice addressed to Hibernian Wind Power Ltd, it is stated that:

"Galway County Council....has become aware in relation to the development described in Schedule 1 hereto....that a Judgment of the Court of Justice of the European Union Commission of the European Communities – v- Ireland (case C-215/06) was made on the 3rd July 2008 that the Permissions were in breach of law for the reasons set out in the said Judgment".



The permissions to which you appear to be referring are those which you say are set out in Schedule 2 to the purported Notice. These permissions, as you note, were granted to Saorgus Energy Ltd and to Gort Wind Farms Ltd. We have carefully examined the decision of the Court of Justice of the European Union to which you refer, and we are satisfied that neither the permissions identified by you in Schedule 2 of the purported Notice nor any other planning permissions or any act which could be described as a development consent is said by the Court of Justice to have been made or done in breach of law. You will no doubt be aware that the proceedings to which you refer were instituted by the Commission of the European Communities pursuant to ex Article 226 EC, which provision permits the Commission to institute proceedings against a Member State following its failure to comply with a reasoned opinion delivered by the Commission to the Member State in question. The Commission complained that Ireland had not taken measures necessary to comply with Articles 2, 4 and 5 to 10 of Directive 85/337/EC.

The complaints of the Commission were also related to circumstances in which four development consents of the 12th of March 1998, the 15th of November 2001, the 30th of July 2002 and November 2003 were granted in respect of a wind farm at Derrybrien, Co. Galway.

The Commission did not complain and the Court did not find that the four decisions/permissions/development consents were in any way made in breach of law, invalid or otherwise defective because of the omission of an environmental impact statement or the inadequacy of an environmental impact statement or for any other reason. The Commission's complaints in relation to Derrybrien were rather that Ireland had failed to comply with its legal obligations.

Numerous findings are made by the Court of Justice of the European Union (as it is now called) but nowhere does the Court find that the development consents referred to in the judgment are themselves in breach of law, invalid or otherwise defective.

As can readily be seen, the judgment in question is complex and it is not clear to what extent the Court of Justice upholds the variety of complaints made by the Commission against Ireland.

In order for a valid Notice to issue pursuant to Section 177B (1) of the Planning & Development Acts, 2000 - 2010, Galway County Council is required to identify a judgment of the Court of Justice of the European Union (or a judgment of the High Court in Ireland) which declares and/or finds that a planning permission was made in breach of law or was declared or found to be invalid or was found or declared to be defective because of the absence of an environmental impact statement or because of the inadequacy of an environmental impact statement.

In accordance with Section 177B (2) (a), Galway County Council, in a valid Notice is required to:

"Inform the person to whom it is given of the proceedings and findings referred to in subsection (1)".

We note that though you have referred to Case C-215/06, you have not referred to the findings in this complex judgment which range over a variety of issues and embrace two categories of complaint. It is not possible to discern from the face of the purported Notice where the declaration or finding of invalidity of the permission required by Section 177B is to be found in the judgment to which you refer.

It is apparent that Galway County Council has confused general findings made against the Irish State with specific findings of the invalidity of particular permissions/development consents issued by a planning authority or by An Bord Pleanála. The latter category of declarations or findings were simply never made by the Court of Justice of the European Union.

Therefore, Galway County Council is required now to exercise its powers under Section 177B (4) to withdraw the purported Notice in accordance with its powers under Section 177B (3) (b). Without prejudice to the foregoing submission, the following defects in the purported Notice are drawn to your attention.

Section 177B (1) requires the Notice to be addressed to *"the person who carried out the development or the owner or occupier of the land as appropriate"*.

The document sent in the post does not appear to be addressed to anybody in particular, though the name Hibernian Wind Power Ltd is typed at the bottom of page 2 of the document. For the avoidance of doubt, Hibernian Wind Power Ltd is not the person who carried out the development, nor is it the owner of any of the lands at Derrybrien, Co. Galway nor is it the occupier of any of those lands. Therefore, the Notice is defective on its face and ought not to have been dispatched unless and until Galway County Council had identified either the developer, the owner or the occupier of the lands in question.

