

THE HIGH COURT

JUDICIAL REVIEW

2016/920 JR

Between

ELEMENT POWER IRELAND LTD

Applicant

and –

AN BORD PLEANÁLA

Respondent

Judgment of Mr Justice Robert Haughton delivered the 28th day of September, 2017.

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Introduction

1. In these proceedings the applicant seeks an order of certiorari quashing the decision (Ref. PL09.PA0041) of the respondent ("the Board") dated 12 October, 2016, refusing to grant permission to the applicant for development comprising Maighne Wind farm consisting of up to 47 wind turbines, 1 electricity substation and associated works and/or a declaration that the Board acted *ultra vires* in refusing permission on the basis of the absence of any national wind energy strategy with a spatial dimension or of wind energy strategies at local level. The applicant further seeks an order remitting the planning application to the Board.

Background Facts

2. The history of the planning application is that the Board decided by order dated 24, March 2015, that the proposed development would be a strategic infrastructure within the meaning of section 37A of the Planning and Development Act, 2000 (as amended) ("the 2000 Act"). On 9 April, 2015, the applicant lodged the application with the Board. The main elements of the proposal include –

- the erection of 47 turbines in five distinct clusters with an overall tip height of 169m (maximum);
- 31km of new site access tracks with associated drainage;
- upgrade of 10km of existing tracks;
- temporary alterations to public roads to facilitate delivery of turbines;
- provision of 75km of medium voltage (33kV) underground cabling between the proposed turbines and the proposed substation, which 36km will be laid within the public roadway;

- a proposed grid connection;
- installation of joint bays along cable routes; and
- underground communication cables.

Of the 47 turbines, it was proposed that 45 of them would be situated in north-west County Kildare, and two of the turbines in the most northerly cluster would be situated within County Meath. The area involved covers some 1,389 hectares of generally flat or gently sloping land. An Environmental Impact Statement and a Natura Impact Statement accompanied the application.

3. The application was the subject of public notification and was sent to the required prescribed bodies, inviting submissions. In total some 808 submissions were received. The applicant issued its response to the submissions on 24 September, 2015. The Board required the applicant to submit a further public notice advising of a further opportunity to make submissions in response to the further information furnished by the applicant. A further public notice was published on 28 October, 2015.

4. No oral hearing was conducted in relation to the proposal. A report was prepared by the Board's inspector dated 4 August, 2016, running to 361 pages, which recommended refusal of the permission giving 12 reasons and considerations for her recommendations. The senior inspector's report included a number of appendices which included at appendix 1 an Assisting Report of an inspector dealing with noise and vibration, shadow flicker, traffic and transportation, health and safety issues and property values. Further reference to some of the submissions and the inspectors' reports will be made later in this judgement.

5. The Board issued a direction on 6 October, 2016, and its decision on 12 October, 2016, deciding to refuse permission for the proposed development giving three reasons as follows: –

"1. It is considered that in the absence of any national wind energy strategy with a spatial dimension or of wind energy strategies at local level in County Kildare and County Meath, the development of a large-scale wind farm comprising 47 number turbines in a number of clusters spread over an extensive geographical area straddling the boundary between the two counties would be premature pending the adoption of such strategies and would represent an undesirable precedent that could undermine any future wind energy strategy for the area. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.

2. The Board considered that the widely dispersed cluster-based layout adopted in the proposed development would have inevitable adverse effects including a disproportionately large visual envelope, the need for extensive underground cabling in poor quality minor roads and undue proximity to areas of sensitivity from a heritage or residential point of view. The Board considered that in a situation where such adverse effects were absent the energy output from the proposed development might be realised in a more efficient and less intrusive manner by a more spatially concentrated development. The Board determined that the proposed development would, therefore, be contrary to the proper planning and sustainable development of the area.

3. Having regard to the nature, structure and condition of the existing public road network serving the development, which includes substantial sections of substandard legacy roads, and to the extensive cable trenching works proposed it is considered that the proposed development would have significant adverse effects on the long-term structural integrity of significant elements of the local road network, is thereby likely to give rise to the creation of traffic hazards and to potentially increased maintenance costs to the local authority. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

The Board decided not to accept the seven further reasons given by the inspector for refusing permission, and set out its further observations in that regard.

6. The applicant was granted leave to seek judicial review by order of Humphreys J. made on 5 December, 2016. The applicant challenges the validity of all three reasons, but asserts that if the court finds the first reason to be invalid that this taints the other two reasons and/or the overall decision of the Board. In its Statement of Opposition, the Board contends for the validity of all three reasons and asserts that even if the first reason were to be held to be invalid this would not invalidate the balance of the decision or reasons 2 and 3.

Reason 1

7. The principal issue raised in these proceedings is whether the Board may lawfully refuse consent for a proposed development on the basis that it is regarded as premature in the absence of national or local strategies affecting the sector in which the development is intended to function. The applicant also pleads that the first reason is too vague and unclear to be adequate and/or intelligible.

8. The applicant's core case is that the Board acted *ultra vires* and/or abdicated responsibility and fettered its discretion in rejecting the application in the alleged absence of national wind energy strategy with a spatial dimension and wind energy strategies at local level. It pleads that in so doing it took into account an irrelevant consideration, and that there is no provision in the 2000 Act which permits the Board to reject and/or defer consideration of a planning application for a wind farm development on the basis of alleged absence of national and/or local wind energy strategies. Insofar as there are any existing national or local wind energy strategies, it is stated that these support the proposed development and the Board failed to have adequate or proper regard to them, or to afford them sufficient weight. In order to better understand the applicant's arguments and the Board's response it is necessary to refer to further relevant material.

9. The inspector in her report to the Board referred to submissions on the basis of an alleged policy vacuum in relation to national and local wind energy strategy with a spatial dimension. She referred particularly to: –

(1) revisions to the 2006 Wind Energy Planning Guidelines ("2006 Guidelines") which were proposed by the then Department of Communications, Energy and Natural Resources (DEHLG) which were then pending;

(2) the draft Strategic Environmental Assessment Scoping Report for Renewable Electricity Policy and Development Framework (2016) ("the 2016 Framework Report") prepared by the then Department of Communications, Energy and Natural Resources ("DCENR"), which was then the subject of scoping for SEA purposes; and

(3) local policies in the development plans of Kildare County Council and Meath County Council.

Each of these will be addressed further below.

10. The inspector's recommendation in relation to Reason 1 and the policy vacuum adopted slightly different wording: –

"1. Having regard to the commitment by the Government to adopt a framework document containing a national wind energy strategy with a spatial dimension, to the commitment of the Planning Authorities in the Kildare and Meath County Development Plans for the area to adopt a wind energy strategy for their respective areas on foot of the adoption of such a framework document, and to the provision in the Transport Strategy for the Greater Dublin Area (2016)...it is considered that the development of a large-scale wind farm, with a blade tip height of 169m and 47 no. turbines spread over an extensive geographical area, would, in the absence of a wind energy strategy for the area, be premature pending the adoption of such a strategy and would constitute piecemeal development which would create an undesirable precedent and would undermine any future wind energy strategy for the area. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area. ".

2006 Wind Energy Planning Guidelines

11. The 2006 Guidelines were issued by the Minister pursuant to section 28 of the 2000 Act which, so far as relevant, provides:

"(1) The Minister may, at any time, issue guidelines to planning authorities regarding any of their functions under this Act and planning authorities shall have regard to those guidelines in the performance of their functions.

(1C) Guidelines to which subsection (1) relates may contain specific planning policy requirements that, notwithstanding subsection (1), are required to be applied by planning authorities and the Board in the performance of their functions.

(2) Where applicable, the Board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions."

12. The 2006 Guidelines outline their purpose and status at paragraph 1.1: –

"These Guidelines offer advice to planning authorities and planning for wind energy through the development plan process and in determining applications for planning permission. The guidelines are also intended to ensure a consistency of approach throughout the country in the identification of suitable locations for wind farm energy development and the treatment of planning applications for wind energy developments. They should also be of assistance to developers and the wider public in considering wind energy development."

13. They apply only to "land use and environmental issues related to onshore wind energy". Section 1.2 sets out the "Policy Context" and the opening paragraph reads:

"The development of renewable energy sources, together with measures aimed at a reduction and more efficient use of energy, are priorities, nationally and at European level, on both environmental and energy policy grounds. The implementation of renewable energy policies must also have regard for the environment. Specifically, there is a legal requirement to integrate the conservation and sustainable use of biological diversity, manifest in Ireland's ratification of the Convention on Biological Diversity and the binding requirements of the EU Directives on Birds and Habitats, into all sectoral guidance, plans and policies."

14. Chapter 3 is concerned with "Wind Energy and the Development Plan" and consists of advice to local authorities on the incorporation into their development plans of policies and objectives in relation to wind energy development and the matters that it will take into account in assessing planning applications for specific wind energy development proposals. In section 3.1 it is stated that the development plan "must achieve a reasonable balance between responding to overall Government Policy on renewable energy and enabling the wind energy resources of the planning authority's area to be harnessed in a manner that is consistent with proper planning and sustainable development". It then states –

"The assessment of individual wind energy development proposals needs to be conducted within the context of a "plan-led" approach. This involves identifying areas considered suitable or unsuitable for wind energy development. These areas should then be set out in the development plan in order to provide clarity for developers, the planning authority, and the public."

