Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

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Legal Digest

Learning from Litigation

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Legal Cases:

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Prepared by Fieldfisher for the Office of the Planning Regulator

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Introduction

The Office of the Planning Regulator (OPR) is pleased to present the eighth edition of the '*Learning from Litigation*' bulletin. This bulletin has been prepared to highlight and disseminate key learnings from the continually evolving planning and environmental case law. It provides information on important precedents, court decisions and emerging trends with an overview of noteworthy planning cases.

The case selection for this edition of the bulletin was made following recommendations received from the Planning Law Bulletin Steering Group. This Group consists of nominees from the Law Society of Ireland's Environmental and Planning Law Committee, An Bord Pleanála, the OPR legal services provider Fieldfisher LLP, the County and City Management Association and the OPR. It was agreed by the Group that this edition of the bulletin would be themed. In this context the cases selected all feature judgments relating to renewable energy projects specifically wind energy developments.

The OPR intends that the bulletin will be published on a quarterly basis.

Disclaimer: This document is for general guidance only. It cannot be relied upon as containing, or as a substitute for legal advice. Legal or other professional advice on specific issues may be required in any particular case and should always be sought before acting on any of the issues identified.

Case: Coolglass Wind Farm Limited v An Bord Pleanála, Ireland and the Attorney General (Notice Parties)
Date: 10 January 2025
Citation: [2025] IEHC 1
Judge: Humphreys J.

This case concerned a challenge by Coolglass Wind Farm Limited (the Applicant) to a refusal of planning permission by An Bord Pleanála (the Board) for a 13-turbine wind farm development and associated works in various townlands in County Laois (the Proposed Development).

The judgment is subject to an appeal to the Supreme Court, in particular on the finding in respect of Core Ground 1 (set out below), the outcome of which is currently pending.

Background

A planning application for the Proposed Development, as a strategic infrastructure development (SID), was made to the Board on 14 August 2023. The Board received a large number of submissions and observations from members of the public, prescribed bodies and in particular Laois County Council (the Council). The Council's chief executive's report stated that the Proposed Development would materially contravene the Laois County Development Plan 2021-2027 (the CDP) and its wind energy strategy (WES), as 12 of the 13 proposed turbines were located wholly or partially in areas designated as *"not open for consideration"* for wind farm development. The Board's Inspector prepared a report dated 16 May 2024 recommending a refusal of permission. The Board made an Order dated 23 August 2024 concurring with the Inspector's recommendation and refusing permission on the basis that the Proposed Development would be a material contravention of the CDP and the WES, and would be contrary to the proper planning and sustainable development of the area.

Part of the background to these proceedings concerns two significant pieces of EU legislation that were introduced to address the energy crisis following the Russian invasion of Ukraine, namely:

- Council Regulation (EU) 2022/2577 of 22 December 2022 which laid down a framework to accelerate the deployment of renewable energy. This came into effect on 30 December 2022 and was known as the Temporary Renewable Energy Regulation (the TRE Regulation); and
- Directive (EU) 2023/2413 of 18 October 2023 related to the promotion of energy from renewable sources (the RED III Directive) which must be transposed in Member States by 21 May 2025.

Both the TRE Regulation and the RED III Directive introduce a presumption that renewable energy projects are of overriding public importance for the purposes of certain environmental measures, including Article 6(4) of the Habitats Directive. In addition, the TRE Regulation requires that Member States ensure, for projects recognised as being of overriding public interest, *"that in the planning and permit-granting process, the construction and operation of plants and installations for the production of energy from renewable sources and the related grid infrastructure development are given priority when balancing legal interests in the individual case."*

Grounds of Challenge

The Applicant brought seven grounds of challenge. The Court found that the matter was capable of being decided on two highly fact-specific grounds, Core Ground 4 and Core Ground 3. However, whilst the Court gave consideration to not deciding any other grounds in the case, it ultimately went on to decide all of the grounds because of the significance of the issues in particular in relation to the interpretation of Section 15 of the Climate Action and Low Carbon Development Act 2015 (as amended) (the 2015 Act).

A summary of the findings in relation to each ground is set out in the order established by the judgment, as follows (with the exception of Core Ground 2 for reasons set out below).

Core Ground 4 – Reliance on wrong section of the 2000 Act

The Applicant alleged that the Board made an error in law in considering whether to grant permission notwithstanding that the Proposed Development materially contravened the CDP by reference to Section 37(2) of the Planning and Development Act 2000 (as amended) (the 2000 Act) instead of Section 37G(6) of the 2000 Act which applies to SID. The Court found that even though the Applicant's documentation might have wrongly referred to Section 37(2), that was not something that the Board should have relied on, and the Board was incorrect to rely on Section 37(2). Further the Court noted that Section 37G(6) is significantly more permissive than Section 37(2), the latter containing a number of additional requirements to be met as set out in Section 37(2)(b)(i) to (iv). The Court found that the Board did not just rely on the wrong section of the 2000 Act but applied a test that doesn't exist in this context. The Court referred to a number of other decisions of the Board – namely *Shannon LNG v An Bord Pleanála [2024] IEHC 555*, and *Nagle View Turbine Aware Group v An Bord Pleanála [2024] IEHC 603* – to the effect that there are significant and compelling Government policy and legally binding targets in respect of achieving the national climate goals that should have taken precedence over the visual impacts of the wind farm that were protected by the CDP.

