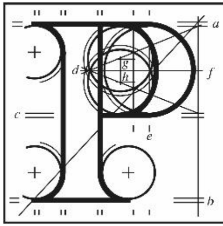

Inspector's Report ABP-307207-20

Development	Whether the proposed increase in annual intake from 97.000 tonnes to 120,000 tonnes at the Glassco Recycling Facility is or is not development or is or is not exempted development at Unit number 4, Osberstown Industrial Park, Caragh Road, Naas. Co. Kildare
Planning Authority	Kildare County Council
Planning Authority Reg. Ref.	ED/00780
Owner/Occupier	Glassco Recycling Ltd.
Planning Authority Decision	Is development and is not exempted development
Referrer	Glassco Recycling Ltd.
Type of Case	Section 5(1) Referral
Observer(s)	None
Inspector	Fergal Ó Bric

1.0 Introduction

This Section 5 referral n has been submitted to the Board by Tom Philips & Associates, Planning Consultants, on behalf of the owners and operators of the site, Glassco Recycling Ltd (the referrer). The referrer has requested a determination under Section 5(1) of the Planning and Development Act 2000 (as amended). The referral relates to an increase in annual intake at its recycling facility from 97,000 tonnes per annum to 120,000 tonnes per annum, at Unit 4, Osberstown Industrial Park, Naas, Co. Kildare.

The site is presently being used as a glass and can recycling facility. There are three structures on the site, a main processing building where glass and cans are sorted, a drying glass building where the glass is dried and bagged and a vehicle maintenance building. The site is located west and north-west of other existing industrial units, east of a one-off dwelling and south of the Naas Wastewater treatment plant.

2.0 Site Location / Description

The Industrial Park is located approximately 2.5 kilometres north-west of Naas, and 1.5 kilometres north-west of Junction 10 (Naas South) on the M7 Motorway. Access to the site is off the R409, a regional route linking Naas with Caragh.

The site is located within the development boundary of Naas, as set out within the Draft Naas Local Area Plan 2021-2027, where the lands are zoned for Industry and warehousing uses.

3.0 The Question

4.1 The question before the Board is:

Whether the increase in annual intake at its recycling facility from 97.000 tonnes per annum (as assessed during the Substitute Consent application pertaining to the site, permitted by An Bord Pleanála, in June 2014), to 120,000 tonnes per annum, at Unit 4, Osberstown Industrial Park, Caragh Road, Naas, Co. Kildare is or is not development or is or is not exempted development.

4.0 Planning Authority's Reports

5.1 Planning Report

A report was prepared by the Planning Authority and the main focus of attention within the report pertains to Environmental Impact Assessment (EIA), and whether the increase in tonnage would or would not require the preparation of a mandatory EIA. The Planning Officer addressed the question asked, in terms of the increase in tonnage from 97.000 tonnes to 120,000 tonnes per annum, but also relied on additional information submitted with the Section 5 referral, including and Environmental Monitoring Assessment (EMA), a Traffic Impact Assessment (TIA and documentation submitted by the referrer to the Environmental Protection Agency (EPA) as part of its Waste Licence Review. Information included within these reports confirm that the annual intake at the facility exceeded the 120,000 tonnes (being sought under this declaration) per annum for of the years 2014 to 2018 inclusive. Some of the data included within the accompanying reports support that the 120,000-tonne annual intake was exceeded by between 2.641 tonnes and 7,000 tonnes for each of those years. The Planning Authority posed the question as to whether the increase in annual tonnage intake to the facility triggers a mandatory EIA, and if so, the increase in tonnage intake would not be exempted development, and therefore would require the submission of a planning application or a substitute consent application.

The Planning Authority stated that the appropriate threshold for this type of development is governed by class 11(b), Part 2, Schedule 5 of the Planning and Development Regulations (the Regulations) 2001 (as amended) which states "That installations for the disposal of waste with an annual intake of greater than 25,000 tonnes, not included in Part 1 of Schedule 2, of the Regulations.

The Planning Authority concluded that a mandatory EIA is triggered by the increase in tonnage intake on two grounds. The first ground, raised by the Planning Authority is that having regard to the reports submitted with the referral, that the 23,000-tonne figure, exceeds the appropriate threshold of 25,000 tonnes by more than 50% is set out within Article 13(a) (ii), Schedule 5, Part 2 of the Regulations. The second ground under which the Planning Authority based its conclusion is that the 23,000-tonne figure, by which it is proposed to increase the intake by, set out by within this referral, is a hypothetical one. The Planning Authority specifically referred to Page 7, Section 3.2 of the TIA, where an annual tonnage intake figure of 127,000 tonnes for the year 2018, is set out. This 2018 intake figure represents an increase of 30.9% over the annual permitted intake of 97,000 tonnes, as conditioned by An Bord Pleanála, in 2014, and above the 25% increase provided for within Schedule 5, Part 2, Article 13 (a) (ii) of the Regulations. Accordingly, a mandatory EIA would be required in compliance with Schedule 5, Part 2, Article 13(a) of the Regulations.