Section 3.4 advises that the development plan should set out policies and objectives supportive of wind energy as a renewable energy source, and maximising potential within the area "commensurate with supporting development that is consistent with proper planning and sustainable development", and advised *inter alia* –

- the identification on development plan maps of the key areas within the planning authority's functional area where there is significant wind energy potential and where, subject to criteria such as design and landscape planning, natural heritage, environmental and amenity considerations, wind energy development will be acceptable in principle;

- the specific criteria for wind energy development that the planning authority will take into account when considering any wind energy or related proposals in the key areas identified, based on the recommended siting and design criteria referred to in these guidelines. Wind energy project developers, the public and other interested parties require a clear framework to indicate where wind energy development should locate, and what factors will be taken into consideration in dealing with such proposals".

15. In an affidavit sworn by Mr Kevin O'Donovan, a Director of the applicant, on 5 December, 2016, he states –

"32. On 11 December 2013, the then DoECLG published Proposed Revisions to Wind Energy Development Guidelines 2006. The revisions documents said it was to be a targeted review of its Wind Energy Development Guidelines in relation to noise, proximity and shadow flicker. It further said that it was proposed to update the relevant sections of the existing Guidelines on these specific issues. Written submissions were invited on same...

33. It is understood that there were substantial submissions received from the public relating to the revisions to the guidelines. However I say and believe and have been advised that it is unclear when any such Revised Guidelines may be adopted, and understand and have been advised that they should have not been of any relevance to the Board's decision.

34. If the Board's decision is not intended to refer to the Revised Guidelines, then the only other relevant national strategy it could be referring to is the Framework Plan for Renewable Energy/Electricity Policy...."

Draft Strategic Environmental Assessment Scoping Report for Renewable Electricity Policy and Development Framework (2016) ("the 2016 Framework Report")

16. In section 8.1 of the inspector's report there is a review of national energy policy, culminating with reference to the 2016 Framework Report. The inspector first refers to the government issuing an Energy White Paper in 2007, in response to the Kyoto Protocol, "Delivering a Sustainable Energy Future for Ireland 2007 – 2020", setting a target of 33% of electricity to be produced from renewable generation by 2020. She notes that this is updated by a new White Paper on 16 December, 2015, entitled "Transition to a Low Carbon Energy Future 2015-2030". She refers to EU Directive 2009/28/EC which promoted and set out new climate and energy targets for 2020 (20% reduction in greenhouse gas emissions across the EU, 20% increase in energy efficiency, and 20% energy consumption from renewable resources), and the adoption, in accordance with Article 4 of the Directive of the National Renewable Energy Action Plan 2010 (NREAP) setting out Ireland's strategic approach to achieving its targets. NREAP set out an Action Plan setting a target of 40% of electrical consumption from renewable resources by 2020, and initiated "Gate 3" as a means of rolling out and implementing renewable energy grid connection offers in batches, and initiated 'REFIT'(Renewable Energy Feed in Tariff), a financial incentive scheme to encourage investment in renewable energy. The most recent scheme, REFIT 2, operated from March 2012 – December 2015. The inspector also notes –

- The EU Energy Roadmap 2011-2052 to further increase renewable energy deployment and reduce greenhouse gas emissions
- Strategy for Renewable Energy 2012-2020 setting out strategic goals and specific actions for developing sources of renewable energy
- Government Policy Statement on the Strategic Importance of Transmission and Other Energy Infrastructure, July 2012, reaffirming the need for development and renewal of energy networks
- EU Climate and Energy Policy Statement – Growth Strategy to 2030, in which the EU Council Agreed new legally binding EU wide targets for reduction of greenhouse gases by 40% by 2030
- Green Paper on Energy Policy (2014) launched by DCENR as a public consultation process on the future of energy policy. The inspector noted that the Department's website indicated that it had established the need for "a Renewable Electricity Policy and Development Framework" and greater community involvement and in-depth community consultation in relevant projects
- United Nations Framework Convention on Climate Change (2015) (Paris)
- White Paper – Transition to a Low Carbon Energy Future for Ireland 2015-2030 – a complete update on energy policy from now until 2030, incorporating the 40% target, and new targets agreed in Paris (2015), with emphasis on embracing new technologies, and favouring consensus approach and community participation. It anticipated publication of a framework document on renewable energy policy
- Climate Action and Low Carbon Development Bill 2015, intended to provide for a national low carbon mitigation plan
- Grid 25 and Review of Grid 25 - a strategy for development of Ireland's electricity grid. The Review of Grid 25 lodged on 27 March, 2015, by Eirgrid sought public submissions on a revised strategy.

17. In relation to the 2016 Framework Report the inspector stated at paragraph 8.1.12 –

"The Draft scoping report in connection with an SEA of the proposed Renewable Electricity Policy and Development Framework document outlines a process to identify potentially suitable land areas for large-scale generation of on-shore renewable electricity, including wind. It has been published for consultation, with a closing date for receipt of submissions of 22/04/16. The purpose of the proposed Framework is to ensure that Ireland meets its future needs for renewable electricity, in a sustainable manner, compatible with environmental and cultural heritage, landscape and amenity considerations. It will set out policy in respect of environmental considerations, community engagement and in relation to potential, future export of renewable electricity, and will seek to broadly identify suitable areas for large-scale projects (over 50MW) of this nature can be developed. It is stated that these can subsequently be incorporated into a revised NSS, Regional Guidelines and development plans, having regard to the considerations of amenity, heritage and efficacy. It would also supplement the guidance contained in the wind energy Development guidelines for Planning Authorities.

The existing system for planning permission, (including EIA) will remain unchanged for such projects, but the Framework will provide guidance to the Board, the P.A.s, developers and the public. An SEA is mandatory for the Framework policy and the draft policy will also be subject to a separate AA process. It is stated that *"following consideration of the submissions made in response to an initial consultation, the Minister has decided to formulate a Renewable Electricity Policy and Development Framework (with a spatial dimension), replacing the previous approach."*

18. In paragraph 35 of his said affidavit Mr O'Donovan observes –

"35. It appears that this Framework is for renewable energy in general and not specifically wind and there does not appear to be any clarity on when it might be adopted. It appears that significant further steps are required including an Appropriate Assessment of the plan. Its statutory status is unclear and it says nothing about pending planning applications. It is therefore not known on what basis the Board took them into account is unknown."

19. This Plan designates all lands outside of settlement boundaries as un-zoned white lands, for which there are no zoning objectives. Chapter 8 headed "Energy and Communications" contains policies and objectives relating to renewable energy, including wind energy development. It recognises that areas in close proximity to grid connections and outside designated heritage sites may be suitable locations for the provision of wind energy. The inspector's report identifies relevant policies in this Plan to include –

WE 1 – to have regard to the Wind Energy Development Guidelines for P.A.s 2006 in assessing all planning applications for wind farms.

WE 2 – to encourage the development of wind energy in suitable locations in an environmentally sustainable manner and in accordance with Government policy.

WE 3 – to ensure that the assessment of wind energy development proposals will have regard to certain matters such as

- the sensitivity of the landscape;
- the visual impact on protected views, prospects, scenic routes and local visual impact;
- the impact on nature conservation designations, archaeological areas and historic structures, public rights of way and walking routes;
- local environmental impacts of associated development such as access roads, plant and grid connection;
- the scale, size and layout of the project, any cumulative effects due to other projects;
- the impact of the proposed development on protected bird and mammal species.

ENO 1 – to examine the possibility of designating appropriate areas of the county as being suitable for the production of wind energy.

Also relevant is Objective ENO 2 - "To prepare and implement an Energy Strategy, as a support to a structured response to energy cost changes and to work with central government to reduce market volatility. This could then assist community stakeholders and the renewable energy sector to cooperate in developing appropriate projects of sufficient scale with a stable demand and thereby attract employment investment."

20. At page 192 of the inspector's report it is stated –

"The [Planning Authority] report on the current application provides some additional relevant information regarding ENO 1. It is stated: –

"As per objective ENO1 above, the Council commenced preliminary work to inform the preparation of a Wind Energy Strategy in 2013. Agreement to progress a variation of the County Development Plan 2011–2017 to include public consultation and involvement from prescribed bodies and the general public was agreed by full Council. However, in 2013, all Councils were advised by the DoECLG in circular PL2013 to defer the completion of such strategies until (1) the policy review of the said Department's Wind energy Development guidelines is complete and (2) until the DoCENR completes the "Renewable Energy Export Policy and Development Framework". The Council is awaiting finalised guidelines to facilitate completion of the Draft Wind Strategy. Once complete, and adopted as a variation to the CDP, the Kildare 09.PA0041 An Bord Pleanála Page 193 of 361 Wind Energy Strategy will establish the detailed local planning policy framework for wind energy in the County and should inform planning applications in this area."

