THE HIGH COURT

COMMERCIAL

[2017 No. 687 JR]

(2017 No. 171 COM)

BETWEEN:

NORTH MEATH WIND FARM LIMITED AND ELEMENT POWER IRELAND LIMITED

APPLICANTS

-AND-

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT of Mr. Justice Twomey delivered on the 7th day of March, 2018

Summary

1. This is a judicial review by the applicant, North Meath Wind Farm Limited (which is joined as a co-applicant by its shareholder, Element Power Ireland Limited), of a decision of An Bord Pleanála ("the Board") on 30th June, 2017. That decision was a refusal of the application (PA0046) to develop a wind farm of 25 wind turbines with a maximum height of 169 metres at a site, known as Castletownmoor, which is 2.9 kilometres north east of Kells, Co. Meath.

2. Although not determinative of any of the issues in this case, the Board pointed out that, based on the Wind Energy Development Guidelines 2006 ("the Guidelines") issued by the Department of Environment, Heritage and Local Government, the proposed development would be regarded as a large wind farm. The Board also submitted, and it was not controverted by the applicant, that the wind turbines to be used in the proposed development, at 169 metres would be among the tallest in the country.

3. The applicant seeks an order of *certiorari* of the refusal of the Board to grant planning permission and an order to remit the matter back to the Board.

4. On the 10th April, 2017, a Report was prepared on the proposed development by a member of the Inspectorate of the Board. This Report recommended the refusal of the planning permission. The key issue in this case is whether the alleged errors made by the Inspector in his assessment of the development, which Report was allegedly acted upon by the Board, are such as to vitiate the decision of the Board to refuse planning permission.

5. Unlike with an appeal on the merits of a decision, in a judicial review of a decision, there is a very high threshold to be reached for that decision to be found to be invalid. In this case, this Court finds that despite the *alleged* error by the Board in characterising the site as overwhelmingly *'hilly and farmland'* rather than as being *'hilly and flat farmland'* and *'flat peatland'* and despite the admitted error in the Inspector's Report regarding the number of buildings within a defined radius of a turbine, there was a reasonable basis upon which the Board could refuse planning permission. In addition, there was material before Board which was capable of supporting that decision. Accordingly, the application for *certiorari* is refused for the reasons set out below.

The kernel of the case

6. Counsel for the applicant described the *'kernel of the ground of challenge'* as the alleged error by the Board in its categorisation of the proposed development site as overwhelmingly *'hilly and farmland'* rather than as being *'hilly and flat farmland'* and *'flat peatland'*. This categorisation of the land in question is contained in the Inspector's Report and it runs counter to the claim, in the Environmental Impact Statement ("EIS") prepared on behalf of the applicant, that the land in question was both *'hilly and flat farmland'* and *'flat peatland'*. The Grounding Affidavit of Richard Barker dated 27th August, 2017, puts the matter in the following terms:

"The Inspector and the Board erred fundamentally in finding that the landscape character type is "*overwhelmingly ... Hilly and Flat Farmland*" on the basis that the issues raised in the [the Guidelines] for the siting and design of wind turbines on Hilly and Flat Farmland were very different from those for Flat Peatland and include "*respect for scale and human activities, with due regard given to houses, farmsteads and centres of populations*"."

Importance of the characterisation of the lands

7. It is clear that the reason why the applicant was anxious that the Board categorise the lands in Castletownmoor as partly *'flat peatland'* was because under the Guidelines, to which the Board must have regard under s. 28(2) of the Planning and Development Act, 2000, there is a greater scope for planning permission to be granted for wind farms on the lands if they were categorised as *'flat peatland'* as well as *'hilly and flat farmland'*.

8. This is because *'flat peatland'* is described in Chapter 6 of the Guidelines at paragraph 6.9.3 in, *inter alia*, the following terms:

> "Landscapes of this type comprise a vast planar extent of peatland and have significant potential for future wind energy development".

9. The Guidelines go on to describe the uses of such lands for wind farms in the following terms:

> "The preferred approach here is one of large scale response. The vast visual openness with few, if any, dominant geometric elements provides a certain freedom in the siting and design of wind energy developments. […] Wind energy developments can be placed almost anywhere in these landscapes from an aesthetic point of view […] The vast scale of this landscape type allows for a correspondingly large spatial extent for wind energy developments."

10. In contrast, *'hilly and flat farmland'* is described at paragraph 6.9.2 of the Guidelines in, *inter alia*, the following terms:

> "Farmsteads and houses are scattered throughout, as well as occasional villages and towns."

