THE HIGH COURT

JUDICIAL REVIEW

[2024] IEHC 311

[Record No.: 2019/327JR]

BETWEEN:

FRANCES ROACHE AND FRED ROACHE

APPLICANTS

AND

AN BORD PLEANÁLA

FIRST NAMED RESPONDENT

AND

IRELAND AND THE ATTORNEY GENERAL

SECOND NAMED RESPONDENTS

AND

ABO WIND LIMITED

NOTICE PARTY

JUDGMENT OF Ms. Justice Siobhán Phelan, delivered on the 21st day of May, 2024.

INTRODUCTION

1. In these proceedings the Applicants challenge the decision of An Bord Pleanála (hereinafter "the Board") made on the 4th of April, 2019 to grant permission for the development of a windfarm (hereinafter referred to as "the Ballymanus Wind Farm"") comprised of 11 turbines and associated works at the townlands of Roddenagh, Killaduff, Ballymanus, Askakeagh, Ballinglen and Preban in County Wicklow.

2. The grant of planning permission is challenged on a range of planning grounds but central to the Applicants' objection to the development is the alleged failure to properly assess the impact of the proposed development on drinking water supplied from a mountain spring to

their farmhouse dwelling and land, coupled with its impact on the visual amenity of the area. A further issue is pursued in relation to turbine height and set back and an alleged failure to have regard to the terns of Circular PL05/2017.

GENERAL BACKGROUND

3. The First Named Applicant died before these proceedings came on for hearing. The Second Named Applicant, her son and executor, is the fifth generation of the Roache family to farm their lands at Killaduff, Aughrim, County Wicklow. The lands were purchased by his great grandmother in 1917. Given her interest in the proceedings and her connection with the farm and land, I will continue to refer to the Applicants in the plural notwithstanding the intervening death of the First Named Applicant and the fact that the proceedings are now maintained by the Second Named Applicant alone.

4. As reflected in their evidence of title since 1917 (notably, Folios WW677, WW3250 and WW1665 of the County of Wicklow), there is appurtenant to the Applicants' lands a right for the owner for the time being to take water for the use of the dwelling house and lands from nearby Roddenagh Wood. Lands at Roddenagh Wood are registered in the ownership of Coillte Teoranta (Folio 3250 for County Wicklow). The folio entry records that the land now registered in the ownership of Coillte Teoranta at Roddenagh Woods is subject to the rights of the owner of lands comprised in the Applicants' folios to take water for the use of the dwelling house and adjoining lands from its present source. Provision is also made for ongoing free access to the pipes, catchment basins, filters, cisterns or other parts connected with or required by such water supply at all reasonable times.

5. The water supply to the Applicants' dwelling house and lands rises as a spring in Killaduff/Roddenagh Wood (hereinafter "the Killaduff Spring") and travels downhill by gravity approximately 125 metres to a brick collection chamber from which it flows by gravity in a pipe to the dwelling house. The Applicants' dwelling house has never had any other source of drinking water and the property is not served by a well or any other source of water. The spring also serves a roadside water spout which is used as a drinking water source by the people of Aughrim. Of note, the public water supply in Aughrim has been contaminated and subject to "*boil water*" notices on several occasions since 2015.

6. These proceedings arise from the Notice Party's (hereinafter "the Developer") second application for planning permission for a wind energy project in the south western foothills of the Wicklow Mountains to the west and south west of the town of Aughrim. The site of the proposed development is located in forest area (seemingly owned by Coillte Teoranta) along an elongated ridge between the Derry Water River and the Ow River. The site will require land clearance including tree felling and vegetation removal for the purpose of the development. The site area includes land in the townland of Ballymanus and also part of the Roddenagh Wood where the Killaduff Spring which supplies water to the Applicants' dwelling house and land originates.

7. At the time of the second application for permission a windfarm comprising six turbines was under construction at Ballycumber to the west of the proposed site (hereinafter "the Ballycumber Wind Farm").

PLANNING HISTORY

County Development Plan

8. In its County Development Plan 2016-2022 (hereinafter "the CDP") Wicklow County Council (hereinafter "the Authority") recognises the need to reduce dependence on fossil fuels for energy generation and supports the development of renewable resources such as wind energy. The CDP also seeks to adequately take account of views and prospects which are listed in it (Objective NH52) and has adopted three landscape categorisations to differentiate between areas of outstanding natural beauty which are "*not favoured*" for windfarm development, areas of high amenity which are "*less favoured*" and other landscape categories which are "*most favoured*".

9. The area proposed for development the subject of these proceedings is identified in the CDP as "*less favoured*" for Wind Energy Development and is designated an area of high amenity. It is indicated that while wind farm development will be considered in this area, the sensitivities revealed would render exploitation more problematic and therefore less favoured for same. The prospect identified in these proceedings as most impacted by the proposed Ballymanus Wind Farm is listed Prospect 54 as set out in Chapter 10 of the CDP. This is a

prospect across the Derry Rivers towards south Wicklow mountains viewed from R748 Holts Way at Coolalug, Mucklagh, Tomnaskela and Kilpipe. Part of the route also travels along the R747.

First Application for Planning Permission for Wind Farm

10. A scheme was first submitted by the Developer for planning permission on the 23rd December, 2014 for twelve turbines (Wicklow County Council Planning Register Ref. 14/2198). This application was refused by the Authority on the 24th February 2015 for reasons that included visual impacts from two scenic designations as well as "*entry views to Aughrim Village*". Rather than appeal the decision to the Board, the Developer elected to revise the proposal.

Consultation Process

11. Prior to the submission of the revised application for planning permission, the Developer engaged in public consultation including by public meetings at which a consultant hydrologist gave a Powerpoint presentation in relation to the impact of the proposed development on water supply (this presentation is reproduced at Appendix 2F of the EIAR). When providing an overview of water supply during this presentation, it was indicated that three turbines were proposed in the Killaduff source catchment area. A visual presentation of the Killaduff Water Supply Catchment was given on a slide depicting "*the catchment area*" outlined in yellow.

12. The size of area outlined in yellow on this map was identified as significant during the hearing before me as it is larger than the area subsequently identified as forming "t*he zone of contribution*" to the Killaduff Spring in the EIAR. The area outlined in yellow shows the water supply catchment area as including not only turbines 2 and 3 but also turbine 4 and meteorological mast 1.

13. The conclusions presented at the end of the Powerpoint presentation were that no impact on groundwater levels or flows were anticipated because of the proposed development and impacts on surface water were regarded as negligible during construction phase with no impacts anticipated during the operational phase.

Second Application for Permission for Windfarm

14. In 2017, the Developer applied for the second time, this time for a ten-year permission for the development of a wind energy project comprising eleven instead of twelve wind turbines. It is this second application (Wicklow County Council Planning Register Ref. 17/814), which is the subject of these proceedings. The application was made on the 5th of July, 2017.

15. The proposed development as detailed in the second application consisted of:

- eleven wind turbines with a maximum overall height of 150m to blade tip from existing ground level;
- a transformer at each turbine;
- a hard-stand area adjacent to each turbine location to facilitate the erection of turbines by crane;
- a 38kV electrical substation and all associated infrastructure and works;
- two meteorological masts with a maximum overall height of 100m tip from existing ground level and all associated infrastructure and works;
- new site tracks and upgraded site tracks and all associated works;
- two new access entrances to local road and all associated works;
- underground cabling.

Environmental Impact Assessment Report ["EIAR"]

16. The application was supported by an EIAR running to more than 900 pages including appendices and figures. The EIAR contains detailed consideration of a wide range of environmental issues involving input from a range of different expert consultants including Ecology, Ornithology, Geology, Hydrogeology and Slope Stability, Hydrology and Water Quality, Noise, Landscape and Visual, Cultural Heritage and Air & Climate. Due to the particular focus of these proceedings, it is proposed to consider the EIAR insofar as it addresses the impact on water, visual impact and turbine height as it relates to set back and Circular PL05/2017 only.

Impact on Water

17. Hydro Environmental Services (including Michael Gill, Hydrogeologist, who has since sworn affidavits in these proceedings) (hereinafter "HES") were retained as experts in relation to Geology, Hydrogeology and Slope Stability, Hydrology and Water Quality and are responsible for the information in Chapter 8 of the EIAR. Chapter 8 is entitled "*Geology, Hydrogeology, Hydrology and Water Quality*" and runs to more than 40 pages. The objectives of the assessment as expressed in the EIAR are:

- Produce a baseline study of the existing geological (soils and bedrock) and water environment (surface water and groundwater) in the area of the proposed wind farm development and proposed grid route connection;
- Identify likely negative impacts of the proposed development on geology, surface water, groundwater and during construction and operational phases of the development;
- Consideration of potential cumulative impacts arising from the proposed grid connection route and other wind farm developments within the same regional hydrological catchment;
- Identify mitigation measures to avoid, remediate or reduce significant negative impacts; and
- Assess post mitigation residual impacts.

18. Relevant Legislation is identified in this part of the EIAR as including:

- S.I. No. 349 of 1989: European Communities (Environmental Impact Assessment) Regulations, and subsequent Amendments (S.I. No. 84 of 1995, S.I. No. 352 of 1998, S.I. No. 93 of 1999, S.I. No. 450 of 2000 and S.I. No. 538 of 2001), S.I. No. 30 of 2000, the Planning and Development Act, and S.I. 600 of 2001 Planning and Development Regulations and subsequent Amendments. These instruments implement EU Directive 85/373/EEC and subsequent amendments, on the assessment of the effects of certain public and private projects on the environment;
- Planning and Development Acts 2000-2015;
- Planning and Development Regulations, 2001-2015;

- S.I. No. 94 of 1997 European Communities (Natural Habitats) Regulations, resulting from EU Directives 92/43/EEC on the conservation of natural habitats and of wild fauna and flora (the Habitats Directive) and 79/409/EEC on the conservation of wild birds (the Birds Directive);
- S.I. No. 293 of 1988 Quality of Salmon Water Regulations, resulting from EU Directive 78/659/EEC on the Quality of Fresh Waters Needing Protection or Improvement in order to Support Fish Life;
- S.I. No. 272 of 2009 European Communities Environmental Objectives (Surface Waters) Regulations 2009 and S.I. No. 722 of 2003 European Communities (Water Policy) Regulations which implement EU Water Framework Directive (2000/60/EC) and provide for implementation of 'daughter' Groundwater Directive (2006/118/EC);
- S.I. No. 41 of 1999 Protection of Groundwater Regulations, resulting from EU Directive 80/68/EEC on the protection of groundwater against pollution caused by certain dangerous substances (the Groundwater Directive);
- S.I. No. 249 of 1989 Quality of Surface Water Intended for Abstraction (Drinking Water), resulting from EU Directive 75/440/EEC concerning the quality required of surface water intended for the abstraction of drinking water in the Member States (repealed by 2000/60/EC in 2007);
- S.I. No. 439 of 2000 Quality of Water intended for Human Consumption Regulations and S.I. No. 278 of 2007 European Communities (Drinking Water No. 2) Regulations, arising from EU Directive 98/83/EC on the quality of water intended for human consumption (the Drinking Water Directive) and WFD 2000/60/EC (the Water Framework Directive);
- S.I. No. 9 of 2010 European Communities Environmental Objectives (Groundwater) Regulations 2010; and,
- S.I. No. 296 of 2009 European Communities Environmental Objectives (Freshwater Pearl Mussel) Regulations 2009.

19. The methodology described in section 8.2 of the EIAR includes consultation (including consultation with Geological Survey of Ireland, the OPW, the Forest Service, the Department of Agriculture, Food and the Marine and Fisheries Ireland), a desk study of the wind farm site, grid connection route and the surrounding area completed in advance of undertaking further walkover surveys and site investigations which involved collecting relevant geological, hydrogeological, hydrological and water quality data for the area.

20. In terms of site investigations, hydrological baseline monitoring, drainage mapping and geological mapping are recorded as undertaken by HES on the 9th of September and 3rd of December, 2014, 6th of November, 2015, 8th of December, 2015 and on 14th of March, 2017. It is further recorded that a trial pit investigation at the proposed wind farm site was undertaken by HES on the 13th of March, 2015. Site investigations recorded in the EIAR include the following:

- A walkover survey and hydrological mapping of the site and the surrounding area were undertaken by HES whereby water flow directions and drainage patterns were recorded;
- A total of 11 no. trial pits were undertaken within the area of the proposed wind farm site development to determine the thickness and lithology of subsoils along with bedrock type and structure;
- Gouge cores were undertaken at development locations to determine the soils and mineral subsoil lithology;
- Field hydrochemistry measurements (electrical conductivity, pH and temperature) were taken to determine the origin of surface water flows;
- 3 no. surface water samples were taken by HES to determine the baseline water quality of the primary surface waters downstream of the site;
- Public consultation meetings (2 no.) were undertaken with local residents regarding local water drinking sources;
- A site visit to a groundwater spring source in the Killaduff was undertaken in the company of a local resident; and,
- Consultation with a local landowner and a site visit associated with a groundwater spring source at Preban was also undertaken as part of the assessment.

21. At section 8.3 the EIAR describes the site topography stating:

"The proposed development site is located in the townlands of Ballymanus, Killaduff, Ballinglen, Askakeagh and Preban which exists approximately 3km west of Aughrim, Co. Wicklow. The elevation range of the site, which has a total landholding area of 457ha, is between 130 and 388m OD (Ordnance Datum). The topography of the local area can be described as hilly to mountainous with the site itself being spread across

three separate summit areas. The proposed site slopes steadily on all sides towards river valleys that exist to the northwest, west and south of the site. The western and eastern sections of the site are dominated by commercial coniferous plantations while the central section comprises agricultural grassland. A network of access roads is present on the site to facilitate the on-going forestry operations. The ground conditions at the site comprised shallow subsoils over bedrock and in general the site was noted to be relatively well draining and very firm underfoot."