21. Mr O'Donovan in his said affidavit comments on Circular PL2013: –

"37. This Circular does not suggest (and I say and believe and have been advised it could not lawfully suggest) that the determination of applications for windfarms such as by the Applicant should be suspended pending the adoption of such guidelines or strategies."

Meath County Development Plan 2013 – 2019

22. As two of the proposed turbines are located just within County Meath, relevant parts of this Plan were also considered by the inspector who summarised as follows at para 8.3.2: –

"Chapter 8 contains policies relating to Energy, including Renewable energy. Meath Co. Co. is committed to developing a more diverse range of energy sources (8.1.3). The relevant policies which facilitate energy production and in particular those from renewable sources include EC POL1, EC POL2, EC POL3 and EC POL4. Policy EC POL13 seeks to ensure that the energy transmission infrastructure network follows best practice with regard to siting and design. Policy ECPOL 20 encourages the development of Wind Energy with regard to Government policy having regard to Landscape Character Assessment and the Wind Energy Guidelines. Policy ECPOL21 supports the preparation of a Study on Wind Energy potential by local authorities jointly in the Greater Dublin Area.

Appendix 7 contains the Meath Landscape Character Assessment. The 2 no. proposed turbines are located within the Lowland Areas and LCA6 - Central Lowlands - This LCA has a Landscape Value that is 'High', a Landscape Sensitivity that is 'Medium' and a Landscape Importance that is 'Regional'. It is stated that the LCA has low potential to accommodate wind energy due to the high number of receptors but a medium potential capacity to accommodate single turbines because extensive views can be more easily screened by vegetation.

Protected Views – there are 2 Protected Views in the vicinity of the Royal Canal. No. 56 at Boolykeagh (Regional significance) and No. 83 at Blackshade Bridge (local significance).

Protected Structures – there are a number of Protected Structures within Longwood village (which is also an ACA) and forming part of the Royal Canal."

Inspectors reasoning for recommending refusal under Reason 1

23. In section 9.1.2 of her report the inspector observes –

“... It is clear that Ireland’s climate and energy policies not only support, but are heavily reliant on, renewable energy sources, including wind energy. As such, the proposed development, which would generate up to 125MW of renewable electricity is generally in accordance with these policies. The applicant has placed much weight on compliance with this policy framework and the need to achieve the legally binding targets in its justification of the need for the development. A significant number of third-party observers have, however, raised questions over capacity issues and the spatial dimension.”

24. In section 9.1.3 the inspection addresses “Land-use policy and energy-related policies with a spatial dimension”, and goes on to deal with “Policy Vacuum” in section 9.1.4, it is necessary to quote these in full because they explain the inspector’s reasoning which in large part was adopted by the Board in framing Reason 1: –

“9.1.3 Land-use policy and energy-related policies with a spatial dimension

Current (adopted) energy policy with a land-use or spatial dimension is largely composed of the Wind Energy Guidelines for Planning Authorities 2006, the Regional Planning Guidelines for the GDA 2010-2022, Grid25 (2008) and the policies contained in the Kildare County Development Plan (2011-2017) and in the Meath County Development Plan (2013-2019). National energy policy generally acknowledges the need for spatial plans for wind energy development, or wind energy strategies. The NREAP submission to the EU Commission states that:-

“The [Wind Energy] Guidelines recommend an approach which seeks to identify within the development plan process, key areas where wind energy resources are good and capable of exploitation in a manner consistent with proper planning and sustainable development, having due regard to key environmental, landscape, technical and economic considerations. This approach is intended to facilitate a consistency of approach by planning authorities, both in identifying areas suitable for wind energy development and having regard to the potential impacts, inter alia, on nature and diversity.”

The Regional Planning Guidelines generally reflect the policy statements contained in Grid 25 to the effect that whilst Dublin and the East Region have the highest population density, levels of economic activity and hence, demand, it does not necessarily have the “greatest renewable generation potential”. As such, it is anticipated that the strengthening of the network will facilitate this demand being met by renewable powered generators located mainly in the West of the country. Policy PIR34 recommends that a study be undertaken on wind energy potential by local authorities jointly in the GDA, “focussing on suitable areas for larger scale wind energy projects...with the outcome of regionally consistent new land-use policies and objectives.”

However, no such strategies/plans have been adopted for the area in which the proposed wind farm is to be placed. Kildare and Meath County Councils (respectively) had embarked, in late 2013, on the development of Wind Energy Strategies for their respective areas, with the intention of varying their respective Development Plans to incorporate strategies which would have established a detailed local planning policy framework and identified suitable areas for the location of wind energy development. In the meantime, a Targeted Review of the Wind Energy Guidelines, in relation to Proximity, Noise and Shadow Flicker, was published in December 2013 for consultation. Prior to adoption of any such local strategies, a Circular was issued by the Department of Environment, Community and Local Government (PL20-13) instructing all local authorities to suspend the development of such strategies pending the adoption of the revised Wind Energy Guidelines and the adoption of a Renewable Energy Policy & Development Framework document by the DoCENR. However, these revisions have not been adopted and the 2006 Guidelines remain in place. More recently, progress has been made towards the development of a ‘framework document’ in that the Draft Strategic Environmental Assessment of Scoping Report for a Renewable Electricity Policy and Development Framework was published for consultation at the end of 2016. These policy documents, once finalised and adopted, will enable wind energy strategies with a spatial dimension to be adopted for the area as well as clearer guidance on the issues of proximity, noise and shadow flicker, which will inform the development of such strategies.

9.1.4 Policy Vacuum

Kildare County Council and the majority of the third party observers have raised serious concerns regarding the grant of planning permission for a large scale wind energy development such as that proposed, in the absence of a wind energy strategy, (with spatial dimension), for the area and prior to the adoption of the revised WE guidelines, as the current guidelines were considered to be outdated. Kildare Wind Energy Committee, in its observation on the current application, advised that this Sub-Committee of the Council had been formed in recognition of the perceived policy vacuum that currently exists in respect of wind energy development in the area. It was pointed out that large scale wind energy development proposals for the Midlands had emerged before local authorities in the region had had an opportunity to formulate strategies based on plan-led analysis. It was further acknowledged that at the time that the current Development Plan WE policies had been formulated, it had not been anticipated that there was a likely prospect of the very tall turbines being erected due to the relatively low level of wind strength in Co. Kildare. Furthermore, it is pointed out that the current Development Plan policies are based on the 2006 WE Guidelines, which had been adopted at a time when the technology was such that turbines of the height now proposed had not been envisaged.

Thus it is contended, that a development such as that proposed, could not have been anticipated at the time of the adoption of either the current Kildare County Development Plan or the WE Guidelines, and given that the WES for the county is in abeyance pending the revision of these guidelines and the adoption of an energy policy framework, the grant of permission for the proposed development would be premature, would be developer-led and would set an undesirable precedent for wind farms of such a scale and dispersed nature without due consideration of the impacts. The applicant, in response, believes that “Irish planning policy is dynamic and constantly changing” and that, as such, the Board cannot delay decision making on this basis as it must rely on current policy guidance. In this respect, the applicant believes that there is ample support in current policy and guidance for the proposed development.

It is noted that a central plank of the WE Guidelines (2006) is the need for a ‘Plan-led approach’ to the assessment of individual applications for WE development, which involves the identification of areas considered suitable or unsuitable for wind energy development. Chapter 3 of the WE Guidelines sets out a step-by-step approach to the analysis of ‘suitable areas’ based on a sieve mapping analysis of key environmental, landscape, technical and economic criteria which must be balanced to identify the most suitable locations for WE development. It is stated that this should include an analysis of

wind resources and sensitivity of the landscape, followed by an overlay of the information to enable optimal visual integration into the landscape and maximisation of the utilisation of WE resources. This, it is considered, should then be integrated with information regarding accessibility to the electricity transmission and distribution grids. This need for a Plan-led approach is reflected in the Regional Planning Guidelines for the GDA and in each of the County Development Plans, (RPG PIR34, KCC ENO1, MCC ECPOL21).

The current guidance to which the Board must have regard is the Wind Energy Development Guidelines, 2006. However, it is clear that policies relating to climate and energy, and in particular, renewable energy, have continued to evolve since the current WE guidelines were adopted in 2006, as have the development of the transmission network and technological advances in both the design and efficiencies of the management of the grid and of the wind turbines. This rapid progression is reflected in the recently published White Paper and in the proposed revision to Grid25 and indeed, in the fact that a review of the Guidelines is underway. I would agree that these factors should not prevent the consideration of individual applications for wind energy development, but I would also accept that the state of flux in the policy framework is a material consideration. This is considered to be of particular relevance in the context of the introduction of such a large scale development, (in terms of both spatial extent and height of turbines), into an area which has hitherto not been associated with, or highlighted as being suitable for, wind energy development on such a scale. Thus I would accept that there appears to be somewhat of a policy vacuum at present, until such time as a strategy for the area is formulated, which in turn, is dependent on the finalisation of the revisions to the Guidelines and adoption of an Energy Policy Framework. However, progress on the Framework document and Revised Guidelines is underway.

