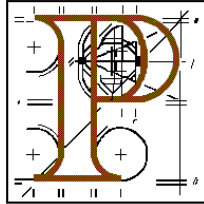


An Bord Pleanála



Inspector's Report

Development: Revisions to P12/455 for construction of waste facility comprising relocation of access onto site, relocation of weighbridge and increase of building height.

Location: Moneenbradagh, Castlebar, Co Mayo.

Planning Application

Planning Authority: Mayo County Council
Planning Authority Reg. Ref.: 16/155
Applicant: McGrath Industrial Waste Limited
Type of Application: Permission
Planning Authority Decision: Grant Permission

Planning Appeal

Appellants: Abbey Alainn Limited
Health Service Executive
Type of Appeals: 3rd v Grant
Date of Site Inspection: 28th July 2016
Inspector: Dolores McCague

1 SITE LOCATION AND DESCRIPTION

- 1.1 The site is located at Moneenbradagh townland off Moneen Road, in the environs of the town of Castlebar, to the north east of the town centre. The area is in transition from agriculture to other uses. Some limited one off residential development has become established along the N60, the Castlebar to Claremorris road, and business parks are beginning to extend off this road. The site is within a partially developed business park which is located close to the junction of Moneen Road with the N60 Claremorris Road. To the right, as you enter the estate road, there is the flank of a dwelling site, which fronts the public road. To the left there is a recently developed block comprising three linked buildings, which are part of a larger health complex referred to further in this report. The area surrounding the buildings is fenced: a mixture of permanent fencing and temporary builders fencing; and on the date of inspection, the buildings had the appearance of not yet being occupied. To the right of the road at a remove from the public road, there is an industrial type building with signage to indicate that it is occupied by An Post; this is immediately adjoining the south of the subject site.
- 1.2 At the end of the access road there is a partially constructed roundabout from which one arm accesses the An Post site and another arm is an unfinished construction entrance to the subject site.
- 1.3 A large industrial building of very recent construction occupies the subject site. One corner of the building is of two stories with windows on each floor. This is clad in white material and is distinguished from the remainder of the building, darkly clad and of single volume with several large entrance doors for vehicles, small pedestrian doors, and no glazing other than clear panels in the roof. A weighbridge is located close to the site entrance and there is hard core in place for an entrance road. On the date of inspection concrete had just been poured to complete a large yard area adjoining the building.
- 1.4 The site is given as 0.902ha.

2 PROPOSED DEVELOPMENT

- 2.1 The proposed development is described as revisions to P12/455 for construction of waste transfer facility and ancillary works, comprising relocation of access into site from that previously granted; relocation of

weighbridge consequent of revised access location; and increase of building height by 1m over previously approved height.

- 2.2 A note on drawing no. PL(200) 01 states '*external fenestration approved on foot of planning compliance dated 16-09-2015.*'
- 2.3 The application drawings for P12/455 show a building of similar overall dimensions: 50.5m (east west) x 40.3m (north south) in comparison to 52.5m x 40m in the subject application and of less height 8.5m max height in comparison to 9.750m height in the subject application. The treatment of the exterior is different to that in the subject application with a half brick (lower section) and half cladding finish proposed, in comparison to cladding which has been used in the subject development. The internal layout differs in the use of an internal ramp, (referred to in the subject documentation); and a narrower office area which, although extending over two floors did not show a stairs or a layout for the first floor. A large garage was shown as a separate area, walled off from the remainder of the building; this does not appear in the subject drawings.
- 2.4 It is worth noting that the building, which was proposed to be erected when the subject application was made, has since been erected.

3 PLANNING AUTHORITY DECISION

- 3.1 The application was submitted on the 4th March 2016.
- 3.2 A letter accompanying the application, from Fergal McGrane Associates Civil & Structural Consulting Engineers, states that the increase in building height is proposed in lieu of the previous proposal to incorporate an internal ramp in the floor which would allow trucks/trailers to reverse down into the facility and be positioned below floor level. The operator, using a loading shovel type machine, would then be in a position to load waste from the floor of the facility into the trailer. It was later decided from both operational and H&S perspectives, that the elimination of the internal floor ramp was desirable. The alternative loading operation, now proposed allows for trailers to be parked on a level floor whilst being loaded, using a grab type machine with an adjustable height cab, that allows the operator to be positioned above the height of the trailer. This will eliminate H&S issues associated with a floor ramp up to 2.5m deep, which would have to extend externally to achieve required gradient (H&S and drainage issues); allow more efficient, effective and cleaner loading operations; allow for a more flexible building layout which can adapt to

future requirements. The building height requires to be increased from 8.5m to 9.5m.

- 3.3 A letter of consent from the landowner James P Murphy, (UK address), accompanies the application.

3.4 Initial Reports

- 3.5 Mayo National Roads Design Office – 14 March 2016 – no issues arise.

- 3.6 Unsolicited further information – 24 March 2016, includes:

Letter from Architect referring to the likelihood that there may be submissions or observations from adjoining developers and enclosing:

a copy of letter sent by applicant to Councillors in response to a report of a meeting of the Castlebar Municipal District, which appeared in a local newspaper. The letter refers to a sequence of events:

- meetings with representatives of the adjoining Health Care Centre,
- correspondence summarising items discussed regarding the permission which had been granted for a waste transfer station;
- a later application for planning permission for the health centre;
- correspondence from the architect for the Health Care Centre acknowledging the existence of the permission for the waste transfer station which may be implemented;

together with copies of the correspondence referred to.

- 3.7 TII – 22 March 2016 – will rely on planning authority to abide by official policy.

- 3.8 EHO – 12 April 2016 – conditions.

