

LEGAL OPINION

**In relation to siting of a proposed
incinerator/thermal treatment
plant at Poolbeg in Dublin**

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EXECUTIVE SUMMARY

1. Dublin City Council authorised the Community Interest Group to instruct Solicitors and Counsel to advise them in relation to the siting of a proposed Incinerator/Thermal Treatment Plant at Poolbeg in Dublin. Dublin City Council are underwriting these legal fees.
2. The brief was to advise on the compatibility of the decision to site a thermal treatment plant at Poolbeg in Dublin and associated decisions with relevant provisions of Irish and European Community law and in particular to consider the following questions:

In complying with requests to write a report to feed into the scoping document, are the CIG members assisting in the procurement of a thermal treatment plant in Poolbeg or compromising any objection they may have to such?

What authority does the City Manager have to procure a thermal treatment plant in Dublin? Within the remit of the waste plan, does he have an option of not procuring a thermal treatment plant?

Were all proper studies and procedures carried out to select the preferred site considering that the City Manager stated that variations of the Development Plan could be carried out if necessary?

3. The following conclusions were arrived at:

(i)

- (i) That the Waste Management Plan adopted by Dublin City Council in December 1998 includes a decision to construct a Thermal Treatment Plant;
- (ii) That the Manager is obliged to implement the objectives of the Waste Management Plan;
- (iii) That the City Manager has the authority and indeed is obliged to procure a Thermal Treatment Plant in view of the terms of the Waste Management Plan;
- (iv) That the members may not vote to direct the Manager not to continue the procurement process;

It was highlighted that the members may vary or replace the plan without the consent of the Manager from December 2002.

4. The following points were found to be of serious concern which may involve illegality on the part of the Dublin City Council: -

- (i) The Dublin Waste Management Plan may not fully comply with Section 22(7) of the Waste Management Act 1996 by reason of its possible failure to provide information on or have regard to matters relevant to the selection of sites in respect of waste facilities, plant or equipment;

(ii)

- (ii) Despite representations that no decision has been made in relation to the siting of the plant at Poolbeg, it is our view that a conditional decision, (but a decision nonetheless) has been made;
 - (iii) There appears not to be in existence a written Order signed and dated by the City Manager regarding the decision on siting, such Order being arguably required in the exercise of an executive function of such importance;
 - (iv) It appears that the City Manager may simply have “rubber stamped” the consultants decision in relation to the choice of Poolbeg and that no independent consideration of the consultants report and decision in relation to the choice of site was made. The Manager may therefore have unlawfully delegated his powers to the consultants;
5. Concerns were raised by members of the Community Interest Group about the effects of their participation in preparing any report, known as a “scoping” report, insofar as future legal proceedings may be concerned. It is clear that a majority of members are of the view that their participation is being treated, or may be represented, by Dublin City Council as public consultation on the siting process. The majority view of the CIG members is that there has not been proper consultation where and when it counted i.e. prior to choosing Poolbeg as the preferred site. It is suggested that if and when the CIG provide a report, they should indicate that their input into the scoping process is entirely without prejudice to either the Groups

(iii)

right or the right of any individual members of the Group to bring a challenge to the process to date and that their involvement should not be construed as an approval of any of the processes to date but rather of their involvement in the process to obtain further information from the developer in the Environmental Impact Statement about the proposed project.

Niamh Hyland, Barrister-at-Law

And

Lavelle Coleman, Solicitors

10th October 2002

Opinion

QUERIST: Community Interest Group ("CIG")

RE: Dublin Waste to Energy

DATE: 10 October 2002

Introduction

We have been asked to consider the compatibility of the decision to site a thermal treatment plant at Poolbeg in Dublin and associated decisions with relevant provisions of Irish and European Community law and in particular to consider the following questions:

In complying with requests to write a report to feed into the scoping document, are the CIG members assisting in the procurement of a thermal treatment plant in Poolbeg or compromising any objection they may have to such?

What authority does the City Manager have to procure a thermal treatment plant in Dublin? Within the remit of the waste plan, does he have an option of not procuring a thermal treatment plant?

Were all proper studies and procedures carried out to select the preferred site considering that the City Manager stated that variations of the Development Plan could be carried out if necessary?

In answering these questions, it should be borne in mind that the perspective adopted is one of the legality of the actions of the City Manager and/or Dublin City Council. In other words, what is examined is not the desirability of a particular course of action or whether or not another course of action would have been better, for example, from an environmental point of view, but whether the action taken is permissible in law.

In view of the fact that there has been a number of summaries of the chronology of events to date in respect of the proposed plant at Poolbeg, it is not proposed to set out in detail the chronology of events but rather make reference where necessary to relevant events.

Authority of City Manager to Procure a Thermal Treatment Plant

Question (b) has two aspects to it. The first is to consider the authority of the City Manager to procure a thermal treatment plant and the second is whether, within the remit of the waste plan, he has an option of not procuring a thermal treatment plant. In order to answer this question, it is necessary to revisit briefly the process that led to the decision to procure a thermal treatment plant. Under the 1996 Waste Management Act, Section 22(2) states that each local authority shall make a plan with regard to the prevention, minimisation, collection, recovery and disposal of non hazardous waste within its functional area and in relation to certain matters concerning hazardous waste.

On 7 December 1998 the Dublin City Council adopted a Waste Management Plan. At page 5 of the executive summary, it refers to four waste management scenarios. Scenario 4 is to achieve maximum realistic level of recycling to comply with EU draft Landfill Directive and achieve bulk waste reduction through thermal treatment. At page 6 it is stated:

"Scenario 4 has been chosen as the best practicable environmental option in that it minimizes landfilling to the greatest possible extent,

maximizes recycling, meets all legal requirements and is the most robust and secure option for the future. The new approach includes thermal treatment of waste which is the subject of further study in terms of available technologies, emission standards, number and size of grants, procurement and siting.....The Dublin local authorities have an open mind currently on likely future forms of thermal and biological treatment, but require the best available technology not entailing excessive cost in each case.”

