Oral Hearing

An Bord Pleanala PA 0151

17th May 2016

Closing Submission by Joe Noonan Solicitor
on behalf of

Mary O'Leary & Others known as CHASE

PDA Section 37G(5)

> *Where an application under section 37E relates to proposed development which comprises or is for the purposes of an activity for which an integrated pollution control licence or a waste licence is required, the Board may, in respect of that development, decide to refuse a grant of permission under this section, where the Board considers that the development, notwithstanding the licensing of the activity, is unacceptable on environmental grounds, having regard to the proper planning and sustainable development of the area in which the development will be situated.*

What is the question before the Board? It is to decide whether or not to give this Application planning permission. This is an easy question to answer. It is hard to understand why we are still discussing the question after 50 days of oral hearing.

An Bord Pleanala has three parallel jobs to do. Two are relatively new, EIA and AA. One is to determine the Application in accordance with the proper planning and sustainable development of the area.

The planning package ring binder is the thinnest of the ring binders on the table. Yet it is the most important.

There is a danger that the AA and EIA process especially hog the limelight. EIA has its place but once it is done properly the outcome does not dictate the result of the planning application. Those framing the EIA Directive might have assumed otherwise but that's not how it works necessarily.

AA can be a red line issue. The Board must establish on evidence that there is no reasonable scientific doubt over the effect of the project on certain protected areas or species. The

thickest volume is the NIS. Its size contrasts with the relatively small quantity of material on the impact of the project on people.

It is our case that the Application can be disposed of by reliance on traditional and well understood planning principles.

National Regional and Local Policy support a refusal of the Application.

The site is patently unsuitable. It was not selected using the coherent and logical process recommended by for example the WHO. In fact it would never have been considered had the exclusionary factors recommended by the WHO been applied.
It does not fulfil the environmental criteria set out in the Southern Region Waste Management Plan.

HSE Submission to the Board on the Application:

> *'This site is a cul-de-sac and therefore, an incident at this site means that emergency response is limited to an approach from one direction only. While this might be acceptable at an existing location built before emergency response practices were developed and current risk analysis procedures were put in place, it appears that the proposed location does not align with current best practice. There are significant education and research facilities located near to the proposed development. Hence, specific arrangements should be made to facilitate the warning and evacuation of such facilities on a twenty four / seven (24/7) basis.*
>
> *As cited heretofore, this is a Strategic Infrastructure Development (SID), as defined by Section 37A of the Planning and Development Act 2000, as per the decision of An Board (sic) Pleanala. However, the reasons advanced in support of the development, relate exclusive to the concept of thermal treatment of waste as a guiding principle, and do not refer to the suitability, or otherwise, of this specific site.*'

Dept of Defence

> *'The construction of such a facility in such close proximity to Haulbowline Naval Service base creates a flight safety hazard to Irish Air Corps helicopter operations……. Haulbowline is an important strategic location for the Irish Defence Forces, with aviation activities performed there including marine counter terrorism, joint Naval Service/Air Corps exercises including simulated attach, cargo-slinging for replenishment of ships at sea, and so on. Therefore restriction on the Irish Air Corps' ability to operate with the Naval Service at Haulbowline is not just a local issue but carries strategic implications for the State.'*

The communities in Ringaskiddy and in the Harbour are united in the view that this project has no place here.

Planning is not a popularity contest but this unanimity and cohesion commands respect and recognition by the Board. Attached is an Appendix with the names of those who took time to attend the hearing and speak to you, as complete as we can make it. It is disturbing that their voices will probably never be heard by the decision-makers.

We are asking the Board to refuse having regard to the following reasons.

1. Development premature by reference to road network serving the area of the proposed development is already acknowledged to be deficient, that deficiency will intensify with prospective development for which permission exists including Port of Cork.

2. Development of the kind proposed would be premature pending the determination by the road authority of a road layout for the area.

3. The proposed development would endanger public safety by reason of traffic hazard or obstruction of road users or otherwise.

4. The proposed development—

(*a*) could, due to the risk of a major accident or if a major accident were to occur, lead to serious danger to human health or the environment, or
(*b*) is in an area where it is necessary to limit the risk of there being any serious danger to human health or the environment.

5. The proposed development is in an area which is at risk of flooding.

6. The proposed development, by itself would adversely affect the use of a national road or other major road by traffic.

7. The proposed development conflicts with objective GI 7-1 of the County Development Plan 2014, and would interfere with the character of the landscape which is designated as a high value landscape in the Plan, or with a view or prospect of special amenity value or natural interest or beauty, any of which it is necessary to preserve.

8. The proposed development by reason of its nature scale and location would conflict with a policy of continued support to NMCI and iMERC, both of which institutions have importance recognised in the County Development Plan 2014 and in circumstances where the Local Area Plan Review proposes that consideration be given in the LAP to how best to continue support for NMCI and iMERC (Table 3.5.2 of the Review).

