THE HIGH COURT
JUDICIAL REVIEW

[2024] IEHC 94

[RECORD NO: 2022/58JR]

IN THE MATTER OF SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN:

ST. MARGARET'S RECYCLING AND TRANSFER CENTRE LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

JUDGMENT OF Ms. Justice Siobhán Phelan, delivered on the 20th day of February, 2024

INTRODUCTION

1. The Applicant challenges the Board's decision pursuant to section 37 of the Planning and Development Act 2000, as amended ("the 2000 Act") to refuse permission, on appeal, to the Applicant for, *inter alia*, retention permission for the permanent continuation of the use of the existing waste processing and transfer facility and the continued use of the existing buildings on site associated with same; and planning permission for new proposed stormwater attenuation storage tanks and associated stormwater treatment infrastructure ("the development").

2. The waste processing and transfer facility has been in operation at its current location at Sandyhill, St. Margaret's, County Dublin, in proximity to Dublin Airport for more than 24 years. Since planning permission was originally granted, it has benefitted from a series of time-limited grants of planning permission and a waste licence issued by the Environmental Protection Agency. The zoning in the Fingal County Development Plan 2017-2023 (hereinafter "the CDP") for the site location is recorded as "DA" – Dublin Airport, the objective of which is to ensure the efficient and effective operation and development of the airport in

accordance with the adopted Dublin Airport Local Area Plan. The site extends to an area of in or about 2.93 Ha.

3. In the decision under appeal to the Respondent, the local authority granted retention permission subject to seventeen conditions including a condition restricting the grant of permission for a period of three years. Appeals were pursued by a third-party objector, who appealed against the grant of permission, and by the Applicant who appealed against three of the conditions imposed, including the condition restricting the duration of the permission to three years.

4. The Respondent's decision to refuse permission was based on the Inspector's Report in which it was found, *inter alia*, that the proposed use materially contravened land use zoning objectives for the site and that insufficient information had been submitted regarding the activities and processes carried on, the volume of waste produced, the nature and quantity of emissions, mitigation or monitoring proposed and measures to prevent and contain fire and to control the discharge of fire water such as to enable the Board to assess the likely impacts of the proposed development on the environment, including impact on protected sites.

5. The decision to refuse is challenged in these proceedings on the basis, *inter alia*, that the treatment of the zoning issue was "*seriously defective*" and the Respondent erred in law and fact in concluding that it had insufficient information to screen for Appropriate Assessment (hereinafter "AA") or Environmental Impact Assessment (hereinafter "EIA").

BACKGROUND AND CHRONOLOGY

6. Planning permission for the facility was first granted in 1998 on foot of an application for retention (F97A/0109). This grant permitted 10,000 tonnes of annual waste to be processed at the Facility. It was a further condition of the permission granted that only inert no-domestic waste would be delivered to the site. This permission was not subject to a temporary period.

7. Since then, several planning permissions have been granted allowing for the expansion of the facility, except for a small number of grants in respect of an expanded site area and infrastructure, these have been time-limited grants of permission relating to use which have required successive applications.

8. Accordingly, in August, 2004, permission was granted for the retention of an existing stone road and stone area for use as agricultural storage, hard standing for use as parking of trucks ancillary to waste transfer depot on an adjacent site (F03A/1682). Permission was also given for retention of single storey buildings comprising office accommodation, canteens, toilets, weighbridge control room, securing fencing and skip storage on an enlarged site encompassing the site previously granted permission under (F97A/0109). Notably, permission granted in 2004 did not expand on the weight or nature of waste throughput permitted under the original permission.

9. Further development on site was refused in April, 2005 when permission was refused for the development of a concrete batching plant, bunded fuel oil tank, storage bays, water recycling unit and other associated works (F05A/0233).

10. In December, 2010, a 3-year permission and retention permission was granted to regularise onsite facilities then operating outside the permissions previously granted for the site (expired in December, 2013). This permission was conditioned on the basis that the annual throughput for all waste streams on site would not exceed 25,000 tonnes per annum. It also provided that only inert non-domestic waste be delivered to the site.

11. In September, 2011 permission was refused for change of use of existing green waste storage building to a de-pollution/recovery building for end-of-life vehicles (hereinafter "ELVs") (F10A/0177) on the basis, *inter alia,* that this would contravene land use zoning objectives for the site.

12. In May, 2012 a 3-year permission was granted for the establishment of an authorised treatment facility for the de-pollution /recovery of ELVs (F11A/0443). It was a condition of the permission that upon its expiry the site be reinstated to the satisfaction of the Planning Authority.

13. Most recently, in August, 2014, a 5-year permission was given (expiring in August, 2019) for the continuation of use of the waste facility (FA1A/0409). This permission authorised, *inter alia*, a throughput of waste not exceeding 21,900 tonnes per annum.

14. An application for permanent continuation of use of the existing waste processing and transfer facility with an increase in waste to accept up to 49,500 tonnes per annum was submitted under Reg. Ref. FW 191/0135 but subsequently withdrawn (in or about October, 2019). There is very little information on the Planning File in relation to this application but it is referred to. It appears that EIAR was submitted in support of this withdrawn application.

15. From the documentation on the Planning File it is clear that although the Environmental Protection Agency (EPA) granted a waste licence authorising reception of up to 60,000 tonnes of waste per annum in 2001, during the period 1998 to date the maximum annual throughput of waste permitted under planning permission has been 25,000 tonnes (pursuant to a temporary 3-year permission granted in 2010).

16. The current waste facility permit in place issued in July, 2019 for a 5-year period and it recites that the maximum amount of waste to be accepted at the facility per annum is 21,900 tonnes. As documented on file, however, it is accepted that waste in excess of limits fixed as conditions of planning have been handled on site. A previous EIAR provided for the development under Reg. Ref. FW 191/0135, referred to in the Inspector's Report, highlighted that the development had handled volumes of 36,391 tonnes.

17. On the 27th of February, 2020, after the expiry of the previous 5-year permission granted in August, 2014, and having withdrawn an application for waste processing at levels of up to 46,900, the Applicant made an application to the Planning Authority for retention and planning permission. The application sought permission for the permanent continuation of the use of the existing waste processing and transfer facility for the bulking, transfer and recycling of metals, construction and demolition waste, bulky/skip waste and an authorised treatment facility for ELVs, accepting 24,900 tonnes of waste per annum. Retention permission was also sought for the continued use of the existing buildings on site associated with the daily operations of the facility including processing shed, offices, plant room, shelter buildings, existing site services, boundary treatments and all ancillary site development works necessary to facilitate the development already erected. In addition, planning permission was sought for new proposed stormwater attenuation storage tanks and associated stormwater treatment infrastructure to serve existing development, with permission also sought to restore part of the lands to agricultural use.

