THE HIGH COURT

COMMERCIAL
[2015 No. 282 JR]
[2015 No. 80 COM]

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACT 2000, AS AMENDED

BETWEEN

SOUTH-WEST REGIONAL SHOPPING CENTRE PROMOTION ASSOCIATION LIMITED AND STAPLEYSIDE COMPANY

APPLICANTS

AND

AN BORD PLEANÁLA

RESPONDENT

AND

LIMERICK CITY AND COUNTY COUNCIL AND REGIONAL RETAIL PROPERTY DEVELOPMENT AND TRADING LIMITED

NOTICE PARTIES

JUDGMENT of Ms. Justice Costello delivered on 4th day of February, 2016.

1. In these proceedings the applicants seek an order of *certiorari* setting aside the entire decision of An Bord Pleanála ("the Board") dated 8th April, 2015, to grant planning permission to the second notice party ("the Developer") and other declaratory reliefs in relation to a development of a large mixed retail and commercial use development at Parkway Valley, Singland, Co. Limerick ("the Development").

2. The applicants argue that the proceedings raise an issue of planning law of fundamental importance. The issue centres on whether the Board has jurisdiction to grant a revision, or to make an amendment, to an extant planning permission other than in the very limited circumstances identified at ss. 146A-146D of the Planning and Development Act 2000, as amended ("the 2000 Act"). Other ancillary arguments are also advanced as discussed further below.

3. The first applicant is a company incorporated with the object of promoting and protecting the trade and business interests of persons and companies carrying on business in the Crescent Shopping Centre, Dooradoyle, Limerick. Membership of the first applicant is comprised of the tenants of the Centre. The Crescent Shopping Centre comprises approximately 32,000 m^2 of retail space with approximately 90 retail tenants. If developed, the Development would be in direct competition with the Crescent Shopping Centre.

4. The second applicant is a private unlimited company with share capital incorporated in the State under the Companies Acts 1963-2006. It is a subsidiary of a group of companies engaged, inter alia, in holding property. At all material times the second applicant was the registered owner of the Crescent Shopping Centre, Limerick from 13th November, 1992, to 16th December, 2014, when it divested that interest in favour of another subsidiary within the group of companies. The second applicant continues to have an interest in the adjoining lands.

5. Leave to challenge the decision of the Board was granted by Binchy J. on 26th May, 2015, on the following substantive grounds:-

> *"1. An order of certiorari setting aside the entire decision of An Bord Pleanala dated 8 April 2015 to grant planning permission to the [Developer]. The said decision bears the reference number PL91.243874 (Reg. Ref 14/828, Limerick City and County Council)…*
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> *2. A declaration that the said decision and/or the grant of planning permission are invalid and void ab initio;*
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> *3. A declaration that An Bord Pleanala was not entitled to treat the application for planning permission on the basis that it represented a 'revision', 'variation' or 'amendment' of earlier planning permissions;*
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> *4. A declaration that An Bord Pleanala was required to assess the application for planning permission on its own merits, by reference to the current versions of the relevant planning policy documents, in particular, the statutory development plan; the statutory local area plan, statutory guidelines; regional planning guidelines; and retail strategy;*
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> *5. A declaration that the application for planning permission must be subject to environmental impact assessment in accordance with the requirements of the Environmental Impact Assessment Directive (2011/92/EU) and the implementing provisions under Planning and Development Act 2000 (as amended)".*

Background

6. On foot of a series of planning applications made by Alocin Ltd., commencing in July, 2004, Limerick County Council[1] granted planning permission for the construction of a mixed-use development at a site located at Singland, Co. Limerick, an out of town located on the outskirts of Limerick City. The initial planning application was made under reference no. 04/3700, which was granted permission on 15th August, 2006, for the following development:-

> *"…construction of mixed use commercial and leisure development incorporating public park. Construction of 2 no. main anchor stores and 46 no. retail/commercial units; restaurants; foodcourt comprising of 8 no. separate outlets; family leisure-plex; public library; creche; administration; staff facilities; 10 screen cine-plex; surface and basement mulit-story (sic) car parking; 2 no. service yards; 9 no. ESB substations, pumping station, signage, mast sign, landscaping and associated site and development works."*

7. Thereafter, a number of further planning permissions were granted by Limerick County Council on the following dates: 25th January, 2007 - PA Ref. No. 06/3211; 29th March, 2007 - PA Ref. No. 06/4103; and 11th October, 2007- PA Ref. No. 07/1024. Each of these grants of Planning Permission varied or amended the original or parent grant 04/3700. In each case the duration of the planning permission was linked to the duration of the original grant 04/3700. In each case the application was in respect of the entire development as revised and amended by the new application and applied to the entire site. The drawings filed showed the proposed development based upon the previously permitted development with the amendments and revisions sought in the new application. This was done following consultation with the Planning Authority in order to present the application and the effect of the application

on the existing grants of permission as clearly as possible. Thus, there were separate grants of planning permission for one composite development. All of these grants were made by the then Planning Authority, Limerick County Council by reference, *inter alia*, to its current development plan.

8. Due to the severe economic turmoil commencing in 2008, development on the site ceased in 2009 by which stage approximately €35 million had been expended in partially carrying out the Development. The planning permissions were due to expire so applications were made to extend the duration of the permissions. On 16th December, 2011, the Planning Authority made a decision, pursuant to s. 42A(1)(a)(i) of the 2000 Act, to grant an extension of duration in respect of four planning permissions, register reference numbers 04/3700, 06/3211, 06/4103 and 07/1024. The duration of each planning permission was extended to 14th August, 2016. In so deciding, the Planning Authority was satisfied that development had commenced on the site before the expiration of the life of the existing planning permissions; that substantial works had been carried out pursuant to the permissions during the period and the Planning Authority believed that the Development would be completed within a reasonable time.

9. On 16th December, 2011, the Planning Authority refused an extension of duration in respect of two further planning permissions bearing register reference numbers 08/645 and 09/236.

10. In 2010, Limerick City and County Council adopted two new Development Plans for the City and the County of Limerick 2010-2016. These plans adopted objectives and policies in relation to retail development which differed significantly to those applicable under the previous development plan applicable to the site at Singland. In particular, the plans favoured the location of retail development in the city centre and stated that grants of permission for further retail development at out of town locations shall not be granted. The Development was classified as an out of town location.

11. The Developer acquired the interest of Alocin Ltd. in the Development with the benefit of the planning permissions (as extended) and the partially erected development on site and was anxious to complete the development of the site.

The 2014 Application and the decision of the Planning Authority
12. By application bearing register reference 14/828 (the "2014 Application"), dated 2nd July, 2014, the Developer applied to the new Planning Authority, Limerick City and County Council, for a further planning permission on the site. It applied for development consisting of revised proposals for the completion of the development and the revisions/amendments included a reconfiguration of the permitted internal layout including the omission of the second floor level, revised proposals for the overall internal road and parking layout and service arrangements and revised proposals for external elevations and signage and completion of hard and soft landscaping and associated site and development works as previously permitted. The proposed development indicated that it would involve an overall gross floor area of 63,712 m^2, less than that permitted by the extant planning permissions (73,142 m^2).

13. The second applicant submitted an observation to the Planning Authority objecting to the application. A legal submission was advanced by its solicitors, Arthur Cox, by letter dated 30th July, 2014. At pp. 2 and 3 of the letter they stated:-

> *"The application is described as revised proposals to include revisions and amendments to 'planning reg ref. 04/3700, 06/3211, 06/4103 and 07/1024 for the completion of the development to include revision and amendments to accommodate a gross floor area of 63,712 sqm'. In effect, this is an application to modify and complete the works as described in the existing permissions and is in all other respects bound by the conditions attached to the previous permissions including the duration of those permissions, unless where a departure therefrom is authorised by any new permission granted.* ***We consider that it would be appropriate for any permission granted in this case to be conditioned appropriately, as has been done before, by reference to the governing permissions referenced in the application description...***
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> *It is instructive that the fee which has been calculated and paid by the developer to accompany this application is that which applies to minor variations, thereby indicating the reliance upon the original 4r permissions recited in the description of the proposed development. However in seeking to modify those existing permissions, the Developer is seeking a five year permission for proposed amendments to the permitted development. If the permitted development as proposed to be modified under the governing 04-07 permissions is built by 2016 then there should be no issue as to timing, and this new application will live on for 5 years. If, on the other hand, the development as proposed to be modified is not built by 2016 then those elements which the Developer seeks to modify by the new application cannot be lawfully completed and so wither with the permitted development under the 04-07 permissions.* ***It is submitted that any other outcome is impermissible in the context of the application before the planning authority, as it is not a freestanding new planning application but one which is based upon the previously permitted development, to include its already extended duration. In so doing, it must fall to be decided within the terms of those permissions save where modified, and to be limited by condition to the time allotted thereto.***
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> *In the alternative, it is submitted that the developer ought to be required to make a fresh submission on a stand alone basis for a planning permission to include the appropriate application fee and all appropriate accompanying reports, when it is submitted it can seek to persuade the planning authority of the necessity to decide the application in its favour, by way of material contravention of the Development Plan." (Emphasis added)*

14. From this submission the following relevant points emerge. The second applicant's legal advisors acknowledged that the application was to modify and complete the works as described in existing permissions. They noted and accepted that there existed four planning permissions which jointly governed the right to develop the lands at the site. They implicitly accepted the power of a planning authority (and by implication the Board) to amend previous extant planning permissions other than on the basis of the provisions of ss. 146A-146D of the 2000 Act. They considered it appropriate for any grant of permission in respect of an application to amend previous permissions to be conditioned by reference to the governing permissions. They submitted that the application fell to be decided within the terms of the existing permissions as it was based upon the previous development and that it be limited by condition to the duration of the prior permissions, 14th August, 2016. If that occurred, "*there would be no issue as to timing.*"

15. They did not take the view that the application to modify and amend existing permissions was legally impermissible or that the grant of permission could not be limited by condition to the duration of the existing permissions. Nor did they argue that the Planning Authority ought not to have accepted the application as a valid application.

Decision of the Planning Authority
16. The Planning Authority refused the application for permission on two grounds:-

> *"1. Having regard to the following*

a) the primacy of Limerick City Centre as the Tier 1 retail centre within the Limerick Metropolitan Area as set out in the retail strategy for the Mid West Region 2010-2016, in the Limerick County Development Plan 2010-2016 and the Limerick City Development Plan 2010-2016;

b) the out of centre location of the proposed stand alone retail development, as defined within the retail hierarchy of retail strategy for the Mid West Region 2010-2012;

c) the overall size and scale of the proposed retail development;

It is considered that the proposed development would materially contravene the retail strategy for the Mid West Region 2010-2016, the Limerick County Development Plan 2010-2016 and Limerick City Development Plan 2010-2016. It is also considered that the proposed development would be contrary to the Guidelines for Planning Authorities Retail Planning, April 2012 issued by the Department of the Environment, Community and Local Government. Furthermore, it is considered that the proposed stand alone retail development would seriously injure the vitality and viability of the Limerick City Centre and existing District Centres and would seriously impact on the shopping role of these centres.

The proposed development would therefore be contrary to the proper planning and sustainable development of the area.

2. Having regard to the absence of the following;

(a) Environmental Impact Assessment

(b) Appropriate Assessment Screening

(c) Retail Impact Assessment

(d) Traffic Impact Assessment

(e) Flood Impact Assessment

(f) Work Place Travel Plan

(g) Sustainable Statement

It is considered that the proposed development would be contrary to the proper planning and sustainable development of the area."

Appeal to the Board

17. The Developer appealed the refusal of the permission to the Board. The grounds of appeal included a report prepared by Ostick + Williams which purported to show the extent of the works carried out at the site as at 12th September, 2014. It set out the drawings which showed the permitted development and the proposed amendments to the permitted development.