Core Ground 3 – Deferral by the Board of its obligations under Section 15 of the 2015 Act and Section 37G of the 2000 Act

The Applicant claimed that the Board had failed to fulfil its obligations under Section 15 of the 2015 Act and/or its jurisdiction under Section 37G of the 2000 Act and deferred responsibility to the Office of the Planning Regulator (the OPR) and/or the Minister for Housing, Local Government and Heritage (the Minister). In deciding not to exercise its discretion to grant permission in material contravention of the CDP, the Board had noted in its Direction dated 21 August 2024 (the Direction) that the OPR and the Minister had not altered the areas designated *"not open for consideration"* for wind farm development during the Section 31 Ministerial Direction procedure on the CDP and WES. The Board determined therefore that it was not required to independently consider its obligations under Section 15 of the 2015 Act and/or the exercise of its discretion under Section 37G(6) of the 2000 Act. The Court found that the fact that the Minister and the OPR did not seek an amendment of the CDP relates to a different test under a different statutory provision and that it was not a legally relevant consideration to the refusal of permission. The Court determined that the Board could have exercised its powers under Section 15 of the 2015 Act or Section 37G(6) of the 2000 Act independently of the Ministerial Direction procedure.

Core Ground 1 – Breach of the 2015 Act

The Applicant claimed that the Board failed to comply with its obligations under Section 15 of the 2015 Act. Section 15 requires a relevant body (including the Board) to carry out its functions consistently, insofar as practicable, with specified climate plans and objectives, including the Climate Action Plan 2024 (CAP24). The Applicant's case was that refusing permission for the Proposed Development was inconsistent with the achievement of the targets for renewable electricity by 2030 set by CAP24 and the Board should have granted permission unless it was not practicable for it to do so. The Applicant claimed that the Board was required to exercise its discretion under Section 37G(6) to materially contravene the CDP, unless it was not practicable for it to do so, and the Board should not have refused permission on the sole basis that the Proposed Development materially contravened the CDP. The Board and the State parties denied that Section 15 of the 2015 Act imposed any statutory obligation to grant permission or to materially contravene the CDP just because it was a renewable energy development.

The Court considered a number of factors relevant to statutory interpretation and concluded that the starting point was the plain and ordinary language used in the provision under consideration (i.e. Section 15 of the 2015 Act). The Court suggested that the relationship of those words to the provision as a whole and the legal context, and the discernible purpose of the statute, are also relevant to understanding the meaning. The Court also noted that an interpretation that complies with EU law and the European Convention on Human Rights (ECHR) obligations is required.

The Court then addressed each of these factors as follows:

i. The language of Section 15(1) – the Court set out the different types of statutory obligations, from *"have regard to"* to *"comply with"*. The Court said *"comply with as far as practicable"* meant compliance unless it was not capable of being put into practice, not merely doing what is reasonable. The Court said that this was a very high standard only just falling short of unconditional compliance requirements. Practicability is assessed objectively not subjectively.

ii. The context of Section 15(1) – the Climate Action and Local Carbon Development (Amendment) Act 2021 amended the 2015 Act and significantly strengthened the pre-existing wording of Section 15(1), which originally contained only a *"have regard to"* obligation. This meant that the decision-maker had to take the matter into account or consider it, but was free to depart from it, and the weight to be attached to the matter was to be determined by the decision-maker. The Court found that the overall meaning of the 2021 amendment was to impose sweeping obligations across the public sector from the Government down to all relevant public bodies. The Court also referred to other elements of the 2015 Act, including the national climate objective, the climate action plan, a national long term climate action strategy, and the requirement on local authorities to make climate action plans that are consistent with national climate action and national adaptation plans. The Court found that the 2015 Act is to be given a wide interpretation reflecting the need for rapid, far-reaching and unprecedented changes to all aspects of the society and the economy.

iii. The purpose of Section 15(1) – the Court, in reliance on a number of authorities, stated that the *"climate emergency represents a critical risk to human and other natural life on earth"*, and relied on UN Intergovernmental Panel on Climate Change (IPCC) information to say *"that rapid, deep and in most cases immediate cuts in greenhouse gas (GHG) emissions are required to meet essential climate targets"*. The Court referenced the Applicant's submissions in respect of three major events that summarised how the law had changed in recent years regarding climate change namely:

- the 2021 amendment to the 2015 Act,
- the TRE Regulation and the RED III Directive, and
- the European Court of Human Rights (ECtHR) for the first time in *Verein KlimaSeniorinnen v Switzerland, Application No. 53600/20* found a breach of the ECHR with respect to climate change.