22. A regional hydrology map is shown as Figure 8.5 of the EIAR. The EIAR points out (at 8.3.5) that the site exists within the Derry Water and the Ow River surface water catchments. It notes that the Ow River flows in a south easterly direction approximately 0.8km to the northeast of the site (at its closest point) while the Derry Water flows in a north easterly direction 0.65km to the south of the site (at its closest point). Both Rivers merge ~0.8km to the east of the site to form the Aughrim River which is a tributary river of the Avoca River. There are 15 watercourse crossings along the proposed route of the Ballymanus Windfarm. A local hydrology map is shown as Figure 8.6 in the EIAR. Three primary streams emerge from the site as shown on Figure 8.7. For description these watercourses are referred to as S1, S2 and S3 in the EIAR. It is noted that another smaller stream emerges close to the northern boundary of the site in the area of Killaduff. In a direct reference to the Applicants' water source, namely the Killaduff Spring, this stream is described as emerging from springs in the forestry and it is recorded that it is used as a water supply for the residents at Killaduff (p. 197 of the EIAR, at 8.3.6).

23. It is noted that most of the proposed turbine locations are remote from the streams identified. Within the site there are numerous manmade drains that are in place predominately to drain the forestry plantations. Site drainage surveys, after periods of heavy rainfall, were undertaken on 6th and 8th of November, 2015 and the majority of the forestry drains were still noted to be dry. The EIAR notes that this would indicate that the natural drainage of the site is relatively good with a significant amount rainfall infiltrating into the underlying subsoil and/or weathered bedrock layer.

24. The EIAR addresses flood risk (at section 8.3.7) and surface water hydrochemistry (at section 8.3.8). In considering surface water hydrochemistry, the EIAR refers to water samples

taken from surface waters downstream of the site on the 14th of March, 2017 at locations SW1, SW2 and SW3. Sample SW1 was taken from a stream that is fed by a number of small springs that are located within the Coillte forestry at Killaduff on the north of the wind farm site noting that these springs are used as drinking water source for locals in the Killaduff area (including the Applicants).

25. Considering the hydrogeology of the site (at section 8.3.9), it is noted that the proposed site and majority of the proposed grid connection route are within a region, mapped to be underlain predominately by Ordovician metasediments, which generally comprises dark grey semi-pelitic psammatic schist in the area of the development site. The Ordovician rocks are classified by the GSI as a Locally Important Aquifer, having bedrock which is moderately productive only in local zones. It is noted that the majority of groundwater flow in this aquifer will take place in the upper 3m of the rocks.

26. It is recorded in the EIAR that typical groundwater flow paths will be in the order of a couple of hundred metres, with discharge occurring to the closest surface water feature. It is further noted that there are several locations in the proposed wind farm site where springs emerge from sloping ground. In this context, reference is again specifically made to the Applicants' water source when it is recorded that the stream which emerges from the site in the area of Killaduff is fed by small springs that rise in the forestry approximately 450m to the north of proposed turbine location T3 (as set out at section 8.3.9 of the EIAR). Reference is made to Figure 8.10 at the end of the EIAR for identification of locations.

27. Figure 8.10 is the Figure which is referred to by the Applicants as being incorrect in their observation on the appeal to the Board. Figure 8.10 assumed an importance in the presentation of the case before me. Figure 8.10 shows a zone of contribution to the Killaduff Spring (marked as Killaduff ZOC) in an egg shape outline on the map which is markedly smaller in area than the area presented during the earlier Powerpoint presentation as the Killaduff Water Supply Catchment area. In Figure 8.10 only turbines 2 and 3 were identified as being proximate to the Killaduff zone of contribution whereas turbine 4 and meteorological mast 1 as well as turbines 2 and 3 had been identified as being within the Kiladuff water supply catchment area in the Powerpoint presentation. As the Powerpoint presentation is reproduced at Appendix 2F of the EIAR, both Figure 8.10 which was prepared on the basis of detailed site investigations as described in the EIAR and the map showing the larger Kiladuff Catchment

Area as presented during the earlier consultation process with locals were before the Board when it came to making a decision on this application.

28. Section 8.3.15 of the EIAR addresses "*Water Resources*" and notes that there are no GSI/EPA mapped public groundwater protection zones (i.e. zones of groundwater contribution) within the area of the proposed development. It is observed that a search of the GSI well database indicates that there are several private wells within 1km of the proposed development site. It is noted that with the exception of one mapped domestic well, which has a location accuracy of ≤200m, all other mapped wells have a location accuracy of ≤1km. It is recorded that as there is no proposed wind farm development up-gradient of this well and therefore there is no potential for impact. It is noted, however, that:

> *"due to the poor location of the remainder of the mapped GSI wells an impact assessment using the location of dwelling houses as a potential indicator is undertaken further below in this section. As the GSI well database is not exhaustive in terms of the locations of all wells in the area (as the database relies on the submission of data by drillers and the public etc) and due to the poor location accuracy of the wells that are mapped, it is assumed that every private dwelling in the vicinity of the proposed development has a water supply well associated with it (this is a very conservative assumption as many are likely to be on a public water supply)."*

29. The locations of private dwellings within 1km of the site boundary are shown on Figure 8.9 and include the Applicants' dwelling even though, as the Applicants point out in these proceedings, they do not have a private well. Their only source of water is the water from the Killaduff Spring. In these proceedings the Applicants identify the assumption of the existence of a private well at their dwelling as an error of fact which undermines the adequacy of the EIAR in this case.

30. Details of the dwellings and the setback distances from proposed wind farm infrastructure are shown on Table 8.13. Table 8.13 of the EIAR locates the Applicants' dwelling house at 520 metres from turbine T2 and 650 metres from T3. A footnote to Table 8.13 notes the assumption that each dwelling identified was assumed to have an on-site water well for the

supply of potable water. It is not in dispute that this assumption was incorrect in the Applicants' case. It is noted that six of the proposed turbines are located hydraulically up-gradient of a private dwelling and potentially a groundwater supply well. Addressing this risk, it is considered that due to the setback distance of the turbines (>520m), the potential to impact on any potential groundwater supply is negligible. In this regard reference is also made to the relatively low permeability of this aquifer type which means that groundwater flow paths are generally short.

31. It is further noted that maximum flow paths are estimated to be 200 - 300m for aquifers in this bedrock type. Based on this, it is considered unlikely that groundwater flow volumes and direction would be impacted by any activity that is at greater than ~300m from a given point in the aquifer. In addition, if a groundwater flow path exceeding 300m did exist, the relatively low permeability would mean that a pollutant would take months to travel this distance. It is estimated that the time of travel (ToT) for a potential pollutant to flow from a turbine location to the closest down-gradient dwelling identified as the Applicants' dwelling which is 520m down-gradient from the proposed T2, would be in the order of 236 days. It is observed that during this time any discharge would be assimilated and attenuated by natural groundwater flow and diluted by rainfall recharge. Also, any entrained sediment would be filtered within the low permeability bedrock aquifer. It is concluded, therefore, that the risk posed to potential well sources at this distance from potential spills and leaks from excavations is negligible to none.

32. The EIAR goes on to further consider and assess impact on spring water. A calculation of the groundwater catchment referred to as the "*zone of contribution*" was said to be shown on Figure 8.10. It is noted in the EIAR that it is reported by people in the locality of Killaduff that springs within in the forestry around the proposed development are being used as a drinking water source. It is recorded that a site visit was made on the 8th of December, 2015 to the Killaduff surface water supply (the Applicants' water supply). The EIAR states:

> *"Water here is being abstracted by means of an off-take from a small stream that emerges from springs/seepages within the forestry area (E308980 N180118). Refer to Table 8.14 below regarding the calculation of the groundwater catchment to the source. The extent of the groundwater catchment to the source is shown on Figure 8.10. A short*

section of proposed wind farm access road (20 – 30m length) passes through the south-western section of the groundwater catchment….. The potential for impact on these sources in respect of the proposed wind farm development is assessed in Section 8.6.13 below."

33. It is clear from the terms of the EIAR that Figure 8.10 is directed specifically to ground water sources including the Applicants' spring. In this way it differs from the map showing the Killaduff Water Supply Catchment presented during the consultation process and reproduced at Appendix 2F of the EIAR which addresses both ground and surface water supply catchment areas. The reference to section 8.6.13 in the extract above quoted from the EIAR appears to be in error as the potential for impact on the spring water is assessed instead at section 8.3.16.

34. At section 8.3.16 under the heading "*Receptor Sensitivity*" it is stated that due to the nature of wind farm developments along with the proposed grid connection route, being near surface construction activities, impacts on groundwater are generally negligible and surface water is generally the main sensitive receptor assessed during impact assessments. It is noted that the primary risk to groundwater at the site would be from hydrocarbon spillage, leakages at turbine base excavations and from on-site wastewater discharges. These are described as:

"common potential impacts to all construction sites (such as road works and industrial sites)".

35. It is stated that these potential contamination sources are to be carefully managed at the site during the construction and operational phases of the development and mitigation measures are proposed within the EIAR to deal with these "*potential minor impacts*".

36. It is further noted, however, that groundwater at the site can be classed as sensitive to pollution because the Ordovician rocks are classified as a Locally Important Aquifer (Ll). It is again expressly acknowledged that:

"there are a number of local water supply spring sources which have their groundwater catchments within the proposed wind farm site and there sources can be considered very sensitive to impact. Surface waters such as the downstream Derry Water, Ow River,

Aughrim River and Avoca River can be considered very sensitive to potential contamination. The primary potential contaminant is suspended solids."

37. The EIAR continues to state that mitigation measures will ensure that surface runoff from the developed areas of the site will be of a high quality and will therefore not impact on the quality of down-stream surface water bodies or habitats. In the first instance a self-imposed 50m stream buffer is proposed for surface water protection. It is noted that all proposed development areas (except for some sections of access road and one watercourse crossing) are significantly away from streams on the site that have been determined to be hydrologically sensitive. It is considered that the large setback distance from sensitive hydrological features means they (along with potential downstream water supplies) would not be impacted on by excavations/drains etc. It is further considered that it also allows adequate room for the proposed drainage mitigation measures (discussed below) to be properly installed up-gradient of primary drainage features within sub-catchments. This, it is observed, will allow attenuation of surface runoff to be more effective. Where work within the hydrological buffer is required, additional mitigation measures are to be employed (as further described in Section 8.6 of the EIAR).

38. As recorded in the EIAR assessment of changes in site run off volumes at section 8.3.17 result in a conclusion that any increase would be "*negligible*" even before drainage mitigation measures and "*there will be no risk of exacerbated flooding down-gradient of the site*." It is separately noted (at p. 223 of the EIAR) that a section of proposed wind farm access road passes through the Killaduff groundwater zone of contribution but no impacts to groundwater flows were anticipated "*due to the shallow nature of the road excavation*". It is noted that an existing forestry road already intercepts the groundwater catchment closer to the spring (downslope of proposed road) and this appeared to be having no impact no spring flows. Mitigation measures are proposed including signage to identify and mark the boundary of the Killaduff contribution zones where it interacts with existing forestry tracks or proposed wind farm access roads. Signposts to be erected would state:

"No Storage of Fuels, No Refuelling, No use of chemicals, No concrete chute wash-outs beyond this point".

39. In view of proposed mitigation measures it is noted in the EIAR that no impact on the local spring sources is expected. At section 8.7 it is concluded that the potential for hydrological cumulative impacts arising from the construction of the internal wind farm infrastructure, grid connection route and the 110kv substation are expected "*to be imperceptible to none*".

Landscape and Visual

40. MacroWorks were the experts retained in respect of Landscape and Visual and their contribution is reflected at Chapter 11 of the EIAR. The landscape is described in the EIAR as the southern end of the Wicklow Mountains containing an elongated ridge. The northern half of the study area contains the core of the Wicklow Mountains while to the south of the site the undulating landscape of hills and valley gradually dissipates to more gentle rolling terrain.

41. As stated at section 11.5.1.1 the landscape of the central study area is:

> *"a diverse mix of productive land uses including farming, forestry set within a rolling landscape of hills and valleys that provide a pleasant degree of containment. There is something of a classical pastoral aesthetic in the tapestry pattern of fields and hedgerows within the valley to the southeast of the site. This is balanced by the extensive conifer plantations contained on the upper slopes and ridges of the site. There is not a strong sense of the naturalistic within the central study area, though there is some sense of remoteness and tranquillity.*
>
> *Whilst there are a couple of wind farms within the wider study area to the south and such development is not unfamiliar in this landscape, wind energy development is not a characteristic feature of the central study area.*
>
> *Within the wider study area to the north are the highest peaks of the Wicklow Mountains with dramatic steep sided glacial valleys, lakes and broad, moorland ridgelines. Contained within the heart of this mountain zone is the monastic site at Glendalough which has a remarkable naturalistic setting and is one of the most important heritage and tourist locations in the country.*

The coastline at the eastern periphery of the study area is not dramatically scenic or remarkable but is popular with tourists and holidaymakers and therefore has a relatively high degree of value. The remainder of the outer study area to the south and west is a less remarkable rural landscape of gently undulating farmland and forestry as the Wicklow Mountains peter out.

