

**IN THE MATTER OF THE PLANNING AND DEVELOPMENT ACTS, 2000
TO 2006**

**AND IN THE MATTER OF AN APPLICATION BY DUBLIN CITY
COUNCIL PURSUANT TO SECTIONS 226 AND 175 OF THE PLANNING
AND DEVELOPMENT ACT, 2000**

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AND IN THE MATTER OF THE LOCAL GOVERNMENT (NO. 2) ACT, 1960

AND IN THE MATTER OF THE HOUSING ACT, 1966

**AND IN THE MATTER OF THE PIGEON HOUSE ROAD / SHELLYBANKS
ROAD AREA COMPULSORY PURCHASE (WASTE MANAGEMENT
FACILITY) ORDER, 2002**

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CLOSING SUBMISSIONS ON BEHALF OF DUBLIN CITY COUNCIL

Introduction

1. In these closing submissions on behalf of Dublin City Council (hereinafter “the Council”) it is intended to provide an overview of the procedures that have led to this oral hearing, in the hope that this will assist the Inspector appointed by An Bord Pleanála (hereinafter “the Board”) in his task of making a recommendation to the Board. It is not proposed to attempt to revisit in detail the evidence that has been adduced. Rather, it is intended to set the evidence in its legislative context; to outline the main legal principles which, it is respectfully submitted, ought to be applied; to consider certain issues where there has been significant controversy; and to address the queries of a legal nature raised by the Inspector in the course of the hearing.

Procedure

2. This is a conjoined application to the Board, for confirmation of a compulsory purchase order, namely the Pigeon House Road / Shellybanks Road Area Compulsory Purchase (Waste Management Facility) Order, 2002 (hereinafter “the CPO”), and for approval of the proposed development that is the underlying reason for the making of the CPO. That proposed development is the development by the Council, on its own behalf and on behalf of the three other local authorities in the Dublin region,¹ of a Waste to Energy (“WTE”) facility on the Poolbeg Peninsula, Dublin 4.
3. It should be noted that the Council has also made an application to the Environmental Protection Agency (hereinafter “the Agency”) for a waste licence to operate the proposed WTE facility.² No decision has yet been made in respect of this application. It will also be necessary to apply to the Commission for Energy Regulation for permission to link the facility to the national grid.³ In this connection, the Council accepts that it will be required to comply with the legislation as in force when that application is made. Specifically, the Council will have to apply to the Board for approval under section 182A of the Planning and Development Act, 2000, as inserted by section 4 of the Planning and Development (Strategic Infrastructure) Act, 2006. It is not likely that this application will require a further EIS, since the particular development in question does not appear to be identified for the purposes of section 176 of the Act of 2000.

Application for approval of proposed development

4. Turning first to the application for approval, certain elements of the proposed development (specifically the pumphouse and cooling water system) are located on the foreshore. Section 226 of the Planning and Development Act, 2000 provides that where development is proposed to be carried out wholly or partly on the foreshore by a local authority that is a planning authority, the

¹ Dún Laoghaire – Rathdown County Council; Fingal County Council; and South Dublin County Council.

² This application was made on 10 July 2006 (EPA Reg. No. W0232-01).

³ EIS, §1.1.1, §2.5.5.

authority must apply to the Board for approval of the proposed development. Hence the instant application.

5. The proposed development is also of a class that requires environmental impact assessment (“EIA”) within the meaning of Council Directive 85/337/EEC of 27 June 1985 on the assessment of the effects of certain public and private projects on the environment (hereinafter “the EIA Directive”).⁴ The EIA Directive is implemented in Ireland by (*inter alia*) the Act of 2000 and the regulations made thereunder.
6. Section 175 of the Act of 2000 requires an Environmental Impact Statement (“EIS”) to be prepared in respect of development belonging to a class identified for the purpose of section 176 of the Act, which a local authority that is a planning authority proposes to carry out. It also provides that such development shall not be carried out unless the approval of the Board is obtained, although in the case of development that is carried out partly on the foreshore, this approval is given under section 226 rather than section 175.
7. Section 226(3) of the Act of 2000 provides that section 175 applies (subject to certain modifications) to proposed development (*i.e.* development wholly or partly on the foreshore) that belongs to a class of development identified for the purpose of section 176.
8. Article 93 of the Planning and Development Regulations, 2001⁵ prescribes the development identified for the purpose of section 176 of the Act of 2000 as that falling within the classes set out in Schedule 5 to the Regulations. The proposed development with which the Board is concerned falls within paragraph 10 of Schedule 5.⁶

⁴ As amended by Council Directive 97/11/EC of 3 March 1997 and Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003. See Article 4(1) and Annex I, paragraph 10: “Waste disposal installations for the incineration or chemical treatment as defined in Annex IIA to Directive 75/442/EEC under heading D9 of non-hazardous waste with a capacity exceeding 100 tonnes per day.”

⁵ S.I. No. 600 of 2001. Article 93 falls within Part 10 of the Regulations, which is amended in parts by the Planning and Development Regulations, 2006 (S.I. No. 685 of 2006). The Regulations of 2006 came fully into force only on 31 March 2007.

⁶ This class is the same as paragraph 10 of Annex I to the EIA Directive (as amended); see above, n. 4.

9. An EIS has been submitted to the Board, comprising three volumes. Certain additional information has also been submitted to the Board as part of the assessment process. Where appropriate, this additional information has been advertised pursuant to directions of the Board. In addition, the hearing has been adjourned to allow members of the public to consider and evaluate evidence adduced by the Council in response to objections.

The CPO

10. Section 227 of the Act of 2000 makes provision for the acquisition by a local authority of land comprising part of the foreshore adjoining its functional area. However, in the instant case the Council does not propose to acquire foreshore land under the CPO, so this section does not apply. Rather, if the approval for the proposed development is granted, the Council proposes to apply to the Minister for the Marine and Natural Resources for a lease or licence over those (relatively small) sections of land upon the foreshore that will be required. Negotiations have already been opened in this regard. This issue is revisited below.
11. The application for confirmation of the CPO therefore comes before the Board pursuant to section 76 of the Housing Act, 1966 and the Third Schedule thereto, as amended by the Planning and Development Act, 2000 (section 214 of which transfers ministerial functions in relation to the confirmation of compulsory purchase orders to the Board, and section 218 of which requires the Board to hold an oral hearing where before the Minister would have been required to hold a public local inquiry). In the instant case, because landowners affected by the CPO have objected, the holding of an oral hearing became mandatory.
12. Section 220 of the Act of 2000 encourages the Board to deal in parallel with an application for confirmation of a CPO and an application for approval of development where the CPO is for the purpose of effecting development that is required to comply with section 175 or any other statutory provision to comply with procedures for giving effect to the EIA Directive. It follows that

it is quite appropriate that an oral hearing should have been convened to deal with both applications.