In light of the foregoing, it is considered that the proposed development would be premature and would constitute developer-led and piecemeal development which would create an undesirable precedent which could undermine any future wind energy strategy for the area, and would be contrary to the proper planning and sustainable development of the area."

The Argument That Reason 1 Is Too Vague And Uncertain

25. This is pleaded as follows at para 11 of the Statement of Grounds:

"Inadequate and/or unintelligible reasons and/or irrationality (Relief D1)

11. The first reason for refusal given by the Board is invalid as being too vague and unclear to be adequate and/or intelligible. It is unclear whether the reasons encompasses the revised Wind Energy Development Guidelines for Planning and the decision of the Board does not identify the Renewable Electricity Policy and Development Framework. In addition apart from general citing "the absence of any national wind energy strategy with a spatial dimension or of wind energy strategies at local level...", the reason does not identify what aspect of national wind energy strategies is lacking which is believed by the Board to be necessary in order to determine this particular application. The scope of proposed revisions to Wind Energy Guidelines is limited to noise, proximity and shadow flicker and does not generally deal with "spatial dimensions", which term is vague and unclear. Furthermore, the proposed turbine layout in the development was designed to meet the proposed draft Guidelines with respect to proposed noise and shadow flicker limits. The proposed Framework Plan for Renewable Energy/Electricity, deals with renewable energy in general and not specifically wind farms."

26. The relevant principles applicable to the construction of planning documents were stated by McCarthy J. in *Re XJS Investments Ltd* [1986] I.R. 750, at page 756: –

"(a) To state the obvious, they are not Acts of the Oireachtas or subordinate legislation emanating from skilled draughtsmen and inviting the accepted canons of construction applicable to such material.

(b) They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."

27. Recently in *North Kerry Wind Turbine Awareness Group v Bord Pleanála* [2017] IEHC 126 at para. 26, McGovern J held: –

"There was no dispute between the parties to this application that current jurisprudence confirmed that the perspective from which a planning decision must be looked is that of an intelligent person who has taken part in the appeal or had been appraised of the issues which had arisen before the Board. The respondent submits that such an interested person must be understood to have read the documents which were before the Board and I accept that submission."

28. Applying these tests I am satisfied that Reason 1 is sufficiently clear and should not be struck down on grounds of vagueness, or lack of clarity.

29. The Board took into account the inspector's report and in large part accepted the inspector's reasons for refusal in formulating Reasons 1, 2 and 3, while deciding not to accept the inspector's further reasons for refusal on the basis of observations set out in the decision.

30. Anyone reading Reason 1 and the words "the absence of any national wind energy strategy with a spatial dimension or of wind energy strategies at local level", in conjunction with the inspector's report, and in particular section 9.1.4 "Policy Vacuum", would understand this to be a broad reference to the adoption of a new national energy policy framework as well as updating of the WEDG 2006. The inspector in the penultimate paragraph of section 9.1.4 refers to both of these in the context of policies on climate and energy which "have continued to evolve since the current WE Guidelines were adopted in 2006" and she regards "this rapid progression" as reflected in the 2016 Framework Report and proposed revision to Grid 25. She also relates this policy vacuum to the holding in abeyance of development of a wind energy strategy in County Kildare. This is the knock-on effect of the pending revision of the WEDG 2006. At the end of this paragraph she states –

"Thus I would accept that there appears to be somewhat of a policy vacuum at present, until such time as a strategy for the area is formulated, which in turn, is dependent on the finalisation of the revisions to the Guidelines and adoption of an Energy Policy Framework. However, progress on the Framework document and Revised Guidelines is underway."

31. The reference to the absence of strategy with a spatial dimension therefore applies both at national and local level. This is further

clear from Reason 1 where the Board goes on to state that the proposed development "... would be premature pending the adoption of such strategies and would represent an undesirable precedent that could undermine any future wind energy strategy for the area." This demonstrates that the Board's concern was with "spatial dimension" in the areas of County Kildare and County Meath where the proposed turbines were to be sited.

32. Further, the suggestion that the term "spatial dimension" is vague and unclear does not stand up when read in context. Reason 1 arises from consideration by the inspector and the Board of "a large-scale development, (in terms of both spatial extent and height of turbines), into an area which has hitherto not been associated with, or highlighted as being suitable for, wind energy development on such a scale" (inspector's report, paragraph 9.1.4). It arises from consideration of national wind energy documents and the two county development plans, and the term refers to the absence of strategy or designation identifying specific areas as potentially suitable for the production of wind energy or the locating of large scale windfarms. This is the meaning that an intelligent person who has taken part in the process and has read and understood the inspector's report would read into the term.

33. Counsel for the applicant also argued that the local authorities did not give a "commitment" in their development plans to introduce wind energy strategies with a spatial dimension when government strategy is adopted, and that the inspector was wrong to include this in his 'Recommendation' version of Reason 1, and that it was not apparent from Reason 1 whether the Board accepted this, as identical wording was not used.

34. It seems to me that this submission fails to take account of objective ENO1 in Kildare County Council's Development Plan "to examine the possibility of designating appropriate areas of the county as being suitable for the production of wind energy", combined with their submission to the Board which stated that the preparation of variation of Wind Energy Strategy for the county had been commenced pre-2013 but had been deferred based on the DECLG circular PL2013 pending the revision of the WEDG 2006 and the adoption of a new national Framework. Meath County Council CEO's Report/submission also acknowledged that "a [wind energy] strategy had not yet been prepared" (emphasis added). There was therefore material before the Board which demonstrated an intention on the part of the local authorities, in particular Kildare County Council, to vary their policy, and to justify the inspector's statement that both had "embarked in late 2013, on the development of Wind Energy Strategy...to incorporate strategies which would have...identified suitable areas..." . Accordingly any technical error in the wording recommended by the inspector, but not used by the Board (possibly deliberately), is of no import.

35. I also accept the respondent's submission that the applicant has not been misled by the meaning of Reason 1, or any lack of clarity, and that it has not been hampered from challenging the validity of this reason.

The Lawfulness of Refusal as Premature on the Basis of Absence of National/Local Wind Energy Strategy with a Spatial Dimension

Applicant's Arguments

36. The applicant argued that taking into account the absence of strategy/policy was *ultra vires* the powers of the Board under the 2000 Act, an abdication of responsibility to determine the application and the taking into account of an irrelevant consideration. Further it was argued that existing EU, national and local wind energy strategy support the proposed application. It was argued that the 2016 Framework Report and proposed revised Wind Energy guidelines are not in force and there is no obligation on the Minister to adopt them. Thus it was argued that the Board unduly fettered its discretion in rejecting the application on the basis that it was premature, and thereby unduly or disproportionately restricted the constitutionally protected property rights of the applicant by introducing the failure of third parties such as the Minister and local authorities to adopt spatial strategies as a reason for rejecting wind farm planning applications. It was argued that in so doing the Board acted in an arbitrary and inconsistent manner, insofar as it had previously granted planning permission for other large wind farm developments, or refused permission without citing the same absence of strategy as a reason for refusal, and that by the impugned decision the Board has effectively suspended the entitlement of developers to obtain development consent for wind farm projects pending the adoption by the Minister or the government, and local authorities, of appropriate wind energy strategies.

Respondent's Arguments

37. In opposing the application, the Board's principal argument was that it is the Board's function under the 2000 Act to determine what is in accordance with "the proper planning and sustainable development of the area", but decisions should be "plan-led" and this permits the Board to deploy the concept of prematurity and to formulate Reason 1 as it did. It was pleaded that "a development may be premature where it is proposed before a development plan, indicating what locations may be suitable for such development, is adopted..." (Paragraph 5 of Statement of Opposition).

38. It was accepted that existing policies and guidelines supported the authorisation of windfarms, but was argued that they did not address the "intermediate issue" of where such turbines should be located, or "that any particular proposal should be deemed suitable for any particular location", and that "the Board was entitled to conclude that the development is proposed could undermine any such strategies to be adopted in future" (para. 3, Statement of Opposition). Whilst accepting that there was "no direct obligation for a national spatial strategy to deal with the location of turbines" it was pleaded that there was a national policy objective to generate electricity from renewable sources and "this objective needs to be translated into an allocation of generating capacity between different generating modes, and then an allocation of indicative capacity levels to particular areas for integration into consequential strategies and local development plans", both of which it was argued were absent.

39. As to the applicant's argument that the decision was arbitrary and inconsistent, it was contended that the Board decided this specific case before it on the basis of the documents/materials specific to the application including the two relevant county development plans, and that this does not predetermine or prejudice wind farm applications in other local authority areas - the decision was "county specific, and the decision in relation to national policy is one which evolves over time" (paragraph 7 of Statement of Opposition).

Provisions of the 2000 Act relevant to national/local policy consideration

40. In terms of policy, the starting point of what a planning authority must or may consider in deciding an application for permission is the 2000 Act (as amended). Section 34 (2) (a) provides: -

"(a) When making its decision in relation to an application under this section, the planning authority shall be restricted to considering the proper planning and sustainable development of the area, regard being had to -

(i) the provisions of the development plan,

(ia) any guidelines issued by the Minister under section 28...