At page 68 of Part IV - Waste Management Policy - the reasons for which thermal treatment is favoured are set out.

At page 90 under paragraph 13.4 it is stated under the heading “*Thermal Treatment of Combustible Waste*”:

“It is recognised that provision of thermal treatment facilities will involve a feasibility/site selection process, detailed planning, EIS and licence application stage, implementation of a procurement process followed by construction and commissioning. It also requires an initial period of public debate and discussion prior to the taking of a decision in principle to construct such a plant. On this basis, a more realistic date for commencement of thermal treatment would be the start of 2004 to allow for public discussions and the putting in place of waste reduction and recycling initiatives”.

Our reading of the Plan and, in particular, those parts of the Plan referred to above, is that a decision in principle has been taken to construct a thermal treatment plant, despite the reference to the necessity for further studies.

This is directly relevant to the question of the authority of the City Manager to procure the thermal treatment plant. However, before dealing with that question, it is necessary to deal with the second question - within the remit of the waste plan, does he have an option of not procuring a thermal treatment plant?

Section 22(12) of the 1996 Act provides:

“A local authority shall take such steps as are appropriate and necessary to attain in relation to its functional areas 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)”.

Sections 132 and 149 of the Local Government Act, 2001 are also of relevance here.

Section 132 provides:

“(1) It is the duty of every manager to carry into effect all lawful directions of the elected council of a local authority or a joint body for which he or she is manager in relation to the exercise and performance of the reserved functions of the local authority or joint body.”

Section 149(2) provides that in respect of each local authority for which he is manager, a manager is responsible for:

the efficient and effective operation of each such local authority; and for ensuring under Section 132 the implementation, without undue delay, of the decisions of the elected Council.

Sub-section (3) provides that for the purposes of discharging the responsibilities set out under sub-section (2) the manager shall:

exercise and perform in respect of each local authority for which he or she is the manager the executive functions of such local authority (including all functions in relation to the employees of each such local authority); and for that purpose, carry on and manage and control generally the administration and business of the authority.

Thus, if one of the objectives of the Plan is the construction of a thermal treatment plant, then, in our opinion, he is obliged to take such steps as to ensure the implementation of this objective in order to comply with his specific duties under Section 22(12) and his general duties under Section 149.

Is it the case that one of the objectives of the Plan is the construction of a thermal treatment plant? The answer to this question depends on the interpretation one places upon the Plan but, in our opinion, the Plan is quite unequivocal in its terms, although very little space is given to the option of a thermal treatment plant. As demonstrated by the extracts set out above, scenario no. 4, which includes thermal treatment of bulk waste, has been adopted. At page 10 of the executive summary, under the heading “*Policy Implementation*”, the implementation date for the thermal treatment plant is stated to be 2004.

Reference to the capital investment requirements for the Plan implementation set out at paragraph 19, pages 10 and 11 shows a dramatic surge in capital investment to £116,793,144 in 2003 and from then on a dramatic reduction, dropping to as little as £409,208 in 2006. One must assume that this substantial capital expenditure in this year, the year before the proposed coming on-stream of the thermal treatment plant, is referable to the construction costs of the plant.

In all of the circumstances, we consider that the City Manager does not have the option of not procuring the thermal treatment plant within the remit of the waste plan.

In relation to the second part of question (b), we consider that the authority of the City Manager to procure the thermal treatment plant arises also from Section 22(12). The doctrine of *ultra vires* is an important one in the law of local government and effectively states that a local authority may only do what it is statutorily required to do or acts which are ancillary to, or implicit in, those statutory objectives [of Section 66 of the Local Government Act, 2001]. However, it seems to us that, in this case, there is no need to seek to imply a statutory power on the part of the Manager, since Section 22(12) explicitly requires the local authority to take the steps to attain the objectives of the

waste management plan. Thus, the Manager is statutorily obliged to procure a thermal treatment plant in Dublin.

Can the Elected Members Vote to Direct the Manager not to continue the Procurement Process?

Section 3 of the City and County Management (Amendment) Act, 1955 empowered the members of a local authority to make a resolution directing that works notified to them not be proceeded with unless the works were those which the local authority are required by or under statute to undertake. Section 4 of the 1955 Act provided similar powers in respect of a requisition that a particular thing be done.

In considering whether the councillors can direct the Manager not to proceed with the procurement process, it is relevant to refer to Section 22(10)(g) of the Waste Management Act, 1996, as inserted by the Waste Management (Amendment) Act, 2001.

It provides:

“A local authority shall not, by resolution, under Section 3 or 4 of the City and County Management (Amendment) Act, 1955 or Section 179 of the Planning & Development Act, 2000 give a direction that work cannot be proceed with or require any act, matter or thing to be done or effected where the effect of such direction or requirement would be contrary to, or inconsistent with, any provision (including any objective contained therein) of a waste management plan or would limit or restrict the proper implementation of such a provision and any resolution purporting to be passed under the said Section 3, 4 of 179 which contravenes this paragraph shall be void”.