The Court quoted at length from an expert wind energy specialist who had filed an affidavit for the Applicant about the chances of Ireland meeting its climate targets and the importance of renewable energy projects in doing so. The Court found that all of this supported a purposive interpretation of Section 15 of the 2015 Act, such that the obligation on public bodies is what it says on its face.

iv. EU law conformity – The Court referred to the duty of sincere cooperation, a principle that public bodies should interpret domestic law in a manner that gives effect to EU law obligations. It found that Section 15 of the 2015 Act should be interpreted in such a way as to comply with EU law regarding the supply of renewable energy (i.e. the EU law climate obligations) and this applies to the board's decisions on wind farms such as the one in question.

v. ECHR conformity – the Court referred to Sections 2-4 of the ECHR Act 2003, as amended (the ECHR Act) which places an obligation on the main institutions of the State (i.e. the legislative, executive and judicial) to comply with the ECHR Act in interpreting any statutory provision and in performing its functions, and the Courts should be aware of the judgments from the ECtHR in this area. The Court referred to the *KlimaSeniorinnen* judgment in detail, concluding that Article 8 of the ECHR *"imposes a positive obligation on the State to put in place a legislative and administrative framework with respect to climate change designed to provide effective protection of human health and life, and a further positive obligation to apply that framework effectively in practice, and in a timely manner"*. The Court found that this gives rise to an interpretation of Section 15(1) of the 2015 Act that allows the climate targets to be met (or conversely does not allow them to fall away).The Court concluded that, the Board should have used its discretionary powers in such a way as to give effect to the obligations under the ECHR Act.

The Court confirmed that there was a need for an imperative reading of Section 15(1) *"that the Board and any other relevant body is required to act in conformity with the climate plans and objectives set out in the subsection unless it is impracticable to do so"*. The Court set out a useful guide (at para. 131 of the judgment) as to how a planning authority should apply Section 15(1) to a decision, summarised as follows:

1. What decision is practicably available that would contribute to achieving the Section 15 goals (e.g. the Climate Action Plan, national climate objective, etc.) ?
2. Is this decision which would contribute to achieving the Section 15 goals precluded by a mandatory legal requirement that confers no discretion or evaluative judgement?
3. If yes, the project has to be refused no matter how climate-friendly it is.
4. If no, can the planning authority's discretion or evaluative judgement be exercised to support the outcome favouring climate goals? For example:
    a. Proper planning and sustainable development;
    b. Material contravention of the City/County Development Plan; or
    c. Non-mitigable impacts on European Sites – overriding public interest test.

The Court noted that this does not mean that there is an obligation to refuse permission for developments that cause emissions in Europe – the net zero target envisages a transition, and refusing permission for an emissions-causing project in Ireland may displace that project to part of the world with lower environmental standards.

The Court found that in this case the Board had not engaged in a meaningful way with Section 15 of the 2015 Act. The Court referred to another decision of the Board (dealt with in the *Nagle View Turbine Aware Group v An Bord Pleanála [2024] IEHC 603* judgment) where the Board's Inspector found that climate goals take precedence over visual impacts and other such planning concerns. The Inspector in this *Coolglass* case had taken the view that the climate policies could not override the policy directives in the CDP, and the Court disagreed with that approach and overturned the decision on this ground.

Core Ground 2 – Failure or refusal to exercise discretion to grant permission in material contravention of the CDP

Following the delivery of the original version of the judgment, the Board applied to re-open the judgment to put further evidence on affidavit before the Court in relation, in particular, to Core Ground 2. Ultimately, the Court decided to re-open certain matters in particular in relation to Core Ground 2, and adjourn them pending the outcome of an appeal to the Supreme Court of the judgment on Core Ground 1 (i.e. the interpretation of Section 15 of the 2015 Act). Therefore, the current version of the judgment does not contain any findings in respect of Core Ground 2.

Core Ground 5 – Breach of the ECHR Act 2003

The Applicant claimed that the Board failed to exercise its discretion under Section 37G of the 2000 Act in a manner that was compatible with the State's obligations under the ECHR Act. The Court upheld this ground as noted above in relation to Core Ground 1 under the heading "*ECHR conformity*".

Core Ground 6 – Breach of Regulation 2022/2577

The Applicant claimed that the Board failed to treat the Proposed Development as being in the overriding public interest and serving public health and safety, and to give priority to it when balancing legal interests in making its decision, as required by Article 3(2) of the TRE Regulation. The Court found that the Applicant had not established that this argument was applicable based on the facts of this case, as the basis for the Board's refusal was a material contravention of the CDP, not any impacts on European sites, so the overriding public interest issue did not arise.

Core Ground 7 – Breach of EU law by failure to provide for material contravention

The Applicant claimed that the Board breached its duty of sincere cooperation in Article 4(3) of the Treaty of the European Union, in refusing to exercise its discretion under Section 37G of the 2000 Act to grant permission for the Proposed Development in material contravention of the CDP, therefore failing to give effect to its EU law obligations (i.e. EU law climate targets). The Court upheld this ground as noted above in relation to Core Ground 1 under the heading *"EU law conformity"*.

Key Takeaways

- The most important aspect of this judgment is the High Court's interpretation of Section 15 of the 2015 Act (which is the subject of a Supreme Court Appeal, the outcome of which is awaited).

- Where making a decision in respect of a Strategic Infrastructure Development application which materially contravenes the development plan, the Board should rely on Section 37G(6) as opposed to Section 37(2).

- The Court applied a literal interpretation to Section 15, but also looked at the provision's context and purpose, and found that a significantly strengthened obligation had been introduced in the amendment provided for in the Climate Action and Low Carbon Development (Amendment) Act 2021.

- In making any decision a relevant body must carry out its functions consistently, insofar as practicable, with national climate policies (e.g. the Climate Action Plan, the national climate objective, etc). This means making a decision that complies with those policies unless that decision is not capable of being put into practice. The requirement is a very high standard, and it does not mean merely doing what is reasonable.