13. The CPO itself was made on 25 July 2002, pursuant to powers conferred on the applicant local authority by section 10 of the Local Government (No. 2) Act, 1960 (as substituted by section 86 of the Housing Act, 1966), section 76 of the Housing Act, 1966, and the Planning and Development Act, 2000. From the outset, the Council requested the Board to defer confirmation of the CPO until after the submission of the EIS.⁷
14. Although it is possible to distinguish between the application for confirmation of the CPO and the application for development approval for certain purposes, a watertight division cannot be maintained. Section 220(1) of the Act of 2000 provides that:

“The person holding an oral hearing in relation to the compulsory acquisition of land, which relates wholly or in part to proposed development by a local authority which is required to comply with section 175 or any other statutory provision to comply with procedures for giving effect to the Council Directive, shall be entitled to hear evidence in relation to the likely effects on the environment of such development.”

It seems to follow that the Board, in reaching its decision on whether or not to approve the CPO, is entitled to take into account evidence relating to the likely effects on the environment of the proposed development that constitutes the reason for the making of the CPO. Indeed, from the perspective of the Council, the two applications are inextricably linked. The development approval is inoperable without the compulsory purchase confirmation, and the CPO is redundant in the absence of development approval.

Adequacy of description on face of the CPO

15. The CPO was made for the stated purpose of “*the provision of a waste management facility*”. The Inspector has raised the question of whether or not

⁷ Brief of Evidence of John Murphy, p. 1.

this description is adequate. It is submitted that it is, for the following reasons.

16. Section 213(1) of the Act of 2000 requires that the power conferred on a local authority under any enactment to acquire land shall be construed in accordance with that section. Section 213(2)(a) goes on to provide that:

“A local authority may, for the purposes of performing any of its functions (whether conferred by or under this Act, or any other enactment passed before or after the passing of this Act), including giving effect to or facilitating the implementation of its development plan... do all or any of the following:

(i) acquire land, permanently or temporarily, by agreement or compulsorily...”

17. Section 38(1) of the Waste Management Act, 1996 provides that:

“A local authority shall provide and operate, or arrange for the provision and operation of, such facilities as may be necessary for the recovery and disposal of household waste arising within its functional area.”

18. It follows from this that it is a statutory function of the Council to provide facilities for the recovery and disposal of household waste. It may also be observed that section 22(12) of the Act of 1996 provides that:

“A local authority shall take such steps as are appropriate and necessary to attain in relation to its functional area the objectives in a waste management plan made by the authority (whether such plan has been made by the authority or jointly by the authority with another local authority or other local authorities).”

19. As the evidence has shown, it was also an objective of the Dublin Waste Management Plan, 1998 that there should be thermal treatment of waste.⁸

⁸ See p. 6, and p. 90 (paragraph 13.4).

There can be no doubt but that the Council made the CPO in the proper exercise of one of its statutory functions.

20. The courts have consistently held that it is not necessary for a compulsory purchase order to bear on its face an elaborate statement of the purpose for which it is made. In *Clinton v. An Bord Pleanála* [2005] IEHC 54; [2007] IESC 19 the High Court and the Supreme Court upheld a compulsory purchase order that was stated on its face to be made for “*development purposes*”. Even though it is difficult to imagine a broader statement of purpose, the Supreme Court held that no substantive objection could be raised. Geoghegan J. (who delivered the judgment of the Court) said: “*In reality in this case, the appellant, at all material times, well knew the purpose which the council was asserting*”, specifically the regeneration of O’Connell Street in Dublin.
21. The *Clinton* case appears to establish two propositions. The first is that a very broad statement of purpose on the face of a compulsory purchase order is not itself objectionable, provided it corresponds substantially to a statutory purpose of the acquiring authority. The second is that, in deciding whether or not the purpose of a compulsory purchase order is adequately elucidated, the Board should take into account the evidence and information presented to the oral hearing. In the instant case, the specific proposals for the use of the site are set forth and explained in great detail in the EIS that accompanies the application, and have been further explained in the course of this oral hearing. These proposals are four-square within and fully consistent with the statutory purpose invoked on the face of the CPO. No landowner affected by the CPO can be in any doubt as to what the purpose of the compulsory acquisition is. It is, therefore, respectfully submitted, that the statement of purpose on the face of the CPO is no impediment to the Board confirming the order.

Areas not included in the CPO

22. There are three areas affected by the application for development approval that are not included in the CPO. These are: (i) the area to the south of the site of the proposed WTE facility designated on the plans submitted to the Board

as a construction and storage compound; (ii) the area of the foreshore through which the cooling water intake is proposed to run, and upon which the proposed pumphouse will be located; and (iii) another area of the foreshore and the Pigeon House Road, over which it is proposed to run pipes. The third area is of no concern, because the Council is already the owner. However, the Inspector has raised queries concerning the other two areas.

23. The area to the south of the site of the proposed facility is in the ownership of Dublin Port Company. Mr. Matt Twomey gave evidence to the hearing⁹ that he had had discussions with the Chief Executive Officer of the Company. The Chief Executive had said that if the CPO were confirmed, the Company would deal with the Council in the normal commercial way in relation to the grant of a short term lease. Mr. Twomey also noted that the same land had previously been leased to the Council.

24. It may be noted that it is not proposed to locate any permanent part of the facility on these lands. They are required only during the construction phase, for the storage of materials and for other construction related reasons. In this connection, there is no requirement in relation to a normal application for planning permission that the applicant should enjoy a legal interest (or even consent from the landowner) in relation to land that he does not propose to develop, but to which he may require access in order to carry out development on his own lands. For example, in a tight urban site, where it is proposed to build a wall hard up to the boundary of the site, it may be necessary for an applicant for permission to obtain the consent of the neighbouring landowner to enter upon his land for the purpose of constructing or rendering the wall. However, it would not be necessary for the applicant to demonstrate any interest in the neighbouring property. The grant of planning permission does not entitle him to enter upon that property; that will be a matter for private bargaining with the neighbouring landowner, and the planning authorities and the Board quite properly do not concern themselves with such matters. The same approach should be taken here.

⁹ Day 3.

25. In relation to the foreshore, the intention of the Council is not to seek to acquire the necessary lands compulsorily, but rather to apply for a foreshore lease or licence. In this connection, sections 226 and 227 of the Act of 2000 have been heavily amended by sections 43 and 44 respectively of the Planning and Development (Strategic Infrastructure) Act, 2006. Section 227(8) formerly provided that: “*The Foreshore Acts, 1933 to 1998, shall not apply in relation to any application to the Board under section 226*”. However, this has been modified by section 44 of the Act of 2006 and subsection (8) now provides:

“(8)(a) Subject to paragraph (b), the Foreshore Acts 1933 to 2005 shall not apply in relation to any application to the Board under section 226...

