

1. Assistant Secretary – Dave Walsh
2. Rúnai Aire
3. Rúnai Aire Stáit (for information)
4. Secretary General (for information)

**Proposed Ministerial Direction regarding the now adopted
Variation No. 2 to the Donegal County Development Plan 2012-2018**

Summary of Decision

Approval is sought to issue a Ministerial Direction under Section 31 of the Planning and Development Act 2000, as amended, to direct Donegal County Council in relation to Variation No.2 of the Donegal County Development Plan 2012-2018. This is as a result of a High Court order setting the Section 31 Direction process in the case of this variation back to a point where an inspector can be appointed under (S31(11))of the Planning and Development Act 2000 (as amended).

Background

In accordance with a High Court order, On 27 July 2016, the Minister appointed an inspector to carry out an independent review, having regard to the specified terms of reference (See Appendix 1), of the draft section 31 direction issued in July 2014 by the Minister in relation to Variation No.2 to the Donegal County Development Plan 2012-2018 (as adopted by the elected members of Donegal County Council on 3rd of June 2014). The Terms of reference for the review were:

'to ascertain if a material amendment to the draft direction in this instance is required

The inspector furnished his report (see full report at appendix 2) to the Minister on 16 August 2016 in accordance with section 31(13)(d) of the Planning & Development Act 2000 (as amended).

Inspectors Recommendation

Having reviewed the Draft Direction previously issued in July 2014 and consulted with interested parties as set out in his report, the inspector concludes that a direction is still warranted but for an amended reason as set out below:

'The decision by the members to alter the policies and objectives in regard to the wind energy objectives as outlined in this direction is premature pending the review of the Wind Energy Guidelines and contravenes the advice contained in planning circular letter PL 20-13

which advised local authorities to defer amending their existing Development Plan policies as part either the cyclical review or variation process.

Consultation

As provided for in section 31(14) of the Act, the Minister issued copies of the report to the Chief Executive, the elected members of Donegal County Council, the Regional Assembly and persons who made submissions on the Chief Executives Report, who then had 10 days in which to make a submission on the report to the Minister.

The Department received 15 submissions, outlined below, as part of this consultation – which includes a submission from a number of Elected Members of Donegal County Council and 8 members of the public or organisations, who oppose the draft direction. Submissions also came in from the Chief Executive of the Council, Irish Wind Energy Association and a member of the public who are in support of the draft direction.

Chief Executive

The submission received on 1st September 2016 from the Chief Executive of Donegal County Council is of the view that the policies and objectives of the current, unvaried, County Development Plan are consistent with the 2006 Guidelines.

The Chief Executive also states that the best manner in which to give effect to the draft direction is for the Minister to issue the Direction as drafted which deletes Variation No.2 from the Donegal County Development Plan 2012-2018.

Elected Members

A number of submissions were made by elected members of Donegal County Council including a joint submission by the Sinn Fein Councillors and a detailed submission by Cllr John Campbell. All agree with elements of the inspectors report but oppose the Inspectors recommendation.

A summary of their submissions is set out as follows.

- The Members of Donegal county Council followed protocol and carefully considered all relevant information before making their decision to vary the development plan.
- The decision was made in a democratic manner.
- The reliance on circular PI 20-13 by the Inspector in amending the statement of reasons is not sufficient grounds to issue a direction under Section 31 of the Planning and Development Act.

- The Draft Direction if confirmed would extend beyond the remit of the Minister and would breach Irish and EU law.
- The review of the Wind Energy Guidelines commenced in 2013 has been unacceptably delayed.

Public Submissions

Submissions were received from persons/parties who had participated in the earlier public consultation on the Draft Direction under section 31(7)(c) of the Planning & Development Act 2000 (as amended). These submissions make points similar to the submissions received earlier in the Ministerial Direction process including the following.

- The review of the Wind Energy Guidelines commenced in 2013 is unacceptably delayed.
- The Inspector did not take full account of the environmental importance of the six sub-basin catchments for the freshwater pearl mussel, a protected species.
- Rejection of the inspectors findings regarding the freshwater pearl mussel and his reliance on circular 20-13.
- Support for the findings of the inspector where they relate to:
 - That the Council did have sufficient regard to the submission made by the Minister;
 - That variation No.2 does not significantly impact on the internal coherence of County Development Plan; and
 - Variation No.2 does not make the County Development Plan inconsistent with regional and national policy.
- The Draft Direction is in breach of Irish and EU law.
- Concerns relating to the legality of the process being followed.

The submissions from the Irish Wind Energy Association and a member of the public support the draft direction. The following points are included in their submissions supporting the deletion of the variation.

- The variation significantly reduces the potential for wind energy developments in Donegal.
- The variation creates incoherence in the County Development Plan.
- The variation is in conflict with policies supporting wind energy in the Donegal CDP.
- Wind energy supports Ireland's commitment to reduce carbon output and supports rural development.

