

Sonás,  
Cahercalla Wood,  
Cahercalla,  
Ennis,  
Co. Clare.

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V.A.T. No. 3015496R



Connellan  
&  
Associates

Architectural,  
Planning &  
Energy Rating  
Consultants

The Secretary,  
An Bord Pleanála,  
64 Marlborough Street,  
Dublin 1

9/5/2019

Dear Sir/Madam,

<b>AN BORD PLEANÁLA</b>	
LDG-	_____
ABP-	_____
<b>17 MAY 2019</b>	
Fee: €	<u>220</u> Type: <u>Charge</u>
Time:	<u>10:30</u> By: <u>PSK</u>

We act for and on behalf of Stephen & Denise Walsh. Mr. & Mrs Walsh applied for a Declaration under Section 5 of the Planning & Development Act 2000, as amended, to Tipperary County Council. The Council by letter dated 26/4/2019 issued their decision. We have been requested by our clients to refer this declaration to An Bord Pleanála for review in accordance Section 5 (3) (a) of the Act.

Copy of decision notification by the Council is attached together with referral fee in the amount of 220 euro.

We set out below -

- Referral details
- Referral considerations
- Comments on Council decision.

# 1. REFERRAL DETAILS

Planning Authority:

Tipperary County Council

Planning Authority Reference Number:

S5/19/31

Date of Issuing of Declaration:

26<sup>th</sup>. April 2019

Name & Address of Referrers:

Stephen & Denise Walsh,  
Newport, County Tipperary

**Question arising:**

'Whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28/4/2014 under planning ref 11510251 (an extension of the duration of planning permission for which was granted under planning reference 16600472 is or is not development and is or is not exempted development'

**Location of Development Site:**

Castlewaller, Newport, Co. Tipperary

**Address for Correspondence:**

c/o Connellan & Associates,  
'Sonas', Cahercalla Wood,  
Cahercalla, Ennis, Co. Clare

## 2. REFERRAL CONSIDERATIONS:

### a) Background to Referral Question:

A wind farm development was granted by North Tipperary County Council on 23/5/2012 under planning reference number 11510251. The applicant in the case was Castlewaller Woodland Partnership c/o Clodagh O'Donovan, Fehily Timoney & Company, Core House, Pouladuff Road, Cork. The permission was due to expire on 22/5/2017. An application to extend the duration of the planning permission was made on 24/5/2015 under planning reference 16600472. The application to extend the period was granted. The permission now expires on 22/5/2022. The applicant for the extension of the duration of the planning permission was once again Castlewaller Woodland Partnership but this time Paul Blount c/o ABO Wind Ireland Ltd, Unit 4 Aspen Court, Cornelscourt, Dublin 18 K400 was the correspondence address.

Castlewaller Woodland Partnership was stated to the 'full owner' in the details regarding legal interest lodged with the application for the extension.

The application as originally lodged is described on the Council web site as follows –

<b>Development Description:</b>	wind farm consisting of 16 turbines (each with a maximum hub height of 100m, maximum rotor diameter of 90m, and with a total tip height of 145m), one permanent meteorological mast, 2 borrow pits, a sub-station including a control building, new internal access roads, upgrading of existing internal access roads, expansion of drainage system, turbine hardstands, wastewater holding tank, underground cables and ancillary works. An Environmental Impact Statement accompanies this application
<b>Development Address:</b>	Castlewaller, Newport, Co. Tipperary

The permission, as now extended, was granted subject to 17 conditions.

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On 28/4/2014 the Council received a submission from the agents for the wind farm development, (ABO Wind Ireland Ltd, 53 Glashule Road, Sandycove, Co. Dublin) on behalf of Castlewaller Wind Farm. The agents requested what they described as a '*minor amendment to the permitted development under planning reference 11510251*'. The agents stated that it was intended to alter the permitted development as follows –

Dear Mr Wright,

ABO Wind Ireland Ltd on behalf of Castlewaller Wind Farm are requesting a minor amendment to the permitted development under planning reference 11510251.

ABO intend to:

- Alter the rotor diameter dimensions from 90m to 97m, thus increasing the overall tip height by 3.5m from 145m to 148.5m
- Relocating 11 of the proposed 16 turbines within 20m micro-siting allowance under the DoEHLG Wind Energy Guidelines, 2006.

I refer to our email correspondence between 20<sup>th</sup> March and 28<sup>th</sup> March 2014 at which we discussed changing the tip height of the permitted wind turbine at Castlewaller from 145m to 148.5m.

This submission is being made in respect of the compliance with Condition No. 3(g) of planning reference 11510251.

The submission was being made according to the agents '*in respect of the compliance with condition No 3(g) of planning reference 11510251*'.

Condition 3 states as follows –

- (3)
- (a) The finished level of all turbine foundations shall be below existing ground level at the location of each turbine.
  - (b) The wind turbines shall be finished in a matt off-white/light grey finish.
  - (c) All turbine blades shall have the same rotational speed and shall rotate in the same direction.
  - (d) All service cables and power lines from the turbines to the substation and any other cabling shall be run in underground ducts.
  - (e) Transformers required in association with each individual turbine shall be located within the turbine unless otherwise agreed in writing with the Planning Authority
  - (f) Excavated banks and bases around the turbines shall be re-laid with overlying soil/earth removed during construction.
  - (g) Prior to the commencement of development, the final specifications of the proposed turbines shall be submitted to the Planning Authority for written agreement. No turbines shall be replaced without the prior written agreement of the Planning Authority.
- REASON: In the interests of visual amenity.

The Council agreed to the proposals as lodged by letter dated 12<sup>th</sup>. May 2014. The relevant except from the Council letter assenting to the changes is set out below.