18. The second applicant submitted to the Board that the decision of the Planning Authority ought to be upheld and permission refused on the appeal, on a number of grounds. In particular, it argued that the attempt by the Developer to seek planning permission from the Board for a period of five years was utterly and fundamentally inconsistent with the suggestion made by the Developer that the 2014 Application was merely an amendment or variation to existing permissions previously granted. Indeed, in the light of the fact that the duration of the initial permissions had already been extended by the Planning Authority to 14th August, 2016, this inconsistency was all the more apparent. In light of the view of the Planning Authority that the 2014 Application amounted to a material contravention of the relevant development plan at that time, s. 37(2)(b) of the 2000 Act, significantly limited the ability of the Board to grant permission. In particular, the Board must, before granting permission, be satisfied as to the matters set out in s. 37(2)(b) which, it submitted, did not apply to the application. It also argued that there was a requirement that a fresh Environmental Impact Assessment ("EIA") be prepared. Among the reasons for this was the proposal in the 2014 Application that a partially constructed car park would be demolished. It also argued that in the light of the length of time that had elapsed since the initial grant of planning permission under register reference number 04/3700 (August, 2006), and the date of the application and the changes to the economic climate in the State during that intervening time, there was a requirement for a revised Retail Impact Statement.

The Inspector's Report

19. The Inspector noted that the site area was 8.16 hectares and was presently occupied by the partially constructed foundations and substructure of a significant mixed-use development which was previously approved on site under earlier grants of planning permission. He noted that the proposed development consisted of revised proposals for the completion of the existing partially constructed development previously approved on site. The revisions/amendments to the approved scheme were set out in the public notices and included the reconfiguration of the permitted internal layout including the omission of the second floor level resulting in a decrease in the overall gross floor area of the development from 73,142 m^2 to 63,712 m^2, the revision of the overall internal road layout, parking layout and service arrangements, alterations to the external elevations and signage associated with the development and the demolishing/removal of 6,465 m^2 of a partially completed decked car park structure. He set out the detailed relevant planning history in respect of the site. In so doing, he made clear that there had been a number of grants of planning permission which amended the original grants PA Ref. 04/3700 in a variety of ways. He noted that four of these grants of planning permission were extended until 14th August, 2016, as set out above.

20. In section 10 of the Report he dealt with the Development Plan and at 10.3 he dealt with the retail strategy for the Mid West Region 2010-2016. He noted that the strategy for Limerick city centre should protect and promote its role as a national tier 2 centre at the top of the Mid Western hierarchy and a gateway to western Ireland. In relation to out of centre development, it provided that planning permission shall not be granted for the provision of any more out of centre retail floor space.

21. At section 11, the Inspector set out his assessment of the issues raised on the appeal. He concluded that the key issues raised were (for the purposes of this application): (1) the principle and nature of the proposed development; (2) the EIA; and (3) the impact on the city centre/retail impact assessment. He identified the critical issue in the assessment of the appeal as whether or not the submitted proposal amounted to a new *"standalone"* application which should be assessed de novo from first principles or if it is simply amounted to the amendment/revision of the design and layout of an already permitted development. He reviewed the matter in detail and concluded that in his opinion it was clear that the subject proposal was intrinsically linked to the extant grants of permission on site. For that reason he was satisfied that the subject application could be reasonably described as amending an extant grant of permission and therefore there was no need to revisit the wider merits and overall principle of the mixed-use commercial/leisure development already permitted on site. Accordingly he accepted that the principle of this type of development was established by extant permissions.

22. He went on to consider whether it was necessary to conduct an EIA in respect of the application. He noted that the proposal involved the amendment of a partially constructed development which was previously approved on the site pursuant to a series of extant grants of permission. He noted that the original parent permission had been accompanied by an Environmental Impact Statement ("EIS") on the basis that it exceeded the relevant threshold as set out in Class 10(b)(iii) of Part 2 of Schedule 5 of the Planning and Development Regulations 2001 as amended ("the Regulations") (The construction of a shopping centre with a gross floor space exceeding 10,000 m^2). He concluded that, as the subject proposal was limited to the amendment of the permitted development, and was not being assessed from first principles, that the submission of EIS pursuant to the Class 10(b)(iii) was not mandatory.

23. On the basis that the approved development had already been the subject of EIA pursuant to the requirements of the Regulations, and as the proposed amendments did not involve a change to or extension of the partially constructed/approved development which would result in an increase in size greater than 25% or an amount equal to 50% of the relevant threshold (whichever was the greater) as set out in Class 13(a) of Part 2 of Schedule 5 of the Regulations, the proposed development would not necessitate the preparation of an EIS. He noted that the subject application would not result in an increase in the size/floor space of the permitted scheme so as to warrant the submission of an EIS pursuant to Class 13(a) of Part 2 of Schedule 5 of the Regulations.

24. He addressed the question whether the demolishing of 6,465 m^2 of a partially completed decked car park structure necessitated the submission of an EIS under Class 13(c) of Part 2 of Schedule 5 of the Regulations. It was his opinion that the works would be unlikely to have significant effects on the environment having regard to the criteria set out under Schedule 7 of the Regulations and therefore he concluded that they did not necessitate the submission of an EIS.

25. In considering the impact on the city centre/retail impact assessment, his opinion was that the Planning Authority focused heavily on matters (including retail impact) which would have already been considered as part of the Planning Authority's determination of the original application for the substantial mixed-use commercial/leisure development permitted on site under PA Ref No. 04/3700 (as subsequently amended by PA Ref Nos. 06/3211, 06/4103 and 07/1024). These related to the wider merits and overall principle of construction of such a development on the subject site. He was of the view that there was no merit or necessity to revisit the wider merits or the actual principle which had been determined in respect of a planning permission which was still extant.

26. He assessed the subject application on the basis that it simply sought permission to modify the design and layout of the permitted development. He reviewed the proposed amendments to consider whether or not they gave rise to any significant additional planning considerations in terms of retail impact over and above those associated with the development approved under the extant grants of permission on the site. He was of the opinion that the proposed amendment did not give rise to any significant additional planning considerations in terms of retail impact and therefore were not the basis for refusing permission for the development sought.

27. He also considered the issue of the duration of the permission. The Developer submitted that there was no provision in the 2000 Act whereby a planning authority (or the Board on appeal) could grant planning permission for a period less than five years[2]. On the other hand, the second applicant submitted that as the proposal involved the amendment of an extant "parent" grant of permission it was inextricably linked to the terms and conditions of that permission and thus must wither on the same expiry date. The Inspector gave his opinion as follows:-

> *"11.7.2.2 I would reiterate that the subject proposal serves to amend an extant grant of permission and does not amount to a 'standalone' application to be assessed from first principles. Accordingly, I would suggest that it is entirely reasonable to require any grant of permission issued in respect of the subject application to be tied to the terms and conditions of the overriding 'parent' permission given that the implementation of the former is evidently reliant on the latter. Indeed, such an approach is commonplace and I am aware of various instances of same having been employed by both planning authorities and the Board on appeal."*

28. He concluded his Report by recommending that the Board overturn the decision of the Planning Authority and grant permission for the proposed developments subject to six conditions set out in his Report.

Decision of the Board

29. By Board Direction dated 31st March, 2015, the Board decided to grant permission generally *"in accordance with the Inspector's recommendation"* subject to a number of conditions it issued its Decision in accordance with the Direction on 8th April, 2015. The reasons for the Board's Decision included the fact that there were *"extant permissions for a similar development on the lands in question"* and that the 2014 Application *"proposes a revised method of completing those partially developed permissions".*

30. Conditions 2 and 3 of the Board's Decision provide:-

> *"[t]he period during which the development hereby permitted may be carried out shall expire on the 14th day of August, 2016.*
>
> ***Reason:** To coincide with the expiry date of the parent permissions granted to applications planning register reference numbers 04/3700, 06/3211, 06/4103 & 07/1024.*
>
> *3. Other than any departures specifically authorised by this permission, the development shall be carried out and completed in accordance with all of the terms and conditions of the parent permissions granted under planning register reference numbers 04/3700, 06/3211, 06/4103 and 07/1024, and any agreements entered into thereunder.*

***Reason**: In the interest of clarity and to ensure that the overall development is carried out in accordance with the previous permissions."*

31. Further, the notes to the Board Direction are informative as to the reasoning for the Board's decision:-

> *"Note 1: 'The Board agreed with the Inspector's analysis at Section 11.1 of his report that the subject application proposed a revision to an extant permission with a view to completing already commenced works. The Board also agreed that permission for these revisions for the purposes of completion should expire when the parent permission expires. The Board considered that any question of granting permission for a longer period would require consideration of the wider issues of planning policy as referred to in the Planning Authority reports and order.*
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> *Note 2: The Board considered that as the subject application involved completion of an extant partially developed permission with a revised design, and as this revision involved a considerable reduction in floor area, that the issue of material contravention did not arise."*

Grounds for review

32. The applicants argue that the Board treated the application/appeal as a proposed revision to extant planning permissions with a view to completing already commenced works. They say this was incorrect in principle. They say that the 2000 Act only allows for the possibility of amending existing planning permissions in the very limited circumstances set out in ss. 146A-146D of the 2000 Act. Other than these statutory provisions there is no power to amend, vary or revise an extant planning permission. In acting as it did the Board erred in law and acted *ultra vires* in reaching its Decision of 8th April, 2015.

33. Secondly, they argue that the Board failed to comply with the provisions of s. 34 of the 2000 Act (and as applied to appeals by s. 37 of the Act) in that the Board failed to have regard to the current version of the Statutory Development Plan, the Limerick County Development Plan 2010-2016 as required by s. 34, or the current version of the Statutory Local Area Plan, the Castletroy Local Area Plan 2014-2020 as required under s. 18 of the 2000 Act.

34. Thirdly, they say that the Board failed to have regard to the policies and objectives for time being of the Limerick County Development Plan[3] and the retail strategy of the Development Plan as required under s. 143 of the 2000 Act.

35. Fourthly, they say that the Board erred in law by failing to require the Developer to carry out a Retail Impact Statement prior to the Planning Authority reaching its decision in circumstances where the original Retail Impact Statement in respect of the original application for planning permission on the site was dated 2006. The statement therefore related to a period when the economic climate in the State was considerably different to the conditions in 2014 and a failure to require the carrying out of an updated Retail Impact Statement effectively deprived the Planning Authority of being able to insist upon up-to-date assessments in relation to this element of town planning.

36. Fifthly, the Board erred in law and acted *ultra vires* in failing (1) to require the Developer to submit an EIS and (2) to carry out an EIA. The applicants submit that the nature and extent of the development was such as to trigger a requirement to carry out an EIA in accordance with the provisions of the Environmental Impact Assessment Directive (2011/92/EU) and Part X of the 2000 Act and Part X of the Regulations. They argue that the proposed development came within Class 10(b) (infrastructure) and/or Class 14 (works of demolition) of Part 2 of Schedule 6 of the Regulations and accordingly the Board was obliged to carry out an EIA but failed so to do.

37. In the alternative the applicants argue that if the appeal fell to be examined on the basis of Class 13 (changes or extensions) of Part 2 of Schedule 6 of the Regulations, the Board erred in law and acted *ultra vires* in failing to carry out any proper screening determination and failed to provide a reasoned screening determination pursuant to the provisions of Article 4 of the EIA Directive and pursuant to the provisions of Article 109 of the Regulations.

38. The applicants say that the Board erred in law and acted *ultra vires* in failing to comply with the provisions of s. 37(2) of the 2000 Act. The Planning Authority had refused planning permission on the basis, *inter alia*, that a proposed development would involve a material contravention of the Development Plan. In the premises, the Board's powers to grant planning permission was confined to the circumstances set out under s. 37(2) of the 2000 Act and further the Board was under an enhanced duty to give reasons for its decision. The applicants argue that it is clear from the Board's Direction of 31st March, 2015, and from its Decision of 8th April, 2015, that the members of the Board purported to second guess the Planning Authority's determination that the Development involved a material contravention of the development plan. In so doing, the applicants argue, the Board acted *ultra vires* and in any event erred as a matter of law and purported to find that the issue of material contravention did not arise.

Submissions of the Board

39. The Board stated that the appeal concerned an application for permission for revised proposals to complete the existing partially completed development which had been carried out under the parent permissions. The parent permissions remained valid and the balance of the partially completed development could lawfully be carried out under those permissions until 14th August, 2016. In the circumstances, the Board was fully entitled to have regard to the existing partially complete development and the parent permissions.