9. The proposed development would cause serious air pollution, water pollution, noise pollution or vibration or pollution connected with the disposal of waste.

10. In the case of development including any structure or any addition to or extension of a structure, the structure, addition or extension would—

(*a*) be under a public road,

(*b*) seriously injure the amenities, or depreciate the value, of property in the vicinity,

(*c*) tend to create any serious traffic congestion,

d*e*) endanger or interfere with the safety of aircraft or the safe and efficient navigation thereof,

(*e*) endanger the health or safety of persons occupying or employed in the structure or any adjoining structure, or

(*f*) be prejudicial to public health.

11. The proposed development would injure or interfere with a historic monument which stands registered in the Register of Historic Monuments under section 5 of the National Monuments (Amendment) Act, 1987, or which is situated in an archaeological area so registered.

12. The proposed development would materially contravene an objective indicated in a local area plan for the area.

13. The proposed development would be contrary to Ministerial guidelines issued to planning authorities under Section 28 of the PDA namely the Planning System and Flood Risk Management Guidelines.

14. The proposed development would adversely affect a landscape conservation area.

15. The proposed development would contravene materially a development objective indicated in the development plan for the conservation and preservation of a European site insofar as the proposed development would adversely affect one or more specific—

(i) (I) natural habitat types in Annex I of the Habitats Directive, or

(II) species in Annex II of the Habitats Directive which the site hosts, and which have been selected by the Minister for Arts, Heritage, Gaeltacht and the Islands in accordance with Annex III (Stage 1) of that Directive,

(ii) species of bird or their habitat or other habitat specified in Article 4 of the Birds Directive, which formed the basis of the classification of that site,

16. By reason of:-

a) Lack of sufficient date necessary to identify and assess the main effects of the proposed development,

b) Inadequate consideration of the interactions between the factors, and

c) Inclusion of technical terminology within the non-technical summary,

the Environmental Impact Statement submitted with the application is inadequate and fails to comply with the mandatory requirements as to content, contrary to the provisions of the relevant European Communities (Environmental Impact Assessment) (Amendment) Regulations, and the EIA Directive, and the Board is not satisfied, on the basis of the information provided in the submitted E.I.S. and at the oral hearing, than the proposed development would not be likely to have significant adverse impacts on the environment.

17. The proposed development which includes hazardous waste incinerator capacity because of its scale (which is considerably in excess of the scale required for the treatment of hazardous waste arising in the area and which is not suitable for recovery) would tend to inhibit the achievement of the Prevention Programme as provided for in the National Hazardous Waste Management Plan. The proposed development would therefore be contrary to national policy in relation to hazardous waste management and disposal.

18. The development of a hazardous waste incinerator facility, in the absence of the concurrent or prior provision of hazardous landfill capacity, would be premature, and would conflict, in a material way, with the provisions of the National Hazardous Waste Management Plan, in that no provision would be made for hazardous waste generated by the proposed development.

19. The development of an incinerator facility for the treatment of non-hazardous industrial waste is contrary to the provisions of the South West Regional Planning Guidelines, 2010 which make no provision for thermal treatment to deal with this type of waste.

20. Having regard to its nature and limited employment content, the proposed development would contravene in a material way, the development objective I–15, indicated in the County Development Plan 2014 and the Carrigaline Local Area Plan 2011, which specify the lands, of which the site forms part, as suitable for large stand-alone industry.

21. Having regard to its nature and purpose, and its location adjacent to Cork Harbour and to port-related activities in Ringaskiddy, the proposed development would contravene, in a material way, the development objectives EE 4-5 and 6-2 indicated in the County Development Plan 2014. The proposed development is not port-related and hence is an inappropriate use that would be inconsistent with the Council's policy of promoting Ringaskiddy as the appropriate location for the future development and expansion of the Port of Cork, and uses that are complementary to that purpose.

22. Having regard to its nature and purpose and location, the proposed development would contravene in a material way development plan objective EE 6-1 which requires implementation of sustainable measures which support and enhance the economic and employment generating potential of Cork Harbour in a manner that is compatible with other Harbour activities, as well as with the nature conservation values of the Cork Harbour Special Protection Area and the Great Island Channel Special Area of Conservation.

23. The proposed development, by reason of its bulk, scale, height, design and location, would be visually obtrusive and seriously injurious to the visual amenities of the area, would constitute a visually discordant feature within the harbour landscape, and would detrimentally impact on the preservation of views and prospects obtainable from scenic routes which it is necessary to preserve. The proposed development would, therefore, be contrary to the proper planning and development of the area.

24. Having regard to the scale, nature and purpose of the proposed development, the site, by reason of its topography, its climatic conditions, its geological and hydrogeological characteristics, and the risk of erosion and flooding of parts of the site, and by reason of objectives FD 1-1, 1-2, 1-3, 1-4 and 1-6 of the Carrigaline Local Area Plan 2011 and objectives WS 6-1 and 6-2 of the County Development Plan 2014, would be fundamentally unsuitable to accommodate the proposed development, and the applicants have not demonstrated that the proposed site is suitable, on the basis of objective criteria in a rational site selection process based on international best practice.