(b) In any case where a local authority that is a planning authority applies for an approval for proposed development under section 226 or has been granted such an approval by the Board, but has not sought the compulsory acquisition of any foreshore on which the proposed development would be carried out under an enactment specified in section 214, the authority may apply for a lease or licence under section 2 or 3 of the Foreshore Act 1933 in respect of that proposed development; in such cases, it shall not, notwithstanding the provisions of any other enactment, be necessary for—

(i) the local authority to submit an environmental impact statement in connection with its application for such lease or licence, or

(ii) the Minister for Communications, Marine and Natural Resources to consider the likely effects on the environment of the proposed development.”

26. This is precisely the position that obtains here. Although the Council seeks approval from the Board for development which, it is proposed, will take place partly on the foreshore, that foreshore land is not included in the CPO.

If approval is granted and the CPO is confirmed, the Council will seek a foreshore lease or licence in order to allow it to carry out the development.

27. More broadly, it is respectfully submitted that it is not relevant to the issues that must be considered by the Board that the Council has not yet acquired (and is not at this time seeking confirmation for the compulsory acquisition of) legal interests in these two areas.
28. This is not, of course, an application for planning permission in the normal sense, and it is submitted in the first instance that an application from a local authority possessing powers of compulsory purchase stands on a different footing from an application for planning permission made by a private person who does not enjoy such powers. If the Board were to approve the proposed development and it proved impossible to agree upon commercial terms with Dublin Port Company for the lease of the lands to the south, it would always be open to the Council as a last resort to exercise its compulsory purchase powers. To this extent, the decision to forego the use of those powers is in ease of, rather than an imposition upon, the current landowner. However, even if the same principles that apply to an application for planning permission apply here, it is submitted that the application for approval is still perfectly valid.
29. At the outset, it should be noted that the Planning and Development Act, 2000 does not contain any express requirement that an applicant for planning permission should enjoy any interest in the land the subject of the application. Indeed, the legislation seems to envisage an application being made by a person who is not so interested, since section 33(2)(g) provides that the Minister may make regulations requiring applicants to submit further information with respect to their applications, including “*any information as to any estate or interest in or right over land*”. Although article 22(1)(d) of the Regulations of 2001 does seem to suggest that an applicant should have some sort of interest, it is well settled that the Act cannot be interpreted by reference to the Regulations made under its auspices. To do so would be to put the cart before the horse (*Lawson v. Fox* [1974] A.C. 803 at 809 *per* Lord

Diplock; approved in *Frescati Estates Ltd v. Walker* [1975] I.R. 177 at 187-188).

30. It is the decision of the Supreme Court in *Frescati Estates Ltd v. Walker* [1975] I.R. 177 that has been interpreted as requiring that an application for planning permission must be made by or with the approval of a person with sufficient interest in the subject lands to allow the proposed development to be carried out.
31. The *Frescati Estates* case arose out of a rather extreme factual scenario. The plaintiff owned certain lands and had been refused permission for development, which would have involved the demolition of an historic structure. A claim for compensation was made on foot of this refusal and the planning authority sought to avoid liability by giving the plaintiff an undertaking to grant permission for development, subject to certain conditions. The defendant was a conservationist who was alarmed at the prospect that the structure might be demolished. Despite having no interest, or hope of acquiring any interest in the land, and no intention to develop it, she applied for outline permission for development of a kind quite at odds with that contemplated by the plaintiff. This application was made as part of a campaign to prevent the plaintiff from developing the land, with a view to restraining the plaintiff from carrying out any development inconsistent with her outline permission. That outline permission was granted by the planning authority and the plaintiff, in tandem with bringing an appeal, sought to restrain the defendant from persisting with her application, on the grounds that it was a nullity.
32. In the Supreme Court it was argued on behalf of the defendant that there was no limit to the class of persons who might validly make an application for planning permission. This was rejected by Henchy J. (who delivered the judgment of the Court). The critical passage in his judgment was as follows.

“To sum up, while the intention of the Act is that persons with no legal interest (such as would-be purchasers) may apply for development permission, the operation of the Act within the scope of its objects and

the limits of constitutional requirements would be exceeded if the word 'applicant' in the relevant sections is not given a restricted connotation. The extent of that restriction must be determined by the need to avoid unnecessary or vexatious applications, with consequent intrusions into property rights and demands on the statutory functions of planning authorities beyond what could reasonably be said to be required, in the interests of the common good, for proper planning and development.

Applying that criterion, I consider that an application for development permission, to be valid, must be made either by or with the approval of a person who is able to assert sufficient legal estate or interest to enable him to carry out the proposed development, or so much of the proposed development as relates to the property in question. There will thus be sufficient privity between the applicant (if he is not a person entitled) and the person entitled to enable the applicant to be treated, for practical purposes, as a person entitled."

33. On this basis it was held that the defendant's application was void and should not have been entertained by the planning authority. The Court's conclusion was stated in broad terms, but it must be understood in its context. In particular, it is notable that the principle on which Henchy J. founded his judgment was that a statute should not be construed in such a way as to allow persons generally rights in respect of another's property (such as the right to apply for planning permission) in order to gratify "*an idle or perverse whim*" (at 187).
34. Although the *Frescati Estates* case has not been explicitly overruled, there have been more recent developments in the area. In *Schwestermann v. An Bord Pleanála* [1994] 3 I.R. 437; [1995] 1 I.L.R.M. 301 O'Hanlon J. reviewed a number of authorities in which a more flexible approach to the question of sufficient interest was demonstrated (see also *Frank Dunne Ltd v. Dublin County Council* [1974] I.R. 45 at 50; *Scott v. An Bord Pleanála* [1995] 1 I.L.R.M. 424 at 429). In *Grange Developments Ltd v. Dublin County Council*

(*No. 2*) [1989] I.R. 296 Murphy J. commented, in part of a passage approved by O’Hanlon J., that:

“The only purpose of inferring any restriction on the range of persons by whom an application for permission may be sought is to prevent an abuse of the planning procedures by persons who have neither an interest in the property or any prospect of obtaining it.”

35. However, the most important decision in point is that of the Supreme Court in *Keane v. An Bord Pleanála* [1998] 2 I.L.R.M. 241. It concerned a grant of planning permission to the Commissioners of Irish Lights for the construction of a radio mast. In other proceedings it was held that the Commissioners lacked the power to erect such a structure, and the question for determination by the Supreme Court was whether a planning application could validly be made in respect of development which the applicant was incapable of carrying out. The applicants, who were seeking to challenge the grant of planning permission, drew an analogy with the position in *Frescati Estates*.

36. Keane J. (as he then was) delivered the judgment of the Court. He rejected the applicants’ arguments and in the course of so doing made certain comments which cast doubt on the continued authority of the *Frescati Estates* decision, which he said must be understood in the context of its particular facts (at 247). He stated (at 246-247):

“In many cases, including the present, a person who has been granted planning permission will be unable to proceed with the development until he has obtained a relevant permission. This may arise either as a matter of public law or private law... Where the land is leasehold, there may be covenants affecting the proposed development which may require the consent of the lessor to be obtained.