The City and County Management (Amendment) Act, 1955 was repealed by Section 5 of the Local Government Act, 2001 (“the 2001 Act”), but the powers conferred by Sections 3 and 4 of the 1955 Act were substantially re-enacted in Sections 139 and 140 of the 2001 Act. The references to Sections 3 and 4 of the 1955 Act have been substituted in some Acts by references to Sections 138, 139 and 140 of the 2001 Act (see e.g. Section 179(5) of the Planning & Development Act, 2000, as substituted by Section 5 and Schedule 4 of the 2001 Act). However, it would appear that, perhaps due to a legislative oversight, Section 22(10)(g) of the 1996 Act, as inserted by the 2001 Amendment Act, was not amended in a similar manner. Thus, although Section 22(10)(g) purports to exclude the making of resolutions under, *inter alia*, the repealed provisions of Sections 3 and 4 of the 1955 Act, it does not exclude a resolution under Sections 139 or 140 of the 2001 Act. Notwithstanding the obvious nature of this legislative omission, the Courts would be unlikely to remedy it since this would involve an invasion by the Courts of the exclusive law-making domain of the Oireachtas, in breach of the constitutional doctrine of the separation of powers and contrary to Article 15.2.1 of the Constitution (see, e.g., *State (Murphy) v. Johnson* [1983] IR 235 and *McGrath v. McDermott* [1988] IR 258). Although the exclusion in Section 22(10)(g) would be unlikely, therefore, to encompass Sections 139 and 140 of the 2001 Act, the local authority may, nevertheless, be *unable* to avail of the powers conferred by the latter sections in the light of case law on the ambit of Sections 3 and 4 of the 1955 Act. In *East Wicklow Conservation Community Limited v. Wicklow County Council* [1996] 3 IR 175 the Supreme Court held that the power

conferred by Section 3 of the 1955 Act did not extend to works which the local authority are under a statutory duty to perform, even though they may have an administrative discretion as to the location in which the works are to be carried out. The respondent had engaged consulting engineers to prepare an EIS and preliminary report for a proposed waste disposal facility to service north east Wicklow. Having considered a number of sites, the consultants concluded that, subject to public consultation and an EIS, the site should be located in a particular area of North Wicklow known as Ballynagran. The councillors passed a resolution rejecting the consultants' proposals and directing other areas be investigated as suitable locations for the proposed site. The County Manager indicated the decision whether or not to proceed with the proposed landfill site at the proposed or any other location was a matter for him in the exercise of his executive functions and he considered the resolution to be *ultra vires* the Council and of no legal effect. His decision was upheld by Mr Justice Costello in the High Court. Mr Justice Blayney delivered the Judgment of the Supreme Court. He referred to Sections 52 and 55 of the Public Health Act, 1878, the latter section of which provided that a sanitary authority shall provide fit buildings or places for the deposit of any matters collected by them in pursuance of this part of the Act. (This case preceded the adoption of the 1996 Waste Management Act). The applicant submitted that the County Council did not have a statutory duty to provide for the disposal of waste at Ballynagran and therefore Section 3 of the City and County Management (Amendment) Act, 1955 applied since the works in question were not works which the local authority were required by or under statute or by Order of a Court to undertake. The Court noted that it was necessary, *inter alia*, to decide on a place for a new landfill site if the County Council were to fulfill its duty under Section 55. In those circumstances, the Judge held that the works did come within the exception in Section 3 since they were works that the local authority were required by or under statute to undertake. Section 55 necessarily required the County Council to choose where it would put the landfill site. It was possible that the obligation of providing a fit place for the disposal of waste could be discharged at a different site, but that did not alter the fact that it would be discharged by the works to be carried out at Ballynagran.

This case seems to us to be authority for the proposition that if the elected representatives of Dublin City Council were to pass a similar resolution under Section 139 of the 2001 Act directing, for example, the Manager to reject the site at Poolbeg and to investigate other sites, such a direction could legally be disregarded by the Manager on the basis that the exception in Section 139 applied, i.e. the procurement of the plant at Poolbeg was a work which the local authority were required under statute to undertake.

Can the Councillors Amend the Waste Management Plan?

Under Section 22 of the 1996 Act, the adoption of a waste management plan was a reserved function (i.e. reserved to the councillors). However, Section 22 has been amended by Section 4 of the Waste Management (Amendment) Act, 2001 and it is now provided that the duties of a local authority with respect to the making of a waste management plan shall be carried out by the manager and is an executive function. However, under Section 22(10)(d) of the 1996 Act, as amended, the review, variation or replacement of a waste management plan is a reserved function although there is a moratorium on the councillors varying or replacing a waste management plan within a period of four years from the date of the making of the plan, unless the manager consents (Section 22(10)(e)).

The Dublin Waste Management Plan was adopted in December 1998. Thus, the four years expires in December 2002. In our opinion, therefore, the local authority will be

permitted to vary or replace or review the waste management plan after that date without the consent of the manager. Furthermore, this is a reserved function and must be taken by the councillors. Thus, the councillors may be permitted to amend the Plan so as to alter the objectives in relation to the thermal treatment plant.

The Siting Process

The second question we have been asked to consider is whether all proper studies and procedures were carried out to select the preferred site. As set out above, this analysis is a legal one and is not concerned with whether the siting process necessarily was the best process or resulted in the most appropriate site. However we have not confined ourselves to the question asked and have attempted to consider the legality of the siting process from a number of points of view.

Following the feasibility study for Thermal Treatment of Waste in the Dublin Region, November 1999 (referred to as “the Siting Report”) the site at Poolbeg was recommended to be the most appropriate site. Before dealing with the conclusions in the siting study, it may be helpful to clarify that we consider that the power pursuant to which the Manager has carried out the siting exercise is that conferred under Section 22(12) referred to above. The power in question is thus an executive function and to be taken by the Manager and not the councillors.