40. The Board argued that the Planning Authority accepted the planning application as valid and the applicant did not challenge this decision within eight weeks of the date of the decision. The application was accepted as a revision or amendment of an earlier permission and not as an application for a new development with new retail floor space. The Board urged that if the applicants argue as a matter of principle that the application should not have been dealt with as a proposed revision of the parent permissions, the time for raising this issue crystallised when the Planning Authority accepted the planning application as a valid application on 3rd July, 2014. In the circumstances, the Board argued that any allegations that the Board was wrong to consider the application as a revision or amendment of an earlier permission cannot now be made as the applicants are out of time.

41. The Board argued that planning authorities and the Board have power to deal with applications to amend existing planning permissions and to deal with them on the basis that they revised or modified existing planning permissions and that the power to amend grants of planning permission was not confined to the provisions of ss. 146A-146D of the 2000 Act.

42. The Board pointed out that the majority of the policies relied upon by the Planning Authority to refuse permission effectively amounted to revisiting the merits of the parent permissions to allow development on the site. The Board submitted that as a matter of principle this was no longer possible in view of the fact that the parent permissions were still extant and it submitted that its approach was both entirely lawful and proper.

43. It argued that as a matter of fact the Board did have regard to the Limerick County Development Plan 2010-2016 and the Castletroy Local Area Plan 2014-2020 and the policies and objectives and the retail strategy set out in the Limerick County Development Plan 2010-2016 when assessing the 2014 Application. There was evidence before the Board in relation to these matters including the submissions and legal opinion furnished by the applicants. The Inspector's Report also considered these issues. There was a considerable corpus of evidence relevant to these issues before the Board. The Board reached its determination as a specialist body exercising its expertise in planning matters following a consideration of the appeal and the proper planning and sustainable development of the area concerned and there was sufficient evidence before the Board upon which it could make the decision it reached.

44. The Board submitted that the proposed revision involved a considerable reduction in the floor area that had been permitted under the parent permissions. As such the Board was fully entitled to reach the view on the evidence before it that the application for planning permission did not involve a material contravention of Policy ED 13 (the policy not to permit any more retail floor space in out of centre locations).

45. The Board submitted that it was obliged to "*have regard*" to the ministerial guidelines, and the policies and objectives identified by the applicant. It submitted that the obligation to have regard to something is not an obligation to follow that thing. It submitted that although the current planning policy was not applied retrospectively to the existing permissions and the partially completed development, it was applied by the Board to the narrower question of whether the 2014 Application to amend the extant permissions should be permitted. There was no obligation on the Board to require the Developer to submit a retail impact statement. The Board was entitled to take the view that none of the revisions were such as to require a reassessment in terms of retail impact and that there was no significant additional planning considerations in terms of retail impact over those associated with the developments approved under the extant parent permissions.

46. The Board argued that it was entitled to assess for itself whether or not the proposed development materially contravened the development plan. As the Board concluded that it did not materially contravene the development plan it was not granting permission pursuant to s. 37(2)(a) of the 2000 Act. Accordingly, the restrictions set out in s. 37(2)(b) did not arise and the obligation to give a reasoned decision pursuant sub-para. (c) likewise did not arise.

47. The Board argued that for the reasons enunciated by the Inspector, an EIA was not mandatory. The application did involve demolition works which can in principle require an EIA, both classes identified by the applicants were subject to the proviso that the demolition itself be likely to have a significant effect on the environment. The Board argued that the demolition works in the proposal were fully described in the submissions and observations before the Board and in the application documents themselves. Consequently there was sufficient information before the Board to determine that these were not likely to have significant effects on the environment and thus no EIS was needed under Class 13(c) or required under Class 14 of the Regulations. They argued that the Inspector set out his reasons for these conclusions and the Board adopted that reasoning. Thus there was a proper screening exercise carried out as required by the Regulations.

48. In submissions to the Court, counsel for the Board conceded that if the Board was incorrect in treating the application as one to amend a partially constructed development with live planning permission and rather, that it was obliged to treat the planning application as a stand alone application, then an EIA was required and the applicants would be entitled to the relief sought on that basis.

Is there a power to amend an existing grant of planning permission?
49. The Board considered the application for planning permission, the file of the Planning Authority, including the observations of the second named applicant, the decision of the Planning Authority, the appeal by the Developer, the observations on the appeal including those of the second named applicant and the Inspector's Report. It concluded that the application was not a stand alone application for planning permission. It formed the opinion that the application was to amend previously permitted planning permissions which had been extended until 14th August, 2016, on the basis that substantial works had been carried out pursuant to those planning permissions. The Board submitted that as a matter of fact it was entitled to treat the application as it did and as matter of law the Board had jurisdiction to amend the planning permission. The applicants argued to the contrary.

50. The applicants stated that statutory power to amend existing planning permissions in the form of ss. 146A-146D of the 2000 Act was introduced in 2006. Section 146A allows a planning authority (and the Board) to make amendments to a planning permission for the purposes of:-

> *"(i) correcting any clerical errors therein,*
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> *(ii) facilitating the doing of any thing pursuant to the permission or decision where the doing of that thing may reasonably be regarded as having been contemplated by a particular provision of the permission or decision or the terms of the permission or decision taken as a whole but which was not expressly provided for in the permission or decision, or*
>
> *(iii) otherwise facilitating the operation of the permission or decision."*

Sections 146B and 146C allow the Board to alter the terms of, *inter alia,* planning permissions granted in respect of strategic infrastructure development ("SID"). Section 146D relates to railway orders. These are the only statutory provisions authorising the amendment of existing planning permissions. It is common case that the provisions of these sections do not apply in this case. The applicants submit that the fact that the Oireachtas expressly legislated for the making of alterations to existing planning permissions (other than those within the scope of s. 146A) but confined this to SID projects and railway orders precludes the reading into the legislation of an implied power to amend planning permissions in any other circumstances. The applicants therefore argue as a matter of principle there was no power to treat the application as an application to amend existing planning permissions and therefore, in so doing, the Board acted *ultra vires* and its decision is accordingly void.

51. The Board submitted that it has not been doubted that planning permissions could be amended in the course of carrying out the development authorised by the planning permission during the life of that planning permission. This has occurred over many decades and long before ss. 146A-146D of the 2000 Act were enacted in 2006. There is nothing in the Act which precludes a power to amend planning permission. It is commonly done for technical reasons, on site reasons, commercial reasons and other reasons. Where an existing planning permission is varied it is normal to include a condition that the new planning permission be built in accordance with the parent planning permission save as varied by the new grant of planning permission. It is usual to limit the life of the new planning permission to that of the parent planning permission. If there was no such implied power to amend planning permissions the planning code would become unworkable and extremely burdensome in respect of all but the simplest of developments. Any time an amendment (other than a clerical amendment) was sought a fresh application for planning permission in respect of the entire development would

have to be submitted. Each and every such application would be treated as a stand alone application to which the full panoply of provisions of the 2000 Act, the Regulations and EU Directives would apply regardless of the nature or scale of the proposed amendment to the existing grant of permission. This would place an extraordinary burden upon developers, planning authorities and also the public.

52. The Developer also submitted that the restricted application of ss. 146A-146D of the 2000 Act should not be interpreted as precluding a wider power to amend a planning permission by way of a subsequent planning permission. It noted that in the case of *Dwyer Nolan Developments Ltd v. Dublin County Council* [1986] I.R. 130, Carroll J. held at pp.138-139:-

> *"…permission to construct a new building to replace existing buildings had to be carried out in all its specifications as the permission was not devisable at the option of the owner. He was obliged to carry out all the works* ***or obtain a variation****…Similarly, I am of opinion that severance of planning permission of an overall building scheme can take place within the limits I have indicated with the effect that the development which has been carried out is authorised.* ***But I am not prepared to hold that the developer can draw on any other existing permission to complete the unfinished scheme. The developer must apply for further planning permission in respect of the completion incorporating, either directly or by implication, the partial development which has already taken place****."*
> *(Emphasis added)*

Thus the High Court held that it was possible to apply for a further planning permission to alter the terms of an existing permitted development "*incorporating, either directly or by implication, the partial development which has already taken place*." The Developer argued that had it been the intention of the Oireachtas to legislate so as to exclude a wider power to amend a planning permission by way of a subsequent planning permission other than is set out in ss. 146A-146D, then the Oireachtas would have done so. In failing to do so the Oireachtas effectively approved the well established practice in relation to applications for completion of development other than in accordance with the relevant permissions granted.

53. I accept the submissions of the Board and the Developer. In my opinion the Oireachtas was entitled to take notice of, and have regard to, the very widespread practice of amending planning permissions in the manner which has occurred here when it enacted the provisions of ss. 146A-146D of the 2000 Act in 2006. In the decades preceding this enactment, there had never been a suggestion that the many amending grants of planning permission by planning authorities and the Board were all *ultra vires* and void. I do not believe that in enacting the provisions of ss. 146A-146D, the Oireachtas intended to radically and drastically limit a widespread existing power to grant planning permissions which amended existing extant planning permissions. Furthermore, I do not accept that if this had been the intention of the Oireachtas that it would not have made such intention explicit and clear. Until the applicants advanced this argument in this case neither the Board, the Planning Authority, professional planners, nor indeed the applicants' solicitors had believed that the sole power to amend planning permission was to be found solely and exclusively in ss. 146A-146D of the 2000 Act.

54. On the contrary, had the Oireachtas been of the view that (a) there was no power under the existing planning code to amend planning permissions by applying for, and obtaining, grants of planning permission which revised or modified extant grants of planning permission, and (b) despite the absence of any such power, there was a long standing common practice to grant such permissions, and the Oireachtas wished to ensure that there was to be a very limited power of amendment confined solely to the provisions of ss. 146A-146D of the 2000 Act, it would have made it clear that the power to amend planning permissions was confined solely to the provisions it was enacting. Such a significant change would not have been left to be devined by implication, as is the case here, if the applicants' argument is correct. I believe it is not.

55. I am reinforced in this conclusion by the provisions of the Planning and Development Regulations 2001 as substituted in 2006. Under the Regulations it is permissible to pay a reduced fee for an application for planning permission under Class 13, rather than the full fee that would otherwise be payable in respect of the entire development under Class 14, as occurred in this instance. Furthermore, Class 13 of Schedule 5 of the Regulations applies to "*any change or extension of development already authorised, executed or in the process of being executed*". The existence of such a class and the right to pay a reduced fee for an application for such planning permission can only be consistent with the power of a planning authority and the Board to accept and adjudicate upon applications which involve minor variations or changes or extensions to extant planning permissions. This means that the Regulations recognise that there may be applications to amend existing planning permissions. Furthermore, it is clear that the second named applicant's solicitors, Arthur Cox, in their submission to the Planning Authority, took no issue with the principle of applications for planning permission which seek to amend existing planning permissions which were not based upon ss. 146A-146D of the 2000 Act. They were quite clearly of the view that the Developer's application was not a stand alone application for planning permission but rather was seeking to amend or revise existing planning permissions and they did not object to the application on that basis.

56. For these reasons, I reject the argument that the Board had no power to assess the 2014 Application on the basis that it was an application for permission to revise or modify existing permissions. Furthermore, it was entitled, on the facts, to assess it on that basis. Any objective, fair reading of the application, including the accompanying drawings, makes it clear that, in the words of Carroll J., it was an application:-

> *"…for further planning permission in respect of the completion incorporating, either directly or by implication, the partial development which has already taken place."*

Duration of the grant of planning permission

57. The applicants argued that the Developer's application for planning permission ought to have been treated as a stand alone planning permission because it sought a planning permission of five years in duration. They argued that this was inconsistent with an application to amend existing planning permissions. It would either have the effect of extending the life of the existing planning permissions, which was not permissible. Alternatively, there would be impermissible confusion as to when the time for the execution of any particular part of the permission expired if different aspects of the overall permitted development were of different duration. This submission was predicated on the argument that in principle it was not permissible to grant a planning permission that was limited to the life of the extant planning permissions which were sought to be amended. This argument is of course, completely inconsistent with the submissions of Arthur Cox to the Planning Authority in July, 2014. They stated:-

> *"[w]e consider that it would be appropriate for any permission granted in this case to be conditioned appropriately, as has been done before, by reference to the governing permissions referenced in the application description…*
>
> *[The application] must fall to be decided within the terms of those permissions save where modified, and to be limited by condition to the time allotted thereto."*

58. The common practice of amending existing planning permission involves limiting the duration of the subsequent amending grants of planning permission to the life of the original "*parent*" planning permission. Just as the Oireachtas may be deemed to have taken notice of the practice of amending existing planning permissions, so to it may be deemed to have taken notice of the manner in which the duration of the subsequent amending planning permissions was limited to the life of the original "*parent*" planning permission by an express condition to that effect. In this case, the four amending planning permissions granted to Alocin Ltd. were each granted in the normal way but were limited in time to the duration of the parent permission 04/3700. Furthermore, when the Planning Authority granted extensions of duration in respect of these planning permissions it granted them each to the same date, 14th August, 2016. There was nothing unusual in relation to this approach and no objection was taken on behalf of either of the applicants to these decisions.