Overall, it is considered that the proposal site lies within the transitional zone between the core of the Wicklow Mountains to the north and its apron of foothills to the southwest and east. Whilst the central Wicklow Mountains are rightfully considered to be an 'Area of Outstanding Natural Beauty' with an obviously high degree of sensitivity, the landscape of the outer southern and western portions of the study area is considered to be of low sensitivity. As a transitional zone between these landscape character areas the central study area is considered to be of medium sensitivity. This is actually consistent with the County development plan, which classifies the landscape containing the site is an area of High Amenity in the Wicklow County Development Plan (2016-2022). This is on the basis that the 'medium' sensitivity classification contained herein is defined as applying to a landscape with a "designation of protection at a county level or at non-designated local level where there is evidence of local value and use". It should also be noted that although there is no intervisibility with the proposal, the coastal corridor of the eastern study area is considered to be of medium sensitivity. The Glendalough monastic site and its surrounding landscape setting is considered to be of very high sensitivity."

42. The methodology adopted for the purpose of this part of the EIAR is recorded in the EIAR as including desktop study and fieldwork. The EIAR considers the landscape and visual impact of the proposed development within a study area with a radius of 20 km. A Zone of Theoretical Visibility (ZTV) study was undertaken and it is included in the EIAR. The theoretical visibility as noted is constant for circa 2-3 km in all directions and it remains to a distance of 10 km to the south and south west.

43. Regarding visual impacts, the EIAR identifies 28 Viewshed Reference Points (VRPs) based on various key views, designated scenic routes/views, local community views, centres of populations and amenity/heritage features. It is recorded that the Authority were consulted in relation to the selection of the VRPs. Photomontages were provided for each VRP and each

photomontage provided a direct comparison between the permitted development and the proposed development for each view. Of the 28 VRPS, the EIAR records that 5 were deemed to experience moderate visual impact with a further 5 experiencing a slightly-moderate visual impact. When viewed from VRP Ref: DR3 on the local road at Coolahullin all of the turbines would be fully or partially visible, with the four turbines at Preban and Askakeagh being visible above the skyline. When viewed from VRP Ref: DR5 near Mucklagh Bridge, six of the turbines would be fully visible and are visible above the skyline. When viewed from VRP Ref: DR6 on the R747 near Mucklagh, seven of the turbines would be fully visible and visible above the skyline.

44. A cumulative ZTV map was also submitted as part of the EIAR to illustrate the visibility of the proposed development and the locations where other windfarms would be visible. The cumulative ZTV indicates that the windfarm at Ballycumber (six turbines) were the most likely to be viewed in conjunction with the proposed development. Its cumulative impact is said to be particularly illustrated from VRP Ref: DR6 on the R747 near Mucklagh.

45. Assessing the magnitude of landscape effects (at section 11.5.1.2), the EIAR states:

> *"The physical landscape as well as the character of the site and its immediate surrounds is affected by the proposed turbines as well as ancillary development such as access and circulation roads and areas of hard standing for the turbines. By contrast, for the wider landscape of the study area, landscape impacts relate almost exclusively to the influence of the proposed turbines on landscape character."*

46. It is further observed that for most commercial wind energy developments, the greatest potential for landscape impacts to occur is because of the change in character of the immediate area due to the introduction of large-scale structures with moving components. Thus, wind turbines that may not have been a characteristic feature of the area become a new defining element of that landscape character. In the EIAR the expert authors add:

> *"In this instance, wind turbines are a familiar, but not characteristic feature of the landscape of the southern study area. They are an unfamiliar feature in the mountainous*

portion of the northern study area. In terms of scale and function, the proposed wind farm is well assimilated within the context of the central study area. This is due to the broad scale of the landform, landscape elements and land use patterns. These attributes prevent the height and extent of the proposed wind farm from causing the type of scale conflict that can occur in more intricate landscape areas.

Whilst the turbines are likely to be visible from elevated sections of the more sensitive mountain landscape of the northern study area (see Visual Impact Assessment at Section 11.5.2), their influence on the character of this landscape is limited by the physical distance and a sense of separation. This is because the perceived scale of the turbines reduces quickly with distance and they will become just another element within the anthropogenic rural landscape that surrounds the core of the Wicklow Mountains."

47. The word "*anthropogenic"* assumed a particular significance in these proceedings given the ultimate decision of the Board. It features for the first time in the EIAR in relation to the assessment of the magnitude of landscape effects but is also used repeatedly later in Chapter 11 when describing visual impact (from section 11.5.2 of the EIAR). At section 11.5.2.1 under the heading "*Visual Receptor Sensitivity*", it is stated that unlike landscape sensitivity, visual sensitivity has "*an anthropocentric basis*". The word is used repeatedly in the EIAR in the assessment of individual VRPs. Thus, DR1 (from local road near Rathvilly at p. 330) describes the prospective turbines as "*part of an anthrogenic vista*", DR4 (R747 at Annacurragh Cross Roads at p. 333) refers to "*this anthrogenic rural setting*", DR5 (R747 near Mucklagh Bridge at p. 334) "*this anthrogenic rural scene*", LC4 "*this anthrogenic upland scene*" (GAA field at Asknagap at p. 342). The word "*anthrogenic*" appears again at section 11.6.2 in relation to the assessment of visual impacts as follows (p. 360):

"Visual receptor sensitivity ranged widely from 'very high' at the summit of Lugnaquilla to 'low' for more typical, or strongly anthropogenic vistas from some of the larger settlements and major routes passing through the study area."

48. Other words and phrases in use in the EIAR in relation to the landscape in the context of visual impact include "*productive rural landscape*" (AV1 Lugnaquilla Mountain at p. 328,

AV2 Wicklow Way at Ballycumber South at p. 329 and CP3d Aughrim R747 approach at p. 349), "*richly diverse productive landscape*" (DR2 Local Road at Killeagh at p. 321), "*productive rural scene*" (DR6 R747 near Mucklagh at p. 335), "*this rural scene*" (DR8 R748 near Coolroe at p. 337), "*richly diverse rural vista*" (DR9 R748 at Kilcavan Gap at p. 338), "*upland landscape context with extensive forest plantations*" (LC1 Local road at Killaduff at p. 339), "*upland rural scene*" (LC2 Local road at Askakeagh at p. 340), "*part of the rural hinterland of Aughrim*" and "*complex urban/rural scene*" (CP3 Aughrim (fishing pond) at p. 345) and "*working rural landscape*" (CP3a Aughrim R753 approach at p. 346).

Objections to the Application

49. The Second Named Applicant made a submission to the Authority on or about the 8th of August, 2017 objecting to the development and asserting legal rights in relation to drinking water on lands in Killaduff including Roddenagh Wood. This submission was one of 324 submissions from the public and not the only submission to raise water rights. A wide range of issues were raised across the submissions received including, material to these proceedings, concerns in relation to water impact and visual impact of the development in a scenic area. Suffice to say the Applicants' concerns were widely held.

Refusal by Wicklow County Council

50. Permission was again refused by the Authority by order dated the 28th of August, 2017 having regard to the location of the wind energy development within Prospect 54 and its visual impact. The reason for refusal as apparent from its decision is that it was considered that the proposed development would have a pronounced effect on the landscape by reason of the height and spatial extent of the proposed turbines and the accumulation of both existing and permitted developments. The refusal reason as stated concluded:

> *"the impacts will have a pronounced effect on the landscape, altering its reading as a rolling rural landscape to a more industrialised scene, when turbines are viewed in the setting."*

51. In addition to its visual impact, permission was refused on grounds of traffic hazard and because the EIAR was considered deficient for failing to assess grid connection and provide

adequate information as regards a range of other identified matters. Impact on water supply was not identified as a ground of refusal by the Authority.

Appeal to the Board

52. The Developer appealed to the Board by appeal dated the 22nd of September, 2017. The grounds of appeal submitted addressed each of the refusal reasons of the Authority in turn. In relation to Landscape/Visual Impacts, the Board was referred to the Landscape and Visual Impact Statements (LVS) prepared by MacroWorks which in its concluding statement records:

> *"On the basis of the conclusions of the landscape and visual section of the project EIAR and the further reasons contained with this appeal response it is not considered that the Wicklow County Council's reason for refusal no. 1 is justified. Wind energy developments are frequently visible from scenic designations throughout the country and many without the degree of visual harmony that the Ballymanus Wind Farm displays from "prospect 54" (Wicklow CDP). The salient character of the receiving landscape will remain that of productive, yet tranquil, rural uplands should the proposed development be realized and will not become industrialised in either a standalone or cumulative sense."*

53. The Second Named Applicant joined with his mother and another neighbour in submitting an observation by letter dated the 17th of October, 2017 in which a range of issues were raised including impact to water supply, road safety and impact of increased traffic, impact to habitat, impact to exclusive sporting rights, impact to health due to noise, impact to health due to shadow flicker and visual impact. The primary focus of their submission was on impact on the drinking water and supply of water to the Applicants' dwelling house and farm. It was pointed out:

> *"as turbine 2 and 3 are in the drinking water source Killaduff spring GW Contribution zone, incorrectly shown on map, Figure No: 8.10 Drawing No: P1246-1214-A4-810-00A. Turbine 4 and the Met Mast 1 is in the catchment area of water source."*

54. Although this was the only reference to a purported mapping error, to which significant importance is attached in oral submissions before me, no basis was advanced for the contention that the map was in error. Reference was also made in the submissions, however, to a high-water table and a multitude of springs in the catchment area. The written observation invoked, *inter alia*, the Drinking Water Directive (Council Directive 98/83/EC of 3rd of November, 1998). Importantly, while the Applicants now rely on the visual presentation of the Killaduff catchment area as shown in the Powerpoint presentation during the earlier consultation process, no reference was made to this presentation in the Applicants' written observations on the appeal to the Board to explain why it was contended that there was an error in Figure No. 8.10.

Inspector's Report

55. The Board appointed an Inspector to report on the application. In her report dating to May, 2018, she confirms having visited the site on two occasions, namely, December, 2017 and January, 2018.

56. The Report runs to 69 pages. In it the Inspector addresses the site location and description, the proposed development, the Authority's decision (including the reports and observations considered), the planning history, the policy context (including the CDP) and the planning appeals (including submissions and observations) before proceeding to assess the application, recording her recommendation that the application be refused and stating the reasons and considerations informing this recommendation.

57. At paragraph 6.5 of the Report, the Inspector records the detail of the observations received from the Applicants noting their concern that the proposed development would seriously impact the supply of water to the farm and that proposed turbines 2 and 3 are located within the drinking source Killaduff spring GW Contribution zone. She records their submission that this has been incorrectly indicated on Figure No 8.10 and that proposed turbine 4 and meteorological mast 1 were also in the catchment area of the water source.

58. Issues considered in the assessment part (part 7) of the Inspector's Report include planning policy (with particular references to the Government's Energy Policy Framework 2007-2020, international commitments under the Kyoto protocol and Directive 2002/77/EC and the EU Renewable Energy Directive 2009 and the National 2020 target for Ireland), visual

amenity and landscape character, traffic and access, environmental impact assessment and appropriate assessment.

59. Under the heading "*Visual amenity and landscape character*" (paragraph 7.2 of the Report) the Inspector states:

> *"In relation to the current proposal the development of 11 no. wind turbines with an overall height of up to 150 metres represents a significant alteration in the landscape in particular as the turbines are located in an area designated Area of High Amenity. The appeal sit forms part of a landscape where there are many houses and farms and the alteration of the landscape will therefore have an impact. This impact, and concerns relating to this impact, is reflected in many of the submissions."*

60. Having visited the area, the Inspector confirms in her Report that she is satisfied that the 28 viewshed reference points (VPRS) are representative and provide an adequate basis for assessing the visual impact of the proposed development from a broad range of vantage points. She identifies three viewpoints as most significant namely:

- VRP Ref: DR3 – the local road at Cooahulin
- VRP Ref: DR5 – the R747 near Mucklagh Bridge
- VRP Ref: DR6 – the R747 near Mucklagh

61. In this way the Inspector identifies in her Report the viewpoints which she considered to be the most significant. She further noted that photomontages were available as part of the planning application.

62. At paragraph 7.2.15 of her Report the Inspector records:

> *"Both VRP Ref: DR5 and VRP Ref: DR6 are located within Listed Prospect No. 54. Listed Prospect No. 54 – Origin at Coolalug, Mucklagh, Tomnaskela and Kilpipe across the Derry Water River towards south Wicklow Mountains. Objective NH52 refers to*

listed views and prospects and states that it is a Development Plan objective to protect listed views and prospects from development that would either obstruct the view/prospect from the identified vantage point or form an obstructive or incongruous feature in that view/prospect. Due regard will be paid in assessing development applications to the span and scope of the view/prospect and the location of the development within that view/prospect. The proposed turbines would extend across the landscape for circa 3.3km within the listed prospect and with a maximum overall height of 150m to blade tip from existing ground level would be highly visible and strident features which would breach the skyline and would have a significant negative impact upon Listed Prospect No. 54 and on the visual amenities of the area."

63. In terms of cumulative impact, the Inspector refers to the development at Ballycumber and concludes (paragraph 7.2.17):

"In conclusion, I would consider that the overall cumulative impact, with particular regard to permitted wind farm at Ballcumber which is currently under construction and already visible, would unduly detract from the overall visual quality of List Prospect No. 54 and the High Amenity Area and would have an unacceptable impact on the visual amenities of the area. I consider, therefore, that planning permission should be refused on this basis."

64. Water issues are addressed by the Inspector in the section of her report dealing with Environmental Impact Assessment (from paragraph 7.4). At paragraph 7.4.15 she records that she is satisfied that the EIAR:

"taken in conjunction with the other details available, including the local authority's report and observations received, is adequate to enable the Board to carry out an environmental impact assessment and to make an adjudication on this application."