Decision re Siting

A recurrent theme in the contact between the CIG and the Manager is whether or not a decision has been taken to site the plant at Poolbeg. The Manager’s position is that no decision has been taken since there are a number of steps that must be taken before any final decision can be made on the plant at Poolbeg. It is certainly true that there are a number of statutory approval processes to go through before the construction of the plant can commence. However in our opinion this does not mean that no decision has been made. Rather we consider that a conditional decision has been made. Support for this conclusion may be found in the procurement documents, in particular the Project Information Memorandum of 12 July 2002 which states, under the heading “Site Information” at paragraph 2.2 “*Dublin City Council proposes to locate the waste to energy facility on the Poolbeg Peninsula within easy access of the Irish power grid and not far from the potential location of a district heating system in the docklands of Dublin. This is the preferred site for the primary waste to energy facility and Dublin City Council intends to make this site available under licence and without charge to the PPP Co.*” It goes on to state that Dublin City Council commenced the process of acquiring the preferred site by means of a compulsory purchase order. A map of the preferred site is attached.

This approach is supported by the decision of Mr. Justice Costello in the *East Wicklow* case referred to above. A question arose in the High Court as to the application of Section 2(7) which required the Manager to inform the members of a local authority before works were undertaken or before committing the local authority to expenditure in connection with the proposed works. The argument was made by the Manager that no works within the meaning of Section 2(7) had been undertaken since the carrying out of a survey of possible sites for waste disposal by consultants and the preparation of an EIS did not constitute works. Mr Justice Costello did not accept this contention. He stated that the facts of the case established that the County Manager had accepted the advice of the consultants and was of the opinion that the waste disposal site should be located at Ballynagran. He had clearly taken a decision that the site should be so developed. But it was a conditional decision - the development was dependent on (a) its suitability in the light of the proposed environmental impact study; and (b) the

approval by the Minister. Thus, the proposed development of the site was “works” within the meaning of the sub-section.

Assuming that the Manager has made a decision on siting, we are of the opinion that this decision is probably governed by Section 151 of the Local Government Act 2001 which requires, inter alia, where the Manager considers an executive function is of sufficient importance it shall be done by a written order signed and dated by him. Report No. 7/2000 from the Manager to the Lord Mayor and Members of the Council which is entitled “Waste Management Plan for the Dublin Region - Progress Report” refers to the conclusions and recommendations of the November 1999 Report on Siting and states that the most suitable site is considered to be Poolbeg. There is no reference to a decision of the Manager to that effect. There is also a memo to the South East Area Committee of 4 April 2000 from M. Twomey Assistant City Manager, where he states that “Arising from the conclusions and recommendations of the report on Siting the site at Poolbeg was identified as the most suitable for a Thermal Treatment facility in accordance with the selection criteria.” It appears that no Order has been made by the Manager pursuant to Section 151. This may be a ground for challenge on the basis that the decision in relation to siting was of sufficient importance to justify an Order under Section 151, although it would have to be shown that the Manager considered it to be of sufficient importance. However this deficiency may be cured by virtue of the Manager making an Order under Section 151.

Delegation

The siting study was carried out by a consultancy group appointed to undertake the study which is made up of a number of different bodies, including engineers, planners and academics. The study is stated to have been overseen by the project steering group, which were appointed to oversee the study. The project steering group included the Assistant City Manager, Matt Twomey, and representatives from Dun Laoghaire, South Dublin and Fingal County Council. An important question will be the extent to which the project steering group and/or the Manager made an independent decision as to the siting or whether it simply accepted unquestioningly the recommendations of the consultants in relation to the siting.

There are strict rules about delegation in administrative law. Under the Local Government Act 2001 Section 154 deals with the delegation of functions. However this applies primarily to delegation to an employee of a local authority.

The general principle is that a power must be exercised by the authority in whom the legislature has vested this power. It may not be transferred to any other person or body. Clearly the arrangements as between the consultants and the Manager do not provide for an express delegation of powers to the consultants. Nonetheless, if it can be demonstrated that the consultants effectively made the decision themselves which was simply rubber stamped by either the City Manager or the project steering committee, then this could prove to be a ground of challenge.

It appears from the papers provided to us that the only meeting held by the Steering Group was that of 31 May 1999. This meeting could not have discussed the siting decision since the report of the consultants on siting and environmental issues is November 1999. Nor have any working papers of the Steering Group been produced.

If it is the case that there were no other meetings of the Steering Group, nor documentation showing consideration of the Report on Siting either by the Steering Group or the Manager then we consider there is a difficulty for Dublin City Council in that they appear *prima facie* to have incorrectly delegated their decision-making functions to the relevant consultants and have not participated in the decision-making function statutorily entrusted to them.

Consultation with Local Community

There are no specific statutory consultation requirements until the application (for planning permission and a waste management licence) is submitted to the relevant agency. However, we should note the grave concern of most, if not all, members of the CIG that there has not been proper consultation. The Siting Report emphasises a Public Involvement Programme, but for instance it is to be queried whether those communities in the four areas which were short listed ought to have been consulted. Furthermore, it is notable that the CIG (and the public) have yet to have the benefit of the report from the Health Research Board on the health and safety aspects of incineration.

Unreasonableness

A further traditional ground of challenge in judicial review is that of unreasonableness.

The standard for unreasonableness is a very high one. The seminal decision in this regard is *O'Keeffe v. An Bord Pleanala* [1993] 1 IR 39. In that case, Chief Justice Finlay held that in relation to planning matters, in order for an applicant to satisfy a court that the decision-making authority has acted irrationally it is necessary that the applicant must establish that the decision-making authority had before it no relevant material which would support its decision.