11. Also in contrast to what is said in the Guidelines regarding wind farms on '*flat peatland'*, the following is what is said in the Guidelines regarding wind farms on '*hilly and flat farmland'*:

> "The essential key here is one of rational order and simplicity as well as respect for scale and human activities […] Although hilly and flat farmland type is usually not highly sensitive in terms of scenery, due regard must be given to houses, farmsteads and centres of population […] [The spatial extent of the wind farm] can be expected to be quite limited in response to the scale of fields and such topographic features as hills and knolls. Sufficient distance from buildings, most likely to be critical at lower elevations, must be established in order to avoid dominance by the wind energy development […] Careful consideration needs to be given to tall turbines in this landscape given the potential proximity of houses […] It is important that wind energy development is never perceived to visually dominate".

12. The difference in approach to siting wind farms on the two landscapes is illustrated most starkly at Table 1 in Chapter 6 of the Guidelines which summarises the recommendations for wind energy developments in different landscapes as follows:

	Spatial Extent	Height
Hills and Farmland	Generally limited to small wind energy developments	Medium typically preferred but tall may be acceptable
Flat Peatland	Large.	Tall.

13. The applicant argues that the alleged error made by the Board in its characterisation of the lands is so serious as to vitiate the decision of the Board. In its Statement of Grounds at paragraph 9 it puts the matter as follows:

> "The Respondent erred fundamentally in its interpretation of the Wind Energy Development Guidelines 2006 (hereinafter "WEDG") and, in particular, Chapter 6 thereof, such that the Board and its Inspector acted perversely in selecting a single landscape character type (being "Hilly and Flat Farmland") against which the design response of the wind farm would thereafter be rigidly assessed, instead of applying the correct design principles set out in the WEDG to a landscape composed of a mix of two landscape character types (being both "Hilly and Flat Farmland" and "Flat Peatland")."

1st Ground: Mischaracterisation of the landscape of the development site

14. Thus, the first and key ground of challenge to the Board's decision is its (and the Inspector's) alleged error in characterising the proposed development site as being of just one character type, i.e. overwhelmingly '*hilly and flat farmland'* and in so doing applying very different criteria to its decision, namely a 'respect for scale and human activities with due regard being given to houses, farmsteads and centres of population' than if the development site had been characterised as both '*hilly and flat farmland'* and '*flat peatland'*, in which case it is assumed that there would have been a greater chance of the planning permission being granted since wind farms are more 'acceptable', to use a lay term, on '*flat peatland'* than on '*hilly and flat farmland'*.

Factual error admitted by the Board

15. In support of the applicant's claim that the Board erred in its characterisation of the land as '*hilly and flat farmland'*, the applicant also relies on an error in the 268 page Report of the Inspector dated 10th April, 2017, which error is admitted by the Board. This error, and its significance to the applicant's claim that the refusal of planning permission by the Board should be set aside, is described in para. 19 of the Grounding Affidavit of Richard Barker in the following terms:

> "The Applicant had pointed to the precedent of the Respondent's grant of permission for Yellow River Wind Farm PA0032 as an example where wind farms of the height, scale and extent proposed were compatible with the WEDG. The Inspector distinguished that precedent on the basis that the said wind farm was surrounded by extensive flat peatland and was "not comparable" in terms of the population density in the surrounding area.
>
> In making that comparison, the Inspector ignored the influence of the flat peatland area surrounding the proposed Castletownmoor wind farm site. Further, the Inspector ignored the data provided in the EIS that demonstrated that the environs of the Castletownmoor wind farm were in the lowest population density band nationally used by the Central Statistics Office for the purposes of comparing the population density of given areas. Most fundamentally, the Inspector erroneously compared the houses within 1.13 km of a turbine in Yellow River (200 no.) with "sensitive receptors" (which include places of work) within 1.31 km (i.e. a larger radius) of a turbine at Castletownmoor (452 no.). Accordingly, the Inspector's bases for comparison were fundamentally flawed. Among other things, this meant the Inspector failed to appreciate that the number of houses within 1.31 km of a turbine in the Yellow River wind farm is in fact greater than the number of houses within 1.31 km of a turbine in the Castletownmoor wind farm (254 houses as against 251 houses). Accordingly, the decision made by the Board and its Inspector was based on a fundamental misunderstanding of the facts on which they both purported to rely."

16. The actual wording of the Inspector's error is contained at para 7.2.29 of his Report, which is headed '*Impact on residential receptors'* and states, insofar as relevant, that:

> "The applicant cites precedent in the Board's decision to permission (sic) for wind energy development of this spatial extent and height in comparative areas, such as PA0032 (Yellow River Wind Farm, Co. Offaly) where there were c.200 houses within c. 1.13 km of a turbine. Extending the catchment slightly, as has been done in the Applicant's noise impact assessment, demonstrates the relatively densely populated nature of this part of rural county Meath, where 452no. sensitive receptors are identified by the Applicant within 1.31 km of the proposed turbines. I am not satisfied that the two areas are comparable."