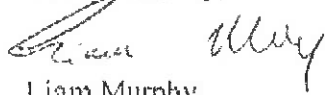
As indicated above, you were required by Section 177B (2) (a) to inform the person to whom the Notice is given of the proceedings and the findings of the Judgment of the Court in question. Unlawfully, you have failed to identify the findings in question.

It is a further defect of the Notice that you do not indicate the development in respect of which substitute consent is sought. As you are exercising a power to require a person (not identified by you) to make an application for development consent, it is a matter exclusively within your knowledge as to what development it is that you require substitute consent for. The purported Notice is void for uncertainty because of its failure to identify the development in question. The failing is acute given the size and complexity of the windfarm at Derrybrien.

Conclusion

In view of the extraordinary powers granted to Galway County Council by Section 177B et seq of the Planning & Development Acts 2000 – 2010, it was incumbent upon the planning authority to serve a valid notice with meaningful content on the proper person. The Notice in question fails in each of these respects. The person to whom it is apparently addressed is a stranger to the permissions and the execution of the works or the occupation/ownership of the lands. It is not possible to discern from the content of the purported Notice what development Galway County Council require a substitute consent for, and the need for clarity is acute in view of the complexity of the works and structures at Derrybrien, Co. Galway. In view of the highly disadvantageous consequences which flow from a failure to comply with the Notice, the planning authority is required to deliver a valid and comprehensible Notice to the proper person. All of this it has failed to do. In this regard, we request that the Council immediately withdraw the notice for the reasons set out above.

Yours sincerely,



Liam Murphy
ESB Wind Development Limited
ESB Head Office
27 Lower Fitzwilliam Street
Dublin 2



Appendix A

Copy of Substitute Consent Notice Served by Galway County Council

21.10.2011
10.10.2011

PLANNING AND DEVELOPMENT ACTS 2000 TO 2010
PLANNING AND DEVELOPMENT (AMENDMENT) (NO.3) REGULATIONS 2011

PART XA

Substitute Consent

NOTICE PURSUANT TO SECTION 177B



WHEREAS:

A. Galway County Council as Planning Authority ("the Council") has become aware in relation to the development described in Schedule 1 hereto (the "Development") for which the several Permissions set out in Schedule 2 were granted by both the Council and An Bord Pleanála ("the Board") that Environmental Impact Assessment ("EIA") was required and that a Judgement of the Court of Justice of the European Union Commission of the European Communities -v- Ireland (case C-215/06) was made on the 3rd July 2008 that the Permissions were in breach of law for the reasons set out in the said Judgement.

B. You are the Developers, Owners or Occupiers of the development.

TAKE NOTICE as follows:

1. You are directed to apply to the Board for Substitute Consent no later than 12 weeks from the date of this Notice.
2. You are directed to furnish with the application to the Board a Remedial Environmental Impact Statement (REIS) and A Remedial Natura Impact Statement (RNIS)

TAKE FURTHER NOTICE as follows:

3. You may make submissions or observations in writing to the Council no later than 4 weeks from the date of this Notice
4. Not later than 8 weeks from the date of this Notice, the Council shall:
 - (a) Where no submissions or observations are made by you or any of you, confirm this Notice, or
 - (b) Where submissions or observations are made by you or any of you, subject to Section 177B (4), decide to confirm or withdraw the Notice.

A copy of Section 177A and B is attached to this Notice.


SCHEDULE ONE

The Development of a windfarm at Derrybrien West and Boleynedorrish and Derrybrien North and East.