(iv) where relevant, the policy of the Government, the Minister or any other Minister of the Government..."

This is extended to the Board when hearing appeals by virtue of section 37(1)(b).

41. In the context of a strategic infrastructural development, section 37G(1) provides that:

"(1) When making a decision in respect of a proposed development for which an application is made under section 37E, the Board may consider any relevant information before it or any other matter to which, by virtue of this Act, it can have regard."

Section 37G(2) then provides:

"(2) Without prejudice to the generality of subsection (1), the Board shall consider –

(a) the environmental impact statement submitted under section 37E(1), any submissions or observations made, in response to the invitation referred to in section 37E(3), within the period referred to in that provision, the report (and the recommendations and record, if any, attached to it) submitted by a planning authority in accordance with section 37E(4), any information furnished in accordance with section 37F(1), and any relevant information before it relating to–

(i) the likely consequences of the proposed development for proper planning and sustainable development in the area in which it is proposed to situate the development, and

(ii) the likely effects on the environment of the proposed development,

(b) any report or recommendation prepared in relation to the application in accordance with section 146, including the report of the person conducting any oral hearing of the proposed development and the written record of any meeting referred to in section 37F(3) and,

(c) the provisions of the development plan or plans for the area,

(d) the provisions of any special amenity area order relating to the area,

(e) if the area or part of the area is a European site or an area prescribed for the purposes of section 10(2)(c), that fact,

(f) if the proposed development would have an effect on a European site or an area prescribed for the purposes of section 10(2)(c), that fact,

(g) the matters referred to in section 143,

(h) any relevant provisions of this Act and of any regulations made under this Act."

Section 37G(3) provides that the Board may in respect of an application under section 37E granted permission, or grant permission with modifications to the proposals or "(b) decide to refuse to grant the permission, and a decision to grant permission... may be subject to or without conditions."

42. Section 28(1) of the 2000 Act empowers the Minister to issue guidelines to planning authorities "regarding any of their functions under this Act", subsection (2) provides: "(2) Where applicable, the Board shall have regard to any guidelines issued to planning authorities under subsection (1) in the performance of its functions."

The Minister is empowered to revoke or amend guidelines that have issued (subsection (4)). Under further subsections the Minister may place guidelines or amendments before each House of the Oireachtas and may cause them to be published, and planning authorities are obliged to make them available for inspection by the public.

43. Section 143 of the 2000 Act provides that: –

"(1) The Board shall, in performing its functions, have regard to –

(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,

(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic, economic or social importance to the State, and

(c) The National Spatial Strategy and any regional spatial and economic strategy for the time being in force."

Discussion

44. Those with interests in property have constitutionally protected property rights. As the applicant accepted, it is the entitlement of the State to regulate, in the interests of the common good, the use and development of property. It does so by way of the planning legislation, which seeks to strike a balance between property rights and the interests of the community at large. However, one of the property owner's rights is to have some certainty in relation to the planning constraints likely to apply in relation the use and development of property. Equally members of the public, who may be involved, or considering becoming involved, in the process, are entitled to some clarity. It is against this constitutional back-drop that the relevant provisions of the 2000 Act, government guidelines and policies, the county development plans and Reason 1 in the Board's decision, fall to be considered.

45. Peart J stated in *Ebonwood Ltd v Meath County Council* [2004] 3 IR 34, at page 49:

"It is of the utmost importance that the public at large and in particular those persons seeking to develop their lands or property should have certainty and precision as to the relevant criteria by which any application for permission will be

judged and the circumstances in which compensation may or may not be payable by the planning authority. The first reference point in their consideration will be the provisions of the Development Plan. If planning authorities were to be entitled to have regard not only to the Development Plan but also to anything which they might at some stage in the future consider they might include in some future Development Plan, uncertainty and confusion would abound. The passage which I quoted above from *Environment and Planning Law* by Ms Scannell puts the matter persuasively in the context of the public's right from a constitutional point of view of being involved in and being consulted in the making of a Development Plan".

46. The status of a county development plan is that "When adopted it forms an environmental contract between the planning authority, the Council and the community, embodying a promise..." – see McCarthy J. in *Attorney General (McGarry) v Sligo County Council* [1991] 1 I.R. 99, at p.113, and cited with approval by Clarke J. in *Christian v Dublin City Council* [2012] 2 I.R. 506, at 518. It is not policy until it is adopted. When adopted it represents the planning authorities "overall strategy for the proper planning and sustainable development of the area of the development plan" (section 10(1) of the 2000 Act) for the next 6 year period. It could not be said that deliberation over a wind energy strategy, or one that might be adopted by a planning authority after due process, could be said to amount to "policy", or that the deferral of such consideration could itself be elevated to the status of policy.

47. Clarke J. in *Christian*, in the context of the limitations on the powers of statutory bodies (in that case Dublin City Council) stated at p.534:

"[60] At the other end of the spectrum, however, statutory bodies do not have the right to make any legally binding decisions save in accordance with the mandate specifically conferred on them by law. The default position is that such bodies cannot act unless the legal criteria which entitle them to so act have been established and then only within the bounds imposed by law. Such bodies are not at large. Rather, such bodies are required to act solely within the four walls of whatever statutory or legal regime applies to them. Where the exercise of any such power by a statutory body comes under scrutiny the court will, therefore, be concerned to ensure that the statutory body has acted in a lawful manner and, consequently, will consider any case made by someone seeking to challenge an exercise of power on the basis of an allegation that the statutory body has gone outside either the express or implied obligations of its statutory remit. It is for that reason that the court will be concerned to see that the exercise of that statutory power operates within the principles enunciated in *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39.

[61]. The difference, therefore, between *Heaney v. Ireland* [1994] 3 I.R. 593 and *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 can be seen to flow from the differing nature of the power being exercised. On the one hand, there is the entitlement of the Oireachtas to formulate policy and put same into practice through legislation limited only by the parameters of the Constitution itself. On the other, and in contrast, is a limited power of any statutory body to exercise an entitlement which has an effect on a person's rights solely within the four walls of the statutory or other legal regime by which the power to effect such rights is conferred.

[62] The position of the Oireachtas is, of course, clear. The position of a statutory body with a precise and relatively narrow statutory mandate is equally clear. However, for the reasons already analysed, a development plan contains at least a significant element of what might legitimately be described as policy formation. It is, of course, the fact that there are limits on the range of policy options which can be adopted by a local authority for the purposes of formulating its development plan. The development plan must conform with the legislation. It must be designed and set out with "an overall strategy for the proper planning and sustainable development" of the relevant area... It must conform with the overall policy objectives mandated by the legislation... Within those very general obligations a great deal of discretion is left to the local authority and it does not seem to me to be unreasonable to describe the breadth of that discretion as amounting to an express, and constitutionally permissible, conferral of at least a degree of policy-making discretion on the local authority concerned. Therefore, the broad strategy of a development plan lies at the policy-making end of the spectrum to which I have referred."

48. In the earlier case of *Tristor Limited v The Minister for the Environment* [2010] IEHC 397 in the context of a challenge to a directive of the Minister to Dun Laoghaire Rathdown Co. Co. in respect of its proposed development plan, Clarke J. had stated:

"6.7 The same principle applies equally to cases where it is said that the relevant decision maker took into account inappropriate matters. It follows that what the Court needs to consider is what the Act actually says needs to be taken into account, or what the Act actually says is the proper basis for the making of a statutory decision and in addition the Court may also look at what might be said to be required or excluded, by implication, by virtue of the subject matter, scope and purpose of the relevant legislation."

Clarke J. also emphasised that where legal rights are involved it is important, where strategy and guideline documents are considered by the decision maker, that the legal status of those documents is clear.

49. These statements of principle apply to the court's consideration of the Board's decision making in the present case. The Board must operate within the four corners of the statutory framework established under European law and the relevant domestic legislation, particularly the 2000 Act and planning regulations, existing statutory guidelines, and local policy as set out in existing county development plans. The court may look at what might be said to be required or excluded, by implication, by virtue of the subject of matter, scope and purpose of this framework. The Board cannot take decisions based on considerations that fall outside this framework, or based on documents that are preliminary, scoping, proposed, consultative, or otherwise lack the status of statutory guidelines that the Board is obliged to consider.

50. It is also implicit from s.37G(1) of the 2000 Act that the Board cannot have regard to information that is not relevant, unless it is otherwise a matter to which it can have regard under by virtue of the Act.

51. Nothing in s.37G(2), or in s.143, authorises the Board to take into account drafts, or the prospect of new or modified government or local authority policy or objectives. I do not discern any provision in the 2000 Act which would entitle the Board to base a decision to refuse permission on the absence of national or local strategy or policy.

52. I am of the view that the possibility, even probability, that the documentation considered by the inspector will lead to new government policy and objectives on wind energy strategy, including a spatial dimension, is not a relevant consideration, or one that the Board is permitted to treat as a reason for refusing permission. The inspector erred in stating that "...the state of flux in the policy framework is a material consideration".