18. A detailed planning statement was prepared by the Applicant's planning consultants in support of the application. In this statement reliance was placed on the nature of the permissions on site which over time "*essentially would equate to a permanent permission*". It was stated that the facility had been compliant with planning and regulatory guidelines since 1997. It was stated that while waste disposal and recovery is not permitted under the CDP 1917-2023, activity at the subject site represents a non-conforming land use under Objective Z05 and was permissible as:

> *"..the principle of a recycling facility at St. Margaret's Recycling as a non-conforming use was established and permitted in the previous grant of permission on the lands in 2014 by Fingal County Council. It can be considered that the proposed continuation of use of the existing facility can be considered an appropriate and acceptable use on the subject lands in accordance with Objective Z05 of the Fingal County Development Plan 2017-2023. The existing recycling facility is an established use on the lands for nearly 23 years with all existing services including existing buildings, hardstanding, weighbridge etc. in place."*

19. In the Planning Statement repeated reference was made to the fact that waste material of up to 60,000 tonnes had been previously been accepted on the site whilst at the same time it was maintained that the use was in accordance with planning permission. The incongruity of an assertion of compliance with planning permission in accepting waste of up to 60,000 when the maximum waste throughout permitted under a planning permission over the life span of the site was 25,000 tonnes per annum was not addressed. The Planning Statement asserted that the use on site was "*currently operated under and in accordance with temporary planning permission Reg. Ref. F13A/0409"* and did not address the fact that as of the date of the submission of the Planning Statement in February, 2020, the said planning permission had expired.

20. The significance of a waste throughput of 24,900 tonnes per annum in the application is that it was just below the threshold for mandatory EIA. EIA is required for installations with an intake of 25,000 tonnes or more per annum (Class 11(b), Part 2, Schedule 5 of the Planning and Development Regulations 2001 (S.I. 600 of 2001)(as amended) (hereinafter "the PDR, 2001"). In response to the Planning Authority's request for further information in which reference was made to the fact that the quantity of the waste for which permission was sought

was at 99.6% of the threshold at which mandatory EIA is required and a request for a reduced intake of waste to ensure an adequate buffer, the Applicant confirmed by letter dated the 18th of September, 2020 that it was revising its application to seek permission to accept up to 24,000 tonnes of waste per annum at the Facility (reduced from 24,900 sought in the original application submitted). At levels of waste of less than 25,000 tonnes per annum the proposed development is a sub-threshold development for the purposes of mandatory EIA but an EIA may still be required where it is considered that the development is likely to have significant effects on the environment. Accordingly, the PDR, 2001 provides for screening of sub-threshold development for EIA. Schedules 7 and 7A of the PDR, 2001 identifies the information to be provided by the developer for the purposes of screening the sub-threshold development and the criteria for determining whether development should be subject to EIA.

21. In this case the application for permission was accompanied by, *inter alia*, screening reports for EIA and AA. The EIA and AA screening reports submitted with the application were updated in response to the request for further information from the Planning Authority and a subsequent request for clarification of the further information.

22. In the EIA screening report submitted in September, 2020 it was stated:

> *"the proposed development is essentially the same development permitted under Reg. Ref. F13A/0409 which was granted for a temporary period of five years only which has now expired. The permitted development was previously screened for an Environmental Impact Assessment and was confirmed as sub-threshold for the purpose of EIA. The proposed development for a waste recycling facility accepting up to 24,000 tonnes remains sub-threshold for the purpose of EIA."*

23. The EIA screening report concluded that the proposed development is not likely to have significant effects on the environment and a full EIAR is not required to be prepared as part of the planning application.

24. Similarly, the updated AA Screening Report submitted in September, 2020 following a request for further information from the Planning Authority, stated:

"this development will not add to any pressure in the catchment area that could act in combination to result in significant effects to Natura 2000 sites."

25. It was noted:

"This proposed development is not located within or directly adjacent to any SAC or SPA but pathways do exist to a number of these areas. An assessment of project has shown that significant negative effects are not likely to occur to these areas either alone or in combination with other plans or projects. No mitigation measures have been relied upon to arrive at this assessment."

26. In its consideration of the application the subject of these proceedings the Planning Authority engaged its own Environmental and Planning Consultants to review the AA and EIA screening reports submitted. Having assessed the information and noted the reduction to 24,000 tonnes waste, the Planning Authority concluded that a full EIAR was not required for the proposed development. It further found that a Stage II AA was not required. Notwithstanding these conclusions, the Planning Authority noted some deficiencies in the information provided specifically relating to fire safety and the restoration of parts of the land to agricultural use as recorded in the Planning Officer's Report.

27. Separately, the Planning Authority also considered the question of non-conforming use under the CDP noting that the extent to which uses may reasonably be extended and improved is governed by Objective Z05 of the CDP 2017-2023. The Planning Authority accepted that the continued operation on the site over a period exceeding 22 years and the stated objectives of the CDP in terms of non-confirming use meant that the continuation of use of the development was acceptable in principle, subject to assessment.

28. On the 12th of April, 2021, the Planning Authority made a decision to grant permission, subject to 17 conditions. One of these, condition 2, restricted the grant of permission for a period of three years from the date of final grant. The reason given for not granting full permission as recorded in the Planning Report was:

"it is considered that due to the deficiencies in the information submitted as part of the clarification of additional information, a permanent permission could not be

considered appropriate in this instance. A temporary three-year permission will be conditioned along with conditions for the submission of required information particularly in respect of land restoration, fire prevention, noise impact and waste streams with the additional information and assessments to be submitted and agreed with the Planning Authority within set timeframes…"

29. Appeals to the Respondent against the decision were lodged by both the Applicant and a Third Party. The Third-Party appeal was lodged by letter dated the 7th of May, 2021. In his detailed appeal the Third Party observed that:

"the facility has transformed from dry recycling facility of construction demolition waste into a major scrap yard. The industrialisation and change of activities on the site have not been permitted through the normal planning process and the continuation of such activities that involves the [sic] industrial processing can not be deemed to be exempt from environmental risk assessment based on a tonnage figures."

30. In its Appeal submitted by letter dated the 10th of May, 2021 the Applicant sought a permanent grant of permission.

31. The Respondent appointed an inspector to prepare a report in respect of the appeal. In her detailed report dated the 23rd of September, 2021, the Inspector summarised in some detail the site location and description, the proposed development, the reports on the planning authority's file including clarification responses and additional information provided leading to the decision of the planning authority to grant retention permission. She set out the planning history and the policy context including the relevant parts of the Development Plan. Under Policy Context she correctly identified the Fingal County Development Plan 2017-2023 as the operative plan. In assessing the appeal she focussed on AA, the principle of development (zoning) and EIA.