SCHEDULE TWO

973470	Saorgus Energy Ltd	Derrybrien West & Boleynedorrish	for a) wind farm of 23 wind turbines; b) service roadways; c) control house; d) anemometer mast - E.I.S. submitted
973652	Saorgus Energy Ltd	Derrybrien North	for a. wind farm of 23 wind turbines, b. service roadways, c. a control house, d. anemometer mast at Caheranearl, Derrybrien - E.I.S. submitted
992377	Saorgus Energy Ltd	Derrybrien North and East	for the installation of a 110kV electricity transmission line between wind farm at Derrybrien North and 110kV ESB transmission line at Loughatorick North
004581	Saorgus Energy Ltd	Derrybrien	for extension to Derrybrien wind farm consisting of 25 wind turbines, service roadways, transformer compounds and anemometry mast (see newspaper notice) at Toormacnevin, Bohaboy and Derrybrien North
035642	Gort Windfarms Ltd	Boleynedorrish Derrybrien West	for (a) windfarm of 23 wind turbines (b) service roadways (c) control house (d) anemometer mast 97/3470 refers
035637	Gort Windfarms Ltd	Derrybrien North	for a wind farm of 23 wind turbines, b. service roadways, c. a control house, d. anemometer mast - 97/3652 refers
05317	Gort Windfarm Ltd	Derrybrien North	for wind farm of 23 wind turbines
05316	Gort Windfarms Ltd	Derrybrien West	for wind farm of 23 wind turbines

Dated this 12th day of OCTOBER 2011.

Signed: 

Galway County Council
County Hall
Prospect Hill
Galway



Name: Hibernian Wind Power Ltd

Address: Stephen Court,
18/21 St Stephens Green
Dublin 2.

29 November 2011

Mr. Kevin Kelly
Director of Service, Planning and Sustainable
Development Unit,
Galway County Council
County Hall
Prospect Hill
Galway

By e-mail (Planning@galwaycoco.ie) and by fax

Re: Derrybrien Windfarm – Substitute Consent Notice

Dear Sir

We refer to previous correspondence.

We are in receipt of a further Notice from you dated the 25th of November 2011, purportedly made pursuant to the named Acts and Statutory Instruments.

We note that you give no reason for the withdrawal of the Notice though multiple deficiencies in the Notice were advanced in our submission dated the 7th November, 2011.

Please note that we shall not apply for leave to seek judicial review of the Substitute Consent Notice of 12th October 2011 in view of its withdrawal, subject to what is said in the 8th paragraph of this letter. This decision is strictly without prejudice to our position that case C-215/06 does not require the surrender/revocation of, or any interference whatsoever with, the Derrybrien planning permissions.

We note that you may have used powers granted to you by the European Union (Substitute Consent) Regulations 2011 dated November 24th 2011 to effect the withdrawal of the Substitute Consent Notice. We are not aware of any obligation

of Community law which necessitated the amendment of Part XA of the Planning and Development Act 2000-2011.

Should the State or Galway County Council decide to renew its attempt to compel any re-application for development consent relative to the Derrybrien Windfarm, the decision not to seek judicial review of your Substitute Consent Notice of the 12th of October 2011 should not be taken by you as our acquiescence in (a) the position adopted by Galway County Council and the State that re-application for development consent is necessary as a matter of Community Law and (b) the validity of the Regulations of the 24th of November 2011 and acts done thereunder.

If you disagree with this and propose to argue in any subsequent proceedings that our decisions not to judicially review the Substitute Consent Notice or its withdrawal constitutes acquiescence or any form of estoppel, please indicate this to us before 5.30 pm Thursday 1st December 2011 so that arrangements can be made to seek judicial review of the Substitute Consent Notice of the 12th of October and if necessary of the Withdrawal Notice of the 25th of November 2011. If we do not hear from you by 5.30 pm on Thursday 1st December then we shall proceed with our application on Monday 6th December 2011.

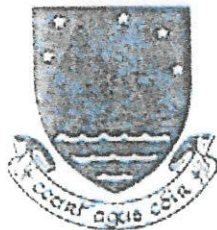
Please note that this letter and any reply will be relied upon in proceedings to explain why we seek to quash a Substitute Consent Notice which purportedly has been withdrawn.

