

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



31 October 2018

Dear Sir

**Dysart, Johnstownbridge, Co. Kildare**

**Application for Declaration under Section 5 of the Planning and Development Acts 2000 to 2018**

**Kildare County Council Reference: ED/00656**

**Date of Decision by County Council: 8 October 2018**

## 1. Introduction

This request to the Board under section 5(2)(a) of the Planning and Development Acts 2000 to 2018 to review a Declaration issued by Kildare County Council has been prepared by IMG Planning Limited, 75 Fitzwilliam Lane, Dublin, D02 CP78, on behalf of Power Capital Renewable Energy Limited, 2 Merrion Place, Dublin 2, D02 XW71, the applicants for a Declaration in this instance.

This request is made under section 5(3)(a) of the Planning and Development Acts 2000 to 2018 and relates to a Declaration issued on 8 October 2018 that a medium voltage grid connection between a permitted solar farm development and the Dunfirth ESB substation at Dysart, Johnstownbridge, Co. Kildare is development and is not exempted development.

A copy of the Declaration issued by the County Council is attached at Appendix A.

A cheque in the amount of €220, in respect of the referral fee, is attached herewith.

## 2. Planning Background

### 2.1 Register Reference 16/1265

On 6 June 2017, Kildare County Council granted planning permission for the construction of a solar PV farm on an 11.5 hectare site in the townland of Dysart, Johnstownbridge, Co. Kildare.

**75 Fitzwilliam Lane, Dublin 2, Ireland**

T +353 1 678 9837 \ Company Registration Number 497912  
E info@imgplanning.ie www.imgplanning.ie \ VAT Registration Number 9784011J

Directors: IM McGrandles, M McGrandles. Registered in Dublin, Ireland. Registered Office: As above.

In the application, the County Council was advised that the proposed development will be connected to the electricity grid at the existing ESB 110 kV substation in the townland of Dunfiirth. The exact route and means of connection will be determined by the ESB; however, as the cable will be laid underground or overground the provision of the connection is exempted development by reason of Class 26, or Class 27, as the conducting electricity will be at a voltage not exceeding a nominal value of 20kV, in Part 1 of Schedule 2 of the Planning and Development Regulations 2001 (as amended).

Prior to granting planning permission, the County Council requested further information including the submission of details of the preferred route option for the grid connection (including archaeological and ecological assessments for the proposed route which shall include a survey of invasive species and control measures).

In response, the County Council was advised that it was not possible at that juncture to provide a specific grid connection route as ESB Networks will be the responsible party in regards to connecting the Client Side Substation to the grid at the ESB Substation. However, solely for information purposes, the applicant considered that the most likely (and most direct) connection route from the site to the ESB Substation will be along the Dunfiirth Park Road (L1004), as shown in the figure overleaf.

The County Council was further advised that installation of the cable ducting (600mm diameter) will be in accordance with the Standard Specification for ESB MV/LV Cable Ducting. This provides for a minimum depth of 750mm (to top of duct) below finished ground level to a maximum depth of 1 metre and a clearance of 300mm to other services. The length of the cable connection using this route would be a total of c. 1.7km (c. 1.3 km along the public road).



The Ecological Assessment provided concluded that given that the proposed cable connection route will follow the existing access road and the L1004, it is considered that no significant ecological impact will occur. Furthermore, there are no watercourses located along the entire length of the proposed route. It is therefore considered that any works associated with the installation of the cable route would not result in any

significant disturbance/impacts to watercourses. The survey of the route did not identify the presence of any controlled or invasive species that would impact on the works.

One of the conditions attached to the permission (number 9) stated that "the selected method of grid connection shall be advised to the Planning Authority in writing, prior to the commencement of such works to facilitate the connection."

## **2.2 Register Reference 17/1222**

On 14 March 2018, Kildare County Council granted planning permission for an extension of solar PV farm granted permission under Register Reference 16/1265.

Permission was granted subject to conditions, two of note being:

"1b) This permission shall be developed in tandem with the development permitted under Kildare Council planning reference no. 16/1285 and shall not be developed in isolation."

"9) The selected method of grid connection shall be advised to the Planning Authority in writing, prior to the commencement of such works."

