



An
Bord
Pleanála

Inspector's Report 09.PF0002

Development	Point of detail regarding compliance with conditions of An Bord Pleanála's decision on 09.PA0004 and 09.PM0008.
Location	Drehid, Co.Kildare
Referrer	Kildare County Council
Planning Authority	Kildare County Council
Applicant	Bord na Mona
Type of Application	Section 37G(10) Planning and Development Act, 2000, as amended
Inspector	Stephen J. O'Sullivan

1.0 Introduction

- 1.1. A dispute has arisen regarding a point of detail in relation to conditions attached to planning approval reg. ref. PA0004, amended by PM0008. Under PA0004 the Board granted approval for the extension and intensification of the Drehid facility increasing the footprint of the landfill by 17.8ha and disposing of 360,000 tonnes of non-hazardous waste per annum for 7 years over. Condition 1 attached to the approval allowed for the acceptance of 360,000 tonnes per annum until 01/12/13. The Board approved an alteration to condition 1 under ref. PM0003 to allow for the acceptance of 360,000 tonnes per annum until 01/12/15. Under PM0008 a further alteration to condition 1 was approved allowing for the acceptance of 360,000 tonnes per annum until 01/12/17. The Board also altered condition 9 attached to decision PA0004 pertaining to haul routes and review of impact of HGV's on the road network. The respective parties have met and corresponded on a number of occasions and the parties have failed to agree on how the conditions are to be implemented. In the absence of an agreement being reached, a submission under the provisions of section 37G(10) was received by the Board from Kildare County Council to determine the points of detail as they relate to conditions 9 and 13 of PA0004 as amended by way of PM0008.

2.0 Planning History

- 2.1. **PL09.212059 (04/371)** – permission granted on appeal for an engineered landfill (footprint 21.2 hectares), to accept up to 120,000 tonnes per annum of non-hazardous residual municipal waste for disposal, a composting facility with a capacity of 25,000 tonnes per annum, for an operational lifespan of 20 years.

Condition 13 - All materials being imported to the site, either in the construction or operational phases shall be transported via one of the haul routes identified on figure TR1 (Rev A), received by the planning authority on the 12th day of August, 2004. After two years of operation of the proposed facility, a review of the impact of the Heavy Goods Vehicle movements generated on the local road network (defined in figure TRI (Rev A)) shall be carried out by the developer in conjunction with the planning authority. Any revisions to the routes allowed to and from the site shall be agreed and implemented within six months of the review and any consequent

additional payments necessary under condition 21 below shall be agreed between the developer and the planning authority or, in default of agreement, the matter shall be referred to the Board for determination.

Condition 21 - Special contribution under section 48 (2)(c) of the Planning and Development Act 2000 in respect of road improvements, traffic calming and public lighting which will benefit the proposed development.

Condition 22 - The developer shall pay to the planning authority a financial contribution of €238,283 in respect of public infrastructure and facilities benefiting development in the area of the planning authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000.

PA0004 – Direct application to the Board. Permission granted for extension and intensification of the waste management facility to accommodate an additional 240,000 tonnes per annum for disposal for 7 years of non-hazardous residual municipal waste [over and above the permitted disposal of 120,000 tonnes per annum of non-hazardous residual waste permitted for a 20 year period] entailing the extension of the landfill footprint by 17.8 hectares Condition 1 restricted the 360,000 tpa increase to December 2013 after which it was to revert to a maximum of 120,000 tpa in accordance with the conditions attached to the original permission, PL 09.212059, unless a further permission in this respect is granted.

Other conditions of relevance to this reference:

Condition 9 - All materials being transported to the site, either in the construction or operational phases shall be transported via the haul routes as identified in figure 4.9.1 of the Environmental Impact Statement. After one year of the acceptance of the facility of the increased capacity of 360,000 tonnes, a review of the impact of the Heavy Goods Vehicle movements generated on the local road network (defined in figure 4.9.1 of the Environmental Impact Statement) shall be carried out by the developer in conjunction with the planning authority. Any revisions to the routes allowed to and from the site shall be agreed and implemented within six months of the review and any additional payments necessary under condition number 13 of this order shall be agreed between the developer and the planning authority or, in default of agreement, the matter shall be referred to the Board for determination.