32. In relation to the AA Screening, the Inspector identified gaps in information available noting:

"the development which involves acceptance, treatment and export off site of large amounts of waste materials, is not supported by sufficient detail on the materials

accepted at the site, the processing which will be carried on, the emissions from these processes to air and water, to enable any meaningful assessment of potential impacts on protected sites. The potential for firewater to be discharged from the site, is not fully considered in the current design and cannot therefore be assessed in terms of its potential impact downstream, including on protected sites, via the identified hydrological pathway. In my opinion the Board does not have before it sufficient information to carry out screening for appropriate assessment."

33. On the EIA question, the Inspector observed that there had been a higher throughput of waste than permitted in previous years (exceeding EIA threshold figures). She said:

"the volume of waste throughput per annum, proposed in the subject application, has been selected in order to avoid the need for Environmental Impact Assessment, but, having regard to the throughputs per annum previously accepted at the facility, which have significantly exceeded planning permission and licence limits, it should not be supposed that the limit state in either the original application (24,900 tonnes) or in the further information response (24,000 tonnes) will be adhered to, and therefore although presented as a sub-threshold development, I consider that the scale is such as to require Environmental Impact Assessment."

34. Considering the zoning question under the heading "*Principle of Development*", she identified the current permission as the 1998 permission permitting a throughput of waste not exceeding 10,000 tonnes, pointing out that successive planning permissions since then have been temporary permissions which had expired. She stated that this permitted use fell to be considered against the background of current policies and standards including the then current CDP identified as the Fingal County Development Plan 2017-2023. She noted that waste facility and recovery is not a permitted use under the CDP but considered Objective Z05 and the exception provided for non-conforming uses before stating:

"The proposed development is not a reasonable intensification or a reasonable extension. The proposed development is not a minor extension or alteration to an existing property. It is a very significant use and is not compatible with aviation activities. It is also a material intensification of use. The volume along [sic] of 24,900 tonnes per annum when compared with the permitted annual throughput of waste not

exceeding 10,000 tonnes, is a multiple of 2.5 times the permitted use. The nature of the proposed waste intake and the processing caried out on site is also a material intensification of the permitted use and would be likely to have a material impact on Dublin Airport. In my opinion the proposed development is not acceptable in principle and this is a reason to refuse permission."

35. By its Direction of the 6th of December, 2021, the Respondent recorded that it decided to refuse permission "*generally in accordance with the Inspector's recommendation*". The Decision of the 7th of December, 2021 challenged in these proceedings was made in consequence of the Direction. Three reasons were given by the Board for refusal, summarised as follows:

A. Insufficient information to enable the Board to assess the likely impacts of the proposed development on protected European Sites precluded the grant of permission (AA ground);

B. Insufficient information to enable the Board to assess the likely impacts on the proposed development on the environment precluded the grant of permission (EIA ground);

C. The waste disposal and recovery development proposed for retention would contravene the land use zoning and objective for the site as set out in the County Development Plan and would therefore be contrary to the proper planning and sustainable development of the area (zoning ground).

36. All three reasons are challenged in these proceedings as being unsustainable. I propose to address the issues in reverse order to better reflect the manner in which they were argued before me. I will consider the information issues together given the obvious overlap in the case made in this regard.

DISCUSSION AND DECISION

The Zoning Issue

37. It is recalled that in the subject application the Applicant sought: (i) an increase from the current permitted (existing valid permission) "*use*" to 24,000 tonnes of waste per annum;

and (ii) an increase on a permanent basis as opposed to temporary. The relevant Zoning Objective for the site is "*DA Dublin Airport*". The stated objective for the zoning is to:

> *"[e]nsure the efficient and effective operation and development of the airport in accordance with an approved Local Area Plan*."

38. Furthermore, the relevant Vision Statement provides:

> *"Facilitate air transport infrastructure and airport related activity/uses only (i.e. those uses that need to be located at or near the airport). All development within the Airport Area should be of a high standard reflecting the status of an international airport and its role as a gateway to the country and region. Minor extensions or alterations to existing properties located within the Airport Area which are not essential to the operational efficiency and amenity of the airport may be permitted, where it can be demonstrated that these works will not result in material intensification of land use..."*

39. The "*Note*" to this part of the Development Plan provides:

> *"Uses which are neither 'Permitted in Principle' nor 'Not Permitted' will be assessed in terms of their contribution towards the achievement of the Zoning Objective and Vision and their compliance and consistency with the policies and objectives of the Development Plan."*

40. As per the Development Plan, uses "*Not Permitted*" in this zoning include Waste Disposal and Recovery Facility *viz.* the proposed development. While the underlying land use zoning applicable to the site is "*DA*" and under this land use zoning waste disposal and recovery are not permitted uses for the area, Objective Z05 of the CPD permits "*reasonable intensification of extensions to improvement of premises accommodating non-conforming uses subject to normal planning criteria.*" Section 11.5 of the CDP sets out what is meant as "*non-conforming uses*" and states as follows:

> *"Throughout the County there are uses which do not conform to the zoning objective of the area. These are uses which were in existence on 1st of October 1964, or which have valid planning permissions, or which are unauthorised but have exceeded the time*

limit for enforcement proceedings. Reasonable intensification of extensions to and improvement of premises accommodating these uses will generally be permitted subject to normal planning criteria."

41. Whilst the parties agreed during the hearing before me that use of the site as a waste facility constitutes a "*non-conforming use*", they disagree as to the nature and extent of the existing use against which intensification falls to be measured for the purpose of determining whether development may be permitted.

42. The Respondent contends that the said use is measured by reference to the terms of an existing permission. As the most recent temporary permission has expired, the only existing permission for this site which authorises waste handling dates to 1998 and is limited to 10,000 tonnes per annum. Furthermore, the parties agree that measured against an annual permitted throughput of 10,000 per annum is unarguable but that one may reasonably conclude that a throughput of either 24,000 or 24,900 does not constitute "*reasonable intensification*".

43. It is contended on behalf of the Applicant, however, that the Respondent has erred in its interpretation and application of the "*non-conforming use*" provision of the CDP and in consequence has improperly assessed the question of intensification by reference to a 10,000 tonnes per annum limit rather than the higher limit of 21,900 tonnes per annum provided for in the last temporary permission which expired in August, 2019. It is contended that were the question of intensification measured on the difference between 21,900 and either 24,000 or 24,900, it would be open to a decision-maker to conclude that this constitutes "*reasonable intensification*" with the result that permission could be granted.

44. The Applicant further contends that the Inspector and the Respondent erred in their treatment of the zoning issue based on a number of further grounds which I will now consider in turn before returning to the question of the proper interpretation of the CDP and Objective Z05, which has emerged as the primary substantive issue in these proceedings.

