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From: [REDACTED]
Sent: 18 April 2024 18:28
To: Appeals2
Subject: First Party Response to ABP Letter - ABP Ref. 319333-24
Attachments: Section 5 ABP Submission 18 April 2024.pdf

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To whom it concerns

Please see attached a Submission made response to the Board's Letter dated 2nd April 2024, in relation to the above referenced file.

I would appreciate acknowledgement of receipt of this email.

Regards

Julie Costello
Associate

Tom Phillips + Associates
Town Planning Consultants



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The Secretary
An Bord Pleanála
64 Marlborough Street
Dublin 1

Thursday, 18th April 2024

[By Email: Appeals@pleanala.ie]

Dear Sir/Madam,

Re: SECTION 5 REFERRAL– GLASSCO RECYCLING, UNIT NO. 4, OSBERSTOWN INDUSTRIAL PARK, CARAGH ROAD, NAAS, CO. KILDARE

AN BORD PLEANÁLA (ABP) REF. ABP-319333-24

Introduction

Tom Phillips + Associates, Town Planning Consultants, have been requested by Glassco Recycling Ltd., Unit No. 4, Osberstown Industrial Park, Caragh Road, Naas, Co. Kildare to prepare this response to the correspondence received from the Board dated 2 April 2024. The correspondence encloses the High Court Order (dated 21 July 2023) regarding the previous Section 5 process (see ABP Ref: 307207-20), which quashed the previous ABP Decision of 25 May 2021. This matter was remitted to the Board for new assessment and the file has been re-activated. In the interest of justice, we have been requested by the Board to make any further general submissions/observations on the referral.

To reiterate, the original question referred to the Board for its assessment was as follows

‘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 within the meaning of the Act?’

The An Bord Pleanála Inspector who assessed the previous Section 5 concluded that the change in annual intake did not require planning permission but this was subsequently overturned by the Board, who considered that it did not constitute exempted development.

Previous Board Order

Our primary contention, which is based on updated technical assessments pertaining to air, noise, storm water and traffic impacts assessing the potential change in impact between the 97,000 tonnes and 120,000 tonnes, is that these impacts were not material and would not give rise to any intensification of use such that a change of use had occurred necessitating planning permission.

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The Board's Decision was rationalised through the following reasons:

'(a) the increase in the annual tonnage intake at the facility of 23,000 tonnes is material in terms of additional volume compared to the annual tonnage of 97,000 tonnes as permitted under An Bord Pleanála Reference: 09.SU0015'.

Applicant Comment:

It is a well-established principle, both in planning practice and case law, that materiality is not assessed simply by way of numerical calculation in isolation, but relates to whether or not the change gives rise to material planning impacts. Thus, there is no basis to assert that the change in tonnage from 97,000 tonnes to 120,000 is, of itself, material in planning terms. This is an incorrect assertion in planning terms.

'(b) the increase in the annual tonnage intake raises material planning issues including potential impacts from additional traffic movements to and from the subject site onto the public road network, from additional storm discharge levels and from additional dust deposition levels';

*Updated
impact
assessments?*

Applicant Comment:

There is no evidence on file that the increase in annual tonnage intake at the facility would raise material planning issues including *'...potential impacts from additional traffic movements to and from the subject site onto the public road network, from additional storm discharge levels and from additional dust deposition levels'*. In fact, the assessments in this regard as submitted by the Applicant confirm that this is not the case and measure actual impact, as opposed to potential or possible impact.

It should also be noted that there must be an actual material impact arising (as opposed to *'potential impacts'*) for there to be a requirement to seek planning permission on intensification of use grounds. In *Galway County Council v. Lackagh Rock*, Barron J held that it was not sufficient for the council to simply establish that an intensification of use had taken place. It had to prove that the intensification of activity amounted to a change of use which was material. Barron J described the test as follows:

'To test whether or not the use is materially different it seems to me that what should be looked at are the matters which the planning authority would take into account in the event of a planning application being made either for the use on the appointed day or for the present use. If these matters are materially different, then the nature of the use must equally be materially different.' [our emphasis]

In the case of Glassco Recycling, the matters which the Planning Authority or An Bord Pleanála would take into account in respect of the increase in annual intake under discussion here would be unchanged in respect of the existing recycling facility use. In addition, as described above, the Applicant has submitted documentary planning evidence by way of updated impact assessments of the relevant matters as noted above that, when compared to the previously assessed annual tonnage, categorically confirm no significant new or material impacts arising. On that basis, we contend that there is no material change of use arising in this case and no development taking place such that planning permission is required.



