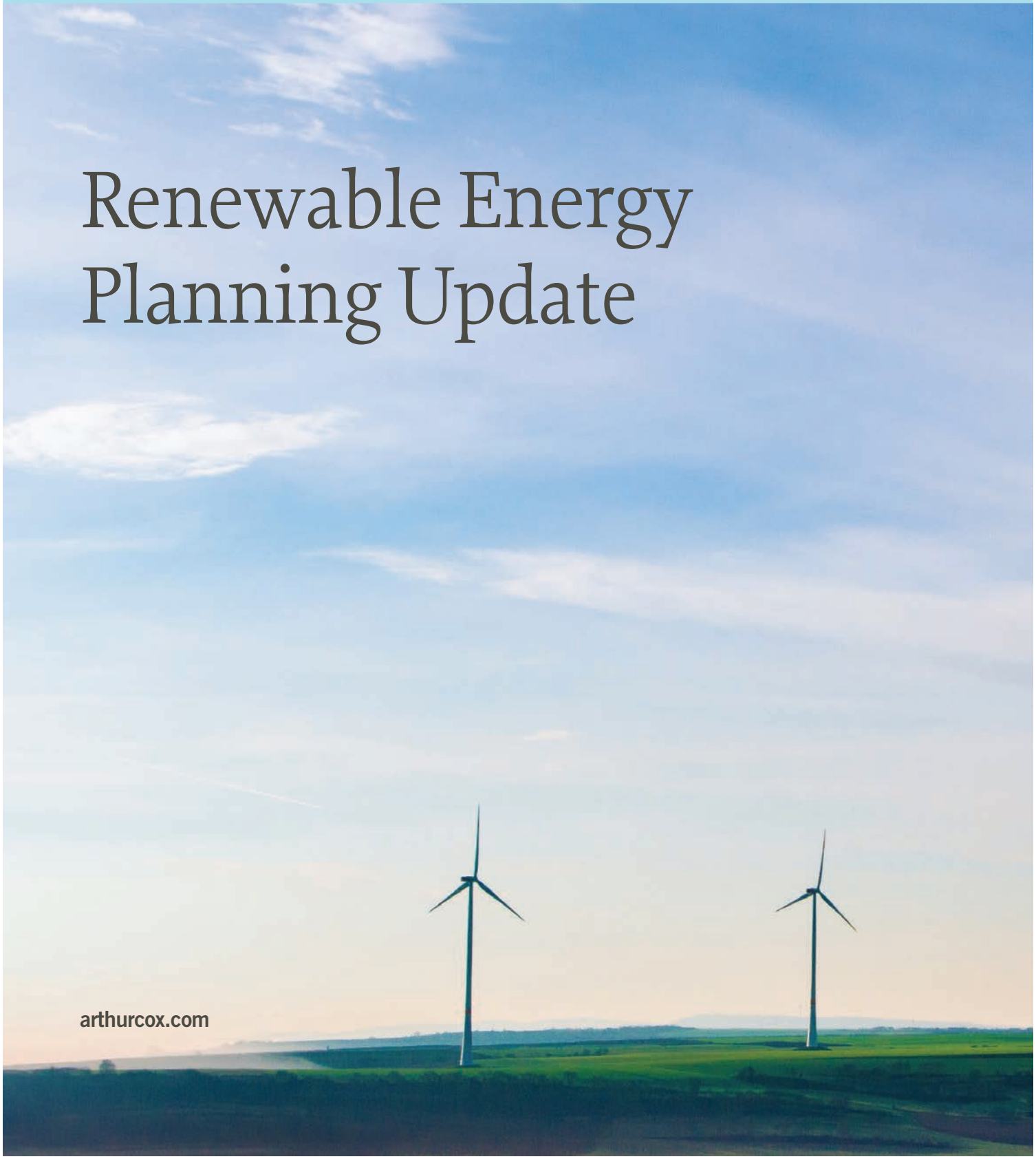
ARTHUR COX

Renewable Energy Planning Update



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In this March 2017 legal update we have summarised and commented on a number of recent legal developments and open issues in the planning sphere that will be of interest to developers of renewable energy projects and their funders. This legal update is neither a complete nor a definitive statement of law or of regulation. Specific legal advice should be obtained before taking any action.

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WIND ENERGY SECTOR - PLANNING UPDATE

The number of wind energy consents being challenged by way of High Court judicial review proceedings is showing no signs of abating and continues to affect the ability of developers to proceed with projects once planning permission and other relevant consents are secured. An Bord Pleanála (the "*Board*") is currently grappling with over 100 'live' judicial reviews.