59. The applicants argue that the implication of a power to amend existing planning permissions where the amending planning permission must be of five years duration, would have the effect of extending the duration of planning permissions beyond the natural cycle of development plans in a manner which fundamentally undermines the primacy of the development plan. Thus, they submit, there can be no such implied power to amend planning permissions. Development plans are replaced every six years and are one of the major means by which changes in planning policy are effected. The applicants argue that the six year planning cycle of the statutory development plan (and ministerial guidelines) is central to the planning code. If a grant of planning permission of five years duration was amended after four years by a further grant, which likewise had a duration of five years, it is possible that the original grant of planning permission for development could have been granted in accordance with one development plan but actually be carried out during the currency, not of the next development plan, but the one thereafter. They argue that as a matter of principle this is clearly impermissible and undermines the arguments that there is an implied power to amend existing planning permissions and that the amending permissions cannot validly be granted for a period of five years.

60. This argument is predicated upon the contention that it is not permissible to so extend the lifetime of a grant of planning permission that it extends not only into the next development plan cycle but also into the one following.

61. However, this is precisely what the Oireachtas has permitted in relation to the power to extend the duration of planning permissions pursuant to s. 42A of the 2000 Act. Section 42A(1) provides:-

> *"[o]n application to it in that behalf a planning authority shall, as regards a particular permission, extend the appropriate period by such additional period not exceeding 5 years as the authority considers requisite to enable the development to which the permission relates to be completed provided that each of the following requirements is complied with:*
>
> *(a) either -*
>
> *(i) the authority is satisfied that –*
>
> > *(I) the development to which the permission relates was commenced before the expiration of the appropriate period sought to be extended,*
> >
> > *(II) substantial works were carried out pursuant to the permission during that period, and*
> >
> > *(II) the development will be completed within a reasonable time,*
>
> *or*
>
> *(ii) the authority is satisfied-…*
>
> > *(II) That there have been no significant changes in the development objectives in the development plan or in regional development objectives for the area of the planning authority since the date of the permission such that the development would no longer be consistent with the proper planning and sustainable development of the area*[4]*,*
> >
> > *(III) That the development would not be inconsistent with the proper planning and sustainable development of the area having regard to any guidelines issued by the Minister under section 28, notwithstanding that they were so issued after the date of the grant of permission in relation to which the application is made under this section…"*

62. The application to extend a permission must be made in the last year of the life of the existing permission. The permission may be extended for five years, thereby giving a planning permission of between 9 and 10 years duration. It is thus clear that it is permissible to extend a planning permission across three cycles of development plans. It follows that the principle advanced by the applicants in this case is subject to exceptions. The Oireachtas has clearly taken the view that where a developer has carried out substantial works it should be giving an opportunity to complete the development within a reasonable time. In principle therefore the Oireachtas accepts that in appropriate circumstances, such as where there have been substantial works carried out pursuant to a grant of planning permission, the evolving planning policy will not prevent the completion of such developments even where they would otherwise be incompatible with evolving plans and policies.

63. I am satisfied that the possible prolongation of the duration of a particular planning permission by the granting of an amendment to an extant permission is not invalid or impermissible as a matter of principle. Thus, I reject the applicants' argument that there can be no implied power to amend planning permissions based upon the argument that it involves impermissible encroachment on evolving planning policy. Separately, I am satisfied that the Board was entitled as a matter of principle to limit the duration of the grant of planning permission in the manner it did. Further, the fact that the Developer had sought a grant of planning permission on 2nd July, 2014, for a permission of five years duration did not mean that the application was in fact a stand alone new application for planning permission and that it therefore did not constitute an application to amend the existing partially constructed and incomplete retail/commercial development.

64. I conclude that the Board had jurisdiction to treat the application for planning permission as a "*revision*", "*variation*" or "*amendment*" of existing planning permissions and that it acted intra vires in assessing the application as an application to amend or vary an existing planning permission. It acted *intra vires* in limiting the duration of the permission to that of the permissions being

amended or varied.

How should an application to amend an existing planning permission be assessed
65. The applicants argued that the Board erred in law in failing to assess the entire Development – as opposed simply to the variations – on the merits in the light of the current development plan, ministerial guidelines and other current planning policies and objectives. The Board and the Developer argued that the Inspector and the Board assessed the application correctly. In particular, they both submitted that it was neither necessary nor appropriate to revisit the principle of the grant of planning permission for development of the scale and nature at the location of the site as the application was not for a stand alone development but was for amendments to permit the completion of extant planning permissions which had been partially and substantially constructed. There was an existing right to develop a large hotel/commercial/leisure complex on the site.

66. It is very relevant to note that the extant planning permission had been extended pursuant to s. 42A of the 2000 Act. The section is of assistance in determining the basis upon which a planning authority ought to assess an application to amend a grant of planning permission which has been extended pursuant to s. 42A. It is clear that if the duration of the planning permission is to be extended pursuant to s. 42A(1)(a)(ii), that the planning authority revisits the question of the proper planning and sustainable development of the area in the light of any significant changes in the development objectives in the development plan or in the regional development objectives for the area or any guidelines issued by the Minister which post date the original grant of planning permission. This requirement does not apply to extensions pursuant to s. 42(1)(a)(i) where a developer has carried out substantial works pursuant to the permission during the lifetime of the permission. The Oireachtas has clearly formed the view that the developer may be entitled to an extension of the period of that planning permission notwithstanding the fact that the development in question may no longer be compatible with new ministerial guidelines or the most up-to-date planning policies and objectives. The Oireachtas has decided that a developer who has carried out substantial works should be giving a reasonable opportunity to complete the development within a reasonable time.

67. The Oireachtas has struck a balance between the desirability of giving primacy to the evolution of development plans, objectives and policies and ministerial guidelines on the one hand, and the interests of individual developers who have made significant commitments on foot of grants of planning permission on the other hand. It is also in the best interests of all concerned that the number of partially constructed, incomplete developments should be kept to a minimum. The balance has been struck notwithstanding the fact that the continuance of the permissions may well conflict or be incompatible with more up-to-date planning policies or ministerial guidelines.

68. I see no reason in principle why an extended planning permission may not be amended in the same manner as a planning permission may be amended within the normal life time of the permission *i.e.* by imposing conditions that save, as amended, the planning permission be carried out in accordance with the terms of the extant planning permission and that the duration of the amending permission is linked to the duration of the extended planning permission. That being so, it follows that any application to amend a planning permission which was extended pursuant to s. 42A(1)(a)(i) should likewise not revisit the principle of the permitted development on the site in question by reference to evolving planning policies and ministerial guidelines. To hold otherwise would be to undermine balance struck by the Oireachtas between sub-paras. (a)(i) and (ii) of s. 42A(1).

69. This is not to say that the application to amend the extant grant of planning permission is not to be assessed by the planning authority or the Board by reference to the current development plan, local area plan, regional guidelines and ministerial guidelines. The application is to be assessed in the normal way but it is the proposed amendments or revisions only that are to be assessed. The parts of the development which are not modified or varied have the benefit of a valid planning permission and thus issues relating to the totality of the development (as opposed to the modifications) should not be revisited. If a site had planning permission for residential development and the site was now no longer zoned residential, an application to alter the density of the proposed residential development could not be rejected on the basis that residential development was no longer permitted on the site. However, the issue of whether or not the variation of the density was permissible is to be assessed by reference to the current planning policies and objectives and guidelines (be they to increase or reduce densities), albeit applied to an area in which the development would not be permitted under those policies.

70. In this case, four grants of planning permission were extended in respect of the Development on the site pursuant to s. 42A(1)(a)(i) up until 14th August, 2016. This means that the Development is permitted notwithstanding the significant changes that occurred in the objectives of the development plan or the regional development objectives or ministerial guidelines. If the application to amend those existing permissions as extended had to be considered in the light of significant changes in the development objectives in the development plan or in the regional development objectives for the area or in the light of guidelines issued by the Minister under s. 28 this would have the effect of applying the provisions of sub-para. (ii) to the extension granted under sub-para. (i). Such a conclusion would effectively deprive the Developer of the full extent of its rights pursuant to the extensions already granted.

71. I conclude that the correct basis upon which to assess an application to amend existing planning permissions is to assess the proposed changes, variations and amendments in the light of all applicable current development plans and ministerial guidelines and other planning policies. In light of those matters, the proposed amendments should be assessed to see whether they meet the requirements of proper planning and sustainable development for the area. Matters that are the subject of an extant grant of planning permission ought not to be reassessed. Accordingly, I hold that the Board was required to assess only the modifications to the Development in the application to amend the existing planning permissions for the Development. It was required to assess those elements on their own merits by reference to the current versions of the relevant planning policy documents, in particular, the statutory development plan, the statutory local area plan, statutory guidelines, regional planning guidelines and retail strategy.

Is the application out of time?
72. Both the Board and the Developer submit that the applicants' case in relation to the power to amend existing grants of planning permission is out of time. They argue that the application of 2nd July, 2014, was clearly an application to amend the existing grants of planning permission. The fee paid was pursuant to Class 13. The Developer did not pay the Class 4 fee of €38,000 which would have applied to a development of a shopping centre of this scale had this been a stand alone application. The application was accepted as a valid application by the Planning Authority on 3rd July, 2014. The second named applicant's solicitors acknowledge that the application was to amend the existing planning permissions. They say that the decision of the Planning Authority to accept the application as a valid application for planning permission when it was clearly an application to vary or modify existing planning permissions ought to have been challenged within eight weeks of 3rd July, 2014, had the applicants wished to argue that there was no power to amend the existing planning permissions and that any case which the applicants now seek to advance based on the alleged invalidity of the application for planning permission is out of time, as it was not made by 27th August, 2014.

73. I accept that there is a clear and well established obligation on parties to raise challenges to matters as they arise and the legislative policy is not to permit parties to "*sit*" on their complaints to the prejudice of the exercise of public (and private) resources

in the planning process when same could be arrested if a potential challenger was to bring his point when it arose.

74. Section 50(2) of the 2000 Act provides that "[*a] person shall not question the validity of any decision made or other act done by… a planning authority… in the performance or purported performance of a function under this Act"*. Section 50(6) imposes a strict limitation period of eight weeks beginning on the date of the decision or, as the case maybe, the date of the doing of the act by the planning authority.

75. In Linehan v. Cork County Council [2008] IEHC 76 at p. 31 Finlay Geoghegan J. stated:-

> *"…it may no longer be safe for an applicant to await a final planning decision to which s. 50 of the Act of 2000, as inserted by the Act of 2006, applies before making an application for judicial review, if the grounds include questioning the validity of an earlier procedural decision or act done by the planning authority. Such decisions or acts may now have to be challenged as they occur…*
>
> *Sections 50(2)(a) and 50(6) will have to be construed in the context of the clear intention of the Oireachtas in the Act of 2000, as amended by the Act of 2006, to impose strict and short time limits for the challenging of decisions in the planning process".*

76. In *MacMahon v. An Bord Pleanála* [2010] IEHC 431 Charleton J. held:-

> *"6. The Act of 2000 as first promulgated, and prior to its amendment as aforesaid, prohibited the questioning outside the relevant time limits of any application for planning permission, which included an application on appeal to the Board, or any procedure by a local authority in respect of its own development under s. 179 or any confirmation of a compulsory purchase order under section 216. These, basically, are all planning permission decisions, as opposed to administrative steps that lead to such decisions. The amendment introduced by s. 13 of the Planning and Development (Strategic Infrastructure) Act 2006, in force since 17th October 2006, extends the remit of judicial review to 'any decision made or any other act done by', and in the following subsection 'a decision or other act' of, the planning authority or the Board on appeal. Previously, it was clear that a final decision had to be reached before a judicial review could be commenced. Finlay Geoghegan J. in Linehan v. Cork County Council [2008] IEHC 76, (Unreported, High Court, 19th February, 2008) offered a view, in respect of the amendment to the Act as it now stands, that it might no longer be safe for an applicant to await a final planning decision before commencing judicial review proceedings. She queried as to whether decisions of a procedural kind during the course of an application might have to be challenged as they occur.*
>
> *7. The view as expressed by Finlay Geoghegan J. is correct. In passing s. 50, and then amending it so as to extend its strictures to administrative steps, the Oireachtas clearly intended to impose strict time limits for the challenging of decisions in the planning process by way of judicial review."*

77. The Board states that if the applicants' case is that no amendment to the parent permissions could be permitted (save in accordance with ss. 146A-146D which were never invoked or conceivably relevant at any point), then the applicants' real complaint is that this was a planning application which never should have been accepted as a valid application and it should not even have been determined.