53. Moreover, it cannot be said when new policy or strategy will be adopted, if at all, and planners can only speculate as to its content. This uncertainty is compelling, because the effect of Reason 1 would be to suspend indefinitely the prospect of obtaining permission for a windfarm in this area. The national policy development may take a number of years, and there is no guarantee that it will result in strategy with a spatial dimension. Thereafter there is likely to be further time lapse as the local authorities adopt new local wind strategies with a wind dimension. This is precisely the sort of uncertainty and confusion decried in *Ebonwood*.

54. The respondent argues that refusal under Reason 1 is permitted by section 37G(2)(a)(i), because, as the reason states, it comes within the concept of "proper planning and sustainable development". Certainly this is a key consideration for the Board, but, as is noted in the Board's own written submission at paragraph 22, its function is "technical and adjudicative" and it must operate within the confines of the 2000 Act, existing government policy and objectives, existing ministerial guidelines, and existing county development plans. These are "the four corners" within which it must address applications and make decisions. Although the Board is entitled to notice of intention to review the existing county development plan, and to make observations/submissions, and to receive a copy of the draft development plan, it has no specific function or responsibility in the drawing up of a development plan. Rather, this is reserved to the elected members of local authority, or in default the county manager, with a right of intervention vested in the Minister. The Board also has no specific role in the preparation of "Local Area Plans" under Chapter II of the 2000 Act, or the creation of "Regional Planning Guidelines" under Chapter III. Equally the Board has no function in the adoption or moulding of government policy or objectives, or anticipating change, and by expressly vesting in the Minister the power to create guidelines it is implicit that the Oireachtas considered that these were not matters for the Board. The reason for this is presumably that the Board at first instance or on appeal must determine planning applications or appeals within its remit independently and impartially, and if it had a statutory role in the formulation of plans or policies this could compromise or be perceived to dilute its independence/impartiality. The sensitivity of the Oireachtas to the integrity and independence of the Board is evident from s.150 of the 2000 Act requiring the adoption of a Code of Conduct concerning disclosure and any conflict of interest. By refusing permission on the grounds of prematurity due to the absence of national or local strategy, and the setting of "an undesirable precedent that could undermine any future wind energy strategy for the area" the Board was effectively taking upon itself the creation of planning policy for the area. This was impermissible.

55. It is no answer to this to say that the 2006 Guidelines advised that decisions be "plan-led", and that there was no plan with a "spatial dimension". It is a generalisation to say that decisions in the planning arena will be "plan-led". It is true that a county development plan is required to set out the overall "strategy" and determine the parameters, such as zoning of land, within which a planning decision will be made, and s.10(2) of the 2000 Act sets out a non-exhaustive list of objectives. Under s.10 (3) "a development plan may indicate objectives for any of the purposes referred to in the First Schedule" (emphasis added). These include, in Part 1 of the First Schedule, objectives related to the "Location and Pattern of Development". In Part 1 the first item is:

"1. Reserving or allocating any particular land, or all land in any particular area, for development of a specified class or classes, or prohibiting or restricting, either permanently or temporarily, development on any specified land."

It is important to note that this is not mandatory. In not having a "spatial dimension" to their wind energy strategies in their county development plans neither local authority breached the 2000 Act; it was permissible that this guidance be omitted.

56. In certain circumstances a plan will dictate the decision that must be made – for example where a Strategic Development Scheme has been adopted for a Strategic Development Zone. Such a scheme of its nature will be very detailed and subjected to environmental impact assessment and appropriate assessment, and the planning authority is mandated to grant permission in respect of a development that is "consistent" with such a scheme (s.170 of the 2000 Act). By comparison, a county development plan is broader in its remit and of its nature will be less detailed and less comprehensive, and will not necessarily set, or be obliged to set, objectives or parameters in certain areas such as those identified in the First Schedule to the 2000 Act. There was no requirement of law – as opposed to a national policy guidance – that the relevant county development plans must give the lead by having wind energy policies, or identifying areas or locations suitable for wind energy.

57. Further the 2006 Guidelines are guidelines, and not intended to be mandatory or determinative. As Quirke J. observed in *McEvoy v. Meath County Council* [2003] 1 I.R. 208, at page 223, following the decision of the Supreme Court in *Glencar Exploration Co. v Mayo County Council (No.2)* [2002] 1 I.R. 84, the obligation to "have regard to" guidelines (in that case regional guidelines in the context of adopting a county development plan) "does not require it rigidly or "slavishly" to comply with the guidelines' recommendations or even necessarily to adopt fully the strategy and policies outlined therein." He concluded at page 224 that the planning authorities obligation was "...to inform itself fully of and give reasonable consideration to any regional planning guidelines which are in force in the area which is the subject of the development plan with a view to accommodating the objectives and policies contained in such guidelines", but they were "...not bound to comply with the guidelines and may depart from them..".

58. In fact both local planning authorities concerned did have wind energy policies in their development plans, albeit not with any detailed "spatial dimension". Some guidance was given. The fact that they did not reserve or allocate particular land for windfarms, or prohibit wind farms in any particular area, may be described as a policy vacuum at local level, but was not a relevant consideration and was not a valid reason for declining permission.

59. The applicant's submission that there is no provision in the 2000 Act empowering the Board to reject a proposed development on the basis that it would be premature pending the adoption of national and/or local strategies supports this conclusion. It does appear that the only provisions of the 2000 Act expressly contemplating rejection on grounds of prematurity are the matters appearing in first three paragraphs in the Fourth Schedule concerning "Reasons for the Refusal for Permission which exclude Compensation". Paragraph 1 concerns deficiencies in water supplies/sewerage facilities and road networks; paragraph 2 concerns prematurity "pending the determination by the planning authority or the road authority of a road layout for the area"; and paragraph 3 concerns prematurity "by reference to the order of priority, if any, for development indicated in the development plan or pending the adoption of a local area plan in accordance with the development plan". None of these relate to the adoption of wind energy strategy with a spatial dimension.

60. In its written submissions, the applicant cites *Myton Ltd v Minister for Housing and Local Government* (1965) 16 P. & C.R. 240, in which Widgery J. observed, at p. 249:

"I think that it would be lamentable if, in circumstances where a sketch plan has been prepared and where there is in effect a tentative proposal for a green belt, all applications for development within that green belt area should be automatically and peremptorily refused merely because provision of a green belt was in contemplation."

In my view, similar considerations apply to the present case where the effect of Reason 1, if valid, would be to deter all wind farm applications in the relevant area- indeed anywhere within Co. Kildare and possibly County Meath- pending the adoption of some future wind energy policy that may or may not have a spatial dimension, and/or to lead to the automatic refusal of such applications for an

uncertain future period.

61. It is appropriate to add some observations particular to the documents most relevant to the present case, which support the Court's conclusion. As the WEDG 2006 were guidelines issued by the Minister under section 28, the Board was obliged to have regard to these. In one respect, it could be said that these guidelines included a "strategy with a spatial dimension", namely in advising local authorities in relation to the identification of suitable locations for wind energy development within their functional areas. However, it could not be said that these guidelines in themselves set out a national "spatial dimension" in terms of identifying where turbines should be located or potential suitable locations for windfarms. In this respect, there was a national policy vacuum, but it was limited in scope.

62. As proposed revisions to WEDG 2006 were not "for the time being in force" they were not matters to which the Board could have regard.

63. In any case the Proposed Revisions dated 11 December, 2013, relate only to revision of the noise and shadow flicker elements, and not "spatial dimension". If adopted they will not have any effect on the "spatial dimension" as the use of that term in Reason 1 may reasonably be interpreted. Accordingly treating the application as premature pending such revision was illogical and irrational.

64. The 2016 Framework Report is a draft, and only a scoping document in relation to a possible future national plan for renewable energy/electricity policy. It could not be said that it represented existing policy or objectives of the government for the time being as contemplated by section 143. It did not fill the policy vacuum at national level identified by the inspector and accepted by the Board.

65. While Kildare County Council Development Plan includes policies and objectives in relation to wind energy, in particular those set out earlier in this judgement, these do not have a specific or detailed "spatial dimension". However, Chapter 8 in 8.11.1 sets out relevant General Energy Policy that seeks to "support" the development of renewable energy sources (ER2), and 8.11.2 is significant in setting out "Wind" objectives. These have been set out earlier in this judgement, but of particular significance are WE1 (to have regard to the WEDG 2006 in assessing planning applications for windfarms), WE2 ("to encourage the development of wind energy in suitable locations...") and WE3 which is "to ensure" that wind development proposals have regard to specified environmental and nature conservation matters and the "scale, size and layout of the project...".

66. Thus, while not specific or detailed, general guidance, to which the Board was obliged to have regard, is given in relation to the assessment of proposed locations for turbines/windfarms. There is not the total absence of a "spatial dimension" suggested by the wording adopted in Reason 1.