## **3. Proposed Development subject to the Declaration**

The request for a Declaration was accompanied by a report by TLI Group entitled "Outline Construction Methodology - 20kV Underground Cable" that outlined and explained the construction techniques and methodologies that will be implemented during construction of the proposed grid connection.

The works consist of the installation of 2 no. 125mm diameter HDPE power cable ducts in an excavated trench, 3 no. 20kV power cables in each to transmit the power generated by the solar farm substation to the 110kV Substation. The trench along the public road, which will extend a distance of 1.321 kilometres, is typically 850mm wide and 925mm deep (with variations to adapt to service crossings and watercourse crossings). No more than a 100 metre section of trench will be opened at any one time. It will take an average of 1 day to complete a 100 metre section of trench. The next 100 metre section of trench will only be excavated once the majority of reinstatement has been completed on the preceding section. Once the cable ducts are installed, the trench is reinstated and the power cables are pulled through the ducts in approximately 600 to 750 metre sections. Pulling the cable will take approximately 1 day per section between joint bays, with the jointing of cables taking approximately 1 day.

In terms of traffic management, the TLI Group report describes that where conditions allow, the works will allow for one side of the road to be open to traffic at all times by means of a stop/go type traffic management system, where a minimum of a 2.5 metre roadway will be maintained at all times. Where the construction requires the crossing of a road, works on one carriageway will be completed before the second carriageway is opened, to maintain traffic flows and reduce impact. Temporary traffic signals, traffic management and road signage in accordance with the Department of Transport: Traffic Signs Manual - Chapter 8: Temporary Traffic Measures and Signs for Road Works will be implemented to allow road users safely pass through the works area by channelling them onto the open side of the road. The traffic signals will be in place prior to the

works commencing and will remain in place until after the works are completed. The public road will be checked regularly and maintained free of mud and debris. Road sweeping will be carried out as appropriate to ensure construction traffic does not adversely affect the local road condition. All construction vehicles will be parked so as not to cause obstruction or inconvenience to road users or residents.

In any event, the works will require a road opening licence from Kildare County Council under Section 254 of the Planning and Development Act. A Traffic Management Plan will be agreed prior to the commencement of the development. This Plan will outline the locations where road closures may be required and the routing of diversions, which will be agreed in advance. The diversions will be implemented to minimise disruption to local residents insofar as possible. Furthermore, all construction works and materials used will be in accordance with ESB specifications.

#### **4. Decision of Kildare County Council**

Kildare County Council declared that the proposed grid connection is development and is not exempted development by reason of the fact that the proposed grid connection would "involve the carrying out of works which would endanger public safety by reason of traffic hazard".

In this regard the Manager's Report that sets out the reasons for the decision states:

*"The File was referred to the Roads, Transportation & Public Safety Department (Roads Department) who in their response on 17<sup>th</sup> September 2018, highlighted that the works would be a substantial amount of ducting to be laid on the public road (c. 1,321 m), extensive traffic management and trench reinstatement works. The Roads Department considers that the proposed works would endanger public safety by reason of traffic hazard, would obstruct road users and are not exempted development."*

#### **5. Legislative Provisions**

##### **5.1 Planning and Development Acts 2000-2018**

###### **Section 2(1)**

*'Works' includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and .....*

###### **Section 3(1)**

*"development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land."*

*'statutory undertaker' means a person, for the time being, authorised by or under any enactment of instrument under an enactment to –*

*(a) Construct or operate a railway, canal, inland navigation dock, harbour or airport,*

- (b) Provide, or carry out works for the provision of, gas, electricity or telecommunications services, or*
- (c) Provide services connected with, or carry out works for the purposes of the carrying on of the activities of, any public undertaking.”*

**Section 4(2)(a)(i)**

*“The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that –*

- (i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or....”*

**Section 4(4)**

*“Notwithstanding..... any regulations under subsection (2), development shall not be exempted development if an environmental impact assessment or an appropriate assessment of the development is required”.*

**Section 172(1)**

*“An environmental impact assessment shall be carried out by a planning authority or the Board, as the case may be, in respect of an application for consent for –*