45. Firstly, insofar as reliance was placed on the 2011-2017 Plan instead of the 2017-2023 Plan in the treatment of Objective Z05 of the CDP including her interpretation of "*non-confirming use*" in the Inspector's Report and the Respondent's decision, reliance was placed on the incorrect development plan. It was accepted in argument before me, however, that in

all material respects the two development plans are the same. It was also accepted that the correct development plan is referenced and quoted from throughout the Inspector's Report and it is clear that the correct test was identified with reference to the current and applicable CDP. Indeed, the mistaken reference to the previous plan, characterised as a typographical error on behalf of the Respondent, appears only in the Inspector's conclusions and the subsequent Board direction and order and it is undoubtedly the case that the applicable and correct CDP was repeatedly referenced up to that point.

46. In *Barford Holdings Limited v Fingal County Council* [2022] IEHC 329 *(*para. 95 *et seq*) a challenge based on a reference to the incorrect version (years) of a Development Plan was rejected where the error did not mislead the applicant or undermine the substance of the decision at issue. In that case, when the reference to the incorrect plan in the decision was considered in context, it was clear that the decision was based on the correct Development Plan. The same is undoubtedly the case here. Furthermore, as pointed out on behalf of the Respondent, the error is one which is capable of correction under s.146A of the 2000 Act and, as such, does not warrant or justify a grant of relief (see *Waltham Abbey v. An Bord Pleanála; Pembroke Road Association v. An Bord Pleanála* [2022] IESC 30 (para. 53 *et seq*).

47. I am quite satisfied that the erroneous reference to the years of the Plan in the circumstances is not a material error which in any way affects the substance of the decision. What is important is that the Inspector identified the correct test or considerations (see *Usk v. An Bord Pleanála* [2010] 4 I.R. 113, para. 170) deriving from the applicable CDP and assessed the application in the light of the requirements set down in the governing CDP. Given the manner in which the substantive provisions of the CDP are repeatedly and correctly referred to by the Inspector throughout her report, there is little doubt but that she considered the application and prepared her report on the basis of a correct understanding of what was provided under the then current CDP.

48. Secondly, issue is taken with reference by the Inspector to 24,900 tonnes of waste in assessing intensification referring to it as 2.5 times the permitted use when the application had been revised downwards to 24,000. Accordingly, in measuring intensification it is contended that not only was improper regard had to the baseline permitted waste throughput of 10,000 tonnes per annum (under the original permanent permission) rather than the higher level of throughput permitted under subsequent temporary permissions (most recently 21,900 under the

2014 permission) but it was also measured without regard to the reduced throughput of 24,000 tonnes per annum conceded by the Applicant in response to request from the Planning Authority.

49. Having carefully considered the terms of the Inspector's decision in which multiple references appear to the reduced tonnage of 24,000 tonnes per annum, I am quite satisfied that the Inspector was aware of the revised application for a reduced tonnage and was not led into error by treating the application as one for 24,900 tonnes per annum rather than 24,000 tonnes per annum in her substantive consideration of the application. Multiple references are made in the report to the reduction. The Inspector referred to the "*volume along [the lines] of 24,900 tonnes per annum*" (*paragraph* 7.5.1). These words in context clearly indicate that the Inspector was referring to same in a general manner. The Inspector also expressly refers to the "*reduction in intake from 24,900… to 24,000 tonnage per annum*" (see, for example, *paragraph* 3.8.1) The Inspector refers to the reduction again (*page 40*) in summarising the Applicant's response to the third-party appeal. In the context of EIA (paragraph *7.6*), the Inspector notes that the "*revised proposal was for 24,000 tonnes*" (paragraph *7.6.7*).

50. When properly construed, the Inspector's Report clearly demonstrates that the correct proposed increase in tonnage was considered. I have no doubt that the Respondent was perfectly aware of the Applicant's offer to reduce the waste tonnage from the original application for 24,900 to 24,000 in deciding to refuse the application on the basis that it did not constitute reasonable intensification of a non-conforming use having regard to the applicable land use zoning. Furthermore, it seems to me (and I understand it to be effectively conceded before me) that if the Respondent was correct in treating 10,000 tonnes per annum as the permitted established use of the site for the purpose of measuring intensification, then it matters not whether the application was for 24,900 or 24,000. On either amount (be that 24,000 or 24,900) the increased tonnage from 10,000 tonnes per annum together with the nature of the use for which application was sought, would constitute an intensification of the permitted use which I am satisfied the Respondent would have been entitled to treat as unreasonable in refusing on the basis of applicable land use principles. In real terms it is unlikely that the difference between 24,900 and 24,000 could have a material impact on this decision.

51. Of the three bases advanced for challenging the decision on "*land use principle*" grounds, therefore, the interpretation of what constitutes "*non-conforming use*" for which

permission may be granted as provided for in the CPD is the one which has required the most deliberation on my part. It is also the issue upon which the Applicant placed primary focus. Weight was attached on behalf of the Applicant to the fact that in granting conditional permission the Planning Authority was satisfied, given the established nature of the facility on site, its continued operation on the subject lands over a period of more than 22 years and the stated objectives of the CDP as contained in section 11.5 and as outlined under Objective Z05, that the application seeking retention and continuation of use was acceptable in principle subject to assessment. Implicit in this was a finding by the Planning Authority that the existing use was properly characterised as a "*non-conforming use*". The fact that the Planning Authority construed the CDP in this manner, it was submitted, was evidence that an informed interpretation of the language used in the CDP properly led to this conclusion.

52. There is no doubt that waste recycling has occurred on site for well in excess of two decades. It is true that planning permission has been granted for waste throughput of up to 25,000 during this period and there is some evidence that waste well in excess of permitted levels have in fact been processed (it being suggested in the statement accompanying the application for permission that waste of up to 60,000 tonnes per annum has been accepted on site). It was submitted in the Planning Statement accompanying the application for permanent permission that "*there has in essence been a permanent planning permission on the lands for recycling facility*".

53. For completeness I should record that it was no part of the case before me on behalf of the Applicant that the Respondent erred in failing to have regard to the fact that the established use of the site meant that the Applicant was immune from enforcement action because of long-established use for which no planning permission had been granted. Indeed, in response to the Planning Authority's request for further information on waste currently accepted and processed on site including volumes and as noted by the Inspector, information was provided for the proposed situation but not the current use (paragraph 7.6.4 of Inspector's Report). On the contrary, the application was predicated on an intensification from 21,900 tonnes of waste permitted under a temporary 5-year planning permission granted in 2014. On this basis it is contended that the application under consideration does not represent an unreasonable intensification of use having regard to a most recently permitted level of 21,900, under which ELV processing was also permitted.

54. If one looks at the reality of what has occurred on site over many years, it would indeed appear that permission is now sought for waste recycling that is not, in fact, materially more intense than in previous years. In the subsequently withdrawn application for permission submitted in 2019 seeking permission to handle waste well in excess of threshold amounts (some 49,500 tonnes) reference had been made to the fact that the existing development had handled volumes of 36,391.18 tonnes. It was noted on the planning file that in both 2018 and 2019 the condition limiting waste tonnage to 21,900 under the 2014 temporary permission had been breached.