78. It submits that in considering this argument the Court is entitled to have regard to what in substance these proceedings seek to impugn. In this regard they rely upon the decision of Kelly J. in *Kinsella v. Dundalk Town Council* [2004] IEHC 373 where he held (at p. 10):-

> *"I took the view that it was quite clear that the whole thrust and ambition of these proceedings was to quash the decision of 3rd August, 2004. As the applicant was quite plainly questioning the validity of the decision to grant planning permission he could not avoid or evade meeting the necessary threshold of proof required under s. 50 of the Planning and Development Act, 2000. Indeed as I pointed out in giving my ruling on this topic, if the applicant were correct in his submission in this regard an absurd result could be achieved which would be entirely contrary to the letter and intent of s. 50."*

79. The Board concludes by saying that if the applicants' case is that there is no basis in law for the Developer's application to be made then the applicants are out of time. The challenge should have been brought within eight weeks of the application for planning permission being accepted as valid by the Planning Authority.

80. In reply, the applicants say that the decision of the Planning Authority to refuse the application for planning permission issued on 22nd August, 2014, within the eight weeks allowed for seeking judicial review of the decision to accept the application for planning permission as valid on 3rd July, 2014. That being so, they rhetorically ask "*what decision was to be challenged or quashed?"* They say it would be futile not to say farcical for the applicants to have applied to quash the decision of 3rd July, 2014, in the light of the decision of 22nd August, 2014.

81. There is considerable practical merit in this submission. So how are the principles of *Lenihan* and *MacMahon* to be applied in these circumstances? I do not accept that the decision of the Planning Authority to accept the application as a valid application for planning permission can be regarded as a provisional decision, as was argued by the applicants. Article 22 of the Planning and Development Regulations 2006 (S.I. 685 of 2006) requires that a planning application complies with certain requirements including the payment of the appropriate fee as calculated by reference to Schedule 9. There is a considerable difference between a Class 4 Fee - €38,000.00 - and the Class 13 Fee paid here – €816.00. If the Planning Authority believed that this was an application for stand alone planning permission of a very substantial commercial mixed-use development of more than 63,000 m^2 it could not have accepted the application as valid in the absence of a fee of €38,000.00. This is because Article 26(3) of the Regulations provides that *"[w]here, following consideration of an application… a planning authority considers that any of the requirements of articles 18, 19(1)(a) or 22… has not been complied with … the planning application shall be invalid."*

82. The applicants' argument potentially undermines the decisions in *Lenihan* and *MacMahon*. They rely upon *Dunnes Stores v. An Bord Pleanála* (Unreported, High Court, McGovern J., 21st May, 2015, *ex tempore*) where the learned High Court judge refused leave to apply for judicial review of the first instance decision on the basis, inter alia, that there was no extant decision capable of being challenged. He stated at para. 9:-

> *"[t]he provisions of s. 37(1)(b) of the Act are quite clear and unambiguous. The effect of that section is that once the Board made its decision, it has the effect of annulling the decision of the Planning authority, SDCC. That been so, there is*

no decision of SDCC which can be challenged. There is no basis upon which the court can go beyond the provisions of the Act. That would be clearly impermissible. At this stage there is simply no decision of SDCC to quash and, therefore, no basis upon which the court can accede to the application to join the planning authority as a respondent in the proceedings."

83. The applicants say that this is authority for the proposition that a challenge to a decision of the Board does not involve "*questioning the validity of*" the first instance decision of the planning authority. There is no extant decision to challenge. It has been annulled by the decision of the Board. They argue that the statutory formula "*shall not question the validity of*" a decision presupposes that there is a valid decision in existence capable of being challenged. This, of course, is perfectly correct. However, up and until the decision of the Board there was an extant decision which was capable of being challenged and the issue is whether or not it ought to have been challenged within eight weeks of 3rd July, 2014, and not whether it is now impossible to challenge that decision.

84. Of more assistance is the decision of Herbert J. in *McCallig v. An Bord Pleanála* (No.1) [2013] IEHC 60. In that case an objector sought to challenge the Board's decision to grant planning permission on the basis that the original planning application was invalid. (On the facts, the application had included the objector's lands within the red line of the application site without her written consent). The Board and the developer had sought to defend the proceedings on the basis that the Board was not entitled to look behind the planning authority's initial decision to accept the application as a valid application. This argument was rejected. The Court noted that non-compliance with the provisions of Article 22(2)(g) of the Regulations was the basis for the major part of the applicant's challenge to the decision of the Board in her judicial review proceedings. The Court held at para. 55:-

"I am unable to accept the submissions made on behalf of the respondent and the second noticed party that this Court should not consider an application for judicial review taken against the respondent rather than the first notice party where the basis of the application is some alleged infirmity in the procedures adopted by the first notice party during the first stage of the two stage planning process."

85. The Court accepted as correct the following passage from *Hynes v. An Bord Pleanála & Ors (*Unreported, High Court, McGuinness J., 10th December, 1997) at para. 62 of the judgment:-

"[t]here remains the question of the validity of the Developer's original application. While the Judgment of Costello J. in the O'Keeffe case makes it clear that it is the decision of the Planning Authority that founds the jurisdiction of An Bord Pleanála, no question of the validity of the original application arose in that case, and I would not interpret the Judgment as meaning (as suggested by Mr. Collins) that An Bord Pleanála could simply ignore a situation were the original planning application was clearly invalid. I accept that the primary duty of vetting a planning application and ensuring that it is in accordance with the relevant planning regulations lies with the Planning Authority but one must ask whether An Bord Pleanála would have jurisdiction to adjudicate on an appeal where the application on its face was one which would be considered invalid under the criteria set out by the Supreme Court in the Frascati case? Surely the answer must be no, particularly bearing in mind the cross reference from s. 26(5) to s. 26(1) of the Act of 1963. It seems to me, therefore, that I should consider the validity or otherwise that the Developer's original planning application."

86. On the basis of the decision in McCallig, any issue in relation to the validity of an application for planning permission must be considered by the Board on any appeal to it. That being so, in effect the issue arises again once a valid appeal is lodged. The decision of the Board on the appeal will involve, *inter alia*, a decision as to whether or not there was a valid application for planning permission in the first place. Therefore any questioning of the validity of the decision of the Board on the appeal can include a challenge to the validity of the application for planning permission. In view of the fact that these proceedings were brought within the statutory limitation period of the date of the Board's decision, I therefore am of the opinion that the applicants are not out of time for raising issues in relation to the validity of the application for planning permission in these proceedings.

Section 37(2) of the 2000 Act

87. The applicants argue that the fact that the Planning Authority decided to refuse permission on the grounds that the development materially contravened the development plan triggered the provisions of s. 37(2) of the 2000 Act. In particular, the Board's jurisdiction to grant planning permission is restricted to the circumstances specified under s. 37(2)(b) and further the Board was under an enhanced duty to state reasons for its decision. Section 37(2) of the 2000 Act provides as follows:-

"(2) (a) [s]ubject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates.

(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—

(i) the proposed development is of strategic or national importance,

(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or

(iii) permission for the proposed development should be granted having regard to regional planning guidelines for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or

(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.

(c) Where the Board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of s.34(10), indicate in its decision the main reasons and considerations for contravening materially the development plan."

88. The applicants argue that the legal effect of the Planning Authority refusing planning permission on the grounds that the proposed development materially contravened the development plan was that the Board was only entitled to grant a planning permission where at least one of the four criteria described in sub-paras. (i), (ii), (iii) and (iv) of s. 37(2)(b) were fulfilled. As there was no suggestion that in fact any of these criteria were fulfilled the applicants contended that the decision to grant planning permission was made in breach of the requirements of s. 37(2).

89. In response the Board argues that under s. 37(2)(a) of the 2000 Act, the Board has the power to grant permission for development where the grant would materially contravene the development plan. Section 37(2)(b) makes clear that the Board may only grant permission in accordance with s. 37(2)(a) where at least one of the specific conditions set out in the subsection arise. The critical point is that a decision needs to be reached as to whether a development does or does not materially contravene the development plan. While clearly the planning authority may make that decision in the first instance, the Board may also make that decision and it may disagree with the planning authority's assessment and decide that the proposed development in fact does not involve a material contravention of the development plan. This means that the Board will be proposing to grant a permission which was not a material contravention of the plan and therefore would not be purporting to exercise the power conferred by s. 37(2)(a) of the 2000 Act. That being so, the provisions of s. 37(2)(c) do not arise.

90. The applicants argued that as a matter of principle it was not open to the Board to revisit the determination of the Planning Authority as to whether or not the proposed development materially contravened the development plan as this would permit the Board to avoid the requirement of s. 37(2)(b). They say it is contrary to the clear, express words of the statute. The Board argued that it clearly has a jurisdiction to deal with the application *de novo*. It submits that if it was the intention of the Oireachtas that the Board would be in effect precluded from reaching its own view on the issue of material contravention of a development plan, then this would be clearly stated in the legislation.

91. I accept the submissions of the Board. It is fundamental to the 2000 Act (and its predecessors) that the appeals to the Board are heard *de novo.* Just as the Board must satisfy itself as to whether or not an application was in fact a valid application for planning permission in accordance with the Regulations, so also the Board must make its own determination as to whether or not the proposed application as a matter of law and fact would materially contravene the development plan. The determination of the planning authority on this one matter cannot limit the jurisdiction of the Board to deal with appeals in the manner contended by the applicants. This is apparent from a consideration of the provisions governing the grant of planning permission which materially contravenes a development plan.

92. A planning authority has power pursuant to s. 34 of the 2000 Act to grant planning permission which would materially contravene its development plan provided it follows the special procedure set out in the section for such permissions. It must publish a statutory notice indicating its intention to consider deciding to grant permission which would materially contravene the development plan. The notice must be published in a daily newspaper circulating in the area and the notice must be given to the applicant for planning permission, any person who made a submission or observation in writing in relation to the development to which the application relates and the prescribed bodies within the meaning of the Acts. The chief executive of the planning authority is then obliged to prepare a report for the members of the planning authority. The members are obliged to consider the report before passing a resolution approving the proposal of the chief executive to grant permission.

93. Obviously this procedure will not be followed where a planning authority decides to refuse an application for planning permission on the basis that it would materially contravene the development plan. If that decision is appealed to the Board, the Board nonetheless has power to grant a permission which would materially contravene the relevant development plan.

94. It appears to me that s. 37(2)(b) needs to be read in the light of the fact that the procedure for granting planning permission which materially contravenes the development plan as laid out in s. 34 of the 2000 Act will not have been followed, yet the Board may decide that, notwithstanding the fact that the application would materially contravene the provisions of the development plan, it is appropriate to grant planning permission. The Oireachtas has decided in those circumstances to limit the Board's power to grant planning permission which materially contravenes the development plan to the four circumstances set out in these sub-paras. (i), (ii), (iii) and (iv) of s. 37(2)(b). I do not read this section as conferring the power on the planning authority to limit the jurisdiction of the Board in respect of appeals. The Board's jurisdiction to hear and determine an appeal *de novo* as if the application for permission had been made directly to it is not affected by the provisions of s. 37(2)(b). Rather, the provisions of this section are designed to limit the Board's jurisdiction to grant a permission in material contravention of the development plan where the Board itself forms the view that the proposed grant would materially contravene the development plan and the complex statutory procedure set out in s. 34 has not been followed.