- (a) proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which exceeds a quantity, area or other limit specified in that Schedule, and*

*(b) proposed development of a class specified in Schedule 5 to the Planning and Development Regulations 2001 which does not exceed a quantity, area or other limit specified in that Schedule but which the planning authority or the Board determines would be likely to have significant effects on the environment.”*

**Section 177U(9)**

*“In deciding upon a declaration or a referral under section 5 of this Act a Planning Authority or the Board, as the case may be, shall where appropriate, conduct a screening for appropriate assessment in accordance with the provisions of this section.”*

**5.2 Planning and Development Regulations 2001-2018**

**Article 3(3)**

*“electricity undertaking” means an undertaker authorised to provide an electricity service.”*

**Article 6(1)**

*“Subject to article 9, development of a class specified in Column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such*

*development complies with the conditions and limitations specified in Column 2 of the said Part 1 opposite the mention of that class in the said Column 1."*

## **Schedule 2, Part 1**

### **Development by Statutory Undertakers**

#### **Class 26**

*"the carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking."*

#### **Article 9(1)**

*"Development to which Article 6 relates shall not be exempted development for the purposes of the Act –*

*(a) If the carrying out of such development would –*

*(i) .....*

*(ii) .....*

*(iii) endanger public safety by reason of traffic hazard or obstruction of road users,  
(v) consist of or comprise the carrying out under a public road of works other than a connection to a wired broadcast relay service, sewer, water main, gas main or electricity supply line or cable, or any works to which class 25, 26 or 31(a) specified in column 1 of Part 1 of Schedule 2 applies,*

*(vi) .....*

*(vii) consist of or comprise the excavation, alteration or demolition (other than peat extraction) of places, caves, sites, features or other objects of archaeological, geological, historical, scientific or ecological interest, the preservation, conservation or protection of which is an objective of a development plan or local area plan for the area in which the development is proposed or, pending the variation of a development plan or local area plan, in the draft variation of the development plan or the local area plan or the making of a new development plan or local area plan, in the draft variation of the development plan or the local area plan or the draft development plan or draft local area plan,*

*(viiA) consist of or comprise the excavation, alteration or demolition of any archaeological monument included in the Record of Monuments and Places, pursuant to section 12(1) of the National Monuments (Amendment) Act 1994, save that this provision shall not apply to any excavation or any works, pursuant to and in accordance with a consent granted under section 14 or a licence granted under section 26 of the National Monuments Act 1930 (No. 2 of 1930) as amended,*

*(viiB) comprise development in relation to which a planning authority or An Bord Pleanála is the competent authority in relation to appropriate assessment and the development would require an appropriate assessment because it would be likely to have a significant effect on the integrity of a European site,*

(viiC) .....

(viii) .....

(ix) .....

(x) .....

(xi) .....

(xii) .....

(b) .....

*(c) If it is development to which Part 10 applies, unless the development is required by or under any statutory provision (other than the Act or these Regulations) to comply with procedures for the purpose of giving effect to the Council Directive."*

## **6. Grounds for Review of the Declaration issued by the County Council**

Notwithstanding the County Council's decision, the applicants contend that the proposed works are development and exempted development. It is submitted that there is no basis for the decision made.

### **6.1 Does the proposed grid connection constitute 'development'?**

Having regard to the nature of the proposal, namely the construction of c. 1.7 kilometres of underground cable, it is evident, by reference to the broad definition of works set out in Section 2(1) and 3(1) of the Act that the proposal does constitute development for planning purposes. The focus, therefore, is on whether or not the proposed development constitutes exempted development.

Following on from Section 4(2)(a)(i) of the Act, and the Regulations made thereunder, the relevant class of development is Class 26 of Part 1, Schedule 2, Planning and Development Regulations 2001, as amended. It is evident that the proposal is "*a development consisting of the laying underground of...cables....for the purposes of the undertaking*". The other requirement of this class is that the development be carried out by an "*undertaker authorised to provide an electricity service*".

