

Ronan Megannety

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Sent: Tuesday 18 June 2024 15:53
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From: Phoebe Duvall [REDACTED]
Sent: Tuesday, June 18, 2024 3:52 PM
To: Bord <bord@pleanala.ie>
Subject: Ref. 319466

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A Chara,

Please find attached a submission from An Taisce in relation to Ref. 319466.

Regards,

Phoebe Duvall

Senior Planning and Environmental Policy Officer
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20240618-ABP-319466

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Sent by email to: bord@pleanala.ie

18th June 2024

Ref: ABP-319466-24

App: Planree Limited c/o MKO

For: Substitute Consent application for 25 no. deviations from the permitted Meenbog Windfarm development (granted under ABP PA05E.300460).

Site: Townlands of Croaghonagh and Meenbog, Co. Donegal.

A Chara,

An Taisce would like to make the following observations on the above application for substitute consent.

1. Exceptional Circumstances

On foot of the Supreme Court's July 2020 judgement in case [2020] IESC 39 (three joined cases - *An Taisce v An Bord Pleanála*, *An Taisce v An Bord Pleanála*, and *Sweetman v An Bord Pleanála*)¹, the Planning and Development and Residential Tenancies Act 2020 introduced provisions allowing for public consultation on exceptional circumstances at the substitute consent application phase.

It is noted that the leave application for the subject case (Ref. 314062) was made under those 2020 provisions and prior to the leave stage of the substitute consent process being removed by the Planning and Development, Maritime and Valuation (Amendment) Act 2022. Consequently, as the applicant notes, the subject application is made under s.41(12) of the 2022 Act.

Therefore, we wish to make the following comments on exceptional circumstances.

¹ https://www.courts.ie/acc/alfresco/80f2cbbf-4f1e-4065-8ca3-f8c14308035b/2020_IESC_39.pdf/pdf#view=fitH

1.1 Definition of Exceptional Circumstances

Section 177K(1J) of the Planning and Development Act 2000 (as amended) states the following with regard to defining exceptional circumstances (or s.177D(2) under the provisions in force at the time of the leave application, ABP Ref. 314062):

"In considering whether exceptional circumstances exist the Board shall have regard to the following matters:

- (a) whether regularisation of the development concerned would circumvent the purpose and objectives of the Environmental Impact Assessment Directive or the Habitats Directive;*
- (b) whether the applicant had or could reasonably have had a belief that the development was not unauthorised;*
- (c) whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired;*
- (d) the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development;*
- (e) the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated;*
- (f) whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development;*
- (g) such other matters as the Board considers relevant."*

As a preliminary matter, An Taisce submits that the definition of exceptional circumstances per Section 177K(1J) requires consideration by the Irish Courts to determine its alignment with CJEU judgements regarding the standards for exceptionality in, for example, c-215/06. It is our view that s.177K(1J) is not consistent with the views of the European Court.

First, we would highlight paragraphs 57 and 58 of the CJEU judgment in c-215/06:

"57. While Community law cannot preclude the applicable national rules from allowing, in certain cases, the regularisation of operations or measures which are unlawful in the light of Community law, such a possibility should be subject to the conditions that it does not offer the persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception.

58. A system of regularisation, such as that in force in Ireland, may have the effect of encouraging developers to forgo ascertaining whether intended projects satisfy the criteria of Article 2(1) of Directive 85/337 as amended, and consequently, not to undertake the action required for identification of the effects of those projects on the environment and for their prior assessment. The first recital of the preamble to Directive 85/337 however states that it is necessary for the competent authority to take effects on the environment into account at the earliest possible stage in all the technical planning and decision-making processes, the objective being to prevent the creation of pollution or nuisances at source rather than subsequently trying to counteract their effects."

These two paragraphs set out what Mr Justice Garrett Simons described in *Suaimhneas Limited v Kerry County Council* (neutral citation [2021] IEHC 451)² as "the limits of a Member State's discretion

² https://www.courts.ie/acc/alfresco/942c2409-e346-4a08-b2ed-e9488b943ea3/2021_IEHC_451.pdf/pdf#view=fith

to regularise the status of development projects carried out in breach of the requirement of the EIA Directive" (para. 49). Essentially, these limits are:

- A regularisation system (such as substitute consent) should not allow for opportunities to circumvent EU laws and should not incentivise the circumvention of EU laws.
- Any regularisation still must adhere to and apply EU laws.
- Any regularisation should be permitted *only* in exceptional circumstances.

It is our firm view that the current definition of exceptional circumstances in s.177K(1J) incorrectly amalgamates two separate issues: a) what actually constitutes an exceptional circumstance, and b) the other limits on regularisation as detailed above.

Second, the definition in s.177K(1J) gives the Board exceptionally broad discretion to consider any issue it so chooses when determining whether or not exceptional circumstances exist (per s.177K(1J)(g) "*such other matters as the Board considers relevant*").