The Planning Authority concluded that the increase in tonnage intake at the Glassco recycling facility is development of a type which would require the preparation of a mandatory EIAR, and therefore would and require the submission of a planning application or an application for Substitute Consent. Article 9(1) (c) of the Regulations removes exempted development provisions if it is development to which Part 10 of the Act applies i.e., requirement for Environmental Impact Assessment. Accordingly, the development cannot be

considered to be exempted development having regard to the provisions as set out within Article 9.

5.0 Planning Authority Declaration

Kildare County Council issued a declaration in accordance with Section 5(1) of the Planning and Development Act, 2000 (as amended) in respect of the development. The Planning Authority determined that the increase in tonnage intake at the Glassco recycling facility is development of a type which requires the submission of a mandatory EIA, and therefore, requires the submission of a planning application or an application for Substitute Consent. Accordingly, the development cannot be considered to be exempted development, having regard to the provisions of Article 9 (1) (c) of the Planning and Development Regulations 2001.

6.0 The Referrer's Submission

6.1 The submission by Tom Phillips & Associates, Planning Consultants, on behalf of Glassco Recycling Ltd can be summarised as follows:

- The Planning Authority did not apply the provisions of the Regulations correctly in respect of Schedule 5, Part 2, Article 13 (a) which provides for "Any change or extension of development already authorised, and executed or in the process of being executed (not being a change or extension referred to in Part 1) which would-

(i) Result in the development being of a class listed in Part 1 or paragraphs 1 to 12 of Part 2 of this schedule and

(ii) Results in an increase in size greater than-

  - 25 per cent, or
  - An amount equal to 50 per cent of the appropriate threshold,

whichever is the greater.

- The Planning Authority have misinterpreted the application of Article 13 (a) of the Regulations and the thresholds regarding the preparation of mandatory EIAR, as set out in Schedule 5, Part 2 of the Regulations. Schedule 5, Part 2, Article 11(b) relates to Other Projects (b) "installations for the disposals of waste with an annual intake greater than 25,000 tonnes, not included in Part 1 of this schedule". It is accepted that the development comprises a class listed in this schedule. In this instance, annual intake was permitted at 97,000 tonnes following the Substitute Consent process. An increase in size of 25% of the 97.000 tonne figure would amount to 24,250 tonnes. An amount equal to 50% of the appropriate threshold, equates to 12,500 tonnes. The greater of these amounts is the 24,250-tonne figure. The proposed 23,000 tonne increase is clearly below the greater amount provided under Article 13 (a) (ii). Thus, the use of 50% of the appropriate threshold provision is wholly erroneous in this case, given this figure is the lesser amount, not the greater as provided for under Article 13 (a) (ii). Therefore, the reason for concluding that the stated increase in annual tonnage constitutes development and not exempted development, by way of triggering a mandatory EIAR is incorrect, and does not provide any basis for this part of the declaration.
- A 25% increase in size would amount to 24,250 tonnes, and the proposed increase in output at 23,000 tonnes, would be below this threshold that triggers the preparation of a mandatory EIAR as per the provisions of Schedule 5, Part 2, Article 13 (a) (ii), of the Regulations.
- In terms of the second EIA trigger set out by the Planning Authority, the referrer states that the Planning Authority has inappropriately relied on information included in the referrer' s submission designed to illustrate in robust terms, that a certain level of development (intake of 127,000 tonnes)

per annum) does not give rise to material planning impacts to ground this part of its decision. The question being considered in this section 5 referral explicitly relates to whether the proposed increase in annual intake from 97,000 tonnes to 120,000 tonnes is or is not development or is or is not exempted development.