- Agreement with the inspector regarding the lack of evidence regarding the additional 'not favoured' status for wind energy in six sub-catchments of the freshwater pearl mussel for wind energy.

Forward Planning Section's Analysis and Recommendation

The original direction was issued (Oct 2014) as a result of concerns relating to the fit between Variation No.2 to the Donegal County Development Plan 2012-2018 and national policy on renewable energy generally and the 2006 Wind Energy Guidelines specifically.

A judicial review was subsequently taken against the direction. The High Court ordered that:

- The direction of the 3rd October 2014 issued under section 31 of the Planning and Development Act 2000 (as amended) be set aside;
- The statutory process be resumed from where the Minister has the power to appoint an inspector (S31(11));
- The minister appoint an inspector before 31st July 2016; and
- The provisions of section 31(6) to continue to apply Variation no 2 of the County Donegal development plan 2012-2018.

The inspector's report and this submission to the Minister on foot of that report and all relevant documentation, including the original decision of the Council and the ultimate decision of the Minister are on foot of this High Court order which states that the statutory procedure under Section 31 be resumed from section 31(11).

Inspector's Report

The inspector's conclusions are laid out in his report and are broadly as follows:

- Donegal County Council did not ignore or take insufficient account of the submissions made by the Minister for the Environment, Community and Local Government in May 2014.
- The draft Variation did not significantly impact on the internal coherence of the development plan.
- The draft Variation did not make the development plan inconsistent with national or regional policies or targets.
- Notwithstanding the weak evidence basis for restricting wind turbines in the six sub-catchments, the statement that the draft Variation does not provide for proper planning and sustainable development is not capable of objective verification.

- The draft Variation contravenes Circular Letter PL 20-13 which advised local authorities to defer amending their existing Development Plan policies relating to wind energy.

The inspector concludes by recommending that a direction to delete Variation No. 2 issues and that the statement of reasons be amended to include reference to the prematurity of varying the Donegal County Development Plan pending the review of the wind energy guidelines and that the variation contravenes the advice contained in circular PI 20-13.

There is a difficulty with the inspectors recommendation in that the reason he believes should ground a direction on this case is not of the types listed in Section 31(1).

Moreover, considering both the inspectors analysis and report and the various submissions made and the Chief Executives report, the requirements of the Act, Government policy on energy and renewable energy in particular, the fact remains that Variation No.2 leaves the Donegal County Development plan significantly at odds with the above, to the extent that a direction should issue but for an amended set of reasons.

National Policy

National policy is positively committed to promoting the development of renewable energy sources, including onshore wind energy. The following policy documents demonstrate this commitment:

- Delivering a Sustainable Future for Ireland – The Energy Policy Framework for 2007-2020’;
- Ireland’s Strategy for Renewable Energy;
- Two Renewable Energy Feed In Tariff (REFIT) schemes;
- The comprehensive National Renewable Energy Action Plan to demonstrate how European Union (EU) renewable targets for electricity, transport and heating will be met;
- The National Low-Carbon Roadmap to indicate how Ireland will meet the EU objective of reducing greenhouse gas emissions by 80-95% by 2050;
- Green Paper on Energy Policy in Ireland 2014; and
- Ireland’s Transition to a Low Carbon Future 2015-2020.

Given the requirements to meet the 2020 targets for renewable energy, including renewables target contribution to gross electricity consumption of 40% by 2020 committed to at a National level, there is a need to raise the level of power output provided particularly by onshore wind energy developments.

The above national policy for renewable energy development is supported in the planning policy framework through the Wind Energy Guidelines 2006 which are the current statutory planning guidelines in force under Section 28 of the Planning & Development Acts

Wind energy Guidelines 2006

Having considered the effect of the variation and the requirements of the Wind Energy Guidelines, the following points should be noted.

Chapter three, of the Wind Energy Guidelines 2006, sets out requirements for a development plan to follow in preparing policies and objectives relating to wind energy policy. In particular section 3.4 sets out five strategic aims and objectives a development plan should have regarding wind energy.

- A positive and supportive statement of the importance of wind energy as a renewable energy source;
- Objectives to secure the maximum potential from the wind energy resources of the planning authority's area;
- The identification on development plan maps of the key areas within the planning authority's functional area where there is significant wind energy potential, subject to criteria such as design and landscape planning, natural heritage environmental and amenity considerations, wind energy will be acceptable in principle;
- Specific criteria for wind energy development that the planning authority will take into account when considering wind energy proposals;
- Investigation for the potential for relatively small-scale wind energy developments.

The report of the Chief Executive received as part of the process refers to the key Development Plan objectives relating to positively supporting wind energy in Donegal (County Development Plan in Section 1.5, Chapter 3, P27 and as part of an explicit policy framework in Chapter 7).