We would highlight that neither *An Taisce v An Bord Pleanála* ([2020] IESC 39)³ nor *Friends of the Irish Environment CLG v Minister for Communications, Climate Action and the Environment & Others* ([2019] IEHC 646)⁴ actually examined the adequacy of the definition of exceptional circumstances in s.177K(1J) in comparison with the CJEU's judgements in -215/06, etc. The Supreme Court judgement in [2020] IESC 39 only compared the checks in the leave application process against the requirements of exceptional circumstances in s.177K(1J). Similarly, in [2019] IEHC 646, the High Court was comparing new regulations with the existing definition in the Act at the time.

We therefore submit that An Bord Pleanála should seek a referral to the High Court on the proper definition of exceptional circumstances as laid out in s.177K(1J) of the Planning and Development Act 2000 (as amended) and its alignment with the standards of exceptionality set out by the CJEU in c-215/06 and others.

We would also highlight that CJEU has clarified on several occasions that it is not permissible for a Member State to benefit from a failure to apply EU law. Ireland has effectively facilitated the ongoing operation of unauthorised activities and the benefits that accrue from that.

1.2 Exceptional Circumstances in the Subject Case

On whether the applicant had or could reasonably have had a belief that the development was not unauthorised per s. 177K(1J)(b) (previously s.177D(2)(b)), we note 6.6.8 of the Inspector's Report for the leave application (Ref. 314062), which simply states:

"I note from the application documents that the applicant is of the view that there is a tolerance for minor deviations from the approved planning-stage designs, in response to actual conditions encountered on the ground, and that such an approach to construction of large-scale construction projects is commonplace."

It is entirely unclear whether the Inspector accepts or rejects the applicant's argument, and no assessment, detail, or reasoned conclusions on this has been provided. This is also not addressed in the Board's decision. We consider that this should now be teased out in the subject application in relation to each of the 25 deviations. We would highlight in particular here Deviations 4, 11 and 25

³ https://www.courts.ie/acc/alfresco/80f2cbbf-4f1e-4065-8ca3-f8c14308035b/2020_IESC_39.pdf/pdf#view=fitH

⁴ https://www.courts.ie/acc/alfresco/1cca7ae8-4d3b-4529-8126-20158df62867/2019_IEHC_646_1.pdf/pdf#view=fitH

regarding the relocation and/or expansion of borrow pits, as well as Deviations 2, 15, 17 and 18 regarding new peat storage cells and an increased volume of peat removal. We consider that these deviations in particular, by virtue of their scale and potential for environmental impact, are likely to constitute material changes. We therefore submit that this requires further assessment with regard to s.177K(1J)(b) (previously 177D(2)(b)).

In relation to compliance with previous planning permissions, the Inspector's Report for the leave application states in section 6.6.20 that, "*The applicant submits that all other completed aspects of the wind farm development have been constructed in accordance with the approved plans and documents*". We submit that this requires verification in order to demonstrate that exceptional circumstances are warranted under s.177K(1J)(f) (previously 177D(2)(f)). No other assessment or detail is provided, and this point is not addressed in the Board's decision. We consider that this now requires further consideration.

2. Potential Ground and Surface Water Impacts

We would share the concerns expressed in the Inspector's Report for the leave application (Ref. 314062), which outlined potential impacts on groundwater and surface water resulting from the extraction activity within borrow pits and the storage of peat in peat cells. We would observe that while the rNIS outlined that the methodology for the borrow pits was as follows:

"As the borrow pit excavations progressed, surface water and groundwater ingress was removed via pumping to settlement ponds, and re-distribution locally across natural vegetated areas",

section 6.4.3 of the Inspector's Report outlines the following concerns, with an observation that there was substantial standing water:

"The borrow pits involved deep excavation and removal of materials, in a number of instances with the excavated pit reused as a peat store. I observed substantial standing water in each of the borrow pits on my visit to the site. I consider the works have the potential to affect the groundwater regime on this peatland site and have the ability to affect the quality and content of surface water discharges from the site."

We are of the view that the borrow pits and peat cells pose a potential significant risk to water quality, which we do not believe has been adequately catalogued and assessed by the applicant. Furthermore, stockpiling of excavated material provides a point source of exposed sediment with the potential to enter nearby waterways.

This inadequate consideration of water quality risks is particularly pertinent given that there was clearly a deviation from the planned methodologies which led to substantial bodies of standing water observed by the Inspector, which may pose a materially higher risk to waterways than anticipated in the initial environmental assessments. We submit that the Board should assess the sufficiency of mitigation measures associated with this, particularly concerning contamination from sediment run-off arising from the borrow pits and peat cells.

Furthermore, we are of the view that the risk to water quality and aquatic SACs has not been adequately assessed with regard to the temporary stockpiled areas which were utilised to stockpile the peat prior to moving it to the peat cell areas. The rNIS outlines that silt fencing was used to surround stockpiles of peat which were left for an undisclosed period of time. The risks posed by this

have not been fully explored in the rNIS, and further detail should be sought on the design and maintenance of those silt fences, in addition to a full risk assessment of the stockpiling for hydrological pathways to Natura 2000 sites.

Please acknowledge this submission and advise us of any decision made.

Is muidne le meas,

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Planning Officer
An Taisce – The National Trust for Ireland

Phoebe Duvall
Senior Planning and Environmental Policy Officer
An Taisce – The National Trust for Ireland

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