- The Court set out a template questionnaire for relevant bodies making such decisions, summarised in Core Ground 1 above.

- This finding does not mean that there is an obligation to refuse permission for developments that cause emissions – the net zero target envisages a transition, and refusing permission for an emissions-causing project in Ireland may displace that project to part of the world with lower environmental standards. However, relevant bodies should engage in a meaningful way with Section 15 of the 2015 Act in any decisions that they make that may have climate-related implications.

A link to the full judgment can be found **here**.

Case: Annagh Wind Farm Limited v An Bord Pleanála
Date delivered: 10 January 2025
Citation: [2025] IEHC 2
Judge: Humphreys J.

This judgment concerned a challenge by Annagh Wind Farm Limited (the Applicant) to a decision of the An Bord Pleanála (the Board) dated 27 June 2024 to refuse permission for the construction of six no. wind turbines, turbine foundations and crane pad hardstanding areas, new site tracks and associated drainage infrastructure and all associated infrastructure, services and site works at Annagh North, Co. Cork (the Proposed Development).

Background

The Annagh Wind Farm Planning Application and Appeal
The Applicant submitted an application for planning permission for the Proposed Development to Cork County Council (the Council) on 2 December 2021. By letter dated 2 February 2022, the Department of Housing, Local Government and Heritage (the Department) made a submission to the Council in respect of the Proposed Development. On 4 February 2022, the Council issued a Request for Further Information (RFI) to the Applicant in respect of five main items namely biodiversity, Appropriate Assessment (AA), the submission made by the Department, noise and engineering. The Council also requested the Applicant to submit an updated Environmental Impact Assessment Report (EIAR) with all chapters updated in response to the five main items set out in the RFI.

The Applicant submitted a response to the RFI on 3 November 2022.

The Department made a further submission to the Council on 12 December 2022 outlining its concerns in respect of the Proposed Development and the conservation of whooper swans within the Kilcolman Bog Special Protection Area (SPA). In order to meet the conservation objectives of the Kilcolman Bog SPA, specifically the conservation objective relating to the whooper swan, the Department recommended the inclusion of a condition in any permission to curtail the wind-turbine operation between dawn and dusk during the period from 15 September to 15 December and between 21 February and 15 April each year.

The Council refused permission for the Proposed Development on 22 December 2022 on three grounds. These grounds included inter alia that insufficient information had been provided to enable the Council to determine beyond reasonable scientific doubt that the

Proposed Development, either individually and/or in-combination with other plans or projects would not have an adverse effect on the whooper swan, a species of conservation interest of the Kilcolman Bog SPA, and an adverse effect on the integrity of the Kilcolman Bog SPA.

On 27 January 2023, the Applicant submitted a first party appeal to the Board in respect of the Council's decision to refuse permission for the Proposed Development. The Board's Inspector inspected the site on 13 and 14 February 2024 and ultimately recommended that the Board refuse permission for the Proposed Development on a number of grounds. These grounds included inter alia that it could not be determined beyond reasonable scientific doubt that the Proposed Development alone during its operational phase would not result in a significant adverse collision impact on the whooper swan, a species of conservation interest of the Kilcolman Bog SPA and as such the Proposed Development would be inconsistent with the SPA's conservation objectives. The Inspector also considered that insufficient information had been provided to determine that the in-combination effects of the Proposed Development with the nearby permitted Ballyroe solar farm and other renewable energy projects in the vicinity would not result in significant new residual disturbance/dispersal impact on the whooper swan.

The Board agreed with the Inspector's overall recommendation to refuse permission and issued its decision on 27 June 2024.

It should be noted that while the matter was pending before the Board, the Climate Action Plan 2024 was published on 8 January 2024.

Details of a Relevant Planning Application Adjoining the Annagh Wind Farm Site

On 15 June 2023, the Department made a submission to the Council in respect of a separate planning application relating to an amendment application to the already permitted Ballyroe solar farm (the Ballyroe Submission), which is situated nearby to the Proposed Development. The submission made by the Department in respect of the Ballyroe solar farm amendment application stated that the Department had carried out survey work over the course of the winter 2022/23 of fields within and directly adjacent to the Ballyroe solar development site where up to 177 individual whooper swans were identified which exceeded the threshold for a site of national importance. The Council refused permission for the Ballyroe solar farm amendment application on 19 June 2023 as it was deemed by the Council that the development would result in a direct loss of an area of core foraging habitat for the whooper swan. The Ballyroe Submission referred to in the context of this planning application is particularly relevant to the Annagh Wind Farm proceedings. Further details are included hereunder.

The Proceedings

The Applicant instituted judicial review proceedings of the Board's decision on the Proposed Development on 20 August 2024. As the proceedings involved a challenge to a project within the Renewable Energy Directive, they were entered into the Court's expedited procedure and an early hearing date was fixed for December 2024.

The judgment of Humphreys J. that issued on 10 January 2025 primarily addressed Core Ground 1 in which the Applicant alleged that the Board had determined the appeal by relying on materials that were not available to the Applicant, and that the Board should have issued a Section 137 and/or Section 131 Notice pursuant to the Planning and Development Act 2000, as amended (the 2000 Act) to seek submissions or observations from the Applicant in relation to that material.

Section 137(1) of the 2000 Act provides that the Board in determining an appeal may take into account matters other than those raised by the parties or by any person who has made submissions/observations to the Board in relation to an appeal if the Board is permitted to have regard to those matters under the 2000 Act.

