

# **MINUTES OF PROCEEDINGS AT SPECIAL MEETING OF LIMERICK CITY AND COUNTY COUNCIL HELD IN THE COUNCIL CHAMBER, DOORADOYLE, LIMERICK, ON FRIDAY, 12<sup>TH</sup> FEBRUARY, 2016, AT 10.00 A.M.**

## **PRESENT IN THE CHAIR:**

Councillor L. Galvin, Mayor.

## **MEMBERS PRESENT:**

Councillors Browne, Butler, Byrne, Collins (J), Collins (M), Crowley, Daly, Donegan, Glligan, Hurley, Keary, Keller, Loftus, Lynch, McCreesh, McMahon, Mitchell, Neville, O'Brien, O'Donnell, O'Donoghue, O'Hanlon, Prendiville, Ryan, Secas, Sheahan (J), Sheahan (K), Sheahan (M), Teefy.

An apology for her inability to attend the Meeting was received from Councillor Sheehy.

## **OFFICIALS IN ATTENDANCE:**

Chief Executive (Mr. C. Murray), Director, Transportation & Travel/Environment (Mr. K. Lehane), Director, Regional Services (Ms. C. Curley), Senior Executive Officer, Transportation & Travel/Environment (Mr. G. Dillon), Senior Executive Engineer, Environment (Mr. G. Doherty), Senior Engineer, Regional Services (Mr. T. Tarpey), Meetings Administrator (Mr. C. O'Connor), Administrative Officer, Corporate Services (Ms. T. Knox).

## **Also in Attendance:**

Messrs. W.E. Leahy and W. Leahy, Leahy & Partners, Solicitors.  
Mr. Gareth McElhinney, Technical Director, RPS Consulting Engineers.

At the outset and with the permission of the Mayor, Councillor Sheahan (J) addressed the Meeting and stated that the Special Meeting had been called on foot of his Notice of Motion at the January Meeting of the Full Council. He added that it had been agreed at that Meeting that a Special Meeting would be the best forum to explore the implications of a gasification plant and also that a legal representative would be in attendance. Councillor Sheahan (J) explained that the Party Leaders had been circulated that morning with the "*Report on the Lease of Lands at Gortadroma Volume 1.*" He said that a frank and open discussion had taken place at the Party Leaders' Meeting in relation to the report but that further time was required to consider the report.

At this point, on the proposal of Councillor Sheahan (J), seconded by Councillor Collins (M), it was agreed to adjourn for twenty minutes.

On resumption, the Mayor stated that the format that the Meeting would take had been agreed by the Party Leaders. He said that it had been agreed that the *“Report on the Lease of Lands at Gortadroma Volume 1”* would be read into the Minutes of the Meeting. He explained that there were five Sections in the said report and that each Section would be dealt with individually. He pointed out that the Director, Transportation and Travel/Environment, would read each Section and that the Members would be afforded an opportunity to ask questions/seek clarifications at the end of each Section.

Before calling on the Director to read the report, the Mayor welcomed Messrs. W.E. Leahy and W. Leahy of Leahy & Partners, Solicitors, and Mr. Gareth McElhinney, Technical Director, RPS, to the Meeting.

At this stage, copy of *“Report on the Lease of Lands at Gortadroma Volume 1”* was circulated to the Members by the Senior Executive Engineer, Environment.

The Director, Transportation & Travel/Environment, confirmed that the Appendices listed in Volume 2 would be circulated to the Members in the following 2-3 days.

The Director then proceeded to read into the Minutes of the Meeting **Section 1**, comprising of Pages 3-4 of the circulated report, as follows:

## Section 1

### Introduction

The Gortadroma landfill facility began operating in 1990 and was owned and operated by Limerick County Council. The facility currently holds a Waste Licence granted by the Environmental Protection Agency, EPA, for the acceptance of both a **130,000 tonnes** of municipal waste and **30,000 tonnes** of inert waste per annum. The site is comprised of **76 ha (188 acres)** of which **18ha (44.5 acres)** (24% of site) is occupied by engineered landfill cells (which are fully lined chambers designed to manage any leachate or gas arising from the waste as it decays).

The Council developed and filled 16 cells in total and the last of these was filled in and then sealed in the summer of 2014.

The site no longer accepts waste for disposal although the public may still bring small quantities of waste to the site. This waste is subsequently collected under contract and then transferred elsewhere for treatment or disposal.

There is planning permission and an EPA licence for a further 2 Cells. These proposed further cells have not been developed due to the uncertainty in the market place for waste disposal and doubts over the financial viability of a new cell development. The EPA has also issued a licence in respect of another area within the site for an additional six cells. However, this area does not currently hold a planning permission. The planning permission and waste licence in situ represent a substantial asset owned by the Council.

The landfill site also includes a gas collection system and turbine to generate electricity which is currently supplying to the grid. The turbine is generating 1 Megawatt of electricity, equivalent to the electrical supply requirement for 700 households. This facility earns a considerable annual income for the Council.

## Landfill Gate Fees

Landfill gate fees (income from accepting waste) began to drop drastically in 2009 as a result of significant landfill capacity being available in the market place and the willingness of collectors to travel significant distances to deposit their waste. It should be borne in mind that in the period during which the facility continued to accept waste for landfill the Council generated a high level of income well in excess of operating costs. Over the lifespan of the facility the net income earned for the Council amounted to many millions. The projected decline in this income was an important factor that influenced the need to consider future options for the use of this major infrastructural asset of the Council.

In 2009 the Council decided to reduce the gate fee at Gortadroma Landfill in line with market forces and managed to maintain a reasonably significant volume of activity over its last three years of operation. However, the option of operating the landfill at the reduced gate fees necessary to ensure a supply of waste ultimately proved uneconomic to the Council. The reduced gate fees resulted in the closure of all of the landfills in the Southern Region of Ireland with waste now mainly being exported to mainland Europe for recovery in thermal treatment plants.

## Pressures on Landfill

The pressure on the landfill market increased due to the restraints on the types of waste that could be accepted in the Landfill Directive (1999/31/EC) and the objectives of the Waste Framework Directive 2008 (2008/98/EC) to move away from landfill.

The national framework policy produced by the Department of Environment, Community and Local Government details specific objectives including reducing the dependence on Landfill. A key stated policy objective in the latest National Policy named "*A Resource Opportunity – Waste Management Policy in Ireland (2012)*," is the virtual elimination of land filling of municipal waste.

The national policy is also incorporated into Council Policy through the Regional Waste Management Plans namely the Limerick/Clare/Kerry Region 2006-2011 and the Southern Region Waste management Plan 2015 – 2021.

The landfill levy forms part of this strategy and currently stands at €75/tonne for any municipal waste accepted at a landfill for disposal. This landfill levy has proven a very effective method in diverting waste from landfills. It should be noted that waste used for energy does not attract the landfill levy. It was apparent to the Council that maintaining the landfill gate fees at low prices to compete against recycling or waste recovery was not a long term viable financial option.

The EPA amended the waste licence in June, 2010 which imposed further restrictions on the Gortadroma Landfill. These restrictions included limiting the organic content of the waste that could be accepted. Limiting this organic waste fraction, which is also described as Biodegradable Municipal Waste (BMW), had the effect of requiring waste collectors to pre-treat or source segregate the waste to remove the organic fraction. Pre-treating adds further costs to waste that goes to landfill.

The introduction of 2 and 3 bin collection systems for householders is an extension of this national policy to divert waste from landfill and to encourage recycling.