2nd Ground: Inspector overstated number of homes within 1.31 km of a turbine

17. Thus, the second and also the key ground of challenge by the applicant to the Board's decision is the error in this part of the Inspector's Report, namely his reference at para 7.2.29 of his Report to there being 452 '*sensitive receptors'* (which term includes, but is not restricted to homes) within 1.31 km of the turbines on the proposed site at Castletownmoor, when in fact there are 251 homes within that area.

18. Having described the *admitted* error in the Inspector's Report and the *alleged* error regarding the characterisation of the

landscape of the relevant lands as '*hilly and flat farmland*', the next step for this Court is to analyse whether these errors are such as to entitle the applicant to an order to set aside the refusal of planning permission. While there are other grounds for challenge to the Board's decision, considered below, the focus of the applicant's oral submissions were almost exclusively on these two grounds and this is therefore the focus of this judgment.

The law

19. The judicial review of planning decisions in the Irish courts is a very common occurrence and there is no need in this judgment to analyse in any detail the extensive number of cases which deal with this issue. This Court proposes to instead adopt the succinct analysis of the nature of judicial review in a planning matters, as set out by Hedigan J. in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226 at para 8.2:

> "Judicial review is not available as a remedy to correct errors or to review decisions so as to render the High Court a Court of Appeal from the decisions complained of (see *State (Abenglen Properties) v. Dublin Corporation* [1984] I.R. 381). The system of judicial review is radically different from the system of appeals. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. When subjecting some administrative act or order to judicial review, the Court is concerned with its legality. On an appeal, the question is "right or wrong?" On review, the question is "lawful or unlawful?" (See D*unne v. Minister for Fisheries and Forestry* [1984] 1 I. R. 230, at p. 237). The nature of judicial review of expert bodies was addressed in *Henry Denny & sons (Ireland) Ltd. v. The Minister for Social Welfare* [1998] 1 I. R. 34, where Hamilton C. J. stated at pp. 37 & 38 that:
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> > 'It would be desirable to take this opportunity of expressing the view that the court should be slow to interfere with the decisions of expert administrative tribunals. Where conclusions are based upon an identifiable error of law or an unsustainable finding of fact by tribunals such conclusions must be corrected. Otherwise it should be recognised that tribunal's which have been given statutory tasks to perform and exercise their functions, as is now usually the case, with a high degree of expertise and provide coherent and balanced judgements on the evidence and arguments heard by them it should not be necessary for the courts to review their decisions by way of appeal or judicial review."
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> There is, moreover, a presumption that the decisions of a body such as An Bord Pleanála are valid until the contrary is shown. One must assume, in the absence of any evidence to the contrary, that statutory bodies such as the Board in this case, exercise their powers and discharge their functions in a lawful and proper manner (see *Lancefort Ltd v. An Bord Pleanála* [1998] IEHC199). The burden of proof of establishing any error of law or fundamental question of fact leading to an excess of jurisdiction, or of demonstrating such unreasonableness as flies in the face of fundamental reason and common sense, rests on the applicant in proceedings such as these. Once there is any reasonable basis upon which the planning authority or the Board can make a decision in favour of or against a planning application or appeal, or can attach a condition thereto, the Court has no jurisdiction to interfere (see *Weston Ltd. v. An Bord Pleanála* [2010] IEHC 255). An applicant may only challenge the Board's decision on irrationality grounds if there was no material before it capable of supporting its view (see *Harrington v. An Bord Pleanála* [2010] IEHC 428). Thus, the nature and scope of judicial review is a limited one. The court should exercise considerable judicial restraint in the application of review principles. If judges overreach or overcontrol, they commit an error which review has been designed to prevent. They usurp the jurisdiction of those to whom the specific power has been granted."

Summary of the applicable law as it applies to the present case

20. Summarising those principles as they apply to the present case therefore, this Court concludes that:

> • It is irrelevant that the applicant believes that, if the Board had not made the alleged error of categorising the land as overwhelmingly '*hilly and flat farmland'*, planning permission would have been granted. It is also irrelevant that the applicant believes that, if the Inspector had not referred to the incorrect number of sensitive receptors within 1.31 km of a turbine, planning permission would have been granted. This may be difficult for a disappointed applicant to hear. However the fact of the matter is that specialist administrative bodies, such as An Bord Pleanala, are entitled to make errors without their decision necessarily impacting upon the validity of the decision, even if where those errors impact upon the decision reached.
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> • This is because what judicial review is concerned with, is not correcting errors – the job of an appeal process is to correct incorrect decisions which are reached because of, *inter alia*, errors made by the decision maker. The job of judicial review is deciding if a decision, even if it is an incorrect decision, was lawful. If it is lawful that decision which could or should have been overturned on its merits on appeal will not be disturbed in a judicial review.
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> • It bears repeating the words of Hedigan J. that judicial review is a very limited jurisdiction. Considerable latitude is given to the decision maker, who is subject to judicial review, to apply their expertise in reaching the decision and the merits of their decision will not be examined. This is particularly important in specialist areas, and as is clear from this particular judicial review, the granting or refusal of wind farms is a highly specialised field of activity, with in this case 400 submissions to the Board including very detailed assessments running to hundreds of page, on noise, visual assessment, impact on habitats and archaeology, to name but a few.
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> • In the present context it means deciding whether there was any reasonable basis upon which the Board could make the decision it did, or deciding whether there was any material before the Board which was capable of supporting that decision. This is a very high threshold for an applicant to reach to be entitled to an order of *certiorari*.