**AN BORD PLEANÁLA**

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LDG- \_\_\_\_\_

ABP- \_\_\_\_\_

"Agobas leis an tpoitil"  
"Working with the community"

Comhairle Contae Thiobraid Árann Thuaidh  
North Tipperary County Council



Fón/Fax: 067-44632  
Fón/Fax: 067-44634  
Gréasán/Weib: www.tipperarynorth.ie  
e-phost/email:  
planning@northtipperary.ie

An Buidé Pleanála, Oifigí Cathartha, Bóthar Lúinigh,  
An tAonach, Contae Thiobraid Árann  
Planning Section, Civic Offices, Limerick Road, Newry, Co. Tipperary

Our Reference  
11/51/0251

Your Reference

Date  
12<sup>th</sup> May, 2014

RE: Castlewaller Wind Farm at Castlewaller, Newport, Co Tipperary

Dear Sir/Madam,

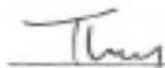
I refer to your submission received in this office on the 28<sup>th</sup> April, 2014 in relation to the above.

I wish to inform you that your proposals regarding Condition No 3(g) (final specifications of proposed turbines) of planning permission 11/51/0251 are agreed.

Please be advised that the increase in rotor diameter blade by 7 metres thereby increasing the overall tip height by 3.5 metres from 145 metres to 148.5 metres and the relocating 11 of the proposed 16 turbines can be treated as a minor variation of planning permission 11/51/0251.

I hope this is of assistance to you. Please do not hesitate to contact Teresa Kiely at 067-44658 should you have any queries.

Yours Faithfully,

  
For Director of Services

ABO Wind Ireland Limited  
53 Glashule Road  
Sandycove  
Co Dublin

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b) Declaration application:

We were requested by Stephen & Denise Walsh to lodge a declaration request under S5 of the Planning & Development Act 2000, as amended – copy of application form and accompanying comments are attached.

The question referred was to adjudicate on whether works relating to alterations to the wind turbine specification and locations set out in submission to Planning Authority on 28/4/2014 under planning reference 11510251 (the extension of duration of planning permission for which was granted under



Planning reference 16600472) 'is or is not development and is or is not exempted development' for the purposes of Section 5 of the Act.

This firm submitted a report with the Declaration request (copy attached) which indicated that in our opinion the amendment works involved 'development'; are not 'exempted development' and finally cannot be deemed to be encompassed within the four walls of planning permission 11510251 (as extended) so to benefit from a letter such as that sent by the Council date stamped 12/5/2014.

We made these comments having regard to the following –

- The definition of 'development' under section 3 (1) of the Planning & Development Act and in particular its reference to development including the carrying out of 'works'.

Development. 3.—(1) In this Act, "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.

'Works' are defined at Section 2 (1) of the same Act as follows -

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

- The lack of any provision in the Act or Regulations which provide an exemption for the type of works involved.
- Condition 1 of the permission which states that -

(1) Save where modified by the following conditions, the proposed development shall be carried out in accordance with the drawings and documentation submitted with the planning application on 14/07/11 and as amended by further information submitted on 24/02/12.  
REASON: To clarify the terms of the permission.

- The provisions of condition 3 which refers only to the 'final specification' of the proposed turbines and makes no reference to any allowance regarding any increase in height of the turbines.

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- (3) (a) The finished level of all turbine foundations shall be below existing ground level at the location of each turbine.  
(b) The wind turbines shall be finished in a matt off-white/light grey finish.  
(c) All turbine blades shall have the same rotational speed and shall rotate in the same direction.  
(d) All service cables and power lines from the turbines to the substation and any other cabling shall be run in underground ducts.  
(e) Transformers required in association with each individual turbine shall be located within the turbine unless otherwise agreed in writing with the Planning Authority.  
(f) Excavated banks and bases around the turbines shall be re-laid with overlying soil/earth removed during construction.  
(g) Prior to the commencement of development, the final specifications of the proposed turbines shall be submitted to the Planning Authority for written agreement. No turbines shall be replaced without the prior written agreement of the Planning Authority.  
REASON: In the interests of visual amenity.

In relation to 'specification' we stated that we did not consider that increasing the height of the turbines (nor indeed relocating same) came within any standard definition or understanding or the word 'specification'. A normal understanding of this word would cover such matters as the final composition of materials involved, the level of performance expected, final finishes etc.

We added that we made these comments that the legal definition of specification has to be much narrower than later interpreted by the Council having regard to the following -

- The application made it clear in the public notices that the maximum rotor diameter was to be 90 metres (not 97 as submitted after the permission was issued) with a total tip height of 145m (not 148.5 as later submitted after the permission issued).

We extracted part of the site notice from the file describing the nature and extent of the development in so far as the public is concerned – copy of extract from site notice is set out below.

### THE DEVELOPMENT WILL CONSIST/ CONSISTS <sup>(5)</sup> OF

construction of a wind farm consisting of 16 turbines (each with a maximum hub height of 100 m, maximum rotor diameter of 90 m, and with a total tip height of 145 m), one permanent meteorological mast, 2 borrow pits, a sub-station including a control building, new internal access roads, upgrading of existing internal access roads, expansion of drainage system, turbine hardstands, wastewater holding tank, underground cables and ancillary works. An Environmental Impact Statement accompanies this application.

Having regard to this, it was our opinion that the Council could not alter the parameters of the planning permission as issued. If this was the case it would totally undermine the public notice system/planning application process on which third parties rely.

For this reason 'specification' had to be understood in our opinion within its normal sense unless other conditions altered the terms of the authorised development such as to allow flexibility in this regard. This is not the case here and condition 1 set out above makes it clear that the development has to be carried out as granted unless other conditions so permit.

We also drew the Council's attention to the case of Bailey v Kilvinane Wind Farm Ltd (Sept 2013) where deviations were allowed by a Planning Authority and it was subsequently decided on section 5

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termination (at Bord level) that the modifications did not come within the scope of the planning permission.

- ☐ The EIS and NIS lodged with the application made particular reference to the description of the development as described in the public notices, not to any flexibility regarding height/location.