65. Based on this information she carried out a detailed assessment of land, soil, water, air and climate impacts as recorded from paragraph 7.4.43 of the Report. Referring to concerns raised by observers regarding potential impacts to water supply the Inspector set out in

summary information contained in Chapter 8 of the EIAR. As regards the information contained in the EIAR in respect of private wells she records that mapping in relation to private wells was imprecise and that there were six turbines upgradient of a number of dwelling houses which might potentially rely on groundwater supply. At paragraph 7.4.48 she notes:

> *"Potentially six turbines are located up gradient of private dwellings which have groundwater supply. However, a set back of over 520m is provided and therefore the potential impact on groundwater supply would be negligible….. Further spring waters sources have been highlighted at Killaduff and Preban. It is concluded in the EIAR that no impacts are expected and that no significant indirect impacts are expected."*

66. At paragraph 7.4.50 she states:

> *"I consider that the EIAR adequately identifies and assesses the potential impact of the proposed development on the hydrological environment and I consider that it provides detailed mitigation measures to protect water quality, primarily through mitigation by avoidance of sensitive aquatic areas."*

67. She concludes (paragraph 7.4.52):

> *"I am satisfied, overall, that the development would not have a significant adverse impact on water quality subject to the proper implementation of the proposed mitigation measures. These measures are comprehensive and are described as pre-emptive and proactive, with ongoing inspection, water quality monitoring and maintenance."*

68. At the end of her detailed report, the Inspector recommends refusal of the proposed development because of its height, scale and siting on a prominent ridge which would be visually intrusive. She adds that the cumulative impact of the proposed development with permitted windfarm to the west at Ballycumber would interfere with the character of the landscape and with "*a prospect of special amenity value, which it necessary to preserve*." The Inspector's recommendation was not based on any concern in relation to water impact.

Decision of the Board

69. The Board decided by a vote of 2:1 to grant permission on conditions.

70. In the Board Direction dated the 28th of March, 2019, it is recorded that the Board undertook an environmental impact assessment in which it took into account the nature, scale and location of the proposed development, the EIAR and associated documentation submitted in support of the application, the submissions made in connection with the planning application and the Inspector's report.

71. It is further specifically recorded that the Board considered that the EIAR, supported by the documentation submitted by the Applicant, adequately considers alternatives to the proposed development and identifies and describes adequately the direct, indirect, secondary and cumulative effects of the proposed development on the environment. It is noted that except insofar as landscape and visual amenity was concerned the Board agreed with the examination set out in the Inspector's report of the information contained in the EIAR, the associated documentation submitted by the applicant and the submissions made during the application and adopted the Inspector's assessment in this regard.

72. In deciding not to accept the Inspector's recommendation to refuse permission with reference to visual impact and visual amenity, it is noted that the Board had regard to the "*significant man-made interventions*" in the:

> *"existing low to medium sensitivity landscape and, notwithstanding the location of the site in an area less favoured for wind farm development as set out in the Wicklow Wind Energy Strategy, considered that the proposed development would not be visually obtrusive and would not, cumulatively with the permitted windfarm to the west at Ballycumber, interfere with the character of the landscape and obstruct or form an obtrusive or incongruous feature in the Listed Prospect No. 54."*

The reference to "*significant man-made interventions*" and "*low to medium sensitivity landscape*" in the Board's decision and the evidential basis for same was the focus of particular attention during oral argument before me.

73. The Board Order granting a ten-year permission for the proposed Ballymanus Wind Farm was in similar terms, including as to conditions. At Condition 7 of the permission, it was stated that the maximum tip height permitted shall not exceed 156.8 metres, even though permission had been sought for a tip height not exceeding 150 metres.

PROCEEDINGS

74. By Order *Ex Parte* (Noonan J.) made on the 24th of June, 2019, leave to proceed by way of judicial review was granted on foot of an application first opened to the Court on the 29th day of May, 2019. The application was grounded on Affidavits sworn by both Applicants. As regards the impact of the proposed development on their drinking water the Applicants further relied on the Affidavit and report of Paul Johnston sworn on the 20th of June, 2019 notwithstanding that there was no evidence from Mr. Johnston before the Board when it made its' decision.

75. A transposition issue which had been pleaded was abandoned and the State Respondents were released early in the proceedings. Many other issues were canvassed in the Statement of Grounds upon which leave to proceed by way of judicial review was granted but it was confirmed during the hearing before me that the only issues being pursued in these proceedings related to:

i. The assessment of impact on the Applicants' water;
ii. The approach to and decision on visual impact;
iii. The treatment of turbine height as it relates to set back and failure to have proper regard to Circular PL05/2017

76. While the Opposition papers filed on behalf of the Board and the Developer contain a full traverse of all issues pleaded and framed by the terms of the order granting leave, it is proposed to only summarise their responses as they relate to issues which remain live in these proceedings. It should be noted in this regard that the Board conceded at an early stage that a mistake had been made in Condition No. 7 of the Planning Permission which allowed for a turbine height of 156.8 metres instead of 150 metres. This error was rectified pursuant to s. 146A of the Planning and Development Act, 2000 (as amended) (hereinafter "the 2000 Act") post the commencement of the within judicial review proceedings by Board Order made on the

18th of August, 2020 in which the original order was amended as to Condition 7(a) by specifying that the maximum tip height shall not exceed 150 metres.

77. Whilst acknowledging a clerical error, by Statement of Opposition filed on the 5th of March, 2020, the Board maintains that it has properly considered the issue of impact of the proposed development on the Applicants' water source placing particular weight on the fact that it was aware from the Applicants' submissions that they did not have a private well-based supply. Reliance is placed on the fact that water resources were addressed at Chapter 8 of the EIAR which assumed the existence of a well at each dwelling house as a precaution but also considered impact on local spring sources. It is confirmed that based on the material before it, the Board concluded that there was no impact on drinking water.

78. The Board objects to the Applicants' attempt to adduce affidavit evidence in these proceedings contending for a risk to the Applicants' water source (through the affidavit of Paul Johnston) as this evidence had not been presented to the Board in advance of its decision.

79. The Board defends its disagreement with the Inspector as regards visual impact, stands over its decision to grant permission notwithstanding visual impact and contends that the reasons for its decision are clearly and adequately stated.

80. The Board further confirms that regard was had to Planning Circular Letter PL 5 / 2017 and denies any frailty in the decision arising from the contents of the said Circular Letter.

81. Opposition papers were separately filed on behalf of the Developer. The Developer contends that the approach taken to water impact assessment in the EIAR submitted to the Board was to:

> *"allow a conservative quantitative assessment on groundwater flow travel times and groundwater flow directions from various components of the wind farm development to be completed"*

82. The Developer maintains that with appropriate mitigation measures as identified in the EIAR there will be no impacts to the local spring source. Objection is also taken on behalf of

the Developer to reliance on the affidavit of Paul Johnston by the Applicants when this evidence was not placed before the Board. The Developer further relies, however, on the affidavit of Michael Gill, who had been engaged by HES and contributed to Chapter 8 of the EIAR in his capacity as Hydrogeologist, in response.

83. The Developer relies on the reference to Planning Circular Letter PL 5/2017 in the Inspector's Report in answer to the plea that there was a failure on the part of the Board to have regard thereto.

84. The Developer further relies on the evidence placed before the Board in terms of visual impact contending that there was sufficient evidence before the Board to allow it to conduct an environmental impact assessment and arrive at the conclusions it did in this regard. Insofar as the Board reached a different conclusion to that of the Inspector it is contended that it did so on the basis of the evidence before it and explained the basis for that decision.

LEGAL FRAMEWORK

85. The environmental issues arising in these proceedings are framed both by measures of EU and domestic law.

86. By Article 3 of EU Directive 2011/92 (hereinafter "the EIA Directive"), an environmental impact assessment shall identify, describe and assess in an appropriate manner, in the light of each individual case, the direct and indirect significant effects of a project on factors including water and human health. The EIA Directive is designed to ensure that projects likely to have significant effects on the environment are subject to a comprehensive assessment of environmental effects prior to development consent being given. The EIA Directive requires member states of the EU to carry out assessments of the environmental effects of certain public and private projects before they are allowed to go ahead. The requirements of the EIA Directive have been transposed into domestic law in terms of development consent by the provisions of Part X of the Planning and Development 2000 (as amended) (hereinafter "the 2000 Act") and the Regulations made thereunder.

87. EU law also protects groundwater as a resource for human use (see, for example, Directive 2000/60). Measures have been adopted to implement this Directive domestically (see European Communities (Water Policy) Regulations 2003 (S.I. No. 722 of 2003). While reliance was placed on Directive 2000/60 in these proceedings, no complaint that any specific provision of the Directive has been breached in this case has been particularized in the Statement of Grounds or advanced in argument before me.

88. Relevant to the arguments made with regard to Circular PL05/2017, the 2000 Act also provides for the issue of statutory guidelines to planning authorities regarding the performance of their functions under that Act (s. 28). The obligation on the Board under s. 28(2) is to "*have regard*" to any guidelines issued under s. 28(1) in the performance of its functions. Under s. 28(4) the Minister may revoke or amend guidelines issued under this section a copy of any guidelines issued under s. 28 and of any amendment or revocation of those guidelines is laid before each House of the Oireachtas.

89. It is generally contended that the grant of planning permission for the Ballymanus Wind Farm is in breach of the requirements of EU law as regards environmental impact assessment as well as the protection of ground water. Although Circular PL05/2017 is not a guideline within the meaning of s. 28 of the 2000 Act, it is contended that there is a failure on the part of the Board to have due regard to it.

DISCUSSION AND DECISION

Water Source

90. As set out above, the EIAR assumes the existence of a private well at the Applicants' dwelling house. This is identified as an error on behalf of the Applicants at paragraphs 15 and 16 of the factual grounds relied upon in proceeding by way of judicial review where it is described as "*an erroneous assumption*". The Applicants complain that while the EIAR acknowledges the presence of a spring supplying water to their property, the erroneous assumption is that the spring source in Roddenagh Wood is not the sole water source serving local dwellings, including that of the Applicants, and that each of the houses has a groundwater well on their own property.

91. It is contended therefore that the assessed impacts to drinking water were made on the incorrect assumption that the turbine construction will occur at a minimum distance

of 520 metres from the drinking water source supplying the Applicants. It is pleaded that the spring serving the Applicants is depicted by the Developer in figure 8.7 of the EIAR to be at about 300 metres from turbine T2, less than the 520 metres indicated for an assumed well. Reference is also made to the PowerPoint presentation prepared by the Developer and exhibited by the Applicants which it is pleaded confirms that at least three of the turbines will be in the source catchment area of the Applicants' water source, instead of the two indicated in Figure 8.10 of the EIAR.

92. It is further pleaded as part of the factual grounds relied upon for seeking relief that at section 7.4.48 of her Report in addressing the issue of domestic water supplies, the Inspector adopted the error in Table 8.13 of the EIAR by assuming that the Applicants' house, which according to the EIAR is located at 520 metres from Turbine T2, had an onsite well for the supply of drinking water. It is contended that the Inspector was led into an error of fact by the EIAR, failed to grasp the significance of the risk to the Applicants' drinking water supply when conducting her assessment under the EIA Directive.

93. In the legal grounds identified in the Statement of Grounds the Applicants plead under the heading "*Failure to take into account Relevant Matters*", the Board erred in law and acted contrary to the Constitution and the European Convention on Human Rights Act, 2003 and the law including International law in failing to take proper or any account of the Applicants' rights to their water supply and their reliance on same water supply as the sole source of drinking water for their family home (paragraph 52).

94. It was further pleaded (at paragraph 60) under the heading "*Ultra Vires and Contrary to EIA Directive*" that in failing to have proper regard for groundwater protection, including for the protection of the Applicants' drinking water supply, and the risk of pollution to same the Board erred in law and acted contrary to Irish law and the EIA Directive as amended in 2014 and the Water Framework Directive.

95. Finally, under the heading "*Failure to give Reasons*", the Applicants plead (paragraph 68) that the Board failed to give reasons for consenting to the development of a wind farm that placed the Applicants' sole source of drinking water supply at risk.

96. Notwithstanding the pleading points argued on behalf of the Board and the Developer

in reliance on cases such as *A.P. v. Director of Public Prosecutions* [2011] 1 IR 729, *Casey v. Minister for Housing, Planning and Local Government* [2021] IESC 42, *People Over Wind v An Bord Pleanála, Eco Advocacy CLG v. An Bord Pleanála (No.1)* and C- 721/21 *Eco Advocacy, Rushe v. An Bord Pleanála* [2020] IEHC 122 and *Ballyboden Tidy Towns Group v. An Bord Pleanála & Ors.* [2021] IEHC 648, I am satisfied that it is sufficiently clear from the Statement of Grounds on foot of which leave was granted that the case is made that there was a failure to properly assess the environmental impact on the Applicants' water because:

i. the Board erred in fact in relying on a mistaken assumption that the Applicants' dwelling had a private well and therefore did not properly assess the impact on the sole water supply to the property from the Killaduff Spring;
ii. the Board failed to properly identify the zone of contribution and proceeded on the incorrect basis that it was limited to an area in proximity to turbines 2 and 3 but excluding turbine 4 and meteorological mast one;
iii. the decision to grant permission was inadequately reasoned with regard to the treatment of water rights, most specifically the zone of contribution issue.