Application of the law to the facts

21. The decision of the Board to reject the planning application was made on the 30th June, 2017. By way of background, this decision refers to Carlanstown, which is 1 kilometre from the Castletownmoor site and Kells which is 2.9 kilometres from that site and the decision states, insofar as relevant, that:

> "In coming to its decision, the Board had regard to the following […]

(c) the need to treat wind farm development in this area with particular sensitivity given the proximity of the development to a large number of houses located in the open countryside and within Carlanstown and in the nearby town of Kells;

(b) the location of the proposed development in an area with a history of settlement and an associated legacy of places and features of cultural importance from many historical periods;

(d) the character of the receiving landscape, including the contextual setting of this landscape for cultural heritage of international, national and regional importance […]

It is considered that a wind farm of the spatial extent and wind turbines of the height proposed would visually dominate this populated rural area, would seriously injure the amenities of property in the vicinity, would interfere with the character of the landscape and would not be in accordance with the overall development objectives of the Meath County Development Plan 2013 – 2019.

Furthermore, it is considered that the proposed development would not align with the Wind Energy Development Guidelines as this guidance document does not envisage the construction of wind farms of large spatial extent and generally does not envisage wind turbines of tall height within an area primarily characterised as a hilly and flat farmland landscape and in such proximity to high concentrations of dwellings. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

Is there any reasonable basis for, or any material supporting this decision?

22. As is clear from the foregoing analysis, the key question for this Court is whether there was any reasonable basis for the decision of the Board to refuse planning permission or whether there was any material supporting that decision before the Board.

23. Obviously when one is asking this question regarding material before the Board, one is asking whether there is any *correct* material before the Board which supported the decision, as distinct from material which is subject to error, such as para 7.2.29 of the Inspector's Report. In this respect, it is clear from the foregoing legal principles applicable to every judicial review, that even if there was inaccurate material before the Board, such as an error in the number of receptors within 1.31 km of the site, this will not vitiate the planning decision, provided that there was accurate material before the Board which supported its decision. This is because all that is required for a decision to be lawful is that there be *some* material (which is accurate) before the Board which supports its decision and not that every single piece of material that supports the decision is accurate.

24. On this basis, for this Court to reach a decision as to whether to grant *certiorari*, it is not required to consider the possible effect of the erroneous material, provided there was other accurate material before the Board supporting the decision, or that the Court could still conclude that there was still a reasonable basis for the decision of the Board despite the existence of this incorrect material.

25. It is nonetheless noteworthy that the accepted error, in overstating the number of sensitive receptors within 1.31 km of a turbine in this case, appears to be of little significance to the decision of the Board.

Significance of the admitted error to the Board's decision

26. The error regarding the number of sensitive receptors within 1.31 km of turbines seems to be of limited significance because the decision of the Board makes no reference to the number of houses or receptors within any radius of a turbine, let alone 1.31 km. Rather, the decision of the Board refers to settlements which are 1 km away (Carlanstown) and 2.9 km away (Kells) from the site. Thus, the specific error made by the Inspector seems to this Court to be of limited significance to the overall decision of the Board for the very reason that, in reaching its decision to refuse planning permission, reliance was not stated by the Board to be placed upon the criterion of the number of houses within 1.31 km. Rather reference was made to other factors, namely the proximity of two settlements, Carlanstown and Kells.

27. Furthermore, it is noteworthy that the EIS, prepared on behalf of the applicant, attaches no specific significance to this distance of 1.31 km. Rather the EIS prepared on behalf of the applicant, makes specific reference to 2-3 km being a relevant distance, since it states at para 4.11.1 that:

"The [Root Screen Analysis] also shows that 'open visibility' of the proposed wind farm reaches a critical threshold in this landscape at around 2–3 km. Thereafter, the turbines tend to become fully screened by intervening vegetation when viewed from within the lowland context. It also shows that there are rarely views of more than 10 turbines and much more commonly views of less than five turbines within the central study area."

The 'central study area' referenced in this section of the EIS is a radius of 5 km from the proposed development site boundaries. The 'study area' referenced in the EIS is a radius of 30 km from the proposed development site boundaries.