We further stated that when EIS or NIS assessments are required under planning legislation that they are tightly prescribed in relation to content and process. Assessments done under the both documents are not open, therefore, to be circumscribed by later amendments in a non-prescribed manner such as in this case where turbines are to be relocated and heights altered by means of a letter after a decision is made.

It was also noted in this case that the development is located within the Slievefelim to Silvermines Special Protection Area (SPA) and is within 10 km of 18 other designated sites. Hen harrier, inter alia, was particularly noted within the site. These facts alone would lean to a very narrow interpretation of the word 'specification'

- ☐ No updated AA screening was carried out by the Council prior to issuing the letter in 2014, even though two years had elapsed since the permission was issued.
- ☐ There does not appear to be any manager's order backing up the Council letter which appears on the face of it to be some type of '*letter of comfort*' sought by the applicant. A letter of comfort is not, however, a planning permission.

For these reasons we did not consider that the applicant could rely on the existing planning permission to cover the alterations to the development set out in the letter lodged on the 28/4/2014 and we stated that we considered that what was described in the submission by the applicant on the 28/4/2014 is development, is not exempted development and is not covered by the terms of the planning permission that issued.

The board will note; the scale of the proposed change in blade diameter is significant, and will increase the total swept area by the turbine blades by a total of 51,635 m<sup>2</sup> and will thus can be expected to lead to a significant increase in bird and bat fatalities relating to this proposed development.

	m	m <sup>2</sup>
Original Radius	145.0	66,052
Extended Radius	148.5	69,279
Increase (Per Turbine)	3.5	3,227
Total Increase - 16 Turbines	56.0	51,635

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## Comments on Council Assessment/Decision

Subsection 2 (a) of Section 5 of the Planning Act 2000, as amended states as follows –

- (2) (a) Subject to F41[*paragraphs (b) and (ba)*], a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under *subsection (1)*, and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.

We have attached the Declaration letter received from the Authority which stated that the Council considered that the works relating to the alterations in question *'is not development'*.

Reference is made in the Declaration that the Council, in considering the referral, had regard to sections 2 & 3 of the 2000 Act and to planning register reference 11/51/0251 & 16/600472. No information is given, however, relating to the *'main reasons and considerations on which its decision is based'* as required by S5 (2) (a) other than that the decision *'is based on the information presented as part of the Section 5 Declaration Application received on 2<sup>nd</sup>. April 2019'*.

We requested and were forwarded a copy of the planner's report on the file. This sets out certain details regarding the assessment (copy attached). Whether these were the considerations that formed the basis of the final decision is not clear, however, nor is it clear whether there is a Council 'order' involved. No reference is made to any such 'order' in the Declaration letter.

In the absence of specific details regarding the decision itself, we will comment on the matters set out in the planner's report.

The report refers to –

- a) Statutory provisions
- b) Site location
- c) Relevant planning history
- d) Assessment.

We have no comments on the first 3 items which basically set out the background details.

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In relation to assessment, part c) of the assessment ask the basic question that our clients require an answer to – *'do alterations to wind turbine specification and location constitute development'*.

The planner's report focuses on the definition of *'works'* in the question submitted and particularly whether *'alterations'* could constitute *'works'* if the structures are not in place. The Council decided that such *'works'* could not constitute development. We would argue that this is a wrong interpretation in the first instance but also serves to side step the essence of the question that was summarised itself in the planner's report - *do alterations to wind turbine specification and location constitute development'*.

S5 allows any person to query what *'is or is not development or is or is not exempted development'*. If a person wants to carry out alteration works to a permitted structure and satisfy himself/herself that



what is involved is/is not development or is/is not exempted development, it is open to that person to put in a Section 5 application to the Council regarding such works. We cannot see any Council stating that they cannot decide the question because the original development is not in place. This would defeat the whole purpose of the Section 5 process.

The Council is aware that what is being queried is whether the alterations it purportedly allowed by a letter in 2014 are or are not development/are or are not exempted development. This in fact is spelled out clearly in the planner's report mentioned above. It was open to the Council to change the nature of the question in front of it if it so wished. This is often done by Councils in applications for declarations and by An Bord Pleanála on referral and we have no objection to this approach if the query is in some way ambiguous or misleading.

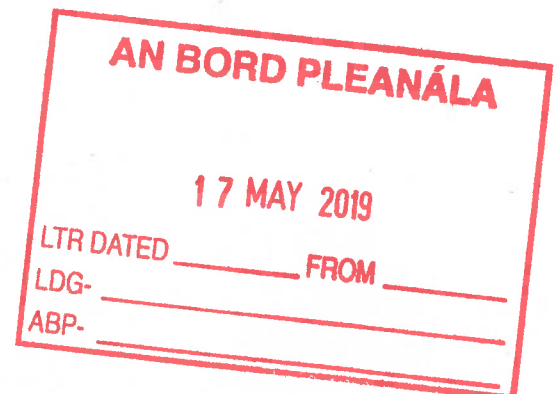
The planner's report goes on to state that the legislation is narrowly focused and does not provide for the determination whether a development is '*subject to consent*'. Presumably this refers to section 5. While this is true in relation to the section 5, it does not preclude a Council/An Bord Pleanála from stating that while something is '*development*' that it is development covered by a particular permission if they so wish. We have seen such determinations from the Bord in the past.

We consider that what is involved is development, is not exempted development and is not covered by the provisions of any extant planning permission.

Yours sincerely,



Mary Lynch B.A., Dip. T.P., MIPI  
Connellan & Associates



## TIPPERARY COUNTY COUNCIL

### Application for Declaration under Section 5

Planning & Development Act 2000, as amended  
Planning & Development Regulations 2001, as amended

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**Planning Ref.:** S5/19/31

**Applicant:** Stephen & Denise Walsh

**Development Address:** Castewaller, Newport, Co. Tipperary.

**Proposed Development:** Whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28/04/2014 under planning ref 11510251 (an extension of the duration of planning permission for which was granted under planning reference 16600472 is or is not development and is or is not exempted development).

