Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

fieldfisher

Legal Digest

Learning from Litigation

Issue 05: September 2024

Legal Cases:

Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála and Ors [2024] IESC 28

Graymount House Action Group and Ors v An Bord Pleanála and Ors [2024] IEHC 327

Paul Freeney v An Bord Pleanála and Ors [2024] IEHC 427

Moya Power and Wild Ireland Defence CLG v An Bord Pleanála and Ors [2024] IEHC 108

Prepared by Fieldfisher for the Office of the Planning Regulator

Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

Introduction

The Office of the Planning Regulator (OPR) is pleased to present the fifth 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.

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: Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála, Ireland and the Attorney General and Elgin Energy Services Limited (Notice Party)
Date: 4 July 2024
Citation: [2024] IESC 28
Judge: Murray J.

Background

In these proceedings, Concerned Residents of Treascon and Clondoolusk (the Appellant) sought to challenge the legality of a decision of An Bord Pleanála (the Board) of 4 October 2021 (the Decision) granting Elgin Energy Services Limited (the Developer) planning permission (subject to conditions) to construct and operate a photovoltaic solar farm on a site of approximately 90 hectares in Co. Offaly (the Proposed Development). The Board's Decision was made following an appeal by the Appellant of the decision of the planning authority, Offaly County Council, dated 5 May 2021 to grant permission for the Proposed Development (again, subject to conditions).

Environmental Impact Assessment (EIA) - The Legislative Background

Article 2(1) of the EIA Directive[1] requires Member States to adopt all necessary measures to ensure that, before development consent is given, *"projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to a requirement for development consent and an assessment with regard to their effects"*. *"Project"* is defined in Article 1(2)(a) of the EIA Directive, and the projects falling within the scope of the EIA Directive are listed in Annexes I and II of that Directive. Article 4(1) of the EIA Directive provides that projects listed in Annex I are required to be made subject to an assessment. Article 4(2) of the EIA Directive dictates that projects listed in Annex II are not required to be subject to an EIA, instead, Member States are required to determine whether the project shall be made subject to such an assessment. In making that determination, a Member State has the option of either carrying out a case-by-case examination of each project, setting thresholds or criteria which, when reached, will mean an assessment is carried out, or apply a combination of both case-by-case examination and setting thresholds or criteria. However, the Supreme Court stated that *"in every case, even where an Annex II project is below these thresholds or outside those criteria, Member States must ensure that it is subject to environmental assessment if it is likely to have significant effects on the environment"*, according to a number of judgments made at the EU level.

The EIA Directive is mainly given effect in Irish law through the provisions of Part X of the Planning and Development Act, 2000 (as amended) (the 2000 Act) the Planning and Development Regulations, 2001 (as amended) (the 2001 Regulations).

1. Directive 2011/92/EU, as amended by Directive 2014/52/EU.

Section 176 of the 2000 Act requires the Minister for Housing, Local Government and Heritage to make regulations identifying development which may have significant effects on the environment and specifying the manner in which same is to be decided. Article 93 of the 2001 Regulations provides that the *"prescribed"* classes of development for the purposes of Section 176 of the 2000 Act are set out in Schedule 5. Parts 1 and 2 of Schedule 5 largely correspond with Annex I and Annex II of the EIA Directive.

Sections 176A-176C of the 2000 Act provide for screening for EIA in relation to development specified within Schedule 5 of the 2001 Regulations. Part 10 of the 2001 Regulations further provides for the screening and, where appropriate, full assessment of *"sub-threshold development"* which is defined in Article 92 of the 2001 Regulations as development of a type set out in Schedule 5 that does not exceed a threshold specified in that Schedule in respect of the relevant class of development.

Solar farms are not a *"project"* listed in Annex I or Annex II of the EIA Directive or in Part 1 or Part 2 of Schedule 5 of the 2001 Regulations. The High Court had previously found that solar farms are not a category of project that requires EIA in *Sweetman v. An Bord Pleanála* [2020] IEHC 39 (Sweetman) and *Kavanagh v. An Bord Pleanála* [2020] IEHC 259 (Kavanagh).

However, Annex II of the EIA Directive includes, at paragraph 1(a), *"[p]rojects for the restructuring of rural land holdings"*. Such projects would require assessment as to whether they are likely to have a significant effect on the environment and, if so, they must be subject to EIA. In 2011, the European Communities (Environmental Impact Assessment) (Agriculture) Regulations 2011 (the 2011 Regulations) were made. Under the 2011 Regulations, the Minister for Agriculture, Food and the Marine (the Minister) was given the function of screening and, where appropriate, carrying out an EIA on certain *'activities'* including the restructuring of rural land holdings. The 2011 Regulations were amended in 2017 to provide that anyone wishing to undertake an *'activity'* must apply to the Minister for a screening decision and it appeared to the Court that the screening thresholds were removed and the obligation to submit an application to the Minister for a screening decision in respect of a proposed activity is no longer subject to any such threshold. However, the Court did note that this position is not free from doubt and it is only where the activity may have a significant effect on the environment that screening is required.

Subsequent to the Decision, the Planning and Development (Amendment) (No. 2) Regulations 2023 (the 2023 Regulations) were made, which inserted a new project into Schedule 5, Part 2 of the 2001 Regulations *"for the restructuring of rural land holdings, undertaken as part of a wider proposed development, and not as an agricultural activity"*. The 2023 Regulations did not amend or repeal the 2011 Regulations, rather they created a requirement for proposed restructuring of rural land holdings to be considered within the planning process for the purposes of EIA where the proposed restructuring forms *"part of a wider proposed development"*, such as a solar farm,

as opposed to an agricultural activity. The 2011 Regulations continue to govern proposed restructuring of rural land holdings when undertaken as an agricultural activity. This new legislation post-dated the Decision, so had no bearing on this appeal.

The Proposed Development

The Proposed Development comprised inter alia the removal of 770 metres of hedgerow to the north of the development site. It also comprised the removal and relocation of a further three sections of hedgerow (with a total length of 140 metres) by three metres. Even though the Developer maintained that an EIA screening and EIA was not required for the Proposed Development, an EIA Screening Report was still submitted with the application for planning permission. The Developer also submitted a Planning and Environmental Considerations Report with the application which in terms of its structure and content was comparable to an Environmental Impact Assessment Report (EIAR). The Developer also submitted a Natura Impact Statement (NIS) with the application.

The planning authority took the view that the Proposed Development did not come within Schedule 5 and was not a *"sub-threshold development"* and therefore an EIAR was not required. In determining the appeal, the Board took the same view and granted planning permission subject to 14 conditions, one of which (condition 7(a) required the retention of *"existing field boundaries"*. All parties to the judicial review agreed that this condition did not prohibit the removal/relocation of the hedgerows.

Grounds of Challenge

The Appellant relied on a wide range of grounds and arguments for the purpose of challenging the validity of the Board's Decision. Most of these had no relevance to this appeal. In relation to the issue of whether the Proposed Development should have been subject to screening and/or an EIA because it included or involved a *"project for the restructuring of a rural land holding"*, the Appellant contended as follows:

- The Board's Decision was invalid because the Board failed to make a screening determination for an EIA for a *"project for the restructuring of a rural land holding"*.
- If the Board claimed to have conducted an EIA screening for the project, it had failed to record its consideration and determination and, moreover, it seemed to lack jurisdiction to do so having regard to the 2011 Regulations.
- The Board's Decision was invalid because of the State's failure to properly transpose Annex II, paragraph 1(a) of the EIA Directive into Irish planning law.
- There was a gap in how the project class of projects for the restructuring of rural land holdings set out in Annex II paragraph 1(a) of the EIA Directive was transposed into Irish legislation. The Appellant claimed that the thresholds set for EIA were to be found in the 2011 Regulations and the competent authority for making an EIA screening determination was the Minister. However, those thresholds were not set for use as part of the planning regime and, while the combined effect of Section 176(3) of the 2000 Act and the European Communities (Environmental Impact Assessment) Regulations 1989, as amended (the 1989 Regulations) was allegedly to

set a threshold for projects for the restructuring of land holdings for the purposes of the 2000 Act where the area to be restructured would be greater than 100 hectares, the thresholds relating to field boundary removal (removal of hedgerows) had not been included as part of the planning regime.

The Appellant also sought declarations that the legislation had failed to properly transpose the EIA Directive into Irish law.