### **6.2 Undertaker/Statutory Undertaker**

Article 3(3) of the Regulations state that an electricity undertaking means "an undertaker authorised to provide an electricity service". However, there is no statutory definition to clarify what exactly this means. The Electricity Regulation Act 1999, at Section 2(1), provides the following definition:

*"electricity undertaking" means any person engaged in generation, transmission, distribution or supply of electricity, including any holder of a licence or authorisation under this Act, or any person who has been granted a permit under section 37 of the Principal Act".*

While this definition refers to holders of licences/authorisations/permits the use of *"including"* prior to the reference to these instruments indicates that they are not essential and that the term *"electricity undertaking"* can apply to *"any person"* engaged in generation, transmission, distribution or supply of electricity.

In the process of assessing the application (for a declaration), Kildare County Council requested a letter from the applicants which clearly states that they have been appointed as an undertaker to carry out the proposed works by the ESB.

In response, the applicants clarified that the ESB is not the only entity authorised to provide an electricity service. It was explained, to the satisfaction of the County Council, that in order to construct the approved solar development, the applicants must have an Authorisation to Construct from the Commission for Regulation of Utilities under section 14 of the Electricity Regulation Act 1999. Similarly, in order to generate electricity it must obtain a Licence to Generate from the Commission. Accordingly, the applicants will have to obtain both Authorisation and a Licence prior to the construction of the proposed development and upon obtaining same will be categorised an Electricity Undertaker as defined in the Electricity (Supply) Act, 1927. Therefore when the development is commenced, including the construction of the grid connection, the applicants will be an 'undertaker authorised to provide an electricity service' satisfying this provision of Class 26 of the Planning and Development Regulations.

### **6.3 Environmental Impact Assessment (EIA) or Appropriate Assessment (AA)**

Being an underground cable for the transmission of electricity, the proposed development does not fall within a class of development for the purposes of EIA. It cannot, therefore, attract a requirement for EIA. Accordingly, Section 4(4) of the Act which effectively de-exempts any development that attracts a requirement for Environmental Impact assessment (EIA) does not apply.

As regards Appropriate Assessment, the two planning applications for the solar farm; both the first application and the application for the extension of the solar farm, included a Screening Report which concluded that arising from separation distances from European sites, the solar farm would not have any impact on habitats forming conservation interest of SACs or avian species indicated as conservation interests within SPAs.

Further, as set out in section 2.1 above, the Ecological Assessment of the proposed grid connection provided concluded that given that the proposed cable connection route will follow the existing access road and the L1004, it is considered that no significant ecological impact will occur.

Accordingly, it is submitted that there is sufficient information to conclude that there is no likelihood of significant in-combination effects. Firstly, the small scale of the project is such that it is not reasonably conceivable that it would be likely to give rise to significant effects over and above those likely to arise from the solar farm that might be considered. Secondly, the nature of the project, which involves the laying of an underground cable within a trench mostly in public roads, is such that significant additional effects are also not likely.



Accordingly, as the proposed development, individually or in combination with other plans or projects would not be likely to have a significant effect on any European site, a Stage 2 Appropriate Assessment is not required and therefore does not fall within the scope of Section 4(4) of the Act in regard to Appropriate Assessment.

#### **6.4 Article 9(1) De-exemptions**

The decision of the County Council is singularly based on its view that as carrying out the proposed development would endanger public safety by reason of traffic hazard or obstruction of road users the de-exemption provided for under Article 9(1)(a) (iii) applies.

The applicants do not accept that the de-exemption provided for under Article 9(1)(a) (iii) applies. While the length of the grid connection route extends over some c. 1.6 kilometres, c. 1.3 kilometres along the public road, as set out on the outline construction methodology submitted with the application for the declaration, the grid connection will be carried out in sections (no more than 100 metres at any one time) and in the case of each section, traffic flow on the road will be managed such that it is maintained during the process and that any impact is reduced to a minimum. Further, all other aspects of the construction will be in accordance with industry best practice, any conditions attached to a road opening licence from Kildare County Council that will be required, and the provisions of a Traffic Management Plan that will have to be agreed prior to the commencement of works. It should also be noted that the works will be limited in duration and being underground will have no impact on traffic safety when completed.

Accordingly it is submitted that the works connected with construction of the grid connection will not have an impact on traffic safety and will not give rise to obstruction of road users and therefore the de-exemption provided for under Article 9(1)(a) (iii) does not apply.