97. I consider that each of the above issues (whilst imperfectly framed in the Statement of Grounds) fall within the scope of the Order granting leave to proceed by way of judicial review in this case. These are also the issues pursued in argument during the hearing before me and properly arise for determination. While other issues were pleaded and some were addressed in written submissions, they have not been pursued in any real sense and are not now treated by me as part of the case made.

Erroneous Assumption of Private Well

98. It is not in dispute that the Applicants' property did not have a private well nor that their only source of water is the water from the Killaduff Spring. It is, however, strongly contested that this incorrect assumption undermines the adequacy of the EIAR because it proceeds on the basis that the Applicants had a well on site.

99. The Board's case (see paragraphs 6 to 13 Statement of Opposition) is that while it is accepted that the Developer in Table 8.13 of the EIAR assumed that the Applicants' farmhouse

is supplied from an onsite water well, the impact on the Killaduff Spring and the mountain stream that flows from it was also considered. As the Board points out, the EIAR also described the predicted impact on both sources; well and spring (including by virtue of the access road which the Applicant maintains was not assessed) at *inter alia* section 8.3.15 and throughout section 8.6 in the "*Statement of Potential Impacts and Mitigation Measures*" from which it is apparent that the impact on Killaduff Spring was fully assessed including by reference to the access road which the Developer acknowledged was within the catchment. In this way, the Board relies on the fact that the EIAR expressly reasoned that for assessing the impact on wells, it could not be excluded that each dwelling had a well but this did not exclude the separate assessment of springs which were fully understood as being a source of drinking water.

100. It seems to me that the actual position regarding the assessment of wells was clearly explained in the EIAR. It must have been plainly understood by the Inspector and the Board that the "*conservative*" approach taken was adopted as a precaution to ensure that a possible water source was not overlooked, This had to be clear to both the Inspector and the Board as it was acknowledged in plain English that the GSI well database is not exhaustive in terms of the locations of all wells in the area and the location accuracy of the wells that are mapped is poor and this was why the precaution was being taken. So, insofar as a set-back of 520 metres was referred to, this was in the context of the wells and related assumptions and had not bearing on any separate question of a spring water or other source. It did not exclude the other separate assessment carried out of springs but rather was an additional assessment adopted on a "*belt and braces*" basis in case there might also be a private well supplying the property which should be considered from the perspective of potential environmental impact. The fact that the assessment of a potential or assumed well undertaken from an abundance of caution was not relied upon in substitution for an assessment of the Applicants' actual water source is clear from the very next part of the EIAR where potential impact on spring water sources is next considered in its turn. There is no doubt that the Inspector also understood this to be the case. Having specifically referred to how "*spring water sources have been highlighted at Killaduff and Preban"* the Inspector says "*[i]t is concluded in the EIAR that no impacts are expected and no significant indirect impacts are expected."* Indeed, insofar as the Applicants say the Inspector ignored the access track, this is manifestly incorrect. The Inspector dealt specifically with run-off risk from the construction of *"access tracks"* at section 7.4.49 of her Report.

101. As stated by the Developer in opposing these proceedings, but also by the EIAR in its own terms, the assumption that the Applicants' dwelling had its own well was to allow a conservative quantitative assessment on groundwater flow travel times and groundwater directions from various components of the wind farm development to be completed. It seems to me that the Applicants misunderstood the EIAR to the extent that they appear to have equated the full assessment (which included an assumed well and the actual spring water) with part of the assessment (only the assumed, non-existent well) and ignored or failed to appreciate that the other part of the assessment fully addresses any issue because the actual source, namely Killaduff Spring, is assessed also. I am satisfied that it is clear from the terms of the EIAR that the assumption of the existence of a private well was intended for completeness and to ensure that if a well existed at the location that the impact on that well was considered and that this was understood by both the Inspector and the Board. The Applicants' concerns are based on a misreading or partial reading of the EIAR which does not flow from the terms of the EIAR read as a whole. These terms are unambiguous.

102. I agree that an erroneous assumption of the kind complained of in these proceedings could be problematic were it the case that the Applicants' actual water supply was not considered in consequence. Had the Board relied upon a supposed setback of over 520m from a non-existent well on the basis that this was a source of water available to the Applicants instead of assessing the water supply deriving from the Killaduff Spring, this would indeed constitute a failure to properly assess the impact on water supply. To arrive at a conclusion that there had been a failure to properly assess water in this case based on a mistaken fact of this nature, however, ignores the plain text of the EIAR. Patently in this case the identified assumption was adopted in an exercise of completeness and thoroughness. It was not exhaustive of the assessment of impact on water supply either in the EIAR or by the Inspector and the Board and the impact on the Killaduff Spring, the Applicants' actual water supply, was separately considered. It is clear from the several references to the Killaduff Spring in the EIAR and in the Inspector's Report that impact to the Spring, the actual source of the Applicants' water, was assessed and considered separately to the question of potential impact on a well, if one were located near the Applicants' dwelling house.

103. Accordingly, the complaint made that the environmental impact assessment of the Applicants' water supply by the Board was inadequate by reason of a mistaken assumption as

to the existence of a private well in proximity to and serving their dwelling house is not substantiated and is without merit. Although this assumption was made as an exercise of thoroughness and completeness, full consideration was also and separately given to the environmental impact of the proposed development on spring water sources, including the Applicants' spring water supply. Accordingly, the Applicants' water source was identified, the impacts assessed, mitigation described and a prediction of *inter alia,* "*no impacts on the local spring sources are expected*" was set out in the EIAR as considered and accepted by both the Inspector and the Board.

Failure to Properly Assess the Zone of Contribution to the Killaduff Spring

104. The thrust of the case as regards inadequate assessment of environmental impact on water supply as made on behalf of the Applicants during the hearing before me was directed to the case made that the zone of contribution depicted on Figure 8.10 differs materially from the visual presentation of the Killaduff catchment area given in the Powerpoint presentation during the consultation phase. The point made is that Figure 8.10 shows a much smaller area (shown in an outline in the shape of an egg on Figure 8.10) as being the "*zone of contribution*" than had been presented as the Killaduff catchment area during the Powerpoint presentation (which presentation is also included Appendix 2F to the EIAR). Although the focus of considerable attention in argument before me, the identified difference between Figure 8.10 and parameters shown on the Powerpoint presentation was not expressly identified in the Applicants' observations to the Board. Indeed, while the Powerpoint was referred to in the Statement of Grounds, no specific reference was made to the visual presentation of the Killaduff catchment area in that presentation as giving rise to the Applicants' complaint of inadequate assessment and the substance of their complaint in this regard only crystallised at submission stage.

105. In written submissions filed on behalf of the Applicants in advance of the hearing before me, express reference is made for the first time to Appendix 2F to the EIAR which contains the map headed *"Killaduff Water Supply Catchment"* which purports to show the extent of the Catchment area for this water source. On a page headed "*Water Supply Overview"* it is stated that 3 turbines were proposed in Killaduff source catchment area along with upgrade of *"existing forestry access roads."* It is contended that the EIAR proceeds on the incorrect basis that only 2 turbines are located in the zone of contribution.

106. The Board denies any failure to properly assess environmental impact with reference to the correct zone of contribution pointing out that, based on the material before it, the Board was entitled to decide that turbine 4 and meteorological mast 1 were not in the zone of contribution to the Killaduff Spring. It relies on the extensive materials before it to contend that it properly assessed environmental impact with reference to the zone of contribution to the Killaduff Spring as identified in the materials before it. In this regard it refers to the Developer's detailed and evidence-based position as set out in Chapter 8 of the EIAR and reflected visually in Figure 8.10.

107. It seems to me that the Board's is correct in its position in this regard. It is recalled, as more fully set out above (paras. 19-38), that the Developer's position was informed by extensive consultation as recorded in the EIAR, a wide-ranging and documented desk study and site investigations which included hydrological baseline monitoring, drainage mapping and geological mapping undertaken by experts physically present on site over the course of several days (notably the 9th of September and 3rd of December, 2014, the 6th of November, 2015 and the 8th of December, 2015 and on the 14th of March, 2017). A trial pit investigation at the proposed wind farm site was undertaken by HES on the 13th of March, 2015. Site investigations detailed in the EIAR are significant and are recorded as including a walkover survey and hydrological mapping of the site and the surrounding area whereby water flow directions and drainage patterns were recorded, a total of 11 no. trial pits within the area of the proposed wind farm site development to determine the thickness and lithology of subsoils along with bedrock type and structure, gouge cores at development locations to determine the soils and mineral subsoil lithology, field hydrochemistry measurements (electrical conductivity, pH and temperature) to determine the origin of surface water flows, 3 no. surface water samples to determine the baseline water quality of the primary surface waters downstream of the site and a site visit to a groundwater spring source at Killaduff. In her Report the Inspector clearly records that she accepts the Developer's information.

108. I am satisfied that the Board was entitled to rely on the material presented in the EIAR which identified the zone of contribution as depicted on Figure 8.10 and as therefore excluding Turbine 4 and Meteorlogical Mast 1. The zone of contribution depicted on Figure 8.10 was identified following appropriate site investigations by experts and the investigations carried out were accepted as adequate by both the Inspector and the Board, each of whom also has relevant expertise. On the other hand the map now relied upon by the Applicants predated subsequent

detailed site investigations. The said map addressed ground and surface water contributions whereas subsequent investigations establish that the Killaduff Spring is a groundwater spring. Implications for groundwater spring sources proximate to the proposed Ballymanus Wind Farm were fully assessed. Accordingly, Figure 8.10 identifies the zone of contribution to the groundwater spring in a manner which precisely identifies the Applicants' actual water source from the Killaduff Spring and the EIAR fully assesses potential environmental impact to this spring source and concludes no significant impact is expected.

109. No basis for interfering with the Board's decision to accept the conclusions of the EIAR in relation to the assessment of water impact following investigations as outlined in considerable detail in the body of the report has been demonstrated. The Applicants' contention that there was a failure to properly assess impact on their water supply is not made out.

Inadequate Reasoning

110. The Applicants asserted in observations made in writing that their water supply from the Killaduff Spring was in the catchment area of not two turbines but three turbines and a meteorological mast, contrary to what was reported in the EIAR and that there was a potential impact on their water supply in consequence. This submission was recorded in the Inspector's Report but no express reference was made to the Applicants' assertion in finding that there would be no impact on the Applicants' water supply if the proposed development were to proceed to explain why the Board was satisfied to proceed on the basis of two turbines only being located within the zone of contribution. It is contended on behalf of the Applicants that simply re-iterating the conclusions of the EIAR does not address the issue raised by the Applicants. The complaint made is that in failing to identify why the Applicants' concerns were being rejected, the Board failed to adequately reason why it was satisfied based on proper environmental assessment that there would be no adverse impact on water supply to their house and lands and how it resolved the issue as to whether there were two turbines only or three turbines and a meteorological mast located in the zone of contribution to the Killaduff Spring.

111. Although the Board in submissions is able to point to the material on file to explain how it could be satisfied to rely on Figure 8.10 as correctly identifying the zone of contribution (based on further site investigations, a changed site layout and a differentiation between surface and ground water sources), it is submitted on behalf of the Applicants that when considering the

effects of the proposed development on private water rights, it is not acceptable for the Board to plead in retrospect that it had various strands of information on its files if these are not adequately assessed during the process itself. The case urged is that simply having the information is not the same as using the information or using it properly. Significant reliance is placed on behalf of the Applicants on the decision of O'Donnell CJ. in *Balz v. An Bord Pleanala* [2019] IESC 90, [2020] I ILRM 367, para. 57 where he stated that:

> *"it is a basic element of any decision-making affecting the public that relevant submissions should be addressed and an explanation given why they are not accepted, if indeed that is the case."*

112. Reliance is also placed on the *obiter* observations of Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2023] IEHC 722 at paras. 172 to 177 where he referred to the decision of the Supreme Court in *Balz* in addressing the fact that the figures put forward by the developer in the *Ballyboden* case had been "*queried*" in questioning whether this amounted to sufficient to demonstrate that the Board had "*truly engaged*" with the issues raised. As the decision in that case did not turn on which figures were accepted or why, it was not necessary for the court to reach a conclusion as to the adequacy of the reasoning reflected in the decision to assure objectors that their views had been heard, listened to and considered thereby demonstrating the legitimacy of the decision and the process.

113. For its part, the Board refers me to the decision of the Supreme Court in *Connelly v An Bord Pleanála* [2021] 2 IR 752; [2018] 2 ILRM 453 on the authority of which I am urged to consider what the reasonable observer, familiar with the issues and having participated would have made of things. It is contended that the reasonable person would have read the EIAR and understood just what it said including the mapped catchment areas, the description of impact and reasoning behind the conclusions. It is contended that reasonable person would see the Applicant's bare assertions and that reasonable person would then see the Inspector's text which the Board submits is clear. Then that reasonable person would see the Board Direction and Decision which, it is submitted, also make it clear the Board had regard to all the information before it and did not determine that any impacts on water were significant based on that information with the result that the requirement for reasons in *Connelly* is discharged.

114. In *Balscadden Road SAA Residents Association Limited v An Bord Pleanála & Crekav Trading GP Limited* [2020] IEHC 586 the Court noted that *Balz* did not extend the duty to give reasons beyond *Connelly*. More recently, the "*centre of gravity*" in the reasons jurisprudence has been described by Humphreys J. in *O'Donnell v An Bord Pleanála* as an obligation to provide the main reasons on the main issues which, it is suggested by Holland J. in *Ballyboden Tidy Towns Group v. An Bord Pleanala* [2022] IEHC 722 (at para. 177) may, on the facts of a given case, need to be reconciled with dicta to the effect that it is crucial that points made in submissions should be addressed.