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#### **1. GENERAL**

An application for a Section 5 Declaration under the Planning and Development Act, 2000 as amended was received on 02/04/19. The applicant is not the developer. The application is supported by a cover letter from Mary Lynch of Connellan & Associates acting on behalf of the applicant as well as copies of documents obtained from the file under Planning Register Reference 11/51/0251.

#### **2. STATUTORY PROVISIONS**

The following statutory provisions are relevant to this referral case;

Section 2(1) of the Planning and Development Act, 2000, as amended, states as follows;

*"In this Act, except where the context otherwise requires –  
"development" has the meaning assigned to it by Section 3 and  
development shall be construed accordingly."*

And,

*"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure".*

Section 3 (1) of the Planning and Development Act 2000, as amended, states as follows: -

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

### **3. ASSESSMENT**

#### **a. Site Location**

The subject site is located in an upland area between the settlements of Newport and Rearcross located in the south of the Nenagh Municipal District area. The site is clearly delineated by the site boundary plotted for Planning Register Reference 11/51/0251.

#### **b. Relevant Planning History**

11/51/0251 – conditional grant of permission issued on 23/05/12 for a wind farm consisting of 16 turbines (each with a maximum hub height of 100m, maximum rotor diameter of 90m, and with a total tip height of 145m), one permanent meteorological mast, 2 borrow pits, a sub-station including a control building, new internal access roads, upgrading of existing internal access roads, expansion of drainage system, turbine hardstands, wastewater holding tank, underground cables and ancillary works. An Environmental Impact Statement accompanies this application. Condition 3(g) required the specifications for each turbine to be agreed in writing with the Planning Authority. On 28/04/14, a submission identified as being in compliance with Condition 3(g) was submitted and identified a minor amendment as part of same. This amendment sought to alter the rotor diameter from 90m to 97m (and so increasing overall height from 145m to 148.5m) and the relocation of 11 of the 16 turbines within 20m micro-siting allowance citing the 2006 Guidelines. In considering the compliance submission, the Planning Authority responded on 12/05/14 advising that proposals in relation to Condition 3(g) are agreed and that the minor amendments *"can be treated as a minor variation of planning permission 11/51/0251"*.

16/600472 unconditional Extension of Duration of permission granted for the wind farm consisting of 16 turbines (each with a maximum hub height of 100m, maximum rotor diameter of 90m, and with a total tip height of 145m), one permanent meteorological mast, 2 borrow pits, a sub-station including a control building, new internal access roads, upgrading of existing internal access roads, expansion of drainage system, turbine hardstands, wastewater holding tank, underground cables and ancillary works. An Environmental Impact Statement accompanies this application. Previous reference number 11/51/025. The permission now expires on 22/05/2022.

#### **c. Assessment**

The question asked does not query whether or not the erection of a wind turbine or farm is development. The question is very specific as to whether the submission received by the Planning Authority on 28/04/14 constitutes development that is exempted development.

In considering this question, regard has been had to the provisions of the legislation, the planning register relating to the subject site and the question before the Planning Authority; Do alterations to wind turbine specification and locations constitute development?

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Development means, except where the context otherwise requires, the carrying out of works (any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure) on, in, over or under land or the making of any material change in the use of any structures or other land.

It is considered that the alterations referred to could only constitute works in the event that the structures were in place. The matter is therefore deemed not to constitute development.

Notwithstanding the above, I note that the legislation is narrowly focused when considering the question of whether development is exempt or not. It does not provide for the determination to consider whether or not the development is subject to consent. Consented development under Section 34 of the Act is not exempted development.

I am of the view that the question asked is inextricably associated with a live consent process whereby permission was sought and conditionally granted and whereby correspondence relates to compliance with said permission was entered into and received the written agreement of the Planning Authority. No development has occurred in relation to this permission and therefore no alteration to any structure or land has occurred.

#### **4. RECOMMENDATION**

**WHEREAS** a question has arisen as to whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28/04/2014 under planning ref 11510251 (an extension of the duration of planning permission for which was granted under planning reference 16600472 is or is not development and is or is not exempted development.

**AND WHEREAS** Tipperary County Council, in considering this referral, had regard particularly to -

- Sections 2, 3 of the Planning and Development Act, 2000, as amended
- Planning Register Reference 11/51/0251 and 16/600472

**NOW WHEREAS** Tipperary County Council, in exercise of the powers conferred on it by section 5(2)(a) of the Planning and Development Act 2000 as amended, it is hereby decided that works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28/04/2014 under planning ref 11510251 (an extension of the duration of planning permission for which was granted under planning reference 16600472 is not development.

Signed: \_\_\_\_\_

S. Reidy, SEP

Date: 26.4.19

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**17 MAY 2019**

LTR DATED \_\_\_\_\_ FROM \_\_\_\_\_  
LDG- \_\_\_\_\_  
ABP- \_\_\_\_\_





**Comhairle Contae Thiobraid Árann**  
Tipperary County Council

**PLANNING & DEVELOPMENT ACT, 2000 (as amended)**

**Application for a Section 5 Declaration**  
**Development / Exempted Development**

**1. Applicant's address/contact details:**

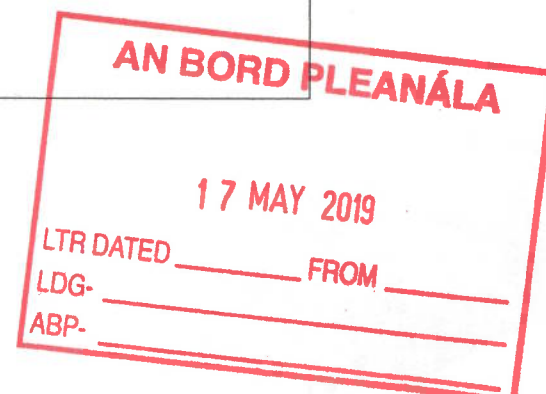
<i>Applicant</i>	Stephen & Denise Walsh
<i>Address</i>	Newport, Co. Tipperary
<i>Telephone No.</i>	086-8269425 (Stephen), 086/6021880 (Denise)
<i>E-mail</i>	stiofan.walsh@gmail.com denisefranciswalsh@gmail.com