In regard to other relevant Article 9 (1) de-exemptions, it is submitted that the proposed development does not fall within their scope:

Article 9(1)(a)(v): the proposed works clearly fall within the scope of Class 26

Articles 9(1)(a)(vii) and (viiA): the proposed works do not impact on any site or feature of archaeological, geological, historical, scientific or ecological interest or on an archaeological monument included in the Record of Monuments and Places

Article 9(1)(a)(viiB): the proposed works do not require an appropriate assessment because they would be likely to have a significant effect on the integrity of a European site

Article 9(1)(c): Part 10 of the Planning and Development do not apply to the proposed works

**7. Conclusion**

On the basis of the foregoing, it is requested that An Bord Pleanála upon review overturn the decision of the County Council and declare that the medium voltage grid connection between a permitted solar farm development and the Dunfirth ESB substation at Dysart, Johnstownbridge, Co. Kildare is development within the definition in section 2(1) of the Act and is exempted development within the definition under Class 26 of part 1 of schedule 2 of the Regulations.

Yours faithfully



**Ian McGrandles**  
**Director**

Encls.

**Appendix A**

Copy of the Declaration issued by Kildare County Council



**Declaration on Development and Exempted Development**

**under Section 5 of the**

**Planning and Development Act 2000-2012**

**WHEREAS** a question has arisen as to whether or not the proposed Medium voltage grid connection between the solar farm development permitted under planning reference no. 16/1265 and the Dunfirth ESB substation at Dysart, Johnstownbridge, Co. Kildare is or is not development and is or is not exempted development.

**AS INDICATED** on the plans and particulars received by the Planning Authority on 15<sup>th</sup> February 2018, as amended by the Further Information received on 14<sup>th</sup> March 2018 and 4<sup>th</sup> May 2018,

**AND WHEREAS** Powercapital Renewable Energy Ltd of 2 Merrion place, Dublin 2, County Dublin requested a declaration on the said question from Kildare County Council;

**AND WHEREAS** Kildare County Council as the Planning Authority, in considering this application for a declaration under Section 5 of the Planning and Development Act 2000 (as amended), had regard to;

a) Section 3(1) of the Planning and Development Act 2000 (as amended) where "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land; and

b) Schedule 2 Part 1:

*CLASS 26 The carrying out by any undertaker authorised to provide an electricity service of development consisting of the laying underground of mains, pipes, cables or other apparatus for the purposes of the undertaking.*

*CLASS 27 The carrying out by any undertaker authorised to provide an electricity service of development consisting of the construction of over-head transmission or distribution lines for conducting electricity at a voltage not exceeding a nominal value of 20kV.*

Note: Classes 26 and 27 are Amended by article 7 of S.I. No. 454/2011 – Planning and Development (Amendment) (No. 2) Regulations 2011.

*7. Classes 26, 27 and 28 of Schedule 2, Part 1 of the Regulations are amended by the substitution of "undertaker authorised to provide an electricity service" for "electricity undertaking".*

- c) Article 9 Planning and Development Regulations 2001 (as amended) which outlines the Restrictions on Exemption:

*(1) Development to which article 6 relates shall not be exempted development for the purposes of the Act— (a) if the carrying out of such development would—*

*(iii) Endanger public safety by reason of traffic hazard or obstruction of road users”.*

**AND WHEREAS** Kildare County Council has concluded that the provision of a medium voltage grid connection between the previously permitted Solar Farm (planning reference: 16/1265) and the Dunfirth ESB substation would involve the carrying out of works which would endanger public safety by reason of traffic hazard.

**NOW THEREFORE** Kildare County Council, in exercise of the powers conferred on it by Section 5(2)(a) of the Planning and Development Act, 2000 (as amended), hereby decides that the proposed development **would be development but would not be exempted development.**

Please note that any person issued with a declaration under subsection 2(a) of the Planning and Development Act 2000 (as amended) may on payment to the Board of the prescribed fee, refer a declaration to An Bord Pleanala within 4 weeks of the issuing of the decision.

Signed:    
 DIRECTOR OF SERVICES

Date: 8<sup>th</sup> October 2018

J.F.