55. Whether the development is for a non-conforming use which is acceptable under the CDP turns on the proper interpretation of the CDP itself. The question which I must determine is whether in construing "*non-conforming use*" under the CDP one tied to existing permissions or uses for which no permission is required or which are immune from enforcement action, as the Respondent contends or entitled to have regard to the *de facto* use of the site in reliance (at least in part) on a series of temporary permissions, now expired, on the basis that such temporary permissions should be considered to be, in essence, the same as a permanent permission. This question, in my view, is the one at the very heart of these proceedings.

56. There is a temptation as a matter of so-called common sense or realism to treat the *de facto* position on site as being so established as to be analogous to the types of existing uses captured by the understanding of "*non-conforming use*" under the CDP. On one view such an interpretation may even appear the fairest or most just interpretation given that there has been a succession of temporary permissions. However, in interpreting the CDP regard must be had to its statutory purpose and context. I am bound to recall that a development plan, as McKechnie J. observed in *Byrne v Fingal County Council* [2001] 4 I.R. 565, is a representation in solemn form, binding on all affected or touched by it, that the planning authority will discharge its statutory functions strictly in accordance with the published plan. This implementation will be carried out openly and transparently. There is now a body of case-law guiding the proper approach to the interpretation of a development plan.

57. It is well established that one should avoid a "*legalistic over-analysis of decisions*" (*Sweetman v An Bord Pleanála* [2021] IEHC 390 (para. *28*), *MR v International Protection Appeals Tribunal* **[**2020] IEHC 41 (paras. 6-7), *Ratheniska Timahoe and Spink (RTS) Substation Action Group and Another v An Bord Pleanála* [2015] IEHC 18) but decisions

should be read "*not solely from an applicant's point of view (an impossible standard), but from the starting point of it being valid rather than invalid where possible. One has to stand back and ask what the decision is fundamentally saying*" (*O'Donnell & Ors v. An Bord Pleanála* [2023] IEHC 381 (para.*54*). Planning decisions, documents and policy "*should be construed not as complex legal documents drafted by lawyers but in a way in which members of the public, without legal training, might understand them*" (*Dublin Cycling Campaign CLG v. An Bord Pleanála* [2020] IEHC 587 (para. *29*)). The exercise of interpreting planning decisions, documents and policy "*is not to be undertaken in the same way in which Acts of the Oireachtas or subordinate legislation would be construed*". Such documents should not be "*read narrowly and restrictively*" (*Dublin Cycling* (para. *63*); and *Ballyboden v. An Bord Pleanála* [2022] IEHC 7 (para. *120*)) but rather in a holistic manner (*Sherwin v. An Bord Pleanála* [2023] IEHC 26 (para. *126*)). As per Humphreys J. in *Clonres CLG v. an Bord Pleanála* [2021] IEHC 303 "*a statutory document like a development plan fits into a wider statutory framework*". In *Redmond v. An Bord Pleanála* [2020] IEHC 151 Simons J. found that the interpretation of the development plan is a matter of law and the views of neither the planning authority nor An Bord Pleanála can be decisive (para. 84).

58. While the CDP is not a statute and should not be construed as such, it must be remembered that it is adopted by resolution of the elected members of the Planning Authority following public consultation in accordance with a statutory process. It words have an objective meaning which set the parameters for decision making on a case-by-case basis with due regard to the wider public interest in proper planning of the area. Accordingly, as Holland J. observed in *Ballyboden v An Bord Pleanála* [2022] IEHC 7 (para. 121) whether a planning permission has issued in material contravention of a development plan is a matter of law, not of planning judgment. This in turn impacts on the nature and/or standard of review applicable to alleged contraventions of a development plan and the question of its correct interpretation. In *Jennings & Anor v An Bord Pleanála* [2023] IEHC 14, the Court noted (para. 112), *inter alia*:

> *"…112. …where a development plan, on a proper interpretation,*
> *• allows appreciable flexibility, discretion and/or planning judgement to the decision-maker, review is for irrationality rather than full-blooded.*
> *• does not allow appreciable flexibility, discretion and/or planning judgement to the decision-maker, review is full-blooded as the issue is one of law."*

59. As I read it, section 11.5 of the CDP operates as an exception to the zoning of the area and seeks to limit "*non-conforming use*" permission to a specified category of development which is closely related in scale to development for which either an existing planning permission exists, planning permission is not required because it is pre-'64 user or the development is immune from enforcement action. This is clearly a limited discretion. I am satisfied that the proper interpretation of the CDP as to the meaning of "*non-conforming use*" is one of law rather than planning judgment, whereas what constitutes intensification of such a use is one of planning judgment.

60. In terms of the interpretation of non-conforming use as a matter of law, it seems to me that the reference to "*land use*"/"*use*" in the CDP must be understood as referring to use in planning terms. What constitutes a permitted use falls to be determined with reference to a valid and existing permission rather than a temporary permission which has expired. Planning permission enures for the benefit of the land. It is not correct to interpret same by reference to the *de facto* land use (*which is not permitted*) or some form of previously permitted, but now expired, temporary use. In *The Board of Management of St Audoen's National School v An Bord Pleanála* [2021] IEHC 453 wherein the Court (Simons J.) noted (para. 16):

> *"The position in respect of temporary planning permissions is different. Here, the time-limit governs the length of time for which the development is permitted to remain in situ. In the case of a material change in use, this is the period of time for which the authorised use may be continued. Once the time-limit expires, then the use must cease…"*

61. Similarly, in *Clonres CLG/Conway v An Bord Pleanála* [2021] IEHC 303 (para. 37) Humphreys J. noted in a zoning context that reference to an existing use should be understood as referring to:

> *"existing uses in the sense that Simons J. is referring to in Redmond v. An Bord Pleanála, namely a previously established use which enures for the benefit of the land until such time as a planning permission for a new use is granted. Even the non-expert reader could appreciate that point."*

He added that the inspector in that case had erroneously had regard to the simple *de facto* situation on the ground which he considered to be incorrect as a matter of law. Similarly, even an extant temporary planning permission cannot be relied upon in seeking to authorise future non-conforming use after it has expired.

62. This being the case, it seems to me that the meaning and intent of section 11.5 of the CDP is clear. It allows for a reasonable intensification of a "*non-conforming use*" viz. a use which does not conform with the zoning objective. A temporary use is not envisaged as an existing use within the definition of a "*non-conforming use*" provided under the 2017-2023 CDP. The reality of what was happening on site in the years preceding this application is not the question framed by the language of section 11.5 of the CDP. When one considers the language of section 11.5, the baseline is measured not by reference to previous use but by reference to use which is either permitted or immune from enforcement by reason of long-user (whether pre '64 or established an immune). As a matter of law, a series of temporary permissions cannot be equated "*in essence*" with a permanent permission and the CDP does not include within the definition of "*non-conforming use*" such use as may have been authorised on foot of a series of temporary permissions. A temporary permission simply does not enure for the benefit of the land in the same way as a pre-64 user does. Likewise, it does not confer the benefit which flows from an unauthorised use which is immune from enforcement action.