**2. Agent's (if any) address:**

<i>Agent</i>	Connellan & Associates
<i>Address</i>	'Sonas', Cahercalla Wood, Cahercalla Road, Ennis, Co. Clare
<i>Telephone No.</i>	065-6824520
<i>E-mail</i>	connellanandassociates@eircom.net
<i>Please advise where all correspondence in relation to this application is to be sent;</i>	
Applicant [ <input type="checkbox"/> ]      Agent [ <input checked="" type="checkbox"/> ]	

**3. Location of Proposed Development:**

<i>Postal Address or Townland or Location (as may best identify the land or structure in question)</i>	Castlewaller, Newport, Co. Tipperary
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#### 4. Development Details:

Please provide details of the proposed development for which an exemption under Section 5 of the Planning and Development Act is applied for.

(Note: only works and uses listed and described under this section will be assessed under this Section 5 Application. Use additional sheets if required.)

Question: Whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28/4/2014 under planning ref 11510251 (an extension of the duration of planning permission for which was granted under planning reference 16600472) is or is not development and is or is not exempted development
Proposed floor area of proposed works/uses:                      sqm    n/a

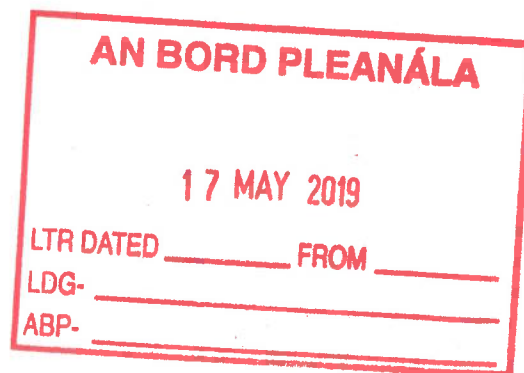
#### 5. Legal Interest of Applicant in the Land or Structure:

<i>Please tick appropriate box to show applicant's legal interest in the land or structure</i>	A. Owner	B. Occupier
	C. Other      ✓	
<i>Where legal interest is 'Other', please expand further on your interest in the land or structure</i>	Live in area affected by wind farm	
<i>If you are not the legal owner, please state the name and address of the owner</i>	Name: Castlewaller Woodland Partnership, Unit 3, Aspen Court, Cornelscourt, Dublin 18 Address:	

Signature of Applicant(s) \_\_\_\_\_

Date: \_\_\_\_\_

**Note:** If the proposed development consists of works to a (Proposed) Protected Structure and/or any structure within the curtilage of a (Proposed) Protected Structure, an application for a Section 57 Declaration may be more appropriate.



## GUIDANCE NOTES

- (1) All queries on the form must be completed and the form must be accompanied by the relevant fee. The amount of the fee is currently **€80.00**.
- (2) This application should be accompanied by **TWO COPIES** of the following documentation
  - OSI Site Location Map with the site outlined clearly – 1:1000 in urban areas and 1:2500 in rural areas
  - Floor Plans & Elevations at a scale of not less than 1:200
  - Site layout plan indicating position of proposed development relative to premises and adjoining properties
  - Other details e.g. brochures, photographs if appropriate.

(All dimensions must be given in metric scale and drawings should be accompanied by a brief description outlining the use of the proposed development)
- (3) Where a proper and complete application is received, a decision must be conveyed to the applicant within four (4) weeks except where additional necessary information is required.

This application form and relevant fee should be submitted to:

Planning Section,  
Tipperary County Council,  
Civic Offices,  
Limerick Road,  
Nenagh,  
Co. Tipperary

OR

Planning Section,  
Tipperary County Council,  
Civic Offices,  
Emmet Street,  
Clonmel,  
Co. Tipperary

Enquires:

Telephone 0761 06 5000

E-Mail [planning@tipperarycoco.ie](mailto:planning@tipperarycoco.ie)

### FOR OFFICE USE ONLY

### DATE STAMP

Fee Recd. € \_\_\_\_\_

Receipt No \_\_\_\_\_

Date \_\_\_\_\_

Receipted by \_\_\_\_\_

**AN BORD PLEANÁLA**

**17 MAY 2019**

LTR DATED \_\_\_\_\_ FROM \_\_\_\_\_

LDG- \_\_\_\_\_

ABP- \_\_\_\_\_

Sonas,  
Cahercalla Wood,  
Cahercalla,  
Ennis,  
Co. Clare.

Phone: 00 353 65 68 24520  
E-mail: [connellanandassociates@eircom.net](mailto:connellanandassociates@eircom.net)  
V.A.T. No. 3015496R



Connellan  
&  
Associates

Architectural,  
Planning &  
Energy Rating  
Consultants

Planning Section,  
Tipperary County Council,  
Civic Offices,  
Nenagh,  
Co. Tipperary

22/3/2019

**Re/ Declaration under Section 5 of the Planning & Development Act 2000, as amended.**

Dear Sir/Madam,

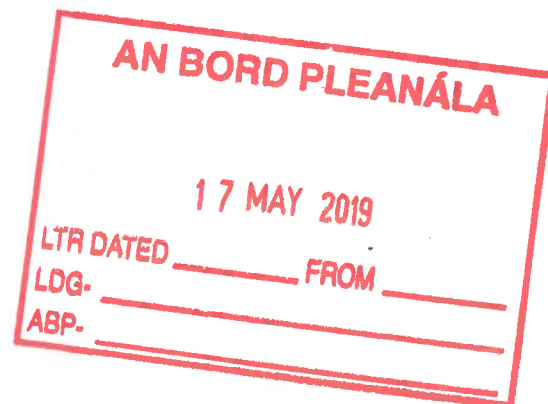
We confirm that we act for and on behalf of Stephen & Denise Walsh of Newport, Co. Tipperary in making a submission for a Declaration under Section 5 of the Planning & Development Act 2000, as amended.