Pursuant to Section 137(2) of the 2000 Act, the Board is obliged to give notice in writing to each of the parties and to any persons who have made submissions/observations in relation to an appeal of any matters that it proposes to take into account under Section 137(1).

Section 131 of the 2000 Act provides that where the Board considers it appropriate to request a party to make submissions or observations on a matter which has arisen in relation to an appeal it may serve a notice requesting said submissions or observations.

The Applicant contended that:

- In its submission on the RFI response, the Department did not express any objection to the Proposed Development, nor did it recommend refusal of permission;
- The Department made a separate submission, in respect of a proposed solar development planning application i.e. the amendment application for the Ballyroe solar farm, months after the Applicant submitted its appeal to the Board. In the Ballyroe Submission the Department purported to identify a different ornithological picture in the greater geographical area from that indicated by the Applicant and its experts;
- The Stage 2 AA carried out by the Board's Inspector and expressly relied on by the Board was dependent on information contained in the Ballyroe Submission;
- Based on Section 137 of the 2000 Act, the Applicant should have been invited to make submissions/observations in relation to the Ballyroe Submission which, the Applicant alleged, both the Inspector and the Board appeared to have heavily relied on in deciding to refuse permission for the Proposed Development; and
- The Board erred in failing to seek the Applicant's views pursuant to Section 131 of the 2000 Act.

The Court ultimately found that the Board indirectly took into account the Ballyroe Submission on the basis that both the Board's Order and the Board's Direction took into account the Stage 2 AA carried out by the Inspector and the Inspector's report had been drafted having taken into account the Ballyroe Submission. The Court stated that *"the fact that the Board said in the direction that it could decide the matter on the application papers is contradicted by the express reliance on the AA."*

The Court referred to a number of examples where the Board's Inspector had referenced the Ballyroe Submission which, it stated, go beyond just in-combination or cumulative effects, such as *ex situ* effects, and the rejection of a condition for curtailment of the operation of the wind farm. The Court held that it was implausible that the Board mentally bracketed off these aspects of the Inspector's AA and came to its own conclusion on AA based on the application documentation.

In its defence of the proceedings, the Board contended that if it was not permitted to write a direction in the terms outlined above, which stated that it did not have regard to the Ballyroe Submission, then that gives rise to a change in the meaning of *'having regard to something.'* The Court rejected this argument and held that its findings in this regard are fact specific to these proceedings and that the Board's contradictory assertions of reliance on the Stage 2 AA and non-reliance on the Ballyroe Submission was the problem.

Conclusion

The Court found that the Board's decision to refuse permission for the Proposed Development was invalid. The Court determined that the Board's reliance on the Stage 2 AA carried out by the Inspector, which in turn relied on the Ballyroe Submission, required notice to be given to the Applicant pursuant to Section 137(2) of the 2000 Act, which was not given. On that basis, the Court did not consider the effect of Section 131 of the 2000 Act or of the right to fair procedures. Consequently, it was not necessary for the Court to determine the other grounds of challenge. The Court quashed the Board's decision and remitted the matter to the Board for reconsideration of the appeal.

Key Takeaways

- Documents recording a decision should clearly indicate if an element of an Inspector's/Planner's report is being rejected or accepted.

- Statutory provisions permitting decision-makers to invite submissions on information or documentation in a decision-making process should be utilised where appropriate.

A link to the judgment is available **here**.

Case: Eco Advocacy CLG v An Bord Pleanála, and Statkraft Ireland Limited (Notice Party)
Date: 15 January 2025
Citation: [2025] IEHC 15
Judge: Humphreys J.

This judgment of Mr. Justice Humphreys concerned an application made by Statkraft Ireland Limited (the Developer) for a wind farm development of up to eight turbines with a tip height of up to 185 metres and all associated foundations and hardstanding areas and site development works at Dernacart Forest Upper and Forest Lower, Co. Laois (the Proposed Development), which is located on the Garryhinch Bog Group and approximately 4.7 kilometres from the Slieve Bloom Mountains Special Protection Area (SPA). The Slieve Bloom Mountains SPA is designated for the protection of the Hen Harrier.

Background
The Developer lodged the planning application for the Proposed Development with Laois County Council (the Council) on 17 February 2020. The Council issued a request for further information on 2 June 2020. The Developer submitted a response to the request for further information on 10 March 2021. On 30 April 2021 the Council refused permission for the Proposed Development. The Council's decision was appealed by the Developer, Mountmellick Wind Turbine Impact and Eco Advocacy CLG (the Applicant). The Applicant had lodged an objection with the Council in respect of the planning application for the Proposed Development. In the Applicant's subsequent submission to An Bord Pleanála (the Board) they sought to appeal the basis for the Council's decision to refuse permission (as opposed to the decision to refuse itself) being limited to possible interference with bat species and habitats. On 3 January 2024 the Board granted permission for the Proposed Development (the Decision).