The Board, the State and the Notice Party all opposed the application for judicial review, mainly on the basis that the 2011 Regulations did not apply to the Proposed Development as the removal of hedgerows did not relate to an agricultural activity, but also that the Decision alone did not authorise an activity within the scope of the 2011 Regulations.

High Court (Mr. Justice Humphreys judgment delivered on 16 December 2022)
The High Court rejected all of the grounds advanced by the Appellant. Two issues identified were relevant to the appeal to the High Court.

The first of those issues was whether the Board's Decision was in breach of the EIA Directive by reason of the alleged failure of the Board to screen for a *"project for the restructuring of a rural land holding"* and, if necessary, to carry out an EIA on the Proposed Development or the part of it that involved such restructuring. The High Court did not accept that the Board had been guilty of any such failure. The High Court acknowledged that the proposed removal of 770m of hedgerow (and removal and relocation of another 140m) did involve rural land restructuring which it deemed was not limited to agricultural projects. However, the High Court highlighted that the Board did not have *"statutory EIA jurisdiction in relation to this particular planning application even if other elements of the wider project would require EIA"* as solar farms were not projects requiring EIA.

The second issue related to the proper transposition of Annex II, paragraph 1(a) of the EIA Directive. The High Court found that broader questions had been raised relating to a situation in which more than one competent authority is involved in giving consent for a project (i.e. *"dual consent"*) and how those authorities should interact. In the first instance, the Appellant contended in submissions that the State failed to transpose the EIA Directive correctly by allowing one competent authority (the Board) to grant permission for one element of a broader project prior to an EIA being carried out on the project as a whole, in circumstances where other elements of the project require an EIA. Secondly it was claimed that there was a failure by the State when transposing the EIA Directive into Irish law in not clarifying how the interactions between different competent authorities should work, especially in a complex situation. The High Court said that EU law does not *"require the centralisation of EIA functions in relation to a project into a single authority, let alone into the regular planning process"*. The High Court stated that there is no obligation to transpose EIA into the planning legislative regime but only into the overall legislative regime and therefore this claim was *"misconceived"*.

The High Court noted that the Appellant was not left without a remedy because it could return to Court in the event that the Notice Party failed to make an application to the Minister for consent under the 2011 Regulations or failed to acknowledge an obligation to do so prior to removing any hedgerows.

The proceedings were dismissed by the High Court, and both an application for a reference to the CJEU and leave to appeal the Judgment of the High Court to the Court of Appeal were refused. The High Court noted that the Developer had confirmed that it would make an application to the Minister under the 2011 Regulations for an EIA screening decision in relation to the removal of hedgerow within the Proposed Development.

The parties agreed on five issues to be determined by the Supreme Court:

"1. Where the carrying out of a proposed solar farm development – itself not a project falling under Annex I or II of the EIA Directive – involves the restructuring of rural landholdings – which is a project included under Annex II, paragraph 1(a) – what is the scope of the assessment required to be undertaken by the Directive?

a. Specifically, does the Directive require the assessment of the environmental impact of the entirety of the proposed development or does it require only that the environmental impact of that part of the proposed development comprising the restructuring of rural landholdings be assessed (though that impact is to be assessed cumulatively with the impact of the remainder of the project)?

2. In the event that, on its proper construction, the EIA Directive requires the assessment of the entirety of the proposed development, do the 2011 Regulations enable the Minister for Agriculture to carry out such an assessment in compliance with the EIA Directive in circumstances where planning permission for the development (including that part of it coming within Annex II paragraph 1(a)) has already been granted in the absence of any environmental impact assessment?

3. Whether the EIA Directive has been properly transposed in the State in circumstances where:

a. The Minister is responsible under the 2011 Regulations for screening for and/or conducting an EIA in respect of an 'activity for the restructuring of rural land holdings' and is limited to the powers granted in those Regulations and as may be lawfully implied or arise (whether through implication or otherwise) by virtue of European law and otherwise has no role in deciding whether development including or involving such an activity should be permitted or the conditions to be attached to such developments.

b. Where consent for a solar farm, which involves the restructuring of rural landholdings, requires (as one element of its authorisation) an application for planning permission under the Planning and Development Act 2000 (as amended) and where such permissions can, as a matter of Irish law, be granted without any prior environmental impact assessment of the development.

4. Whether the Board's decision to grant planning permission to the Notice Party should be quashed by reason of any of the matters set out here [...] relating to transposition, scope, and/or effect of the EIA Directive."

Pleadings Issue

The fifth issue involved a preliminary question to be considered by the Supreme Court in advance of determining issues 1-4. That was the question of whether the Appellant's pleadings were sufficient to permit them to advance the issues set out at 1-4 above and/or whether any or all of those issues were premature on the basis that no application to the Minister has yet been made or determined.

The Supreme Court found that the Appellant was wrong to suggest that arguments that were not made in taking proceedings by way of judicial review could be relied upon to allow a challenge to succeed because they *"arose in the course of debate in the High Court"*. Judicial review proceedings must pursue the grounds that have been challenged. It is not the role of such proceedings to open an investigation into whether the decision or process is unlawful on any grounds that might subsequently present themselves in the course of the hearing of the matter.

Analysis of the Pleadings

The case put forward by the Appellant was that the Board had breached the 2001 Regulations in two broad respects. The first related to the failure of the Board to make a screening decision; this was ultimately not pursued. Second, it was claimed that the Board's Decision was invalid because the State had failed to properly transpose the EIA Directive. However, this transposition case was made on a single ground, namely that the Directive should have been transposed *"into Irish planning law"* rather than by creating a separate consent procedure. The Appellant had not contended that transposition was ineffective because the Minister rather than the Board would conduct an EIA screening or an EIA in relation to the rural landholding restructuring, but the Minister was not a party to the proceedings and no relief was sought against him. The Supreme Court stated that it does not generally entertain claims that have not formed part of the judicial review proceedings that have been taken and, except in unusual circumstances, it does not decide cases that have not been argued in the lower Courts. The Supreme Court concluded that most of the substantive issues raised by the Appellant lacked any basis, therefore, there was no unfairness in proceeding to decide at least some of these issues (and indeed the Developer wanted the merits addressed).

Issue 1: The Whole of the Proposed Development must be Subject to EIA
The Appellant contended that, because the Proposed Development involved a project for the restructuring of rural land holdings within Annex II, paragraph 1(a) of the EIA Directive, the entirety of the Proposed Development (including the solar farm) must be subject to EIA screening and, if appropriate, a full EIA.

This was misconceived, according to the Supreme Court. The fact that hedgerows were to be removed did not trigger the obligation for an EIA of the entire solar farm development. What is to be assessed is the whole project identified in the Appendices to the EIA Directive, and that meant the removal of the hedgerows. The Supreme Court stated that the following points are relevant in this context:

- First, solar farms are not referred to in either Annex I or II of the EIA Directive. While the EIA Directive does not allow the exclusion of components of Annex I and II projects, that does not mean that a wider development must be subject to a full EIA because a particular element of it falls within a project listed in Annex I or II. This is consistent with what was intended by the definitions included in the EIA Directive, where solar farms are not included, as identified by O'Moore J. in *Kavanagh*.

- Second, this does not mean that the EIA Directive allows the impacts of the solar farm project to be disregarded. Annex III of the EIA Directive provides for authorities to consider *"the cumulation of the impact with the impact of other existing and/or approved projects"*. This cumulative assessment requirement means that the other works associated with the solar farm are cumulatively assessed with the rural land restructuring. Having regard to this, the Supreme Court determined that it was incorrect to suggest that the rural land restructuring will be assessed separately, and that it was incorrect to say that the overall project becomes a de facto EIA project if any element of it involves an EIA project.

- Third, that conclusion does not imply that it is permissible to split an EIA project into smaller parts with the intention of removing the requirement to comply with the EIA Directive from projects to which it applies. The Supreme Court deemed that the Annex II project in this instance, the project for the restructuring of rural land holdings, will be subject to an EIA/screening and that will necessarily take into account the cumulative effect of other projects including the solar farm. However, the Supreme Court noted that taking into account the solar farm when carrying out an EIA of the proposed restructuring of the rural landholding is not the same as carrying out an EIA of the solar farm (relying on *Fitzpatrick v An Bord Pleanála* [2019] IESC 23).