25. The proposed development, because of its nature and function, its location in close proximity to high density housing development at Ringaskiddy, and the resultant noise and disturbance arising from its construction and operation, would be seriously injurious to residential amenity, and would be likely to depreciate the value of residential property. The proposed development would, therefore, be contrary to the proper planning and development of the area.

26. Having regard to the location of the proposed development at the end of the peninsula of Ringaskiddy, with a single road access and no rail access, on the southern coast of the State, and to the scale of the development which is designed to source waste from all parts of the State, the proposed development would involve excessive movement of vehicular traffic through urban areas, and hence would give rise to conditions that would be prejudicial to public safety and amenity. The proposed development would therefore be contrary to the proper planning and development of the area.

27. The existing road infrastructure in the vicinity of the site, particularly along the N28 national primary route at Carr's Hill, the Shannonpark and Shanbally roundabouts, and along the LP2545 local road within Ringaskiddy, is currently the subject of serious traffic congestion, and is inadequate to accommodate the extra volume of traffic and traffic movements that would be generated by the proposed development, both during construction and operational phases, particularly the significant H.G.V. content. The proposed development would endanger public safety by reason of a serious traffic hazard and obstruction of road users.

28. The proposed development would be premature by reference to the existing deficiencies in the road network serving the area of the proposed development, which it is not likely will be rectified within a reasonable period.

29. On the basis of the evidence submitted to the Board and the evidence heard at the oral hearing, it is clear that the proposed development would pose significant risks to public safety in the event of major accident hazard, particularly in view of the proximity of the site to the National Maritime College, and to nearby Seveso II establishments, and having regard to the inadequacy of emergency infrastructure in the area and to the location of the site at the end of the peninsula, with limited road access.

30. Having regard to the strategic nature of the proposed activity, proper planning and sustainable development requires to be situate in a strategically selected location. Having regard to the remote location in regional and national terms, the deficiencies in the road network, the constrained emergency access options to this cul de sac, the susceptibility of the site to flooding, the vulnerability of the site to coastal erosion and recession and the hazard to flight safety in the environs of the Naval Service National HQ base, the site is not suitable for the proposed development.

31. Having regard to the information furnished by the Applicant there is no or no adequate independent evidence to demonstrate that the development meets the applicable R1 criteria under the Waste Framework Directive. Accordingly the development would contravene in a material way zoning objective ZU 3-7 of the County Development Plan 2014.

32. Having regard to the evidence that the proposed development would cause a significant increase in greenhouse gas emissions when measured on a national scale, the development would be incompatible with national policy and commitments undertaken in relation to action on climate change.

33. The development is unacceptable on environmental grounds, having regard to the proper planning and sustainable development of the area in which the development will be situated.

Why are we still even talking about this? The best explanation I can come up with is that sometime in the late 1990s a view took hold in Dublin that Ireland needed a big hazardous waste incinerator. Someone formed the view that Ringaskiddy was the place for it. This view took hold. It became a fixed view in official circles beyond the reach of rational argument.

This was the mindset which led to the rejection of the possibility of student accommodation at the Maritime College as set out in Condition 1 of the Outline Permission granted for the College in 2001. Inspector Jones' Report at page 18 notes that *'it was established during questioning of the County Planning Officer Mr Brendan Kelleher at the Oral Hearing on 10th October 2003 that the condition preventing residential accommodation arose from the potential difficulties it would pose for the Indaver application which "was known by the Council officials to be imminent"'* as well as the potential for problems in relation to industrial uses on adjoining sites.

This proposed development was casting a shadow in the area before it ever even reached the desk of the planning authority by way of an application. That shadow lifted after the Board's refusal in June 2011. You have heard detailed cogent evidence from Minister Simon Coveney and from Minister Sean Sherlock of the significant change in Government policy in relation to development and the promotion of employment, educational opportunities and economic activity in Cork Harbour linked for example to the EU 2020 Horizon Programme.

The direction and expression of Government policy emerging since June 2011 has changed the planning policy context for the better in Cork Harbour. This development proposed by the Applicant is declared by all public representatives in the area now to be inappropriate and unacceptable. It is in fact now seen as a threat to the achievement of the policy goals described to you during this hearing.