95. For these reasons, I conclude that the Board was entitled to exercise its own expertise and determine for itself whether or not the 2014 Application materially contravened the development plan. Having concluded that it did not, the provisions of s. 37(2)(b) and (c) did not apply to the application. It therefore follows that the applicants' arguments that the decision of the Board is *ultra vires* for failing to comply with these provisions must fail.

Material contravention

96. The applicants referred to the second note of the Board's Direction. The note stated:-

> *"[t]he Board considered that as the subject application involved completion of an extant partially developed permission with a revised design, and as this revision involved a considerable reduction in floor area, that the issue of material contravention did not arise."*

The applicants concluded that the phrase "*the issue of material contravention did not arise*" suggested that the Board concluded that it did not have to decide the issue. They said that this was particularly so in the light of note 1 of the Board's Direction which indicated that the "*wider issues of planning policy*" referred to in the Planning Authority's reports and order did not arise for consideration. The applicants submitted that the evidence before the Court indicated that the Board did not in fact make a decision on whether the development involved a material contravention of the development plan. Rather, the language in note 2 indicated that the Board took the view that it was not necessary to resolve this issue in the context of an application to amend or revise an extant planning permission. Further, or in the alternative, if the Board did make a decision on material contravention then the Board failed to provide a proper statement of reasons in this regard.

97. The Board submitted that note 2 of the Board's Direction clearly showed that the Board felt that there was no material contravention because of the "*considerable reduction in floor area"*. If the Board had been of the view that an amendment to an existing planning permission per se did not require to be assessed in light of, *inter alia*, the development plan then this comment would be irrelevant. The note therefore clearly indicates that the Board was aware of the requirement to consider the application in the light

of the current development plan. It is abundantly clear from all the materials that were before the Board and from the Inspector's Report that the issue of the application of the current development plan to the proposed development was considered in great detail.

98. It was submitted that if the Board were assessing the modified proposal as a first time, stand alone application for planning permission then there would be a serious issue as to whether a mixed-use centre with a very substantial retail component of the kind with which this case is concerned was consistent with the applicable policy. In particular, there would be an immediate issue concerning the permitted substantial retail floor space in this out of centre location. However, it was submitted, the Board was not considering whether to grant permission for the proposed shopping centre *per se*. The shopping centre had already been permitted and partially built in accordance with the relevant planning policies pertaining at the time. It was authorised and that permission could not be revoked through a refusal of the 2014 Application.

99. The Board submitted that it was not disputed that the planning application containing the modified proposal had to be assessed by reference to the current planning policy. It submitted that this was done. The proposal was to reduce, rather than to enlarge, the retail floor space in the Development. A reduction in the amount of retail floor space was entirely consistent with the policy objectives requiring that there be no more retail floor space permitted in out of centre locations. Consequently, it was said there was no material contravention in permitting a reduction in existing permitted retail floor space and it was in this context that the Board noted that "*material contravention did not arise*".

Planning Policies and Guidelines
100. The applicants submit that the planning policy framework under which the original planning consents were granted had changed at all levels of the policy hierarchy including:-

a. Retail Planning Guidelines for Planning Authorities 2012

b. Mid West Regional Planning Guidelines 2010-2022

c. Retail Strategy for the Mid West Region 2010-2016

d. Limerick County Development Plan 2010-2016

e. Limerick City Development Plan 2010-2016

f. Castletroy Local Area Plan 2009-2015 and

g. Executive Report dated June, 2014.

101. The retail planning guidelines are ministerial guidelines issued under s. 28 of the 2000 Act. It is provided that the planning authorities and the Board "*shall have regard to*" the ministerial guidelines "*in the performance of their functions*". The guidelines prefer the location of development within town centres. When the location of a proposed retail development is not consistent with the policies and the objectives of the development plan and/or the relevant retail strategy to support the city and town centre, then the development proposal must be subject to a sequential approach whereby sites for retail development are examined in order of priority. An out of centre site can be considered only in circumstances where the applicant demonstrates and the planning authority is satisfied that there is no site or potential site either within the centre of a city, town or designated district centre or on the edge of the city, town or district centre that is (a) suitable, (b) available and (c) viable. It is common case that the site in question is an out of centre site and that this sequential assessment was not conducted by the Board.

102. The retail strategy for the Mid West Region 2010-2016 comprises of Volume 5 of the Limerick County Development Plan 2010-2016. The strategy emphasises the importance of fostering development in Limerick city centre. The strategy referred to the Development and noted that while it could potentially provide a range of shopping facilities it was not yet fully built. It did not include the Development within the retail hierarchy and said that it should be treated as being out of centre in the consideration of any future planning applications.

103. The Limerick County Development Plan 2010-2016 adopted a set of retail policies based upon the retail strategy. The Planning Authority and the Board are to have regard to these policies. They focus on the application of the sequential approach in all retail applications and support and assist the role of the city centre and centres designated within the two stage retail hierarchy. Policies ED12 and ED13 were of particular relevance. Policy ED12 states:-

> "*The Council endorses the retail strategy for Limerick City Centre to:*
>
> *(a) Protect and promote the City Centres role as a National Tier 2 centre at the top of the Mid West Hierarchy and a Gateway into western Ireland;*
>
> *(b) Encourage the development of substantial new retail floor space in the City Centre and extensions thereto, in order to allow the city centre to recapture trade it has lost to other retail schemes across Metropolitan Limerick, and to reconfirm its position as the dominant retail location in the region;*
>
> *(c) Adopt a pro-active stance to help assemble site and remove bureaucratic hurdles to facilitate retail development on complex urban sites."*

104. Out of centre retail development policy was dealt with in Policy ED 13 which states:-

> "*[i]t is the policy of the Council to implement the strategy for those parts of the Metropolitan Area of Limerick that fall within the county, and as follows:…*
>
> *(3) in relation to Out of Centre locations,*
>
> *(a) Not to permit any more retail floorspace;*
>
> *(b) Not to permit any new foodstores, including discount stores. They should be part of existing or new centres;*

(c) To consider new neighbourhood centre and/or local shops where they would serve new areas of housing development or to meet areas of deficiency."

105. The applicants refer to objective ED 12 which states in brief that it is the objective of the planning authority to stringently apply the sequential test to the assessment of all retail proposals, other than those intended to serve a local population. Objective ED 13 states that it is the objective of the Planning Authority to require a detailed retail impact assessment for development on the edge or outside of identified locations above certain thresholds (1,000 m^2 outside the metropolitan area).

106. The applicants say that the proposed development directly contravenes the strategic aims of the Limerick County Development 2010-2016 in respect of policies ED12 and ED13 in that:-

i. It fails to protect and promote Limerick city centre's role as a national tier 2 centre; and

ii. It fails to encourage the development of substantial new floor space in Limerick city centre and extensions thereto, in order to allow the city centre to recapture trade it has lost to other retail schemes across metropolitan Limerick and to reconfirm its position as the dominant retail location in the region; and

iii. It requires the Planning Authority to permit more retail floor space in an out of centre location.

It also says that it breaches the policy objectives ED 12 and ED 13 in that there was a failure to require the Developer to demonstrate compliance with the sequential test or to provide a detailed retail impact assessment.

107. The applicants' submissions failed to acknowledge that the parent permissions are extant and can be completed. They do not acknowledge the existing partially complete retail centre. They approach the assessment of the application on the basis that it is for a stand alone development and conclude that it would materially contravene the development plan and breach the policies and objectives cited above. However, I have held that as a fact, the application was to modify and vary an existing, partially completed retail centre with the benefit of extant permissions so that the development could be completed. Crucially, the application involved a reduction in the size of the development permitted under the parent permissions. In those circumstances, the grant of planning permission did not permit "*any more retail floor space*" as prohibited by objective ED 13 of the Development Plan in relation to out of centre locations. A greater floor space in the parent permission was already permitted and could have been developed had planning permission being refused by the Board. The fact that it was not yet constructed, did not mean that it was not part of the assessment of "*more*" out of centre retail floor space.

108. I agree with the submission of the Board that once it is accepted that the existence and contents of the parent permissions is a relevant consideration for the Board, as I have so held, then the applicants' case in relation to material contravention of the development plans and failure to comply with ministerial guidelines effectively falls away. The points raised will relate to the principle of development of retail space of the scale already permitted at the location of the subject site. But it was not permissible to deprive the Developer of its existing right to develop the site in accordance with the extant permissions. The Board clearly did have regard to the development plan and took the view that a grant of permission for a reduction of retail floor space in an already permitted development was not contrary to the current planning policies. Although current policy was not applied retrospectively to an existing permission and partially complete development, it was applied to the narrower question of whether a proposed amendment to that permission should be permitted on foot of the application before the Board. It was not open to the Board to ignore this fact and to approach the appeal as if the entire Development was to be assessed on a *de novo* basis in the light of current policy.

109. The Board submits that there was no obligation on it to require the Developer to submit a retail impact assessment as no new assessment was needed. The Inspector stated at section 11.3 of his Report:-

"[f]rom a review of the available information, I am inclined to concur with the applicant that the Planning Authority's assessment of the subject application and its ultimate decision to refuse permission is heavily focused on matters (including retail impact) which would have already been considered as part of its determination of the original planning application for the substantial mixed-use commercial / leisure development permitted on site under PA Ref. 04/3700/ABP Ref. No. PL13.214040 (as subsequently amended by PA Ref. Nos. 06/3211, 06/4103, 07/1024) and which relate to the wider merits and overall principle of constructing same on the subject site. In my opinion, these are issues which have already been comprehensively addressed by the Planning Authority in its assessment of PA Ref. No. 04/3700 and I can see no merit or necessity to revisit same as part of the subject application which simply seeks permission to modify the design and layout of the permitted development. In this respect, having reviewed the proposed amendments, I am satisfied that they do not give rise to any significant additional planning considerations in terms of retail impact over those associated with the development approved under the extant grants of permission on site. Furthermore, I am inclined to suggest that the subject appeal is not an appropriate forum to which to revisit the merits or otherwise in terms of retail impact of any previous decisions of the Planning Authority".

It is clear that the Board considered the Inspector's Report and agreed with it in this regard. There was sufficient evidence before the Board to enable it to determine that no retail impact statement was needed in order for it to determine the appeal.

110. As already noted, the Board submitted that if it were assessing the application as a first time, stand alone application for planning permission, then there would be a serious issue as to whether a mixed-use centre of this nature with a very substantial retail component was consistent with the applicable policy. But they were not. Instead, the Board was considering a narrower issue whether the already permitted and partially constructed shopping centre should be modified in accordance with the proposal contained in the planning application. This modified proposal had to be assessed by reference to the current planning policy. The proposal was to reduce rather than to enlarge the retail floor space in the Development. A reduction in the amount of retail floor space in the Development is entirely consistent with the planning objectives requiring that there be no more retail floor space permitted in out of centre locations. This was very different from a proposal to increase the floor space which could have been rejected, notwithstanding the extant permissions. As the principle of retail floor space of this magnitude at this location was determined when the parent permissions were granted it was not necessary to revisit the issues in relation to retail strategy for the purpose of determining this application.

111. Insofar as the applicants' argue that the permission was still a breach of ED 12 which is to *"[p]rotect and promote [Limerick] City Centre's role as a National Tier 2 centre at the top of the Mid West Hierarchy and a Gateway into western Ireland*", this ignores the fact that the parent permissions still exist and the refusal of the amendments applied for would not have the effect of revoking or otherwise nullifying those permissions or changing the status of the partially completed development constructed at the location pursuant to them. The Board carefully limited the duration of the amending permissions to the residual lifespan of the permitted

permissions so there can be no valid complaint that the grant of the permission somehow serves to continue expired policies beyond their natural lifespan. There was no breach of Policy ED 12.

112. In the light of these conclusions, the applicants' arguments based upon the failure of the Board to apply the cited provisions of the development plan to the entire Development at the site in assessing the appeal must be rejected. The applicants have not established that the Board failed to have regard to those policies, objectives and guidelines when assessing the modifications to the Development for which planning permission was sought in the 2014 Application.