The report of the Chief Executive goes onto state:

' The incremental increase in the extent of territory materially affected by the variation, as it related to the height of turbines and the Fresh Water Pearl mussel catchments, has been evidentially assessed and demonstrated by the planning authority.

In practical terms the restrictions introduced by Variation No.2 considerably reduces the amount of land where applications can be considered for wind energy...'

The Chief Executive makes the point that the current plan (pre-variation) positively supports the maximising of wind energy potential in Donegal, but that the effect of variation No.2 is that it

significantly reduces the amount land where wind energy development proposals can be considered for two reasons:

- The imposition of setback distance 10 times the tip height of the turbine; and
- Wind energy developments cannot be located within 6 identified catchments of the Freshwater Pearl mussel.

I will deal with the practical implications of variation No.2 and their variance from the requirements of statutory guidelines in more detail below;

Set back distance

The Wind Energy Guidelines 2006 refer specifically to distance from sensitive properties, in relation to assessing the impact of noise on sensitive properties and in relation to the assessment of the impact shadow flicker from the spinning of the wind turbine(s).

In respect of both of these issues the Wind Energy Guidelines 2006 states;

'In general, noise is unlikely to be a significant problem where the distance from the nearest turbine to any noise sensitive property is more than 500 metres. Planning Authorities may seek evidence that the type(s) of turbines proposed will use best current engineering practice in terms of noise creation and suppression.' (Section 5.6).

Regarding shadow flicker, the guidelines state that:

" careful site selection , design and planning , and good use of relevant software, can help avoid the possibility of shadow flicker at neighbouring offices and dwellings within 500m should not exceed 30 hours per year or 30 minutes per day.'

'At distances greater than 10 rotor diameter from a turbine, the potential for shadow flicker is very low. Where shadow flicker could be a problem, the developers should provide calculations to quantify the effect and where appropriate take measures to prevent or ameliorate the potential effect, such as turning off a particular turbine at certain times.' (Section 5.12).

While both sections do refer to a distance of 500metres, this does not exclude developments being sited closer once the impacts of both noise and shadow flicker are objectively assessed on a case by case basis. As such the guidelines do not provide for an area of mandatory exclusion, unlike variation No.2 which introduces an arbitrary set back distance of 10 times the tip height from the wind turbine from residential properties or other centres of human habitation.

This set back is not based on any evidential basis and does not allow for wind energy proposals to be assessed on case by case basis in line with an evidence based framework.

The practical effect of this proposed new setback is illustrated in the Chief Executive's report which concludes that an additional 33% of the area of the County will be excluded from consideration for wind energy proposals. This is based on a tip height of 100m, a relatively conservative estimate given that wind turbines can have a height of 150m plus.

In practical terms the effect of the setback is to greatly limit current technology which is tending towards the provision of fewer but taller and more efficient turbines compared to past practice that relied upon a greater number of smaller turbines.

As such the proposed set back distance would therefore be likely to greatly limit the height of wind energy turbines which will, in turn, reduce their potential generating capacity and in effect will not maximise securing the potential of wind energy resources.

Therefore, variation No.2 introduces a new mandatory set back distance that practically is considerably in excess of that non-mandatory guidance setback referred to in the statutory guidelines and removes the provision for a case by case objective assessment of wind energy proposals that the statutory guidelines provide for.

Fresh Water Pearl mussel

In respect of the exclusion of wind energy development six identified catchments for the Fresh Water pearl mussel, a protected species the inspector concluded;

'that the evidence basis for restricting wind turbines in the six catchments is weak and unconvincing.'

The Chief Executives report states on this matter;

'The proposed exclusion is not the appropriate mechanism and that the assessment tools afforded under Part XAB of the Planning & Development Act (Appropriate Assessment) provide an effective means for managing activities that may affect the FWPM.'

While recognising that the freshwater pearl mussel is a protected species, I agree with both the inspector and Chief Executive's conclusions. The planning code already affords a high degree of capacity to assess the effect, if any, of a proposed development on areas protected or protected species. With respect to Wind energy development Section 5.2 of the Wind Energy Guidelines set out a framework for considering the impact of wind energy proposals on natural heritage.

The effect of this section is to balance necessary protection of designated area/ species with the strategic importance of wind energy proposals in contributing significantly to decreasing the dependence on fossil fuels and the meeting of targets relating to contribution of renewable energy sources.

The effect of variation No.2 is to prohibit wind energy in certain geographical catchment areas; this is clearly in breach of the Wind Energy Guidelines section 5.2 which allows for the appropriate consideration of proposals on a case by case basis and it is therefore contrary to the objective in the Wind Energy Guidelines (Section 3.4) to secure the maximum potential from the wind energy resources of the planning authority's area.