The Applicant said in 2003 that they chose this site because this was where 60% of the country's hazardous waste arose. That was the rationale offered at the time. The rationale offered now has changed but the reality is that this site is put forward for this development because it suits the Applicant. It does not suit local regional or national needs. The local and regional planning policy context is summarised in the:

Cork County Council Planning Policy Unit (PPU) Report of February 2016

This Report forms part of the County Council's Report to the Board on the Application. It refers to the relevant statutory planning documents, namely the South West Regional Planning Guidelines 2010, the County Development Plan 2014 and the Carrigaline Electoral Area Local Area Plan 2011. The PPU Report notes that the South West RPG contain an objective RTS-08 to encourage provision of a materials recovery facility or a Mechanical Biological Treatment in a sustainable location within the Cork Gateway with good transportation links.

The RPG do not include waste to energy facilities.

The PPU sets out several objectives in the County Development Plan of direct relevance to this Application commencing at page 4 of the PPU Report. These include ZU 3-7, EE 4-1, EE 4-4, EE 4-5, WS 7-1, GI 7-2 and GI 7-3 and HE 4-1. It also notes the zoning in the LAP I-15. It refers to the construction of the iMERC campus on a site opposite the proposed development site and goes on

> *'there is great potential to expand existing educational activities in Ringaskiddy and establish a centre of excellence for marine related education, research and training. Any proposed development is likely to comprise research facilities for the existing NMCI and for the Coastal Marine and Resources Centre and Hydraulics and Maritime Research Centre of UCC. In addition a marine related research and innovation park may be developed including general office accommodation, manufacture and storage associated with prototype development and testing.'*

The Southern Region Waste Management Plan recognises that there may be a need by 2030 for up to 300,000 tonnes per annum incineration capacity for municipal waste nationally. While it was indicated during this hearing by the Applicant that it had carried out some form of gravity modelling exercise, none has been produced to you Inspector.

On the subject of the Southern Region Waste Management Plan the secretariat has written to the Board about this Application. A representative attended on the opening day and not subsequently. She advised you that the Applicant had written to the SWMO 'addressing' some outstanding questions and that the SWMO had nothing further to contribute.

We learned something very important on that opening day that struck us as so significant that we wrote placing it on record with the SWMO. That was that the SWMO does not assess or evaluate in any way what it is told by the Applicant. It accepts what the Applicant says at face value.

The NPWS says that it relies on as yet unknown EPA licence conditions for reassurance.

The County Council has been obviously over stretched in trying to get to grips with the Application in the time allowed. An example is that the Council witness dealing with flooding admitted candidly that he was not a flooding expert.

The HSE says that the material given to it by the Applicant is 'taken as read'. By this I gather it means 'taken at face value'. Nevertheless the HSE did suggest to the Board that it should contact the municipal authorities and emergency services in Antwerp for information about the recent explosion and fire. As far as we know that has not happened.

Instead a consultant for Indaver purported to give information at the oral hearing as to why what happened in Antwerp could not happen here. You will remember Inspector that when asked for the source of his information, he replied simply 'Indaver'.

The EIS contains at Appendix 6.1 a document called 'Hazard Identification and Risk Assessment'. It was prepared for Indaver Ireland Ltd. There is a very specific disclaimer at the start of the document. It says among other things that the Report is confidential to the client. It says the authors accept no responsibility of whatsoever nature to third parties. It concludes '*any such party relies upon the Report at their own risk.'*

In passing Dr Peter Daly elicited from Mr Leonard of Byrne O'Cleirigh Ltd that the Report had not been written to the standard for risk assessments laid by the International Standards Organisation.

Even if it had, the Board is specifically precluded in terms from relying on it.

On previous occasions oral hearings had the benefit of testimony from bodies such as the NRA, OPW, HSE, HSA and the Fire Services who attended by invitation. That has not

happened on this occasion. While we say there is ample reason to refuse this Application anyway, information from those bodies would have been of interest to the public and of benefit to the Board.

Taking roads as an example, you might note Inspector that at the 2003 oral hearing, the Chief Planning Officer for the County at that time, told the hearing that the new road was expected to be built within five years. By 2009 no such assertions were made. We're no wiser now in 2016.

In our objection letter to the Board we said that we were asking the Board to interrogate all of the data and assertions made by the Applicant. This is a difficult and tedious task but it is essential. The Board must undertake an independent competent audit of the material in the Application. The public do not have the resources to do this properly.

During this hearing the very limited scrutiny by mainly unpaid volunteers has already revealed multiple significant errors gaps and inadequacies in the Application. Unfortunately, this has led at times to exasperation and further obfuscation rather than a constructive response which has only increased the worry and concern felt by many of the Observers at the hearing.

In addition the implications of the works proposed are only gradually emerging. An example of what I mean was yesterday when we learned that the stones to be poured on the beach would create a 1:3 slope creating unstable and hazardous underfoot conditions. No older person or parent with a young child would feel they could safely traverse this area. What is now a pleasant stroll would become at best a fraught event. The amenity of the beach would be lost.

Similarly we learned of 'curtailment' of public access to the beach. Though when pressed Ms Patterson became quite vague on the extent of the 'curtailment'. Indaver's Counsel asserted that his client owned the car park, the use of which would be restricted if not altogether prevented at times. The car park is in charge of the Council and is maintained for the benefit of the public by the Council. Indaver has no right to deny full and free access and parking facilities to the public.