- A 127,000-tonne figure was used to ground the TIA. This figure was used to demonstrate that the recycling facility operating at 127,000 tonnes per annum is deemed to have no material traffic impacts, in terms of operation or capacity within the local road network. At no stage did the referrer, seek a declaration from the Planning Authority as to whether an increase in annual tonnage to 127,000 tonnes per annum comprised development or exempted development. This question would be outside the remit of the Planning Authority and relies on another annual tonnage figure referenced in part of the referral documentation. This stance by the Planning Authority is wholly out of context and cannot be considered appropriate grounds in terms of assessing the current question set out within this referral.
- It is evident that the Planning Authority understood the question asked, as it specifically references 23,000 tonnes in its conclusion within the planning report and within the face of the decision issued by it.
- The referrer submits that the Planning Authority is precluded from grounding its assessment of the Section 5 referral by materially altering or re-interpreting the question being put to it. The referrers contend that this is outside the remit of the Section 5 process and relies on other annual tonnage figures referenced within documentation accompanying the referral, is out of context and would not be considered appropriate grounds to determine that an EIAR is a mandatory requirement in this case.

- The 97,000-tonne figure represented the annual intake at the time of the Substitute Consent (SC) application and formed the basis of assessment for the Remedial Environmental Impact Statement prepared in respect of the SC application. The Board in that instance did not include any conditions that require the annual intake to be capped or restricted to 97,000 tonnes. There was no aspect of that decision that precludes an increase in tonnage intake or mandates that planning permission must be sought for any increase over the 97,000-tonne intake. For planning permission to be required, an intensification of use would need to occur to such an extent that material planning impacts are apparent. The referrers have enclosed relevant EMA and TIA assessments as part of the planning documentation submitted, which confirms that there are no material planning or environmental impacts arising as a result of the increase in tonnage, particularly in respect of air, noise, or traffic levels.
- A new Appropriate Assessment (AA) screening document concludes that significant effects are not likely to arise, either alone or in combination with other plans or projects that will result in significant effects to the integrity of the Natura 2000 network, A Natura Impact Statement is, therefore, not required.
- Therefore, the proposed change in annual intake is below any potential mandatory EIA threshold. The assessment carried out in relation to air, noise and traffic conclude that the proposed level of additional tonnage does not give rise to material planning, environmental or traffic impacts. On the basis that no material impacts will arise on foot of the proposed change, and therefore, the development constitutes exempted development.
- In this case, the increase in annual intake does not constitute development, as defined in the Planning and Development Act 2000 (as amended). This is

based on the fact that no works will be carried out in order to affect the increase in tonnage. Thus, the issue to be resolved is whether or not an intensification of use arises, such that a material change in the use of the site would occur, resulting in development and the requirement for planning permission.

- The referrer's reference case law (Galway County Council v Lacknagh rock), where Judge Baron ruled that the onus on the Planning Authority is to prove that the intensification of activity amounted to a change of use which was material. The referrer has submitted updated environmental and traffic assessments of the relevant matters, confirming that no significant new or material impacts arise. The referrer concludes that no material change of use arises, and no development is taking place such that planning permission is required.
- In this instance, no change to the character of the existing use will occur as a result of the increased tonnage, which remains as recycling. It is entirely possible for an existing business to intensify and increase its operation without necessarily resulting in a material change of use, and that Glassco Recycling is one such example.
- The referrers are satisfied that none of the restrictions on exemptions as identified in Part 2, Article 9 of the Regulations 2001 apply to the increase in annual intake, including that cited by the Planning Authority under Article 9(1)(c), regarding the mandatory requirement for the submission of an EIAR. The increase in tonnage is below all mandatory EIAR thresholds and can, therefore, be considered as exempted development.
- The Planning Authority set out their arguments in terms of the factual information presented within the referral, rather than specifically assessing

the question asked within the referral, pertaining to the 23,000 tonne increase in output.

7.0 Response to Referrer's Submission

7.1 Response of Kildare County Council to the appeal of the Section 5, referral case is as follows:

- Kildare County Council have nothing further to add since the referral report prepared on the 19th day of March 2020.

8.0 Planning History

The following is the relevant planning history pertaining to the site:

Planning Authority reference number 18/563, In 2018 Glassco Recycling Ltd were granted planning permission for the construction an optical sorting unit within the existing glass recycling plant.

Planning Authority reference number 16/24, In 2016, Rehab Glassco Ltd were granted planning permission for the construction of s surface water treatment plant.

Planning Authority reference number 14579, In 2014, Rehab Glassco Ltd were granted planning permission for an extension to the glass recycling plant.

An Bord Pleanála reference number 09.SU.0015, In 2014 Rehab Glassco Ltd were granted substitute consent for a glass recycling facility. A Remedial Environmental Impact Assessment was submitted as part of the planning documentation.