More importantly, in the way in which the Council has varied its development plan, it has failed to comply with the provisions of Section 28 (1B)(b) because in its reasoning behind the decision not to implement certain provisions of the 2006 wind energy guidelines, it has not pointed to any evidential basis for the set back or fresh water pearl mussel related restrictions.

Section 28(1B) requires planning authorities to give reasons where they depart from the policies of the Minister contained in Section 28 Guidelines that must relate to some sort of physical reason relating to the nature and characteristics of their area.

Specifically and in relation to the above, I am not aware of any scientific analysis under the Habitats Directive carried out by the Council which concludes that one specific land use or development, in this case windfarms, over other forms of development such as rural housing with its on-site wastewater systems, will have a detrimental effect on the identified catchments sufficient to merit a complete ban on such development.

As such, the basis put forward by the Council, as confirmed by the independent inspectors report, is arbitrary and specifically designed to block one form of development over others which have not been the focus of the attention of the elected members.

The adoption of a development plan, or a variation thereto, is one of the most important functions of the democratically elected council and one that must be exercised in a carefully considered and balanced approach.

It is clear to me that Variation No. 2 was specifically designed as a device to block one form of development over others, without either a national policy justification or a clear evidential or scientific basis.

If adopted on a widespread basis and all local authorities elected to restrict windfarms on the weak basis that Donegal Co Co have used, there would be profound implications for meeting Ireland's legally binding commitments concerning energy requirements from renewable sources. Indeed, the indications are that at setback's much more than 500m, such requirements would be very challenging, if not impossible to secure.

Conclusion

The contents and recommendations of the inspectors report are noted including the conclusion to amend the Draft Direction.

The Minister's attention is drawn to Section 31 (16) of the Planning and Development Act 2000 (as amended);

'.. the Minister, having considered the report, recommendations or submissions, as the case may be, shall decide for the stated reasons-

(a) to issue the direction referred to in subsection (4)(b),

(b) not to issue the direction referred to in subsection (4)(b), or

(c) to issue the direction referred to in subsection (4)(b), which has been amended by the Minister to take account of any of the matters referred to in subparagraphs (i) or (ii) as the Minister considers appropriate:

(i) recommendations contained in the report of the inspector referred to in subsection (13)(d); or

(ii) any submissions made pursuant to subsection (15).

While correct to state that the proposed variation has not complied with circular PL20-13 this recommendation is considered to be flawed as a basis for issuing a Section 31 direction as it is not grounded in the requirements of the Planning and Development Act.

However, in arriving at a recommendation and taking on board all the documentation in this case, the views on both sides and notwithstanding the findings of the independent inspector, particular weight must be placed on:

1. Settled Government policy and binding international commitments as regards energy policy and renewable energy generation;

2. The 2006 Wind Energy Guidelines and its clear advice on setbacks, shadow flicker and habitat protection; and
3. The requirements of Section 28(1B)(b).

Considering all of the above, there is an inescapable conclusion that variation No.2 is not in compliance with the requirements of the Act because of the failure of the Council to give an adequate and evidentially grounded reasoning for their departure from the 2006 Wind Energy Guidelines, in that the variation;

1. Introduces an arbitrary and mandatory exclusion or set back distance for wind turbines of ten times the tip height from noise sensitive properties. This is in clear breach of the requirements of Sections 5.6 and 5.12 of the Wind Energy Guidelines 2006 in that it removes the capability for a case by case assessment of wind energy applications based on objective analysis of the impact of noise and shadow flicker on the amenity of noise sensitive properties. Furthermore in practical terms this element of the variation introduces a setback distance considerably in excess of the non-mandatory guidance set-back referred to in the statutory guidelines.
2. Introduces the arbitrary and mandatory exclusion of wind energy developments alone within six freshwater pearl mussel catchments contained in the freshwater pearl mussel sub-basin management plans for Claddy, Eske, Glaskeelin, Leannan, Owencarrow and Owenea. This is direct conflict with the framework for balanced assessment of wind energy proposals as contained in Section 5.2 'Natural Heritage' of the Wind Energy Guidelines 2006.
3. Given that 1 and 2 above introduce mandatory and arbitrary exclusion zones the effect of variation No.2 is to introduce policies that are in breach of the planning policy guidance contained in the Wind Energy Guidelines 2006 and do not maximise wind energy potential in Donegal in direct conflict with the requirements of Section 5.2 'to secure the maximum potential from wind energy resources of the planning authority's area commensurate with supporting development that is consistent with the proper planning and sustainable development.'
4. The elected members of the planning authority have not demonstrated to the Minister, sufficient and evidentially based reasoning, relating to the nature and characteristics of Donegal, for the above significant policy departures from his guidelines on wind energy and has therefore failed to comply with the provisions of Section 28(1) and Section 28(1B)(b) and Section 31(c) of the Act.