An example of the application of the O'Keeffe principles may be found in the case of *O'Reilly v. O'Sullivan*, Unreported, Supreme Court, February 26, 1997. In this case the applicant was seeking to challenge a decision to provide a temporary halting site for a number of travelling families. It was alleged that the decision of the Manager was so irrational that it ought to be set aside. Reference was made to the decision of *O'Keeffe v. An Bord Pleanala* and to the finding of the Chief Justice, Mr Justice Finlay, that the legislature has placed questions of the balance between development and the environment and the proper convenience and amenities of an area unequivocally and firmly within the jurisdiction of the planning authority. It was also pointed out that the High Court could not interfere with an administrative decision merely on the ground that it was satisfied that on the facts, as found, it would have raised different inferences and conclusions. Referring to the decision of Miss Justice Laffoy in the High Court, Mr Justice Keane noted that she had carefully evaluated the considerable volume of evidence before her in the light of those principles and had concluded that the applicants had not discharged the onus resting on them of establishing that the Manager had acted irrationally in making his Order. Mr. Justice Keane concluded that she was correct in so deciding.

Thus, to show that the decision to site the plant at Poolbeg was irrational and manifestly unreasonable will be a difficult one. In order to decide whether or not there was any justification for such a challenge, a report from an independent expert experienced in the matters of siting would have to be obtained to see whether there were technical grounds which meant that the decision in question was indeed manifestly unreasonable. On the face of the consultants' report, we are of the opinion that it does not appear that there was insufficient material upon which to base a decision to site at Poolbeg.

Legality of the Waste Management Plan in relation to Siting

Section 22(6) of the 1996 Act contains certain general matters that the Waste Management Plan (“the Plan”) shall include.

Section 22(7) provides that, without prejudice to the generality of sub-section 6, a waste management plan shall include information or have regard to a number of specified matters including the following:

“(e) facilities, plant and equipment which the local authority or authorities concerned expect to be available or, in its or their opinion, will be required to be available for the collection, recovery or disposal of waste in its or their functional area or areas during the relevant period and matters relevant to the selection of sites in respect of facilities aforesaid”.

On our reading of the Plan there is no information about the selection of sites in respect of a thermal treatment plant. There is a fleeting reference for site selection at p. 90 where it is stated:

“It is recognised the provision of thermal treatment facilities will involve a feasibility/site selection process, detailed planning, EIS and license application stage, implementation of a procurement process followed by construction and commissioning.”

Arguably this does not constitute information on siting although it might be considered sufficient to satisfy the requirement of having regard to matters relevant to the selection of sites.

If the correct interpretation of the Plan is that it neither contains information nor has regard to siting considerations, this would appear to be an important omission. As noted by the consultants in their November 1999 Report on siting, there are no national guidelines regarding the selection of areas suitable for the location of thermal treatment facilities (p. 37) ¹. In view of the absence of guidelines, it would appear all the more important for the Plan to have reference to the important question of siting.

Given that the Plan is to be reviewed after five years, this will mean that the first review of the Plan (unless of course the Councillors vote to do so earlier) will be December 2003. Given that the commencement of thermal treatment is envisaged by the start of 2004, by the time the review has taken place it is envisaged that the thermal treatment plant would practically be up and running. Therefore, there is no possibility of the review including detail in relation to siting or having regard to siting factors. In those circumstances, it is apparent that any omission in the Waste Management Plan is not simply a minor procedural defect, but a real problem from the point of view of the Plan².

Ultimately, of course, it is a matter for a Court to decide the extent to which a waste management plan has had regard to any given factor, including siting considerations.
Zoning

We have been asked to consider whether the fact that the feasibility studies excluded areas not zoned for thermal treatment may be a ground of challenge. We do not consider this to be the case. It is certainly true that the Development Plan may indeed be materially contravened under certain circumstances. Indeed, under the provisions of the Waste Management (Amendment) Act, 2001 the material contravention procedure is disapplied in circumstances where the development is consistent with provisions (including any objectives contained therein) of, and is necessary for the proper implementation of, a waste management plan in force in relation to the area concerned (see Section 4, which introduces Section 22(10)(c) into the 1996 Act). Thus, there is no question but that the Council would be permitted to override the Development Plan if it is necessary for the proper implementation of the waste management plan.

However, does this mean that the Council has an obligation so to do or to consider whether or not to do so? In view of the jurisprudence on the purpose of a development plan, we do not necessarily think so. In the case of *McGarry v. Sligo County Council* [1989] ILRM 768, Mr Justice McCarthy described the Development Plan as follows:

“When adopted it forms an environmental contract between the planning authority, the Council and the community embodying a promise by the Council that it will regulate development in a manner consistent with the objectives stated in the plan and further that the

¹ Reference is made in the Report to the draft EPA Guidelines for landfill site selection. These Guidelines set out matters to be taken into account when selecting a landfill site.

² The Minister adopted regulations in relation to the content of the Plan (Waste Management (Planning) Regulations, 1997, S.I. No. 137/1997), but these do not affect the provisions of Section 7(e).

Council itself shall not effect any development which contravenes the plan material.”

Many developments have been struck down on the basis that they are not in conformity with the Development Plan. The argument here is the opposite – that the siting process is invalid for complying with the Development Plan. We do not consider that such compliance could be considered to be manifestly irrational or unreasonable in the *O’Keeffe* sense or in breach of any procedural requirement. Our conclusion in this respect is reinforced by virtue of the fact that three out of the four local authority Development Plans appear from the November 1999 Siting Report to have made specific provisions for an incinerator. Thus the question of an incinerator is a matter which has been considered by the local authority in drawing up the Development Plan and a decision has been taken as to where such a project should be located in the context of the Development Plan. It is hard to see how taking this factor into account when siting could be considered to be unlawful.