'(c) the increase in the annual tonnage intake at the facility would therefore constitute a change in the use of the facility that is a material change in the use by reason of intensification';

Applicant Comment:

In our opinion, there is no basis for the Board to reach this conclusion based on the assessments submitted as part of the Section 5 submission. All assessments conclude that no material impacts arise. The Board Inspector concurred with this analysis.

'(d) There is no provision in planning legislation by which such development could be deemed exempt'.

Applicant Comment:

We disagree with this conclusion. Our submissions have proved that material impacts will not arise as a result of the increase in annual intake. As such, the change does not constitute development and, accordingly, planning permission is not required in line with the legislation.

Previous Board Direction

The previous Board Direction stated the following:

'In deciding not to accept the recommendation of the Inspector the Board determined that while the increase in annual intake of 23,000 tonnes would fall below the threshold of 24,250 tonnes whereby a mandatory EIAR would be triggered in this instance and the provisions of article 9(a)(c) of the Planning and Development Regulations 2001, as amended, would apply, this does not mean that such an increase in annual tonnage would not raise material planning issues'.

In the interest of clarity, at no stage, has the Applicant sought to link the relevant EIA thresholds and any mandatory requirement to prepare an EIAR with the issue of material impacts. In our view, these are separate matters. It would appear that all parties agree that the tonnage increase of 23,000 tonnes does not trigger a mandatory EIAR under the legislation.

We have never contended that because this is the case, there would be no material planning issues arising. On the contrary, notwithstanding the clear position regarding EIA in this case, the Applicant commissioned bespoke technical assessments of the relevant matters to assess the impact of increasing annual intake from 97,000 to 120,000 tonnes. Thus, no assumptions were made arising from the EIA issue in this regard. We note that the *'material planning issues'* raised by the Board have been thoroughly assessed by the Applicant and conclude that no material planning impacts arise, a conclusion supported by the Board's Inspector.



The Direction further states:

'In addition, the Board considered that the limits set within a Waste Licence do not automatically preclude any planning implication arising from an increase of 23,000 tonnes in annual intake at the waste facility. On the basis of the information on file, the Board did not share the view of the Inspector that such an increase would not raise material planning issues as described above.'

As above, at no stage has the Applicant sought to argue that the limits stipulated in any Waste Licence pertaining to this site precluded or otherwise influenced this Section 5 planning assessment regarding an increase in annual intake. This matter is being rationalised by the Applicant on its planning merits and relates to the question as submitted to Kildare County Council in the first instance and, subsequently, An Bord Pleanála in relation to the increase in annual tonnage intake from 97,000 to 120,000 tonnes. This is the only issue for consideration – we are not relying on a Waste Licence to support this case.

Finally, we note that the Board deviated from its Inspector's recommendation on this assessment. The Inspector reached his conclusions based on the Applicant's assessments that accompanied the Section 5 application and planning judgement of the matter at hand. Whilst the Board notes that *'On the basis of the information on file'*, it did not *'...share the view of the Inspector that such an increase would not raise material planning issues as described above'*, the planning file in this case supports in full the Inspector's rationale and recommendation and the Applicant's position. We fail to see any basis as to how the same planning file can be cited to draw a polar opposite conclusion, when the enclosed assessments clearly conclude that material impacts on foot of the changed tonnage do not arise. This is not clear in the Board Direction.

Conclusion

We contend that in this case, the proper basis for planning assessment is whether or not the increase in activity constitutes an intensification of use such that a material change of use occurs as described above, thereby necessitating a new grant of planning permission. We are satisfied that based on the updated assessments completed by the Applicant, and having regard to relevant case law, no such materiality arises on foot of the change in annual intake. The increase in tonnage to 120,000 tonnes per annum is below all potential mandatory EIAR thresholds and can, therefore, be considered as development not requiring planning permission. The Board Inspector concurred with this view. We request that An Bord Pleanála consider the above matter and determine that the increase in annual intake from 97,000 tonnes to 120,000 tonnes at the Glassco Recycling Facility is not development and is exempted development.

We look forward to acknowledgement of receipt of this submission in due course and please contact the undersigned should any additional clarification or information be required.

Yours sincerely

John Gannon
Director
Tom Phillips + Associates