9.0 Statutory Provisions

9.1 **Planning and Development Act 2000 (as amended)**

Section 2(1)

In this Act, except where the context otherwise requires—

“works” includes any act or operation of construction, excavation, demolition, extension, alteration, repair, or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

Section 3(1)

In this Act, “development” means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.

Section 5(7)

Requires that a planning Authority or An Bord Pleanála, in the case of a development specified in Part 2 of Schedule 5 of the Planning and Development Regulations, 2001 (as amended) to specify in is declaration or decision whether the development proposed would be likely to have significant effects on the environment, by virtue, of at least, of the nature, size or location of such development and require an Environmental Impact Assessment.

9.2 **Planning and Development Regulations, 2001 (as amended)**

PART 2 - Exempted Development.

Article 6(1) states:

Subject to article 9, development of a class specified in Column 1, Part 1, Schedule 2, shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1, opposite the mention of that class in the said column 1.

Article 9 further restricts the application of Article 6 in certain circumstances

Article 9(1) (c) states:

If it is development to which Part 10 applies unless the development is required by or under any statutory provision (other than the act of these Regulations) to comply with procedures for the purpose of giving effect to the Council Directive.

Schedule 5, Part 2, Article 13 (a) relates to any changes or extension of development already authorised, executed or in the process of being executed (not being a change or extension referred to in part 1) which would-

(i) Result in the development being in a class listed in part 1 or paragraphs 1-12 of Part 2 of this Schedule, and

(ii) Result in an increase in size greater than –

-25 per cent, or

-An amount equal to 50 per cent of the appropriate threshold,

Whichever is the greater.

10.0 Assessment

10.1 The Question of 'Development'

Having regard to the question before the Board, I propose to undertake my assessment by considering the following:

1. Whether the increase in annual intake of glass and aluminium cans from 97,000 tonnes to 120,000 tonnes at the Glassco Recycling Facility Is or is not development, or is or is not exempted development, within the meaning of the Planning and Development Act 2000, (as amended).

10.2 Does the increase in intake of recyclable glass and aluminium at an existing recycling facility constitute works?

Section 2(1) **-** In this Act, "works" are defied as "Any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal…...any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure".

Given that the referrer has clearly stated that no works will be carried out in order to affect the increase in tonnage, and that no material planning, environmental or traffic impacts will arise from the increase in tonnage intake, I am satisfied that proposed increase in tonnage intake would not comprise development, as defined in in Section 3(1) of the Act.

10.3 Would the proposed increase in tonnage intake represent an intensification of use, such that a material change in the use of the site arises, resulting in development and the subsequent requirement for planning permission?

Judge Barron held in the case of Galway County Council v Lacknagh Rock, that the onus is on the Planning authority (decision maker) to prove that the intensification of activity amounted to a change of use which was material. I note that the referrer has submitted environmental and traffic assessments, in the form of an EMA and TIA, both assessments conclude that no significant new or material impacts arise from the 23,000-tonne intake increase. Therefore, no

material change of use is considered to arise in this instance, and as no development is proposed in terms of additional buildings or processes, such that would require the benefit of planning permission.

The referrer states that no change to the character of the existing recycling use would occur as a result of the increased tonnage intake and that the main use will remain as recycling. I consider it reasonable for the referrers to intensity and increase operation on site without necessarily resulting in a material change of use.

The next element of the question is whether the development is or is not exempted development. In this regard I would refer the Board to the provisions Schedule 5, Part 2, Article 13(a) (ii), of the Regulations. This particular provision could trigger a requirement for the submission of a mandatory EIAR, and hence a planning application if either of the thresholds are breached. The thresholds set out relate to an increase in size greater than 25%, or an amount equal to 50% of the appropriate threshold, whichever is the greater. The appropriate threshold in this instance is 25,000 tonnes as set out within Article 11 (b) within the Regulations, and 50% of this figure, would amount to 12.500 tonnes. Clearly the 23,000-tonne increase, would exceed this figure. The existing permitted tonnage intake at the recycling facility is 97,000 tonnes. 25% of this figure amounts to 24,250 tonnes. The 24,250 figure is greater than the 12,500-tonne figure and therefore the referrer is entitled to use the greater figure in terms of a threshold, as per the provisions of Article 13 (a). Given the referrers proposals in this instance relate to a stated increase of 23,000 tonnes, which is less than the 24,250-tonne figure, the current proposals are considered to constitute sub-threshold development under the Article 13 (a) (ii) provisions. Therefore, I am satisfied that the submission of a mandatory EIAR is not required in this instance

under these provisions, given their entitlement to use the greater threshold provided for under Article 13 (a) (ii).