Yours faithfully

Louise Cushen
SOLICITOR

Tel: 01 7026227

E-mail: louise.cushen@esb.ie



Comhairle Chontae na Gaillimhe
Galway County Council

PLANNING AND DEVELOPMENT ACTS 2000 TO 2010

PLANNING AND DEVELOPMENT (AMENDMENT) (NO. 3) REGULATIONS 2011

EUROPEAN UNION (SUBSTITUTE CONSENT) REGULATIONS 2011

PART XA

Substitute Consent

NOTICE PURSUANT TO SECTION 177B

With reference to the above and the Notice issued to you by Galway County Council pursuant to Section 177B on 12th October 2011 and without prejudice to the Council's right not to accept all or any of the points raised in your submission dated the 7th November 2011, Galway County Council hereby withdraws the said Notice.

Dated this 25th day of November 2011.

Signed:

Kevin Kelly
Director of Service

Galway County Council
County Hall
Prospect Hill
Galway

Name:
Address:

Hibernian Wind Power Ltd
Stephen Court
18/21 St. Stephens Green
Dublin 2.

Appendix 14



AERTECH
Stephen Court
18/21 St Stephen's Green
Dublin 2, Ireland
Telephone +353-1-703 8000
Fax +353-1-676 4408
www.esbi.ie

Planning Department,
Galway County Council,
Galway.

20th May 2003

Re: Derrybrien Wind Farm
Planning References 97/3470 and 97/3652


Dear Ms Mc Connell,

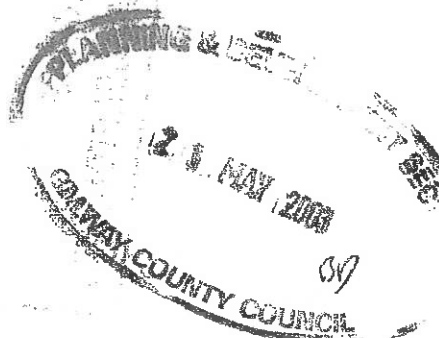
Please be advised that the Derrybrien Wind Farm is been acquired by ESB's subsidiary company, Hibernian Wind Power Limited, from Saorgus Energy Limited and that ESB International has been appointed as project managers for the Works. Aertech is a division of ESB International and they will undertake the project management function.

With reference to the above planning permission, we wish to advise you that it is our intention to commence site operations on the Wind Farm on 9th June 2003 and hereby give notice in accordance with planning requirement Clause 10(a).

Kindly note that you have been previously advised on the commencement of site operations on the project (reference letter of 13th March 2003). However, due to other circumstances, the commencement of the works has been delayed until now.

Yours sincerely,


Pierce J. Kirby
Construction Manager
Aertech Projects.





Hibernian Wind Power accepts report on Derrybrien landslide

Thursday, February 5, 2004 Hibernian Wind Power (HWP) today presented the findings of a firm of specialist consultants who have been investigating the peat-slide last October at Derrybrien, Co Galway

The report into the cause of the peat-slide found that there was a combination of contributory physical factors in the area where the slide occurred, including a zone of weak peat and a natural drainage channel and activity associated with the construction of the windfarm

The report was compiled by Applied Ground Engineering Consultants (AGEC) who were commissioned by the developers to carry out a detailed investigation following the slide on 16 October, 2003. The developers asked AGEC to investigate the cause of the failure and to survey the entire windfarm site and to make recommendations as to how to proceed in the future

The report identifies a number of changes to construction work practices which will be put in place. Geotechnical consultants will monitor every stage of construction of the windfarm on a full-time basis in the future

The report states that provided the recommendations are implemented, "it is considered that the construction of the windfarm can be completed safely".

Mr Brian Ryan, Managing Director of Hibernian Wind Power stated "We intend to fully implement all AGEC's recommendations prior to any further construction activity. The safety of the public and our staff is paramount. We will continue to liaise closely with the community in Derrybrien and with all statutory bodies."