This note considers recent decisions of the Irish and European courts and identifies the main themes in potential grounds of legal challenge to wind farm consents. The main grounds of challenge include issues related to the Environmental Impact Assessment ("*EIA*") and Habitats Directives as well as the Aarhus Convention. Some recent decisions of the Board have also been successfully challenged due to the inadequacy of reasons provided in Board Decisions and not because of the substantive information submitted by the developer, such as for example in *Connolly v An Bord Pleanála* [2016] IEHC 322. We also anticipate that objectors will seek to invoke the Strategic Environmental Assessment ("SEA") Directive and contend that the 2006 wind guidelines ought to have been subject to SEA, in light of the European Court's recent decision in *D'Oultremont.*[1]

Grid Connection Update

The High Court has given judgment in the second challenge in *O Grianna v An Bord Pleanála.*[2] It determined, in the context of making a fresh decision after the matter was sent back to the Board for re-consideration[3], that an adequate EIA had been carried out by the Board and that the permission did not authorise the development of a grid connection. In the first *O Grianna* decision, the applicants alleged that the Board failed to carry out an EIA in relation to the overall project which included both the construction of wind turbines and the works necessary to connect the windfarm to the national grid.[4] It was submitted that the cumulative effect of the entire development should have been the subject of EIA and that in fact there had been 'project splitting' since the connection to the national grid is a fundamental part of the overall development. It was also contended that the two stages should be considered as part of an overall project and assessed on a cumulative basis.

The High Court in *O Grianna (No.1)* noted that the wind turbine development on its own serves no function if it cannot be connected to the national grid and considered that, although grid connection details were not available to the developer

1 Case C-290/15, Patrice D'Oultremont and Others v Région wallonne, Judgment of the Court (Second Chamber) of 27 October 2016.

2 O Grianna & Ors. v An Bord Pleanála [2017] IEHC 7.

3 O Grianna & Ors. v An Bord Pleanála [2015] IEHC 248.

4 O Grianna & Ors. v An Bord Pleanála [2014] IEHC 632.

at the time the application was made, 'in principle at least' the cumulative effects of both phases must be assessed before consent is given in order to comply with the EIA Directive. The implications of that decision are that a developer must wait until sufficient details about the grid connection are known and can be incorporated in the environmental impact statement ("*EIS*") for the whole project. Alternatively, a developer could apply separately for planning permission for the grid connection works when the grid route is known and cumulatively assess the environmental impacts of both grid and the windfarm itself. If the precise grid route has not been defined at the time of the application, a developer could also include details of every potential grid connection option as well as a consideration of cumulative impacts of each option in the relevant EIS.

The outcome of the remittal process was considered in *O Grianna* (No.2) following the Board's decision to grant permission on 15 July 2016 for the windfarm development comprising of six turbines and other associated works. In this regard, the notice party developer proposed a number of changes, including the relocation of T1, minor alterations to the internal access track and a change of the redline boundary of the site to accommodate the relocation of the turbine, in response to a notice by the Board seeking further information pursuant to s.132 of the Planning and Development Act 2000 (the "*PDA 2000*").

The applicants alleged that the Board did not have power to: (1) grant permission for the grid connection works because they did not form part of the proposed development or the planning application; or (2) modify the route or condition the manner in which grid connection works were to be carried out. The applicants contended that there must be full public consultation in respect of the modified project (which included the proposed grid connection) and therefore it was not possible for the Board to conduct a lawful EIA. It was also contended that the response by the developer to the s.132 notice went beyond the scope of what was permitted in purporting to alter the scope of the application.

The High Court accepted the developer's argument that the EIA Directive must be construed purposively and that consents should not be indiscriminately struck down where in reality there has been substantial compliance with the procedural requirements. The court noted that the function of the EIA Directive is to provide for effective EIA and public participation. The High Court concluded that once the matter was remitted to the Board, it was required to assess the cumulative impacts of the proposed windfarm development and the connection to the national grid. The court also noted that the grid connection was not permitted by the Board's decision and there was no substantive deficiency in the EIA or *lacunae* in the appropriate assessment carried out by the Board. Finally, the court noted that any complaint that the grid connection should have been included in the planning application was out of time and could not be raised in this challenge.

The decision in *O Grianna (No.2)* confirms that the Board is entitled to seek further information when a matter is remitted to the Board following a successful judicial review application. The developer is also entitled to submit additional information to address the inadequacies identified or further information requests made by the Board as part of that process. In the event of successful judicial review proceedings, it is advised that developers should seek to have the matter remitted to the Board to avoid the original decision being quashed outright with the consequent delays of having to re-apply.