A decision to extend the life of the Landfill and commit capital to build new cells was not considered viable given the market and regulatory restrictions.

In summary, the increased competition in the market for waste, the rise in the cost of the landfill levy, the statutory compliance requirements all combined to limit the future viability of Gortadroma as a landfill.

The Mayor then invited Members to indicate if they wished to ask questions/seek clarifications in relation to Section 1.

Following a short discussion, it was agreed that there was a merit in reading the full report to the Members at the Meeting and for recording it in full in the Minutes. Some Members stated that they felt it was important for them to be provided with information on the historical background to the site.

In response to a query from the Members, the Director, Transportation & Travel/Environment, confirmed that the report, as circulated, was a public document.

Following requests from the Members, it was agreed that Volume 2 of the report would be circulated to the Members imminently.

The Director, Transportation & Travel/Environment, then proceeded to read into the Minutes of the Meeting **Section 2**, comprising of Pages 5-12 of the circulated report, as follows:

## **Section 2**

### **Market Sounding Exercise & Proposed Sale of Gortadroma Landfill**

Limerick County Council commenced a review of the future use of the Gortadroma site in 2010.

At the Special Meeting of the Council held on 26<sup>th</sup> March 2010, the status of the landfill was brought to the attention of the full Council. A presentation given to the CPG earlier the same day (see Appendix A) was also given to the Council. The presentation outlined the options available to the Council. These options were as follows:-

- Continue to operate with new cell development
- Close the landfill
- Lease/sell the Landfill
- Add value to the landfill
- A combination of any of the above.

The Elected Members approved the recommendation to proceed with a market sounding with a view to engaging with the private sector to secure either the disposal of the site or identifying some other possible partnership arrangement.

On foot of the Elected Members approval, the Council engaged a leading firm of Irish Environmental Consultants, RPS, to undertake the Market Sounding Exercise on behalf of the Council.

RPS prepared a notice in the EU journal in May, 2010 and then reported on the response of the Market Sounding. This report indicated that the outright sale of the landfill facility represented a viable option for the Council. This recommendation was communicated to all the Members by the Director of Service for Environment on the 23<sup>rd</sup> June, 2010, (see Appendix B).

This option of disposal then became the preferred option for the Council as full disposal had the potential to eliminate the financial risks to the Council associated with the long-term operation and aftercare of the landfill. This disposal option would have involved Council divesting itself of the following:

- Ownership,
- Operation activities and associated costs,
- Environmental & commercial risks including existing and contingent liabilities.

The Council conducted a competitive tender process on E-tenders on 27<sup>th</sup> July, 2010 and appointed RPS Consulting Engineers in partnership with a specialist environmental legal firm of Matheson Ormsby Prentice on the 5<sup>th</sup> Oct, 2010 to progress the disposal option on its behalf.

The sale process was commenced with advertisements in appropriate media and a number of interested parties expressed an initial interest. The Council engaged in further discussions with these interested parties. However following an assessment of the bids by the RPS team a satisfactory offer was not received and the sale process was then terminated on the 11<sup>th</sup> July, 2011. The principal reason for failure of the sale was that the sale required a bidder to accept the historic environmental liability for the Landfill and this provision was ultimately unacceptable to the bidders.

A further presentation was given to the full council on the 24<sup>th</sup> October, 2011. (see Appendix C). The presentation informed the members that the sale process had been unsuccessful and was officially closed.

The presentation concluded with the following 3 possible options –

- (i) Development of new cells at a cost of €4m/€5m. This option was not recommended as even if loan sanction could be obtained, the current gate fees would not meet the loan charges in addition to the other operating costs.
- (ii) Based on the waste intake during 2011, it was anticipated at that time that the existing cells would be full by early 2013.
- (iii) It was possible in the meantime to seek to establish a potential use for the site as an alternative treatment option for waste or as an alternative energy option.

In conclusion the date of closure of the landfill was anticipated as 2013 based on the current intake of waste.

## **Alternate Waste Management Technologies at Gortadroma Landfill**

As a follow-up to the market sounding, a number of interested parties approached the Council during 2012 proposing alternate waste treatment options that could be sited at Gortadroma Landfill.

These inquiries reflected the continuing development in new waste treatment technologies as well as the impact of the greatly increased landfill levy and the mandatory landfill diversion targets.

These approaches included both biological and waste to energy processes for waste. These parties expressed an interest in entering a lease/contribution agreement with Limerick County Council. Some of these interested parties also requested that they be allowed to take-over the gas to energy plant in order to utilise the connection to the national electricity grid.

At this stage the Council produced an options report into the Future of Gortadroma (see Appendix D) in July, 2012. This report recommended that the RPS and Matheson Team be re-engaged to assess the possibility of disposing of the site by way of a lease option. The original appointment of the RPS and Matheson team included the option of dealing with any alternative treatment technology proposal in the event of the sale process being unsuccessful. The technical aspects would be dealt with by RPS Consulting Engineers and the legal input would be undertaken by the leading commercial and environmental law firm Matheson Ormsby Prentice.

Limerick County Council then engaged the RPS Team to ensure that the interested parties were professionally, technically and financially capable of following through with an alternate development at Gortadroma Landfill.

Alternative development proposals were requested following a negotiated procedure with advertisement in the EU journal. These submissions were as follows:

- A mechanical & biological waste treatment process and new landfill cells,
- A wind turbine,
- A waste to energy plant using gasification.
- A waste to energy plant using pyrolysis.

The relevant steps undertaken in the assessment process are as set out hereunder.

## **The prequalification and the selection of the preferred bidder**

### **• Stage 1 - Pre qualification.**

This process was utilised to pre qualify any expressions of interest on future uses of Gortadroma Landfill so that only proposals that met the Pre-Qualification criteria for professional, technical and financial standing would proceed to the second stage.

These pre qualifying expressions of interest were advertised in the EU journal and on E-tenders on the 1<sup>st</sup> August, 2012 and called for an expression of interest by the 15<sup>th</sup> March, 2013. The requirements of the expressions of interest also required the completion of a Pre-Qualification Questionnaire.

The results of these Pre-Qualification questionnaires were evaluated by the RPS team, namely F Clifford, G McElhinney and then approved by RPS Director, W Madden. The Pre-Qualification Questionnaire Assessment Report was issued on 15<sup>th</sup> July, 2013.

The RPS report recommended that the Council authorised proceeding to the selection of preferred bidder stage. The above reports are included in Appendix E.

- **Stage 2 - Selection of Preferred Bidder**

The Council, on the 31<sup>st</sup> October, 2013 informed each of the parties who had expressed an interest if they had been short listed. These parties were then invited to make a detailed technical and financial submission by the closing date of 8<sup>th</sup> May, 2014.

These bids were evaluated by RPS.

R Staunton, technical engineer of the RPS team produced a technical and financial appraisal of these Bids which were then reviewed by G McElhinney, technical associate and approved by Willie Madden, Director in the report called the **Bidder Proposals Assessment Report – Lease of Land and Infrastructure** dated 23<sup>rd</sup> July, 2014.

In this report, RPS recommended that Cadence Enviropower Ltd. been selected as the preferred bidder. The above report is included in Appendix F.

- **Stage 3 –The terms of the Lease.**

The specialist legal advisors, Matheson recommended that any lease should be divided into two parts, with the Council firstly entering into an “**Agreement to Lease**”, subject to conditions, and secondly, and subject to all conditions having been met, entering into the formal “**Lease**”.