It is therefore my recommendation that the Minister should direct Donegal County Council to remove the content inserted by Variation No.2 on the basis of the reasoning set out above, which would represent a change in the reasons given to take account of the various submissions received.

Recommendation

Adopting the approach outlined above, the Department's recommendation is that the Minister uses his powers under Section 31(16) of the Act to issue a Direction as set out below with amended statement of reasons referring to the breaches identified above regarding compliance with the requirements of the Wind Energy Guidelines 2006.

The Minister may wish to give his reasons for issuing the direction as follows:

Having carefully considered the Independent Inspector's report, public submissions received and the report of the Donegal Chief Executive's report, , I have decided to issue the draft direction on the Variation No. 2 to the Donegal County Development Plan 2012-2018 taking account of the following:

1. Variation No. 2 introduces an arbitrarily based and mandatorily applied exclusion or set back distance for wind turbines of ten times the tip height from noise sensitive properties, which breaches Sections 5.6 and 5.12 of the Wind Energy Guidelines 2006 in that it removes the capability for a case by case assessment of wind energy applications based on objective analysis of the impact of noise and shadow flicker on the amenity of noise sensitive properties. Furthermore in practical terms this element of the variation introduces a setback distance considerably in excess of the non-mandatory guidance set-back referred to in the statutory guidelines.
2. Variation No. 2 introduces an arbitrarily based and mandatorily applied exclusion of wind energy developments alone, as distinct from any other class of developments, within six freshwater pearl mussel catchments contained in the freshwater pearl mussel sub-basin management plans for Claddy, Eske, Glaskeelin, Leannan, Owencarrow and Owenea. This is direct conflict with the framework for balanced assessment of wind energy proposals as contained in Section 5.2 ' Natural Heritage' of the Wind Energy Guidelines 2006.
3. Given that 1 and 2 above introduce mandatory and arbitrary exclusion zones the effect of variation No.2 is to introduce polices that are in breach of the planning policy guidance contained in the Wind Energy Guidelines 2006, the Council will fail to maximise wind energy potential in Donegal, which directly conflicts with the requirements of Section 5.2 of the Guidelines above which state that development plans must ' secure the maximum potential from wind energy resources of the

planning authority's area commensurate with supporting development that is consistent with the proper planning and sustainable development.'

4. The elected members of the planning authority have failed to demonstrate to the Minister, sufficient and evidentially based reasoning, relating to the nature and characteristics of Donegal, for the above significant policy departures from his guidelines on wind energy and has therefore failed to comply with the provisions of Section 28(1), Section 28(1B)(b) and Section 31 (c) of the Act.

Decision Sought

In light of the foregoing, approval is sought to issue an amended Ministerial Direction under Section 31(c) of the Planning and Development Act, as amended, to direct Donegal County Council, with regard to the proposed Variation No.1 Donegal County Development Plan 2012-2018.

The Donegal County Development Plan 2012-2018 is to be amended by deleting:

- i. The written statement in respect of the Natural Resource Development (Chapter 7, Section 7.2.1 – Background – Wind Energy – Not Favoured) is to be amended by deleting the following text in the County Donegal Development Plan 2012-2018:

,including the catchments identified in the Sub-Basin Management Plans for Clady Eske, Glaskeelin, Leannan, Owencarrow and Owenea (as listed in S.I. 296 of 2009),

- ii. The written statement in respect of the Natural Resource Development (Chapter 7, Section 7.2.2 - Objectives) is to be amended by deleting the following text in the County Donegal Development Plan 2012-2018:

E-O-6:	<i>To ensure that wind energy developments do not adversely impact upon the existing residential amenities of residential properties, and other centres of human habitation (as defined at 10.6.7) in Chapter 10 Development and Technical Standards.</i>
---------------	---

- iii. The written statement in respect of the Development and Technical Standards (Chapter 10, Section 10.6. – Wind Energy) is to be amended by deleting the following text in the County Donegal Development Plan 2012-2018:

<p>10.6.5</p>	<p>(c) <i>The 6 Fresh Water Pearl Mussel (S.I. 296 of 2009) catchments contained in the Freshwater Pearl Mussel Sub-Basin Management Plans for Clady, Eske, Glaskeelin, Leannan, Owencarrow and Owenea.</i></p> <p><i>A set back distance of ten times the tip height of proposed turbines from residential properties and other centres of human habitation.</i></p> <p>(d)</p>
<p>10.6.7</p>	<p><i>Centres of Human Habitation</i></p> <p><i>Definition:-</i></p> <p><i>'Centre of Human Habitation' includes schools, hospitals, churches, residential buildings or buildings used for public assembly'.</i></p>

- iv. The plan/map entitled "County Donegal Development Plan 2012-2018 (as varied) Map 9 Wind Energy" (July 2014), as in the County Donegal Development Plan 2012-2018 (as varied), which sets out the designations for Wind Energy for Donegal is to be removed. For ease of reference a copy of the said plan/map is attached as Appendix 1 to this direction.