- Fourth, the Appellant's reliance on the decisions in Case C-215/06, *Commission v. Ireland (Derrybrien I)* and Case C-261/18, *Commission v. Ireland (Derrybrien II)* was misplaced. In *Derrybrien I*, the CJEU found that because the development involved

peat extraction and road construction (which were listed in Annex II), an EIA was required. The fact that peat and mineral extraction and road construction were 'projects' was not stated as converting the wind farm project into one captured by Annex 1 or 2 as they then were. That was made clear in *Derrybrien II*.

- Fifth, general references in either the EIA Directive to *'the whole project'* or in the case law to the EIA Directive having a *"wide scope and purpose"* do not create obligations beyond those specified in the EIA Directive. The purpose of the EIA Directive is to ensure that the projects listed in Annex I and II are subject to EIA processes. That entails ensuring that the whole EIA project is subject to EIA, as opposed to the wider project. Other projects which are not included in either Annex I or II are accounted for by way of cumulative assessment.

- Finally, the other decisions of the CJEU relied upon by the Appellant were not relevant in the sense that the Minister's EIA jurisdiction is not confined by any decision made by the Board.

Issue 2: EIA of the Proposed Development Cannot be done under the 2011 Regulations

The Appellant claimed that an EIA of the Proposed Development could not be conducted under the 2011 Regulations in circumstances where planning permission for the development (including that part of the development said to constitute a project under the EIA Directive) had already been granted in the absence of any environmental assessment. Even if the land restructuring could be assessed independently of the solar farm there is no obligation to consider cumulative effects in a screening other than with other activities as defined in the 2011 Regulations. The Appellant suggested that it was not possible *"to untangle the solar farm development from the hedgerow removal, land reprofiling, and or restructuring that is the cause and effect of the renewable energy development."*

The Supreme Court found that there is no reason in law why the Minister could not carry out an effective assessment under the EIA Directive. Nor is there anything unlawful about a process whereby multiple development consents may be required. EU law requires that an EIA of the project requiring EIA is carried out before the relevant development consent is granted. While the Minister could not in law reverse the Board's Decision, their decision could result in the Developer being unable to carry out the Proposed Development as permitted by the Board. Conversely, if there were a decision of the Board granting planning permission for something which required the Minister's consent for a *"project for the restructuring of a rural land holding"*, the Board's decision does not permit that to go ahead without that Ministerial consent. There was no issue with conflicting jurisdictions because the Developer was never empowered under the Board's decision to do anything which still required Ministerial consent. Interpreting the national legislation in light of EU law, the Supreme Court determined that there was nothing in the Regulations that presented any impediment to a compliant EIA.

The Supreme Court further noted that the question of whether it is possible for the Minister in a given case to carry out an assessment that is compliant with the EIA Directive can only be properly addressed when the Minister has actually done so. This issue was theoretical and could not be properly addressed in what was considered a factual vacuum.

Issue 3: The Frailties in Transposing the EIA Directive
This issue was closely related to the first and second issues set out above, but it was specifically aimed at two suggested weaknesses in the transposition of the EIA Directive into national law.

The first was the fact that the Minister was responsible under the 2011 Regulations for screening for EIA and/or conducting an EIA but had no role in deciding whether a development involving such an activity should be permitted or the conditions to be attached thereto. The second was that the planning permission required for the solar farm development could be granted without any prior EIA.

First, the effect of a planning permission was only to assure the applicant that, according to the planning legislation, their development will be lawful. Further permission, under another distinct statutory code – such as building bye-law approval – may be required before that development can actually proceed. Dual consent regimes were envisaged in the EIA Directive.

There were two distinct consent regimes operating independently here. The Minister was not constrained in any way by the Board's Decision. It followed that the Minister could still refuse consent, in which case the Proposed Development could not proceed, or could give consent subject to any conditions that the Minister considered were required by EU law.

Any such conditions would have to be complied with by the Developer, in addition to the conditions attaching to the Board's Decision. The Court found that this disposed of issue 3(b).

Issue 4: Whether any of the Grounds invalidated the Board's decision
The fourth issue was whether any of these grounds were a basis for invalidating the Board's Decision. The Supreme Court found that the Respondents and the Notice Party made a strong case that, even if there was an issue with transposition of the EIA Directive through the 2011 Regulations, this did not affect the validity of the Board's Decision, merely how the regime operates. In light of the Supreme Court's decision on Issues 1 and 3, this did not arise in relation to those questions. In circumstances where the Supreme Court found Issue 2 to be premature, it did not think it necessary or appropriate to answer it. Therefore, this question was answered in the negative and the Supreme Court dismissed the appeal.

Key Takeaways

- There is a *"dual consent"* regime for rural land restructuring, including the removal and relocation of hedgerows (often required as part of a large solar farm development), and while this may constitute a *"project for the restructuring of a rural land holding"* as defined in Annex II of the EIA Directive, solar farms themselves are not an EIA project.

- The requirement for cumulative assessment means that the other works associated with the solar farm are cumulatively assessed with the rural land restructuring.

- It is not permissible to split an EIA project into smaller parts to remove the application of the EIA Directive, however, an Annex I or Annex II project will be subject to an EIA screening and that will necessarily take into account the cumulative effect of other projects (including non-EIA projects such as a solar farm).

- A *"dual consent"* regime is permitted by the EIA Directive. The EIA Directive does not require the centralisation of EIA functions in relation to a project into a single authority, let alone into the regular planning process.

- The Minister's EIA jurisdiction is not confined by any decision made by the Board. The Board and the Minister operate independently of each other. The Minister's decision could have the effect that the Developer would be unable to carry out the Proposed Development pursuant to the Board's decision. Conversely, if there were a decision of the Board granting planning permission for something which required the Minister's consent, the Board's decision does not permit the Proposed Development to proceed without that Ministerial consent.

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

Case: Graymount House Action Group, Darragh Richardson and Aoife Grimes v An Bord Pleanála, Fingal County Council, the Minister for Housing, Local Government and Heritage, Ireland and the Attorney General and Trafalgar Capital Limited (Notice Party)
Date delivered: 31 May 2024
Citation: [2024] IEHC 327
Judge: Barr J.

Background

In these proceedings, Graymount House Action Group, Darragh Richardson and Aoife Grimes (the Applicants) challenged the legality of a decision of An Bord Pleanála (the Board) of 21 October 2022 to grant planning permission to Trafalgar Capital Limited (the Developer) for the demolition of Graymount House and the construction of a residential development comprising a two to four-storey apartment block consisting of 32 apartments and ancillary works on Dungriffin Road, Howth, Co. Dublin (the Proposed Development). The Board's decision was made following an appeal by the Applicants of the decision of the planning authority, Fingal County Council, dated 7 September 2021 to grant permission for the Proposed Development subject to conditions.

The Main Issues

The Applicants challenged the Board's decision for a number of reasons which the Court summarised as follows:

(a) The Board failed to have any, or any adequate regard, to the fact that due to the unsatisfactory nature of the footpaths at either end of Dungriffin Road, the traffic generated by the Proposed Development would constitute a traffic hazard;

(b) A number of the reasons were based on the Applicants' suggestion that by granting permission for the Proposed Development the Board had materially contravened the Fingal County Council Development Plan 2017 – 2023 (the CDP) and had not adopted the correct procedures. These reasons included:

- The Proposed Development constituted a greater density than that permitted under the CDP;
- The number of units permitted in the Proposed Development exceeded the provisions of the settlement strategy in the CDP;
- The Proposed Development included for the demolition of Graymount House;
- The Board did not consider the requirements in the CDP in relation to public open space; and
- The removal of a substantial number of trees from the site.

(c) The Board failed to have regard to Annex III of the EIA Directive[2] as required by Article 4(3) of the EIA Directive. Annex III contains the selection criteria to be used by a competent authority in carrying out an EIA screening. The Applicants claimed that in carrying out a preliminary examination, the Board failed to properly apply the provisions of the EIA Directive, in particular in relation to the effect of the Proposed Development on bats and the cumulative effect on traffic in the area.

Finally, the Applicants stated that if they were not permitted to challenge the decision of Fingal County Council to grant permission for the Proposed Development at this stage, the State had failed in their obligation to provide practical information under Article 11(5) of the EIA Directive.

The Applicants' Case against Fingal County Council

A preliminary point that the Court first decided was whether the Applicants were entitled to challenge the original decision of Fingal County Council. The Court noted that Fingal County Council had issued a decision to grant permission for the Proposed Development on 7 September 2021. This decision was appealed by the Applicants to the Board on 4 October 2021 with the Board's decision being made on 21 October 2022. The Applicants first moved their application for judicial review, looking to quash both the decisions of the Board and Fingal County Council on 15 December 2022.