It was agreed that the Lease would be held in “escrow” by Matheson and only be released when all the conditions within the Agreement to Lease have been complied with.

The advantage of this approach is that if the pre-conditions in the Agreement to Lease were not met by Cadence Enviropower Ltd., then the Council would not be required to conclude the full Lease Agreement.

This arrangement would simplify dealing with any non compliance by Cadence Enviropower Ltd and ensure the interests of the Council were protected.

In accordance with the procedures of the Council a presentation was given on 9<sup>th</sup> September to the Members of the Adare-Rathkeale Municipal District. The Council then proceeded to set out for the Members the outcome and recommendation of the Assessment Report to allow the Members consider and make an informed decision in relation to the future use of the Gortadroma site, as set out herewith.

It is clear that the Council has considered all potential options arising out of the openly advertised request for expressions of interest in relation to future uses of the Landfill. All procedures have been correctly followed and were in accordance with procurement law.

## **Briefing of the Councillors in the Adare-Rathkeale Municipal District**

The Gortadroma Landfill is located within the Adare-Rathkeale Municipal District.

The Members for the Adare-Ratkeale Municipal District had a standing item on their agenda called "Gortadroma Monitoring Report". The report included information on the waste accepted, the remaining capacity, operational issues and complaints.

A presentation was given by the Environment Section to the Adare-Rathkeale area meeting on the 9<sup>th</sup> Sept, 2014, (see Appendix G). The presentation detailed the bidding process as outlined above and the proposal of the preferred bidder. The Members considered the proposal to dispose of the site by way of lease and requested additional details on the gasification facility. It was agreed by the Members that the proposed disposal of the Gortadroma site would be further considered at the next District meeting.

The Environment Department provided further information on the nature and the layout of the proposed gasification plant at the meeting of the Adare-Rathkeale Municipal District held on the 7<sup>th</sup> October, 2014, (see Appendix H). The Members considered that they required further information to form a definitive opinion on the matter and requested that a delegation from the preferred bidder, Cadence Enviropower Ltd. be requested to give a detailed presentation of their proposed development to the Adare- Rathkeale Councillors.

Cadence Enviropower Ltd. gave a presentation detailing their proposals to the Adare-Rathkeale Municipal District area meeting on 11<sup>th</sup> November, 2014, (see Appendix I).

The Adare-Rathkeale Municipal District Councillors requested at their meeting on 13<sup>th</sup> January, 2015 that a site visit to a similar gasification facility be arranged in order to allow them develop a better understanding of the proposal.

At the Adare-Rathkeale Municipal District meeting on 10<sup>th</sup> February, 2015 the Members also requested that members of the local community should be represented on the visit.

The Council consulted with Cadence Enviropower Ltd who suggested a visit to a plant in Europe which uses their proposed technology. This facility is located at Morcenx in France. The Council then coordinated with Cadence Enviropower Ltd on the arrangements for the requested visit.

The delegation from Limerick included four of the six Adare-Rathkeale Councillors, two local residents who were also committee members of the local Gortadroma Action group and two LCCC council staff.

The visit took place on the 11<sup>th</sup> and 12<sup>th</sup> March. 2015. The Council delegation were met by Leonardo Riera, the CEO of Cadence Enviropower and Ron Bailey, the president of PRN Systems, the company who designed the Gasification System. The two representatives were available throughout the visit for questions and answers from the delegation in relation to their proposal.

A site visit report was prepared by the Council and circulated to the Adare-Rathkeale Councillors on the 13<sup>th</sup> March, 2015, (see Appendix J).

On the 16<sup>th</sup> March, 2015 a briefing of the Adare-Rathkeale Municipal District took place in Rathkeale. This briefing was given at the request of the Members to discuss the gasification proposal following the site visit the previous week. It was unanimously agreed by the Members at that meeting to support the proposal.

It is clear from the above time frame that the proposed disposal of the site by way of a lease to facilitate the Cadence Enviropower proposal was in the public domain for a period 6 of months. Subsequent to this period of consideration, the Adare-Rathkeale Members took their decision to support the proposed disposal at their meeting of the 16<sup>th</sup> March, 2015.

## Consultation with Local Residents Representatives - The Gortadroma Action Group

The Gortadroma Action Group was formed in the 90's and held its first AGM in 1998. It is made up of representatives of local residents and its function is to discuss issues relating to the operation of the landfill and to assist in the administration of the Gortadroma landfill community fund.

For every tonne of waste accepted at the landfill, €1.27 euros (1 Punt), was placed into the community fund. Projects such as a local group water scheme and a local amenity called the white river walk were funded this way. The Gortadroma Local Area Development fund currently contains €686,810

Meetings were held with the Gortadroma Action Group throughout the life of the Landfill. In the period 2002 to 2009 these meetings were held on average once per quarter. After 2009 the meetings were arranged on an "as required" basis at the request of the Group. The Council's Landfill Manager continued to provide monthly reports to the Secretary of the Gortadroma Action Group up to the closure of the landfill.

On 10<sup>th</sup> April, 2014 five members of the Gortadroma Action Group met with the Council. They members of the Action Group were aware of the impending closure of the landfill as the proposed closure had been advertised and they wished to discuss the implications of the closure for the site and area.

They were informed that the council was exploring future options for the landfill and were advised by Council that they had received bids including options for a wind turbine, mechanical & biological treatment and waste to energy proposals. The Action Group members were advised that they would be informed if the Council intended to proceed with any of the options.

Following on from the April meeting with the Gortadroma Action Group, a presentation was given by the Environment Section to representatives of the Group on 8<sup>th</sup> December, 2014. This presentation was the same as that given to the Adare-Rathkeale Councillors on the 9<sup>th</sup> September, 2014 and it outlined the proposals of the preferred bidder, Cadence Enviropower.

At the request of the Adare-Rathkeale Councillors that local residents be included in the delegation to the site visit to France, the Council contacted the Gortadroma Action Group. The Group nominated two representatives who both live in close proximity to the Landfill. The two residents participated fully in the visit and were given the opportunity to ask questions of Cadence Enviropower about their proposal during the trip.

It is clear from the above that the Council continued to engage with, communicate and inform the local resident representative group in relation to these proposals.

The Mayor then invited Members to indicate if they wished to ask questions/seek clarifications in relation to Section 2.

In response to queries from the Members, the following points were noted:

- A review of the future use of the Gortadroma site had been commenced by Limerick County Council in 2010. The preferred option at that time was for the disposal of the site as full disposal had the potential to eliminate the financial risks to the Council associated with the long-term operation and aftercare of the site. However, a satisfactory offer was not received and the sale process was terminated in July 2011.
- In relation to the pre-qualification and the selection of the preferred bidder, it was stated that pre-qualification questionnaires were assessed by RPS Consulting Engineers on the basis of leasing of land only. It was confirmed that no risk assessment was required at that stage and that the future use of the lands was the sole consideration.
- Cadence EnviroPower Limited were selected as the preferred bidder, full details of appraisal process were included in report dated 23<sup>rd</sup> July, 2014, entitled "Bidder Proposals Assessment Report – Lease of Land and Infrastructure."
- Based on legal advice received, it was stated that the lease was divided into 2 parts. The first part involved the Council entering into an "Agreement to Lease," subject to conditions. The second part involved the entering into the formal "Lease," this was subject to all conditions having been met.
- Legal representatives at the meeting explained that the lease was being held in "escrow" by the legal team and would only be completed when all the conditions within the *Agreement to Lease* had been complied with.
- It was confirmed that all procedures were correctly followed and were in accordance with procurement law.
- It was pointed out that knowledge of the proposed disposal of the site by way of a lease to facilitate the Cadence EnviroPower proposal had been in the public domain for a period of six months. It was important to acknowledge that there had been extensive newspaper coverage of the proposal.
- Cadence EnviroPower would need to undertake and satisfy a statutory planning and licensing process prior to any formal decision being made in relation to the proposed development.
- It was confirmed that no cell would be opened at the landfill for municipal waste.
- It was likely that this application for planning would be referred to An Bord Pleanála, given the scale of the plant and in accordance with the relevant legislation in relation to Strategic Infrastructure Development.
- The *Agreement to Lease* the lands was not a pre-planning process, no indication had been given as to whether planning would be appropriate.