Condition 12 - Financial contribution in respect of public infrastructure and facilities benefiting development in the area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000.

Condition 13 - Special contribution under section 48(2)(c) of the Planning and Development Act, 2000 in respect of road improvements and traffic calming measures, which will benefit the proposed development.

- 2.2. **PM0003** - alteration to condition number 1 of Board Order 09.PA0004 in December 2013, extending the period for which 360,000 tpa can be accepted to the 1st day of December, 2015. Thereafter waste for landfill disposal at the facility shall be restricted to a maximum of 120,000 tonnes per annum, in accordance with the conditions attached to the original permission, PL 09.212059, unless a further permission in this respect is granted.
- 2.3. **PA0027** – permission granted in March 2013 for MBT facility. Condition 18 required the payment of a special contribution towards specified road improvements which would benefit the development. The development has not yet commenced.
- 2.4. **PM0008** – further alteration to *condition 1* allowed for 360,000 tpa until the 1st day of December, 2017. Thereafter waste for landfill disposal at the facility shall be restricted to a maximum of 120,000 tonnes per annum, in accordance with the conditions attached to the original permission, PL 09.212059, unless a further permission in this respect is granted.

The Board also altered *condition 9* as follows: All materials being transported to the site shall be transported via the haul routes as identified in Figure 4.9.1 of the Environmental Impact Statement. A review of the impact of the Heavy Goods Vehicle movements generated on the road network (defined in Figure 4.9.1 of the Environmental Impact Statement) shall be carried out by the developer in conjunction with the planning authority within three months of the date of this order. Any revisions to the routes allowed to and from the site shall be agreed and implemented within three months of the review, and any additional payments necessary under Condition Number 13 of this order shall be agreed between the developer and the planning authority or, in default of agreement, the matter shall be

referred to An Bord Pleanála for determination. **Reason:** In the interests of traffic safety, orderly development and the protection of amenity.

3.0 Kildare County Council's Submission

3.1. Kildare County Council has referred to the case to An Bord Pleanála for determination of a number of issues. The submission states that Bord na Mona and Kildare County Council have failed to:

1. Secure agreement in relation to organising the review of the haul routes as identified in Figure 4.9.1 of the EIS and conditioned by PL09.212059 (04/371), PL09.PA0004 and PM0008.
2. Consequent on failing to agree item 1, failure to agree if any revisions are necessary to the haul route or if any additional payments are due as a result of the review of the haul routes.
3. Failure to secure agreement in regard to the payment of €5,582,000 as detailed in an invoice dated 04/08/16 which relates to PL09.PA0004

3.2. Kildare County Council does not agree with Bord na Mona's intention to appoint Tobin Consulting, Civil and Structural Engineers to carry out the review who have been engaged by Bord na Mona on a number of occasions. Whilst their professionalism and capability is not in question it is of paramount importance that the public perception of the review should be that it is carried out by an independent party.

3.3. The Board's view is sought on the following:

- Who will carry out a review of the haul routes?
- Once the appointment of a consultant engineer is agreed, what the scope of the review should contain, is requested including how the base line/original condition of the haul routes for comparison purposes can be agreed.
- Clarification as to whether it is envisaged by the Board that the review could either recommend payment of compensation to Kildare County Council in respect of damage caused to the haul routes by the impact of HGV's travelling to and from the facility and/or make recommendations in regard to alternative

haul routes that should be used. If the review recommends payment of compensation does the Board expect Bord na Mona to pay such compensation to Kildare County Council?