- 3.9 Further unsolicited further information – 14 April 2016 - responding to objections/observations.

- 3.10 Planning – 26 April 2016 – under previous application P12/455 permission was granted for the construction of a waste transfer facility on this site. Permission has been granted for a business and technology park on lands to the south. Unit J of this park has been constructed and is occupied by An Post. A two storey Health Care Centre is currently under construction to the west of the site.

The proposed development is concerned with changes to this existing waste transfer facility which is currently under construction. The type of waste processing associated with the facility will be to accept skips, sort material (as documented under previous application) into appropriate waste streams, bailing of paper, cardboard and plastic, and the movement of the sorted waste onto suitable recycling, recovery and disposal facilities. No material will be stored on site.

The amendments to the planning permission are considered minor changes as the use has been permitted under the grant of permission P12/455. No objections were lodged during the course of that application nor were any appeals lodged to An Bord Pleanála. The amendments proposed are considered acceptable. The land is zoned enterprise and employment. The report recommends permission.

- 3.11 A decision to grant planning permission was made 26th April 2016, subject to 3 standard conditions.
- 3.12 The decision was in accordance with the planning recommendation.
- 3.13 Observations on the file have been read and noted.

4 PLANNING HISTORY

Per planning report:

12/455 planning permission granted for a waste transfer facility.

P09/82 A masterplan encompassing phase 1 of a retail, business and technology park including 9 sites as part of phase 1, landscaping, new entrance and exit to R373, access road, plaza, lights, signage, car parking, traffic calming and internal orientations, drainage, connections to both foul and surface water and all associated site works.

P09/188 – Construction of warehouse, office and distribution building, including car parking, landscaping, boundary treatment, lights, signage and all associated drainage and service connection to the southeast, (An Post building – Unit J of masterplan).

P13/125 Planning permission for Health Care Centre (unit A and H of masterplan and extended northwards outside masterplan area).

PE10/16 - warning letter to McGrath Waste. Response stated that the development will be carried out in accordance with planning conditions of p12/455.

5 GROUNDS OF APPEAL

- 5.1 Two third party appeals have been made against the decision to grant permission.
- 5.2 A third party appeal has been made by Kennedy Associates, Chartered Town Planners, on behalf of **Abbey Alainn Ltd.**
- 5.3 Oral hearing sought.
- 5.4 The grounds can be summarised as:
- 5.5 The third party is currently developing a large medical complex at Moneenbradagh, on lands directly adjoining the subject site comprising: Primary Care Facility, Nursing Home, Alzheimer's Units and Independent Living Units. The third party and the HSE have serious concerns with regard to the negative impact of the waste transfer facility on the medical complex. The proposed development represents an inappropriate and unacceptable use of the site having regard to the adjoining medical complex and nearby residential properties. The development will have significant negative environmental impacts in terms of noise, dust, odours, traffic and vermin. The proposed development will seriously injure the amenities of the medical complex. The proposed development will depreciate the value of the third party's property and nearby dwellings. The proposed development will undermine the policy and objectives of the development plan to promote the provision of healthcare and related facilities. The proposed development will undermine nationally adopted primary health care policy for the Western Region. A full assessment of the proposed

development should have been carried out by the planning authority. The environmental and planning assessment was insufficient. The application was not subject to Appropriate Assessment Screening. The decision to grant is inadequate in terms of conditions to properly control and monitor the future use and activity. The proposed development would be prejudicial to public health.

- 5.6 The development permitted 27th February 2013 to McGrath Industrial Waste, subject to 18 conditions comprised: 2,100 sq m of floorspace accommodated within an 8.2m high steel framed industrial structure clad in profiled metal sheeting with part block/brick walls. Condition 2 stipulated that the development shall be used as a general transfer/sorting facility in accordance with documentation submitted on 22/11/2012 and 19/12/2012.
- 5.7 The quantity of material to be accepted, processed and removed or the capacity of the facility, are not specified. The range of material includes paper and cardboard, plastics, various types of packaging, wood, glass, building products and a wide range of metals. Items such as used tyres, oil filters, transformers and capacitors containing PCBs, batteries, bituminous products, biodegradable kitchen and canteen waste, paints, inks, detergents, mixed municipal wastes, street cleaning residues and numerous other materials, some containing mercury and chlorofluorocarbons, are also listed.
- 5.8 The development permitted 21st June 2013 to Mr Michael Collins, Abbey Alain Ltd is referred to. At the time of the application the third party was aware that planning permission had been granted for the waste transfer facility but was led to understand that the proposed facility would not progress as the sale of the land to McGrath Industrial Waste Ltd would not be proceeding. Correspondence is attached to the grounds illustrating this point. The land proposed to be used for vehicular access to the waste facility was purchased as part of the medical complex and consequently the waste facility granted could not be constructed as permitted.
- 5.9 There are four buildings proposed for the medical complex: the alzheimers care centre and nursing home will be located at the northern end of the complex, with independent living units and primary care centre located further to the south. The primary care centre will include doctor's surgeries, consulting rooms and a range of other health care facilities, including an elderly day care centre and three retail units. Ten independent units are proposed. The nursing home will provide 72 rooms: bedsits, single en-suite rooms and double en-suite rooms. The

alzheimers care centre will include 2 no. ten bed units, with secure outdoor garden areas. Three access points are proposed, one from the roundabout and two from points towards the southern end of the complex. The health care centre is one of the largest proposed in the Western Region and is key to the overall HSE health services delivery strategy for that population.