The Court held that the Applicants were not entitled to challenge the decision of Fingal County Council, because once a decision on the appeal had been made by the Board, the decision of Fingal County Council was annulled. The Court referred to Section 37(1)(b)[3] of the Planning and Development Act 2000, as amended (the 2000 Act). The Court in support of this view referred to the judgments in *Yennusick v Wexford County Council [2023] IEHC 70*[4] and *Duffy v Clare County Council [2023] IEHC 430*.[5]

The Court acknowledged that the rule against bringing a challenge by way of judicial review proceedings to a decision of a planning authority, is not a hard and fast rule and referenced the judgment of *Mount Juliet Estate Residents Group v Kilkenny County Council [2020] IEHC 128*. This judgment establishes that it is possible to bring a judicial review application against a decision of a planning authority in certain circumstances, while an appeal is pending before the Board if the subject matter relates to the jurisdiction of the Board.[6]

The Applicants' Case against the State

The Court noted that the Applicants' case against the State only arose in the event that the Court held that the Applicants were not entitled to challenge the decision of Fingal County Council. As the Court had decided that the Applicants were not entitled to challenge Fingal County Council's decision, the Court proceeded to determine the case against the State.

2. Directive 2011/92/EU, as amended by Directive 2014/52/EU (the EIA Directive).
3. "*... the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given*".
4. See paras. 13 and 14.
5. See paras. 26 and 27.
6. See paras. 20 and 21.

The Applicants' case against the State was that in having regard to the provisions of Article 11(5) of the EIA Directive, the State was obliged to provide "*practical information*" which would have alerted them to the fact that they would have lost their opportunity to challenge the decision of Fingal County Council by proceeding with an appeal before the Board.

Article 11(5) of the EIA Directive states: *"In order to further the effectiveness of the provisions of this Article, Member States shall ensure that practical information is made available to the public on access to administrative and judicial review procedures."*

The Court determined that the Applicants failed to make a proper argument on this point, finding it unclear what information the Applicants contended that the State should have provided. The Court noted that, even if it were wrong on that point, the State had provided adequate practical information, which is sufficient to comply with its obligations under the EIA Directive. In particular, the Court found that guidance of a comprehensive and practical nature is given in the 2000 Act and the Planning and Development Regulations 2001, as amended (the 2001 Regulations).

The Challenge to the Board's Decision
The Board's decision was challenged by the Applicants for the following reasons:

(a) Inadequate Consideration of the Traffic Hazard Posed by the Development
The Applicants argued that the Board, in making its decision, failed to have regard to the potential traffic hazard that would be posed by the Proposed Development on Dungriffin Road and failed to adequately consider the submissions made on this point. In particular, it was argued that the Board failed to give any consideration to the fact that Dungriffin Road was a narrow road, with narrow footpaths. The Applicants also argued that the Board had not given adequate consideration to whether the grant of permission constituted a material contravention of the CDP, having regard to the objectives contained therein to improve pedestrian connectivity in the area.

The Board's Inspector concluded that the Proposed Development would not lead to any appreciable increase in traffic volume which in turn could cause problems for pedestrians. In arriving at this conclusion, the Board's Inspector relied on an expert report prepared by the Developer's engineering consultants. That report said that the Proposed Development would have negligible impact on the surrounding roads due to the low number of trips being generated by the Proposed Development. The Applicants did not provide expert evidence to support their claims. The Court found that the Inspector and the Board reached a *"logical and rational conclusion"* based on the expert evidence that was submitted by the Developer.

On the material contravention point, the Court noted that the Applicants were relying on Objective MT22 of the CDP, which proposed to improve pedestrian and cycling connectivity to travel hubs. The Court went on to state that this does not mean that a development that will only produce a negligible volume of traffic should not be granted planning permission because it will not improve pedestrian or cycling connectivity to transport hubs. The Court suggested that if the Applicants were correct in their interpretation of this objective, it would mean that the Board would have to hold that every new development within Fingal County Council's administrative area must improve pedestrian and cycling connectivity to transport hubs, otherwise the development would be held to be in material contravention of the CDP, and this would be an unacceptable conclusion.

(b) Density

It was argued by the Applicants that the Board approved a high density development based on the Guidelines for Planning Authorities on Sustainable Residential Development in Urban Areas (the 2009 Guidelines) rather than the Sustainable Urban Housing: Design Standards for New Apartments Guidelines (the 2020 Guidelines), meaning they had regard to guidelines that had been superseded. The Applicants argued that the Board had a statutory obligation under Section 28(2) of the 2000 Act to have regard to the 2020 Guidelines.

The Applicants argued that although higher density was allowed for developments that were close to public transport, the Proposed Development was not sufficiently close to a public transport corridor.

Neither was it within walking distance of Howth DART station, given that it was accepted in the planning statement lodged by the Developer that the Proposed Development was 1.6km from Howth DART Station. The Applicants also argued that while the Proposed Development would be relatively close to a bus stop, the bus service serving this bus stop was not sufficiently frequent to qualify as a public transport corridor, given that there were two buses servicing the area three times per hour.

The Court found that there was no substance to this ground of challenge. The Court noted that the Board must have regard to relevant guidelines when considering an application for planning permission, however, it was established in *Cork County Council v Minister for Housing, Local Government and Heritage [2021] IEHC 683* that the obligation is to have regard to the guidelines but *"rigid or slavish adherence to them is not required"*.

The Court concluded that:

- The density of the Proposed Development, being 32 units on 0.48ha., which represents 67 units/ha., is not that much higher than the 50 units/ha. which is provided for in the guidelines.
- The 2020 Guidelines do not implicitly or explicitly replace the 2009 Guidelines. Paragraph 1.18 of the 2020 Guidelines explicitly states that they should be read in conjunction with the 2009 Guidelines.

- The fact that the DART station is 1.6km away from the Proposed Development and the Guidelines provide that developments should be 1.5km away from DART stations, is not a sustainable basis on which to strike down the decision.
- The Inspector had regard to the Proposed Development and to its place within the community generally, in terms of its proximity to a relatively frequent bus service and to Howth DART Station.

The Court found that the Inspector dealt with the issue in a logical and reasonable manner, considering the similarities to other high-density areas. The Court concluded that allowing higher density in this location was not *"unreasonable or irrational"*.

c) Settlement Strategy

The Applicants argued that Section 10 of the 2000 Act provides that a development plan must set out a strategy for the relevant area which is consistent with regional spatial strategies. They referred specifically to Objective SS02 in the CDP that refers to ensuring that all proposals for residential development are consistent with Fingal's County Settlement Strategy and accord with the identified hierarchy of settlement centres. They also referred to Objective SS03 which provides that the local authority should identify sufficient lands to accommodate residential growth. It was submitted that the general objective in the CDP was to develop lands within Fingal's administrative area in accordance with the settlement strategy.

Referring to the relevant settlement strategy for the Howth area and the figures provided in Variation No. 2 of the CDP, the Applicants claimed that the Howth area had the potential to deliver 436 more residential units for the remaining period of the CDP. The Applicants then referred to other planning permissions granted in the Howth area and they claimed that the number of units permitted in those permissions had exceeded the available capacity in the settlement strategy and that any proposal to grant permission for the Proposed Development would therefore constitute a material contravention of the development plan.

A key issue under this heading was the date on which permission was granted for the nearby Techcrete site[7] and the operative date of the variation to the settlement strategy in the CDP. The Court accepted the Board's submission that the grant of permission in this case was not in excess of the settlement strategy due to the fact that the figure of 436 units for the Howth area for the remainder of the period of the CDP did not include the permission in respect of the Techcrete site. This was because Variation No. 2 to the CDP specially stated that it was effective from 19 June 2020 and the Techcrete permission predated the implementation of that variation.

7. 512 units - (An Bord Pleanála Ref 306102-19) granted on 03 April 2020.

(d) Protection of Existing Historic Building

The Applicants argued that the Board's decision breached Objectives CH33[8] and CH37[9] in the CDP which provided for the protection of the historic building stock in the Fingal administrative area and the repurposing of historic buildings through adaptation and reuse.

The Applicants argued that the Board did not consider these objectives when approving the demolition of Graymount House. The Applicants then claimed that if the Board wanted to deviate from the CDP and to grant permission for a project that required demolishing a historic building, it had an obligation to explain its decision.