113. The Board submitted that in any event the obligation "*to have regard*" to something is not an obligation to follow that thing. It relied upon the decisions in *Evans v. An Bord Pleanála* (Unreported, High Court, Kearns J., 7th November, 2003) to the effect that the non-recitation of guidelines in the reasons of the decision of the Board does not mean that proper consideration was not giving to the guidelines. The Board submits that it was clear that the relevant policy material was before the Board and it was dealt with in submissions and in the Inspector's Report. In the absence of disagreement between the Inspector and the Board and, in particular, where the Board followed the Inspector's recommendation, the Court is entitled to read the Inspector's Report and the Board's Decision together. In this regard it relies upon the decisions in *Maxol Ltd. v. An Bord Pleanála* [2011] IEHC 537 and *Buckley & Anor v. An Bord Pleanála* [2015] IEHC 590.

114. I accept these submissions of the Board. There is ample evidence that the Board "*had regard*" to the policies and guidelines relied upon by the applicants when it assessed the revisions, modifications and amendments to the Development in respect of which permission was sought in the 2014 Application. Accordingly, it did not act incorrectly or unlawfully in this regard.

Environmental Impact Assessment

115. The applicants argue that an EIA was required in this case and that as no such assessment was conducted, the decision is void. They refer to s. 172(1) of the 2000 Act , which provides (insofar as relevant) as follows:-

> *"[a]n environmental impact assessment shall be carried out by the planning authority or the Board, as the case may be, in respect of an application for consent for proposed development were either-*
>
> *(a) the proposed development would be of a class specified in-*
>
> > *(i) Part 1 of Schedule 5 of the Planning and Development Regulations 2001, and either–*
> >
> > *(I) such development would exceed any relevant quantity, area of other limit specified in that Part, or*
> >
> > *(II) no quantity, area or other limit is specified in that Part in respect of the development concerned,*
>
> *or*
>
> *(b) (i) the proposed development would be of a class specified in Part 2 of Schedule 5 of the Planning and Development Regulations 2001 but does not exceed the relevant quantity, area or other limit specified in that Part, and*
>
> *(ii) the planning Authority or the Board, as the case may be, determines that the proposed development would be likely to have significant effects on the environment."*

116. The applicants say that the legislation thus envisages that an EIA will be carried out in circumstances either where the project comes within a particular category or class of development and meets the threshold prescribed, or where it comes within a particular category or class of development and is sub-threshold but is nevertheless determined to be likely to have significant effects on the environment. In this latter case, a screening process is required.

117. The applicants say that Classes 10, 13 and 14 of Part 2 of Schedule 5 of the Regulations are relevant in the present case. The relevant Classes provide as follows:-

"Class 10 Infrastructure Projects

> *10(b)(iii) Construction of a shopping centre with a gross floor exceeding 10,000 square metres…*

Class 13 Changes, extensions, development and testing

> *(a) Any change or extension of development already authorised, executed or in the process of being executed (not being a change referred to in Part 1) which would:-*
>
> > *(i) result in the development being of a class listed in Part 1 or paragraphs 1 to 12 of Part 2 of this Schedule, and*
> >
> > *(ii) result in an increase in the size greater than –*
> >
> > *• 25 per cent, or*
> >
> > *• An amount equal to 50 per cent of the appropriate threshold,*
> >
> > *whichever is the greater.*
>
> *(b) Projects in Part 1 undertaken exclusively or mainly for the development and testing of new methods or products and not used for more than 2 years.*
>
> *(In this paragraph, an increase in size is calculated in terms of the unit of measure of the appropriate threshold).*
>
> *(c) Any change or extension of development being of a class listed in Part 1 or paragraphs 1 to 12 of Part 2 of this*

Schedule, which would result in the demolition of structures, the demolition of which had not previously been authorised, and where such demolition would be likely to have significant effects on the environment, having regard to the criteria set out under Schedule 7.

Class 14 Works of Demolition

Works of demolition carried out in order to facilitate a project listed in Part 1 of Part 2 of this Schedule where such works would be likely to have significant effects on the environment, having regard to the criteria set out in Schedule 7".

118. The applicants argue that the proposed Development fell within Class 10(b)(iii) and accordingly an EIA was required. Alternatively, they contend that the proposed development came within Class 13(c) and/or Class 14 and accordingly a screening assessment was required to be carried out by the Board and a reasoned screening determination issued. This was not done and therefore the decision to grant permission is void.

Class 10(b)(iii)

119. The applicants submit that the Development in the present case is for a shopping centre with a gross floor area of 63,712 m^2. Thus this exceeds the threshold prescribed in Class 10(b)(iii) of 10,000 m^2 . They say that therefore the carrying out of an EIA was mandatory. They say that the threshold must be applied to the quantum of development actually applied for. It has to be contrasted with the situation where a developer of a existing retail development applies to build an extension to that development. In such a scenario, the red line of the planning application will be confined to the extended area; it would not include the existing development. The question of whether an EIA would be required would be determined by examining, first, whether the extended area exceeded the thresholds prescribed under Class 13(a). If it did, an EIA was requested. If it did not then, secondly, carrying out a screening exercise to determine whether the development – including its cumulative impact with existing development – would be likely to have a significant effect on the environment. But that is not what was applied for in this case.

120. In reply to this argument, the Board submitted that Class 10(b)(iii) requires the provision of an EIS for the construction of a shopping centre with a gross floor space exceeding 10,000 m^2. The 2014 Application was for revisions of, and amendments to, existing grants of planning permission and involved an overall reduction in the size of the Development. They quoted the Inspector's Report at section 11.2 as follows:-

"[a]ccordingly, given that the subject proposal is limited to the amendment of the permitted development and is not being assessed from first principles, in my opinion, the submission of an EIS pursuant to Class 10(b)(iii) is not mandatory in this instance".

They submit that this was entirely reasonable a *fortiori* where the extant planning permissions and the underlying permitted development had previously undergone a full EIA. It was argued that clearly the Board agreed with the Inspector as no EIS was in fact required. They also stated that it is significant that the applicants have not pointed to one single substantive point which they have a concern over regarding environmental impact at all. This was a point made by Haughton J. in *An Taisce v. An Bord Pleanála* [2015] IEHC 604 at para. 79.

121. I accept that the Inspector and the Board acted correctly in relation to this matter. The issue is whether an EIA was mandated by the provisions of the Regulations because the application fell within Class 10 of the Regulations. Class 10 refers to infrastructure projects and in particular at 10(b)(iii) the construction of a shopping centre with a gross floor exceeding 10,000 m^2. The applicants accept that an application of less than 10,000 m^2 to extend a shopping centre of more than 10,000 m^2 would not be captured by this Class as the application would not be for the construction of a shopping centre with a gross floor exceeding 10,000 m^2. They say in this case the planning application shows that the gross floor space of proposed works is 63,712 m^2 and that the application site included the entire site. That being so, on its face the application clearly falls within Class 10 of the Regulations and an EIA accordingly was mandatory.

122. I do not accept that this is a correct characterisation of the 2014 Application or a correct application of the Regulations to the planning application. I accept that this is an application to amend the existing planning permissions. It involves the reconfiguration of the internal layout of the complex and revised proposals for the overall internal road layout, parking layout and service arrangements. It also revises the external elevations and signage associated with the Development and the hard and soft landscaping. Thus the changes are to the entire area of the site but the application is not for planning permission to develop a shopping centre of more than 10,000 m^2. It is to make alterations to a shopping centre of more than 70,000 m^2 in respect of which an EIA has already been conducted. In my opinion therefore the application simply does not fall in Class 10 and to simplistically state that it does because the proposed floor space is set out as 63,712 m^2 is to ignore the essence of the application for planning permission and to focus on the form.

123. The applicants' argument is predicated on the submission that every application for planning permission, where what is sought is permission merely to modify existing grants of planning permission and which do not fall within the strict limits of ss. 146A-146D of the 2000 Act must be assessed from first principles and subject on each and every occasion either to an EIA or to an assessment as to whether or not an EIA is required as appropriate. As I have rejected this premise earlier in my judgment, it follows that I reject this argument based upon the premise. Furthermore, it is inconsistent with Class 13 of the Regulations. Class 13 applies, *inter alia*, to changes and extensions to development in the process of being executed. The 2014 Application was an application to change a development in the process of being executed. It is common case that it did not satisfy the requirements of Class 13(a) and therefore, it seems to me, that the 2014 Application did not require to be further assessed for EIA.

124. This is entirely sensible and consistent with the overall objectives of the EIA Directive which is to ensure that development projects which are likely to have significant effects on the environment are subject to EIA prior to any decision being made to grant development consent. The Directive is transposed into Irish law by the 2000 Act and the Regulations. The 2014 Application did not require to be assessed for EIA under Class 13(a) or Class 10(b)(iii). In the circumstances, I hold that an EIA was not mandatory under the provisions of s. 172 of the 2000 Act in this case.

Class 13(c) and Class 14

125. The application involved the demolition and removal of 6,465 m^2 of a partially complete decked car park structure. That being so, the parties were agreed that the provisions of Class 13(c) and Class 14 applied to the application. The applicants argued that the works of demolition should have been screened by the Board in order to determine whether they were likely to have a significant

effect on the environment. Further, they say the screening determination should have been recorded in writing by the Board. They say that the Board failed in both respects. The applicants relied upon on Article 109 of the Regulations which provides (where relevant) as follows:-

"(1) Where an appeal received by the Board relates to a planning

> *application for a class of development specified in Schedule 5 which exceeds a quantity, area or other limit specified in that Schedule for that class of development, and an EIS was not submitted to the planning authority in respect of the planning application, the Board shall require the applicant to submit an EIS to the Board.*

(2) Where an appeal relating to a planning application for sub-threshold

> *development is not accompanied by an EIS, and the likelihood of significant effects on the environment cannot be excluded by the Board, the Board shall make a determination as to whether the development would be likely to have significant effects on the environment and where it determines that the development would be likely to have such significant effects it shall, by notice in writing, require the applicant to submit an EIS and to comply with*
>
> *the requirements of article 112…*

(4) The Board shall, in determining under this article whether a proposed

> *development would or would not be likely to have significant effects on*
>
> *the environment, have regard to the criteria set out in Schedule 7 and the determination of the Board, including the main reasons and considerations on which the determination is based, shall be placed and kept with the documents relating to the planning application.".*

126. The applicants contend that the practical effect of these provisions – and in particular the obligation to place the determination with the documents relating to the planning application – is that the Board was required to make a screening determination at an early stage of the appeal process and the outcome of the determination as to whether an EIA was required ought to have been recorded in the statutory planning register. They submit that there is no reference in either the Board's Decision or the Board's Direction to a screening determination having been made and there is no record of the main reasons and considerations for the determination. They submit that in order to be lawful, a screening determination would have to disclose the reasons for deciding (1) that the development in general was not likely to have a significant effect on the environment, and (2) that the demolition works in particular were not likely to have a significant effect on the environment. There is no such determination in this case according to the applicants.

127. They referred to section 11.2.2 of the Inspector's Report where he dealt with the impact of demolition works as follows:-

> *"With regard to that aspect of the proposed development which involves the demolition / removal of 6,465 m^2 of a partially complete decked car park structure, it is my opinion that the said works would be unlikely to have significant effects on the environment having regard to the criteria set out under Schedule 7 of Regulations thus do not necessitate the submission of an EIS in reference to Class 13(c) of Part 2 of Schedule 5 of the Regulations."*

They say that this merely represents a conclusion and that the rationale for his opinion is not set out.

128. More importantly they say that the Inspector in his Report did not address the question whether the development in general is likely to have significant effects on the environment. They say that the Board is obliged to set out a proper statement of the reasons and main considerations in order to allow for an effective right of judicial review. They refer to the decision of the Court of Justice of the European Union in C-*75/08 The Queen, on the application of Christopher Mellor v. Secretary of State for Communities and Local Government.* The CJEU stated at paras. 58 and 59:-

> *"[i]t does not follow, however, from Directive 85/337, or from case-law of the Court, in particular, from that judgment, that a determination not to subject a project to an EIA must, itself, contain the reasons for which the competent authority determined that an assessment was unnecessary…*
>
> *…the competent National Authority is under a duty to inform [interested parties] of the reasons on which its refusal is based, either in the decision itself or in a subsequent communication made at their request".*

129. In reply, the Board points out that the onus is on the applicants to prove that either an EIA was required or that a screening process was required and was not in fact carried out. They say that the applicants fail on each account. The Board submits that the demolition works in the proposed planning permission were fully described in the submissions and observations before the Board and indeed, in the application documents themselves. They say that consequently there was sufficient information before the Board to determine that these were not likely to have significant effects on the environment and thus no EIS was needed under Class 13(c) or under Class 14.