- 5.10 Comments on the application from the EHO and objections from the HSE and third party are referred to.
- 5.11 Objections from the HSE and the third party were summarily dismissed in the planning report.
- Ignoring of the EHO advice.
- 5.12 Condition no. 15 attached to the earlier permission, P12/455, is referred to as not complying with the Development Management Guidelines (section 7.3.4).
- 5.13 The planner accepted without question that the only matters requiring assessment and evaluation related to the so called 'revisions' to the 2013 permission. In failing to properly assess the application before it. Mayo County Council erred in law and failed to exercise its duty of care to promote the proper planning and sustainable development of the area.
- 5.14 With the exception of Strategic Infrastructure Development, there is no provision in Irish planning law which permits a 'modification' or 'revisions' planning applications. The planning authority cannot refer to and rely on permission P12/455, as establishing any principle of development as of the date of this appeal and of its decision, in circumstances where a significant healthcare facility and associated development is nearing completion on the immediately adjacent land. The waste transfer facility cannot be implemented as permitted, in circumstances where the third party has acquired the interest in the adjacent lands, including the lands proposed for the access under P12/455. The development has never been properly assessed. An environmental appraisal or impact assessment was not carried out: noise/mitigation, dust, odours, rodents and birds. The quantum of material is not stated and must be inferred from the number of truck movements. A very large facility of 2,100 sq m would have the capacity to process waste in excess of mandatory EIA threshold limits. Based on the level of information, this cannot be

determined. The planning authority should have scoped the proposal in terms of sub-threshold EIA. No screening for appropriate assessment was submitted with either application.

- 5.15 The effects of a development on the community, on material assets and on adjacent zoned land are material factors to which regard must be paid in considering the impact/ effects on the environment (O'Mahony v An Bord Pleanála 2005). The nature of the materials to be processed is a matter of concern. The planner's report refers to paper, cardboard and plastic. The list supplied with the application in 2012 is much more extensive. It is entirely inappropriate that this matter be left to the waste permit to determine. It is evident from a perusal of the conditions that the duties, standards and working methods required of the operator are unclear and the conditions will be difficult to enforce. Condition no. 15 could not be enforced. Hours of operation are left to the waste permit to control.
- 5.16 The Department of Health policy document 'Future Health: Strategic Framework for Reform of the Health Service 2010-2015' is referred to, wherein investment in primary care centres has been identified as a priority; specifically action 29. The third party participated in a HSE leasing arrangement / public procurement tendering process, has entered into an agreement for lease and will be delivering a turn-key primary care centre for lease this summer.
- 5.17 Planning Policy – the site is zoned D, enterprise and employment, in the Castlebar and Environs Development Plan 2008 – 2014. Policies related to healthcare are referenced.
- 5.18 In circumstances where this application is in fact for a different development to P12/455 it is open to the Board to assess the merits of the use of this land as a waste transfer facility.
- 5.19 Senior Counsel advice to the third party is that the application was *de novo* in circumstances where the previous permission could not be implemented as granted.
- 5.20 Planning and sustainability arguments must be considered afresh. There is no principle of development established.

- 5.21 The Board's decision must consider all policies as of the date of this appeal and decision. Work has commenced, which is unauthorised, since the permission cannot be implemented.
- 5.22 Conditions are suggested in the event that the Board is disposed to grant permission re: EMS and an annual Environmental Report including details of the types and volumes of materials to be processed, their final destination and all environmental monitoring results; noise; hours of operation; tonnage limits; types of waste.
- 5.23 The Board is requested to refuse permission.
- 5.24 The grounds has attached a legal opinion from Mr Dermot Flanagan SC which includes:
- 5.25 An outline of the planning history of the site and the application P16/155. A notice published 26th January 2016 is mentioned: '*to retain and complete revisions to waste transfer facility building and ancillary works being constructed on foot of Planning Permission P12/455 incorporating increased building height, revision of site boundaries and site entrance and other minor ancillary revisions at the above address.*'
- 5.26 In relation to whether the application should be considered *de novo* or whether there is any principle of *res judicata* that binds the Board, the opinion is that An Bord Pleanála must have regard to relevant planning policy at the date of its decision. The opinion quotes from the Planning and Development Act (from sections 32, 34, 131, 137, 143 and the fourth schedule, reasons for refusal). Case law is cited: Judicial Review, Ashbourne Holdings v An Bord Pleanála, Supreme Court 2003, which dismissed an appeal by the Board against a High Court decision to quash the Board's decision; a number of findings are cited. The one noted is that the decision in 1993 to grant permission subject to conditions was not *res judicata* and the applicant was not estopped from challenging the *vires* of the planning authority to impose the impugned conditions.
- 5.27 Part of the judgement (page 134) is quoted including:
- the question of *vires* to require public access was never raised or discussed, and a point not argued is a point not decided. The condition was imposed by the second respondent and was not the subject of

appeal. I cannot see how the mere fact that the second respondent decided to impose the condition without any *inter partes* discussion of its power to do so can be said to give rise to a *res judicata*, or an omission to appeal its order to confirm it.

- 5.28 The opinion considers that this case has a bearing on four items:
- the appellants did not have an interest in the land in February 2013.
 - the appellants obtained planning permission in June 2013, in the knowledge that the planning permission granted in February 2013 could not be implemented,
 - the issues that now arise in planning terms are materially different in circumstances where a new planning permission is required for a waste transfer facility,
 - the issues raised on appeal both legal and planning, such as the absence of screening for EIS/Habitats, planning policy issues and sustainability arguments, were not the subject of detailed consideration at the time of the grant of permission in February 2013.
- 5.29 An application for planning permission must be determined having regard to all relevant planning and sustainability parameters existing at the date of the decision.
- 5.30 There is no principle of *res judicata* in planning law.
- 5.31 An Bord Pleanála is obliged to have regard to relevant jurisdictional (*vires*) and planning merits arguments at the date of decision: planning issues, legal (e.g. absence of EIA/Habitats Screening) and the planning merits; are materially different from those that arose at the date of the previous decision under P12/455.
- 5.32 The current application is a *de novo* application which must be considered having regard to all material planning considerations at the date of determination. Compatibility of adjoining uses must be considered, and cannot be referenced back to previous grants of permission. No principle of *res judicata* could apply as materially different planning considerations arise on this appeal.