The Court was satisfied that Objectives CH33 and CH37 of the CDP come within the definition of general objectives. The Court deemed that on this basis the decision-maker could exercise planning judgment when considering these objectives in the context of the Proposed Development. In this case, the Inspector had regard to the architectural design statement and the architectural assessment submitted by the Developer with the planning application, the planner's report and the report of the conservation officer and concluded that the house, in its current state, did not substantially contribute to the character of the area.

The Court was satisfied that the Inspector had given the matter careful consideration and in adopting the Inspector's reasoning, the Board had exercised its planning judgment in a way that was *"rational and reasonable in all the circumstances"*.

(e) Access to Public Open Space

The Applicants argued that the Board's decision was invalid due to the fact that, while public open space had been provided in the Proposed Development, there had been no provision in the permission granted, whereby the right of the public to have access to the open space was secured.

The Applicants referred to the provisions of the CDP that required the provision of public open space. It was submitted that while the Developer had stated that it would make public open space available within the Proposed Development, that statement alone was not enough to secure the right of the public to have access to the open space provided.

The Applicants relied on the case of *Mahon v An Bord Pleanála [2010] IEHC 495* wherein it was deemed that the zoning of lands as public open space, did not have the effect of making the lands available for use by members of the public.

8. Objective CH33 stated: "Promote the sympathetic maintenance, adaptation and re-use of the historic building stock and encourage the retention of the original fabric such as windows, doors, wall renders, roof coverings, shopfronts, pub fronts and other significant features of historic buildings, whether protected or not."

9. Objective CH37 stated: "Seek the retention, appreciation and appropriate revitalisation of the historic building stock and vernacular heritage of Fingal in both the towns and rural areas of the County by deterring the replacement of good quality older buildings with modern structures and by protecting (through the use of Architectural Conservation Areas and the Record of Public Structures and in the normal course of Development Management) these buildings where they contribute to the character of an area or town and/or where they are rare examples of a structure type."

The Applicants suggested that a representation that the land, or a portion of it, would be public open space, was not sufficient to ensure a right of access for members of the public to it.

The Court said that the key area of disagreement between the parties was in relation to whether an adequate right of access for the public to the open space had been provided for in the planning permission granted to the Developer.

The Court referred to the relevant conditions of the permission:

- Condition 1 - provided that the planning permission is granted on the basis of the documentation submitted as part of the planning process.
- Condition 13 - provided that the management and maintenance of the proposed development following its completion, shall be the responsibility of a legally constituted management company. It further provided that a management scheme, providing adequate measures for the future maintenance of public open spaces, roads and communal areas shall be submitted to, and agreed in writing with the planning authority prior to commencement of development.
- Condition 21 - which provided that prior to commencement of development, the developer had to lodge with the planning authority a bond from an insurance company, to ensure that the Proposed Development would be carried out in accordance with the terms of the planning permission

The Court's view was that the Applicants confused the grant of planning permission with the implementation of that permission. The securing of the right of access to the public to the public open space provided under the permission, is a matter that can be agreed at a later date between the Developer and Fingal County Council.

In the circumstances the Court was satisfied that adequate public open space had been provided and that there was sufficient measures in place to secure the right of the public to have access to the open space.

(f) Removal of Trees

As part of the permission granted, 34 of the existing 86 trees, five of the existing seven hedges and two shrub borders were to be removed. An arboricultural assessment was submitted as part of the application, which contained a tree survey. This survey confirmed that none of the trees to be removed achieved a classification of high value.

The Applicants argued that the CDP provided for the objective of preserving trees and that the Inspector had not considered this objective. It was submitted that the removal of almost 50% of the trees could not be regarded as preserving and protecting trees.
The Court found this objective to be of *"a general and aspirational nature"* which required the exercise of planning judgment. The Inspector had an extensive report detailing the quality and quantity of the trees that were to be removed. He also had extensive information from the landscape design documentation, showing the level of planting that was to be carried out on the site.

The Court noted that there was no contrary expert evidence in relation to the trees before the Inspector and that the removal of 34 trees did not constitute a material contravention as the objectives set out in the CDP did not lend themselves to that interpretation.

(g) Environmental Impact Assessment (EIA) Ground
The Applicants submitted that the Board failed to have regard to the matters set out in Annex III of the EIA Directive as required by Article 4(3) of the EIA Directive. Annex III contains the criteria to be used by a competent authority in making an EIA screening determination.

The Board had determined after a preliminary examination that full screening for EIA was not required.

The Applicants argued that the Inspector's Report made no reference to the cumulative effect on traffic or the effect on bats and that there was insufficient information to come to the conclusion that no further screening for EIA was necessary. The Applicants argued that because the Developer's bat survey, which was included in an ecological impact assessment submitted with the planning application, noted that lighting on site would cause a decrease in foraging the issue of bats had to be considered and it was only if the likelihood of any significant effects could be ruled out that the Board could conclude that no EIAR was required.

The Court accepted the Board's submission that the obligation to take into account the matters in Annex III did not require the Board to go through a *"tick box"* exercise. The Court referred to the Advocate General's Opinion in the case of *Eco Advocacy v An Bord Pleanála Case C-721/21* which stated that the level of reasoning required varied depending on the issue concerned and that (in relation to screening) it was not necessary to follow the exact structure of Annex III as long as it was clear that the project would not have adverse effects on the environment.

The Court found that in circumstances where the bat survey concluded that there were no bats roosting on site, some evidence that bats foraged in the eastern side of the site at night and where there was very little light spillage in the area, it was entirely reasonable for the Inspector to conclude that the Proposed Development would not have any adverse effects on biodiversity, and in particular on bats. In circumstances where he was carrying out a preliminary examination for a sub-threshold development, the Inspector was entitled to reach the conclusion that it did not warrant any further investigation or assessment.

On the cumulative traffic impacts point, the Court considered this to be unfounded given the uncontroverted expert evidence before the Inspector that the traffic generated by this development at peak time would be negligible.

For all of the above reasons, the Court dismissed all the reliefs sought by the Applicants.

Joined Case of Morris v An Bord Pleanála [2024] IEHC 328

The Board's decision was also challenged in the joined case of *Morris v An Bord Pleanála* and was heard in conjunction with the Graymount case. In certain cases where identical challenges are made to a decision, the Court can elect to *"join"* the cases and hear both cases at the same time in order to avoid duplication of any ground covered or arguments made in both cases.

Judgment in the Morris case was also delivered on 31 May 2024 and dealt with the additional grounds raised by the Applicant that were not contained within the Graymount decision. The additional grounds were as follows:

a) The Board's decision seemed to ignore the statutory restriction upon new building within a certain distance of an area where a structure already exists and that there was a want of curiosity or diligence on the part of the Board in reaching its decision.

The Court held that the Applicant in these proceedings had not identified any statutory requirement which had allegedly been breached and that the alleged want of curiosity or diligence were not legal errors.

b) The Board had not given due consideration to the fact that this development was a very significant departure from buildings already in the vicinity.

The Court considered this point to be so general that it could not be characterised as a legal error.

c) The overall approach of the Board in the matter of "injury" was excessively subjective.

The Court found this did not amount to an assertion that the decision-maker had made any specific error of law.

d) The Board had not seemed to have given thought to "certain ever evolving extenuating circumstances".

As above, the Court found this did not amount to an assertion that the decision-maker had made any specific error of law. As with the Graymount case Mr Morris' challenge was dismissed. A link to the Morris decision can be found **here.**

Leave for Certificate to Appeal

The Applicants in both the Graymount and Morris cases both sought certificates for leave to appeal under Section 50A(7) of the 2000 Act. The joint certificate hearing was heard on 24 July 2024, and judgment was delivered on 13 September 2024. In both cases, the Court was satisfied that the Applicants had not raised points of law of exceptional public importance and refused leave to appeal.

Key Takeaways

- The judgment suggests that if applicants in judicial review proceedings criticise expert evidence of developers that is before the Board, then there is an obligation on them to provide their own expert evidence during the application process before the Board, to refute the developer's expert evidence.

- The judgment reiterates the principle in *Cork County Council v the Minister for Housing, Local Government and Heritage [2021] IEHC 683* that the obligation is to have regard to Section 28 guidelines rather than rigid or slavish adherence to them.

- The judgment noted that some objectives within the CDP are *'general objectives'* and decision-makers should exercise their planning judgment in relation to these objectives.