- Until such time as all conditions had been met, the lease would not become operative.
- In response to a request from some Members, it was agreed to contact Cadence EnviroPower Limited to ascertain if it was possible to release details of the “*Agreement to Lease*.”

Councillor Sheahan (J) referred to leaflet which had been produced and circulated and which highlighted the risks associated with gasification. He held up for those present a copy of this leaflet. He also made reference to a public meeting which was scheduled to take place in Shanagolden on 18<sup>th</sup> February, 2016. He asked what could be done in advance of this meeting to allay some of the fears of the local residents. He asked if information could be given to the *Residents Against Gasification in our Environment* (R.A.G.E.) Committee.

The Chief Executive, in response, clarified the position by reiterating that he had signed an *Agreement to Lease* only. He said the lease in this case was divided into two parts, with the Council firstly entering into an “*Agreement to Lease*,” subject to conditions, and secondly, subject to all conditions having been met, entering into the formal lease. He added that this enabled the company to advance their proposals through the statutory planning process and licensing requirements with the Environmental Protection Agency (EPA).

He informed the Members that the *Agreement to Lease*, subject to conditions, had been signed as a consequence of the majority decision of the Council on 23<sup>rd</sup> March, 2015. He emphasised that the disposal of an asset, in this case a lease, was the function of the Elected Members.

In relation to the public meeting scheduled for 18<sup>th</sup> February, he confirmed that he had received an invitation to attend, as did a number of staff in the Council. He confirmed that he would not be attending and, in addition, that he would not be sending a representative. He stated that it was his opinion that it would be more beneficial to the process if a small delegation of the R.A.G.E. Committee could be nominated to attend a meeting with himself and senior staff of the Council on a date suitable to all. He further stated that this would provide an opportunity to listen to the concerns of the residents of the area. It would also provide a forum for council staff to outline factually the process envisaged under the *Agreement to Lease* to Cadence EnviroPower.

On the proposal of Councillor Sheahan (J), seconded by Councillor Mitchell, it was agreed that the Party Leaders would be invited to attend this meeting, subject to a proviso that no persons currently running for Dáil Éireann would attend due to the ongoing election process.

It was also agreed that it would be preferable if this meeting could take place before the public meeting.

The Director, Transportation & Travel/Environment, then proceeded to read into the Minutes of the Meeting **Section 3**, comprising of Pages 13-15 of the circulated report, as follows:

### Section 3

#### **Section 183 Notice to Dispose of Lands at Gortadroma Landfill and the Signing of the Contracts for the Agreement to lease and the Lease**

The disposal of land is a reserved function of the Members of Council.

The manner by which any proposed disposal is considered and agreed is set out in Section 183 of the Local Government Act, 2001.

Section 183 is set out hereunder for ease of reference.

183.—(1) The following provisions have effect in relation to any proposed disposal (not being by demise for a term not exceeding one year) of land which is held by a local authority:

(a) notices shall be sent or delivered to the members of the local authority giving particulars of—

(i) the land,

(ii) the name of the person from whom such land was acquired, if this can be ascertained by reasonable inquiries,

(iii) the person to whom the land is to be disposed of,

(iv) the consideration proposed in respect of the disposal,

(v) any covenants, conditions or agreements to have effect in connection with the disposal;

(b) at the first meeting of the local authority held after the expiration of 10 days after the day on which such notices are sent or delivered, the local authority may resolve that the disposal shall not be carried out or that it shall be carried out in accordance with terms specified in the resolution;

(c) if the local authority resolves by virtue of paragraph (b) that the disposal shall not be carried out, it shall not be carried out;

(d) if the local authority does not pass a resolution pursuant to paragraph (b), the disposal may be carried out;

(e) if the local authority resolves by virtue of paragraph (b) that the disposal shall be carried out in accordance with terms specified in the resolution, the disposal may be carried out in accordance with those terms;

(f) the disposal shall not be carried out otherwise than in accordance with paragraph (d) or (e) and subject to the consent of the Minister where consent is required under section 211(2) of the Act of 2000.

(2) Section 90 (inserted by section 26 of the Housing (Miscellaneous Provisions) Act, 1992) of the Housing Act, 1966, is amended by the substitution of the following for subsection (4):

“(4) (a) Subject to any regulations made under this section, section 183 of the Local Government Act, 2001, shall apply in relation to the sale of a dwelling under subparagraph (ii) or (iii) of paragraph (a), or paragraph (b), of subsection (1) of this section but shall not otherwise apply to the sale of a dwelling under this section.

(b) This subsection is without prejudice to the application of section 183 of the Local Government Act, 2001, to the disposal of land by a housing authority under section 211 of the Planning and Development Act, 2000, and for the purposes of this paragraph ‘land’ does not include a dwelling.”

The notice of the proposal to dispose of the site by way of a lease under Section 183 of the Local Government Act was sent on the 12<sup>th</sup> March, 2015 to all Council Members together with the associated report proposing the lease of lands at Gortadroma were sent with the Agenda for the full council meeting of the 23<sup>rd</sup> March, 2015. (see Appendix K).

At the Full Council Meeting on the 23<sup>rd</sup> March, 2015, (see Appendix L), the following resolution was proposed by Councillor C McMahon and Seconded by Councillor R O’Donoghue and Resolved:

*“That the approval of the Council be and is hereby given to the disposal of 14 hectares of land located within Gortadroma Landfill, Ballyhahill, to Cadence Enviropower Limited, 4 The Crescent, Limerick, for a signing fee of €50,000; when planning permission and waste licence are in place, a rent of €4,000,000 per annum is payable; In addition a contribution to a Local Community Fund of €100,000 per annum; the disposal to be by way of Lease Agreement for a period of 30 years following granting of all authorisations.”*

The Chief Executive, subsequent to the passing of the Section 183 notice by the Members and the payment of the Signing fee by Cadence Enviropower Ltd, signed the “Agreement to Lease” Documents on the 25<sup>th</sup> May, 2015.

One copy of the Agreement to Lease was handed to Cadence Enviropower Ltd.

The “Lease” Documents were also signed and passed to Matheson, Dublin to be held in Escrow, to be released if and when the conditions of the “Agreement to Lease” are complied with.

The Mayor then invited Members to indicate if they wished to ask questions/seek clarifications in relation to Section 3.

In response to queries from Members, the following points were noted:

- The disposal of land was a Reserved Function of the Council and the process followed was as set out in Section 183 of the Local Government Act, 2001.
- The “Agreement to Lease” was signed by the Chief Executive on 25<sup>th</sup> May, 2015.