115. It seems to me that the tension signalled by Holland J. does not present an issue requiring to be resolved because of the nature of the submission made and the full extent of the material relied upon by the Board in making its decision. Sight cannot be lost of the fact that the submission made in relation to the zone of contribution was not developed beyond the barest assertion. In *Náisiúta Leictreach Contraitheoir Eireann (NECI) v. Labour Court & Ors.* [2021] 2 ILRM 1, the Supreme Court referred to *Balz* noting that it makes clear that a decision maker must engage with significant submissions (McMenamin J. at para. 155). Quite clearly, the Applicants' reference to a broader zone of contribution without elaboration was not a "*significant*" submission.

116. From *Connelly* it is established that the reasons for a decision need not be set out in the terms of the decision itself if the person affected can determine what the reasons are. If it is broadly clear why a view is preferred in arriving at a decision, the requirement for reasons identified in *Connelly* and applied in case law since then is satisfied. It seems to me that the *Connelly* standard as interpreted and applied in subsequent case law is met in this case. Whilst the Applicants asserted that turbine 4 and meteorological mast 1 fell within the zone of contribution, they did not set out the basis for this assertion. They provided no evidence to support their assertion. Although there was a map prepared as part of the Powerpoint presentation during the earlier consultation stage which located turbine 4 and meteorological mast 1 within the Killaduff water catchment area contained in the materials before the Board (in an appendix to the EIAR), this map was not referred to by the Applicants and they did not make clear the significance they were attaching to it.

117. Further, the assertion made by the Applicants, without specificity, was contrary to the Developer's detailed and evidence-based position as set out in Chapter 8 of the EIAR and reflected visually in Figure 8.10. Had the Inspector's Report expressly said "*there is no evidence relied on by Mr. Roache to support the view that the catchment area is wrongly described"* the Applicants' case regarding the identification of the zone of contribution would be wholly unstateable. The absence of these words, however, does not mean that the decision is flawed as being inadequately reasoned once this reasoning is ascertainable and capable of being readily determined deriving from the documents and the context of the decision.

118. In proceeding to grant permission based on the EIAR in this case the Board obviously did not accept the submission made by the Applicants in relation to the zone of contribution but preferred the evidenced based findings recorded in the EIAR. It is indeed difficult to see how the Board could have reached any other conclusion given that it was obliged to make its decision based on evidence before them albeit upon being satisfied that the assessment was adequate. Although it is beyond question that a decision maker is entitled to prefer one item of evidence over another, provided the basis for preference is understood and is sustainable, the situation in this case was much more akin to an evidence-based position juxtaposed against a position for which no evidence was produced.

119. It is recalled, as more fully set out above (paras. 19-38 and 106), the zone of contribution of the Killaduff Spring reflected in Figure 8.10 of the EIAR was supported by all of the expertise garnered and investigations conducted in preparing the detailed EIAR presented to the Board. The explanation for preferring the Notice Party's position over the bare assertion of the Applicants is manifest. Where an assertion is made without evidence, then it is clear why an evidence-based finding to the contrary is preferred. As a bare assertion it was not supported by any evidence and fuller investigations reflected in the EIAR, the adequacy of which were accepted by the Board, clearly communicated the reasons for Board's decision that there would be no adverse impact on the Applicants' water supply, contrary to their apprehensions.

120. I am satisfied there has been no failure to adequately explain the reasons for the decision regarding an apprehended impact from the proposed development on water rights. While the Board did not specifically address why it was rejecting the Applicants' contention that the zone of contribution was inaccurately drawn when excluding turbine 4 and meteorological mast 1 in

Figure 8.10, the reason for rejecting this contention is indeed obvious and discernible from the body of material before the Board as comprised in the EIAR, the findings of which the Board expressly accepted. The map included in the Powerpoint presentation, now understood to be the basis for the assertion made regarding the erroneous extent of the zone of contribution, was available to the Board in an Appendix to the EIAR. While the Applicants did not refer to it or set out why it was considered significant and therefore did not raise the issue of the earlier map in a manner which required direct attention in the Board's subsequent reasoning, no error of appraisal is established by the failure to address this map directly in the conclusions arrived at based on the zone of contribution identified in Figure 8.10. This is particularly so when, properly understood, the maps are not contradictory and where Figure 8.10 is informed by all of the investigations described in the EIAR.

121. In accepting the findings in the EIAR, the Board obviously proceeded on the basis that the detailed investigations carried out after the Powerpoint presentation (which in relevant part was not confined to ground water and included surface water not impacting on the Applicants' water source) had correctly identified the zone of contribution as depicted in Figure 8.10. It is not necessary for the Board to set this out in express terms for its reasoning to be understood because the Applicants did not refer to this earlier map still less identify the meaning they attached to it in a manner which would require the Board to explain why it was satisfied that the earlier map did not correctly identify the zone of contribution for the Killaduff Spring.

122. This is not a case like *Ballyboden* where the developer's view but not the notice party's were recorded without an apparent basis for preferring one over the other. In this case the Applicants' submission was recorded but it was not supported by anything other than bare assertion because the map included in the Powerpoint presentation was not identified in making the assertion and the said map did not, in any event, disturb the findings subsequently made following investigations on a different question of the zone of contribution to groundwater alone, as opposed to the area of catchment for both groundwater and surface water. Accordingly, had the Applicants properly identified the basis for their concern with reference to the map included in the Powerpoint presentation, this concern was one which was capable of being easily addressed based on the information already before the Board.

123. Faced with detailed information from the Developer and none beyond bare assertion from the Applicants, the Inspector clearly records that she accepts the Developer's information.

The plain reason for the decision to accept the Developer's position regarding the extent of zone of contribution is therefore that the Applicants' assertion is rejected because there is no evidence to support and the Developer's position was accepted because it was evidence based and supported by the material presented.

124. In the absence of any evidence in support of the Applicants' bare assertion, there was no obligation on the Board to embark on an explanation as to why it preferred the Developer's position supported in evidence over an assertion for which no evidence was offered, as the explanation is obvious and may be inferred from the materials which were before the Board including the express acceptance of the adequacy of the EIAR and agreement with its conclusions insofar as water was concerned. The decision was sufficiently clear to enable the Applicant to consider whether there were grounds to challenge the decision on the basis that it might be contended that an adequate EIA had not been conducted (meeting the test set out at para. 11.4 of *Connelly*).

125. In the light of the foregoing, I am satisfied that the duty to give reasons has been discharged in this case. The evidential basis for concluding that there was no adverse impact on the Applicants' water supply was clearly set out and no evidence to the contrary was offered on behalf of the Applicants. The Inspector (i) noted that observers had raised concerns regarding potential impacts to water supply, (ii) identified that potential impacts on geology, hydrological environment, hydrology and water quality were addressed in Chapter 8 of the EIAR, (iii) identified the spring water source at Killaduff, (iv) specifically considered the potential construction phase impacts on subsurface flows due to the construction of access tracks and (v) concluded, lawfully, that the proposed windfarm development would not have a significant adverse impact on water quality, subject to the proper implementation of the proposed mitigation measures. The Inspector, an expert in her own right, considered the Developer's information persuasive and probative of the conclusion that there would be no impact from the proposed development on the Applicants' water supply and clearly so stated.

126. The Board, also experts in the planning area and vested with statutory responsibility for assessing environmental impact, expressly adopted these conclusions and clearly so stated. In the circumstances, the Board discharged any obligation to address concerns in relation to water raised in the observation made by the Applicants. There has been no failure to address a relevant submission to explain why it was not accepted as no meaningful submission which

required to be addressed was made. In my view, the Board's reasoning in rejecting the Applicants' bare assertion may be derived from the terms of the decision and the context to the decision which includes a host of expert investigations. The Inspector and Board clearly accepted the information submitted by the Developer, which information was evidence based, there being nothing in the evidence to controvert it.

Preliminary Issue – Ex Post Facto Evidence as to Impact with Water

127. It is a feature of this case that the Applicants seek to rely on *ex post facto* expert evidence from a hydrologist (Mr. Johnson) contending for potential impact on the Applicants' water source and supply. Reliance by the Applicants on this *ex post facto* expert evidence in seeking to impugn the Board decision to grant permission based on the assessment of potential impact on the Applicants' water source and supply has resulted in a protracted exchange of affidavits, albeit the evidence on behalf of the Developer is from the expert retained for EIAR purposes (Mr. Gill) and is, in some part, directed towards further explaining the EIAR and thereby demonstrating that issues raised by Mr. Johnson were assessed in the material before the Board. There is no doubt, however, that most of Mr. Johnson's evidence and some of Mr. Gill's evidence goes beyond what was before the Board when conducting an EIA and granting planning permission on the basis that it was satisfied that there would be no impact on the Applicants' water supply.

128. An issue arises as to the admissibility in evidence in judicial review proceedings of evidence which was not before the decision maker. It is trite to observe that evidence which was not placed before the Board for the purpose of its decision could not have been considered by the Board in arriving at its decision and should not therefore be relied upon to impugn a decision otherwise properly made. Were it permissible to challenge a decision made by an expert body by simply producing new material after the decision was made, there would be no incentive for objectors or participants in a process to fully present their case before a decision is made and the objective of securing finality would be seriously undermined.

129. It is well-established that the obligation placed on the Board in conducting an EIA is to examine, analyse and evaluate the direct and indirect impacts of a proposed development on the environment, having regard to the materials before (*Ratheniska v. An Bord Pleanála* [2015]

IEHC 18, *Aherne v. An Bord Pleanála* [2015] IEHC 606 and *O'Brien v. An Bord Pleanála* [2017] IEHC 773). While there is a duty on the Board to be satisfied that the EIAR submitted by the developer identifies and describes adequately the direct and indirect significant effects on the environment of the proposed development, this duty is discharged by requiring further information or refusing permission on the basis that the EIA is inadequate.

130. There is no hard and fast rule which precludes reliance on new evidence which was not before the decision maker to be admitted challenging a decision in all circumstances but the circumstances in which fresh evidence may be received to challenge a decision predicated on the adequacy of the EIA as assessed by the Board after a decision has been reached are properly very limited. As clear from the caselaw, the answer to the admissibility of new evidence question turns on the nature of the challenge and the purpose for which it is sought to adduce the fresh evidence.

131. The purpose of the Applicants in seeking to introduce expert evidence in these proceedings when they did not do so before the Board made its decision is not immediately obvious. From the terms in which Mr. Johnson gives his evidence it appears to be to demonstrate that the EIA conducted was inadequate insofar as water impact is concerned with the result that the Board's decision should be quashed, however this is not an argument which was realistically open on the evidence and was not seriously pursued before me.

132. As the Board is an expert body making a decision with the benefit of an Inspector who also has relevant expertise and where the decision is made on the basis of expert reports which support the factual conclusions made, the circumstances in which a Court would be justified in admitting fresh evidence for the purpose of a challenge to the factual conclusions and judgment of the Board, supported by ample evidence before it, are rare indeed. Where it is sought to disturb factual conclusions arrived at by an expert body supported by evidence, the new evidence required to upset the conclusions arrived at would generally need to be very strongly probative on an important or fundamental issue which ought to have been considered by the decision maker in the proper discharge of their decision-making duties.

133. Where the purpose of the Applicants in seeking to adduce expert evidence is to contend for potential impact on their water supply notwithstanding evidence to the contrary before the Board as fully documented in the EIAR, it seems to me that the weight of authority supports the conclusion that it was necessary for the Applicants to provide such evidence as it wishes to

rely upon to the Board before the Board made its decision. As Humphreys J. says in *Reid v. An Bord Pleanala (No.1)* [2021] IEHC 230 (at para. 19):

> *"Failure to do so maybe doesn't preclude being allowed to go through the motions of a challenge later but it renders the challenge empty, and devoid of any prospect of success, because the issue in that challenge would be whether there was doubt by reference to the material before the decision-maker, not by reference to new matters the applicant thought of after the event."*

134. It is usually inappropriate for a reviewing court to admit expert evidence, after the decision is made, for the purpose of challenging the factual conclusions and judgment of the Board, itself an expert body, based on material which was before it when the decision was made when that material could support the conclusions and judgments arrived at. The fact that proposed new evidence, had it been before the Board, might have influenced the Board's decision is not a basis for admitting it. Save in special circumstances, the Board's decision is properly reviewable by reference to the material which was before it and not new evidence presented at a later stage.

135. I acknowledge that the position advanced in oral argument was somewhat more nuanced than seeking to demonstrate that the EIA was inadequate as otherwise suggested by the terms in which the affidavits were sworn. In the way the case was presented in oral argument, the purpose of the *ex post facto* affidavit evidence was directed to demonstrating a problem with the approach taken by the Board to the question of the proper identification the catchment area or zone of contribution to the Killaduff Spring.

136. The issue really was whether, based on the materials before it, the Board should have been more probing in this regard. Mr. Johnson's evidence was urged as supporting a conclusion that further assessment was required as there was a potential for impact on water based on a larger zone of contribution to the Applicants' water supply which the Board should have been on enquiry about because the Applicants had raised an issue in this regard and both maps were contained in the materials before the Board.

137. In relation to the specific issue of the parameters of the zone of contribution to the Killaduff Spring, however, Mr. Gill stood over the adequacy of investigations carried out in the EIAR. In so doing he pointed out that which was otherwise evident from the materials actually before the Board, namely that the map relied upon in the Powerpoint presentation was generated for consultation before much of the subsequent investigation relied on in the EIAR was carried out and relates to both surface and ground water and an earlier site layout, whereas the zone of contribution relied upon in Figure 8.10 relates to groundwater only, as relevant to spring water and having regard to the site layout actually proposed in the planning application. In consequence, there was no need for further enquiry as the materials before the Board were comprehensive and there was nothing which would give rise to a requirement for further enquiry.