28. In addition, the Residential Amenity Assessment part of the EIS refers to a different radius again, since it provides at para 5 that:

"The aim of the residential visual amenity survey is to identify and predict visual effects on residential properties within a 1 km radius from the proposed Castletownmoor Wind Farm"

29. As regards the terms of the decision of the Board, as well as make any reference whatsoever to a radius 1.31 km (and the fact that it refers instead to Kells and Carlanstown), it is to noted that the decision makes no reference to any particular distance. The only reference in the decision to houses affected by the proposed development is to the fact that there are *'a large number of houses in the open countryside'*, the fact that the turbines would dominate *'this populated rural area'* and that the siting of the turbines is inappropriate *'in such proximity to high concentrations of dwellings.'*

30. Thus, it seems clear to this Court that the admitted error in the Inspector's Report is of very little significance to the Board's decision to refuse planning permission. No express reliance was placed upon it in the written decision of the Board and more significantly criteria, other than the erroneous criterion of the number of receptors within 1.31 km, were referenced by the Board.

Is there any reasonable basis or material for this aspect of the Board's decision despite the admitted error?

31. In any case, the crucial question for this Court in this judicial review, is not whether the error was a significant error (which would be an issue of significance if this were an appeal on the merits), but whether there was a reasonable basis for the Board making the foregoing statements in its decision or reaching the conclusions it reached, or whether there was any material before the Board supporting this aspect of the Board's decision and conclusion.

32. It seems clear to this Court that as the town of Carlanstown, with a population of over 600, is only 1 km away from the proposed development and the town of Kells, with a population of over 2,000, is only 2.9 km away, it was perfectly reasonable for the Board to make the statements it did and reach the conclusions it did in particular regarding the *'populated rural area'* and the *'high concentration of dwellings*' and to rely on these factors in reaching its decision to refuse planning permission.

33. In addition, as regards whether there was material before the Board to support its decision, it is the case that some of the material before the Board which supported these conclusions was supplied by the applicant itself. For example, at p. 23 of the Landscape and Visual Assessment of the EIS it is implicitly acknowledged that the site is populated *albeit* that while there is a reference to a 'low population density':

> "This settlement pattern has in some ways facilitated the wind farm proposal as it the allows a greater proportion of areas that are further than 500m from dwellings, which was one of the constraints originally applied to the search area. It also reflects the fact that the landscape within and around the site has a low population density according to the most recently published census results."

Thus, there was material for the Board to conclude in its decision that the site was in a *'populated rural area'*. In this regard, it is also relevant to note that the EIS does not suggest that the study area of a 30 km radius or the central study area of a 5 km radius is sparsely populated or remote, save in respect of the area of peatland, which is described in the EIS as *'more sparsely populated'*. However, as noted below this area of peatland makes up a small proportion of the central study area and an even smaller proportion of the study area.

34. In this context, it is also relevant to note that the Guidelines provide in relation to *'flat peatland'* that the *'evidence of human habitation is sparse'*. In contrast in *'hilly and flat farmland'* there is reference to *'farmsteads and houses are scattered throughout, as well as occasional villages and towns*'. Crucially, and bearing in mind this characterisation of *'hilly and flat farmland'* as having houses, villages and towns, the applicant's EIS makes it clear that in the context of the Guidelines, the *'criteria for the 'Hilly and Flat Farmland' and the 'Flat Peatland' landscape types are of most relevance'* (para 14.11.3.1) and that the 'vast majority of the 30 km radius study area is a farmed landscape' (para 14.7.3) which clearly falls within the *'hilly and flat farmland'* category. The applicant's own EIS therefore provides material for the Board to support its decision regarding the populated nature of the site.

35. Thus, it seems clear to this Court that, notwithstanding the admitted error in the Inspector's Report regarding the number of sensitive receptors within 1.31 km of a turbine, there was material before the Board which supports its conclusions that Kells and Carlanstown were nearby, that there were *'a large number of houses in the open countryside*', that it was a *'populated rural area'* and that there was a *'high concentrations of dwellings*.' Similarly this Court finds that the proximity of turbines to the said population was a reasonable basis upon which to reach its decision to refuse planning permission.

36. On this basis, this Court sees no reason to declare that this aspect of the decision making was unlawful and it therefore rejects the ground of challenge based on he admitted error in the Inspector's Report.

Wrong characterisation of the site

37. The other main ground of challenges by the applicant is that the lands were wrongly characterised. The decision of the Board states that the siting of the turbines in Castletownmoor would not align with the Guidelines which do not envisage wind turbines of a tall height within an area which is *'primarily characterised as a hilly and flat farmland landscape*'. It is common case that the turbines proposed for this development were of a tall height.