Grounds of Challenge
The Applicant challenged the Decision on two grounds. Firstly, the Applicant alleged that the Decision was invalid on the basis that the Board failed to make the Environmental Impact Assessment Report (EIAR) available on its website in breach of Section 146(7) of the Planning and Development Act 2000, as amended (the 2000 Act), which requires that where an EIA was carried out the documents, including the EIAR, relating to a decision of the Board be made available for inspection on the Board's website *"in perpetuity beginning on the third day following the making by the Board of the decision."*

The Applicant also alleged that the Decision was invalid because it contravened Article 6(3) of the Habitats Directive, as transposed into domestic law by the 2000 Act, insofar as there was:

- a failure to conduct a lawful screening for Appropriate Assessment in respect of the Slieve Bloom Mountains SPA;
- a failure to carry out an Appropriate Assessment without any gaps and which was capable of dispelling all reasonable scientific doubt as to the effects of the Proposed Development on the Slieve Bloom Mountains SPA; and
- a failure to identify and examine the implications of the Proposed Development for species to be found outside the boundaries of the Slieve Bloom Mountains SPA where those implications are liable to affect the conservation objectives of that SPA.

Ground 1: Failure to make the EIAR available on the Board's website

In this ground, the Applicant acknowledged that the EIAR was published on the Board's website. However, the EIAR was published in the form of 67 documents arranged out of their proper sequence and named with a randomly generated code from which the contents or order of the documents could not be ascertained. The Applicant claimed that the Board also failed to make amendments to the EIAR and Appropriate Assessment (AA) Screening Report available on the Board's website. The Court found that these amendments were accessible via a link to the website of the Council. On the matter of the link to the website of the Council, the Court distinguished between a failure to publish and the manner of publication. The Court observed that *"one can see an argument that the board shouldn't outsource publication of documents to other bodies, even councils, just as it shouldn't do so to private parties. It thereby loses control over continued publication or hosting"* before finding that this point was not pleaded by the Applicant. The Court went on to find that in order to comply with legal requirements what is required is real and practical compliance that will be effective in vindicating any underlying rights and the giving of information must be *"reasonably accessible, not pro forma."*

The Court, referencing the naming of the EIAR documents on the Board's website, stated that *"such a load of gibberish is unacceptable in terms of the requirement that documents 'shall be made available' under Section 146(5) and/or (7) of the 2000 Act."* Nevertheless, the Court determined that this did not warrant quashing the Decision as publication of the EIAR documents comes after the decision and no prejudice to the Applicant could be demonstrated.

While the Court was critical of the Board's naming of these documents, it was noted that this is a new point and that the Board's non-compliances with various information and publication provisions typically involve new problems, and the Board tends to rectify any such problems when they arise so they are not repeated. However, the Court ultimately decided to grant the Applicant declaratory relief on this ground, noting that this form of relief serves as encouragement to reduce issues surrounding publication and information in the future.

Declaratory relief in this context means that the Court determined that a legal error occurred that did not impact the validity of the Decision. Here, for example, the failure to publish the EIAR occurred after the Decision had been made by the Board so it did not impact upon the Decision.

Ground 2: Breach of Article 6(3) of the Habitats Directive
In this ground the Applicant took issue with the manner in which the screening for AA in respect of the Slieve Bloom Mountains SPA and the Hen Harrier was carried out. The Applicant contended that in screening out the requirement to assess the impacts of the Proposed Development on the Hen Harrier the Board failed to have proper regard to concerns raised by the National Parks and Wildlife Service (NPWS) in respect of the survey methods used by the Developer. The Applicant claimed that this meant the AA screening that was carried out was not conducted on the basis of best scientific knowledge or objective information, contrary to the Habitats Directive.

The key issue here was essentially whether the Applicant had demonstrated a defect in the AA on the evidence that was before the Court. In this regard, the Court stated that the Applicant is required to do more than assert doubt. The Applicant must demonstrate the doubt and do so by reference to the material that was before the Board or matters the Board was required to consider autonomously. The Applicant's failure to provide evidence to demonstrate doubt ultimately proved fatal here, as the reasons provided in these circumstances could not be overcome by mere assertion but rather required evidence which demonstrated the alleged doubt. The Court also observed that the case made here was essentially a re-run of the argument rejected in *Eco Advocacy CLG v An Bord Pleanála C-721/21*. The Court noted, from that case, that the Board is not under a duty to carry out a point-by-point rebuttal of all of the doubts raised. Rather the Board has to state, to the requisite standard, the reasons why it was able to exclude the doubts.

In this case, the Board's AA Screening Report recorded that no Hen Harrier was observed on the site in the surveys that had been carried out. A submission from the NPWS suggested that the surveys that had been carried out were inadequate, and a submission from a local birdwatcher referenced a sighting of a Hen Harrier. The Board subsequently requested further information from the Developer. Following receipt of this further information, the NPWS made a second submission referring to the guidance on which the surveys were carried out which specifies that watches at roosts should be carried out at least once a month from October to March (i.e. across six months) but surveys carried out by the Developer were only conducted across five months; and that a *"known roost"* at Garryhinch bog had not been identified. However, upon review of the Inspector's Report the Court identified three reasons for the decision to screen out the impacts on the SPA via the Hen Harrier, being as follows:

- A lack of relevant observations, particularly a lack of observations of Hen Harrier on a flight path within the actual site of the Proposed Development;
- A lack of suitable habitat on the site; and
- The distance between the site of the Proposed Development and the SPA.