The decisions in both *O Grianna (No.1)* and *O Grianna (No.2)* confirm that when a planning application is made for a windfarm development, there must be an assessment of the cumulative impacts of the windfarm with its grid connection. The question of whether grid connection must be included in the original wind farm planning application or whether a separate application can be made for grid connection works appears to have been resolved by the recent decision in *North Kerry Wind Turbine Awareness Group v An Bord Pleanála v An Bord Pleanála & Ors.*[5] In that case, the applicants contended that the Board was unable or was not permitted to assess the likely significant effects of the windfarm and grid connection and their cumulative effects as permission was not sought for the connection.

That argument was rejected by the High Court which relied on the decision in *O Grianna (No.2)* and held that there was no necessity that grid connection works be included in the planning application for the purposes of seeking consent in order for an EIA to be carried out. Instead the developer should submit information on grid connection as part of the planning application to enable the Board to assess the likely significant effect of the windfarm and the grid connection as a whole, when carrying out the EIA.

In practice, however, it is advisable at present to apply for the windfarm and grid connection works as part of a single application, particularly given the pending change of law on grid connection exemptions. At the very least, developers should ensure that there is a comprehensive cumulative impact assessment of the grid connection works in the EIS and an in-combination assessment in order to comply with the EIA Directive and the Habitats Directive.

Public Participation

The right to engage in public participation during the earlier stages of the Strategic Infrastructure Development ("*SID*") process was unsuccessfully challenged in *Callaghan v An Bord Pleanála*. The High Court held that when the Board formed an opinion at the pre-application stage that the development was SID this did not

5 Unreported, High Court, McGovern J., March 9, 2017.

mean that the Board was pre-judging the outcome of the SID application itself and did not infringe the applicant's right to public participation. The court also held that the EIA Directive did not require public participation at the earlier stages of the SID process.[6]

The High Court subsequently granted leave to appeal to the Court of Appeal on a single question on whether, by not providing for public participation, the pre-application stage in the SID process was in breach of fair procedures. It held that it was not. In certifying that question, the court noted that the law on fair procedures was still evolving.[7] The Court of Appeal held that the opinion formed by the Board as to whether development was SID or not at the pre-application stage did not materially or practically affect the rights of the person seeking to argue that a development does not constitute SID such that the Board would be obliged to entertain submissions from him as a third party during the pre-application stage.[8]

Although the Court of Appeal rejected the argument that there had been a breach of public participation rights in that case, applicants have sought to invoke public participation grounds in a number of other cases, most notably in the *Grousemount* case concerning a challenge to the s.5 declarations that determined certain grid connections to be exempted development.[9] Although that challenge failed because it was brought outside of time, it did raise the possibility of an inherent vulnerability in the legislation insofar as s.5 applications do not require any public participation and only the person making the request and the owner and occupier of the land in question are notified of the planning authority's declaration or a decision by the Board, where a declaration is referred to it for decision.

Developers should be aware that where a s.5 declaration is sought from a planning authority that grid connection works are exempted development, a challenge could be brought on the grounds of breach of fair procedures by vigilant objectors. The courts could take the view however that a prospective objector must demonstrate that he/she has sufficient interest to challenge the legislation. Although a s.5 declaration is an opinion as to whether works are exempted development and is not a permission in itself but rather a determination that planning permission is or is not required, the Court of Appeal has determined in *Killross Properties Ltd. v ESB*[10] that the court should not look beyond an otherwise valid s.5 declaration in the course of s.160 injunction proceedings. This has been followed in the *Grousemount* case.

Time Limits for Judicial Review Proceedings

When calculating when time runs for the purposes of bringing a judicial view challenge, the High Court has held that the 'clock stops' when proceedings are issued in the Central Office of the High Court and not when the matter is formally moved in court.[11] The courts will generally ensure that time limits are strictly followed. The adherence to strict time limits reflects public policy considerations of certainty in decision-making. Any proceedings brought outside the eight-week limit will generally be statute-barred unless the applicant can demonstrate that time should be extended because there is 'good and sufficient' reason for doing so and the circumstances that resulted in the failure to make the application for leave within the statutory period were outside the control of the applicant.[12]

The time limit of eight weeks is fixed by reference to the date of the decision under challenge and not to the date of knowledge that a s.5 declaration was made or the date when a party impacted by a s.5 declaration became aware that his/her rights might have been infringed. In *Irish Skydiving Club Limited v An Bord Pleanála*[13], the High Court refused to extend time and held that the applicant had failed to give 'good and sufficient reason' as to why time should be extended.