Key Recommendations of Report on Windfarm Site

- The report recommends that no concentrated loads, such as excavated material from turbine foundation excavations, shall be placed on marginally stable ground. Concentrated water flow onto the peat slopes and unstable excavations are to be avoided.
- It recommends that construction should be supervised on a full time basis by qualified and experienced geotechnical personnel
- Ongoing ground investigation work should continue with regular monitoring of specialist movement detection equipment, site roads and other works
- Modified construction work practices which do not adversely affect existing stability, are to be adopted
- Robust drainage plan to be developed

ENDS

Editor's note

Work commenced on the 60 MW windfarm at Derrybrien which has full planning permission, in July 2003. The wind farm comprises 71 proposed wind turbines and associated access roads. Construction of some 90% of the site roads and 50% of the bases for the wind turbines had been completed when slide occurred on the afternoon of Thursday 16th October 2003 immediately south of the proposed location for turbine T68.

The windfarm site is 300 hectares in size, however the areas of the site affected by the landslide was less than one per cent of the windfarm site.

As a precaution, work was immediately suspended on site following the incident and has remained suspended since. It will only be restarted after changes are put in place to ensure there will not be a further slide. Extensive containment and stabilisation work including drainage and the construction of barriers was carried out by HWP and its contractors following the slide in October.

There was no injury to any person working on the site or any member of the public as a result of the slide. The property affected comprised forestry land and one unoccupied house. There was damage to fisheries in the river at the base of the slide because of debris entering the river. Two roads were blocked by debris from the slide and have since been cleared.

HWP has since the landslide co-operated fully with Galway County Council and has participated fully in liaison with the local community and statutory bodies.

[contact us](#) [our wind farms](#) [about wind energy](#) [have you a site?](#)

Post Office Box No. 27,
Áras an Chontae,
Prospect Hill,
Galway.

Mo Thag:

Do Thag:

Íasachtaí/Deontais Tithíochta
(091) 509 301

Housing Loans/Grants

Íarratais Tithíochta
(091) 509 300

Housing Applications

Comhshaoil
(091) 509 302
Environment

Acmhuinní Daonna
(091) 509 303
Personnel

Mótarcháin
(091) 509 099
Motor Taxation

Ceadúnais Tiomána
(091) 509 305
Driving Licences

Seirbhísí Uisce
(091) 509 306
Water Services

Pobal & Fiontar
(091) 509 066
Community & Ent.

Pleanáil
(091) 509 308
Planning

Iancalóireacht
(091) 509 309
Engineering

Clár na dToghthóirí
(091) 509 310
Register of Electors

Deontais Ard Oideachais
(091) 509 310
Higher Ed. Grants

VR /MD/P466(05)

Ref



COMHAIRLE CHONTAE NA GAILLIMHE
GALWAY COUNTY COUNCIL

LAW AGENT'S OFFICE

Vivian Raine/Law Agent
Angela Casey/Senior Executive Solicitor
Anne McCormack/Senior Executive Solicitor
Dorothea Turley/Executive Solicitor
Noëlle Hogan-Chambers/Executive Solicitor
Orla Reilly/Executive Solicitor

30 May 2008

D.O.S. Planning & Sustainable Development - Paul Ridge

RE: The High Court Judicial Review
Derrybrien Development Society Limited
-V-
Galway County Council

Bosca Poist Uimhir 27,
Áras an Chontae,
Cnoc na Radharc,
Gaillimh.

Telephone: (091) 509000
Fax: (091) 509010
E-Mail: @galwaycoco.ie
Web: www.gaillimh.ie
www.galway.ie

LAW AGENT'S Contact details:
Telephone: 091 509350
Fax: 091 509044
E-Mail: lawagent@galwaycoco.ie

FORWARD PLANNING

- 1 JUN 2008

GALWAY COUNTY COUNCIL

A Chara,

In the above matter I enclose cheque in favour of Galway County Council in the sum of €100,000.00 being the amount of the contribution of ESB Ireland towards the costs of the Applicant for Judicial Review. In due course I will receive particulars of costs from the Applicant as I propose to have them taxed and to secure as big of a reduction as possible.