Necessity for Development Plan to include reference to Thermal Treatment Plant

An issue which has not been fully resolved in planning and environmental law is whether or not a local authority is obliged to disclose in its development plan all proposed development. In the case of *Keogh v. Galway Corporation* [1995] 3 IR 457 the planning authority had indicated a number of proposed locations for halting sites in its statutory development plan. It was sought to develop another undisclosed site. Mr Justice Carney held that this would represent a material contravention of the development plan since, having indicated certain sites, the local authority could then proceed to develop another site. This was despite the fact that under the legislation then in force there was no express requirement on a planning authority to include development objectives in the development plan.

In *Roghan v. Clare County Council* (Unrep., Mr Justice Barron, December 18, 1996) Mr Justice Barron indicated that he did not accept it was unnecessary for a local authority to include all its development objectives in its plan. He considered that this would override, not only the plan, but the consultative procedures preceding the making of a development plan.

In *Wicklow Heritage Trust Limited, Unreported, 5 February 1998* Ms. Justice McGuinness quashed the decision of Wicklow County Council to submit an EIS on a landfill site on the basis that the objective of providing waste disposal sites was not included in the 1989 Wicklow County Development Plan, although under the 1963 Act the Council was entitled to include the provision of waste disposal sites as an objective in the plan. In those circumstances, she held that the proposed development of a waste disposal site was in material contravention of the County Development Plan for County Wicklow and stated as a general proposition that it was necessary for local authorities to include all its objectives in its plan since, otherwise, it would mean that the local authority could totally override its own plan (p. 35).

It appears that under the Dublin Corporation City Development Plan an incineration plant is listed as a permissible use under the zoning objective Z7³. Thus there is no omission in the Development Plan.

However, reference is also made in the November 1999 Study to the Docklands Area Master Plan. Under the Dublin Docklands Development Authority Act, 1997, Section 24

³ See p. 55 of the Feasibility Study - Report on Siting and Environmental Issues, November 1999.

of the Act provides for the Master Plan and provides that the Master Plan shall consist of a written statement and a plan indicating the objectives for various aspects of the Dublin Docklands Area. Section 24 sets out in detail those matters that the Master Plan shall include. Under sub-section (4) provision is made for the publication of the draft Master Plan and the obtaining of submissions and observations to the Authority in relation to the draft Master Plan. These provisions are similar to those which exist in relation to the Development Plan, although do not provide for as detailed a consultation.

Section 25 is also of interest. This provides, under Section 25(1)(a) that the Authority may prepare a scheme known as the planning scheme, for the Custom House Docks area or any part thereof and any other area specified for that purpose by order of the Minister. Under the Docklands Master Plan, it was recommended that the Poolbeg Peninsula be designated under Section 25. However as far as we can ascertain, the Minister has not made a designation under Section 25. Consideration might be given to lobbying for such a designation. If the area was designated there are strict restrictions on the type of development that may be included in the given area which would almost certainly preclude the possibility of a thermal treatment plant.

Position of CIG Members

We have been asked to consider whether, in complying with requests to write a report, the CIG members are assisting in the procurement of the thermal treatment plant in Poolbeg or compromising any objection they may have to such.

It should be emphasised that the current request to the CIG to write a report to feed into the scoping document is not being made pursuant to any statutory provision and is therefore an entirely voluntary action on the part of the Council and, indeed, on the part of the CIG itself.

It is proposed by Dublin City Council to draw up terms of reference of the environmental impact assessment which is to be carried out by the service provider. The input of the CIG is sought in this respect. Thus the CIG report will influence those matters the developer will be asked to include in its environmental impact statement. Thus, participation by the CIG in this respect will, at a maximum, simply be an input into the terms of reference to be provided by the service provider (see document entitled "*Questions and Answers relating to Waste Management Proposed by the CIG for the Dublin Waste to Energy Project*"). Putting it simply, what the CIG are being required to do is to identify areas where the local community wishes to obtain specific information.

It is difficult to see how this participation amounts to an approval of the proposed project. Nonetheless, on one view, it could be considered that if the group were seeking to challenge an aspect of the project that has already been decided, for example, the necessity of a thermal treatment plant at all, or the decision to site the plant at Poolbeg, that no further action should be taken by the group and, instead, the challenge should be immediately mounted.

As against this view is the fact that the Council have continually stressed that no decision as such has been taken and that the siting process, etc, cannot be considered to be a decision to site the plant at Poolbeg since there are a number of other steps that must be carried out before any such decision could be taken. However, as set out above, we do not fully agree with this view and consider that a decision has been made, albeit a conditional decision. Moreover, it may be necessary for the purpose of any challenge to argue that a decision has been made.

From one point of view, the participation of the CIG may be of assistance if the CIG subsequently wishes to challenge any of the process. This is in relation to the requirement of *locus standi*. Any challenge to the thermal treatment plant at Poolbeg

would be brought by way of judicial review and this requires that the applicant has a sufficient interest or a substantial interest in the matter, depending on the route taken by the applicant. The law relating to *locus standi* is quite well developed in environmental cases. There have been a number of important decisions on standing. In *Lancefort Limited v. An Bord Pleánala* [1999] 2 IR 270, at issue was planning permission for a hotel, office and bank in the centre of the City of Dublin. The applicant was a company which had been incorporated to oppose the development. Certain of the members of that company had taken part in the oral hearing in front of An Bord Pleánala. The respondent raised an issue as to the standing of the applicant, arguing that it did not have sufficient interest to proceed.