- 3.4. Condition 9 as altered makes reference to any additional payments necessary under Condition 13 arising from the review. Condition 13 pertains to a special financial contribution in respect of road improvements and traffic calming measures which will benefit the proposed development. As a result of this condition an invoice was issued for €5,582,000. This has been disputed by Bord na Mona and remains outstanding.
- 3.5. While it is acknowledged and accepted that Bord na Mona paid Kildare County Council €197,500 in order to comply with the original intention of condition 21 of PI09.212059 the local authority maintains the position that condition 13 of PL09.212059 could still result in an additional financial contribution being payable as a result of the potential recommendations stemming from the review of the haul routes.
- 3.6. The County Council is seeking confirmation that the 3 month period referred in condition 9 of PA0004 as amended by PM0008 by which the review is to be carried out is suspended pending receipt of the determination.
- 3.7. The submission is accompanied by copy of correspondence between the respective parties to the determination including correspondence from Kildare County Council received by the Board on 19/12/16 provides details of meetings and correspondence held with Bord na Mona on the following dates 04/08/16, 09/08/16, 22/08/16, 24/08/16 and 07/09/16

4.0 Bord na Mona Response

The response which is accompanied by supporting detail and copies of correspondence with Kildare County Council can be summarised as follows:

- It is considered that the narrow framing of the referral is not appropriate or permissible. In default of agreement the Board must first determine the true and correct meaning of the conditions and, having done so, direct the parties as to how the conditions should be determined.

- The correct meaning of the conditions is clear and does not permit the interpretation being placed on them by the planning authority in which it infers an ongoing requirement for payment of compensation for damage caused to the haul routes by the impact on HGVs from Drehid.

Condition 9

- The applicant has attempted to engage with the PA regarding the review of the haul routes since 2012.
- Consequential additional payments under conditions 21 and 13 of the respective permissions should only arise in respect of any agreed and implemented revisions to the haul routes arising from the review.
- The purpose of the review is to determine whether or not it was necessary to revise the haul routes allowed to and from the site and whether any consequential additional payments were necessary under Condition 13 of PA0004 in respect of any additional haul routes necessitated by the outcome of the review. Whilst the PA does not concur with Bord na Mona it does not set an alternative interpretation. It cannot see any basis for a contention that the condition is intended to cover ongoing maintenance of existing haul routes.
- The referral to the Board appears to call into question the independence or at least the perceived independence of Tobin Consulting Engineers recommended by the applicant to assist with the review. It is intimately familiar with the regulatory development of the site and, in particular, the consultations which were undertaken with the PA in respect of the network of approved haul routes. It is a matter for Bord na Mona to choose its own advisors and it is open to the PA to do likewise.
- The relevant condition requires the review to be carried out by the developer in conjunction with the PA. It is not open to the PA to interpret this as requiring the parties to agree on an independent expert to undertake the review.
- The PA is misdirected in interpreting the haul routes review condition as requiring the assessment of the original condition of the haul routes. Bord na

Mona has paid in full the contributions required in respect of the relevant development contribution scheme and a special contribution in respect of specific exceptional development works necessitated by the development with respect to the permitted haul routes. Any additional special contribution may only relate to specific infrastructural works to any revised haul routes required to facilitate the development.

- The PA must take some responsibility for any difficulty in agreeing a base line/condition of the approved haul routes at this stage having failed to engage sooner on the matter.
- It is its view that the review could not recommend payment of compensation in respect of damage caused to haul routes by the impact of HGVs.
- The PA's referral does not specifically seek a determination in respect of the sum detailed in the invoice dated 04/08/16 but maintains that the sum remains outstanding. It is not entitlement to issue an invoice in the absence of acceptance by the developer.
- The figure of nearly €6 million identified to satisfy compliance with conditions 13 is in stark contrast to the amount of €389,390.48 previously recommended in 2008.
- The PA has attributed a complete road upgrade to the development on the basis of its unsubstantiated estimate that 2% of the traffic using those roads is associated with the development. In any event the calculation of a special contribution on such a generalised basis does not appear to be an appropriate basis for calculated 'specific exceptional costs' within the meaning of section 48(2)(c); such a generalised methodology fails to differentiate between costs associated with road improvements generally and development specific costs of the nature contemplated by the said section.
- The PA did not write to Bord na Mona following grant of permission under PA0004. No additional specific exceptional costs in respect of road improvements and traffic calming required to benefit the development were identified by, or agreed with Kildare County Council as there was no revision to the approved haul routes under the permission.