In the *Grousemount* case referred to above, the applicant sought to challenge s.5 declarations made by Cork County Council and Kerry County Council that the relevant grid connection works were exempted development. The High Court initially granted leave to bring judicial review proceedings and extended time for bringing the leave application. However, at the substantive judicial review stage, the High Court held that although the circumstances of the delay were beyond the control of the applicant, insofar as the s.5 declarations were not notified to the public, he had failed to demonstrate 'good and sufficient reason' as to why time should be extended and accordingly set aside the previous Court Order granting leave to bring judicial review proceedings. The court also held that the applicant did not have sufficient interest to challenge the legislation setting out the section 5 procedure itself as he was not personally affected by the legislation.

In the *Grousemount* case the s.5 declarations were made on 1 April 2015 (by Cork County Council) and 6 May 2015 (by Kerry County Council). The court noted that the applicant became aware of this in September 2015 and sought legal advice. However, the application for leave was not instituted

6 Callaghan v An Bord Pleanála & Ors. [2015] IEHC 357.

7 Callaghan v An Bord Pleanála & Ors. [2015] IEHC 493. The Supreme Court rejected the application for 'leapfrog' leave to appeal in Callaghan v An Bord Pleanála & Ors. [2015] IESCET 60.

8 Callaghan v An Bord Pleanála & Ors. [2016] IECA 398.

9 Sweetman v An Bord Pleanála & Ors. [2017] IEHC 46.

10 Killross Properties Ltd. v Electricity Supply Board [2016] IECA 207.

11 McCreesh v An Bord Pleanála & Ors. [2016] IEHC 394.

12 Section 50(8) of the Planning and Development Act 2000.

13 [2016] IEHC 448.

until 14 September 2016. When served with proceedings, developers and their advisors should always ensure that the proceedings were served in time and, if not, then an application to set aside leave should be considered as a preliminary first step, particularly where the proceedings were brought outside time and no 'good and sufficient' reason is demonstrated for extending time.

Costs Protection

The default costs provisions in s.50B of the PDA 2000 as well as in the Environment (Miscellaneous Provisions) Act 2011 that parties bear their own costs, subject to the specific exceptions, continue to be the subject of litigation. In *Callaghan v An Bord Pleanála*[14], the Applicant sought a protective costs order (PCO) in respect of a preliminary application for discovery and contended that the applicant was protected under s.50B of the PDA 2000 and the Aarhus Convention. The High Court refused the order for discovery on the basis that it was no more than a 'fishing exercise' and rejected the argument that the applicant was entitled to costs protection on the basis that the preliminary determination by the Board at the pre-application stage of the SID process was not within the scope of the EIA Directive.

In *North East Pylon Pressure Campaign Limited v An Bord Pleanála*[15], the High Court has referred a number of questions to the Court of Justice of the European Union (the "*CJEU*") on the scope of the 'not prohibitively expensive' requirement in Art.11(4) of the EIA Directive in the context of planning judicial review proceedings. One of the questions raised was whether the entitlement under Art.11(4) of the EIA Directive to a 'not prohibitively expensive' procedure applies to the process before a national court whereby it is determined whether or not a particular application for leave to apply for judicial review has been brought at the correct stage.

The Supreme Court has also referred a number of questions to the CJEU in *Klohn v An Bord Pleanála*[16], including whether the 'not prohibitively expensive' requirement should apply where: (1) the development consent challenged in the proceedings was granted; and (2) proceedings challenging the consent were taken, prior to the latest date for transposition of the EIA Public Participation Directive. The questions referred also relate to the role of the Taxing Master in awarding costs against parties and whether the Taxing Master is required to take into account the 'not prohibitively expensive' requirement.

The Supreme Court has also just granted leave to appeal on costs in *Sweetman v An Bord Pleanála & Ors.*[17] In that case, which concerned the Bellacorick windfarm, the High Court had granted costs against the unsuccessful Applicant who had challenged what he alleged to be project splitting. The Supreme Court has now granted leave to appeal on the question of whether cases involving challenges on appropriate assessment grounds are entitled to costs protection on the basis of the Aarhus Convention, despite the fact that there is no reference to the Habitats Directive in s.50B or the Aarhus Convention. Another issue which has been raised in that appeal is whether an Applicant is entitled to costs protection where he/she challenges a decision on screening for EIA, where it is determined by the planning authority, having carried out a screening exercise, that EIA is not required.

We await the answers to these questions with great interest as they will have implications for our evolving case law and as a result for the sector.