63. In my view the Inspector (paragraph *7.4 et seq*) and the Respondent in turn properly interpreted the CDP and correctly identified the "*non-conforming use*" as being the "*use.…which* [had a] *valid planning permission…*", that being the throughput of 10,000 tonnes of waste per annum as per the only permanent permission addressed to throughput of waste annually. Any other permission authorising use more than this was temporary, had expired and did not enure for the benefit of the land. Insofar as the CDP in Objective Z05 proceeds to generally permit reasonable intensification of, extensions to and improvement of premises accommodating non-conforming uses, subject to normal planning criteria, this must, on the application made in this case, be related to the enduring permission attaching to the site or the established planning status of the site (where long user for which permission was not required or which is immune from enforcement action is concerned).

64. I am quite satisfied that section 11.5 of the CDP does not properly embrace a series of temporary permissions which "*in essence*" amount to a permanent permission. Accordingly, I consider that the decision to refuse on the basis that the permitted user was waste recycling of inert non-domestic waste not exceeding an annual throughput of 10,000 tonnes was correct in law and the Applicant's challenge in this regard must fail.

Insufficient Information to Screen for EIA and AA

65. The Respondent's first and second reasons for refusal as they appear on the Order concern insufficient and/or an absence of information before it for the purposes of EIA Screening (Part X of the 2000 Act and Art.109, Schedule 5 and Schedule 7 of the Planning and Development Regulations, 2001 (as amended) ("hereinafter "PDR 2001") and AA Screening (s.177U of the 2000 Act).

66. To properly understand this reason for refusal and contextualise the grounds for challenge, it is recalled that EIA requirements apply to classes of development set out in Annex 1 or II of the EIA Directive 2011/92/EU on the assessment of the effects of certain public and private projects on the environment as amended by Directive 2014/52/EU. In Irish legislation Annex 1 and 11 have been broadly transposed in Schedule 5 Part 1 and Part 2 of the PDR, 2001. Classes of development listed in Parts I and II of Schedule 5 that meet or exceed the thresholds set out therein require mandatory EIA. Where EIA is mandatory a screening determination is not required and the EIA must be conducted as a matter of course. Class II(b) of Part 2 of Schedule 5 PDR 2001 lists "*installations for the disposal of waste with an annual intake greater than 25,000 tonnes not included in Part I of this Schedule*."

67. Even where the threshold is not exceeded, however, any project which is likely to have significant effects on the environment having regard to the criteria set in Schedule 7, namely characteristics of the proposed development, location of the proposed development and types and characteristics of potential impacts, must also be subject to EIA (s. 172(1)(b) of the 2000 Act). To this end a screening exercise is conducted to determine whether a full EIAR is necessary.

68. Separately, Article 6(3) of the Habitats Directive requires that an appropriate assessment (AA) be carried out for those areas where projects, plans or proposals are likely to

have an effect on areas designated as important for certain listed habitats and birds known as Special Areas of Conservation (SAC) and Special Protection Areas (SPAs), together forming the Natura 2000 network of protected sites.

69. It is recalled that under s. 34 (12) of the 2000 Act a planning authority shall refuse to consider an application to retain unauthorised development of land where the authority decides that if an application for permission had been made in respect of the development concerned before it was commenced the application would have required one or more of the following (a) an EIA, (b) a determination as to whether an EIA was required or (c) an AA. Implicit in the conditioned grant of permission by the Planning Authority, must therefore be a finding that neither an EIA nor a determination as to whether an EIA was required nor an AA was required despite the fact that the application was for retention of a marginally sub-threshold waste recycling use. While the decision of the Planning Authority is not the subject of challenge in these proceedings, it is curious in this context that it concluded that neither an AA nor a full EIAR was required whilst also finding that a temporary rather than a permanent permission should issue in view of identified deficiencies in information relevant to matters of environmental concern (such as fire prevention, noise impact and waste streams).

70. The decision of the Respondent that insufficient information had been provided was challenged in the Statement of Grounds on foot of which leave was granted and in written submissions filed on behalf of the Applicant on the basis of the rationality of that decision in the light of the material put before the Respondent (in terms of screening reports and responses to further information requests) and the planning history of the site (on the asserted basis that it had operated for some time as a waste recycling facility without adverse environmental consequences) and inadequate reasons for this conclusion. During the course of oral argument, a new complaint emerged, for which leave had not been granted, to the effect that the Respondent ought to have determined an EIAR and an AA were necessary rather than refuse planning permission on the basis that there was insufficient information before it.

71. In terms of the reasonableness challenge to the decision that more information was required reliance has been placed on behalf of the Respondent on the dicta of Holland J. in *Heather Hill v An Bord Pleanála* [2022] IEHC 146 (para. 232) where he found:

"The adequacy of information provided in a planning application must be assessed in context and, for planning, EIA and AA purposes, is primarily a matter for the Board".

72. I have also been referred to *Coyne v An Bord Pleanála* [2023] IEHC 412, where the Court stated (para. 414):

"The Board is entitled to curial deference to its view of the adequacy of the information before it and, as to such adequacy, is reviewable only for irrationality. Of the many and ample authorities to such effect, I cite only Browne, People Over Wind, M28 Steering Group, and Kemper."

73. From the foregoing it is clear that a high threshold applies in the case of a challenge to a decision by the Respondent that insufficient information has been provided.

74. In this case, the Inspector's Report is detailed and demonstrates a careful consideration of all of the information on file, including the EIA and AA screening reports. At para. 7.6.8 of her report the Inspector concluded that as presented the proposed development falls within a class of development under Schedule 5, and therefore requires screening to determine whether it is likely to have significant effects on the environment. She continued under para. 7.7.1 of her report:

"The scale of the proposed development, as currently proposed, is only marginally below threshold, at which EIA is required. According to documentation on file it is currently operating well above the threshold at which EIA is required."

75. She added that it was difficult to comprehensively assess the aspects of the environment likely to be significantly affected by the proposed development instancing, *inter alia*, a lack of data in relation to matters such as dust measurement or monitoring, information pertaining to the impact on air and emissions as well as impact on surface run-off water from site. It is clear from reading her report that there was a thorough assessment by the Inspector of information which had not been provided. Having done so she concluded:

"Having regard to: the characteristics of the proposed development: the size, which as presented is marginally below the threshold at which EIA is mandatory; the production

of waste, and the likelihood of discharge of pollution and nuisances to air and water; the sensitivity of the location and its proximity to Dublin Airport, an existing and approved land use; and the types and characteristics of potential impacts, including fire risk; it is considered that the proposed development should be subject to environmental impact assessment. The Board should note that this application is for retention. In the case of retention requiring EIA it is necessary for the applicant to apply for leave to apply for substitute consent."