- It has complied with all relevant development contributions to date. In 2006 in response to a request from the Planning Authority it paid €197,500 as a special contribution as per condition 21 attached PL09.212059 (04/371). The €238,283 financial contribution stipulated in condition 22 was also paid.
- Condition 9 of PA0004 superseded condition 13 of the permission PL09.212059. Under the previous permission the applicant sought to engage with the local authority regarding the review in 2012 notwithstanding that the facility had yet to accept the increased annual capacity of 360,000 tonnes per annum.

5.0 Assessment

- 5.1. Kildare County Council in its referral to the Board is seeking determination on points of details to be agreed between the applicant and the planning authority in compliance with conditions attached to decisions PL09.212059 (04/371), 09.PA0004 and 09.PM0008. The submission does not make reference to the respective section(s) of the Planning and Development Act, 2000, as amended under which the referral is being made.
- 5.2. In the interests of clarity I note that the issues arising with regard to PL09.212059 would be addressed under Section 34(5) of the Act and those pertaining to PA0004 and PM0008 under Section 37G(10) of the Act.
- 5.3. It is my opinion that Condition 9 attached to the PA0004 superseded that condition 13 attached to PL09.212059 (04/371) and, consequent to the Board's decision on the request to alter condition 1 attached to PM0008, was further altered. I submit that this is the relevant condition for determination at this juncture. The condition reads as follows:

All materials being transported to the site shall be transported via the haul routes as identified in Figure 4.9.1 of the Environmental Impact Statement. A review of the impact of the Heavy Goods Vehicle movements generated on the road network (defined in Figure 4.9.1 of the Environmental Impact Statement) shall be carried out by the developer in conjunction with the planning authority within three months of the date of this order. Any revisions to the routes allowed to and from the site shall be agreed and implemented

within three months of the review, and any additional payments necessary under Condition Number 13 of this order shall be agreed between the developer and the planning authority or, in default of agreement, the matter shall be referred to An Bord Pleanála for determination.

Reason: In the interests of traffic safety, orderly development and the protection of amenity.

- 5.4. Firstly the parties have failed to agree on the interpretation of the condition in terms of organising the review. From the documentation accompanying the respective submissions the matter of the consultants to be retained to undertake the work is a kernel issue. Bord na Mona wish to retain Tobin Consulting Engineers to assist it in the review whilst Kildare County Council, whilst not questioning the professional integrity of the company, consider the issue of public perception of impartiality to be relevant in view of the fact that the said company has undertaken work on behalf of the applicant at Drehid.
- 5.5. It is my reading of the submission that it is Kildare County Council's interpretation of the condition that the carrying out of the review by the applicant *in conjunction* with it includes the agreement as to consultants to be used. Bord na Mona does not concur with this view.
- 5.6. My interpretation of the phrase *shall be carried out by the developer in conjunction with the planning authority* means for the review to be carried out in co-operation/in collaboration with each other. I do not consider that this is the same as the carrying out of the review by the developer *to be agreed with the planning authority* which is also a commonly used phrase in planning conditions. However I would not consider that the meaning of the condition extends to the planning authority stipulating whom may assist the applicant in the conducting of that review. It is envisaged as a collaborative exercise in which the planning authority can exert its equal position/standing in the findings. Therefore I submit that the planning authority cannot enforce the applicant to direct who may undertake work on its behalf.
- 5.7. I consider that the purpose of the review as set out in the condition is clear namely to identify the impact, if any, of the Heavy Goods Vehicle movements generated on the road network (defined in Figure 4.9.1 of the Environmental Impact Statement) and to identify if any revisions to the routes allowed to and from the site are required.