A link to the Judgment can be found **here.**

Case: Paul Freeney v An Bord Pleanála, CWC Fairgreen Limited (First Named Notice Party) **and Galway City Council** (Second Named Notice Party)
Date: 9 July 2024
Citation: [2024] IEHC 427
Judge: Bradley J.

Background

On 9 July 2024, the Court delivered judgment in this case dismissing the Applicant's (Mr. Freeney) challenge to the decision of An Bord Pleanála (the Board) to grant planning permission to the first named notice party (CWC), for a change of use and related works to a premises in Galway.

The grant of planning permission was subject to conditions and was for a development consisting of a change of use of the ground floor unit of a commercial building from retail to gaming use, including internal reconfiguration and fit out, construction of access and associated lobby area to an existing adjoining multi-storey carpark, external signage and branding and all associated and ancillary works and development at Fairgreen House, Fairgreen Road, Galway.

In the proceedings Mr. Freeney argued that CWC's description of the proposed use of the premises as a *"gaming use"* was inadequate and failed to comply with the requirements of the Planning and Development Regulations 2001 (the 2001 Regulations) in relation to floor plans, public notices and the description of the proposed development.

The Main Issues Considered by the High Court

The Court refused Mr. Freeney's application on a number of grounds including the following:

1. Preliminary Objection

The Court commented on the need for applicants to set out the reasons why they are challenging a decision in a clear and precise manner, and ultimately dismissed some of Mr. Freeney's points including those relating to:

- The validity of the application for planning permission having regard to the 2001 Regulations and the floor plans,
- An error of law in the context of the Gaming and Lotteries Act 1956 (the 1956 Act),
- A reasons argument in relation to opening hours, and
- A reasons argument in relation to screening for Appropriate Assessment - on the basis of inadequate pleadings.

2. Omission of the Temporary Condition: Reasons
The Court found that the Board's decision to omit a temporary condition regarding opening hours, recommended by the Inspector, was adequately reasoned, notwithstanding that the Board is not required to explain its decision not to impose a condition according to Section 34(10)(b) of the Planning and Development Act 2000 (the 2000 Act). Section 34(4)(q) of the 2000 Act gives the Board discretion to impose conditions regulating the hours and days during which a business premises may operate.

The Court found that the fact that the Board has such a discretion does not mean that a decision made by the Board (a) not to include a condition regulating the hours of operation or (b) leaving it over to another code (i.e. the 1956 Act) makes that decision unlawful.

3. Alleged Material Contravention
The Court found that although Galway City Council made a decision dated 2 June 2021 to refuse planning permission, the reasons cited in the decision to refuse permission did not include a material contravention of the Galway City Development Plan. Therefore, the Board was not restricted to granting permission under the Section 37(2)(b) process (relying on *Nee v An Bord Pleanála* [2012] *IEHC 532, Redmond v An Bord Pleanála* [2020] IEHC 151, and *South-West Regional Shopping Centre v An Bord Pleanála* [2016] IEHC 84).

4. The Gaming and Lotteries Act 1956 / Irrelevant and Relevant Considerations
The Court relied on Section 34(13) of the 2000 Act in relation to the operation of the gaming development, as proposed, being conditional upon the necessary authorisation for operating gaming at the site under the 1956 Act. Section 34(13) dictates that a grant of permission alone is not sufficient to entitle a person to carry out a development where other requirements may exist such as a valid gaming licence. Whether or not the required authorisation was or would be in place did not detract from the Board's assessment of the proposed development in planning terms but may have implications for the operation and use of the building in the manner envisaged.

The Court found that the Board was not required to be aware of whether these authorisations were, or were not, in place in order to make a lawful decision on the application before it.

5. Floor Plans and Articles 22(4)(b)(1) and (2) of the 2001 Regulations
The arguments, which the Court agreed were made for the first time at the hearing, in relation to the validity of the application (e.g. that the gaming machines in the premises were structures and should have been properly particularised on the plans) were ultimately dismissed on the basis that they should have been made to the Board by Mr. Freeney in his submissions to the Board (i.e. it was *"gas-lighting"* as per Humphreys J. in *North Great George's Street v An Bord Pleanála* [2023] IEHC 241).

The Board should have been given an opportunity to deal with these issues at the time of making its decision rather than being raised for the first time before the Court. The Court also noted that the Board had inserted a *"Boland*[10]*-type condition"* (i.e. one that leaves over certain points of detail to be agreed with the planning authority post consent) at condition 3 of the permission requiring more detailed floor plans to be submitted to Galway City Council prior to the commencement of the development.

6. Public Notices

Mr. Freeney claimed that the reference to *"gaming"* in the public notices was ambiguous and did not explain the nature of the activity. The Court considered the requirements for newspaper notices in Article 18 and site notices in Article 19 of the 2001 Regulations, and the alleged requirement for the planning authority to invalidate an application as soon as may be after receipt under Article 26(5) of the 2001 Regulations.

In reliance on *Byrne v Dublin City Council* [2009] IEHC 122 the Court found that the notices in this case were adequate in the detail and description of the proposed change of use and this was evidenced by the submissions made during the course of the planning application process.

The Court found that Mr. Freeney was not prejudiced in this instance as he had expressed his own objections in relation to gaming to the planning authority and made no complaint about the notices at the time.

7. Screening for Appropriate Assessment (AA)

Mr. Freeney complained about the syntax and grammar used in the Board's AA screening conclusion. The Court relied on *Eoin Kelly v An Bord Pleanála* [2019] IEHC 84 to find that consideration should be given to *"the substance of the screening report and the inspector's report rather than to focus on the particular use or rather non-use of certain words"*.

The Court also referred to the judgment in A*rdragh Wind Farm Limited v An Bord Pleanála* [2019] IEHC 795, where the use of the term *"generally in accordance with the Inspector's recommendation"* was held to be sufficient to denote that the formal decision of the Board was aligned with the Inspector's report.

The Court found that the essential test for AA screening (i.e. whether the particular development was likely to have a significant effect on a European site, either individually or in combination with other plans or projects) was carried out by the Inspector and adopted by the Board.

10. Boland v An Bord Pleanála 1994 WJSC-HC 2149.

Key Takeaways

- The Board need only rely on Section 37(2)(b) of the 2000 Act if the original decision of the planning authority was to refuse permission due to a material contravention of the development plan.

- Whether or not the requisite components under the 1956 Act are in place to control a gaming development (such as anti-social behaviour, closing hours, etc) does not detract from the Board's planning assessment of a proposed development, but may have implications for the use of the building in future (and Section 34(13) of the 2000 Act is relevant in that a person shall not be entitled solely by reason of a permission under this section to carry out any development).

- The judgment highlights the importance of complying with the 2001 Regulations, especially regarding the submission of detailed floor plans and public notices.

- The Courts are likely to dismiss arguments from applicants which have not previously been included in submissions to the Board but are raised with the Courts. Such arguments are seen as *'gas-lighting'*. The Courts consider that a decision-maker should be given an opportunity to deal with such issues at the time of making its decision.

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

Case: Moya Power and Wild Ireland Defence CLG v An Bord Pleanála, the Minister for Housing, Local Government and Heritage, Ireland and the Attorney General and Knocknamona Windfarm Limited (Notice Party)
Date delivered: 28 February 2024
Citation: [2024] IEHC 108
Judge: Holland J.

Background

Permission was granted by An Bord Pleanála (the Board) to Knocknamona Windfarm Limited (the Developer) on 28 September 2022 in respect of amendments to a previously permitted, but as yet unbuilt, windfarm (the 2022 Permission). The previously permitted windfarm provided for the construction of eight turbines on a site near Dungarvan, Co Waterford. The site consisted mostly of commercial forestry (the 2016 Permission). The proposed amendments to the 2016 Permission (the Proposed Development) were:

- An increase in the uppermost tip height of the eight turbines from up to 126 metres to up to 155 metres; and
- An amendment to the meteorological mast from a tubular tower mast up to 80 metres in height to a lattice tower mast up to 99 metres in height.

The basis for seeking these amendments was that the 2016 Permission reduced the number of turbines from the 12 sought to eight. This reduced the power output from the windfarm, the subject of the 2016 Permission, as against that for which planning permission had been sought and left a deficit in the power output compared to the Maximum Export Capacity which had been approved by ESB Networks. The Proposed Development, if permitted, would allow the Developer to increase the power output from the windfarm to the Maximum Export Capacity.