138. While the decision of Humphreys J. in *Reid* helpfully elaborates on the types of cases in which it may be permissible to introduce evidence in judicial review proceedings which was not before the decision maker whose decision is impugned, there is nothing in the fresh evidence in this case which would bring it within any of the categories of evidence which may be admitted in judicial review proceedings as identified in *Reid*.

139. Specifically, I do not consider the matters addressed by Mr. Johnson on affidavit to be directed to a gap in information or a need for further enquiry which the Board ought to have identified (in the sense sought to be conveyed in para. 18 of *Reid*) in the conduct of an adequate EIA such that his evidence is relevant to a complaint that this was not done. Instead, it seems to me that the primary purpose of his evidence was to contend for a potential impact on water contrary to the conclusions reached by the Board. Therefore, it is quintessentially of the type of information which should have been presented to the Board before it made its decision, not afterwards.

140. Even if I am wrong in the conclusion that special circumstances warranting the admission of new evidence not before the Board when making its decision are not present in this case, it seems to me that the new evidence sought to be adduced is not probative of any matter which goes to the sustainability of the Board's decision. Indeed, insofar as the purpose of adducing fresh evidence on behalf of the Applicants in this case may have been to undermine

the adequacy of the EIA and the sustainability of the conclusions reached based on it, it is patently ineffective for such purpose as the evidence of Mr. Johnson is largely neutralized by the evidence of Mr. Gill leaving me with what amounts to a difference of opinion between experts, which it is accepted I cannot resolve.

141. Nothing in the new (albeit contested) evidence sought to be relied upon supports a conclusion that the decision was unsustainable by reason of a failure to properly assess environmental impact. The decision to grant permission was made in reliance on an EIA informed by the investigations described in the EIAR which were in turn subjected to scrutiny by both the Authority and the Inspector appointed by the Board before being considered by the Board. I am satisfied that on a proper and fair reading of the material before the Board having due regard to the thoroughly comprehensive EIAR submitted to the Board, itself based on extensive investigation including assessment of impact on the Applicants' source of water (Killaduff Spring) rather than a potential water source (non-existent or hypothetical private well), the Applicants fall well short of substantiating a claim that conclusions arrived at on the basis of the EIA carried out in this case should be quashed because of either a flawed identification of the zone of contribution to the Killaduff Spring or an otherwise inadequate assessment of environmental impact on water.

142. I see no proper basis for admitting fresh evidence for the purpose of seeking to undermine the adequacy of the assessment conducted by the Board in the face of evidence that a thorough assessment was carried out. It would be otherwise were the Applicants able to demonstrate that the assessment conducted was patently inadequate such that no proper environmental impact assessment had occurred. Such inadequacy, if established, would amount to a failure on the part of the Authority to properly discharge its statutory function and would render its decision *ultra vires*. The facts in this case are very far from such a scenario and the evidence sought to be adduced does not demonstrate error (still less manifest or substantial or significant or serious error) by the Board in the discharge of its functions.

143. Having considered the evidence belatedly offered on behalf of the Applicants and the grounds of challenge pursued before me for which leave has been granted, I have decided it

would be impermissible to permit the Board's conclusions to be challenged now based on new material which was not placed before the Board and on grounds not properly identified in pleadings. I am supported in this conclusion by a long line of cases including *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888, *An Taisce v. An Bord Pleanála (No.1)* [2021] IEHC 254, *Monkstown Road Residents Association v. An Bord Pleanála* [2022] IEHC 318, *Fursey Maguire v An Bord Pleanála* [2022] IEHC 707, *Hennessy v An Bord Pleanála* [2018] IEHC 678; *People Over Wind v An Bord Pleanála* [2015] IEHC 271, and *O'Neill v An Bord Pleanála* [2020] IEHC 356.

Visual Impact

144. The Developer's application for planning permission was refused by the Authority in part because of the visual impacts on the view protected as Listed Prospect No. 54 in the Development Plan. Prior to making his Order refusing permission for the development, the Acting Chief Executive visited the site, inspected the view at Mucklagh as indicated in the EIAR and drove along the R747/748 to view the site in the context of the listed prospect. Arising from this visit he agreed with the refusal reason recommended in the Executive Planner's report in relation to visual impact within Listed Prospect No. 54. Likewise, the Inspector recommended refusal following two site visits because of visual impact.

145. It is pleaded at paragraph 51 of the factual grounds as set out in the Statement of Grounds that there is no report in the Direction or on the Board's file to suggest that the Board members visited the site to observe the view. It is noted, on the contrary, that the Inspector had visited the site on two occasions. While it is clearly established that the Board may be entitled to take a different view to that of the Inspector in relation to visual impact even though differing opinion was based essentially on the same evidence (*People over Wind v. An Bord Pleanala* [2015] IEHC 271 para. 12), underpinning the Applicants' challenge to the decision of the Board to disagree with the Inspector's recommended refusal by reason of the visual impact of the proposed development, at least in part, is the fact that the Inspector, like the executives of the Planning Authority, had visited the area but the members of the Board had not. The frailty suggested on behalf of the Applicants is that the Inspector was in a better position to assess visual impact than the Board by reason of the site visits.

146. It seems to me that any complaint related to an inadequacy of assessment by reason of

the fact that the members of the Board did not visit the site despite disagreeing with the Inspector and the Authority who had, is fully addressed by the contents of Chapter 11 of the EIAR, the supplemental Landscape and Visual Statement [LVS] submitted to the Board with the appeal and the Inspector's Report. The landscape is fully described in the EIAR which thoroughly describes a diverse mix of productive land uses including farming, forestry set within a rolling landscape of hills and valleys, a tapestry pattern of fields and hedgerows within the valley balanced by extensive conifer plantations contained on the upper slopes and ridges of the site. There are also several wind farms within the wider study area to the south and such development is described as *"not unfamiliar in this landscape"*.

147. It is manifest from the contents of the EIAR that the Board was not required to rely only on the detailed descriptive narrative contained in the EIAR and the Inspector's Report, however, as the methodology adopted for the purpose of this part of the EIAR included desktop study and fieldwork. A Zone of Theoretical Visibility (ZTV) study was undertaken and was included in the EIAR. A cumulative ZTV map was also submitted as part of the EIAR to illustrate the visibility of the proposed development and the locations where other windfarms would be visible.

148. Furthermore, the EIAR identified 28 Viewshed Reference Points (VRPs) based on various key views, designated scenic routes/views, local community views, centres of populations and amenity/heritage features. Photomontages were provided for each VRP and each photomontage provided a direct comparison between the permitted development and the proposed development for each view.

149. Given the nature of the material before the Board, I am satisfied that it was able to decide on visual impact in disagreement with the Inspector and the Planning Authority without itself conducting a site inspection and no frailty arises in the process of decision making adopted in this case.

150. In deciding not to accept the Inspector's recommendation to refuse permission, the Board stated that it:

"...had regard to the significant man-made interventions in the existing low to medium sensitivity landscape and, notwithstanding the location of the site in an area less favoured for wind farm development as set out in the Wicklow Wind Energy Strategy, considered that the proposed development would not be visually obtrusive and would not, cumulatively with the permitted windfarm to the west at Ballycumber, interfere with the character of the landscape and obstruct or form an obtrusive or incongruous feature in Listed Prospect No. 54."

151. It is contended under the heading "*Taking account of irrelevant matters*" (at paragraph 55 of the Statement of Grounds) that the Board erred in law in having regard to what is described in the Board Direction as "*significant man-made interventions in the existing low to medium sensitivity landscape*", being matters that were not before it and were not identified in public consultation. The Applicants plead that no reasons were given to explain the nature and location of any such *'significant man-made interventions'* and they are not illustrated in photomontages that relate to Listed Prospect No. 54 as described by the Inspector in her report.

152. The Applicants also make the case (at paragraph 62 of the Statement of Grounds) that in failing to have proper or any regard to impacts on landscape and the effects of the development on protected views and prospects, the Board acted contrary to the 2000 Act and Regulations made under that Act and the EIA Directive (as amended).

153. In opposition, however, the Board points to the fact that in disagreeing with the Inspector in relation to matters concerning visual impact, the Board referred expressly to the character of the landscape in the area, the absence of any ecological designations, the characteristics of the site and of the general vicinity and the pattern of existing and permitted development in the area. In this way it is contended that the Board sets out clearly its reason for disagreeing with the Inspector on this issue. It is further contended that the Board was entitled to base its decision on "*significant man-made interventions in a low to medium sensitivity landscape*", having regard to the evidence that was before it in the EIAR Landscape and Visual Impact Assessment chapter (Chapter 11). It is further noted that the EIAR referred to the landscape as *'anthropogenic'* and described the receiving environment in these terms.

154. Accepting as they must that the word "*anthropogenic*" is used in the EIAR and that properly construed it relates to man-made activity, the Applicants contend that the fact that a landscape may be described as having "*anthropogenic*" elements does not provide a basis for asserting that man-made interventions are "*significant*" and that there is no evidence of "*significant*" man-made interventions in the material before the Board.

155. It seems to me that the conclusions reached in relation to visual impact are amply supported by the evidence before the Board. For example, the reference to the description of the surrounding landscape as being "*low to medium sensitivity*" which was particularly criticised by the Applicants was not plucked from thin air. It derives directly from the language of the EIAR. Chapter 11 of the EIAR addresses the landscape assessment in the County Development Plan (see section 11.3.1.6.2). The location of the windfarm development is also shown on the various plates which contain the different classifications within the Development Plan. Section 11.7 (at page 310) identifies that the development is in an area of "*low to medium sensitivity*". The nature of the location in which the windfarm is to be constructed is also addressed, in narrative terms, at section 11.5.1.1, where it is stated that the proposal site lies within the transitional zone between the core of the Wicklow Mountains to the north and its apron of foothills to the southwest and east noting that *"the landscape of the outer southern and western portions of the study area is considered to be of low sensitivity. As a transitional zone between these landscape character areas the central study area is considered to be of medium sensitivity…"*

156. The use of the word "*antropogenic*" in the EIAR is also not without importance when it comes to a challenge to the evidential basis for a conclusion that there were significant man-made interventions in the area. This word, uncommon in everyday parlance, has a significance in planning terms and is defined in s. 2 of the 2000 Act in relation to greenhouse gas emissions as meaning "*those emissions that result from or are produced by human activity or intervention."* It is therefore clear that the word "*anthropogenic*" may be used interchangeably with "*human activity*", "*human intervention*" both of which might also be described as "*man-made interventions*". The word. "*anthropogenic"* meaning man-made or human activity or human intervention was used repeatedly in Chapter 11 when describing visual impact from different vantage points. It appeared in section 11.5.2.1 under the heading "*Visual Receptor Sensitivity*" and again at section 11.6.2 in relation to the assessment of visual impacts where

the words "*strongly anthropogenic vistas from some of the larger settlements and major routes passing through the study area"* were used.

157. I understand the words "*strongly anthropogenic"* to reflect significant man-made interventions. As set out above, the word "*anthropogenic"* was also used repeatedly in the assessment of individual VRPs at DR1 where the prospective turbines were described as "*part of an anthrogenic vista*", DR4 where reference was made to "*this anthrogenic rural setting*", DR5 where the description of "*this anthrogenic rural scene*" was used and LC4 where reference was made to "*this anthrogenic upland scene*". Repeated use of the word to describe different vistas also tends to suggest that man-made interventions described are widespread or otherwise "*significant*".

158. While weight is attached to the use of this word "*anthrogenic"* because of its meaning, it seems to me that evidence of man-made interventions was also before the Board through other descriptive narratives not involving use of this word. This is seen, for example, in descriptive language such as a "*productive rural landscape*" and similar formulations of words conveying human (productive) activity such as agriculture, forestry or wind energy projects. As pointed out on behalf of the Board, while considered traditional land uses, use in agriculture and forestry represent man-made activities. The sense in which the word "*rural*" is used in the narrative descriptions in the EIAR associated with vistas which were visually represented in related photomontages reflects a meaning that not only signifies the opposite to "urban" or "city" but also embraces agricultural activity and forestry.

159. The word "*rural*" is repeatedly used, sometimes coupled with "*productive*" or "*working*", in describing such activity in the EIAR. Apart from the repeated use of the word "*anthrogenic"* therefore other formulations conveying man-made interventions in the form of agriculture or forestry found in the EIAR include "*richly diverse productive landscape*" (DR2 Local Road at Killeagh at p. 321), "*productive rural scene*" (DR6 R747 near Mucklagh at p. 335), "*this rural scene*" (DR8 R748 near Coolroe at p. 337), "*richly diverse rural vista*" (DR9 R748 at Kilcavan Gap at p. 338), "*upland landscape context with extensive forest plantations*" (LC1 Local road at Killaduff at p. 339), "*upland rural scene*" (LC2 Local road at Askakeagh at p. 340), "*part of the rural hinterland of Aughrim*" and "*complex urban/rural scene*" (CP3 Aughrim (fishing pond) at p. 345) and "*working rural landscape*" (CP3a Aughrim R753

approach at p. 346).