The fact that such permissions or consents may be required before the development may lawfully commence does not preclude the planning authority, or An Bord Pleanála, from granting the permission, provided all the relevant requirements of the planning legislation are met.” (emphasis added)

37. Having quoted the critical passage from the judgment of Henchy J. in *Frescati Estates* (set out above), Keane J. commented as follows (at 248-249).

“It may be that the ratio of this decision is to be found in the first paragraph of this passage and that the second paragraph, to the extent that it suggests that an application for planning permission can only be made by or with the consent of a person entitled to a legal estate or interest sufficient to enable him to carry out the proposed development, should properly be regarded as obiter. One could readily envisage circumstances in which an application could be made by some other person which could not possibly be described as either ‘unnecessary’ or ‘vexatious’.”

38. It must be conceded that Keane J.’s comments on the wider issue were themselves probably *obiter*. However, they show that the courts, and in particular the Supreme Court, is now willing to take a more flexible approach to the requirement of sufficient interest. It seems that Keane J. would be prepared to permit a planning authority (or An Bord Pleanála) to adjudicate on a planning application provided the same was neither “unnecessary” nor “vexatious”. This is a less rigid standard than that suggested by Henchy J., which could conceivably be satisfied by applications in respect of which the consent mentioned in *Frescati Estates* is absent.
39. The decision in *Keane v. An Bord Pleanála* has proved to be influential¹⁰ and represents, it is submitted, both good sense and good law. For this reason, it is respectfully submitted that it is not relevant to the Board’s deliberations that the Council has not sought to acquire all the land that it proposes to use during the construction phase, and on which it proposes to locate part of the development.

Environmental Impact Assessment

40. Several objectors have repeatedly criticised the proposal before the Board on the basis that there is insufficient detail to allow the Board to satisfy itself that

¹⁰ See *Boyne Valley & Newgrange Environmental Protection League Ltd v. Environmental Protection Agency* [2002] IEHC 24; [2002] W.J.S.C.-H.C. 1173.

the proposed development will not give rise to significant adverse environmental effects, and will not be inconsistent with the proper planning and sustainable development of the area. It is respectfully submitted that these criticisms are misplaced.

41. This objection can take two forms: a technical objection to the effect that the Council has failed to submit some essential document or information, and a more substantive objection, the gist of which is that the Board does not have enough information to allow it to grant approval with confidence. Neither form is well founded in this case.
42. Dealing first with the formal objection, it has already been noted that this is not an application for planning permission under Part III of the Planning and Development Act, 2000. The provisions of Part IV of the Planning and Development Regulations, 2001 are not, therefore, applicable to this application. As the estimated cost of the proposed development is more than €126,000, it falls within paragraph (k) of article 80 of the Regulations of 2001 and, as such, is *prima facie* prescribed for the purpose of section 179 of the Act of 2000, which is concerned with local authority own development. However, it section 179(6)(d) provides that the section does not apply to “*development in respect of which an environmental impact statement is required under section 175 or under any other enactment*”. Since the proposed WTE facility is development in respect of which an environmental impact statement is required, it seems to follow that the requirements of Part 8 of the Regulations of 2001 (which includes article 80) do not apply.
43. As Prof. Scannell has commented in her leading work:

*“An application for approval under section 175, although somewhat similar to an application for planning permission, is not a planning application. Local authority projects tend to be larger than most private sector projects and applications for approvals are not, and cannot usually be, as detailed.”*¹¹

¹¹ Scannell, *Environmental and Land Use Law* (Thomson Round Hall, 2006), para. 5-147.

44. Chapter 4 of Part 10 of the Regulations of 2001 is concerned with the Environmental Impact Assessment of local authority own development. Article 118 requires the local authority to send to the Board, together with three copies of the EIS, three copies of “*the plans and particulars of the proposed development*”. There is no indication in the Regulations of what those plans and particulars must include. By inference from the requirements of section 175 of the Act of 2000, the information submitted to the Board must be sufficient to allow it to evaluate: “*(i) the likely effects on the environment of the proposed development, and (ii) the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the said development of such development*”.¹² There can be no hard and fast rule as to the level of information that will satisfy this requirement in different cases.

45. It is not a requirement of Irish or EU legislation that the proposal for which approval is sought must be final and complete in every detail. The Sixth recital of the EIA Directive provides that:

“...development consent for public and private projects which are likely to have significant effects on the environment should be granted only after prior assessment of the likely significant environmental effects of these projects has been carried out; whereas this assessment must be conducted on the basis of the appropriate information supplied by the developer...”

46. Article 5(3) of the EIA Directive prescribes the minimum information to be provided by the developer. It is transposed in Schedule 6, paragraph 1 of the Regulations of 2001, which requires the developer to submit:

“(a) A description of the proposed development comprising information on the site, design and size of the proposed development.

(b) A description of the measures envisaged in order to avoid, reduce and, if possible, remedy significant adverse effects.

¹² PDA 2000, s. 175(6).

(c) The data required to identify and assess the main effects which the proposed development is likely to have on the environment.

(d) An outline of the main alternatives studied by the developer and an indication of the main reasons for his or her choice, taking into account the effects on the environment.”

47. It is respectfully submitted that, in deciding whether or not the information furnished to it is adequate, the crucial question for the Board is whether or not that information is sufficient to allow it to form a view on the likely significant environmental effects of the proposal, and on the likely effect of the proposal on the proper planning and sustainable development of the area. It is submitted that the information before the Board more than satisfies this test.
48. The Inspector has invited submissions in relation to the provision by the Council, during the hearing, of drawings of the proposed pump house and security buildings. In the context of the proposal as a whole, these are minor elements. The documents submitted as part of the EIS showed the location of these buildings, and their respective footprints. The EIS also contains a description of the two buildings.¹³ The approximate size of the pump house is specified,¹⁴ and the EIS also includes a cross-sectional drawing of this building.¹⁵ The security building is not regarded as likely to have any significant effect on the environment; nor, in the context of the proposed development as a whole, is it regarded as likely to have any implications for the proper planning or sustainable development of the area. It is therefore submitted that the information contained in the initial application relating to these two elements was sufficient, under the governing legislation.
49. Even if Part 8 of the Regulations of 2001 did apply, it is respectfully submitted that there has been compliance with its requirements. Article 83 requires the local authority to make available for inspection: (i) a document describing the nature and extent of the proposed development and the principal features thereof; (ii) a location map, drawn to a scale of not less than

¹³ EIS, §5.5.8 and §5.5.9.

¹⁴ EIS, §5.5.13.

¹⁵ EIS, Chap. 22, Drawing BE041A.