- 5.33 A third party appeal has been made by the **Health Services Executive (HSE)**. The grounds includes:
- 5.34 The HSE has contracted to enter into a long term lease for a Primary Care Facility on lands adjoining the development. The Primary Care Facility is approaching completion, one of the largest in the Western Region and key to the overall national health services delivery strategy for the 22,000 population of Castlebar and environs. The 4,100 sq m Primary Care building, due to become operational during summer 2016, will provide patient consultation and treatment in General Medical Practice, Public Health Nursing, Physiotherapy, Speech and Language, Occupational Therapy, Dental Surgery, Mental Health services, diagnostic services and allied care services.
- 5.35 The waste facility is inappropriate for such close proximity to a healthcare facility and incompatible with healthcare services and the environment required for same. The volumes of heavy vehicles and other traffic would restrict access for the general public and staff to their services. Nuisance, pollution and noise would affect their ability to deliver their services and maintain the quality of clinical environment and patient care ethos that is required.
- 5.36 The application is sufficiently varied from the original application to constitute a new scheme, not a revision.
- 5.37 The planning authority should have taken account of the Primary Care Centre which was well advanced in construction at the time of the decision.

6 RESPONSES

6.1 The Planning Authority

6.2 The Planning Authority has responded to the grounds of appeal.

6.3 The response includes:

6.4 The permission 12/455 granted on 27th February 2013 included condition

no. 3:

The external finishes and design of the proposed development shall include high quality architectural cladding system and glazing and shall be agreed in writing with Mayo County Council (MCC) prior to commencement of development on site.

6.5 Conditions 8 & 13 also required details to be submitted for agreement. Revised site layout plans, plans and elevations were submitted to MCC on 21/5/2015, and a letter issued 16/9/2015 stating that the Council are satisfied that conditions 3, 8 & 13 are being complied with subject to minor stipulations referred to in the letter.

6.6 Responding to the HSE appeal:

The current application relates to a relocation of the access and weighbridge and an increase in height of the building previously approved; the use, building footprint and site location are exactly the same as the original permission. The original permission established the use of the lands for the construction of a waste transfer facility. That permission was granted before the receipt of the application for a Primary Care Facility. The current application is for revisions; the use was previously decided.

6.7 Responding to the Abbey Alain Ltd appeal:

The current application relates to a relocation of the access and weighbridge and an increase in height of the building previously permitted;

The planning report makes reference to the submissions and outlines the main concerns of these submissions.

The use was established under the previous permission. MCC have complied with the guidelines as outlined in the appeal.

Re. a revision to a previous application not being provided for in Irish law, that the previous application was not properly assessed from an environmental viewpoint and that the Board should request sub-threshold scoping for EIS and AA, the current application under appeal is

for relocation of access and weighbridge and an increase in building height. Factors relating to the current application can only be considered at this stage.

Re. that the applicants did not own the land to implement the previous permission and therefore the current application is a new application and should be considered afresh, the issue relates to access to the lands in question, the use was considered under P12/455, the legal issue of ownership has been addressed by the new access in the current application.

6.8 First Party

- 6.9 A response from the first party to the third party appeals has been received from Grady Carr Architects, on behalf of McGrath Industrial Waste Ltd. The response includes:
- 6.10 McGrath Industrial Waste Ltd. operates waste transfer facilities in Killala and Moneen Castlebar, accepting waste from the private, commercial and industrial sectors, which is segregated into various waste streams before being transferred to appropriate recycling or recovery facilities. They also operate a wheelie bin collection service which serves the private, commercial and industrial sectors. Residential / municipal waste collected is diverted to landfill. Recyclable waste is segregated into various waste streams for further recycling.
- 6.11 A waste facility permit is required for each waste transfer facility and an Environmental Management System (EMS) is required which in turn requires Annual Environmental Returns (AER) to be submitted to the local authority. McGrath Industrial Waste Ltd. employ Environmental Science Consultants, Earth Science Partnership. The consultants have commenced work on the Environmental Management System for the waste transfer facility and a draft EMS is enclosed. A waste facility permit has been obtained for the facility: WFP-MO-13-0030-01, 4th June 2013. Condition 1.2 of which requires the facility to operate in accordance with the planning permission (p12/455).
- 6.12 The facility in Killala is located in a building contiguous with and attached to the Schutz Ireland factory producing packaging predominantly for the food and beverage industry. The waste transfer facility and the packaging factory co-exist in harmony, and a letter, attached, from the general manager of Schutz, demonstrates the first party's track record.