Grounds of Challenge

Moya Power and Wild Ireland Defence CLG (the Applicants) challenged the validity of the Board's decision for the following reasons:

- Environmental Impact Assessment (EIA) – The EIA of the Proposed Development was defective as it failed to assess the entire Knocknamona Windfarm permitted by the 2016 Permission as amended by the Proposed Development.
- Public Participation – The EIA of the Knocknamona Windfarm and Grid Connection was carried out over a number of development consent processes and the combination of these processes was contrary to Article 11(4) of Directive 2011/92/EU, as amended by Directive 2014/52/EU (the EIA Directive) and the Aarhus Convention in that the public were required to participate in multiple consent processes.

The Applicants claimed that this meant a duplication of fees and increased obligations to fund professional advisors to assist in drafting submissions, which ultimately created an obstacle to the public participating in the planning process and should invalidate the 2022 Permission. This point was not pursued in depth during the hearing of the case and the Court dismissed the point on the basis that it was not supported by any evidence.

- The Board had no jurisdiction to perform an Appropriate Assessment (AA) of the Proposed Development in the absence of conservation objectives for the Blackwater Callows SPA. Of relevance to this argument is that, during the course of the hearing, the State conceded that it had failed to fulfil its obligations under the Birds Directive[11] and the Habitats Directive[12] by failing to establish the necessary site-specific conservation objectives and measures in the Blackwater Callows SPA.

The two main issues ultimately considered by the Court were EIA and the Board's jurisdiction to carry out AA.

Issue 1: EIA

The Applicants claimed that the EIA of the Proposed Development was defective as it failed to assess the entire Knocknamona Windfarm permitted in 2016 as part of the assessment of the Proposed Development. It was agreed by the parties to the proceedings that the EIA of the Proposed Development only assessed the proposed amendments to the Knocknamona Windfarm as previously permitted and did not include elements of the Knocknamona Windfarm which were not proposed to be amended. The cumulative assessment of the Proposed Development incorporated the unamended elements of the Knocknamona Windfarm and other projects. The parties also agreed that the Knocknamona Windfarm as permitted in 2016, the Woodhouse Windfarm (another windfarm located close to the Knocknamona Windfarm and featuring in the cumulative assessment carried out as part of the EIA here) and the Grid Connection had all been subjected to an EIA.

The Applicants suggested that the Board failed to properly consider the class of project under the EIA Directive. The Applicants alleged that the Board had erred in deciding the project requiring EIA was a *"change or extension"* within paragraph 13(a) of Annex II of the EIA Directive without having first conducted an EIA screening. The Applicants further submitted that the Board erred in law by failing to carry out an EIA of the Knocknamona project when viewed as a whole as opposed to carrying out an EIA of only part of the windfarm project. In other words, the Applicants argued that the entire windfarm should have been assessed, rather than just the extension of the unbuilt turbines.

11. Directive 79/409/EEC, as amended by Directive 2009/147/EC (the Birds Directive).
12. Directive 92/43/EEC (the Habitats Directive).

It was contended that as a result of the failure to assess the entire Knocknamona Windfarm the noise impacts were assessed using 2014 baseline data which was out of date and the cumulative assessment of the Proposed Development with the Knocknamona Windfarm as previously permitted was not an adequate substitute for the failure to identify both together as the project to be subject to EIA.

Notably, it was observed that there was considerable dispute between experts in relation to the noise assessment carried out, something the Court found surprising in the sense that the disagreements went as far as basic assumptions and ground rules for the prediction of windfarm noise and the effect of same on local residents. However, it was clear to the Court that the Board's Inspector recognised and considered that dispute before finding in favour of the Developer's expert. The Court went on to observe that the dispute between noise experts was alarming and would have been *"appreciably ameliorated"* by up to date Wind Energy Development Guidelines.

At the outset, the Court observed that the *"obvious difficulty"* which the Applicants were faced with was that paragraph 13(a) of Annex II provides that a *"project"* requiring EIA may consist of the amendment of a project which has previously been permitted. It states: *"Any change or extension of projects listed in Annex I or this Annex, already authorised, executed or in the process of being executed, which may have significant adverse effects on the environment"*

This, the Court said, meant certain changes and extensions to previously permitted projects could be likely to have significant effects on the environment in and of themselves and, accordingly, the greater the change or extension the higher the likelihood of significant effects and the more likely the change or extension would be considered to be a project in its own right and require EIA on that basis. This EIA would inevitably incorporate a cumulative assessment in respect of the cumulative effects of the project to which the change or extension is being made. Looking behind the intent of the EU legislature in adopting paragraph 13(a) of Annex II, the Court observed that *"To require the proposer of the amendment to reinvent the wheel of the earlier EIA would be burdensome, duplicatory, wasteful, and disproportionate to the purpose of EIA. That is true generally but will be especially so as to those elements of environmental effect of the original project on which the proposed amendment will have no effect".*

The Court found that the Board was correct in identifying the proposed development as consisting of a change or extension for the purposes of conducting an EIA on the Knocknamona Windfarm. In doing so, the Court cited the cases of *FitzPatrick*[13] and *Bund Naturschutz 1994*[14] in reaching the conclusion that the project for which an EIA is to be conducted is the development for which planning permission is sought.

13. FitzPatrick v An Bord Pleanála, Galway County Council & Apple Distribution International [2019] IESC 23, [2019] 3 IR 617.
14. C-396/92 Bund Naturschutz in Bayern v Freistaat Bayeran, Judgment of 9 August 1994, E.C.R. I-3717.

The Court also referred to *Coyne*[15] for the proposition that different elements of a project may be subject to different EIAs as long as their cumulative effect has been assessed, and found that the fundamental objective of the EIA Directive is to ensure that an EIA has been undertaken on projects that are likely to have a significant effect on the environment. Therefore, the Court rejected the Applicants' argument here, finding that there was *"no purposive deficit in the approaches taken in those authorities and no purposive impetus to conduct EIA of the entire windfarm as amended"* and that the EIA that was conducted encompassed the cumulative effects of the entire windfarm.

The Court further observed that the Board's assessment of the cumulative effects of the project to which the change or extension is being made is precisely what is envisaged by paragraph 13(a) of Annex II of the EIA Directive. The Court relied on the *Derrybrien Windfarm case*[16] as being a highly relevant case in finding that the Board was correct in saying that the Proposed Development is a project under paragraph 13(a) of Annex II. The Court held that the entire point of this section was that it will require EIA of *"changes or extensions"* so great and consequential that they are likely, considered as projects in themselves, to have a significant effect on the environment.

An alternative view of this was provided by the Applicants, which the Court termed the *"Replacement Theory"*. The Applicants tried to overcome the hurdle in relation to paragraph 13(a) of Annex II by arguing that the Proposed Development was not a change or extension of the Knocknamona Windfarm but rather the *"replacement"* of the Knocknamona Windfarm as previously permitted to be replaced by a different windfarm to the extent that EIA of the replacement windfarm was required under paragraph 3(i) of Annex II. The Court noted that a difficulty with this approach was that, despite the fact that the windfarm, as amended, would produce more power and the turbines would be greater in height with greater area swept by longer rotors, the windfarm would remain on the same site with the same number of turbines in the same places making it difficult to perceive the Proposed Development as a replacement.

The Applicants pointed to the purported increased power output of the Knocknamona Windfarm in support of this *"replacement theory"*, claiming that the increase in power output was open-ended and not limited to the 11MW increase envisaged by the Developer on the basis that the previously permitted windfarm, which effectively permitted a power output of 23MW, could have been built at a lower output. The Court did not find this argument persuasive and noted that there was never any real prospect of the previously permitted windfarm being built at a lower output than 23MW. The Applicants also contended that an 11MW increase of power output is over double the Irish threshold for EIA of windfarms of 5MW, and this would require EIA of a standalone windfarm.

15. Coyne v An Bord Pleanála [2023] IEHC 412.
16. C-215/06 Commission v Ireland, Judgment of 3 July 2008.

The Court found a number of difficulties with this argument. First, the figures relied upon reflect Ireland's choice of thresholds in transposing the EIA Directive and these thresholds could have been set higher in other Member States. Regardless of any differences in these thresholds, the net result is the same i.e. a requirement to carry out EIA of all projects likely to have significant effects on the environment.

Second, the purpose of these thresholds is to ensure that an EIA is carried out, they cannot rule out EIA and the fact that the thresholds may be set lower or higher does not back up any argument that above whatever threshold is set there is a further upper limit beyond which a project is considered to amount to a replacement rather than a change or extension of that which was previously permitted.