1:1000 in built up areas and 1:1250 in all other areas (which shall be identified thereon) and marked or coloured so as to identify clearly the land on which it is proposed to carry out the proposed development; (iii) a site layout plan, drawn to a scale of not less than 1:500, showing the boundary of the site on which it is proposed to carry out the proposed development and the buildings or other structures, and roads or other features, in the vicinity of the site; and (iv) such other plans and drawings, drawn to a scale of not less than 1:100, as are necessary to describe the proposed development. All of these documents have been provided. There is no clear elucidation of what is meant by “*such other plans and drawings... as are necessary to describe the proposed development*”. However, for the reasons already alluded to, it is submitted that the plans and drawings submitted with the initial application were more than adequate to describe the proposed development.

50. At the Inspector’s request, further detail has been provided in the form of more detailed drawings. These may be of assistance to the Board, but it is the position of the Council that they were not required in order for the Board to discharge its function.

51. This analysis is, it is submitted, fully consistent with that of the High Court of England and Wales (upheld on appeal) in R. v. Rochdale Metropolitan Borough Council, ex parte Milne [2001] J.P.L. 470. Sullivan J. said:

“[104] If one asks the question how much information about the site, design, size or scale of the development is required to fall within ‘a description of the development proposed’ for the purposes of [the English regulations implementing the EIA procedure]?, the answer must be: sufficient information to enable ‘the main’, or the ‘likely significant’ effects on the environment to be assessed... and the mitigation measures to be described...”

52. The substantive objection that has been made by a number of objectors (most notably Mr. Bryan) is that there is over-reliance by the Council on the licensing regime, and compliance by the developer and operator with conditions that may be imposed by the Board or by the Agency, for example

in relation to adherence to best practice during construction and the monitoring and control of air emissions and biocides during operation. In this connection, the Council again adopts the comments of Sullivan J. in *R. v. Rochdale Metropolitan Borough Council, ex parte Milne*, where he said:

“[128] Any major development project will be subject to a number of detailed controls, not all of them included within the planning permission. Emissions to air, discharges into water, disposal of the waste produced by the project, will all be subject to controls under legislation dealing with environmental protection. In assessing the likely significant environmental effects of a project the authors of the environmental statement and the local planning authority are entitled to rely on the operation of those controls with a reasonable degree of competence on the part of the responsible authority... Mistakes may occur in any system of detailed controls, but one is identifying and mitigating the ‘likely significant effects’, not every conceivable effect, however minor or unlikely, of a major project.”

53. The information that has been provided to the Board, both in the EIS and in the course of the oral hearing, is more than adequate, having regard to the stage of the consent process that the project has reached,¹⁶ to allow the Board to adjudicate on the matters within its remit. The Board does not need to know every detail, because it is not required to consider every conceivable effect. Provided the likely significant effects on both the environment and the proper planning and sustainable development of the area can be addressed, the information is adequate. It is submitted that this is the case.
54. In this connection, it is important to bear in mind that Environmental Impact Assessment is a dynamic process, rather than a single event. As Prof. Scannell puts it:

“A distinction must be drawn between an EIS and an EIA. The EIS is a document or documents and other information supplied by the developer or promoter of the project. The EIA is the procedure or

¹⁶ See EIA Directive, Art. 5(1)(a).

*process by which the significant environmental impacts of the project are assessed taking into account the EIS and other inputs into the EIA procedure, including further information provided by the developer, the comments of members of the public and other bodies concerned with the project by virtue of their specific environmental responsibilities...*¹⁷ (emphasis in the original)

55. This understanding of the dynamic nature of Environmental Impact Assessment is also to be found in *R. (Blewett) v. Derbyshire County Council* [2003] EWHC 2775 (Admin); [2005] J.P.L. 751, where Sullivan J. warned against unrealistic and unduly legalistic expectations by objectors as to the comprehensiveness of an EIS. He accepted that an EIS may be deficient in some respects and that the publicity and consultation processes exist to allow such deficiencies to be identified and rectified, so that the decision-maker is presented with as full a picture as possible.
56. It is now proposed to deal, very briefly, with the issues that have been considered in the context of the Environmental Impact Assessment of the proposed development.

Plans and policies

57. Under section 175(6) of the Planning and Development Act, 2000, the Board is required to consider the likely effects on the environment of the proposed development, and the likely consequences for proper planning and sustainable development in the area in which it is proposed to situate the said development of such development. Section 175(12) provides that:

“In considering under subsection (6) information furnished relating to the likely consequences for proper planning and sustainable development of a proposed development in the area in which it is proposed to situate such development, the Board shall have regard to—

(a) the provisions of the development plan for the area,

¹⁷ Scannell, *op. cit.*, para. 5-86.

...

(d) where relevant, the policies of the Government, the Minister or any other Minister of the Government...”

58. The effect of this provision is that the Board is required to have regard to policies that are expressed in the local development plan, and also to governmental policies. These policies are dealt with in detail in the evidence of a number of witnesses, in particular Bernard McHugh, Matt Twomey, P. J. Rudden and John Murphy. It is submitted that, when their evidence is considered, it is clear that the policy statements all pull in the same direction: in favour of the thermal treatment of waste and in favour of a WTE facility being located on the Poolbeg peninsula.

59. It should also be noted in this connection that the prevailing development plan is deemed by law to include the objectives of the relevant waste management plan. Section 22(10A) of the Waste Management Act, 1996 (as amended by section 26 of the Protection of the Environment Act, 2003) provides that:

“(a) The development plan for the time being in force in relation to the functional area of a local authority shall be deemed to include the objectives for the time being contained in the waste management plan in force in relation to that area.

(b) (i) In the event of there being a conflict between an objective deemed to be included in a development plan by virtue of paragraph (a) (the ‘first-mentioned objective’) and an objective otherwise included in the development plan (the ‘second-mentioned objective’), the first-mentioned objective shall override the second-mentioned objective, irrespective of whether or not the development plan is subsequent to the waste management plan referred to in that paragraph.”

60. It is respectfully submitted that the attempts of certain objectors (notably Mr. Joe McCarthy and Mr. John Gormley) to reopen these policy statements cannot be entertained by the Board. Mr. McCarthy has devoted considerable

energy to attempting to show that the Dublin Waste Strategy and Regional Plan of 1998 is flawed, and Mr. Gormley has suggested that the Board should set aside the 2005 Waste Management Plan. As a matter of law, the Board has no such power and must, it is respectfully submitted, take the relevant plans as it finds them. The Oireachtas has – for good or ill – conferred the power to make and change such plans on bodies other than the Board. If the Board were required, in the course of every oral hearing, to reconsider the validity of the policy objectives laid down by relevant plans, it could not possibly discharge its functions. The plan is the plan, as adopted, and it is to the plan that the Board must have regard.