The Board makes it decisions on the basis of the evidence before it. You have heard the evidence given by Professor Colin Bradley a GP in Cobh and Professor of General Practice at UCC. Speaking on his own behalf and on behalf of his colleagues in Cobh, Dr Paul McDonald, Dr Peter Morehan, Dr Harry Kelleher and Dr George Fitzgerald, Professor Bradley said:

> '*we cannot see how the proposed incinerator can be anything other than a retrograde development. ……. we have no difficulty in sharing with our patients a sense that this proposal will have a deleterious effect on their health and wellbeing.'*

Corroborating evidence was given by Dr Jennifer Hayes Clinical Psychologist. None of this evidence was controverted.

Dr Martin Hogan acknowledged that he had not spoken to anyone in the area when formulating his own opinion on the potential health impact. He had done a type of search online. This had found an article about Japanese incinerator workers. He assured us that their mental health was above average.

The limitations of Dr Hogan's research method are readily apparent and need not be rehearsed here. One example among many is the discussion about the Sharma paper. Inspector you will recall that this study warned of adverse health effects from large scale incineration. Dr Hogan however sought to dismiss the study as it related (or so he thought) to incinerators in India. These he asserted were not relevant as they were not subject to the same level of control and regulation as European incinerators.

Dr Gordon Reid read the Sharma paper. He showed you the list of incinerators. None was in India. Most were in Western European and other Western industrialised nations. It was the authors of the article who were in India.

When asked what guidelines he had had regard to when approaching his task, Dr Hogan said he was aware of some WHO and EU guidelines. He did not mention the EPA Guidelines in place since 2002 (even though these are listed in the EIS in the section to which he contributed). When the September 2015 Draft EPA Guidelines were mentioned to him, he indicated that he could not comment on them as they were a legal matter.

Dr Hogan said that what he called a 'stand-alone health impact assessment' would be impractical and unnecessary. He took none of the steps that would have been required in order to carry out such as an assessment. He confined himself to receiving assurances from the Applicant and its consultants that the development would operate safely and lawfully. He concluded on that basis that it would only have negligible impact on human health. As a result the EIS does not contain data that would enable the Board to assess human health impact of this development at this location.

Dr Staines has explained clearly that it is both possible and necessary to conduct such a health impact assessment and he has outlined how to go about it by reference to authoritative sources and his own experience as the leading national expert in the field.

We submit that Dr Staines' methodical data based approach is entirely consistent with the EPA Guidelines including the requirement in the September 2015 draft Guidelines for experts to have appropriate competence.

Professor (Dr) Vyvyan Howard gave evidence that the fine particulates created by combustion escape into the atmosphere in high quantities and cause harm to human health.

It is essential to avoid becoming so enmeshed in the minutiae of technical and scientific argument about filter effectiveness and limits, as to lose sight of the fact that the entire unambiguous thrust of policy at international EU and national level is towards reducing air pollution as much as possible in order to limit the damage it causes to health. Adding this incinerator at this location is contrary to all those policies.

Empirical evidence v computer modelling

We have heard repeated examples of the Applicant's preference for presenting theoretical computer models when empirical data are readily available. Examples include measuring noise at Carranstown (not done), measuring actual pollutant deposition at Carrantsown (not done), measuring actual weather conditions at the Ringaskiddy site (hardly done at all) and of course as previously mentioned, gathering available empirical data on the health status and population structure in the area (not done).

This Application is based to a dangerous degree on assumptions and computer models. While models may be useful tools, they cannot supplant empirical research and hard evidence.

AA

In relation to Appropriate Assessment Mr Inspector I believe that you have a clear view of the situation. The sediments in Cork Harbour tell their own story. This proposed development cannot but make a bad situation worse. There is no reasonable scientific doubt but that this development must have an adverse effect on the Natura 2000 sites within Cork Harbour.

EIA Public Consultation

- Article 6 of Directive 2011/92 EU : *Reasonable time-frames for the different phases shall be provided, allowing sufficient time for informing the public and for the public concerned to prepare and participate effectively in environmental decision-making subject to the provisions of this Article*.

  The Board has not complied with this Article, and as a result will be unable to comply with Article 8 of the Directive: *The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure.*

- The Board is required under Article 2 to assess the effects of the project. Article 3 sets out what the assessment entails. Article 5 requires the developer to provide specified information including data so that the Board will be able to identify and assess the project's main effects. The developer must also give an outline of the main alternatives studied by it and must indicate the main reasons for its choice *taking into account the environmental effects.* The developer has not given the required information or data.