The Court also found that the Applicant had not provided any evidence to support its claim that the Board had not considered the impacts on the Hen Harrier outside of the SPA boundaries. The Court found that the Inspector had accepted the Developer's survey, and that any suggestion that the Inspector had done so without giving adequate consideration to impacts on the Hen Harrier outside of the SPA was not supported by evidence from the Applicant. While a single Hen Harrier flight had been recorded, this had been considered by the Inspector and any submissions expressing doubt as to the effects on the Hen Harrier did not equate to a conclusion of doubt. The Court found that the Applicant had confused a lack of a narrative discussion on this with a lack of actual consideration of the issue at play here. The Court ultimately found that as long as reasons were provided for excluding doubt then there is no requirement to engage in a point by point reply to every submission.

The Court went on to note that even if there was an omission in the assessment carried out by the Board, the Court would have exercised its discretion against quashing the Decision for a number of reasons, including the fact that the Applicant's appeal to the Board did not raise any specific points about AA and that it had not been shown that any further assessments would have made any difference.

This judgment is also notable in the sense that it contains a robust defence of the expedited procedure implemented by the Planning and Environment division of the High Court, which arose in light of complaints the Applicant made concerning the impact of this procedure on their ability to make out their case in full.

Key Takeaways

- A public body should not rely on other bodies in order to comply with its own statutory publication obligations.

- Compliance with legal obligations regarding the publication of documents requires real and practical compliance rather than a mere technical compliance with the terms of the relevant statutory provision.

- In carrying out an AA, the decision-maker is not required to remove all scientific doubt by replying to each and every point submitted. Instead, the requirement is to provide sufficient reasons to remove all scientific doubt.

- The onus is on the applicant to prove that reasons provided for a conclusion of no real impact are inadequate and evidence is required to prove this. A mere assertion will not be sufficient.

- Where it is argued that additional assessments should have been carried out, the applicant may be required to show that such additional assessments would have made a difference in order to succeed.

A full copy of this judgment is available **here**.

Case: Nagle View Turbine Aware Group v An Bord Pleanála, and Coom Green Energy Park Limited (Notice Party)
Date delivered: 1 November 2024
Citation: [2024] IEHC 603
Judge: Humphreys J.

This case concerned a challenge by Nagle View Turbine Aware Group (the Applicant) to a decision of An Bord Pleanála (the Board) granting permission to Coom Green Energy Park Limited (the Developer) for a windfarm consisting of 22 turbines with a maximum tip height of 169m and a maximum rotor diameter of 138m and related site works and ancillary development to the south of the Nagle Mountains in North County Cork (the Proposed Development).

Background

A planning application for the Proposed Development, as a strategic infrastructure development (SID) was made to the Board on 11 December 2020. The Board received a large number of submissions and observations in relation to the planning application. A request for further information was issued by the Board on 28 September 2021. A response to the further information request was submitted by the Developer to the Board on 30 March 2022. The Board's Inspector prepared a report dated 9 January 2023 recommending that permission for the Proposed Development would be approved subject to conditions. By Order dated 9 November 2023 the Board granted permission in accordance with the Inspector's recommendation and subject to conditions.

Grounds of Challenge

The Applicant challenged the Board's decision on four grounds:

1. The Board failed to consider relevant material relating to wind turbine noise other than the Section 28 Wind Energy Development Guidelines issued by the Department of the Environment, Heritage and Local Government in 2006 (the Wind Energy Development Guidelines);
2. The Board failed to have adequate regard to submissions made in respect of the likely noise impacts of the Proposed Development;
3. The Board failed to conduct any inquiry into what best practice is in terms of noise impacts. Instead, the Board relied on the standards contained in the Wind Energy Development Guidelines; and
4. The Board failed to consider the environmental impacts of the Proposed Development in terms of noise impacts and had no objective information before it to support a conclusion of no significant effects on the environment for the purposes of the Environmental Impact Assessment (EIA).

Core Ground 1 – Alleged failure to consider relevant material relating to wind turbine noise other than the Wind Energy Development Guidelines

The Applicant contended that the Board failed to consider relevant material relating to wind turbine noise other than the Wind Energy Development Guidelines and failed to engage with submissions made by the Applicant in respect of likely noise impacts. It was alleged that this meant that the Board had not engaged with what would constitute best practice and instead relied on an out of date standard, being the Wind Energy Development Guidelines which were published in 2006. In doing so, the Applicant argued that the Board disregarded the decision of O'Donnell J. in *Balz v. An Bord Pleanála [2019] IESC 90, [2020]* where the Court observed that *"it is inevitable that, particularly where guidelines deal with matters of technology or science, the knowledge in that field may develop, or that the experience of application of the existing guidelines to particular circumstances produced greater knowledge and insight"*. The Board refuted this assertion, identifying numerous other methodologies that were explicitly considered by the Board's Inspector in their report and stated that the submissions made by the Applicant were clearly considered by the Board.

The Inspector's report noted that 396 submissions were made and considered by the Inspector. The Court stated that in the absence of proof to the contrary the claim of a lack of consideration had no basis. The Court suggested that the assertion made by the Applicant demonstrated confusion on the part of the Applicant where a lack of explicit narrative discussion was deemed to be a lack of consideration. Furthermore, the Court made it clear that in circumstances where a *"staggering"* range of issues and objections were raised in submissions, reasons provided cannot be *"indefinitely extensive"* and it is permissible to summarise submissions, and consequently the reasons provided.