- 6.13 Events relating to the dates of planning applications for the subject site and the Abbey Alairn Ltd development, and details of meetings between representatives of the first party and third party, are outlined.
- 6.14 The industrial context of the site is referred to: the Roadstone manufacturing plant and quarry immediately to the north of the site and the other industries in proximity: Baxter Health Care, Jackson Engineering and Fort Wayne metals.
- 6.15 A legal opinion from Mr Eamon Galligan, Senior Counsel, in respect of certain issues arising out of the appeal, is attached to the response and is referred to in the response including:
- Setting out the history of the site and responding to the issues raised in the grounds.
 - That there is no provision in Irish planning law which permits a 'modification' or 'revisions' planning application.
 - That the current application should be assessed as a *de novo* application in circumstances where the previous permission could not be implemented as granted.
 - The decision of the High Court, Costello, J, in Southwest Regional Shopping Centre Promotion Association Ltd v ABP is cited.
 - Paragraph 51 of the judgement, which summarises the Board's submissions, is cited.
 - Paragraph 53 and 54 of the judgement, which indicates acceptance of the Board's submissions, is cited.
- 6.16 How should an application to amend an existing planning permission be assessed?
- 6.17 The opinion cites paragraphs 65 of her judgement at which Costello J sets this out the arguments:

The applicants argued that the Board erred in law in failing to assess the entire development – as opposed simply to the variations – on the merits in the light of the current development plan, ministerial guidelines and other current planning policies and objectives. The Board and the Developer argued that the Inspector and the Board assessed the application correctly. In particular, they both submitted that it was neither necessary nor appropriate to revisit the principle of the grant of planning permission for development of the scale and nature at the location of the site as the application was not for a stand-alone development but was for amendments to permit the completion of extant planning permissions which had been partially and substantially constructed. There was an existing right to develop a large hotel /commercial /leisure complex on the site.

6.18 Her conclusions set out at paragraph 71 of her judgement, are cited:

I conclude that the correct basis upon which to assess an application to amend existing planning permissions is to assess the proposed changes, variations and amendments in the light of all applicable current development plans and ministerial guidelines and other planning policies. In light of those matters, the proposed amendments should be assessed to see whether they meet the requirements of proper planning and sustainable development for the area. Matters that are the subject of an extant grant of planning permission ought not to be reassessed. Accordingly, I hold that the Board was required to assess only the modifications to the Development in the application to amend the existing planning permissions for the Development. It was required to assess those elements on their own merits by reference to the current versions of the relevant planning policy documents, in particular, the statutory development plan, the statutory local area plan, statutory guidelines, regional planning guidelines and retail strategy.

6.19 Responding to submission that EIA screening or AA screening should have been carried out, a similar argument was made by the applicant in the Southwest Regional Shopping Centre case. Paragraph 119 of the judgement, is cited.

6.20 The conclusions reached by Costello J set out at paragraph 121-124 of her judgement are cited.

122 - I do not accept that this is a correct characterisation of the

2014 Application or a correct application of the Regulations to the planning application. I accept that this is an application to amend the existing planning permissions. It involves the reconfiguration of the internal layout of the complex and revised proposals for the overall internal road layout, parking layout and service arrangements. It also revises the external elevations and signage associated with the Development and the hard and soft landscaping. Thus the changes are to the entire area of the site but the application is not for planning permission to develop a shopping centre of more than 10,000m². It is to make alterations to a shopping centre of more than 70,000 m² in respect of which an EIA has already been conducted. In my opinion therefore the application simply does not fall in Class 10 and to simplistically state that it does because the proposed floor space is set out as 63,712m² is to ignore the essence of the application for planning permission and to focus on the form.

123 - The applicant's arguments is predicated on the submission that every application for planning permission, where what is sought is permission merely to modify existing grants of planning permission and which do not fall within the strict limits of ss. 146A-146D of the 2000 Act must be assessed from first principles and subject on each and every occasion either to an EIA or to an assessment as to whether or not an EIA is required as appropriate. As I have rejected this premise earlier in my judgement, it follows that I reject this argument based upon the premise...

- 6.21 It is therefore Mr Galligan's opinion that in considering whether an EIA or AA assessment is required, the Board must consider the proposed development the subject matter of the application: the revisions / amendments.
- 6.22 The opinion refers to one or two additional legal and factual issues to be addressed in relation to Mr Flanagan's opinion.
- 6.23 Re. the published notice of 26th January, it was decided not to proceed with an application on foot of that notice. The application was made on foot of notices published 4th March 2016. There is no suggestion that the appellant was misled by the earlier notice.
- 6.24 Ashbourne Holdings Limited v An Bord Pleanála is referred to in Mr Flanagan's opinion: that the fact that the Board had made an earlier ultra vires decision which was not challenged by the applicants did not estop

the applicants from challenging a subsequent decision to attach a condition requiring public access across the golf course. The first party's reliance on the Southwest Regional Shopping Centre Promotion Association Ltd case is not in any way inconsistent with the conclusions of the Supreme Court in relation to the estoppel argument.

- 6.25 The decision of the High Court in Southwest Regional Shopping Centre Promotion Association Ltd and Stapleyston Company v ABP, requires the Board to consider only the proposed development that is the subject matter of the amendments / revisions application. This is not in any way inconsistent with the conclusions of the Supreme Court in relation to the estoppel argument raised in Ashbourne Holdings.
- 6.26 In so far as reference is made to the previous grant of permission under P12/455, Abbey Alairn Ltd is prohibited from questioning the validity of this decision in any proceedings whatsoever other than by way of an application for judicial review brought within the eight week time limit, the prospects of an extension of time being granted by the Court in respect of such a challenge are extremely remote and can in Mr Galligan's opinion now effectively be discounted.
- 6.27 Without prejudice to the legal opinion, the first party responds to the issues raised in the grounds of appeal:
- 6.28 The amendments are considered minor changes as the use has been permitted on foot of P12/455.
- 6.29 The amendments include change to the access road, relocation of the weigh bridge and the increase in the building height of 1.25m.
- 6.30 The objections appear to be concerned with the permitted use, previously examined and approved, and seek to revisit an already permitted application.
- 6.31 McGrath Industrial Waste Ltd is advised that the Board is confined to considering the proposed revisions to the already permitted waste transfer facility.
- 6.32 They note without prejudice the policy context in which P12/455 was granted: Castlebar & Environs Development Plan 2009-2014, extended to 2020 - zoning and objectives:

PUO 4 - It is an objective of the Council to promote the implementation of the Connacht Regional Waste Management Plan 2006-2011, in conjunction with the other local authorities in the region.