38. As to whether there was a reasonable basis for the Board reaching this conclusion or whether there was material before the Board supporting it, it seems clear that there was. Some of this material was also supplied in the applicant's own EIS. Paragraph 14.7.3 states:

> "The vast majority of the 30 km radius study area is a farmed landscape consisting of fields of crops and pasture that are defined by mixed species broadleaf hedgerows."

39. It is important to note that in other parts of the EIS that there are references to peatland e.g.

> "there are several areas of peatland" (para 14.7.3);
>
> "the site and its immediate environs are located within a landscape type from the Guidelines of both the 'Hilly and Flat Farmland' landscape type and 'Flat Peatland' landscape type from the Guidelines" (para 14.7.4.1)

40. Indeed, it is not surprising that there would be such references, since logic would dictate that the greater the emphasis in the EIS on the development site having *'flat peatland'*, the greater the chances of planning permission being granted, since the Guidelines make it clear that such sites were more suited to large wind farms with tall wind turbines, than *'hilly and flat farmland'* sites.

41. However, it is crucial to bear in mind that the function of this Court is not to determine whether the Board was correct to designate the lands as *'primarily characterised as a hilly and flat farmland landscape'* but rather whether there was any reasonable basis/any material before it, to reach this conclusion.

42. In this regard, the Guidelines themselves contain a reference to the possibility of there being two landscapes at play in one site. At p 47, the Guidelines state:

> "It is, however, common that a wind energy development is located in one landscape character type but is visible from another, for example, where the site comprises an unenclosed moorland ridge standing above a broad flat farmland. In such an instance, the entire visual unit should be taken into consideration. It will be necessary to decide whether the moorland ridge or the farmland might more strongly influence the approach."

43. Under s. 28(2) of the Planning and Development Act, 2000, the Board must have regard to, but is not bound by, this suggestion in the Guidelines. It is nonetheless relevant that the Guidelines recommend that the Board should decide whether in this instance '*hilly and flat farmland*' or '*flat peatland'* more strongly influence the approach of the Board to granting planning permission.

44. Based on the applicant's own submissions alone to the Board ('*the vast majority of the 30 km radius study area is a farmed landscape'*), it seems clear to this Court that there was material before the Board to enable it reach the conclusion that the site was '*primarily characterised as a hilly and flat farmland landscape'* or to put it another way, that *'hilly and flat farmland'* more strongly influenced the approach of the Board to granting planning permission, than '*flat peatland'*.

45. Indeed, although not determinative of this Court's decision (as no formal percentage or measurement was provided), this Court was also shown a map of the relevant study area of a radius of 30 km and the smaller central study area of a 5 km radius (a map entitled '*UNESCO World Heritage Sites (WHS) Candidate WHS and National Monuments'*) which was submitted as part of the applicant's EIS. Based on that map, the area of peatland, as deciphered from a map entitled *'CORINE Land Cover (2012)*' also submitted with the EIS, seemed to this Court to make up an area of approximately 5% of that smaller central study area.

Other grounds of challenge
46. The vast majority of the applicant's oral submissions in this case dealt with his arguments under the 'land characterisation' heading and the error regarding the number of sensitive receptors within 1.31 km of a turbine, the first two grounds of challenge. The Court has fully taken into account all of the other grounds set out by the applicant, but as it only referred in passing to these other grounds in oral submissions, and in some cases not at all, this Court will briefly deal with these grounds.

3rd Ground: reference by Inspector to examples in the Guidelines
47. The planning permission sought by the applicant was for 25 wind turbines. The Guidelines stated at Table 1 of Chapter 6 that the spatial extent, i.e. the size of wind farms which was recommended by the Guidelines was 'large' for '*flat peatland'* and 'generally limited to small wind energy developments' for '*hilly and flat farmland'*. Against this background, the applicant complains that at para 7.2.5. of the Inspector's Report, the Inspector specifically refers to two figures in the Guidelines, which apparently puts a figure on the meaning of 'small' and 'large', which figure is less than the 25 wind turbines sought by the applicant. This is because at p. 53 of the Guidelines, there is a photograph of a wind farm on a site, figure 2(a), which has fifteen wind turbines and has the following caption:

> "Wind energy development of large spatial extent – this example is inappropriate given the scale of this landscape."