The Director, Transportation & Travel/Environment, then proceeded to read into the Minutes of the Meeting **Section 4**, comprising of Pages 16-29 of the circulated report, as follows:

## Section 4

### Concerns raised by Members

Subsequent to the completion by the Chief Executive of the Agreement to Lease, a number of Members stated that they had developed concerns in relation to the proposed development at the site, and offered the opinion that issues had arisen in relation to the accuracy of some of the information they had been given in relation to the proposed development.

Members offered the opinion that, if these allegations were found to be well founded, it would have had a material bearing on their decision to support the disposal of the property to Cadence Enviropower.

**Council meeting of the 21<sup>st</sup> July, 2015**, (see Appendix M),

**Emergency Motion** - Members sought as part of an emergency motion that the executive would conduct an immediate and comprehensive review of the provisions of the agreement to lease with a view to establishing options including the question of the termination of the agreement to lease. The Chief Executive confirmed he would seek legal advice in relation to the concerns raised by the Members with a view to establishing the options available to the Council.

The Chief Executive confirmed that he would fully investigate any concerns or allegations made by the Members, and that he would also consider any documentation submitted by the Members in support of the allegations.

The Members also sought clarification as to the Planning process that Cadence would be required to undertake prior to any formal grant or refusal of permission.

**The Following Question was submitted by Councillor J Sheahan to the Council meeting held on Tuesday, 21<sup>st</sup> July 2015.**

***“I will ask at the next meeting, following the signing of the lease with Cadence Enviropower Limited for a gasification plant at Gortadroma, will the planning process be a direct application to Limerick City and County Council, a direct application to An Bord Pleanála or a Part V111 application by the Council.”***

**REPLY:**

This application will be considered in accordance with the relevant legislation in relation to Strategic Infrastructure Development.

It is a mandatory requirement for a prospective applicant for planning permission for development listed in the 7th Schedule (see below) to enter into pre-application consultations with the Board and obtain notice from the Board stating whether or not the proposed development is regarded as strategic infrastructure development.

For the purposes of these consultations, the prospective applicant must supply sufficient information to the Board to enable it to assess the proposed development in the light of the criteria set out for strategic infrastructure development.

**Definition of Strategic Infrastructure Development**

The 7th Schedule to the 2000 Act lists the classes of infrastructure development which, if considered by the Board to be strategic infrastructure development, require direct application for permission to the Board instead of the local Planning Authority.

To qualify as strategic infrastructure development, a proposed development must first come within the scope of one or more of the classes and comply with the thresholds contained in the 7th Schedule.

In addition, the Board must come to the opinion that the proposed development, if carried out, would fall within one or more of the following:-

- is of strategic economic or social importance to the State or the region in which it would be situate,
- would contribute substantially to the fulfilment of any of the objectives of the National Spatial Strategy or any regional planning guidelines in respect of the area or areas in which the development would be situate,
- would have a significant effect on the area of more than one planning authority.

The opinion is formed by the Board at the conclusion of the planning pre-application stage.-

**Notice of Motion submitted by Councillor J. Sheahan to the Council meeting held on Tuesday, 21<sup>st</sup> July 2015.**

*“I will move at the next meeting that a Quantitative Risk Assessment be immediately carried out so as to assess the risks or none of the operation of a Gasification Plant at Gortadroma.”*

The following reply was drafted by the planning section.

*“The Council do not have sufficient detail to prepare a quantitative risk assessment at this stage and in any event this assessment will be carried out as part of the planning application process.”*

## Legal Advice requested since the signing of the Contract

Members sought legal advice in relation to a number of issues.

### **(A) The Following Question was submitted by Councillor J Sheahan to the Council meeting held on Tuesday, 21<sup>st</sup> July 2015.**

*"I will ask at the next meeting if a Section 183 decision can be revoked and, if so, what the procedure is."*

The Senior Executive Officer, Corporate Services, having regard to the Legal Advice available to the Council, set out the position in relation to the possibility of revoking a Section 183 Notice as follows:-

"Legal advice was sought in relation to this Question and I set out details of the advice received hereunder for your attention:

*To deal with this Question, one has to consider Section 183 of the Local Government Act 2001, and also paragraph 56 of the Standing Orders of Limerick City & County Council which, collectively, provide as follows:-*

- 1) *Section 183 deals with the requirements for the proposed disposal of land held by a Local Authority and notes that a disposal for a term of years not exceeding one year does not come under the provisions of this section.*
- 2) *Section 183 further sets out certain procedural matters connected with the disposal of property, including the giving notice to the Members. The purpose of this notice is to provide the Members with certain information including, inter alia:-*
  - (I) The property being disposed*
  - (II) The person from whom the property was acquired*
  - (III) The person to whom the property is to be disposed*
  - (IV) Any covenants or conditions that are to attach to the disposal.*
  - (V) The purchase price.*
- 3) *The Members, having been supplied with the above information, have the opportunity of considering the matter and making a decision as to whether they agree or disagree with the disposal. Naturally, it is open to the Members to raise any issues in respect of which they may need Clarification at that meeting and before a decision is reached. The Members then decide whether to pass the resolution to dispose of the property, or to decide that the disposal shall not be carried out.*
- 4) *Turning now specifically to paragraph 56 of the Standing Orders, it is important to note that this is worded in such a manner as to afford an opportunity to the Members in certain circumstances to rescind a resolution. If the rescission is to take place within six months of the resolution being passed, the Councillors have to carry out the procedures that are set out in paragraph 56. Notice has to be given of the intention of the Members to rescind a resolution passed within the previous six months and that notice has to have the name of the Member who proposes the Motion, together with the names of five other Members who are supporting the Motion to rescind.*

*It is important to bear in mind that Standing Orders cannot overrule the existing common law or statutory law. Standing Orders are brought in for the purpose of regulating meetings. There is no doubt that the Council, in the Standing Orders which it has adopted, has given itself a general power to revoke a resolution. However, I must reiterate that such a revocation must not result in any breach of statutory law or common law.*

*Further, where the Council is exercising a quasi-judicial power, such as revoking a Section 183 Resolution, this cannot, in my view, be done where there is a binding contract in place. The Members will be acquainted with the number of resolutions that come before it for the disposal of dwelling houses and other properties. The contracts in respect of those properties typically contain a provision that the contract is subject to the passing of a resolution under Section 183 of the 2001 Act.*

*When that resolution is passed, the sale of the property is then completed. There is no question of waiting to see if the resolution is going to be rescinded under the provisions of the Standing Orders. If a binding contract exists, as it would where there is a disposal of houses or other property, then once the resolution is passed, that binding contract becomes enforceable. In those circumstances, it would be very wrong for the Members to rescind a resolution when the purchaser of the property has been advised of the passing of the resolution and a contract exists.*

*One must also be very much aware of the fact that the Councillors have an opportunity, when considering a Section 183 resolution, of either approving of the disposal or rejecting the disposal. That is very significant, because it could be very strongly argued that the Councillors had an opportunity of rejecting the resolution at that particular time. Once that resolution was passed, then the likelihood is that a binding legal contract comes into existence. If that is so, in my view, the resolution under Section 183 of the Local Government Act, 2001, could not be revoked or rescinded on foot of the Standing Orders.*

*Of course, the question may be asked as to why the Members seem to have a revocation power at paragraph 56 of the Standing Orders but are now being advised by me that this cannot apply to decisions made with regards the transfer of property where there is a binding contract. The answer to this is quite simply that, in my view, the power the Councillors have given themselves to revoke is not absolute and must be conditional on the decision not affecting a third party who has acquired a contractual interest.*

*This would differ, for example, where the Members wish to revoke a resolution passed with regards to an item fully within the control of the Local Authority – traffic control, signage etc. In such an instance, it is of course open to the Council to revisit the decision. However, where a third party has, on foot of the passing of a resolution, acquired a contractual interest, I believe that the Councillors do not have the same leeway to revoke.”*

*End of legal Advice*

**(B) The relevance of an unsigned Document received through the Chair of the Adare-Rathkeale Municipal District.**

The Council subsequently received for consideration a document, described as “Briefing Document, Adare-Rathkeale Councillors”, and dated 23<sup>rd</sup> October 2015, through the Chair of the Adare-Rathkeale Municipal District. (Appendix N)

The Director of Service, in accordance with a commitment given to the Members, sought legal advice in relation to the content of this document. The advice received by the Council is set out hereunder.