The Supreme Court as a whole held that, in all the circumstances of the case, the company did not have *locus standi* to bring the challenge but accepted as a general proposition that bodies limited by guarantee owning no property affected by the permission may be entitled to *locus standi* in proceedings of this nature and referred to the decision of *Blessington Heritage Trust v. Wicklow County Council* [1999] 4 IR 571. In this case Ms. Justice McGuinness stated that a blanket refusal of *locus standi* to all such companies may tip the balance too far in favour of the large scale and well resourced developer and noted that every case must be dealt with on its own facts. One of the facts that will be of relevance is the extent to which the applicant has been involved in the planning process prior to the legal challenge and to this extent the CIG's participation might be helpful.

However that involvement may also preclude challenge in a particular area. In the case of *Lancefort*, Mr Justice Keane gave as a ground for refusing standing the fact that members of the Applicant had not previously objected to facts giving rise to their challenge. In that case the Applicant's claim that the permission was invalid rested on the alleged failure of the first respondent to consider whether an EIS was required. Mr. Justice Keane noted that although members of the Applicant company had attended the hearing held by the first named respondent, they had at no stage put forward this objection. In those circumstances, he considered it would be a significant injustice to a party in the position of the notice party to be asked to defend proceedings on the ground of an alleged irregularity, which could have been brought to the attention of all concerned at any time prior to the granting of permission, but which was not relied on until the application was made for leave to bring the proceedings.

It should also be remembered that the issue of *locus standi* is one entirely within the discretion of the Trial Judge and therefore irrespective of what advice is given, there can be no certainty about the view a Trial Judge will ultimately take as to the standing of any group irrespective of its levels of participation or otherwise in the process to date. From all of the above, it will be clear that there are many factors influencing the answer to this question and that it is not possible to provide certainty on this point. What may be of assistance is to indicate a suggested basis on which the CIG could participate although it should be stressed that this cannot guarantee that their participation will not ultimately be problematic in terms of any challenge⁴ they may subsequently mount.

We would suggest that when providing a report they should indicate that their input into the scoping process is entirely without prejudice to either the group's right or the right of any individual members of the group to bring a challenge to the process to date and that their involvement should not be construed as an approval of any of the

⁴ The CIG should also be aware that time limits in judicial review are very strict and that if they wish to challenge any decisions made to date, they are obliged to do so promptly.

processes to date but rather that their involvement in the process is in order to obtain further information from the developer in the environmental impact statement about the proposed project.

Conclusion

The Waste Management Plan adopted by Dublin City Council in December 1998 includes a decision to construct a thermal treatment plant.

The Manager is obliged under Section 22(12) of the Waste Management Act 1996 and Sections 132 and 149 of the Local Government Act 2001 to implement the objectives in a Waste Management Plan.

These Sections provide him with the authority and indeed oblige him to procure a thermal treatment plant in view of the terms of the Waste Management Plan. Thus he does not have the option not to procure a thermal treatment plant.

The members may not vote to direct the Manager not to continue the procurement process, in particular by virtue of the provisions of Section 22(10)(b) of the Waste Management Act 1996 as amended by the Waste Management (Amendment) Act 2001. The members may vary or replace the Plan without the consent of the Manager from December 2002.

The Waste Management Plan may not fully comply with Section 22(7) of the Waste Management Act 1996 by reason of its possible failure to provide information on, or have regard to, matters relevant to the selection of sites in respect of waste facilities, plant or equipment.

A decision – albeit a conditional one – has been made in relation to the siting of the plant at Poolbeg.

According to information provided to us, no Order has been made by the Manager under Section 151 of the Local Government Act 2001.

On an initial view, it appears that the Manager may simply have “rubber stamped” the consultants’ decision in relation to the choice of Poolbeg and that no independent consideration of the report and decision in relation to the choice of site was made. If this is so, it may amount to unlawful delegation.

It is difficult to establish that a planning decision is manifestly unreasonable in the legal sense. It must be demonstrated that there was no material upon which the relevant body could base its decision. On the face of the consultants’ report, it appears there is sufficient material upon which to base a decision to site the plant at Poolbeg. It would be necessary to obtain independent consultants to ascertain whether any technical objections could be made to the choice of Poolbeg.

The fact that the consultants excluded areas not zoned for thermal treatment in the Development Plan in deciding upon the site is not a ground of challenge, despite the fact that the zoning could have been altered under Section 22 (10)(c) of the Waste Management Act 1996 as amended where the development was necessary for the proper implementation of a waste management plan.

The Dublin Docklands Development Authority Act 1997 provides under Section 24 for a Master Plan. The zoning in the Master Plan does not include an explicit reference to thermal treatment plants. There is a general requirement that county development plans should contain all their objectives. A similar rationale may apply in respect of the Master Plan under this Act and if no thermal treatment objective exists then any final decision on the siting of a thermal treatment plant at Poolbeg may be unlawful.

Similarly, the thrust of the Master Plan in respect of Poolbeg is for environmentally friendly initiatives and would seem to be against an incinerator.

It is not possible to give any certainty to CIG about the effects of their participation in the scoping report insofar as future legal proceedings may be concerned. On the one

hand it might assist them in establishing *locus standi* but on the other it might be considered to be a factor precluding them from raising objections where they did not raise them at an earlier stage and participated in a process despite those objections. A form of words to accompany any input is suggested to mitigate these concerns but it cannot be guaranteed that these words will necessarily have the desired impact.