48. Figure 2(b) has the same scene as Figure 2(a) but with seven wind turbines and it has the following caption:

> "Wind energy development of small spatial extent – this example is appropriate given the scale of this landscape"

49. Accordingly, the applicant complains that, by referring to figures in the Guidelines which showed a photograph of a 'small' wind farm (which had 7 wind turbines on it) and also a photograph of a 'large' wind farm (which had 15 wind turbines on it), the Inspector (and the Board which considered the Inspector's Report) concluded that the Guidelines do not permit a large wind farm of 25 wind turbines within a hilly and flat farmland area by virtue of the Inspector's reference to the two figures. The applicant puts the matter as follows:

> "the Inspector relied exclusively on figures 2(a) and (b) of the WEDG (at page 53 WEDG) **as being determinative** [*emphasis added*] of the spatial extent of a proposed wind farm, by reference alone to the number of turbines visible in those images, notwithstanding that the inspector had simultaneously noted that the said figures "provide an **indication** [*emphasis added*] of what constitutes large (15 no.) and small (7no.) spatial extent for wind energy development within the hilly and flat farmland landscape context"

50. The relevant reference by the Inspector is in the following terms in his Report at para 7.2.5:

> "For *Flat and Hilly Farmland* medium height is typically preferred under WEDG, although the Board will be aware the tall turbines may also be acceptable. But it also advises that the spatial extent be limited to small wind energy developments and that the establishment of sufficient distance from buildings likely to be critical to avoid dominance by wind energy development. Figures 2 (a) and (b) of the WEDG (p. 53) provide an indication of what constitutes large (15no.) and small (7no.) spatial extent for wind energy development within the hilly and flat farmland landscape context. It is therefore evident that the proposed wind farm […] can still be defined as of large spatial extent under the WEDG."

51. This Court does not accept that the applicant has put forward a sustainable argument to invalidate the planning decision under this heading. The Inspector simply referenced examples given by the Guidelines and does no more than that. The reference by an Inspector to examples from the Guidelines cannot make a planning decision unlawful, in this Court's view. There is no evidence that the Inspector, let alone the Board, regarded these examples as being other than indicative examples of large and small wind farms and certainly there is no evidence that these examples were determinative of the planning decision taken. The giving of examples from the Guidelines of large and small wind farms by the Inspector is a long way, in this Court's view, from producing evidence that there was no reasonable basis for the Board's decision to reject planning permission for this particular development (which happened to be for 25 wind turbines).

4th Ground: large wind farm and tall turbines contrary to Guidelines?
52. The next ground of challenge by the applicant is that the statement in the Inspector's Report that a large wind farm and tall turbines are contrary to the Guidelines renders the planning decision unlawful.

53. This ground is based on the fact that at para 7.2.6 of his Report, the Inspector states:

> "I am satisfied that the large spatial extent of the proposed wind energy development and tall height of the proposed turbines is contrary to the recommended approach to wind energy development in hilly and flat landscape context under the WEDG."

54. The applicant alleges that this renders the decision unlawful, presumably on the basis that there was no reasonable basis for the Inspector to reach this conclusion or no material before him which supports this conclusion.

55. Again, this Court is not concerned with whether the Inspector or the Board reached the correct decision, but rather whether there was any reasonable basis for its conclusion. As previously noted there was a reasonable basis for the Board to conclude that the site was overwhelmingly a '*hilly and flat farmland'* landscape. Once this conclusion was reached, the Guidelines provide, at Table 1

of Chapter 6, that the recommended approach is to have wind farms which are 'generally limited to small' and that 'medium [height turbines] typically [are] preferred but tall may be acceptable.'

56. On this basis, this Court finds that there was a reasonable basis for the Inspector to conclude (and for the Board to rely on that conclusion) that a large wind farm (of 25 turbines) with tall turbines (being 169 metres) is contrary to the recommended approach. The fact that the Guidelines provide that tall turbines *may* be acceptable does not alter this conclusion, since the test is simply whether there was any reasonable basis for the conclusion, not whether a contrary conclusion was possible (which it was). Indeed, it is noteworthy that the Inspector specifically refers to the fact that under the Guidelines the Board may approve tall turbines, since at para 7.2.5, he states:

> "For Flat and Hilly Farmland medium height is typically preferred under WEDG, although the board will be aware that tall turbines may also be acceptable."

5th Ground: Inspector's assessment of photomontages

57. The fifth ground of challenge by the applicant is that the Inspector's Report, in considering the Residential Visual Impact Assessment, erred in concluding that the:

> "height and blade spread of the proposed turbines and the photomontage selected are not those that would be experienced by the nearest cluster of dwellings".

In essence, the applicant takes issue with what the Inspector says about the photomontages and the reliance that he places upon them. The Inspector, at para 7.2.31 of his Report states:

> "I note the Residential Visual Amenity Assessment submitted by the applicant, but notwithstanding its systematic and ostensibly objective approach, I am not convinced by it. In particular, I note that it does not expressly take into account the height and blade spread of the proposed turbines and that the photomontage views selected are not those that would be experienced by the nearest cluster of dwellings (e.g., in particular nos. 156 – 160 and 229 – 269)."