- 5.8. Kildare County Council in its referral requests the Board to determine what the scope of the review should contain including how the base line/original condition of the haul routes for comparison purposes can be agreed. In order to assist my assessment I have had regard to the previous applications pertaining to the site.
- 5.9. In terms of the parent permission granted in November 2005 under ref. PL09.212059 (04/371) a similar condition was attached (condition 13) requiring a review of the haul routes after a two year period. This was not dependent on a certain tonnage per annum being reached as required by the later permission under PA0004. From the details on file no such review appears to have been undertaken although this may have been due to the fact that the application for extension and intensification was lodged with the Board under ref. PA0004 in April 2008 most likely prior to the expiration of the said 2 year period following commencement of operation.
- 5.10. Concurrently condition 21 attached to the parent permission required the payment of a special contribution in respect of road improvements, traffic calming and public lighting which would benefit the proposed development. From the details provided by Bord na Mona this contribution of €197,500 which was subject to agreement with the planning authority was paid in 2006. In the absence of any referral to the Board for determination I conclude that both parties accepted that the sum covered expenditure that would have arisen in terms of improvements to roads including the haul routes.
- 5.11. The Board granted permission for the extension and intensification of the facility in 2008 under ref. PA0004 subject to conditions. Condition 13 pertaining to a review of the haul routes was effective after one year of the acceptance of the increased capacity of 360,000 tpa. As the said tonnage was not reached the review was not conducted. Notwithstanding Bord na Mona wrote to Kildare County Council in 2012 seeking to initiate the review notwithstanding the fact that the capacity trigger was not reached. The County Council did not respond. In this regard I note that the routes to be used are as detailed in the EIS and Addendum report by the applicant making reference to the need for improvements. As to why the County Council did not avail of the opportunity when it arose is unclear.
- 5.12. I also note that the Board in its decision to grant permission for the MBT facility on the site under ref. PA0027 in March 2013 by way of condition 18 required the

payment of a special contribution towards specified road improvements which would benefit the development. The development has not yet commenced. The haul routes presented in Figure 11.1 of the EIS correspond with those given in Figure 4.9.1A of PA0004.

- 5.13. Due to the fact that the tonnage threshold was not met under PA0004 the requirement to retrospectively apply a review to that date would not be in accordance with the parameters of the condition as intended by the Board it could be argued that the review should be of the condition of the haul routes and the ability to continue to accept the increased tonnage for the remaining period.
- 5.14. As such I would suggest that the baseline for the review of the haul routes would pertain from the date of the grant of permission under PM0008 in 2016. As evident in the information provided by various parties on file ref. PM0008 alterations to the haul routes have been required arising from certain events which would provide information to steer the review.
- 5.15. A material issue in the dispute also arises as to interpretation of the section of the condition providing for additional payments necessary under Condition Number 13, namely whether additional payments necessary would pertain to any revisions to the haul routes allowed, only, or whether additional payments would be required arising to cover costs of works required along the identified haul routes and any revisions to same and applied retrospectively as contended by Kildare County Council.
- 5.16. In the assessment of the application for extension and intensification under ref. PA0004 I note the Inspector in her assessment stated:

The impact of increased traffic on the road pavement on the haul routes was raised by the planning authority. It is acknowledged in both EIS and the Addendum Report that there will be some adverse impact on the pavement of the roads to the extent that weak sections of the existing pavement will be subject to increased loading and may require strengthening. It is also accepted that HGV's are the major cause of damage. Whilst a visual inspection of the haul roads revealed that they are in relatively good condition, there are localised sections showing signs of deterioration that are in need of remedial works. The Board addressed this issue in the previous permission

through the imposition of a two conditions. Condition No 21 required the payment of a special contribution towards road improvements, traffic calming and public lighting. The First Party has stated its agreement to the imposition of a similar condition with respect to the proposed development, which is considered reasonable. Condition No 13 facilitated a review of the impact of HGV's on the designated haul routes after two years of operation with an opportunity for a review of the routes and to reassess the contributions based on what is happening on the ground. The planning authority stated that this afforded a level of comfort with regard to the future of the haul routes and stated in the event of permission being granted for the proposed development, that a similar type arrangement should be put in place, which is also considered reasonable. (pg.23 Inspector's report)

- 5.17. The purpose of the condition therefore is to facilitate a review of the impact of HGV's on the designated haul routes with an opportunity for a review of the routes and to reassess the contributions based on what is happening on the ground. On this basis therefore I submit that any additional financial contribution would be with respect to the identified haul routes in terms of exceptional costs and any revisions to same. Such a special contribution is not intended to cover the ongoing maintenance of the approved haul routes.
- 5.18. As stated above I consider that condition 9 originally attached to PA0004 and amended under PM0008 supersedes that attached to the parent permission and as such I would not concur with Kildare County Council's view condition 13 as attached to same can be invoked.
- 5.19. The purpose of the review is to determine whether or not it was necessary to revise the haul routes allowed to and from the site and whether any consequential additional payments were necessary under Condition 13 of PA0004 in respect of any additional haul routes necessitated by the outcome of the review. Should there be an absence of agreement at that juncture then the matter would be referred to the Board for determination.