**NIAMH HYLAND B.L.
AND
LAVELLE COLEMAN, SOLICITORS
OCTOBER 10, 2002**

APPENDICES

Appendix 1

List of documentation supplied by Dublin City Council to Lavelle Coleman

1. Waste Management Strategy Report (December 1997).
2. Waste Management Strategy for Dublin Main Technical Report dated December 1997.
3. Waste Management Plan for the Dublin Region Adopted by Dublin City Council on 7th December 1998.
4. Feasibility Study for Biological Treatment of Waste in the Dublin Region (September 1999).
5. Feasibility Study for the Treatment of Waste for the Dublin Region (September 1999).
6. Feasibility Study for the Treatment of Waste for the Dublin Region – Report on Siting and Environmental Issues (November 1999).
7. Minutes of Community Interest Group Meetings in October/November 2001 and February/March/April 2002.
8. Dublin Waste to Energy Project Draft Terms of Reference for Preparation of Environmental Impact Statement for Proposed Dublin Waste to Energy Project dated November 2001.
9. National BioDiversity Plan(Department of Arts, Heritage, Gaeltacht and the Islands).
10. National Heritage Plan(Department of Arts, Heritage, Gaeltacht and the Islands).
11. Document entitled “Timeline” setting out a Chronology to date and enclosing copy Motions and related reports of Dublin City Council.
12. Copy Brochure from Department of Environment and Local Government entitled “A Policy Statement, Waste Management, Changing Our Ways”.
13. Document entitled “Some Facts about the Proposed Incinerator at Poolbeg” distributed by Councillor Dermot Lacey at CIG meeting in March 2002.
14. Copy letter sent to the CIG by Mr. Matt Twomey, the Assistant City Manager in response to the circular distributed by Councillor Lacey.

15. Copy Dublin City Waste Management Plan for 1993-1998.
16. Copy further material from records of Dublin City Council meetings.
17. Copy Draft EPA Guidelines for Landfill Site Selection and Retail Planning Guidelines.
18. Copy Dublin City Development Plan.
19. Copy Docklands Area Master Plan.
20. Copy Planning Schemes for Custom House Docks Area.

Copy further Documentation Relating to the Feasibility Study

1. Preliminary Briefing Notes for Consultants.
2. Monthly Report No. 1 September 1998.
3. Acceptance of appointment to carry out the study.
4. Letter from Department of the Environment (DoE) regarding the study.
5. Monthly Report No. 2 October 1998.
6. Letter to DoE.
7. Letter from MCOS.
8. Agenda for Workshop.
9. Notes from Workshop.
10. Letter from DoE confirming details of the Study.
11. Monthly Report No. 3 December 1998.
12. Monthly Report No. 4 January 1998.
13. Summary of Public Consultation Methodology.
14. Letter from MCOS indicating delivery of the first volume of the report.
15. Minutes of Steering Group Meeting.
16. Monthly Report No. June/July 1998.
17. Letter from MCOS indicating delivery of the second volume of the report.

Copy Procurement Documentation

1. Copy Project Information Memorandum (12th July 2002).
2. Copy Request for Qualification (12th July 2002).
3. Copy Contract Notice.

Copy Documentation Provided in relation to the Community Interest Group

1. Report A: Summary of the CIG process.
2. Report B: Selection Process and Application form for the CIG.

3. Terms of Reference for the CIG.
4. Official record of CIG meetings in October, November, February, March and April.
5. Written answers to questions raised by the CIG.
6. Report on the process to date from Hendrick van der Kamp.
7. Indicative timeline for the project.
8. Map of “Area Under Consideration”.
9. Draft Terms of Reference for the Developers EIS.
10. Dublin Waste to Energy Project brochure.
11. Waste Wise Issue 1.
12. Waste Wise Issue 2.

Various Copy Documentation Supplied By CIG Members

Various Correspondence from Dublin City Council with Lavelle Coleman

Appendix 2

List of Legislation referred to and/or considered in Opinion

National Legislation

1. Public Health Act 1878.
2. City and County Management(Amendment)Act 1955.
3. Local Government(Planning and Development)Act 1963.
4. Waste Management Act 1996.
5. Waste Management(Planning)Regulations 1997 SI No. 137/1997.
6. Dublin Docklands Development Authority Act 1997.
7. Planning and Development Act 2000.
8. Waste Management(Amendment)Act 2001.
9. Local Government Act 2001.
10. Planning and Development Regulations 2001 SI No.600/2001

EU Legislation

11. Council Directive on Waste 75/442/EEC.
12. Directive 85/337/EEC as Amended by Directive 97/11/EEC on Environmental Impact Assessment.
13. Council Directive on Emissions from New Waste Incineration Plants 89/369/EEC.
14. Council Directive on Emissions from Waste Incineration Plants 89/429/EEC.
15. Council Directive on the Landfill of Waste 1999/31/EC.
16. Directive 2000/76/EC on the Incineration of Waste.

Appendix 3

List of Case Law Referred to in Opinion and/or considered

1. State (Murphy) –v- Johnson [1983] IR 235
2. McGrath –v- McDermott [1988] IR 258
3. East Wicklow Conservation Community Limited –v- Wicklow County Council [1996] 3 IR 175.
4. O’Keeffe –v- An Bord Plenala [1993] 1 IR 39.
5. O’Reilly –v- O’Sullivan
Unreported Supreme Court Decision of 26th February 1997.
6. McGarry –v- Sligo County Council [1989] ILRM 768.
7. Keogh –v- Galway Corporation [1995] 3 IR 457.
8. Roghan –v- Clare County Council
Unreported Judgement of Mr. Justice Barron of 18th December 1996.
9. Wicklow Heritage Trust Limited
Unreported Judgement of Ms. Justice McGuinness of 5th February 1998.
10. Lancefort Limited –v- An Bord Plenala [1999] 2 IR 270.
11. Blessington Heritage Trust –v- Wicklow County Council [1999] 4 IR 571.
12. Ni Eili v. Environmental Protection Agency Supreme Court 30 July 1999