Third, the Court struggled to see how the arguments made by the Applicant could be reconciled with Case C-411/17 *Doel*[17] where the CJEU found that the concept of a change or extension encompassed a project to extend the life of a nuclear power station by 10 years (i.e. 25% of the original permitted duration).

The Court ultimately agreed with the Board's position that to argue that an increase in power output by more than 5MW means the project is a new windfarm as opposed to a change for the purposes of EIA is an argument which confuses threshold with project description.

EIA - Alleged Inadequacy of Cumulative Assessment and of Multiple Planning Permission and EIA Processes

The Applicants further argued that the cumulative assessment of two projects is insufficient compared to the cumulative assessment of the same proposed developments considered as a single project. However, the Court found that the Applicants did not advance anything to support this argument and there was nothing to suggest that the EIA suffered in substance by being identified as the Proposed Development as opposed to the previously permitted Knocknamona Windfarm as amended. The Court, in rejecting this argument, found no good reason to abandon the EIA already carried out for the projects considered as part of the cumulative assessment for the EIA of the Proposed Development. The Court did not consider that there was any need to start again with an assessment of the full windfarm as amended in isolation.

The Court concluded that *"the Applicants neither pleaded, nor particularised nor identified any substantive gap or inadequacy in the EIA"* and held that the cumulative effects of the overall whole project were considered as part of the cumulative assessment.

17. C-411/17, Inter-Environnement Wallonie and Bond Beter Leefmilieu Vlaanderen, Judgment of 29 July 2019, ECLI:EU:C:2019:622.

EIA – Use of 2014 Noise Baseline Defective

The Applicants claimed that the EIA of the Proposed Development was legally defective in using 2014 Noise Baseline data because that baseline was out of date when the EIA was conducted in September 2022 and it was based on a one kilometre envelope of the Knocknamona Windfarm. By contrast, the revised EIAR and the Board's EIA conducted a noise assessment extending to a two kilometre envelope of the Knocknamona Windfarm. The Applicants further argued that had an assessment of background noise been carried out at the home of the First Named Applicants the noise could have been in excess of the limits conditioned in the Board's decision.

The Court agreed with the Board's submission that this final point was purely hypothetical and speculative with no evidential basis. The Court understood the substantive complaint of the baseline but could not see the alleged legal significance, finding it is clearly a matter for expert judgment as to whether noise baseline measurements carried out in 2014 within a one kilometre envelope of the Knocknamona Windfarm would remain valid for an assessment carried out in 2022 in relation to a two kilometre envelope, and that the Board's decision in this regard was only reviewable by the Court for irrationality which was not part of the Applicant's case as it came before the Court.

Therefore, in relation to this argument, the Court held that there was no necessary relationship between the two alleged errors in respect of the Proposed Development and the use of the 2014 noise baseline and agreed with the Board's submission that this was a *"red herring"* in relation to the arguments made on EIA as to the definition of the project. In essence, the Court found that the use of the 2014 baseline was irrelevant to the identification of the project for the purposes of carrying out an EIA.

EIA – Further Arguments

There were further arguments made by the Applicants in relation to EIA which were pursued to varying degrees. These included the following:

- The planning permission was *"open ended"* and therefore invalid. This was rejected on the basis that judicial review of the previous permission had failed and thus retained its validity regardless of whether it contravened this principle. Furthermore, even if an argument had been made that this invalidated the permission for the Proposed Development the Court did not see how such an argument plea could succeed and noted that this permission did not contain an *"up to"* condition in respect of turbine dimensions.

- The Proposed Development was invalid as it extended the duration of the 2016 Permission which is not allowed. The Court agreed with the Board's submission that the permitted development was only the Proposed Development, being the amendments to the turbine tip heights and the meteorological mast, and that all other elements of the previously permitted Knocknamona Windfarm remained subject to the requirement to be effected in accordance with the 2016 Permission and within its 10-year duration from 2016.

- The Board erred in determining that the project requiring EIA was a *"change or extension"* within paragraph 13(a) of Annex II of the EIA Directive without carrying out an EIA screening. The Court stated that screening is one route to EIA and exceedance of thresholds is another, and screening was unnecessary here as the requirement to conduct EIA was apparent from the exceedance of the threshold in paragraph 13(a) of Annex II of the EIA Directive.

Issue 2: AA in the Absence of Conservation Objectives

The Applicants contended that the Board had no jurisdiction to perform an AA of the Proposed Development in the absence of conservation objectives for the Blackwater Callows SPA, relying on Article 6(3) of the Habitats Directive. The Board screened in the Blackwater Callows SPA as requiring AA. Therefore, permission for the Proposed Development could not be granted unless an AA found beyond all reasonable scientific doubt that the Proposed Development would not adversely affect the integrity of the Blackwater Callows SPA.

The Court considered EU Commission Guidance issued on the meaning of *"integrity of the site"* in 2021[18] which sets out that the integrity of the site is closely related to its conservation objectives. The Court further noted that the Commission's Guidance does not explicitly state that an AA can never be done in the absence of conservation objectives and that it clearly envisages AA in the absence of conservation objectives. The Court therefore rejected the Applicant's argument and found that it is possible for the purposes of AA to identify the substantive content of site integrity that may be at risk and to be able to conclude as a matter of reasonable scientific certainty, that the project will not adversely affect the integrity of the site concerned.

The Court noted that on the facts of the case it was possible for the Board to identify the substantive content of site integrity potentially at risk (i.e. the Whooper Swan by way of an off-site effect) and to conclude as a matter of reasonable scientific certainty that the project *"will not adversely affect the integrity of the site concerned"* (i.e. the physical presence of the Whooper Swan on the site of the Knocknamona Windfarm was required for the off-site effect in question, therefore if the Whooper Swan is not on the Knocknamona Windfarm site it is impossible that it will collide with the Knocknamona Windfarm turbine rotors). Accordingly, the Court rejected the Applicant's contention that the Board had no jurisdiction to conduct AA in the absence of conservation objectives for the Blackwater Callows SPA.

An appeal has subsequently been brought in relation to this ground, with the Applicants having been granted leave to appeal the following point of law:
"Are valid conservation objectives for a Special Protection Area a pre-requisite to the Board's jurisdiction to carry out a valid Appropriate Assessment under Article 6(3) of the Habitats Directive and thus grant planning permission?"

18. Commission Notice Assessment of plans and projects in relation to Natura 2000 sites – Methodological guidance on the provisions of Article 6(3) and (4) of the Habitats Directive 92/43/EEC (2021/C 437/01) 28.10.2021 §3.2.3.

Conclusion
Ultimately, the Court rejected the arguments made by the Applicant and did not overturn the decision of the Board, noting that it was not necessary to refer any questions to the CJEU despite the Applicant's suggestion that they do so. The Court also observed that the differences observed between reputable noise experts was alarming and would have been *"appreciably ameliorated"* by up to date Wind Energy Development Guidelines and found it difficult to see how litigation of windfarm disputes will abate in the absence of same.

Key Takeaways

- The absence of up to date Wind Energy Development Guidelines is proving problematic for the purpose of conducting expert noise assessments in relation to windfarm developments, and the absence of these guidelines may contribute to an increase in the number of windfarm litigation disputes.

- The project for which an EIA is to be conducted is the proposed development for which planning permission is sought.

- The fundamental objective of the EIA Directive is to ensure that all projects which are likely to have significant effects on the environment are subject to EIA. Where an amendment to a permission is concerned, there is no obligation to conduct EIA of the entire project as amended where an EIA of the amendments is carried out which includes a cumulative assessment of the effects of the entire project.

- The State has an obligation to establish the necessary site-specific conservation objectives and conservation measures in order to protect the integrity of a Natura 2000 site. However, while the absence of same may jeopardise the ability to conduct AA, it does not necessarily preclude an AA being carried out without legal error where the substantive content of site integrity potentially at risk can be identified and conclusions can be reached that the project will not adversely affect the integrity of the site concerned. This point is subject to appeal.

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

These case summaries were prepared by members of the Planning and Environmental Department of Fieldfisher Ireland LLP (Jonathan Moore, Rory Ferguson, Patrick Reilly, Craig Farrar, Niamh McDonnell, Simon Curmei, Olivia Butler, Adam Winston).

Supported by the Law Society of Ireland, Environmental and Planning Law Committee.

fieldfisher

OPR

Oifig an Rialaitheora Pleanála

Office of the Planning Regulator

Publication date: 16 September 2024