58. The test for challenging the decision of the Board, which allegedly relied on this conclusion, is whether there is any reasonable basis for Inspector's statements and conclusions in this regard. The applicant appears to be taking issue with the subjective assessment of the Inspector that the height and blade spread was not adequately represented in the photomontages. However, the Inspector made a site visit and he concluded that the photomontages of the foregoing dwellings did not accurately represent their views of the turbines. The onus is on the applicant to provide evidence that there was no reasonable basis for this conclusion, which was reached by the Inspector after an actual inspection of the site, as distinct from a photomontage. Furthermore, this assessment by the Inspector is very subjective, since the essential question is how acceptable is the impact of the proposed development on the view from certain homes. Because of the subjective nature of this aspect of the Inspector's conclusion, it poses a particular challenge for the applicant to argue that the wrong conclusion was reached in such a manner as to render the planning decision unlawful. In any case no evidence has been provided to this Court that this conclusion could not have been reasonably reached.

59. It is also relevant to note that the houses referred to by the Inspector, nos. 156-160 and nos. 229-269 are all within 1 km of a turbine, since this was the parameter for the Residential Visual Amenity Assessment section of the EIS. However, no photomontage was provided in the EIS of the effect on some of these homes and some of them are only 500 metres from a turbine. So the Inspector was, at it happens, making a perfectly valid point that there was no photomontage of certain houses, some of which were only 500 metres from the turbines.

60. Accordingly, this Court rejects this ground for the challenge to the Board's decision.

6th Ground: alleged defect in a submission by another party- the CAAS Report

61. The next ground of challenge is that at para 3.1 of his Report, the Inspector relied for its review of landscape and visual impact, on the findings made in the *'CAAS Report'* which was contained in a submission from Meath County Council to the Board. The CAAS Report dealt with the effect of the proposed wind farm on certain designated views in County Meath. In particular, the applicant complains that the CAAS Report was not prepared using industry standard guidelines - the UK's Landscape Institute Guidelines for Landscape and Visual Impact Assessment. However, the CAAS Report was provided to the applicant on 7th October, 2016, and by letter of 25th November, 2016, the applicant was advised that there was not going to be an oral hearing in relation to the application and was invited to make any further submissions. By letter dated 28th November, 2016, the applicant replied that it had nothing further to add and from that date until the decision of the Board on the 30th June, 2017, no comment was made by the applicant regarding the CAAS Report, which it must be recalled has simply the status of a submission of another interested party to the planning process.

62. Despite making no comment or complaint about the CAAS Report before the decision of the Board, the applicant is now seeking in the High Court, to raise *'an alleged irregularity which could have been brought to the attention of all concerned at any time prior to the granting of permission*' [or in this case the refusal of permission] in the words of Keane CJ in *Lancefort v. An Bord Pleanála (No 2)* [1990] IR 270 at 315. In reliance on Keane CJ's judgment in that case, this Court concludes that it is not open to the applicant to raise this matter in judicial review proceedings, which it could have raised as part of the planning process.

7th Ground: cultural and heritage assessment deals only with visual impact

63. The applicant argues that the risk of the proposed development to the heritage and cultural value of two particular heritage sites, the Hill of Tara and Loughcrew, was based on a visual impact analysis rather than the broader methodology set out in the International Council on Monuments and Sites ("ICOMOS") Guidance on Heritage Impact Assessments for Cultural World Heritage Properties. Thus, it is argued the Inspector conflated *'visual impact'* assessment regarding a particular heritage site with *'impact on the cultural and heritage value'* of that heritage site.

64. In *O'Brien v. An Bord Pleanála* [2017] IEHC 733 at para 41, Costello J. stated in relation to a planning decision before An Bord Pleanála, that:

> "The issue of the sufficiency of the information or the validity of a methodology adopted by an expert for a party to the appeal are matters solely for the Board."

65. On this basis, this Court cannot see how the methodology used by the Board to assess the effect of the development on cultural and heritage sites could be such as to affect the lawfulness of the refusal of planning permission. To put the matter another way,

there was some material before Board to support its determination that that there was a negative impact upon cultural and heritage sites, namely the visual impact, albeit that the applicant would have preferred if the Board had also considered other material based on the methodology set out in the ICOMOS Guidelines.

66. For this reason, and notwithstanding the applicant's preference, this ground of challenge to the Board's decision is rejected.

8th Ground: Breach of s. 172(1G)
67. The applicant alleges in its Statement of Grounds that the Board breached s. 172(1G) of the Planning and Development Act, 2000. However, no particulars were provided as to how this section was breached. Indeed, this Court cannot recall any reference whatsoever being made to this ground in the oral submissions and accordingly, this Court cannot base an order for *certiorari* on this ground.

Conclusion
68. For the reasons set out above, this Court refuses to grant the applicant an order for *certiorari* of the Board's decision to refuse planning permission for the wind farm development.