And

The plan/map entitled "County Donegal Development Plan 2012-2018 Map 9 Wind Energy" (June 2012), as in the County Donegal Development Plan 2012-2018 published in June 2012, which sets out the designations for Wind Energy for Donegal is to be re-inserted. For ease of reference a copy of the said plan/map is attached as Appendix 2 to this direction.

The effect of this amendment will be that the 6 Sub-Basin Catchments of SAC populations listed in S.I. 296 of 2009 (First Schedule) for the Fresh Water Pearl Mussel as 'Not Favoured Areas' for wind energy will be removed.

Next Steps

A decision on this matter is required no later than 3 weeks after the date of the last submission received on the Inspectors Independent Report¹ i.e. to be with the Planning Authority by Friday 14th October 2016. The Minister may extend the time to make this decision under Section 31(16) of the Planning and Development Act 2000 (as amended), should he so deem it necessary.

The proposed Final Amended Direction and an accompanying letter to the Chief Executive (to be copied to the Cathaoirleach of Donegal County Council and the Regional Assembly) are filed in the pouch across for the Minister's approval and signature.

For Information

Subject to the issuing of the amended Direction, the Department will arrange for a copy to be laid before each house of the Oireachtas and publish a copy of the direction on the Department's website. In addition, the letter to the Council outlines, *inter alia*, the steps to be taken by the planning authority pursuant to Section 31(2) of the Planning and Development Act, 2000 (as amended) to comply with this Direction.

The Donegal County Development Plan 2012-2018 would therefore be altered as indicated in the amended Direction, and the Planning Authority must ensure that copies of the plan as altered are available for inspection at its offices and on its website. The Planning Authority is also advised to publish notice of the making of the Direction and alteration of the County Development Plan, and post a copy of such notice on its website.

Colin Ryan

Senior Adviser (Planning)

5/10/16

¹ Required under Section 31(11) Planning and Development Act 2000 (as amended).

8

- 1. Assistant Principal – Ruth Murray *but 6/10/16*
- 2. Principal Adviser – Niall Cussen *NC 6/10/16*
- 3. Assistant Secretary – Dave Walsh *DW 6/10/16*
- 4. Rúnal Aire *[Signature]*
- 5. Rúnal Aire (for information)
- 6. Secretary General (for information)

Minister,
 submission and amended Direction
 reflect strengthened statement of
 reasons to take account of legal
 considerations raised by State's legal
 advisers in prev. JR on this issue.
 Recommended to issue.

[Signature]
 6/10/16

**Proposed Ministerial Direction regarding the
 Adopted Variation to the Donegal County Development Plan 2012-2018**

Summary of Decision

Approval is now sought to issue an amended Ministerial Direction under Section 31 of the Planning and Development Act 2000, as amended, to direct Donegal County Council in relation to Variation No.2 of the Donegal County Development Plan 2012-2018. This is as a result of a High Court order setting the Section 31 Direction process in the case of this variation back to a point where an inspector can be appointed under (S31(11)) of the Planning and Development Act 2000 (as amended).

Background

A Judicial Review taken by Cllr John Campbell of Donegal County Council was settled in advance of the High Court Hearing commencing with both Parties agreeing that the matter be remitted to the stage of the statutory process, where the Minister was entitled to appoint an Independent Inspector pursuant to section 31(11) of the Planning and Development Act 2000 (as amended) and make that appointment before the 31st of July 2016. This settlement is attached at Appendix 1.

In this regard, Hendrik van der Kamp was appointed on 27 July 2016 to carry out an independent review of the draft Direction and the Chief Executives report of September 2014. See Appendix 2 for the Order of Appointment.

The Terms of reference for the review were:

'to ascertain if a material amendment to the draft direction in this instance is required in relation to the proposed development plan variation on wind energy development in Donegal;

Independent Inspectors Recommendation

The Independent Inspector submitted his report on 16 August 2016, see Appendix 3, which was then sent to the Chief Executive, the elected members of Donegal County Council, the Regional Assembly and persons who made submissions on the draft Direction for any views they had. On foot of this consultation process 15 submissions were received.

Having reviewed the Draft Direction previously issued on 22 July 2014 and consulted with interested parties as set out in his report, the inspector recommends that the Minister should issue an amended Direction by changing the Statement of Reasons to the following or similar:

The decision by the members to alter the policies and objectives in regard to the wind energy objectives as outlined in this direction is premature pending the review of the Wind Energy Guidelines and contravenes the advice contained in planning circular letter PL 20-13 which advised local authorities to defer amending their existing Development Plan policies as part of either the cyclical review or variation processes.

Consultation

As provided for in section 31(14) of the Act, the Minister issued copies of the report to the Chief Executive, the elected members of Donegal County Council, the Regional Assembly and persons who made submissions on the Chief Executives Report, who then had 10 days in which to make a submission on the report to the Minister.