PUO 5 - It is an objective of the Council to promote the development of facilities in accordance with the waste hierarchy principles, which involves a shift towards preventative and waste minimisation measures.

PUO 6 - It is an objective of the Council to reduce waste consigned to landfill sites.

PUO 7 - It is an objective of the Council to encourage the recycling of construction and demolition waste and the re-use of aggregate and other materials in future construction projects.

- 6.33 The EMS the Waste Facility Licence and McGrath Waste's track record demonstrate that the Waste Transfer facility can co-exist with other land uses.
- 6.34 Environmental Issues – without prejudice, they note the waste facility permit, with a lifespan of 5 years, which is subject to a substantial number of conditions. A letter from Earth Science Partnership and a draft Environmental Management System are attached to the response.
- 6.35 An oral hearing is unnecessary.
- 6.36 The revised entrance location is minor and does not give rise to any additional traffic impact. A letter from Fergal McGrane Associates Consulting Engineers is attached in this regard.
- 6.37 Attached to the response are: a draft EMS; cover letter from Earth Science Partnership; letter from Schutz Ireland; planning notice and site notice; letter from Declan McGrath, McGrath waste to Councillors & enclosures; an aerial view identification map; a legal opinion from Eamon Galligan Senior Counsel; a copy of the High Court judgement referred to by Mr Galligan; further information response to MCC; and a letter from Fergal McGrane Associates Consulting Engineers.

6.38 A legal opinion from Mr Eamon Galligan, Senior Counsel, in respect of certain issues arising out of the appeal, attached to the response is referred to in the response.

6.39 Third Party

6.40 A response from the third party to the other third party appeal has been received from Kennedy Associates, Chartered Town Planners, on behalf of Abbey Alainn Ltd.

6.41 The response includes:

6.42 They confirm that the HSE has contracted to take a long lease on the Primary Care Centre, which will be operational in the coming months.

6.43 The Abbey Alainn Ltd development will include a Nursing Home, Alzheimer's Units and Independent Living Units.

6.44 The Independent Living Units will be located close to the Primary Care Centre. Ten units are proposed, each providing a living area/kitchen, bedroom, bathroom, storage accommodation and an outdoor space. The nursing home will provide 72 rooms in a mix of bed-sit units, single ensuite rooms and double ensuite rooms. It will include day areas, treatment rooms and secure outdoor courtyard gardens. The Alzheimer's Unit will cater specifically for people with dementia. It will provide 2 no. ten bedroom units, with day rooms, treatment rooms and ancillary accommodation. Secure outdoor garden areas will also be provided, designed specifically for people with dementia. The third party agrees with the other third party that the proposed development is an incompatible use. The zoning 'D' Enterprise and Employment includes a medical centre etc as normally permitted. A waste transfer facility is not referred to but it could be considered under the category of general industry which is normally permitted. Flexibility in permitting a range of land uses within employment zones is common practice in Development Plans nationwide. However it is neither common practice or good planning to permit nursing homes etc in the same land use zone directly alongside general industrial activities. Avoiding bad neighbour problems is a basic principle and purpose of land use zoning. Of greater importance are the policies and objectives of the Plan.

6.45 The Castlebar and Environs Plan is cited:

CDO 1 - It is an objective of the Council to co-operate with the Health Service Executive and other statutory and voluntary agencies in the provision of health and community facilities in Castlebar.

CDO 2 - It is an objective of the Council to ensure that adequate lands and services are available for the improvement, establishment and expansion of health services.

CDO 3 - It is an objective of the Council to ensure that high standards of design and layout are achieved in new healthcare facilities and in the change of use of existing premises to health care facilities.

CDP 1 - It is the policy of the Council to encourage, support and facilitate the provision of a range of services for the aged population.

14.12.5 Nursing Homes - Privately run nursing homes provide an essential service for the elderly and the infirm. The council will, subject to protecting residential amenity, consider the location of nursing homes in residential areas and on sites considered adequate in size to cater for all generated needs of the development.

6.46 **The Mayo County Development Plan is cited:**

HH-01 - It is an objective of the Council to support the provision of improved health services on suitably zoned lands in the Linked Hub, Key Towns and in Other Towns and Villages, on lands in the town centres or immediately adjacent to town centres (based on the sequential approach), which are serviced (water service, footpaths, lighting etc.).

6.47 The proposal is materially contrary to the provisions expressed, which must be given primacy over the general land use zones.

6.48 The third party agrees with the other third party that the increase in traffic would affect and restrict access for the general public and staff to the medical complex.

6.49 There are three set down areas approved by the planning authority to enable users of the primary Care Centre to travel to and from the medical care facilities, the proposed Waste Facility would increase significantly the risk of serious accidents occurring to users and visitors.