- Project Splitting. The Board is obliged to ensure that all elements of a project covered by the EIA Directive are scrutinised at the one time. We submit that the evidence suggests that key elements of this project have been kept away from the table in order to frustrate that task. Specifically we cite the Waste Transfer Station, the ultimate disposal location for waste ash, and the positioning of rock armour to protect the Eastern boundary of the site as it is falling into the sea.

- No information is presented in the EIS about the environmental effects of taking up or removing utilities including power lines, high pressure gas main, underground power cables and water services in order to facilitate works on the site. All of these are admitted to be essential yet they are completely absent from the EIS.

- Who is the Applicant? In order to enter into legal transactions a party must be a legal person. There are two types of legal person, a natural person or a body corporate. By definition only a legal person has legal capacity to enter into legal transactions, own property, dispose of property, enter into contracts, seek and hold licences, sue and be sued or indeed be prosecuted for offences.

  The law requires a legal person carrying on business under a name or style which differs from their legal name, to register that different name in the Registry of Business. The Registry of Business Names simply imposes an obligation to register a business name but does not endow that business name with legal personality. John Williams t/a Great Guitars registers his business name 'Great Guitars'. He wants to buy a shop and change the facade. He cannot buy this in the name of 'Great Guitars', nor can he apply for planning permission in that name.
  If John Williams incorporated a company called 'Great Guitars Ltd', then that company being a legal person would be entitled to buy the shop and apply for planning permission.

  In exactly the same way, it is open to the company to register a business name such as 'Great Guitars'. However if the company wish to a buy a shop or apply for planning permission, it must do so in its company name of 'Great Guitars Ltd'.

  The Companies Act separately requires companies to publish the full name of the company on all official notices etc.

  The SID legislation provides that a prospective applicant shall seek a determination from the Board as to whether their development is strategic infrastructure. That is a precondition to making a planning application under the SID process. It is also a precondition to the Board having jurisdiction to consider such a planning application. 'Prospective applicant' is defined as '**a person** who proposes to apply for permission for any development specified in the Seventh Schedule.' This definition is referred to in Section 37A(3) and 37B(1). Section 37A is headed 'Board's jurisdiction in relation to certain planning applications.'

In the present case, the prospective applicant identified itself to the Board only as 'Indaver Ireland'. As we have explained in our opening submission and as we have reiterated here, this is not a legal person. The purported determination issued to 'Indaver Ireland' dated 23rd December 2015 by the Board is of no effect.

Even if it were otherwise, the planning application made to the Board was made by 'Indaver Ireland Ltd'. Indaver Ireland Ltd neither sought nor was granted a determination prior to lodging its application. Indaver Ireland Ltd was never a prospective applicant.

For that reason, the Board had no jurisdiction to accept the planning application. That remains the position.

By letter dated 3rd February 2016, Indaver Ireland wrote to Kieran Doherty to say:
'Please note the application form contained a clerical error in sections 2,3 and 4. In four instances, the company name reads 'Indaver Ireland Ltd' where I should read 'Indaver Ireland'. The company registration number, director details and address are all correct for Indaver Ireland, as are the public notice and site notice.
As discussed, this letter is sufficient to confirm that the clerical error, which does not prejudice any third parties, has been both acknowledged and corrected. We will await instruction from the Board with regard to uploading this information to the standalone planning website.'

Kieran Doherty replied by letter dated 29th February 2016 addressed to Indaver Ireland Ltd noting the content of the letter 'with regard to the clerical error'. He said: 'The issue should be addressed by Indaver Ireland, with any other errata, at the commencement of the oral hearing.' This letter neither confirms nor denies the acceptance by the Board of the content of the Indaver letter.

Neither of these letters were made available to the public prior to the commencement of the oral hearing, when copies were included in the papers available for inspection in the room.

We raised the question of the applicant's identity in our written Observation of 8th March 2016 and together with other observers, we raised this again at the outset of the Oral Hearing.

The information set out in the letter of 3rd February 2016 is inaccurate in that there is no company with the name 'Indaver Ireland' registered in Ireland with the number 904443. The characterisation of the persons named in the Application Form as directors is acknowledged in the submission of the Applicant's Counsel to be inaccurate insofar as the persons named are not directors but rather representatives of the Belgian company, Indaver NV.

The identity of the applicant remains undetermined.

What is happening in the course of this oral hearing is that the suggestion is made that the identity of the Applicant may be changed from 'Indaver Ireland Ltd' to 'Indaver Ireland'. The purported replacement 'Indaver Ireland' is not a legal person and therefore cannot be a valid Applicant.

Furthermore, because the Board does not have a valid application before it, namely one lodged pursuant to a determination granted to a legal person who is a prospective applicant within the meaning of the Act, the Board has no jurisdiction in any event to entertain any application to amend the invalid planning application.

The Applicant's Counsel in his opening submission referred to a number of cases in non-SID applications, where evident errors or irregularities were not regarded as fatal to a permission. None of the cases cited is a precedent for the circumstances now before the Board.