*"I attended a meeting of the Limerick City & County Council on the 20<sup>th</sup> October last when many issues relating to the proposed development of the Gortadroma Site as a Gasification Plant were discussed.*

*At that meeting it was agreed that the Councillors for the Adare/Rathkeale area would provide you with evidence of alleged misrepresentation, or misleading information was provided by representatives of Cadence Enviropower Limited, regarding the proposed development. The Councillors for the Adare/Rathkeale area were to meet to discuss the matter further and agreed to forward to you supporting evidence/documentation in that regard.*

*You received from Councillor Richard O'Donoghue a briefing document dated the 23<sup>rd</sup> October last. The document was unsigned.*

*I considered this briefing document which is highly technical in nature, with the relevant officials of the City & County Council. Whilst I am not qualified to assess the more technical aspects of the document, I fail to see any evidence in that document that the proposed lessee misled or misrepresented the Council in any way.*

*There are a large number of detailed environmental issues to be considered. There certainly were issues raised in the briefing document relating to detailed environmental matters that still need to be fully assessed and will form part of the statutory requirement for the application to carry out an environmental impact assessment as part of the proposed lessee's planning and waste licence applications.*

*Yours sincerely,*  
**WILLIAM E. LEAHY**

### **Chain of e-mails between the 19<sup>th</sup> June, 2015 and 22<sup>nd</sup> October, 2015**

The Members of the Adare-Rathkeale Municipal District sought legal advice in relation to the content of a chain of e-mails between the 19<sup>th</sup> June, 2015 and 22<sup>nd</sup> October, 2015 between Cllr T Neville and Leonardo Riera, CEO of Cadence which were sent via the Council, (See Appendix O).

The area of concern to the Members was to establish if these emails provide evidence that the lessee has misled or misrepresented aspects of the proposed development to the Council.

The Council's legal representative, having reviewed the chain of emails, offered the following advice.

*"I have considered the correspondence that has passed between Councillor Tom Neville and the Council and also the correspondence that the Council have received from Leonardo A. Riera the Chief Executive of Enviropower Renewal, Inc. The main issue arising out of that correspondence is whether or not the residue from the thermal treatment of solid waste at the Gortadroma facility will be inert or not.*

*Throughout the correspondence Mr Riera seems to me to be very definite in stating that, all of the solid residue resulting from the processing of waste at Gortadroma will be inert. That appears to have been made very clear in the responses received from the Chief Executive Officer.*

*He does make reference to the disposal of 0.5% of the waste processed and states that would need to be disposed of in a sanitary landfill. Notwithstanding that, he still clarifies in his e-mail of the 29<sup>th</sup> September 2015 and indeed in other parts of the correspondence, that the waste will all be inert.*

*I cannot see from that correspondence, that it is possible to argue that the Councillors were misled in regard to the disposal of the solid residue from the Gortadroma facility.*

*Mr Riera in his e-mail of the 1<sup>st</sup> October states "to summarise; the 5% of the 10% referred to in the August 28 letter will be inert materials".*

*The letter goes on to summarise the type of material comprised at 0.5% and the Chief Executive Officer concludes that paragraph by stating:-*

*"again, these are all inert materials".*

*On the basis of this correspondence it would be very difficult for me to recommend proceedings based on an allegation of misrepresentation by Enviropower.*

*It would appear that if one were to contemplate legal proceedings one would have to be satisfied that there was serious misrepresentation. If the Council was of the view that the correspondence justified legal proceedings, and were to launch same, the Council would in my view be in serious difficulties. Obviously any such proceedings would delay the process and could possibly result in the An Bord Pleanala application, or the application for the licence being stalled. That in itself could well result in Enviropower having a very substantial claim for loss and damages against the Council.*

*There is a lot of case law on misrepresentation and deceit. In a very old case, which is still relied on, the following extract will give you some idea of the complexities of the law in regard to this particular issue. The case was Derry –v- Peak and the following extract is helpful:-*

*"the promoters of a company issued a prospectus stating that they have a licence to use steam power to run a tram. They did not; they expected to get it as a mere formality. They were refused and the company failed. The shareholders sued for deceit. The action failed because it was not proved that the Directors lacked honest belief in what they had said".*

*The following extract from an article on “fraud in Ireland” might help to clarify in a small way the difficulties that arise in proving misrepresentation.*

*“deceit arises in circumstances where the defendant causes the plaintiff loss through misleading the plaintiff by means of a fraud (ie with dishonest intent).”*

*This will give you some idea of the hurdles that have to be got over in pursuing a claim of this nature. On the information I have read to date, I am satisfied there is not sufficient, or any evidence to conclude that the Council were misled, or that there is sufficient grounds to consider bringing proceedings for misrepresentation.*

*If any of the Councillors have any other evidence that I am not aware of, perhaps they would supply it either to the Chief Executive or to me, so that it can be considered further.*

*It is important also to understand that the Lessees in the Lease have to go through the planning process and also obtain a waste licence. That will afford an opportunity to anyone to make objections or representations. The likelihood is there will be an oral hearing and perhaps that is the forum that should be used to formulate grounds to lodge serious objections to the proposed development.*

*You might revert to me if I can be of any further assistance.*

***Yours faithfully,  
WILLIAM E. LEAHY***

The Council also sought advice from Senior Counsel in relation to a number of the issues raised by the Members and the content of the advice received is set out hereunder;

### **Advice from Senior Counsel, JAMES DWYER SC, re: Gortadroma Agreement for Lease.**

I note that I furnished my Opinion in this matter as of October last, which Opinion related to the possibility of revoking a Resolution made pursuant to Section 183 of the Local Government Act 2001, as a means of determining an Agreement for Lease which had been made between Limerick City and County Council and Cadence Enviropower Limited. It appears that the Council accept that there isn't really scope for revoking a Section 183 Resolution, and also they presumably have taken on board the fact that even if the same was revoked it would not entitle the Lessee to terminate the Agreement for Lease.

The issue which has now arisen is a more complex issue, and it relates to the possibility that Limerick City and County Council would seek to argue that they had been induced to enter the agreement on the basis of a misrepresentation and thus seek to rescind the same on that basis. It is beyond doubt that the Court will, under in fairness very limited circumstances, which I will deal with below, grant relief to a party who had been induced to enter into an agreement by virtue of the

misrepresentation made by the other contracting party. Such relief is equitable relief. that means that it is not available save at the discretion of the Court, and equally the onus of proving misrepresentation rests with the party alleging it, which in this case would be Limerick City and County Council.