The Department received 15 submissions, outlined below, as part of this consultation – which includes a submission from a number of Elected Members of Donegal County Council and 8 members of the public or organisations, who oppose the draft direction. Submissions also came in from the Chief Executive of the Council, Irish Wind Energy Association and a member of the public who are in support of the draft direction.

In brief the submission received on 1st September 2016 from the Chief Executive of Donegal County Council is of the view that the policies and objectives of the current, unvaried, County Development Plan are consistent with the 2006 Guidelines.

The Chief Executive also states that the best manner in which to give effect to the draft direction is for the Minister to issue the Direction as drafted which deletes Variation No.2 from the Donegal County Development Plan 2012-2018.

It should be further noted that the Chief Executive in his report of 16 September 2014 on the submissions and observations received on the draft direction stated that the best manner in which to give effect to the draft direction is for the Minister to issue the Direction as drafted.

Further detail on each of the submissions is contained in the Departments Planning Advisors report attached at Appendix 4.

Forward Planning Sections Analysis and Recommendation

The draft direction issued as a result of concerns relating to the fit between Variation No.2 to the Donegal County Development Plan 2012-2018 and national policy on renewable energy generally and the 2006 Wind Energy Guidelines specifically.

The inspector's report and this submission to the Minister on foot of that report and all relevant documentation, including the original decision of the Council and the ultimate decision of the Minister are on foot of this High Court order which states that the statutory procedure under Section 31 be resumed from section 31(11).

Inspector's Report

The inspector's conclusions are laid out in his report and are broadly as follows:

- Donegal County Council did not ignore or take insufficient account of the submissions made by the Minister for the Environment, Community and Local Government in May 2014.
- The draft Variation did not significantly impact on the internal coherence of the development plan.
- The draft Variation did not make the development plan inconsistent with national or regional policies or targets.
- Notwithstanding the weak evidence basis for restricting wind turbines in the six sub-catchments, the statement that the draft Variation does not provide for proper planning and sustainable development is not capable of objective verification.
- The draft Variation contravenes Circular Letter PL 20-13 which advised local authorities to defer amending their existing Development Plan policies relating to wind energy.

The inspector concludes by recommending that a direction to delete Variation No. 2 issues and that the statement of reasons be amended to include reference to the prematurity of varying the Donegal County Development Plan pending the review of the wind energy guidelines and that the variation contravenes the advice contained in circular PI 20-13.

There is a difficulty with the Inspectors recommendation in that the reason he believes should ground a direction on this case is not of the types listed in Section 31(1).

The Departments Planning Advisor is of the view that *"considering both the inspectors analysis and report and the various submissions made and the Chief Executives report, the requirements of the Act, Government policy on energy and renewable energy in particular, the fact remains that Variation No.2 leaves the Donegal County Development plan significantly at odds with the above, to the extent that a direction should issue but for an amended set of reasons."*

In the Planning Advisors report, see Appendix 4, on the Independent Inspectors Report and as already highlighted to the Minister previously on matters of the same subject, Forward Planning is of the view that in order to uphold national policy in relation to renewable energy generally and wind energy specifically, the Minister having already taken a stance in relation to the adoption of the Westmeath County Development Plan and proposed material alterations to the Draft Offaly County Development Plan, 2014-2020 should issue a Direction with amendments to the statement of reasons to Donegal County Council.

Adopting the approach outlined above, the Department's recommendation is that the Minister uses his powers under Section 31(16) of the Act to issue an amended Direction as set out below with amended statement of reasons referring to the breaches identified above regarding compliance with the requirements of the Wind Energy Guidelines 2006.

The Minister may wish to give his reasons for issuing the direction are set out below.

Statement of Reasons as amended:

Having carefully considered the Independent Inspector's report, public submissions received and the report of the Donegal Chief Executive's report, I have decided to issue the draft direction on the Variation No. 2 to the Donegal County Development Plan 2012-2018 taking account of the following:

1. Variation No. 2 introduces an arbitrarily based and mandatorily applied exclusion or set back distance for wind turbines of ten times the tip height from noise sensitive properties, which breaches Sections S.6 and 5.12 of the Wind Energy Guidelines 2006 in that it removes the capability for a case by case assessment of wind energy applications based on objective analysis of the impact of noise and shadow flicker on the amenity of noise sensitive properties. Furthermore in practical terms this element of the variation introduces a setback distance considerably in excess of the non-mandatory guidance set-back referred to in the statutory guidelines.
2. Variation No. 2 introduces an arbitrarily based and mandatorily applied exclusion of wind energy developments alone, as distinct from any other class of developments, within six freshwater pearl mussel catchments contained in the freshwater pearl mussel sub-basin management plans for Claddy, Eske, Glaskeelin, Leannan, Owencarrow and Owenea. This is direct conflict with the framework for balanced assessment of wind energy proposals as contained in Section 5.2 'Natural Heritage' of the Wind Energy Guidelines 2006.
3. Given that 1 and 2 above introduce mandatory and arbitrary exclusion zones the effect of variation No.2 is to introduce policies that are in breach of the planning policy guidance contained in the Wind Energy Guidelines 2006, the Council will fail to maximise wind energy potential in Donegal, which directly conflicts with the requirements of Section 5.2 of the Guidelines above which state that development plans must '*secure the maximum potential from wind energy resources of the planning authority's area commensurate with supporting development that is consistent with the proper planning and sustainable development.*'
4. The elected members of the planning authority have failed to demonstrate to the Minister, sufficient and evidentially based reasoning, relating to the nature and characteristics of Donegal, for the above significant policy departures from his guidelines on wind energy and has therefore failed to comply with the provisions of Section 28(1), Section 28(18)(b) and Section 31 (c) of the Act.

Decision Sought

In light of the foregoing, approval is sought to issue an amended Ministerial Direction under Section 31 of the Planning Acts to direct Donegal County Council, with regard to Variation (No.2) to the Donegal County Development Plan 2012-2018 (as varied) to:

1. Amend the written statement in respect of the Natural Resource Development (Chapter 7, Section 7.2.1 – Background – Wind Energy – Not Favoured) in the Donegal County Development Plan 2012-2018 (as varied) by deleting the following text:

,including the catchments identified in the Sub-Basin Management Plans for Claddy, Eske, Glaskeelin, Leannan, Owencarrow and Owenea (as listed in S.I. 296 of 2009),

2. Amend the written statement in respect of the Natural Resource Development (Chapter 7, Section 7.2.2 - Objectives) in the Donegal Development Plan 2012 – 2018 (as varied) by deleting the following text:

E-O-6: To ensure that wind energy developments do not adversely impact upon the existing residential amenities of residential properties, and other centres of human habitation (as defined at 10.6.7) in Chapter 10 Development and Technical Standards.

3. Amend the written statement in respect of Development and Technical Standards (Chapter 10, Section 10.6.5 – Wind Energy) in the County Donegal Development Plan 2012 – 2018 (as varied) by deleting the following text:

c) *The 6 Fresh Water Pearl Mussel (S.I. 296 of 2009) catchments contained in the Freshwater Pearl Mussel Sub-Basin Management Plans for Clady, Eske, Glaskeelin, Leannan, Owencarrow and Owenea.*

(d) *A set back distance of ten times the tip height of proposed turbines from residential properties and other centres of human habitation.*

4. Amend the written statement in respect of Development and Technical Standards (Chapter 10, Section 10.6.7) in the County Donegal Development Plan 2012 – 2018 (as varied) by deleting the following text:

10.6.7 *Centres of Human Habitation*

Definition:-

'Centre of Human Habitation' includes schools, hospitals, churches, residential buildings or buildings used for public assembly'.

5. Amend Map 9 'Wind Energy', at Appendix 1 of the County Donegal Development Plan 2012 – 2018 (as varied), to show the removal of 6 Sub-Basin Catchments of SAC populations listed in S.I. 296 of 2009 (First Schedule) for the Fresh Water Pearl Mussel as 'Not Favoured Areas' for wind energy.

The statement of reasons is to be amended as set out above.

Next Steps

A decision on this matter is required no later than 6 weeks after the date of the last submission received on the Inspectors Independent Report¹ i.e. to be with the Planning Authority by Friday 14 October 2016.

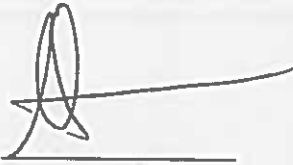
The proposed Final Direction and an accompanying letter to the Chief Executive (to be copied to the Cathaoirleach of Donegal County Council and the Regional Assembly) are filed in the pouch across for the Minister's approval and signature.

¹ Required under Section 31(11) Planning and Development Act 2000 (as amended).

For Information

Subject to the issuing of the Direction, the Department will arrange for a copy to be laid before each house of the Oireachtas, publish a copy of the direction on the Department's website and issue a copy of the direction to those who made a submission on the public consultation. In addition, the letter to the Planning Authority outlines, *inter alia*, the steps to be taken by the planning authority pursuant to Section 31(2) of the Planning and Development Act, 2000 (as amended) to comply with this Direction.

To this end, the Donegal County Development Plan 2012-2018 must therefore be altered as indicated in the Direction, and the Planning Authority must ensure that copies of the plan as altered are available for inspection at its offices and on its website. The Planning Authority is also advised to publish notice of the making of the Direction and alteration of the development plan, and post a copy of such notice on its website.



Eoin Bennis,

Planning Section

6th October 2016