- 6.50 The third party agrees with the other third party that the application is sufficiently varied from the original application to constitute a new scheme not a revision and that the planning authority should have taken account of the Primary Care Centre, which was well advanced in construction at the time of the decision.
- 6.51 They reiterate other points made in their grounds of appeal.
- 6.52 They include a report from Mr Arrigan of Arrigan Geo Surveyors, commissioned by them to carry out a levels survey, to determine the height of the structure which has been erected. The report of the survey is attached to the response. The survey of 31/5/2016, indicates the parapet level of the Waste Transfer Facility building (under construction) at 51.30m. Assuming a finished floor level of 41.7m this suggests the height of the elevations as constructed are approximately 9.6m above FFL. This is 2.6m in excess of the height indicated on the P12/455 planning application drawings, 0.85m in excess of the P12/455 compliance elevations and is generally in compliance with P16/155 planning application drawings – currently under appeal.
- 6.53 It would appear that the applicant is in the process of implementing the development currently before the Board for determination, and that the works being carried out are therefore unauthorised. While they recognise that unauthorised development is a matter for the Planning Authority rather than the Board, under S 35 of the 2000 Act (as amended) the planning history of the applicant can be considered a relevant factor in the determination of a planning application.
- 6.54 They refer in general terms to other sites operated by the first party and request the Board to consider that there is a pattern of non-compliance.
- 6.55 They consider that the proposed development has not been properly assessed in relation to environmental appraisal. In relation to Environmental Impact Assessment and the Waste Management Act 1996 they refer to Section 257 of the 2000 Act and quote subsection 3A of the Act.

3A) Where a waste licence has been granted under this Part or is or will be required in relation to an activity, a planning authority or An Bord Pleanála may, in respect of any development comprising the activity or for the purposes of the activity, decide to refuse a grant of permission under section 34 of the *Planning and Development Act*,

2000, where the authority or An Bord Pleanála considers that the development, notwithstanding the licensing of the activity under this Part, 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.

6.56 The planning authority has not carried out any environmental appraisal of the proposed development, preferring to leave the entire matter to the Waste Permit process, yet it has full legal jurisdiction and a clear duty to do so.

6.57 The third party considers that there is a real prospect of an unrestricted intensity of use of the waste facility for the processing of an unknown and unrestricted range of materials. The use of the facility for this range of materials has not been the subject of any proper assessment whether in environmental or sustainability terms as provided for in the Planning Acts.

6.58 **Further Responses**

6.59 The first party's responses were circulated and further responses were received.

6.60 **Planning Authority**

6.61 The planning authority notes that the response refers to a report by Kennedy Associates on behalf of the third party and makes reference to those comments.

6.62 Mayo County Council disagrees with the Kennedy Associates assertion that their decision was anomalous and irrational.

6.63 Regarding the comment that the Castlebar & Environs Plan is fundamentally flawed, it was adopted by the elected members in the appropriate manner.

6.64 Mayo County Council complied with the policies and objectives referred to at page 4 of the Kennedy document, in granting planning permission for the primary care centre.

- 6.65 Regarding the suggestion that Mayo County Council should have re-examined the whole proposal, the zoning had not changed, all that had changed was that the primary care centre permission. To re-examine the principle of the waste centre facility would have been unreasonable, and anomalous.
- 6.66 Mayo County Council are not in a position to reopen P12/455 and do not believe it would be appropriate to do so. The issue of unauthorised development is being addressed.
- 6.67 **Third Party**
- 6.68 Kennedy Associates, Chartered Town Planners, on behalf of Abbey Alainn Ltd has responded to the first party's responses, including:
- 6.69 The South-West Regional Shopping Centre case (SWRSC) is specific to the circumstances pertaining to that development.
- 6.70 There was no change to the boundary in that case.
- 6.71 There is a fundamental change in planning terms in the subject case because the developer could no longer carry out the development in accordance with the permission granted, P12/455.
- 6.72 The developer has carried out work solely by reference to P16/155.
- 6.73 In SWRSC the developer had carried out substantial works on foot of existing permissions.
- 6.74 The 2014 permission in SWRSC represented a reduction in floor area. In this case there is an increase in the roof height.
- 6.75 In SWRSC no additional land, including third party land, was involved.
- 6.76 In SWRSC the extension of duration was relied on.
- 6.77 In the subject application a new planning unit is involved.

- 6.78 The new access arrangement must be assessed in light of the primary care centre. Material planning considerations arise for the Board which are different to P12/455 and different to the decision in the SWRSC case.
- 6.79 Without prejudice it is open to the Board to impose appropriate conditions in relation to the construction and or use in the context of the physical changes proposed.
- 6.80 The developer has carried out development on foot of the decision to grant, which is now under appeal.
- 6.81 The developer has sought to pre-empt the statutory role and function of ABP.
- 6.82 Issues arise which did not arise under P12/455.
- 6.83 The SWRSC cannot be an authority to the present appeal where planning considerations involve the relationship in land use terms to a waste transfer facility immediately adjacent to a primary care centre, nursing home and Alzheimer unit.
- 6.84 In the Ashbourne Holdings case the inference that, as a matter of planning law some principle of 'res judicata' is of some relevance, was flatly rejected by the Supreme Court.
- 6.85 That there is no provision in Irish planning law which permits a 'modification' or 'revisions' planning application is not negated by the judgement in SWRSC.
- 6.86 Accepting such applications does not negate the duty of planning authorities to properly assess the full extent and impact of development.
- 6.87 The application was *de novo* in circumstances where P12/455 could not be implemented.
- 6.88 Planning and sustainability arguments must be considered afresh. There is no principle of '*res judicata*'.