Mise le meas,

Vivian Raine
Law Agent

Ext 350



71/2 DAME STREET DUBLIN 2

93-20-86 €

Date 19/05/2008

Pay GALWAY COUNTY COUNCIL or order

euro euro euro

ONE HUNDRED THOUSAND EURO

€ 100,000.00

ONLY

HIBERNIAN WIND POWER LTD



AIB PAYEE

Signature

500 206 93 2086 87778073 09

PLANNING RECEIPTS

DATE: 4/6/08

NAME: Hibernian Wind Power Ltd

ADDRESS: Stephen Guest

18-21 St. Stephens Green, Dublin 2

PLANNING REF: 03/5637

- ☐ Planning Application Fee (006569)
- ☐ Fire Safety Certificate (006158)
- ☒ Legal Costs Re Court (006157)
- ☐ Planning Deposits/Bonds
- ☐ - Refundable (060135)
- ☐ Exempted Development (006548)
- ☐ Finger Post Signs (006082)
- ☐ Eircom Licences (006563)

<input type="checkbox"/>	Commencement Notice	(006160)
	Fee Paid €	

House No's

- ☐ Photocopying (006484)
- ☐ Planning Misc. Fees (006159)
- ☐ Objection Fee (006483)
- ☐ Archive Files (006485)
- ☐ Development Levy (006547)
- ☐ Special Dev. Contribution (006402)

<input type="checkbox"/>	Development Contribution	(006397)
	Fee Paid €	

House No's

CASH ☐

CHEQUE ☒

LASER ☐

OTHER ☐

AMOUNT REC: € 100,000.00

FEE DUE: €

CHANGE: €

SIGNATURE: _____

RECEIPT NO. _____

MNC/RC

24th November 2003

Mr. Brian Ryan
Director,
Gort Windfarms Ltd
Hibernian Wind Power,
27 Lower Fitzwilliam Street,
Dublin 2

Re: Compliance with Planning Conditions concerning the Control of Silt-Laden Discharges

Dear Mr. Ryan,

I refer to your letter of the 24th November, 2003, the Malone O' Regan McGillicuddy drainage master plan drawing dated 14th November 2003 and the Ascon method statement on dewatering and pollution control. These documents have been submitted in relation to the compliance with condition 9, planning references 97/3470 and 97/3652, condition 11, planning reference 00/4581 and condition 12, planning reference 02/3560 on the control of silt-laden discharges.

I note that silt traps have been installed on drains adjacent to the locations of construction activity that has taken place to date.

Before any construction works recommence on site please submit for agreement with the Environment Section a drawing of the site drainage master plan showing the location of all proposed silt traps. Please note that failure to do so may result in non-compliance with the planning permission conditions listed above.

Yours sincerely,

Máire Ní Chionna
Senior Engineer
Environment Section

c.c. Liam Gavin, SE Planning

Gort Windfarms Limited
Annual Report and Financial Statements
For the Year Ended 31 December 2019

Gort Windfarms Limited

Notes to the Financial Statements For the Year Ended 31 December 2019

16. Share capital

	2019 €000	2018 €000
Authorised		
1,000,000 (2018 - 1,000,000) Ordinary shares of €1.00 each	<u>1,000</u>	<u>1,000</u>
Allotted, called up and fully paid		
100 (2018 - 100) Ordinary shares of €1.00 each	<u>-</u>	<u>-</u>

The holders of ordinary shares are entitled to receive dividends as declared from time to time and are entitled to one vote per share at meetings of the company.

17. Contingent liabilities and guarantees

The company has, in the normal course of business, provided decommissioning and reinstatement cash bonds. The bonds may be drawn against in the event that the company fails to properly restore the site of any project on termination of the project's useful life. The total value of these bonds at 31 December 2019 is €386 thousand (2018 - €386 thousand).

The company is party to a bank guarantee facility for €40 million along with a number of its fellow Group companies.