76. In the recommendation section of her report the Inspector stated:

"Insufficient information has been submitted regarding the activities and processes carried on, the volume of waste produced, the nature and quantity of emissions, mitigation or monitoring proposed, and measures to prevent and contain fire and to control the discharge of fire water; such as to enable the Board to assess the likely impacts of the proposed development on the environment, including impact on protected sites; accordingly the proposed development would be contrary to the proper planning and sustainable development of the area."

77. In argument before me no issue was taken with the factual correctness of the Inspector's observations with regard to information identified as required, albeit that the Applicant sought to protest that sufficient information had been provided and an evidential basis for environmental concern did not exist. Of course, it may seem trite to observe that a vicious circle is perpetuated by a failure to provide data on relevant matters. As noted in *Weston Limited v. An Bord Pleanála* [2010] IEHC 255 (Charleton J.) the role of the inspector is to bring objectivity in circumstances where in the planning context persons seeking permission rarely make errors against interest. If relevant information or data is not provided, then evidence of adverse impact will similarly not be available. It is therefore no answer to the Inspector's observations that her concerns were not supported by evidence on the file. Her observations were based on the absence of data or information which might either justify or dispel those concerns and reflected the type of appropriate rigour endorsed by the High Court in *Weston* (see para. 25).

78. In the event, the Respondent accepted the Inspector's recommendation in refusing the application on appeal on the basis that it had insufficient information. In arriving at this

decision, it is clear from the record of the decision that the Inspector and the Respondent expressly considered the procedural history of the application (*including further information*) and the entirety of the evidence presented, including on behalf of the Applicant; and having assessed same, considered that there were numerous identified deficiencies in the information presented for the purposes of EIA (para. 7.6 *et seq*) and AA Screening (para. 7.2).

79. The Applicant's contention that the Board's decision was flawed because it should have accepted the conclusions of its EIA Screening and AA Screening Report fails to recognise that it is the Respondent, not the Applicant, who is vested with jurisdiction to carry out such environmental "*assessments*". I agree with the submission made on behalf of the Respondent that the same logic applies to the Applicant's reliance on the Planning Authority's position on EIA Screening and AA Screening. It is noteworthy in this regard that the Planning Authority for its part decided against a grant of *permanent* permission due to, *inter alia*, an absence of information/adequate information on land restoration, fire prevention, noise impact, waste stream, and the operation of the hammermill. Accordingly, while the Planning Authority did not require a full EIAR or AA on the basis of the screening conducted, it was not fully satisfied with the information it had received. The Respondent brings a separate and independent judgment to the assessment and is entitled to reach a different decision on the basis of the same information. There was material before the Respondent capable of supporting its view as to the inadequacy of the information provided. I am satisfied that there was nothing irrational about the Respondent's approach and that the decision was properly reasoned.

Whether Decision Tainted by Assumed Future Non-Compliance

80. An overarching objection was taken to the refusal of planning permission in this case on the basis that the decision was infected by an improper assumption of future non-compliance referrable to previous failure to comply with planning conditions as to waste tonnage. It was submitted with reference to s. 35 of the PDA, 2000 that the application ought not properly be approached on the basis that past non-compliance will recur. It was submitted that the Respondent must assume future compliance noting that it has no function in relation to enforcement. The offending paragraph in the Inspector's Report states (para. 7.6.7):

> *"The volume of waste throughput per annum, proposed in the subject application, has been selected in order to avoid the need for Environmental Impact Assessment, but, having regard to the throughputs per annum previously accepted at the facility, which*

have significantly exceeded planning permission and licence limits, it should not be supposed that the limit stated in either the original application (24,900 tonnes) or in the further information response (24,000 tonnes) will be adhered to, and therefore although presented as a sub-threshold development, I consider that the scale is such as to require Environmental Impact Assessment."

81. It seems to me that the Applicant misconstrues both the import and effect of s. 35 of the 2000 Act and of the Inspector's reliance on compliance issues in her report. Section 35 provides that a planning authority may form the opinion based on information available to it in accordance with s. 35(1) that there is a real and substantial risk that the development in respect of which permission is sought would not be completed in accordance with such permission if granted or with a condition to which such permission if granted would be subject, and that accordingly planning permission should not be granted to the applicant concerned in respect of that development. Where such an opinion is formed, s. 35(4) prescribes the procedure to be followed and provides for a right of appeal to the High Court under s. 35(6) against any subsequent decision to refuse planning permission based on this opinion. This provision was not invoked in this case and the Planning Authority did not refuse permission pursuant to s. 35(5) of the 2000 Act.

82. The fact that no similar provision exists whereby the Respondent may refuse permission based on its opinion that there is a real and substantial risk of future non-compliance does not mean that the Respondent is precluded from considering the planning history on site as part of its assessment of an application. Nor for that matter did the Inspector recommend refusing permission because of a real and substantial risk that the development in respect of which permission is sought would not be completed in accordance with such permission or with a condition of such permission if granted. The Inspector did, however, have regard to information available on the planning file in relation to throughputs per annum in exceedance of limits fixed to conclude in her assessment of the development that the scale of same, presented as a sub-threshold development, was such as to require EIA.

83. While I am satisfied that there was nothing improper in the Inspector considering this in her assessment of whether the proposed development falls within a class of development under Schedule 5 and therefore requires screening to determine whether it is likely to have

significant effects on the environment, it is plain from the terms of the Respondent's decision that an assumption as to future non-compliance was not relied upon to refuse permission. The reasons for refusal were clearly stated and concerned an absence of information and/or inadequate information for the purposes of AA Screening and EIA Screening.

84. Accordingly, I consider the Applicant to be simply incorrect in asserting that the Respondent refused permission due to anticipated future breaches. The Inspector's comments do not, in any way, invalidate the Respondent's decision or the reasons given for refusal. The Respondent's reasons are not invalid because of the view expressed by the Inspector which was immaterial to the actual reasons adopted by the Respondent. The Inspector prepares a report which makes recommendations but the Respondent makes the ultimate decision, having considered the Inspector's Report. As O'Neill J. observed in *M & F Quirke & Sons and Others v. An Bord Pleanála and Others* [2009] IEHC 426 (para. 9.9)

> *"In my judgement, any error on the part of the inspector in this regard, could not vitiate the entirely separate exercise by the respondent of its self contained statutory jurisdiction to make the decision required from it. The status of the error in question was no more that that of any other piece of mistaken information which the respondent was free to consider and reject in the overall discharge of its statutory function. The decision of the respondent, on its face, contains no such error…"*

Whether decision Tainted by Failure to Determine whether EIA / AA Required

85. As for the case urged for the first time in oral argument to the effect that the Respondent should have proceeded to determine that an EIA and AA was required rather than refuse the application, it seems to me that this argument falls outside the parameters of the case for which leave has been granted. The argument was urged having regard to the terms of s. 177U(4) of the 2000 Act and XX of the PDR 2001. Section 177U(4) provides:

> *"(4) The competent authority shall determine that an appropriate assessment of a draft Land use plan or a proposed development, as the case may be, is required if it cannot be excluded, on the basis of objective information, that the draft Land use plan or proposed development, individually or in combination with other plans or projects, will have a significant effect on a European site."*

86. Similar provision is made for EIA. Regulation 109(2) of PDR 2001 provides that in sub-threshold cases the Respondent shall consider whether there is a significant and realistic doubt in regard to the likelihood of significant effects on the environment in screening for EIA and shall make a determination either that an EIA is or is not required.