5.20. Ultimately, if the parties to a dispute cannot agree on an issue that falls to be determined under a planning condition, the board's role would necessarily involve choosing between proposals submitted by the parties. The board is not in a position to engage in or supervise an ongoing process between the developer and the planning authority, or to carry out surveys, supervise traffic flows or formulate proposals regarding haul routes or works to them.

6.0 Conclusions

6.1. I would therefore advise the board that –

- The developer's obligation to provide a special contribution under condition no. 21 of the grant of permission PL09. 212059 was met by the payment of €197,500 in 2006. Condition no. 13 on that permission was superseded by condition no. 9 on the approval under PA0004, which condition was then amended by the board under PM0008. The terms of the latter condition therefore govern the issues in the dispute raised by the planning authority.
- The planning authority may not determine whom the developer employs to fulfil its obligations under condition no. 9 of PA0004.
- The condition of the road network serving the authorised development on the date on which the board amended that condition under PM0008 on the 12th September 2016 would be the appropriate baseline upon which the required review of the condition of the haul routes would be based.
- Monies that might be payable under condition no. 13 of PA0004 subsequent to a review under condition no. 9 could only refer to costs that relate to works to the haul routes (being those that have previously been designated or any revised routes designated pursuant to the review) which are exceptional and specified. They should not be used to defer the costs associated with ongoing maintenance, nor should they be calculated by reference to general estimates of the cost of unspecified works or a fraction thereof.

7.0 Recommendation

7.1. I recommend that the board advise the parties as follows-

The developer's obligation to provide a special contribution under condition no. 21 of the grant of permission PL09. 212059, Reg. Ref. 04/371 has been fulfilled.

Condition no. 13 on that permission has been superseded by condition no. 9 on the approval under PA0004, which was then amended by the Board under PM0008.

The terms of the latter amended condition govern the matters now raised by the planning authority.

The condition of the road network serving the authorised development on the date on which the board amended approval PA0004 by its decision under PM0008 on the 12th September 2016 would be the appropriate baseline upon which the required review of the condition of the haul routes would be based. The planning authority may not decide whom the developer employs to fulfil its obligations under condition no. 9 of PA0004. If the planning authority and the developer have not agreed how the required review of the haul routes is to be carried out, then the developer should proceed to carry out its review without such agreement. The planning authority is not obliged to accept the conclusions of such a review with regard to the revision or otherwise of the haul routes. The planning authority may make its own proposals in this regard to the developer. If agreement on any such proposals is not forthcoming then they may be submitted to the board for determination under condition no. 9 of PA0004 as amended. The planning authority is not required to wait before making such proposals. In the absence of agreement between the planning authority and the developer or a determination by the board, the haul routes shall be those identified on Figure 4.9.1 of the EIS.

The review that is completed by the developer may recommend amounts to be paid to the planning authority as special contributions under condition no. 13 of PA0004. The planning authority is not obliged to agree to any such amount and may make its proposals to the developer in this regard. In the absence of agreement on the matter it may be referred to An Bord Pleanála for determination of the amount payable as special contributions in respect to the authorised development. The additional payments that may arise under condition 13 subsequent to a review under condition no. 9 can only refer to costs arising from works to the haul routes that have

previously been designated or any revised routes designated pursuant to the review and where such works are exceptional and specified. The special contributions should not be used to defer the costs associated with ongoing maintenance, nor should they be calculated by reference to general estimates of the cost of a type of works or a fraction thereof.

Stephen J. O'Sullivan
Planning Inspector

15th March 2017