Standing Requirements

It was generally understood that for an Applicant in judicial review proceedings to have standing to raise certain points before the court, they ought in general to have participated in the planning process and previously raised these points in the process. In *Grace & Sweetman v An Bord Pleanála*[18], the Supreme Court applied a more relaxed approach to the entitlement to bring a judicial review challenge in circumstances where neither of the applicants had participated before the planning authority or the Board at all. The court held that a person who has a sufficient physical proximity or connection to a wind farm may have standing even without participation. Those who do not have such proximity or connection may reasonably be required to show that they have some interest which is potentially affected and one way of doing that is by demonstrating that interest by participation in the permission process. That is not, however, the only way in which such an interest can be demonstrated. The more general and more important the amenity which may be at stake, such as for example a European site, the wider range of persons who may well be able to show that they have an interest in the amenity of the area in which development is proposed.

Applying that analysis the Supreme Court held that one of the applicants, Ms. Grace, did have standing on the basis of her proximity to the relevant European site and community links but did not decide whether Mr. Sweetman had standing (who relied on his general interest in environmental issues) nor did the Supreme Court elaborate on or restrict what criteria might be applied by the courts to satisfy the requirement of 'wide access to justice' as mandated by the EIA Directive. In any event, developers are advised that the rules on standing will now be developed by the Courts on a case-by-case basis.

Appropriate Assessment and Habitats

In the substantive issue raised in the *Grace & Sweetman* case, as to whether the proposals by the notice party developers

14 [2015] IEHC 235.
15 [2016] IEHC 490.
16 Klohn v An Bord Pleanála, Judgment of the Supreme Court, February 24, 2017.
17 [2017] IESCDET 19.
18 [2017] IESC 10.

could properly be characterised as mitigatory or compensatory measures, the Supreme Court decided to refer a number of questions to the CJEU. In the reference, the Supreme Court has queried whether the alteration over time of habitat which is beneficial for a protected species (the hen harrier) may properly be characterised as mitigatory, particularly where a Species and Habitat Management Plan had been developed for the site as a whole which was designed to ensure that at any given time the amount of the site suitable as habitat for the hen harrier would not be reduced and indeed may be enhanced and where the habitat concerned may be deemed to have no intrinsic value.

The referral to the CJEU is the third time that the issue of mitigation/ compensatory habitat has been referred to the CJEU following on from the decisions in Case C-521/12, *T.C. Briels*[19] and Case C-387/15, *Hilda Orleans*[20] and is the first time that the issue will be considered in the context of a special protection area ("*SPA*"). It is hoped that this will provide some much needed clarity on the degree to which ecological ameliorative measures may be described as mitigatory or compensatory.

It remains the case that developers should ensure that the information submitted to the planning authority or the Board on appeal is the 'best available scientific knowledge' and does not include any deficiencies, such as seasonal ecological surveys or lacunae which would prevent a lawful appropriate assessment from being carried out in accordance with s.177V of the PDA 2000, as affirmed by the Court of Appeal in *People Over Wind & Anor. v An Bord Pleanála.*[21]

Land Ownership Rights

The issue of land ownership rights continues to cause difficulties for windfarm developers who are dependent on consents by numerous landowners. We would advise that, in light of the decision in *McCallig v An Bord Pleanála*[22], when applying for planning permission, all relevant consents should be in place where the developer is not the landowner. The consents should be recorded in writing and state in clear and unambiguous language what the consent purports to include, i.e. the siting of a turbine or ancillary works or oversailing.

As a matter of law, where consent is given at the time of the making of the application but is subsequently withdrawn, the planning permission is still valid.[23] However, the subsequent withdrawal of a landowner consent to planning may cause practical difficulties for developers who may not be able to implement a valid grant of permission. The wording of Art.22(2)(g) of the Planning and Development Regulations, which was introduced to prevent frivolous or vexatious planning applications being made[24], will also be determined by the Courts in the future in the context of windfarm developments, particularly where permission is sought for works on the grass verges of public roads or where public bodies rely on their powers as statutory undertakers to proceed with permitted development.

19 Case C-521/12, T. C. Briels and Others v Minister van Infrastructuur en Milieu, Judgment of the Court (Second Chamber) of 15 May 2014.
20 Case C-387/15, Hilde Orleans and Others v Vlaams Gewest, Judgment of the Court (Seventh Chamber) of 27 July 2016.

21 [2015] IECA 272.
22 [2013] IEHC 60.

23 Buckley & Grace v An Bord Pleanála [2015] IEHC 572.
24 Frescati Estates Ltd. v Walker [1975] I.R. 177.

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