61. Lest there should be any doubt, the Council contends that it is appropriate for the Board to have particular regard to the development plan and the waste management plan that are now in force. As it happens, both were adopted before the EIS was lodged with the Board, but in any event, it is submitted that the plans to which the Board must have regard in its deliberations are those currently in force, since they state the current objectives and policies of the Council and the other authorities.¹⁸

Need for the project

62. The need for the project is dealt with in detail in Chapter 3 of the EIS and in the evidence of Mr. Matt Twomey and Mr. P. J. Rudden.
63. The evidence demonstrates that at every level of the policy hierarchy, the necessity of developing an adequate infrastructure for the thermal treatment of waste is accepted. The more specific policy documents, the 2005 Waste Management Plan and the Dublin City Development Plan 2005 (which is deemed to include the objectives for the time being contained in the waste management plan in force in relation to the area) make express provision for the development of that infrastructure on the Poolbeg peninsula. The Waste Management Plan for the Dublin Region made on 11 November 2005 states:

¹⁸ See in this regard *Boyne Valley & Newgrange Environmental Protection League Ltd v. Environmental Protection Agency* [2002] IEHC 24; [2002] W.J.S.C.-H.C. 1173 at 1192.

“The Plan policy is to develop a Waste to Energy (incineration) plant at the preferred location of Poolbeg Peninsula, Dublin 4.”¹⁹

64. At the higher level, it is sufficient for the purpose of these submissions to refer to the National Strategy on Biodegradable Waste April 2006, which provides:²⁰

“Thermal treatment with energy recovery in accordance with the internationally- accepted waste management hierarch is a key element of Irish waste management policy. The 10 Waste Management Plans for the regions/counties of Ireland recognise this integrated policy role of thermal treatment and facilities have been proposed by local authorities for the treatment of residual waste within 6 of the regions. This method provides a robust technology for dealing with mixed residual waste, and forms a necessary element in the integrated Waste Management Plans of the six regions, similar to models from other EU countries such as Germany, Belgium, Holland, Austria and Denmark.”

65. Both Mr. Rudden and Mr. Twomey point to practical imperatives that require the urgent development of an adequate thermal treatment infrastructure. This infrastructure is higher on the waste hierarchy than landfill, and it is required to enable the four Dublin authorities to meet targets under the Landfill Directive to divert waste from landfill. Although some objectors have suggested that a zero waste policy should be implemented instead, the evidence is that, under all conditions, there is likely to be a very significant amount of residual waste that must be dealt with. Thermal treatment provides the most satisfactory solution. It is a proven and safe technology, in widespread use across the EU.
66. As for the capacity of the proposed facility, Mr. Twomey has given evidence that this is required to cater for future waste arisings in the Dublin region.

¹⁹ Waste Management Plan for the Dublin Region, 2005, p. xvii; see also paragraphs 11.5 (p. 85), 18.8 (p. 144); Map 12; and Appendix F

²⁰ §9.5.1.

Planning and land use

67. Evidence has been given in relation to planning and land use issues by John Murphy and Bernard McHugh.
68. It has been established that the site is appropriately zoned for the proposed development. In this connection, it is submitted that the attempt of the elected members to block the development by imposing a special zoning (Z7A) for the site should be disregarded, since it conflicts with the provisions of the Waste Management Plan for the Dublin Region made on 11 November 2005.
69. In any event, as Mr. Murphy has shown, even under Z7A zoning, development of a WTE facility or incinerator falls to be considered on its merits.
70. The planning and land use issues fall to be considered generally, and also with specific reference to the situation of Dublin Port Company.
71. Looking first at the general picture, this is an in-fill site, located between a sewage treatment plant and a power station, with another power station in close proximity. These three land uses are established and are likely to continue for the long term. The proposed use of the site is fully consistent with these uses, and there is no realistic likelihood in the short or medium term of the use character of the area changing dramatically away from industrial type uses. It is respectfully submitted that it is unrealistic (as some objectors seem to suggest) that this site might be left in an undeveloped state, or transformed into a managed wildlife area. Even if approval for the proposed development is refused, this is most unlikely. The site is currently in use as a scrap metal yard and for molasses importing. Compared to the existing uses, WTE is highly regulated. The proposal is to construct a state-of-the-art facility that will set a new standard for the area in terms of its architectural quality. The proposed development is in fact likely to be the cleanest industrial use on the peninsula.
72. It has been suggested by Dublin Port Company that the use of the site for a WTE facility is inconsistent with the Company's stated policy of attempting to preserve lands for port related use. It has been shown, however, that the

Company's land use policy is far less consistent. It parted with its interest in the nearby Irish Glass Bottle site for a mixed use residential development, and sought to have the area to the south and south-west of the site zoned Z6, for enterprise, rather than for port use proper (which would require a zoning of Z7). More importantly, however, Dublin Port Company has not demonstrated that the site is required for the proposed Berth 47A, or even gone so far as to suggest that Berth 47A will not go ahead if the WTE facility is approved. In truth, the port company has furnished the Board with no information concerning real proposals for what it intends to do with the land. Rather, it seeks to rely on generalised aspiration, speculation and conjecture. None of these is an adequate basis for suggesting that the proposal is in any way flawed in land use or planning terms.

Site selection

73. The site selection procedure is addressed in detail in Chapter 4 and Appendix 4.1 of the EIS, and in the evidence of Mr. Rudden.
74. A detailed site selection study was carried out in 1999, which resulted in the selection of Poolbeg as the preferred location for a WTE facility. That recommendation was formally acted upon by the making of the CPO and the adoption of the 2005 Waste Management Plan, which named Poolbeg as the preferred location.
75. Factors telling in favour of the selected location include the fact that (as has just been discussed) the zoning and land use characteristics of the site are appropriate. The site is near the centre of gravity of waste in the Dublin region. In this connection, criticism from objectors to the effect that the use of the strategic road network for deliveries of waste alters the position is misplaced. It would be possible to allow for direct deliveries from all locations to the facility, in which case there could be no sensible argument but that the facility is located at or near the centre of gravity of waste. However, requiring deliveries from certain (less proximate) areas to be made via transfer stations along the strategic road network is a measure that mitigates the

possible adverse traffic effect that could result from universal direct deliveries. As Mr. Christy O’Sullivan stated in his evidence relating to traffic:

*“the proposed strategy remains the more optimal strategy as it seeks to achieve a balance between the need to reduce the traffic impact on the local road network while also ensuring that the overall waste collection and management strategy is efficient and has the least overall city wide traffic and environmental impact”.*²¹

76. The selected site also has the advantage of having a source of water available for cooling, thus increasing the efficiency of the facility. The port is nearby, which facilitates the export of bottom ash and fly ash. Furthermore, the likelihood of large scale commercial and residential development taking place in the vicinity means that there is good potential for district heating schemes in the future.
77. Mr. Rudden has also given evidence that the site selection was revisited in 2006 (although the process was not repeated in full). He expressed his satisfaction with the choice of site and indicated that, if anything, the merits of the location had been underplayed in the 1999 study.