The Declaration Application request relates to aspects of a wind farm development at Castlewaller, Newport, Co. Tipperary and consists of the application form attached and this cover letter setting out details of the background to the request together with comments on the application and is based on section 5 of the Planning Act which states –

Declaration and  
referral on devel-  
opment and  
exempted devel-  
opment.

5.—(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.

**1. Background to Declaration Request:**





The original wind farm development was granted by North Tipperary County Council on 23/5/2012 under planning reference number 11510251. The applicant in the case was Castlewaller Woodland Partnership c/o Clodagh O'Donovan, Fehily Timoney & Company, Core House, Pouladuff Road, Cork. The permission was due to expire on 22/5/2017. An application to extend the duration of the planning permission was made on 24/5/2015 under planning reference 16600472. The application to extend the period was granted. The permission now expires on 22/5/2022. The applicant for the extension of the duration of the planning permission was once again Castlewaller Woodland Partnership but this time Paul Blount c/o ABO Wind Ireland Ltd, Unit 4 Aspen Court, Cornelscourt, Dublin 18 K400 was the correspondence address.

Castlewaller Woodland Partnership was stated to be the 'full owner' in the details regarding legal interest lodged with the application for the extension.

The application as originally lodged is described on the Council web site as follows –

**Development Description:** wind farm consisting of 16 turbines (each with a maximum hub height of 100m, maximum rotor diameter of 90m, and with a total tip height of 145m), one permanent meteorological mast, 2 borrow pits, a sub-station including a control building, new internal access roads, upgrading of existing internal access roads, expansion of drainage system, turbine hardstands, wastewater holding tank, underground cables and ancillary works. An Environmental Impact Statement accompanies this application

**Development Address:** Castlewaller, Newport, Co. Tipperary

The permission, as now extended, was granted subject to 17 conditions.

On 28/4/2014 the Council received a submission from the agents for the wind farm development, (ABO Wind Ireland Ltd, 53 Glashule Road, Sandycove, Co. Dublin) on behalf of Castlewaller Wind Farm. The agents requested what they described as a 'minor amendment to the permitted development under planning reference 11510251'. The agents stated that it was intended to alter the permitted development as follows –

Dear Mr Wright,

ABO Wind Ireland Ltd on behalf of Castlewaller Wind Farm are requesting a minor amendment to the permitted development under planning reference 11510251.

ABO intend to:

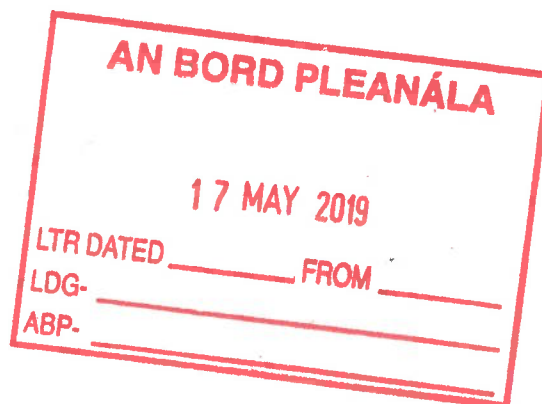
- Alter the rotor diameter dimensions from 90m to 97m, thus increasing the overall tip height by 3.5m from 145m to 148.5m
- Relocating 11 of the proposed 16 turbines within 20m micro-siting allowance under the DoEHLG Wind Energy Guidelines, 2006.

I refer to our email correspondence between 20<sup>th</sup> March and 28<sup>th</sup> March 2014 at which we discussed changing the tip height of the permitted wind turbine at Castlewaller from 145m to 148.5m.

This submission is being made in respect of the compliance with Condition No. 3(g) of planning reference 11510251.

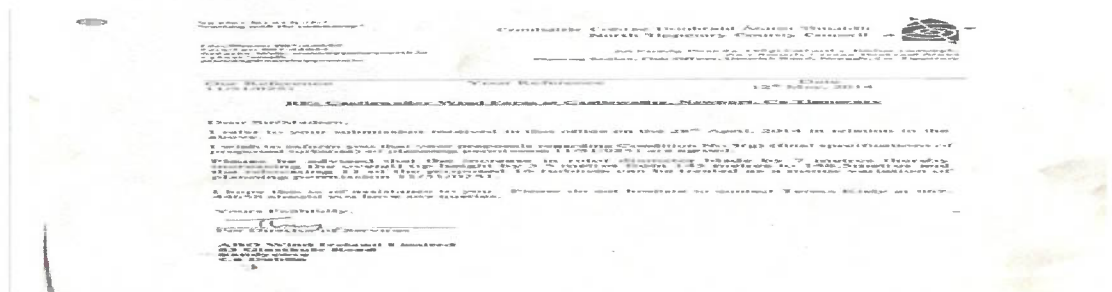
The submission was being made according to the agents 'in respect of the compliance with condition No 3(g) of planning reference 11510251'.