The Planning Authority raised two specific aspects of the planning legislation which they considered were pertinent to this particular referral. The first pertained to Article 13(a) (ii) of the Regulations and has been addressed in the paragraph above.

The second aspect raised by the Planning Authority is in relation to the actual annual tonnage intake at the recycling facility. The Planning Authority noted that the referrers exceeded the 120,000 annual tonnage intake in each of the five years between 2014 and 2018. The exceedance of the 120,000 figure is set out within the EMA prepared by Patel Tonra. Section 4.3.3 of this report identifies exceedances of between 4,417 and 6,205 tonnes for the years 2015 to 2017. Similarly, section 3.2 of the TIA where it states that "The facility is currently processing approximately 127,000 tonnes of glass per annum" and the annual returns from the referrer to the EPA as part of its Waste Licence Review stated that the annual tonnage intake for 2014 was 122,641. Based on the information set out within these documents, accompanying the Section 5 referral. It is apparent that the 120 000 figure has been exceeded for the last number of years, 2014-2018.

However, the question posed by the referrer to the Planning Authority and now to An Bord Pleanála relates to an increase from the permitted 97,000 tonnes to 120,000 tonnes. This increase is of a scale below the thresholds which would require the submission of a mandatory EIAR. I did consider the possibility of re-wording the question asked by the referrer, having regard to the figures provided within the environmental and traffic assessments. However, on balance, I

consider it appropriate to assess and address the specific question asked by the referrer.

I note the restrictions on exemptions as identified in Part 2, Article 9 of the Regulations 2001. However, it is apparent that none of the restrictions apply to an increase in annual intake, including that cited by the Planning Authority under Article 9(1) (c), regarding the mandatory requirement for an EIAR. I am satisfied, based on the question posed that the increase in tonnage is below all mandatory EIAR thresholds and can, therefore, be considered as exempted development.

11.0 CONCLUSION AND RECOMMENDATION

The proposals to increase the annual tonnage intake at the recycling facility is not development and is exempted development under Schedule 5, Part 2, Article 13(a)(ii) of the Planning and Development Regulations 2001, (as amended). The question, as posed is sub-threshold in terms of the requirement to submit a mandatory EIAR and therefore, there would not be a requirement to submit a planning application or substitute consent application in this instance. Therefore, the 23,000 annual tonne increase intake is not development and is exempted development.

WHEREAS the following question has arisen as to whether:

The increase in annual intake at its recycling facility from 97.000 tonnes per annum (as assessed during the Substitute Consent application pertaining to the site, permitted by An Bord Pleanála, in June 2014), to 120,000 tonnes per annum, at Unit 4, Osberstown Industrial Park, Caragh Road, Naas, Co. Kildare is or is not development or is or is not exempted development.

AND WHEREAS Kildare County Council, issued a declaration on the said question to the referrer on 10th day of March 2020, stating that the development

triggers two separate thresholds for the submission of a mandatory Environmental Impact Assessment Report as set out within the Planning & Development Regulations.

AND WHEREAS An Bord Pleanála, in considering this referral, had regard particularly to -

(a) Section 2 (1) of the Planning and Development Act, 2000, as amended,

(b) Section 3 (1) of the Planning and Development Act, 2000, as amended,

(c) Article 6(1) & Article 9(1)(c) of the Planning and Development Regulation's 2001, as amended,

(d) Schedule 5, Part 2, Article 13(a) (ii) of the Planning and Development Regulation's 2001, as amended,

AND WHEREAS An Bord Pleanála has concluded that –

- The increase in the annual tonnage intake in question is not development for the purposes of Section 3 of the Planning and Development Act 2000, as amended.
- The development comprises exempted development under Schedule 5, Part 2, Article 13(a) (ii) of the Planning and Development Regulations 2001, as amended.
- The development would be exempted development having regard to Article 9(1)(c) as it would be of a type that would be sub-threshold and not trigger the requirement to submit a mandatory Environmental Impact Assessment Report

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by section 5 (1) of the 2000 Act, hereby decides that:

(a) the increase in annual intake at the recycling facility from 97,000 tonnes per annum to 120,000 tonnes per annum is not development: and

(b) the increase in annual intake at the recycling facility from 97,000 tonnes per annum to 120,000 tonnes per annum is exempted development

at Unit number 4, Osberstown Business Park, Caragh Road, Naas, Co. Kildare

____

Fergal Ó Bric

Planning Inspectorate