87. It is argued on behalf of the Applicant that as the Respondent claims it did not have enough information, it ought to have determined that an AA and an EIA was necessary instead of simply refusing planning permission on the basis that the Respondent had insufficient information to enable it to assess the likely impacts of the proposed development on the environment as this is the outcome mandated by the language of the applicable statutory provisions.

88. It seems to me that this issue is not properly before me having regard to the terms of the leave granted. As the matter was argued on behalf of the Applicant without objection on behalf of the Respondent, I agree that it is undoubtedly the case that an AA and EIA are required unless significant effect on a European site or on the environment can be excluded. I would further observe, however, that there is nothing in s. 177(U)(4) of the 2000 Act or in equivalent provisions of the PDR 2001 regarding EIA which precludes the Respondent from first concluding that further objective information is required before it can properly determine this question.

89. I note that where retention is sought in respect of a development carried out in breach of the requirements of the EIA Directive and the Habitats Directive, it cannot benefit from a retention planning permission. The planning status of the development can only be regulated by way of an application for *"substitute consent*" pursuant to Part XA of the 2000 Act. Given that a requirement to conduct an EIA means that the Applicant would be precluded from seeking retention permission but would instead be required to seek substituted consent, the approach of the Respondent in refusing permission not on the basis that an EIA was required but on the basis that more information was needed before a decision could be made on whether to exclude such requirement may even have been in ease of the Applicant. In consequence of the terms in which the decision has been couched, the question of whether full EIA and AA is required remains an open question. Leaving the zoning issue to one side, it is still open to the Applicant to address the information deficit identified by the Inspector (and indeed the

Planning Authority before that) and acknowledged by the Respondent in seeking to satisfy the competent authorities that a significant effect on a European site or on the environment can be excluded as the Respondent has not yet determined this question.

90. I am satisfied that no proper basis for interfering with the decision of the Respondent to refuse planning permission has been made out based on the Respondent's conclusion that more information was required as regards the necessity for both AA and EIA. In its expert capacity the Respondent assessed all the information presented and identified in some detail why this information was considered inadequate. The Applicant fully understands this reason for refusal, namely, an absence of information and/or inadequate information on identified issues to assess the likely impacts of the proposed development on the environment and on a European site.

Severability

91. The decision to refuse planning permission by the Respondent was attacked on several fronts in circumstances where three distinct reasons were given for the decision. As found by Owens J. in *Murtagh v An Bord Pleanála* [2023] IEHC 345 a decision may be made for a number of reasons. Some of the reasons may be valid and some may be invalid. Some reasons for a decision may be more important than others. Accordingly, it does not follow that an invalid reason will automatically result in an invalid decision. Therefore, even if there were a frailty inhering in the Respondent's decision arising from a failure to determine one way or the other whether an AA or EIA is required given the effects of the development on a European site or the environment (a question which was touched on in argument before me but did not feature in terms in the written submissions and does not arise from the grounds upon which leave was granted), where separate and distinct reasons for refusal of planning permission were given by the Respondent, as here, any such a frailty, if established, does not render the decision itself invalid.

92. It is my view that in this case that the zoning issue, on its own and without reference to the information deficit also identified, warranted refusal of planning permission. It follows that to successfully impugn the decision to refuse on the basis of some frailty in the treatment of the EIA or AA question, it would be necessary for the Applicant to also establish that the Respondent erred in its assessment of the non-conforming use issue because this is a stand-

alone determination on a decisive issue. Where this standalone decision on a determinative issue is sound, as I have found, then it is in fact irrelevant whether a different conclusion might have been reached on some other element which also led to a decision to refuse as it would not affect the outcome which would remain a refusal of planning permission.

CONCLUSION

93. As set out above, I have approached this application for relief by way of judicial review by addressing the grounds of challenge advanced. I have not relied on discretionary factors in refusing the application for relief. It seems to me, however, that it would be remiss where the application for retention is predicated on an existing use, as it was in this case, were I not to clearly signal a concern about reliance on a previous use which involved above threshold levels of waste in seeking retention permission for a lesser level of use, without a full EIA having been conducted in respect of the said above threshold use for planning purposes.

94. There is no doubt that had permission been sought for use at the level which actually occurred on the site in 2018 and 2019, as documented on the planning file, then an EIA would have been mandatory as prescribed threshold levels were exceeded. Had permission been granted in this case based on an application for prospective use at a sub-threshold level against this background of above threshold use occurring in breach of planning conditions, the result would have been that the Applicant would have avoided the EIA completely in respect of development consent for its previous above threshold activity. It seems to me that such an outcome would not be compatible with the spirit, if not the letter, of the State's obligations under EU law.

95. It is established that a strict approach is warranted in discouraging avoidance of EIA requirements through the system in place in the State for the regularisation of unauthorised development. The rationale for the strict approach as explained by Simons J. in his judgment in *Mount Juliet Estates Residents Group v. Kilkenny County Council* [2020] IEHC 128, referring to the criticisms made by the CJEU in its judgment in Case C-215/06, *Commission v. Ireland*, is to serve a deterrent purpose. As explained by Simons J. in his judgment in *Mount Juliet Estates Residents Group v. Kilkenny County Council* a lenient approach serves to encourage circumvention of the requirement to submit to screening for EIA and full EIA.

96. In view of the requirement to deter circumvention of a requirement to submit to environmental assessment in accordance with the requirements of EU law, I am bound to observe that had the Applicant been successful in establishing some frailty in the decision-making process, which it has not been, I would nonetheless have required some persuasion to quash the Respondent's decision to refuse retention permission where the effect of that decision was to ensure proper screening for EIA before development consent could be granted against a background where above threshold user has taken place without appropriate development consent first being obtained following due and proper assessment of environmental impacts. As succinctly stated by McMenamin J. in *Usk v. An Bord Pleanala* [2010] 4. I.R. 113 at p. 179, the obligation on the State is unequivocal. All measures must be adopted to ensure there is a fully compliant environmental assessment as the basis for development consent.

97. For the reasons given, I refuse this application.