Landscape and visual impact

78. The visual impact of the proposed development is one of the more subjective assessments that must be made and is a difficult issue to address in submissions. However, the Council believes that the evidence adduced by Mr. Jan Fritsdal and Thomas Burns, along with the information in Chapter 6 of the EIS is more than adequate to allay any concerns in this regard.
79. In any event, visual impact objections to the project exaggerate the potential adverse impacts. Dublin Port Company’s critique was not logical. It was suggested that some of the revised photomontages were accurate, but that others were not. The methodology of preparation of photomontages is a precise one, which relies on the construction using a computer of a three-dimensional wire frame image of the development. The computer model then

²¹ Evidence of Christy O’Sullivan, slide 21.

inserts the image in the photograph. If all of the photomontages were objected to, there might be some basis for the argument, but it is not possible that some are correct and others are not, since once the 3D model is prepared it is constant to all photomontages.

80. There has been no attempt on the part of the Council to hide the potential visual impact of the facility. The proposal is a bold step, but a positive one, it is respectfully submitted.

Traffic

81. Traffic is addressed in Chapter 7 of the EIS and in the evidence of Mr. Christy O'Sullivan. The evidence, which has not been contradicted, suggests that there will be a very minimal impact on traffic as a result of the facility. Indeed, the only peer review of the traffic study, which was carried out on behalf of Dublin Port Company, supports the analysis.

Air quality

82. Air quality is dealt with in considerable detail in Chapter 8 of the EIS and the associated Appendix. The area has also been the subject of considerable controversy, with conflicting evidence given by Dr. Edward Porter on behalf of the Council and Dr. Imelda Shanahan on behalf of Dublin Port Company. The criticisms of Dr. Shanahan's approach have been thoroughly explored in cross-examination, and in Dr. Porter's response. However, it is fair to say that the Council believes that Dr. Shanahan has made excessively pessimistic assumptions upon which she based her evidence, and that in conjunction with questionable methodology these have skewed her results.
83. The methodology and assumptions of Dr. Shanahan that are particularly criticised include the following.
 - (a) Modelling of dispersion using the ICTSC model, which Dr. Shanahan has acknowledged in another EIS prepared by her office tends to overstate concentrations. Dr. Porter has shown that the error can be of the order of many hundreds of per cent.

- (b) Measuring the 99.8thile of 1 hour process emissions against short term air standards by adding it to the 99.8thile of background concentrations; in other words, by assuming that two rare events are likely to coincide, despite the lack of any link between them.
- (c) Constant use of very high NO/NO₂ conversion ratios, even in relation to short term averages under high concentrations.
- (d) Insistence that shoreline fumigation is a more or less continuous phenomenon, without any clear basis for the assertion, and in the teeth of both the standard screening assumptions and local empirical evidence to the contrary.
- (e) Insistence that it is likely that the facility will operate with 15 separate incidents annually of total loss of flue gas containment, each of which lasts for the maximum period of 4 hours prescribed by the Waste Incineration Directive.
- (f) Assumption that the facility will operate at the 97% limits prescribed by the Waste Incineration Directive for 97% of the time (less 60 hours), at 100% limits for 3% of the time, and emitting raw flue gas for the remaining 60 hours each year.
- (g) Deriving long term averages from short term averages by the application of a factor. This is wrong in principle under shoreline fumigation conditions. Furthermore, the factor is wrong. And in any event, even if the factor were correct, the very highest factor has been used, in every case by adding the margin of error to the baseline factor.
- (h) Assuming that abnormal outputs are likely to coincide with shoreline fumigation conditions.

84. It is respectfully submitted that in the light of her questionable methodology and unrealistic assumptions, the Board should attach far less weight to Dr. Shanahan's evidence than to that of Dr. Porter.

85. It is important to note that Dr. Porter has carried out modelling at upper levels at the site of the proposed Fabrizia development, and has found that there will be no exceedences, and that the levels are significantly below those of the worst case receptor.
86. It is accepted that some of the modeling carried out by Dr. Porter shows that there may be exceedences in relation to certain short term standards for certain metals. However, Dr. Porter has stated that these exceedences are extremely unlikely to occur. In this connection, the Council relies upon the Canadian case of *Residents Against Company Pollution Inc., Re Section 38 of the Environmental Bill of Rights, 1993* (1996) 20 C.E.L.R. (n.s.) 97,²² where the court stated:

“Because of the inherent subjectivity of the concept of ‘significant harm’, the Board should attempt to use a test which does not rely on the individual views of its members. Where possible, significance should be determined by reference to scientific principles and evidence or legal criteria. ‘Significant harm’ means primarily an emission, likely to cause an adverse effect, an emission likely to exceed a numerical standard or an emission likely to violate some other legal requirement.” (emphasis added)

The focus of the Board, it is respectfully submitted, should remain on whether the exceedence of a standard is *likely*. Given very conservative modeling assumptions, it is possible to predict exceedences. That they will occur in practice is, however, most unlikely.

87. The same passage may also be relied upon in connection with the objections raised by Mr. McCarthy concerning ultra-fine particulates. It is accepted that there are no environmental standards by reference to which these particles can be measured. The proposal complies with the requirements in relation to PM₁₀ and PM_{2.5}. Prof. Schrenk has suggested that it is reasonable to assume that the incidence of ultra-fine particles is reduced by the scrubbing technology in the same way as for larger particles, and has also pointed out

²² Quoted in Scannell, *op. cit.*, para. 5.71.

that there are no studies to suggest that such particles emitted from incinerators have any adverse health consequences. Mr. McCarthy's submission is based on speculation and conjecture, and it is not an appropriate basis for the Board to refuse approval for the proposed development.

88. In any event, it is clear that the Board has a limited function in relation to emissions, such as those to air. By virtue of section 175(10)(a), the Board cannot impose conditions for the control of emissions, because the WTE facility will also require a waste licence from the EPA. Section 175(10)(b) provides that the Board may refuse approval "*where the Board considers that the development, notwithstanding the licensing of the activity, is unacceptable on environmental grounds, having regard to the proper planning and sustainable development of the area in which the development is or will be situate*". It is respectfully submitted that, even if the Board is not fully persuaded by the criticisms made of Dr. Shanahan's evidence, what it is faced with is a difference of opinion between experts. The Board cannot possibly be satisfied, on this basis alone, that the proposal is unacceptable on environmental grounds. Rather, this is an issue that will have to be addressed by the EPA in the context of the waste licence application.

Climate

89. Chapter 8 of the EIS and the evidence of Dr. Porter show that thermal treatment of waste is a better option from a climate perspective than landfill under almost all modelling conditions. If it is less favourable, the difference is marginal and is certainly not enough to allow the Board to reach the conclusion that thermal treatment of waste is unsustainable.
90. In any event, there is a fundamental objection to the arguments that have been pressed – notably by Mr. McCarthy – on this issue. While the Council has not yet heard Mr. McCarthy's submission in its entirety, the criticisms that are made of thermal treatment are not specific to this proposed facility. They would apply to a WTE facility, wherever it was located. However, the key policy decisions to proceed with thermal treatment of waste have already been taken. Under the guise of climate, Mr. McCarthy is in reality seeking once

again to reopen old arguments concerning the policy direction adopted by Government and the local authorities. The Board has no jurisdiction to allow this, and since the arguments from climate against thermal treatment are in flat contradiction of the waste management policies to which the Board is obliged to have regard, it is submitted that they carry little or no weight.