160. In addition to the detailed narrative of the EIAR, the supplemental Landscape and Visual Statement [LVS] submitted to the Board with the appeal and the Inspector's Report, the Board also had the benefit of photomontages. These photomontages, some of which were also available to me in enlarged reproduction, clearly depict a rural landscape which is actively farmed and in use in agriculture and forestry. It is clear from the photomontages that the Board had ample material before it upon which it could properly conclude that there was "*significant*" evidence of man-made activity as evidenced through photographic evidence of fencing, forestry, human settlement, roads and indeed, in some instances, other windfarm turbines, combining to provide a rich and beautiful tapestry pattern of fields in diverse use by people

161. Having carefully considered the contents of the EIAR including the ZTN study, the VRPs and the photomontages (as more fully described above), I cannot accept the submission that there was no evidence before the Board upon which it could justify its conclusion, in disagreement with the Inspector and the Planning Authority, in relation to visual impact in the light of significant man-made interventions. I am quite satisfied that description of "*significant man-made interventions*" used by the Board in explaining its decision to depart from the Inspector's recommendation based on visual impact reflects the landscape described in the application before it and evidenced by the material presented.

162. I am equally satisfied that in carrying out the EIA the Board properly discharged the duty under ss. 34(2)(a) and 37(l)(b) of the 2000 Act to have regard to the provisions of the CPD and any special amenity area order relating to the area. In the decision arrived at it was fully acknowledged that the site is in an area which is designated as an Area of High Amenity in the current CDP and regard was had to the impacts on landscape and on protected views and prospects, but it was concluded that the visual impact did not justify a refusal of planning permission.

163. It bears note also that the EIAR details the design and layout features which were adopted to minimise impact on the landscape and improve the aesthetic of the proposed Wind Farm development. The complaint advanced in written submissions (although not articulated as such in the Statement of Grounds upon which leave to proceed was predicated) therefore that the EIA was defective because the Board granted planning permission without a description of

the measures envisaged to avoid, prevent, reduce or, if possible, offset any identified adverse effects on the landscape being provided to it is clearly unfounded. It is based on a selective reading of the EIAR. The visual impact of the wind farm, including on Prospect 54, is addressed in Chapter 11 of the EIAR and the Board were satisfied that those impacts were adequately described in the EIAR. Mitigation of the impacts was also addressed in the EIAR, which explained the approach of mitigation by design. The Board concluded that the impacts on the environment from the windfarm development would be acceptable.

164. It was open to the Board to disagree with the Inspector and the Planning Authority, based on the evidence before it, provided it gave reasons for its disagreement. Notably, it is no part of the Applicants' case as pleaded that the Board did not reason its disagreement in relation to visual impact, although a case was made in submissions that reasons given were inadequate in view of a requirement to explain disagreement with the Inspector and failed the test in *Connelly* v. *An Bord Pleanala* [2018] IESC 31. Even if this case had been properly pleaded, I could not agree with it.

165. Patently, the Board did provide reasons for its disagreement with the Inspector. These reasons were also clearly understood by the Applicants. The central thrust of the case made on their behalf in relation to visual impact has been built on the contention that there was a failure to properly assess visual impact as there was no evidence to justify a finding of existing or permitted "*significant man-made interventions*" or of a landscape properly described as "*low to medium sensitivity*" before the Board, these being the reasons given by the Board from its departure from the Inspector's recommendation. As demonstrated above, however, there was ample evidential basis for this conclusion and by pursuing a challenge in the terms in which they did, it is equally clear that the Applicants knew the reasons for not accepting the Inspector's recommendation.

166. The complaint that the Board failed to properly assess visual impact having regard to the evidence before it does not withstand scrutiny when regard is had to the material which was before the Board. While the Applicants clearly disagree with the Board's decision to grant permission, they are not entitled to mount a challenge to the merits of that decision simply because they disagree with it. Nor are they entitled to baldly assert that there was no EIA of visual impacts or that the issue was not addressed in the EIAR and

application documentation when the material and record of the decision demonstrates otherwise. The fact that the Authority and the Inspector reached a different decision on the merits of the application and they agree with the Applicants in relation to visual impact does not alter the role of the court on a challenge by way of judicial review once the decision was properly made and was one which was open to the Board. I am satisfied that no basis in law or fact has been established to warrant intervention by way of relief by way of judicial review having regard to visual impact.

Turbine Height and Set Back - Planning Circular Letter PL 5 / 2017

167. Wind Energy Development Guidelines issued under s. 28 of the 2000 Act in 2006. A review of the Wind Energy Development Guidelines has been ongoing for some time and an Information Note, Review of the Wind Energy Development Guidelines 2006 '*Preferred Draft Approach*' was published in June 2017. Planning Circular PL 5/2017 is a communication in respect of this review process in which reference to an emerging "*preferred draft approach*" is made. New Wind Energy Development Guidelines have yet to be adopted despite the passage of some seven years since the publication of the then "*preferred draft approach*". The status of the "*preferred draft approach*" is therefore ambiguous.

168. In 2017, Interim Guidelines issued for Planning Authorities on Statutory Plans, Renewable Energy and Climate Change under s. 28 of the 2000 Act (as amended) in order to provide guidance on the administrative procedures relating to making, reviewing, varying or amending development plan or local area plan policies or objectives that relate to renewable energy, and in particular, wind energy developments but these Interim Guidelines have no relevance to the case advanced before me in these proceedings as I am not concerned with a challenge to the making, reviewing, varying or amending of a development plan, local area plan policies or objectives within the meaning of those Interim Guidelines and no case in this regard has been made.

169. The 2006 Wind Energy Development Guidelines ("the Wind Energy Guidelines"), which remain unrevoked or amended, did not provide for any recommended minimum set-back but recommended that a distance of 500m from a turbine should be sufficient to prevent any significant noise impact. In the preferred draft approach published in the context of the review process a recommended set-back of four times turbine height subject to a minimum of

500 metres was recommended. From the Guidelines set-back is normally considered as a noise mitigation measure. Logically, however, it also can assist with visual impact and it is apparent from the EIAR in this case that it has potential relevance for water impact. While providing a summary of the then consensus which included a visual set back of 4 times the turbine height subject to a mandatory minimum distance of 500m, Planning Circular Letter PL 5/2017 did not purport to replace existing Guidelines with the result that there is an ongoing obligation to have regard to the Wind Energy Guidelines.

170. Under the heading "*Failure to take account of relevant matters*" at paragraph 53 of the Statement of Grounds, the Applicants plead that the Board erred in law and acted contrary to fair procedures in failing to take account of or otherwise have regard to Planning Circular Letter PL 5/2017 - Interim Guidelines for Planning Authorities on Statutory Plans, Renewable Energy and Climate Change and Wind Energy Development and in failing to apply the Minister's preferred draft approach of a minimum setback of 4 times the turbine height between the Applicants' home and the nearest turbine, subject to a mandatory minimum set-back of 500 metres. This is because instead of a minimum set back of 600 metres preferred in the case of a turbine height of 150 metres in accordance with the "*preferred draft approach*" communicated in Planning Circular Letter PL 5/2017, the nearest turbine is only 520 metres from the Applicants' dwelling house. Had the approach set out in Planning Circular Letter PL 5/2017 been followed by the Developer or required by the Board in this case, it would have been necessary to increase the distance between the Applicants' farmhouse and the nearest turbine or reduce the turbine height.

171. The obligation to "*have regard*" to any s. 28 guidelines was the subject of detailed consideration by the Supreme Court in *Balz v. An Bord Pleanála* [2020] 1 ILRM 367 but while I was referred to this judgment in argument and while it is contended that there was a failure to "*take account of or otherwise have regard to Planning Circular Letter PL 5 /2017*" in the case as pleaded, it has not been contended, nor could it be, that there is a breach of s. 28 of the 2000 Act in this case. Such an argument would be wholly untenable as the *"preferred draft approach"* is not a guideline under s.28 of the 2000 Act. Given its ambiguous status the preferred draft approach is at most a reflection of the then state of consensus said to have been obtained between stakeholders expressed as likely to be included in future guidelines.

172. The fact that the intended future guidelines were not in place when the Board considered the application in this case and even now have not been adopted does not mean that they were irrelevant or should not be considered by the Board. The Board would have been entitled to support a decision that greater set back distances were necessary informed by the Planning Circular Letter PL 5/2017, having had regard to the Wind Energy Guidelines, were this its considered view based on its assessment of environmental impact in this case. However, the mere fact that the Board could have regard to Planning Circular Letter PL 5/2017 as well as the Wind Energy Guidelines as a relevant consideration does not translate into an obligation to give effect to the draft preferred approach outlined in Planning Circular Letter PL 5/2017. Afterall, even if it were a Guideline the obligation to have regard to a specified matter is discharged without necessarily giving effect to the Guidelines in a particular case. Certainly, no greater weight falls to be accorded to Planning Circular Letter PL 5/2017 than would be accorded to a Guideline in similar terms. Given their ambiguous status, one would expect circumspection in placing reliance on them in decision making even where the draft approach communicated is not necessarily inconsistent with the existing statutory Guideline but is simply more specific in relation to desirable set back areas.

173. Recalling therefore that even a s.28 Guideline does not fall to be applied as a binding rule, the proposition that the Board's decision is invalid because of a failure to apply the Minister's preferred draft approach of a minimum setback of 4 times the turbine height is simply unsustainable in law. The "*draft preferred approach"* has no special legal status where it has never been finalised. Quite clearly Planning Circular Letter PL 5/2017 does not give rise to a mandatory requirement to provide for a minimum 600 metres set back. Indeed, notwithstanding the pleaded case, I did not understand such contention to be pursued with any conviction on behalf of the Applicants during the hearing before me.

174. Whatever about a failure to apply the draft preferred approach as a rule (a case pleaded but not seriously contended for), it remains part of the Applicants' case that there was a failure to properly consider Planning Circular Letter PL 5/2017 in the decision-making process. While the proper approach to a "*draft preferred approach*" which is inconsistent with an existing statutory Guideline may, depending on its contents and particular circumstances of a given case, present a problem for decision-makers, it did not do so in this case. It is undeniable that regard was had to the preferred approach of providing a set-back distance of 600 metres (being 4 times turbine height) even though it was also acknowledged that this was a "*draft preferred*

approach". The Inspector's Report identifies the Guidelines (section 5.2.3) and Circular PL 5/2017 (section 5.2.3). The Inspector further expressly recites (section 5.2.3) the "*preferred draft approach.*"

175. Accordingly, express reference was made to the Circular letter in the Inspector's Report. It was clearly noted that the letter communicated a "*preferred draft*" approach. In the light of the established position in law in relation to a requirement to "*have regard*" recognised in cases such as *Coyne v An Bord Pleanála* [2023] IEHC 412 (see para. 22), *Cork County Council v Minister for Housing, Local Government and Heritage, Jennings v An Bord Pleanála* [2023] IEHC 14, (at para. 217) and *Killegland Estates Ltd v Meath County Council* [2022] IEHC 393 (at para. 53), where clear and express reference is made to Planning Circular Letter PL 5/2017 and its' contents in the materials before the Board, it cannot be said that it was not considered. There was no statutory obligation to have regard to it but Planning Circular Letter PL 5/2017 was nonetheless considered. The case advanced to the effect that there was a failure to have regard to it must fail. Any obligation to consider the draft preferred approach has clearly been discharged.

176. For completeness I have also considered the possibility that the Board were somehow mistaken in relation to applicable set-back distances since it has been necessary to amend Condition 7 to reduce the permitted height to 150 metres by reason of an error on the part of the Board. It is manifest, however, that there was no mistake on the part of the Board in deciding to grant permission on an assumption that the draft preferred set-back distances had been achieved. The Board must be taken to have understood that the Applicants' dwelling was not more than 520 metres from the nearest turbine given the several references to this fact in the materials before the Board. I am satisfied that the single reference noted in the EIAR to turbines being moved to achieve 600 metres set-back could not have led the Board to a mistaken conclusion that a desirable set-back of 600 metres had been provided in respect of every turbine on the facts of this case, even had such a case been pleaded (which it was not).

177. Furthermore, I see no reason to question the Board's position that a clerical error was made in respect of turbine height in Condition No. 7. Even if this were not a clerical error, however, but indicated a mistaken understanding that the turbine height for which permission was sought was 156 metres, such an error would not support a conclusion that the Board granted permission on the mistaken basis that set-back distances in line with the draft preferred

approach having been achieved. If a turbine height of some 156 metres were permitted, the preferred set-back distance under the draft approach communicated in PL 5/2017 would have been greater, not less.

178. While turbine height was certainly an issue when these proceedings commenced given the clerical error in Condition 7, it seems to me that the case made on behalf of the Applicants in reliance on Planning Circular Letter PL 5/2017 because a setback exceeding 600 metres is weak, even though in the case of one turbine the setback required is only 520 metres. A basis for challenging the decision for failure to have proper regard to this letter is not substantiated when regard is had to the materials before the Board and the terms of its decision.

CONCLUSION

179. An important argument was mooted in the pleadings and in written submissions but not pursued during oral submissions in relation to the proper approach to the assessment of an interference with a right to water. It has not been necessary to address these submissions because, on the facts in this case, the finding made and supported by the materials before the Board was that there would be no adverse impact on the Applicants' water supply arising from the proposed Ballymanus Wind Farm project. The question of balancing interests where an interference is assessed as occurring and in what circumstances it would be lawful to permit development notwithstanding an assessed interference with water rights must therefore await a case in which it properly arises for determination.

180. The case advanced before me was based on three general areas for concern. None of these concerns have been substantiated as invalidating the Board's decision to grant permission. Accordingly, I refuse the relief sought and dismiss these proceedings.

181. I will hear the parties in relation to consequential matters including costs noting that a part of the Applicants' case was rendered moot by the Board's decision to issue an amended order in exercise of powers under s. 146(1)(b)(i) of the 2000 Act.