67. Meath County Council Development Plan adopts a policy that is similarly supportive of the development of renewable energy sources, and the adoption of best practice with regard to siting and design. As mentioned earlier, Appendix 7 contains the Meath Landscape Character Assessment which includes assessment for the area where two of the proposed turbines are located. The assessment of this area is that it has low potential to accommodate wind energy, but medium potential capacity to accommodate single turbines. Again, while this plan is not prescriptive, it does give general guidance and some "spatial" guidance to which the Board was obliged to have regard in assessing and the application.

68. Of course, even if there was a clear national strategy in relation to "spatial dimension", and while this would doubtless assist the Board, the Board under present legislation would not be obliged to follow such guidelines or plans, and in the exercise of its own judgement and expertise would be entitled to take a different view. Equally if a local development plan adopted wind energy strategies with a more detailed "spatial dimension", for example by zoning particular areas as suitable for wind farm development, it would be open to the Board to grant permission for a proposed development, even if it was a material contravention of such zoning. Section 37G(6) expressly empowers the Board to grant permission even if the development would materially contravene a development plan. Thus, while the Board must have regard to national and local strategy, it is not bound by it.

69. Having regard to these observations, and notwithstanding the limitations of existing national and local wind energy strategy, the Board had an obligation to properly evaluate the application in the light of existing policy and particularly the WEDG 2006 and the two relevant County development plans. Having had regard to the matters to which it was required to have regard, the Board was obliged to make a decision. Unfortunately, by adopting Reason 1 it appears that the Board failed to fully address whether, on grounds of proper planning and sustainable development, and in particular by reference to the wind energy policy contained in the two development plans, it should grant permission. The applicant suggests that there was an 'abdication of responsibility', but this characterisation goes too far, because it is apparent from the extent of the inspector's consideration, and the balance of the Board's decision, that it did give the application careful and appropriate consideration in other respects.

70. Furthermore, I accept the submission of the applicant that the Board's determination that the proposed development was premature pending the adoption of national and local wind energy strategies with a spatial dimension did represent a fettering of its discretion to determine whether the location of the proposed development was in accordance with proper planning and sustainable development in that area. The applicant cites *Carrigaline Community Television Broadcasting Co. Ltd. v. Minister for Transport* [1997] 1 ILRM 241, which concerned the decision of the Minister to grant licences under the Wireless Telegraphy (Television Programme Retransmission) Regulations 1989 but excluded any form of a retransmission system. Keane J. stated: –

"The cumulative effect of all these factors was a decision by the Minister to reject the Plaintiff's application without any detailed investigation of the question as to whether it was a feasible method of meeting an existing public demand for the UK programme services...

Such a decision might well be regarded as according with reason and common sense. As I have noted, however, those are not the only criteria by which the validity of the Minister's decision falls to be assessed. His paramount duty remained to consider all the proposals before him for the use of the air waves in a fair and impartial manner. He was not entitled effectively to foreclose such a consideration of any of the applications, including the Plaintiffs, by determining in advance, as he did, that one form of retransmission alone would be permitted and that franchises would be granted for it to the exclusion of any other system. I'm satisfied that that was not a valid exercise of the power vested in the Minister."

This was followed by O'Sullivan J in *McDonagh v. Clare County Council* [2002] 2 IR 634. In my view in adopting Reason 1, and the underlying reasoning of the inspector in that regard, the Board effectively foreclosed on full consideration and evaluation of the application.

71. In light of the foregoing it is not necessary to address the applicant's further argument that the Board acted in an arbitrary and inconsistent manner insofar as it has previously granted permission for other large windfarms and/or refused permission without citing

a similar reason.

72. I find that Reason 1 was *ultra vires*, took into account irrelevant considerations and is invalid.

Reason 2

73. This reads;

"2. The Board considered that the widely dispersed cluster-based layout adopted in the proposed development would have inevitable adverse effects including a disproportionately large visual envelope, the need for extensive underground cabling in poor quality minor roads and undue proximity to areas of sensitivity from a heritage or residential point of view. The Board considered that in a situation where such adverse effects were absent the energy output from the proposed development might be realised in a more efficient and less intrusive manner by a more spatially concentrated development. The Board determined that the proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

74. The applicant pleads that in this reason for refusal the Board cites "inevitable adverse effects" including "a disproportionately large visual envelope... and undue proximity to areas of sensitivity from a heritage or residential point of view". The applicant pleads that this is unintelligible and/or contradictory and/or irrational insofar as the Board later in its decision expressly rejects visual impact as a reason for refusal in the following passage: –

"Visual Impact

The Board decided not to accept the Inspector's recommendation to refuse permission on grounds relating to visual impact as the Board considered that notwithstanding the various landscape designation set out in Chapter 14 and Appendix 3 of the Kildare County Council Development Plan 2011-2017, the local landscape is one of considerable robustness wherein extensive cross-country views, while possible given the basin-like nature of the current and former bogland, are rarely achieved due to the extent and depth of barrier and boundary vegetation. This limits, in the Board's view, any adverse visual impact of the proposed development to a number of key localised areas of particular sensitivity, specifically the canal corridors (and associated human settlements) and the setting of the historical sites at Carbury and Lullymore. In other circumstances these concerns could have been addressed by the omission of selected turbines and/or clusters."

75. This plea is misconceived as it fails to take into account all of the wording in Reason 2. The reference to "disproportionately large visual envelope" is one of three adverse effects which are related back to the earlier words in Reason 2, namely "the widely dispersed cluster – based layout adopted in the proposed development". It is apparent from the mapping of the proposal that the turbines are in five clusters, and cover a very large area/spread, and it is this aspect that gives rise to three adverse effects (the others being 'extensive underground cabling in poor quality minor roads', and 'proximity to areas of sensitivity from a heritage or residential point of view') that leads the Board to state that the development "might be realised in a more efficient and less intrusive manner by a more spatially concentrated development".

76. The meaning of Reason 2 is clear and does not confuse when read as a whole. Moreover, the passage just quoted on "Visual Impact" is not contradictory – indeed it is entirely consistent because the Board makes clear its view that the inspector's concerns over the visual impact and its own concerns over clusters causing a "disproportionately large visual envelope" and adverse effect on areas of heritage/residential sensitivity, could have been addressed "by the omission of selected turbines and/or clusters" or by a "more spatially concentrated development".

77. The applicant also pleads that –

"13. The second reason includes the factually incorrect statement that "... *The energy output from the proposed development might be realised in a more efficient and less intrusive manner by a more spatially concentrated development...*". If 47 turbines are placed in one large section the energy production loses due to 'wake effect' and noise curtailment required in order to meet the noise limits would increase dramatically, and reduces the efficiency and energy export capacity of the wind farm. It would not be more "efficient" from the "output" perspective to have the turbines in "a more spatially concentrated development".

78. This is supported by averments in paragraph 66 of the affidavit of Mr O'Donovan sworn on 5 December, 2016, which are not contested in the replying affidavit. However, I reject this ground of complaint.

79. When Reason 2 is read as a whole I interpret the term "more efficient" in the context in which it is used as relating to efficiency of land use rather than efficiency of electricity generation. In any case I accept the respondent's submission that the matters referred to in the second reason, including its comment on energy output, are matters of planning judgement for the Board. It follows that if there is a factual error, this error was made within jurisdiction.

Reason 3

80. This reads:

"3. Having regard to the nature, structure and condition of the existing public road network serving the development, which includes substantial sections of substandard legacy roads, and to the extensive cable trenching works proposed it is considered that the proposed development could have significant adverse effects on the long-term structural integrity of significant elements of the local road network, is thereby likely to give rise to the creation of traffic hazards and to potentially increased maintenance costs to the local authority. The proposed development would, therefore, be contrary to the proper planning and sustainable development of the area."

81. In the Statement of Grounds, the applicant raises a number of complaints in relation to this reason. The first is that the Board's inspector had concerns on the impact on the structural integrity of the roads both from the impact of traffic and the cable routing, and it is unclear whether this reason is confined to impact due to cable routing or also the impact of traffic.

82. This complaint must be rejected because reading the reason as a whole makes it clear that the Board's concern is the cable trenching works and the effect that these will have on the structural condition of the local roads, and traffic hazards that may arise

from such works, and not the impact of traffic per se.

83. Secondly, it is asserted that structural integrity of the local roads should have been dealt with by way of condition to a planning permission given the applicant's commitment in the application documents to reinstate the roads into the same or better condition than prior to the proposed development, to consult with the relevant local authorities and to cover the costs of all such works. In paragraphs 17 and 18 of the Statement of Grounds it is pleaded:

"17. While the Board's inspector considered Types 1 to 3 reinstatement works to be reasonable and expressed concerns about Type 4, the reason given by the Board does not make any distinction between the four types of road reinstatement and so it is unclear whether it is only concerned with Type 4 reinstatement which related solely to roads over peat or bog. It is therefore difficult to understand the reference to significant adverse effects on "significant elements of the local road network", as there was no evidence that Type 4 reinstatement would be required on significant elements of the local road network.

18. There is no evidence that the structural integrity of a road could not be restored to the same and/or better condition than prior to the carrying out of the works and any suggestion to the contrary is irrational and/or unreasonable and contrary to common sense."