Following a ruling by the Court of Justice of the European Union, the Irish State is arranging for an environmental impact assessment of the current and future operations of the wind farm from the start of construction to decommissioning phase in its own right and in combination with other relevant development/activities. This environmental impact assessment is being carried out under the Planning and Development Acts under the Substitute Consent provisions to An Bord Pleanála. The directors of Gort Windfarms Ltd have been advised that a refusal by An Bord Pleanála will lead to a notice being served on Gort Windfarms Limited ordering the cessation of all activities or to carry out remedial measures.

18. Events since the end of the financial year

IAS 10 defines an adjusting event as an event that provides evidence of conditions that existed at the reporting date. A non-adjusting event indicates conditions that arose after the reporting date. The spread of the Covid-19 virus and its identification as a pandemic by the World Health Organisation does not provide additional evidence about the situation that existed at 31 December 2019, and it is therefore a non-adjusting event.

The Covid-19 pandemic has created turbulence in financial markets and economic uncertainty, which will impact individuals and businesses. Given the nature of the Company's business, the directors do not believe that Covid-19 will have a material impact on the company. However, given the inherent uncertainties, there is a risk that this could change as the financial impact of Covid-19 on the company's future financial performance becomes clearer.

19. Capital commitments

The company has no capital commitments at the Balance Sheet date (2018 - Nil).

Gort Windfarms Limited

Notes to the Financial Statements For the Year Ended 31 December 2019

20. Controlling party

The company is 100% owned by Hibernian Wind Power Limited, a company incorporated in Ireland. Hibernian Wind Power Limited is a wholly owned subsidiary of the Electricity Supply Board (ESB), established and operating in Ireland, which is the ultimate parent. The largest and smallest group into which the results of the company are consolidated is that headed by ESB and the consolidated financial statements of ESB are available to the public and may be obtained from Two Gateway, East Wall Road, Dublin 3, Ireland D03 A995.

21. Approval of financial statements

The board of directors approved these financial statements for issue on 22 June 2020.

Appendix 15

Derrybrien Development Society Ltd
Derrybrien
Loughrea
Co Galway

Mr Brian Ryan,
Gort Windfarms Ltd,
Hibernian Wind Power,
Clifton Mews,
Lower Fitzwilliam Street,
Dublin 2.

27th August 2008

RE: Liaison mechanism

Dear Mr Ryan,

As you are aware one of the points agreed between Derrybrien Development Society Ltd and Gort Windfarms Ltd in the High Court in Dublin on 18th April 2008 was that a "liaison mechanism" should be established between both parties. Mr Justice Declan Budd was made aware that agreement had been reached by both sides in the case and that in due course the "final orders" in the case would be carried out in accordance with the terms as agreed on 18th April.

Please outline in writing your suggestions as to how we should proceed with establishing the aforementioned "liaison mechanism".

I await your comments and suggestions on this issue.

Yours sincerely,


Martin Collins

Contact details; address above or e-mail  or mobile 

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Stephen Court, 18/21 St Stephen's Green, Dublin 2, Ireland
Telephone +353-1-703 8000 Fax +353-1-703-7097
www.esbi.ie

Derrybrien Wind Farm
Kylarack,
Loughrea,
Co. Galway.

Derrybrien Development Society
Derrybrien
Loughrea
Co. Galway

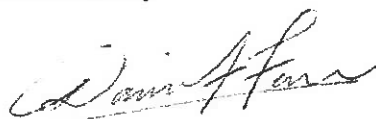
September 15th 2008

Dear Mr. Collins,

Following the agreement between Gort Windfarms Ltd and Derrybrien Development Society Limited in the High Court on April 18th 2008, Mr. Joe Knight was appointed as the liaison officer for Gort Windfarms limited. If you or any member of the public wish to raise a matter in relation to Derrybrien wind farm please contact Mr. Knight.

Mr. Knight is on site daily at Derrybrien wind farm and can be contacted at the above address or by telephone during office hours at 086 197 4020.

Yours sincerely



David Finn
**Commercial Manager Renewables,
Independent Generation
ESB International**

Tel: +353 (0)1 703 7030 Fax: +353 (0)1 703 7097 Mobile: 