Condition 3 states as follows –



- (3) (a) The finished level of all turbine foundations shall be below existing ground level at the location of each turbine.  
 (b) The wind turbines shall be finished in a matt off-white/light grey finish.  
 (c) All turbine blades shall have the same rotational speed and shall rotate in the same direction.  
 (d) All service cables and power lines from the turbines to the substation and any other cabling shall be run in underground ducts.  
 (e) Transformers required in association with each individual turbine shall be located within the turbine unless otherwise agreed in writing with the Planning Authority.  
 (f) Excavated banks and bases around the turbines shall be re-laid with overlying soil/earth removed during construction.  
 (g) Prior to the commencement of development, the final specifications of the proposed turbines shall be submitted to the Planning Authority for written agreement. No turbines shall be replaced without the prior written agreement of the Planning Authority.  
**REASON: In the interests of visual amenity.**

The Council agreed to the proposals as lodged by letter dated 12<sup>th</sup>. May 2014. The relevant except from the Council letter assenting to the changes is set out below.



## 2. Comments on Declaration application:

The question is whether works relating to alterations to the wind turbine specification and locations set out in submission to Planning Authority on 28/4/2014 under planning reference 11510251 (the extension of duration of planning permission for which was granted under planning reference 16600472) 'is or is not development and is or is not exempted development' for the purposes of Section 5 of the Act.

In our opinion the amendment works involved are 'development'; are not 'exempted development' and finally cannot be deemed to be encompassed within the four walls of planning permission 11510251 (as extended) so to benefit from a letter such as that sent by the Council dated 12/5/2014.

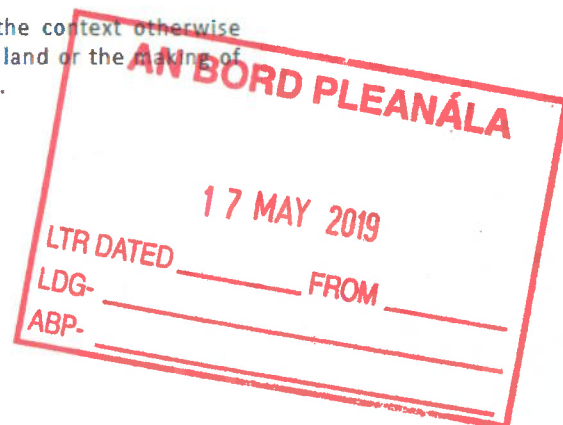
We make these comments having regard to the following –

- The definition of 'development' under section 3 (1) of the Planning & Development Act and in particular its reference to development including the carrying out of 'works'.

Development.

3.—(1) In this Act, "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.

'Works' are defined at Section 2 (1) of the same Act as follows -



"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

- The lack of any provision in the Act or Regulations which provide an exemption for the type of works involved.
- Condition 1 of the permission which states that -  
  
(1) Save where modified by the following conditions, the proposed development shall be carried out in accordance with the drawings and documentation submitted with the planning application on 14/07/11 and as amended by further information submitted on 24/02/12.  
**REASON:** To clarify the terms of the permission.
- The provisions of condition 3 which refers only to the '*final specification*' of the proposed turbines and makes no reference to any allowance regarding any increase in height of the turbines.  
  
(3) (a) The finished level of all turbine foundations shall be below existing ground level at the location of each turbine.  
(b) The wind turbines shall be finished in a matt off-white/light grey finish.  
(c) All turbine blades shall have the same rotational speed and shall rotate in the same direction.  
(d) All service cables and power lines from the turbines to the substation and any other cabling shall be run in underground ducts.  
(e) Transformers required in association with each individual turbine shall be located within the turbine unless otherwise agreed in writing with the Planning Authority.  
(f) Excavated banks and bases around the turbines shall be re-laid with overlying soil/earth removed during construction.  
(g) Prior to the commencement of development, the final specifications of the proposed turbines shall be submitted to the Planning Authority for written agreement. No turbines shall be replaced without the prior written agreement of the Planning Authority.  
**REASON:** In the interests of visual amenity.

In relation to '*specification*' we do not consider that increasing the height of the turbines (nor indeed relocating same) come within any standard definition or understanding of the word '*specification*'. A normal understanding of this word would cover such matters as the final composition of materials involved, the level of performance expected, final finishes etc.

We make these comments that the legal definition of specification has to be much narrower than later interpreted by the Council having regard to the following -

- The application made it clear in the public notices that the maximum rotar diameter was to be 90 metres (not 97 as submitted after the permission was issued) with a total tip height of 145m (not 148.5 as later submitted after the permission issued).

We have extracted part of the site notice from the file which describes the nature and extent of the development in so far as the public is concerned - copy of extract from site notice is set out below.

**AN BORD PLEANÁLA**

**17 MAY 2019**

LTR DATED \_\_\_\_\_ FROM \_\_\_\_\_

LDG- \_\_\_\_\_

ABP- \_\_\_\_\_

## THE DEVELOPMENT WILL CONSIST/ CONSISTS <sup>(5)</sup> OF

construction of a wind farm consisting of 16 turbines (each with a maximum hub height of 100 m, maximum rotor diameter of 90 m, and with a total tip height of 145 m), one permanent meteorological mast, 2 borrow pits, a sub-station including a control building, new internal access roads, upgrading of existing internal access roads, expansion of drainage system, turbine hardstands, wastewater holding tank, underground cables and ancillary works. An Environmental Impact Statement accompanies this application.

Having regard to this, the Council could not alter the parameters of the planning permission as issued. If this was the case it would totally undermine the public notice system/planning application process on which third parties rely.

For this reason '*specification*' has to be understood within its normal sense unless other conditions altered the terms of the authorised development such as to allow flexibility in this regard. This is not the case here and condition 1 set out above makes it clear that the development has to be carried out as granted unless other conditions so permit.

We would also draw the Council's attention to the case of *Bailey v Kilvinane Wind Farm Ltd* (Sept 2013) where deviations were allowed by a Planning Authority and it was subsequently decided on section 5 determination (at Bord level) that the modifications did not come within the scope of the planning permission.