Even if the Board were now to be asked to allow the application to proceed in the name of the Belgian company, Indaver NV, nothing so far presented to the Board in respect of this planning application discloses the names of the directors of that company.

- Identity and Consent of Landowner

We have considered the response by Counsel for the Applicant made on 4th May 2016 to Mr Frank Kelleher's submission. The response is inadequate.

This hearing has been told categorically that Indaver Ireland is merely a business name. By definition it does not have legal personality and therefore does not have legal capacity to own land. It follows that it cannot give consent as the owner of land.

The attempt to suggest that it can consent because the Land Registry record shows the registered owner as 'Indaver Ireland' is spurious. One may speculate as to the nature of the entity shown as the registered owner in the public Land Registry Folio for the site as of 2005. For example, at that time there could have been an unlimited company called 'Indaver Ireland' which would have been a legal person.

The question is why has no clear answer been provided to this simple question. This is a matter capable of easy and quick clarification. If the applicant is the owner of the land, then the applicant is in a position to furnish to the Board a copy of the 2005 Land Registry Instrument (registration documents) which would immediately clarify the true identity of the registered owner.

- Applicant's planning history at this site

In 2001, they applied for a five year planning permission for an industrial hazardous and non-hazardous waste incinerator (100,000 tonnes pa), a waste transfer station and a community recycling park with some heat recovery and power generation.

Although the 2001 planning application was limited to one incinerator, the EIS submitted with this planning application envisaged both a fluidised bed incinerator with post combustion chamber for the treatment of hazardous and non-hazardous solid and liquid waste (100,000 tonnes pa) and a separate moving grate incinerator for the treatment of residual non-hazardous solid industrial, commercial and household waste (100,000 tonnes pa).

In 2008, they applied for a ten year planning permission for a fluidised bed incinerator with post combustion chamber for the treatment of hazardous and non-hazardous solid and liquid waste, a separate moving grate municipal waste incinerator and a waste transfer station with some heat recovery and power generation. The maximum combined capacity of the two incinerators envisaged in the 2008 planning application was 240,000 tonnes pa.

In August 2012, they wrote to the Board asking for a determination under SID in relation to proposed waste incineration facilities with two options then in mind:

1) an industrial hazardous/ non-hazardous waste incinerator (100,000 tonnes pa) fluidised bed and post combustion chamber, a separate municipal waste moving grate incinerator (140,000 tonnes pa) and a waste transfer station.

2) a single industrial hazardous/ non-hazardous and moving grate municipal waste incinerator (220,000 tonnes pa) and a waste transfer station. They indicated that the likely split between hazardous and non-hazardous waste would be 70:30 [meeting notes 12.11.2012]

Three years later, **in July 2015** while the pre SID consultation process was still underway, they decided to omit the waste transfer station. This is noted in the Board's records of the pre-consultation process as follows.

In the Board's Minute of its pre SID consultation meeting of 16th July 2015 with the Applicant, it is noted at page 4:

> 'Project description update:
> 'The prospective applicant informed the Board that the pre-treatment facility (transfer station) has now been removed from the intended planning application. This has been done in order to simplify the planning application, though it hopes to make a separate application for this element at some time in the future. The prospective applicant said that the overall size of the subject site will remain the

same. Noting this, the Board said that it would be important to be clear on this point so as to avoid any possible accusations of project-splitting and an incremental approach to the development of the site.

Arising from this, the prospective applicant said that the site should no longer fall under the Seveso Regulations. This would be due to the removal of storage of certain volumes of solvents. Notwithstanding this, a Risk Assessment will be included as part of the formal planning application. The Board for its part advised that consultations with the Health and Safety Authority may be necessary if there are other Seveso establishments within notification distance of the proposed development. The matter may also need to be referred to in public notices.*'*

In the Board's Minute of its next consultation meeting with the applicant of 11th September 2015 at page 2, it is noted:

'The prospective applicant is recorded as requesting "clarifications" on the record of July 16th meeting at:

Page 4 of that record first paragraph in relation to transfer station –
"*The transfer station is not needed at this time. It may revisit it as a separate application in the future*"

Page four second paragraph -
"*The proposed development will not fall under the Seveso Regulations; therefore reference to the Major Accidents Directive in the Public Notices is not required*"'.

In January 2016, they submitted the present planning application which is for a single industrial hazardous/ non-hazardous and moving grate municipal waste incinerator (240,000 tonnes pa) with some heat recovery and power generation. The application does not include a waste transfer station. The application does include a raised platform similar in dimension and elevation to the platform on which the previously sought waste transfer station would have stood.

- <u>Strategic Infrastructure</u>

Strategic infrastructure has to be carefully planned. A proposed development which comes under the strategic infrastructure designation must be able to demonstrate that its site is suitable for long term use for the activity and that the development does not cause damage to other strategic interests or priorities. Strategic infrastructure where possible should be located close to existing supporting infrastructure for example transport networks. In this way public investment previously made in such infrastructure achieves an appropriate return on investment.