- 6.89 The appeal must be considered having regard to current policy: Castlebar & Environs Development Plan 2009-2014 (extended), Mayo County Development Plan 2014-2020 and all relevant regional and national policy as of the date of this appeal and in circumstances where the appellants have implemented their planning permission.
- 6.90 Re. the draft EMS, the document does not assess the impact of the development on the medical complex or the wider environment. No baseline environmental data is presented and no impact assessment has been carried out. It simply sets out a basic environmental management regime for the facility. The third party refers to the waste streams and their concerns in this regard, particularly in relation to odours and waste accepted at the facility. There is no evidence that EPA recommendations in relation to odour control have been part of the design process. The range of noxious materials to be accepted and processed is very extensive and will undoubtedly be a cause of great dis-amenity to the residents and users of the adjoining medical complex. At a minimum, it is essential that the range of materials to be accepted at this facility be properly controlled and the facility should not be used for the processing or handling of any liquids, liquid products, organic matter including food waste or other biodegradable waste, mixed municipal waste or street cleaning residues.
- 6.91 It is entirely inappropriate that this matter be left to the waste permit to determine.
- 6.92 The planning authority and the Board have full legal jurisdiction to evaluate all environmental matters and can refuse planning permission on environmental grounds.
- 6.93 Without prejudice conditions are recommended:
- Re. EMS
 - Noise limits
 - Hours of operation
 - Tonnage limits
 - Waste type limits.
- 6.94 Reasons for refusal are set out.
- Injury to amenities and depreciation of the value of property in the vicinity.
 - Endanger the health and safety of persons occupying or employed in adjoining structures.

- Prejudicial to public health.
- Inappropriate and unacceptable use adjoining the medical complex and residential properties.
- Significant negative environmental impacts in terms of noise, dust, odours, traffic and vermin.
- Material contravention of the policy and objectives in the Castlebar & Environs Development Plan 2009-2014 to promote the provision of healthcare and related facilities.
- Undermining nationally adopted primary health care policy for the Western Region.

6.95 The further opinion of Mr Dermot Flanagan SC which has been referred to in the response is attached to the submission.

6.96 In addition to the foregoing which includes Mr Flanagan's advice, the opinion cites the judgement of Charleton J in *Wexel v An Board Pleanála* 2010 IEHC 21, that in practice consideration of the proper planning and sustainable development of an area and of the development plan are often inextricably linked. ... the terms of the development plan are not conclusive: the overriding consideration must be the proper planning and sustainable development of the area. The language of s35 is noteworthy. A planning authority and An Board Pleanála are *'restricted to considering proper planning and sustainable development'*, whereas they are only required to *'have regard to the provisions of the development plan'*... The planning merits of a case depend on reference to some wider view of the public interest in land-use and sustainable development matters and not just (or only) the interests of particular individuals.

6.97 An Bord Pleanála is being asked whether or not it is entitled to revisit the principle of the grant of planning permission (which could not be implemented) in changed circumstances.

6.98 The planning authority and the Board have full legal jurisdiction to evaluate all environmental matters and can refuse planning permission on environmental grounds.

7 PLANS AND POLICIES

7.1 **Castlebar & Environs Development Plan 2009-2014** remains in force, following the Local Government Reform Act 2014, until 2020.

7.2 Relevant provisions include:

7.3 Zoning – zoned enterprise and employment. It is an objective to provide for the improvement of retailing, enterprise and industrial employment needs of the town. This zoning allows for a more varied and flexible number of land uses.

8 ORAL HEARING REQUEST

8.1 The Board decided, 22nd July 2016, not to hold an oral hearing.

9 ASSESSMENT

9.1 The first issue on which the Board has to make a decision is the validity of the application.

9.2 The published notices describe the proposed development as planning permission for:

revisions to planning permission P12/455 for construction of a waste transfer facility and ancillary works comprising:

1 relocation of access into site from that previously granted,

2 relocation of weigh-bridge consequent of revised access location,

3 increase of building height by 1 metre over previously approved height.

9.3 The development differs in other ways from that permitted under P12/455. These differences may be accounted for by the fact that compliance drawings were submitted to the planning authority for agreement; these are not on the Board's file. A note on drawing no. PL (200) 01 on this file states '*external fenestration approved on foot of planning compliance dated 16-09-2015.*'

- 9.4 The planning report states that the proposed development is concerned with changes to the existing waste transfer facility which is currently under construction and that the amendments to the planning permission are considered minor changes as the use has been permitted under the grant of permission P12/455.
- 9.5 One of the third party's has employed a surveyor to measure the development to check its height. His report references a compliance drawing submitted to Mayo County Council on 21st May 2015 and has found that the as constructed height is 2.6m in excess of the height indicated on the P12/455 planning application drawings, 0.85m in excess of the P12/455 compliance elevations and is generally in compliance with P16/155 planning application drawings currently under appeal. The third party point's out that the development has been carried out and that this represents unauthorised development.
- 9.6 From the information available on the file it does not appear that the site layout, building design or height are material issues in planning terms. The increase in building height has not been raised as an issue which impacts on the area or on adjoining properties.
- 9.7 The Board must have before it a valid application in order to make a determination on the planning merits of the development. In my opinion the application is not a valid application since the development has been carried out. To be valid, the application should be for retention, accordingly I recommend that planning permission should be refused.

10 RECOMMENDATION

In light of the foregoing assessment I recommend that planning permission be refused for the following reasons and considerations.

11 REASONS AND CONSIDERATIONS

Articles 17 – 19 and schedule 3 of the Planning and Development Regulations 2001 as amended, set out the requirements for notices, which require that notices should state that the application is for permission for development, outline permission or retention. It is considered that the submitted application is for retention, but is incorrectly described in the notices as permission for development, in these circumstances, the Board is precluded from giving further consideration to the granting of permission for the development the subject of the application.

_____		_____
Dolores McCague		Date
Inspectorate		
Appendix	1	Map and Photographs
Appendix	2	Extracts from the Castlebar & Environs Development Plan 2014 – 2020