The Board confirmed that the Inspector had not relied solely on the Wind Energy Development Guidelines but dealt with the matter of what constitutes best practice. This included inter alia a consideration of the draft Revised Wind Energy Development Guidelines 2019 (the Draft Guidelines). The Court considered how draft guidelines should be treated, noting that while disregarding draft guidelines altogether or having regard to them as if they are government policy or verging on same would be problematic, it is in principle lawful to have regard to draft guidelines as part of the evolving scientific context or in *"illuminating what amounts to best practice"*. Here, the Court found that the Inspector correctly noted that the Wind Energy Development Guidelines were those in force and they also considered the Draft Guidelines *"insofar as they represented best practice"*. The Court held that this was lawful.

In dismissing this ground, the Court also noted that a grant of permission does not preclude civil litigation, in this instance for nuisance, and any such grant of permission does not provide the recipient any immunity from such action.

Core Ground 2 – Alleged disregard of submissions on the likely noise impacts of the Proposed Development by the Board

In this core ground, the Applicant argued that the Board failed to have proper regard to submissions made in respect of the noise impacts of the Proposed Development. In particular the Applicant claimed that the Board failed to have regard to the submissions made to the effect that the Wind Energy Development Guidelines were out of date and no longer represented best scientific knowledge. The Court held that the Board did have regard to these submissions but preferred the Developer's submission and reasons were provided for this preference. The Court stated that there is no legal obligation to *"engage with"* submissions to the extent that a discursive analysis is provided. This, the Court found, would go well beyond the test provided for in *Connelly v. An Bord Pleanála [2018] IESC 31*. The test, as set out in *Balscadden Road SAA Residents Association Limited v. An Bord Pleanála [2020] IEHC 586*, is whether the main reasons were provided on the main issues, and the Court found that the Board had met this test.

The Court repeated the point that there is no prohibition on effected parties bringing civil litigation following the grant of permission where something is unlawful as a matter of private law. While the Court did state that permission should be refused where a proposed development cannot be carried out without an actionable wrong taking place, if the answer to that question is not clear on the face of the material provided then the Board cannot be expected to carry out a technical analysis and adjudicate upon such a matter. The Board's concern is with proper planning and sustainable development and an actionable nuisance which is not clear on the material before the Board is a matter for the civil courts to determine.

Core Ground 3 – Lack of best practice

In this core ground, the Applicant alleged that the Board failed to conduct any inquiry into what best practice is in terms of noise impacts and further alleged that the Board deals with this matter on a case-by-case approach without any consistent approach being taken. The Applicant claimed that this resulted in the Inspector applying the standards contained in the Wind Energy Development Guidelines which the Applicant claimed were out of date and no longer represented best practice in the context of windfarm noise.

The Court found that the Applicant misunderstood the decision-making process here, noting that the Board is obliged to have regard to the relevant government policies, which include the wind energy policy, regardless of whether it is viewed as being out of date. The Court found that the Board's consideration went beyond the Wind Energy Development Guidelines and included material submitted by interested parties and the Developer. The Court held that the Board did in fact consider best practice by going beyond the Wind Energy Development Guidelines and in particular by considering the material from the Developer and the submissions of the Applicant.

Core Ground 4 – Inadequate EIA assessment in terms of noise impacts for the purposes of Sections 171A and 172 of the Planning and Development Act 2000, as amended (the 2000 Act)

In this core ground, the Applicant alleged that the Board failed to consider the environmental impacts of the Proposed Development in terms of noise impacts and had no objective information before it to support a conclusion of no significant effects on the environment for the purposes of EIA. While the Court recognised the validity of the Applicant's argument that EIA must be as complete as possible, it found that the Applicant failed to discharge the onus of proof to show that the EIA was unreasonable on the evidence put before the Court. While the Applicant claimed the Board failed to consider the issue of Amplitude Modulation (AM) of the sound generated by the turbines, the Court found that this claim was not borne out on the facts given that the Inspector explicitly referred to the Developer's view that it was not considered appropriate to include conditions dealing with AM. The Court held that it is permissible to accept a Developer's science. The Court observed that the key point here was that any scientific or factual shortcomings in EIA or in Appropriate Assessment (AA) must be established evidentially by an applicant. The Applicant had failed to discharge that burden of proof here.

Key Takeaways

- The weight given to submissions is entirely a matter for the decision-maker and the decision-maker is entitled to elect not to accept the applicant's submissions.
- The obligation on the decision-maker is to provide *"the main reasons for the main issues"*.
- In the context of Section 28 guidelines, it is in principle lawful to have regard to draft guidelines as part of the evolving scientific context or in *"illuminating what amounts to best practice"*, particularly where the extant guidelines are potentially viewed as outdated.
- A grant of planning permission does not create an immunity against civil action, and, and a planning authority does not have to make findings in respect of technical issues which are related to another area of law (such as nuisance) which are not clear on the face of the materials before it.
- Judicial review is not a mechanism to review the merits of a decision save to the limited extent that issues such as irrationality or disproportionality arise.
- Any scientific or factual shortcomings in EIA or in AA must be established evidentially by an applicant.

The full judgment is available **here**.

These case summaries were prepared by members of the Planning and Environmental Department of Fieldfisher Ireland LLP (Craig Farrar, Rory Ferguson, Ruth Gahan, Kristina Keenan, and Jonathan Moore).

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