This Application when tested against these criteria fails dismally.

- Perception of Bias

  - The Board is under a statutory duty to deal with pre consultation SID expeditiously.

  - The Board indulged in hasty decision making in 2004.

  - The Board leaned heavily in favour of the Applicant during the 2008 Application. Specifically it facilitated the Applicant who had failed to present essential information, by adjourning the oral hearing half way through. It proceeded to invite the Applicant after the hearing closed to submit yet more information. It allowed an extension of time for that purpose on request. It gave the minimum time possible on the community to respond to that information, rejecting their requests for further time. While its ultimate decision to refuse was welcome, the process itself caused deep concern.

  - The speed with which the present Applicant has been dealt with so far by the Board is oppressive to the communities in Cork Harbour and their representatives. It is astonishing when put in contrast with the indulgence shown to the Applicant over three years and four months supposedly dealing with the single question of whether this was SID. Board opted to have the Applicant's material placed online. It did so in a manner that left control of the online site with the Applicant. This meant that the Applicant had the ability to gather data on all who visited the site, what they looked at, how long they remained, how often they returned. The Applicant should not have been privileged in this way.

  - By contrast when the Board received Observations these were not circulated to other parties. Neither were they placed online for the benefit of the public or the parties concerned. This has led to the absurd situation where in order to the submissions of public bodies we have had to travel to Cork County Council offices, and otherwise to the offices of An Bord Pleanala in Dublin. The presence of those submissions on a table in this hall during this hearing is a silent reproach to the Board's attitude to the public.

  - As set out above, the Board appears to have acquiesced in the Applicant's late removal of the waste transfer station from the proposed development. This has been done '*to simplify'* the planning application. It was immediately acknowledged that a consequence of the removal was that the development would no longer fall under the Seveso Directive. This is a transparent device and should not have been countenanced by the Board. The waste transfer

station has been a feature of this development since the first application was lodged in November 2001.

- The elaborate pre-planning guidance given by the Board to this Application is remarkable. The SID determination process took three years and four months and during this time the Board engaged in elaborate enquiries with the County Council and other parties in relation to the project, and in a lengthy series of meetings with the Applicant. The tenor of these engagements and enquiries as recorded by the Board suggests that the Board may have predetermined the principle of incineration at the site and may be focused only on the four reasons for refusal in 2011. In this regard I would refer for example to the email sent on 31st January 2013 by an Executive Officer of the Board to an official of Cork Co Council. The email sought to set up a meeting with personnel in the Council in relation to the pre-application consultation then underway. Having asked who would be the best personnel to liaise with to ascertain the Council's views on the proposed development the email concludes: *'Of particular interest to the Board are the issues of waste management policy, access road, flooding and coastal erosion.'* These 'particular interests' formed the basis for the four refusal grounds in 2011.

- We asked in our Observation Letter of 8th March re the validity of the application for various reasons. The Board made no response to these concerns. We now know that in February the Applicant wrote to the Board saying they had put the wrong name on the Application Form. This letter was not included in the List of Correspondence on the website and so we only saw the letter at the oral hearing. The letter is couched in terms that seek to suggest an acceptance by the Board that this was merely a clerical error and of no concern in substance.

- The Board's response, sent to the wrong company, simply suggested the matter be raised at the hearing. At the oral hearing, the matter was raised not by the Applicant but by us on behalf of the Observers. The Board has still made no response or determination on the issue.

- A Board approaching its function in a judicious way would use its powers to investigate and rule on this as a preliminary issue. Instead, and explicitly by reason of the 18 week non-binding statutory objective for making decisions, the Board arranged to proceed with a speedy oral hearing. If the Application is invalid, the oral hearing will have been wasted. The fact that the oral hearing has taken place itself now may unduly influence how the Board approaches the validity question.

- The Board's determination to deal with the Application expeditiously is in sharp contrast to it approach to the pre-application consultation. This is exemplified in the record of its 23 November 2015 meeting with the Applicant which states: *'the Board's representatives advised that it is for the prospective Applicant to close the pre-application consultation process; however the prospective Applicant may wish to comment on the record of this meeting and also leave the process open as long as necessary in case any further issues were to arise.'*

- In order to remove any perception of bias we submit that the SID Division of the Board which has managed this process since august 2012 should step aside and this Application should now be considered by other Board members.

Learning Lessons

Inspector you have learned that the area adjacent to Gobby Beach is a classroom for young sailors. You have also learned that Gobby Beach itself is an open air classroom for third level students of geology. These educational resources complement the more high profile facilities recently established across the road from the proposed development site. Taken together these educational resources are a powerful answer to anyone thoughtless enough still to cling to the idea that this site is suitable for this development. As you have heard, if this development site was next to a football pitch, the application would have been rapidly refused. This application deserves no better fate.

End.