130. In section 11.2 of his Report the Inspector clearly set out his reasoning why an EIS was not required (and by extension why the Board was not required to carry out an EIA). As discussed above, he expressly considered the question of Class 10(b)(iii) of Part 2 of Schedule 5 of the Regulations. On the basis that the approved development had already been subjected to an EIA he noted that the proposed amendments did not involve a change or extension to the partially constructed/approved development which would increase the size by more than 25% or an amount equal to 50% of the relevant threshold (which ever was the greater) in reference to Class 13(a) of Part 2 of Schedule 5 of the Regulations and thus would not necessitate the preparation of an EIS. With regard to the aspect of the proposed development which involved demolition works, he expressed his opinion that the works would be unlikely to have significant effects on the environment having regard to the criteria set out in Schedule 7 of the Regulations and therefore did not necessitate the submission of an EIS in relation to this Class. At section 11.2.3 he stated:-

> *"[a]ccordingly, having regard to the site location, the context of the proposed development site, and the nature and scale of the works proposed, in my opinion, the subject proposal does not involve a class of development prescribed for the purposes of Section 176 of the Planning and Development Act, 2000, as amended, as set out in Part 1 & 2 of Schedule 5 of the Planning and Development Regulations, 2001, as amended, and, therefore, it does not necessitate the preparation of an Environmental Impact Statement."*

131. It was submitted that the applicants were incorrect in their argument that the Board had made no screening decision. In this case the Inspector clearly set out his reasoning why an EIS was not required (and by extension why the Board was not required to carry out an EIA). The Board clearly adopted that reasoning. The Board's Direction recited that it adopted the Inspector's recommendation. Thus there was a proper "*screening*" exercise carried out and the reasons for the decision are clearly set out as to why EIS was deemed not necessary (and thus no EIA was required).

132. The Board submitted that Article 109 of the Regulations does not require a separate independent written screening determination. In this regard they refer to the fact that in *Aherne v. An Bord Pleanála* [2015] IEHC 606 and *Ratheniska v. An Bord Pleanála* [2015] IEHC 18 the High Court twice rejected the argument that s. 172 of the 2000 Act required a separate EIA document to the Board decision. It was contended in *Aherne* and *Ratheniska* that the obligation to make available the evaluation of the direct and indirect effects of the proposed development required an independent published decision by the Board. In both cases this was rejected. It was held that the Board decision itself was the evaluation.

133. The Board submitted that if the High Court did not accept that s. 172(1) required the creation of an independent document to evidence the evaluation comprised within an EIA, then logically there is no basis for assuming that the requirement under Article 109 to place a screening determination on file requires the creation of an independent document to evidence the screening process. In essence, just as with the substantive EIA, the "*determination*" can be encompassed within the Board decision.

134. The Board also noted that in both of the cases the High Court followed the long established approach of considering the inspector's report with the Board's decision to assess the reasoning behind the decision in question (in those cases on EIA). In this case, they submit that the Inspector's Report and the Board's Decision make it clear that a screening process was carried out, the Board reached a decision in respect of the screening process and a written record of the decision exist in the Board's Decision, Direction and the Inspector's Report.

135. I accept the submissions on behalf of the Board in relation to these points. It is clear that the question as to whether or not an EIA was required was raised in the papers before the Board. It was thoroughly addressed in the Inspector's Report. The Board adopted the Inspector's Report. It is a well established that a court may impute the reasons set out in an inspector's report to the Board where the Board accepts the recommendations of the Inspector and does not differ from the inspector's report in reaching its decision. In those circumstances, I am satisfied that the Board carried out a proper screening as required by the provisions of Class 13(c) and Class 14 in this case, reaching the decision on the basis of its expertise and within its jurisdiction that no EIS (and thus no EIA) was required and a decision to that effect was available to the public.

136. Insofar as the applicants complain that this decision did not exist separately and was not readily available to them prior to the decision of the Board, it is to be noted in the case of *Mellor* that the CJEU accepted that the requirement to inform interested parties of the reason for the refusal to subject a project to an EIA may be set out either in the decision itself or in a subsequent communication made at their request. There is no indication that the applicants sought the reasons for the determination from the Board subsequent to its decision to grant planning permission in this case. I am satisfied, on the authority of *Mellor*, that there was no failure by the Board to give reasons for its determination that an EIA was not required and that, in accordance with the Directive and the Regulations, the determination was placed and kept with the documents relating to the planning application as it is to be found in the Inspector's Report and the Direction and Decision of the Board.

137. The Board did not err in law in failing to require that the 2014 Application be subject to an EIA. The Board, through its Inspector, carried out a screening exercise to ascertain whether or not the application might have significant environmental impacts and thus whether an EIA ought to be conducted. It reached a decision that the proposed development did not necessitate the preparation of an EIA. The grounds for the decision were set out in the Inspector's Report and the Board's Direction and Decision. These documents are kept with the planning file. There was, therefore, compliance with the requirements of the Regulations, the 2000 Act and the Directive and the applicants' arguments in this regard are rejected.

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138. The applicant submitted that in the provisions of s. 172 of the 2000 Act are clear: where, as in the present case, the development is of a class prescribed under Part 2 and exceeds the relevant threshold, then an EIA is mandatory. There is nothing in the legislation nor in the regulations which indicates that a different test is to apply merely because an EIA may have been carried out years earlier in the context of a planning permission which is now withering. They submit that if this were permitted under the Irish planning legislation then the legislation and Regulations might be inconsistent with the EIA Directive. They rely upon the Opinion of the Advocate General in C-416/10 *Križan & Ors v. Slovenská Inšpekcia Životného Prostredia ("Križan").* Advocate General Kokott stated as follows:-

> *"126. The EIA Directive does not expressly govern the question whether the validity of an assessment which is adequate in terms of its content can be prolonged. Nevertheless, the objective of the environmental impact assessment which is laid down in Article 2(1) of the EIA Directive must be determinative. Pursuant to that provision, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to an environmental assessment. Such an assessment cannot be restricted to the effects which would have been caused if the project had been proceeded with at some time in the past. On the contrary, it must include all the effects which may actually be likely at the time of the consent…*
>
> *128. If, in the meantime, environmental conditions or the project have changed so that other significant effects on the environment are possible, the procedure for the environmental impact assessment must be supplemented or even be carried out completely again in a repeat EIA procedure. Consequently, it may become necessary to examine whether the environmental impact assessment still correctly represents the possible significant effects of the project on the environment at the time of consent; therefore, in other words, an updating assessment must be carried out with the objective of determining whether a supplementary environmental impact assessment is necessary…*
>
> *131. Furthermore, since the environmental impact assessment the town of Pezinok has changed its development plans. Consequently, the possibility cannot, in particular, be ruled out that the environmental effects of the landfill project will need to be re-evaluated with regard to changes to the use of neighbouring areas which have not yet been taken into account. Such uses could be more sensitive as regards the effects of a landfill or could intensify the cumulative effects compared to the original assessment.*
>
> *132. However, intensified cumulative effects might also result from the fact that the existing Pezinok landfill site was not closed in 2001, as had been assumed in the environmental impact assessment, but had continued in use until at least 31 October 2007, possibly even for longer. As a consequence of this, the previous impact upon the area could have*

increased."

139. Relying upon this Opinion, the applicants argue that a change in the development plan is a factor which may trigger the requirement for a new EIA . It follows that a screening as to whether a new EIA is or is not required must be carried out where a new development plan has been adopted between the date of the EIA and the date of the application for permission relating to the project previously the subject of the EIA to determine whether a new EIA is required in order to comply with the requirements of Article 2 of the EIA Directive.

140. The Board noted that *Križan* concerned a refusal to disclose to the public the location of a potential landfill site on the basis of commercial confidentiality. The location had been determined in an "*urban planning decision*" of the relevant urban authority for Pezinok, Slovenia but this was not made available to the public in the context of proceedings concerning the subsequent licensing of that landfill facility. The Advocate General raised a point that Pezinok had changed its development plan since the last EIA was carried out on the landfill as part of the discussion as to whether the EIA Directive required access to this information. The Board referred to paras. 131-132 of her Opinion, cited above.

141. The Board submitted that this Opinion did not mean that every time a development plan changed it will be a necessary to reassess existing or permitted developments for EIA. Furthermore, the Board actually did consider whether a further EIS was required and expressly decided that it was not. They submitted that the simple fact of a change in development plan cannot of itself raise the possibility of likely significant effects on the environment and therefore the requirement for a new EIA.

142. The Developer submitted that the Opinion of the Advocate General is not binding on the Court. It referred to the judgment of Haughton J. in *People Over Wind v. An Board Pleanála & Ors* [2015] IEHC 393 at para. 25 where he stated that opinions of an Advocate General "*while weighty do not have the status or force of law*". The Developer submitted that it was clear that the case related to the requirement to conduct an EIA in circumstances where the development consent had expired, and the decision was made to extend the duration of the consent beyond its initial expiry date. The CJEU summarised the issue in Križan:- "*can it be said that a decision under Directive [85-337], once issued is valid indefinitely?"* They point out that the impugned decision relates to an amendment to an existing, valid development consent and they say that no new EIA was required.

143. The first point to be made is that there is no issue in this case regarding the transposition of the EIA Directive into Irish law. The issue was not raised in the Special Summons and no leave to challenge the transposition of the Directive into Irish law was granted. At para. (E)12 of the Statement of Grounds the applicants plead:-

> *"An Bord Pleanála failed to have any, or any adequate, regard to the Opinion of the Advocate General in Case C-416/10 Križan ECLI:EU:C:2012:218, a case that was included in the written observations dated 14 October 2014 on behalf of Second Applicant."*

This is the case which falls to be considered.

144. The Opinion concerns changes to environmental conditions or the subject project "*so that other significant effects on the environment are possible*". The applicants have not identified any significant effects on the environment which they say are possible arising out of the 2014 Application. They refer simply to the fact that the development plan and ministerial guidelines and policies have changed. I accept the submissions of the Board that the Opinion does not mean that every time a development plan changes there will be a need to reassess existing or permitted developments for EIA and I also accept that the simple fact of a change in a development plan cannot of itself raise the possibility of likely significant effects on the environment.

145. As a matter of fact, the Inspector did asses whether or not a new EIS (and EIA) was required. This is dealt with in section 11.2 of his Report and his conclusion at section 11.2.3 (which I have quoted at para. 130 above). The Board accepted the Inspector's Report and therefore may be deemed to have accepted his assessment and reasoning in relation to whether or not an EIA was required. As such, I am satisfied therefore, that there was in fact a screening exercise carried out in respect of the possible need to conduct a new EIA in relation to the 2014 Application and it concluded that it was not required. In those circumstances, I am satisfied that even if the Board was obliged to comply with the Opinion of the Advocate General in *Križan* there has being no failure on its part in assessing the 2014 Application. In any event it was a decision it was entitled to make within its jurisdiction. It is not for the Court to question or query the quality of the EIA that was conducted or to assess whether a new EIA was required on the basis of possible substantial effects on the environment.

Conclusions

146. For the reasons set out in this judgment, I refuse the relief sought in paras. 1-6 of the Statement of Grounds. The parties agreed that the issues in relations to costs and in particular whether or not the provisions of s. 50B of the 2000 Act were to be heard and determined subsequent to the judgment in this case. I therefore will list this aspect of the application for hearing at a later date.

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[1] As it then was. It is now described as Limerick City and County Council pursuant to the Local Government Reform Act 2014.

[2] Separate provisions apply in respect of the granting of a temporary permission under s. 34(4)(n) of the 2000 Act.

[3] Policies ED11, ED12,ED 23, ED 16, ED 17, ED 11, ED 12, ED 13.

[4] This section was subsequentially amended on the 1st June, 2014, by the Local Government Reform Act 2014 s. 5(7).