I would say as a preliminary point that insofar as Limerick City and County Council is concerned one of the biggest issues in this case will inevitably be the fact that the change of heart on the part of the individual councillors appears to have occurred subsequent to representations being made by individuals, who presumably live in the Adare-Rathkeale areas, in relation to the prospect of the erection of the proposed gasification plant. While clearly it is perfectly legitimate for any County Council to have regard to the views of voters etc. it does have to be accepted that the views of the voters while they may influence individual county councillors, it cannot be seen as a justification for or a reason for seeking to void existing contractual arrangements. Even in the context of a misrepresentation the Court will look at all surrounding circumstances, and it does seem to me that the timescale in the present case, which is essentially the consideration of the possibility of establishing a gasification plant, which does in fairness have significant financial, if no other, benefit for Limerick City and County Council, the passing of the 183 Resolution and entering into the Agreement, before in fairness any issues arose as to the suitability of the project from the point of view of local individuals, is a matter that will have some significant influence on the Court in considering whether or not misrepresentation is in fact a realistic prospect.

At its simplest misrepresentation is a statement made by one contracting party to the other which has the effect of, which may not necessarily be intended, of inducing that other party to enter into a contract. By definition all contracts would have as their basis representations made by the contracting parties prior to the contract being entered into, those representations could relate to any number of factors such as, for example, an existing fact situation, a future or present intention, or even a statement as to economic or other factors. A misrepresentation is simply a representation which is untrue.

There are two types of misrepresentation, there are the misrepresentations which are innocently made, and there are the misrepresentations which deliberately made. It is only in the context of a misrepresentation which has been deliberately made that a contracting party i.e. the other contracting party, is usually entitled to apply to the Courts for rescission of the contract, the basis of the application for rescission is clearly that the individual would not have entered into the contract save for the fact that misrepresentation had been made.

By definition a misrepresentation has to relate to a significant factor in the context of the contractual relations between the parties, and I would stress this, if rescission is to be sought the misrepresentation must have been essentially deliberate or at the very least as a result of significant carelessness on behalf of the person making the same.

If there is a representation made in all innocence that generally speaking would entitle a party to damages, where damages had been suffered, but not to rescission of the contract. Equally it has to be accepted that where there is a deliberate misrepresentation, which is generally referred to as fraudulent misrepresentation, it must have had the effect of inducing the party to enter into the contract. For example, if the contracting party was aware that misrepresentation was false, then clearly misrepresentation, be it fraudulent or otherwise, did not induce that party to enter into the contract.

Insofar as I understand matters the misrepresentation which would be alleged relates to information that would have been furnished to, I presume, Council officials, presumably much of the information given was very technical in nature, which I presume would relate to the environmental and other aspects of the construction of the gasification plant, and the suitability etc. of same. By definition such information would be highly specific in nature and quite complex. I note reference is made to the series of emails between Leonardo Riera, who is the Chief Executive Officer of Cadence of the one part and Councillor Tom Neville of the other part. It does not appear on consideration that the information given in these emails is in fact inaccurate or false, but I have to confess I would have no personal knowledge in that context.

I would envisage two very practical difficulties in Limerick City and County Council seeking to argue that there had been a misrepresentation, the first is that it would have to be established that the information given, if it was technical information, was significantly incorrect, and by that presumably one would have to accept that the information given was given in a particular way so as paint a false picture in relation to the gasification plant, for example, if the levels of pollution generated by same were significantly understated. Clearly in order to have any relevance the information given has to have been given in writing, but equally there is an issue as to who would have been the recipient of the information, in that if the decision is made by the County Councillors as a whole, then information given to one County Councillor clearly couldn't really be said to have influenced others albeit that presumably third hand information might have been given to them.

It seems to me that it would be very difficult on the basis of technical information given, unless the same was grievously inaccurate, to seek to argue that there had been a misrepresentation. Misrepresentation is always difficult to establish, but it will always be easier to prove a statement to the effect that a second-hand car had done 50,000 miles, when evidence exists to show that it had done 150,000 miles, than arguing about the merits or demerits of technical data or scientific information, in respect of which there may well equally be a variety of viewpoints, and as such it is quite difficult to establish that the information given was in fact inaccurate, which is the evidence that would be required.

A significant amount of time and consideration, presumably, went into the issue as to whether or not the Resolution should be passed and the Agreement for Lease entered into. The Agreement for the Lease is only the first part in a long process, and it is the case that the Agreement for Lease contemplates a fairly stringent planning and environmental process being put in place before the Lease is to be granted.

I have read the briefing document which was received from the Adare-Rathkeale Councillors, and quite clearly the same does deal to an extent with technical issues, it doesn't seem to me that the same would go anywhere near being sufficient to establish a basis for seeking to argue that there had been a fraudulent misrepresentation which had induced Limerick City and County Council to enter into the Agreement for Lease. At the end of the day that is what is necessary.

Any attempt to seek to set aside the Agreement for Lease will inevitably be heavily resisted, that means presumably a difficult and complex High Court action, which presumably would be, given the value of the scheme etc. be dealt with in the Commercial Court. That would mean that the hearing would take place, if such

Proceedings were launched, relatively quickly i.e. probably within 12 months, but the costs of any such action would be very significant.

From the point of view of Limerick City and County Council to contemplate bringing such an action one would also have to be aware of the fact that in the event that the action was not successful, and I have to say on the basis of the documentation that is available to date it seems to me that this is effectively a certainty, insofar as such things ever are, that would involve therefore two sets of Commercial Court costs, as well as the potential for damages. It would almost inevitably be acceptable for Cadence to down tools and not proceed with any application in relation to planning permission pending the resolution of the Proceedings such as might be brought, that would result in effectively a 12 months' delay, which would presumably in itself, if the action was not successful, give rise to a claim in damages.

Clearly it is in theory possible if there was sufficient evidence that an application to set aside the Agreement for Lease could be made on the basis of misrepresentation, it would have to be a fraudulent misrepresentation which essentially would mean a deliberate misrepresentation which was made so as to induce Limerick City and County Council to enter into an Agreement for Lease. That would involve having very clear and certain evidence as to the fact that there were such misrepresentations, the nature of same and that same were deliberately made, and that if such evidence was available, and it doesn't seem to me that it is, then and only then would it be appropriate to consider the possibility of bringing such an application.

I trust this clarifies matters, if any further points arise please do not hesitate to contact me.

Yours sincerely,

**JAMES DWYER SC.**

The Mayor then invited Members to indicate if they wished to ask questions/seek clarifications in relation to Section 4.

In response to queries from Members, the following points were noted:

- Cadence EnviroPower would be required to make an application to An Bord Pleanála in accordance with the requirements attached to major infrastructure proposals. The Council would then have an opportunity to make a formal submission to An Bord Pleanála as part of the consultation process and would undertake a Quantitative Risk Assessment to support its submission in this regard.
- As part of the Council's application to An Bord Pleanála, a Quantitative Risk Assessment would be carried out as part of the planning application process.
- It was noted that a significant amount of time and consideration had gone into the issue as to whether or not the Section 183 resolution should be passed and the "Agreement to Lease" entered into. The "Agreement to Lease" was only the first part in a long process, it would be followed with a

stringent planning and environmental licensing process to be completed before the Lease could be granted.

- Legal advice in relation to the Section 183 Notice under consideration was that the Council had entered into a binding contract.
- Legal advice based on information submitted concluded that the proposed lessees had not misled the Council.