Noise and vibration

91. There is no predicted significant adverse impact in relation to either noise or vibration from the construction or operation of the proposed facility, taking into account the mitigation measures that are proposed.

Residues

92. The treatment of residues from the process is dealt with in Chapter 10 of the EIS.
93. It has been suggested that the proposal to export bottom ash is incapable of application because it involves the transfrontier shipment of waste. This argument is wrong. The evidence is that bottom ash can successfully be used in applications such as road building. This is a recovery operation. In Case C-203/96 *Chemische Afvalstoffen Dusseldorp BV v. Minister von Volkshuisvesting* [1998] E.C.R. I-4075 the Court of Justice held that waste for recovery should be able to move freely throughout the Community for processing provided that the transport did not pose a threat to the environment. It was also held that the principles of proximity and self-sufficiency did not apply to waste intended for recovery. The operator of the facility will of course be required to comply with any conditions imposed by law in relation to the shipment of waste.

Soils, geology and groundwater

94. No significant issue arises in relation to these matters.

Water

95. The effect of the proposed facility on water has been extensively considered and modelled. The prediction is that there will be no significant impact on aquatic life as a result of either the thermal plume from the cooling water discharge or the release of biocides into the channel.

Human beings

96. Although there has been considerable speculation at the hearing concerning the possible effects on human health of the proposed development, it has been entirely based on speculation and fear, rather than on evidence. The evidence of Prof. Schrenk and Mr. Buroni is that there is no significant risk of adverse effects. Seveso issues have been considered by Dr. Menzies, and again it is not predicted that there will be any significant adverse effect. It is not predicted that the development will have any effect on property prices in the area.

Ecology

97. Issues in relation to ecology have received very extensive treatment in the EIS and in the evidence of Dr. Madden, Dr. Callaghan, Mr. Vested, Dr. Rasmussen, Mr. Emblow and Mr. Brophy, and Ms. Mayes.
98. It is accepted that the site is located in relatively close proximity to Special Areas of Conservation under the Habitats Directive²³ and Special Protection Areas designated under the Wild Birds Directive.²⁴ It is also accepted that the proposed development can be approved only if the Board ascertains that it will not adversely affect the integrity of the sites concerned.²⁵ However, the clear evidence is that there will be no adverse effect on the sites. Ms. Mayes in particular has addressed the position of the protected areas at length, and has stated that there will be no adverse impact.

²³ Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.

²⁴ Directive 79/409/EEC on the conservation of wild birds.

²⁵ See Habitats Directive, art. 6(3).

99. In this connection, it should be noted that her evidence is that Brent geese do not in fact use the site of the proposed facility, and that there will be no loss of habitat from its construction. If this proposal were refused, it is most unlikely that the site would be devoted to a use more compatible with the requirements of wild birds. Given its location it is far more likely that it would, consistently with its zoning, be put to some other kind of industrial use.
100. There appears to be some confusion regarding the specific area in which the proposed development will be carried out. There is no evidence that the site itself or the proposed temporary construction compound constitute a habitat of conservation significance.
101. No significant adverse effects are predicted in relation to terrestrial, aquatic or estuarine ecology and there is no real evidence to suggest that this prediction is badly founded.

Archaeology, architectural and cultural heritage

102. The proposed development has little or no impact in relation to these issues.

Community gain

103. It is proposed that a community gain fund will be established. The Inspector raised the question of whether section 175(9)(b) of the Act of 2000 would apply, as amended. As originally enacted, section 175(9) provided:

“(9) The Board may—

(a) approve,

(b) approve, subject to conditions, or

(c) refuse to approve,

a proposed development under this section.”

104. This subsection is substantially amended by section 34 of the Planning and Development (Strategic Infrastructure) Act, 2006. The amended subsection now provides:

“(9) (a) The Board may, in respect of an application for approval under this section of proposed development—

(i) approve the proposed development,

(ii) make such modifications to the proposed development as it specifies in the approval and approve the proposed development as so modified,

(iii) approve, in part only, the proposed development (with or without specified modifications of it of the foregoing kind), or

(iv) refuse to approve the proposed development, and may attach to an approval under subparagraph (i), (ii) or (iii) such conditions as it considers appropriate.

(b) Without prejudice to the generality of the foregoing power to attach conditions, the Board may attach to an approval under paragraph (a)(i), (ii) or (iii) a condition requiring—

(i) the construction or the financing, in whole or in part, of the construction of a facility, or

(ii) the provision or the financing, in whole or in part, of the provision of a service, in the area in which the proposed development would be situated, being a facility or service that, in the opinion of the Board, would constitute a substantial gain to the community.

(c) A condition attached pursuant to paragraph (b) shall not require such an amount of financial resources to be committed for the purposes of the condition being complied with as would substantially deprive the person in whose favour the approval operates of the benefits likely to accrue from the grant of the approval.”

105. The Council has no formal position in relation to the application of this subsection, as amended. The amendment appears to have become operative

after the application to the Board was lodged, and the law in relation to the question of whether or not such an amendment should be applied is unclear. There is something to be said for the proposition that an application should be determined under the law as it was when the application was lodged. However, there is equally merit in the argument that the Board should apply the law as it finds it when it comes to make its decision. The Council leaves this issue in the hands of the Board, but will in any event consent to a condition requiring the establishment of a community gain fund and procedures as outlined in the evidence of Mr. Coll.

Cumulative impacts

106. The cumulative impacts of the proposed developments have been considered, primarily by the authors of the individual chapters of the EIS, but also by Ms Ria Lyden. No significant adverse cumulative impact is predicted.

Sustainability

107. The issue of economic sustainability has been raised by certain objectors. It is submitted that this is not an issue with which the Board should properly concern itself. If the facility is not economically sustainable, it will not be built. The argument that the Board should seek to investigate in detail the likelihood that a development proposal would be profitable or economically viable is entirely novel and unsupported.
108. Arguments in relation to climate are misguided, for the reasons already explained.
109. It is submitted that the focus of the Board should be on the issue of “sustainable development”. In this context, for the reasons already given above, this proposed development is eminently sustainable in land use planning terms. It is also sustainable in terms of the waste strategy for the country and the Dublin region. There is nothing to suggest that the proposal is unsustainable.

Conclusion

110. It is the respectful submission of the Council that the proposed development is fully consistent with the proper planning and sustainable development of the area, and that it has been demonstrated that the proposal will not cause any significant adverse environmental effects. For these reasons, the Council requests the Board to approve the proposed development.

111. The public need for the project is clear. If the proposal is approved, it is submitted that it must follow that the Board should also confirm the CPO.