In paragraph 19 it is further pleaded that the Board acted in a disproportionate and inconsistent manner, and that this could have been dealt with by a request for further information and conditioning in a planning permission.

84. These complaints are also rejected. While it seems to the court that this could have been dealt with by request for further information and conditioning, it is a matter for the Board to determine whether a particular issue warrants refusal of permission, or could be dealt with by a condition on a grant of permission. As submitted by the respondent, "this is a question of fact and degree, and one eminently within the expert decision-making function of the Board..." (Paragraph 72 of its written submission). The Board's conclusion is not irrational, or "unreasonable" in the O'Keeffe sense of that term.

85. In her "Conclusions" in relation to impact on the physical road network, it is correct to say that the inspector at section 9.12.1 says she is "satisfied the applicant's proposals for road reinstatement following trench works are appropriate, in the case of proposed Types 1, 2 and 3 designs." However, in the next bullet point she goes on to state: -

"I have serious reservations about the proposed Type 4 trench reinstatement plans for roads over peat due to risk of differential settlement over the carriageway. The Type 4 trench reinstatement plans are not stated to DTTS standards. The proposed cable works may have serious long-term impacts on extensive areas of the network, including the L5006 and the L1004, with long term implications for maintenance cost of the network for the roads authority. In the absence of detailed investigative work demonstrating to the contrary, this would be a particular concern for the R414 (from Rathangan), which traverses an extensive area of cutover peat, and the L7004 which is on alluvium."

This follows the advice of the Assisting Report at Appendix 1 of the inspector's report (particularly in para.s 1.1.28 and 1.1.29).

86. There was therefore an evidential basis, in the report and technical information underpinning it, available to the Board to adopt Reason 3 as a reason for refusing the proposal. Moreover, the wording adopted by the Board in large part reflects the wording in the above quoted bullet point, while not distinguishing between the different reinstatement design Types. There was no need to distinguish between these, because when the inspector's report is read Reason 1 can only be read as applying to the Type 4 reinstatement design. I accept the Board's submission that any intelligent observer familiar with the contents of these documents would understand Reason 3 to be referring to Type 4 reinstatement for significant parts of local roads.

87. The applicant suggests that the approach adopted by the Board was inconsistent with its approach in other cases, and Mr O'Donovan in paragraph 83 of the affidavit which he swore on 5 December, 2016, refers by way of illustration to another recent planning approval in relation to a landfill site granted by the Board subject to conditions. This example was evidence that was not before the Board. Leaving that aside, all applications for planning permission will be different and particular to their own facts and circumstances. These differences will affect the Board's approach, and may justify a different approach even on similar facts. Inconsistency in approach may be more perceived than real. Even where it is real this may reflect evolving thinking, or something as simple as different composition of the Board.. It seems to me that it would take a compelling case, and possibly one that could be decided on grounds such as irrationality or bias, for the court to strike down a Board decision on grounds of inconsistency of approach. This is not such a case.

Consequences of Court's Findings

88. The court accordingly finds that Reason 1 is invalid, but that Reasons 2 and 3 are valid.

89. Section 50A(9) of the 2000 Act provides: -

"(9) If an application is made for judicial review under the Order in respect of part only of a decision or other act to which section 50(2) applies, the Court may, if it thinks fit, declare to be invalid or quash the part concerned or any provision thereof without declaring invalid or quashing the remainder of the decision or other act or part of the decision or other act, and if the Court does so, it may make any consequential amendments to the remainder of the decision or other act or the part thereof that it considers appropriate."

90. This gives the court a broad discretion to quash a decision in whole or in part. Some guidance on its exercise may be gleaned from *Talbot v An Bord Pleanála* [2009] 1 I.R. 375 where the Supreme Court considered an appeal from the refusal by the High Court (Peart J.) of leave to seek judicial review where planning permission was refused for building a family home, on the basis that no benefit would result the applicants from the order sought, there being no challenge to the second reason for refusal. The applicants came within the class of persons to whom a "positive presumption" arose in favour of the granting of permission for the building of "one off houses". Fennelly J. for the majority commented at page 384:

"29. However, a person entitled to the positive presumption may be in a better position to persuade the planning authority to decide in his favour, depending, of course, on the strength of the countervailing planning considerations. In other words, I do not think that those considerations are necessarily in a watertight compartment, uninfluenced by the status, *vis-à-vis* the issue of positive presumption, of the applicant for permission. I merely say that it would be open to a planning authority or the first respondent to modify their position. I would not wish to say more and I certainly do not

state that they would or should modify their position. There is no doubt that the planning history constitutes very strong evidence that the applicants face an uphill battle in seeking to obtain planning permission. However, I am satisfied that a judge is not entitled to presume in advance what the outcome of an application will be. That is exclusively a matter for the statutory bodies charged with those functions."

Fennelly J. did not decide this issue, stating that it had not been addressed in argument. Kearns J., who was in the minority, stated at paragraph 39-40: –

"The latter reason for refusal has not been challenged in the instant proceedings. It follows therefore that unless an error by the respondents in respect of the first reason for refusal vitiates the refusal for the second reason, the overall decision to refuse permission remains valid.

Of course there will be cases where, if part of a decision is impugned, it logically must follow that the entire decision must be quashed. If the grounds for granting relief in respect of part of a decision relate, for example, to bias on the part of the planning authority, failure to take into account a relevant consideration, or want to fair procedures, these would all be reasons which would taint the overall decision."

91. In analysing this decision in my judgment in *O'Flynn Capital Partners v. Dun Laoghaire County Council* [2016] IEHC 480, I took the view, at para. 243, that "the decision of Kearns J. is at best *obiter* on the point and an argument could be advanced that s.50A(9) does not contain wording that would warrant the restricted construction ascribed to it in his judgment."

92. It seems to me in exercising the broad discretion given to the court it should be mindful of the planning authorities' statutory powers and function, and the options open to it in a particular case, and should not seek to presume any particular outcome, but beyond that it should take such course as is most likely to do justice between the parties in all the circumstances.

93. I have therefore determined, for the following reasons, that the decision of the Board should be quashed in its entirety, and the matter remitted to the Board to reconsider.

94. Reason 1 is a prominent position and is concerned with policy/the absence of policy, and may fairly be described as overarching the decision insofar as both of the other reasons also refer to the large-scale location of the proposed development. In this sense, while the reasons are freestanding, there is a certain link between them. It is not possible, nor is it appropriate, to anticipate what decision the Board might have reached had Reason 1 been absent. Absent Reason 1 the applicant might, in the words of Fennelly J., "be in a better position to persuade the planning authority to decide in his favour".

95. Reason 2 is concerned with "the widely dispersed cluster-based layout adopted" but is qualified in the sense that in the second sentence the Board goes on to express the view that the difficulties (including the "larger visual envelope") arising from this might be met by "a more spatially concentrated development". Furthermore, later in its decision under "Visual Impact" the Board ends by stating "in other circumstances these concerns could have been addressed by the omission of selected turbines and/or clusters." From this it is implicit, or at least conceivable, that, absent Reason 1, the Board might deal with the perceived problems arising from cluster-based layout in a different way – e.g. by raising a request for further information, or granting a modified permission or permission subject to conditions as to layout. The court however wishes to emphasise that whether to seek further information, or whether to grant a modified permission or to impose conditions, are entirely matters for the Board in the exercise of its functions and its discretion.

96. Thirdly, the importance of Reason 3, which reflects the Board's concerns on adverse effect on the long-term structural integrity of elements of the local road network, is diluted by its later statement under the heading "Roads and Traffic Matters", which concerns *inter alia* "the carrying capacity of a number of the rural roads within which underground cables are to be installed", where the Board stated:

"... These were judged not to be matters which in themselves warranted a refusal of permission. They could have been addressed by seeking further information but the Board decided not to do so in light of the substantive reasons cited above for refusal."

It is possible that absent Reason 1 (or Reasons 1 and 2) the Board might address its concerns over the local road network in a different fashion.

97. In passing, it should be said that the Board's statements in its decision under other headings, such as "Aviation Safety", "Ecology" and "Appropriate Assessment" suggest that on remittal there may be other reasons for seeking further information, and ultimately other reasons for refusing the application could emerge. This again is a matter entirely for the Board.

98. Accordingly, I propose to make orders in the terms of the reliefs sought in the Statement of Grounds at paragraphs 1, 2 and 3. It is my intention that the effect of the remittal order should be –

(1) to enable the Board to consider its decision on the planning application based on the information, observations and submissions already before it on the 6 October, 2016, when it gave its Direction; and,

(2) insofar as the 2000 Act and regulations made thereunder permit, to afford sufficient time, should the Board see fit, to raise with the applicant requests for further information and/or a request to produce evidence and/or an invitation to the applicant to submit revised plans or other drawings or other particulars providing for modification of the development to which the application relates.

I will hear Counsel further in relation to the form of order best designed to achieve these objectives, whilst being mindful of the time objectives for decision making by the Board set out in section 37J of the 2000 Act. It may be that the court should stipulate a start date for the 18 week period mentioned in s.37J(2).