The Director, Transportation & Travel/Environment, then proceeded to read into the Minutes of the Meeting **Section 5**, comprising Pages 30-34 of the circulated report, as follows:

## Section 5

### Current status of the Agreement to Lease.

Cadence Enviropower in accordance with clause 3.1.2.3 of the Agreement to Lease are required to "...use all reasonable endeavours to ensure a planning application is lodged with the planning authority within 12 months of the date of the Agreement..." which is 12 months from the 25<sup>th</sup> May, 2015.

Cadence Enviropower Ltd arranged and held a public information meeting at Shanagolden Community Hall on the 16<sup>th</sup> July, 2015.

Cadence Enviropower have appointed a firm of environmental consultants, AWN consulting, Dublin who commenced work in July 2015. This work included a site investigation and the preparation of the baseline study as required by clause 10.1 of the Agreement to Lease. AWN Consulting submitted the report to LCCC on the 31<sup>st</sup> December, 2015.

The report stated that the baseline study will form the basis of an EIS scoping report to be submitted to LCCC, the EPA and to An Bord Pleanala.

Cadence Enviropower has not as yet applied to An Bord Pleanala for a decision under the Planning and Development (Strategic Infrastructure) Act, 2006 to secure clarification as to whether their proposal falls within the classes of development designated as Strategic Development in the Act. Cadence has stated in the Baseline Report under Planning Context that it is their intention to seek such a designation.

The decision as to whether the proposed development at Gortadroma constitutes Strategic Infrastructural Development can only be made by An Bord Pleanala, on foot of a submission by Cadence Enviropower.

### **Termination of Lease**

The principal measures within the Agreement to Lease detailing how the Agreement to Lease may be terminated are as follows:-

*"It is agreed that notwithstanding and without prejudice to any other rights, remedies or powers contained in this Agreement otherwise available to the Landlord or the Tenant, on the occurrence of the following events:*

- *the Tenant fails to obtain the Satisfactory Permission on or before the Planning End Date*
- *the Tenant fails to obtain the Environmental Licences on or before the Final Date;*
- *the Tenant fails to obtain all Requisite Consents on or before the Final Date;*
- *the Tenant fails to complete the Facility Construction Works within seven (7) years from the date of the agreement.”*

The Planning End Date is defined as 5 years from the date of the agreement and the Final End Date is defined as 5 years and 6 months from the date of the agreement. The date of the Agreement was the date it was signed which was 25<sup>th</sup> May, 2015.

## Conclusions

The Section 183 resolution passed by the Members in relation to the disposal of land at Gortadroma has been passed in accordance with the Local Government Act 2001. The Legal advice available to the Council confirms that, inter alia,

*“Further, where the Council is exercising a quasi-judicial power, such as revoking a Section 183 Resolution, this cannot, in my view, be done where there is a binding contract in place” and, “However, where a third party has, on foot of the passing of a resolution, acquired a contractual interest, I believe that the Councillors do not have the same leeway to revoke.”*

The advice available to the Council in relation to the Section 183 Notice under consideration in this report is that the Council has entered into a binding contract.

The Council has also had the documentation submitted by the Members, subsequent to the passing of the Section 183 Notice of Disposal, and also the completion of the Agreement to Lease, assessed.

The legal advice available to the Council is that the information submitted does not provide evidence that the proposed lessee misled the Council in any way.

The advice confirms that

*“I fail to see any evidence in that document that the proposed lessee misled or misrepresented the Council in any way.”*

This advice also acknowledged that there are technical aspects of the proposal which will require further consideration and that the appropriate time to have these concerns raised and addressed will be during the application for planning procedure and the application to the EPA for the required Waste Licence.

*“There certainly were issues raised in the briefing document relating to detailed environmental matters that still need to be fully assessed and will form part of the statutory requirement for the application to carry out an environmental impact assessment as part of the proposed lessee’s planning and waste licence applications.”*

The Legal advice also cautions the Council in relation to initiating proceedings based on a belief that some aspects of the proposed development were misrepresented to the Members, unless there is very strong evidence available to the Council to support such an allegation or case.

*“It would appear, that if one were to contemplate legal proceedings one would have to be satisfied that there was serious misrepresentation. If the Council was of the view that the correspondence justified legal proceedings, and were to launch same, the Council would in my view be in serious difficulties. Obviously any such proceedings would delay the process and could possibly result in the An Bord Pleanala application, or the application for the licence being stalled. That in itself, could well result in EnviroPower having a very substantial claim for loss and damages against the Council.”*

The substance of these opinions has been confirmed by the advice from Senior Counsel.

*“I have read the briefing document which was received from the Adare-Rathkeale Councillors, and quite clearly the same does deal to an extent with technical issues, it doesn't seem to me that the same **would go anywhere near being sufficient to establish** a basis for seeking to argue that there had been a fraudulent misrepresentation which had induced Limerick City and County Council to enter into the Agreement for Lease. At the end of the day that is what is necessary.”*

*“From the point of view of Limerick City and County Council to contemplate bringing such an action one would also have to be aware of the fact that in the event that the action was not successful, and **I have to say on the basis of the documentation that is available to date it seems to me that this is effectively a certainty**, insofar as such things ever are, that would involve therefore two sets of Commercial Court costs, as well as the potential for damages. It would almost inevitably be acceptable for Cadence to down tools and not proceed with any application in relation to planning permission pending the resolution of the Proceedings such as might be brought, that would result in effectively a 12 months' delay, which would presumably in itself, if the action was not successful, give rise to a claim in damages.”*

A Contract is now in place between Limerick City and County Council and Cadence EnviroPower Ltd. Any attempt to unilaterally withdraw or frustrate this Contract that would result in Cadence EnviroPower not being able to meet their contractual obligations would have serious implications. The legal advice available to the Council confirms that such a development could well result in Cadence EnviroPower having a very substantial claim for loss and damages against the Council.

The Council must also have regard to the fact that Cadence EnviroPower must undertake and satisfy a statutory planning and licencing process prior to any formal decision being made in relation to this proposed development.

*“The Agreement for the Lease is only the first part in a long process, and it is the case that the Agreement for Lease contemplates a fairly stringent planning and environmental process being put in place before the Lease is to be granted.”*

In conclusion it is also clear from the legal advice available to the Council that the financial and reputational damage that is likely to impact on the Council should it decide to undertake any action to disengage or frustrate this Contract would be substantial.

The Mayor then invited Members to indicate if they wished to ask questions/seek clarifications in relation to Section 5.

In response to queries from Members, the following points were noted:

- Cadence EnviroPower, in accordance with Clause 3.1.2.3 of the “Agreement to Lease” were required to “.....use all reasonable endeavours to ensure a planning application is lodged with the Planning Authority within 12 months of the date of the Agreement.....,” which was 12 months from 25<sup>th</sup> May, 2015.
- It was confirmed that Cadence EnviroPower had not as yet applied to An Bord Pleanála for a decision under the Planning and Development (Strategic Infrastructure) Act, 2006.
- The decision as to whether the proposed development at Gortadroma would constitute Strategic Infrastructural Development could only be made by An Bord Pleanála on foot of a submission by Cadence EnviroPower.
- A contract was now in place between Limerick City and County Council and Cadence EnviroPower Limited. Any attempt to unilaterally withdraw or frustrate this contract that would result in Cadence EnviroPower Limited not being able to meet their contractual obligations would have serious financial and reputational implications. Legal advice available confirmed that such a development could well result in Cadence EnviroPower having a very substantial claim for loss and damages against the Council.

This concluded the Meeting.

Signed:

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**Mayor**

Date:

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