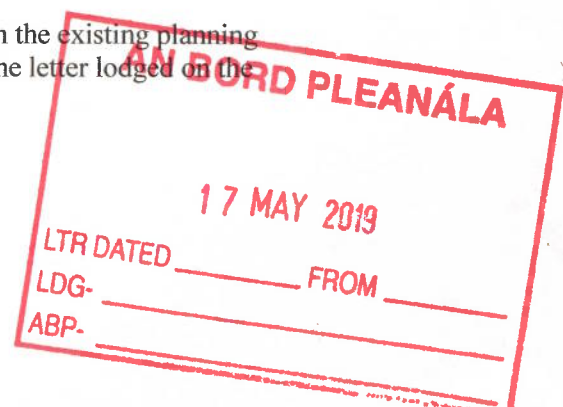
- The EIS and NIS lodged with the application make particular reference to the description of the development as described in the public notices, not to any flexibility regarding height/location.

When EIS or NIS assessments are required under planning legislation they are tightly prescribed in relation to content and process. Assessments done under the both documents are not open, therefore, to be circumscribed by later amendments in a non-prescribed manner such as in this case where turbines are to be relocated and heights altered by means of a letter after a decision is made.

It is noted in this case that the development is located within the Slievefelim to Silvermines Special Protection Area (SPA) and is within 10 km of 18 other designated sites. Hen harrier, inter alia, was particularly noted within the site. These facts alone would lean to a very narrow interpretation of the word '*specification*'

- No updated AA screening was carried out by the Council prior to issuing the letter in 2014, even though two years had elapsed since the permission was issued.
- There does not appear to be any manager's order backing up the Council letter which appears on the face of it to be some type of '*letter of comfort*' sought by the applicant. A letter of comfort is not, however, a planning permission.

For these reasons we do not consider that the applicant can rely on the existing planning permission to cover the alterations to the development set out in the letter lodged on the 28/4/2014.



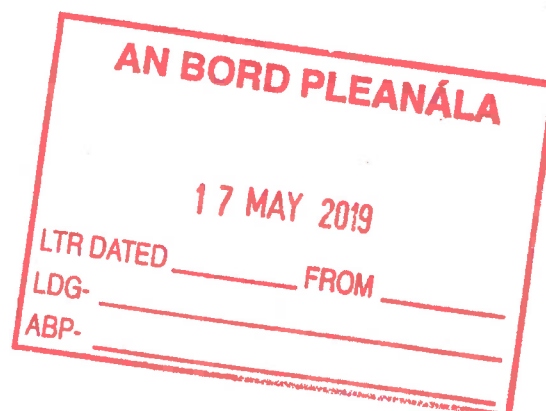


For the reasons set out above, we consider what is described in the submission by the applicant on the 28/4/2014 is development, is not exempted development and is not covered by the terms of the planning permission that issued.

Yours sincerely,



Mary Lynch B.A., Dip. T.P., MIPI  
Connellan & Associates





Comhairle Contae Thiobraid Árann  
Tipperary County Council

Comhairle Contae  
Thiobraid Árann,  
Oifigí Cathartha,  
Cluain Meala,  
Co. Thiobraid Árann  
Tipperary County Council,  
Civic Offices, Clonmel,  
Co. Tipperary

Comhairle Contae  
Thiobraid Árann,  
Oifigí Cathartha,  
An tAonach,  
Co. Thiobraid Árann  
Tipperary County Council,  
Civic Offices, Nenagh,  
Co. Tipperary

t 0761 06 5000  
e customerservice  
@tipperarycoco.ie  
tipperarycoco.ie

S5/19/31

26<sup>th</sup> April 2019

Stephen & Denise Walsh,  
C/o Connellan & Associates,  
'Sonas',  
Cahercalla Wood,  
Cahercalla Road,  
Ennis,  
CO. CLARE.

**Re: Declaration under Section 5 of the Planning and Development Act 2000**

Dear Sir/Madam,

I refer to your application for a Section 5 Declaration received on 2<sup>nd</sup> April, 2019 in relation to the following proposed works:-

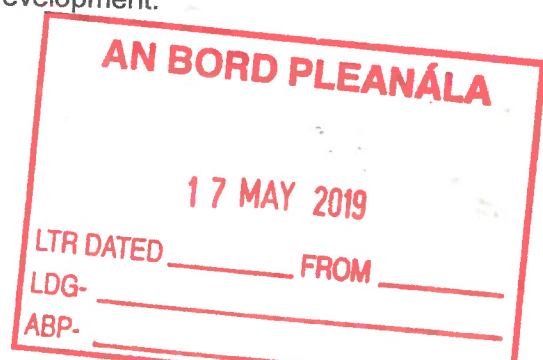
Whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28/04/2014 under planning ref 11510251 (an extension of the duration of planning permission for which was granted under planning reference 16600472 is or is not development and is or is not exempted development at Castlewaller, Newport, Co. Tipperary

**WHEREAS** a question has arisen as to whether works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28/04/2014 under planning ref 11510251 (an extension of the duration of planning permission for which was granted under planning reference 16600472 is or is not development and is or is not exempted development.

**AND WHEREAS** Tipperary County Council, in considering this referral, had regard particularly to -

- Sections 2, 3 of the Planning and Development Act, 2000, as amended
- Planning Register Reference 11/51/0251 and 16/600472

**NOW WHEREAS** Tipperary County Council, in exercise of the powers conferred on it by section 5(2)(a) of the Planning and Development Act 2000 as amended, it is hereby decided that works relating to alterations to wind turbine specification and locations set out in submission to planning authority on 28/04/2014 under planning ref 11510251 (an extension of the duration of planning permission for which was granted under planning reference 16600472 is not development.



This decision is based on the information presented as part of the Section 5 Declaration Application received on 2<sup>nd</sup> April, 2019.

**NOTE:** Any person issued with a Declaration of a Planning Authority may refer the Declaration for review to An Bord Pleanála, 64 Marlborough Street, Dublin 1, within four (4) weeks of the date of issue of the Declaration and on payment of the prescribed fee.

Yours faithfully,

  
for Director of Services.

