Neutral Citation: [2014] IEHC 487

THE HIGH COURT

JUDICIAL REVIEW

[2013 No. 505 J.R.]

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

BETWEEN

OGALAS LIMITED (t/a HOMESTORE AND MORE)

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

SLIGO COUNTY COUNCIL

FIRST NAMED NOTICE PARTY

AND

SLIGO CHAMBER OF COMMERCE

SECOND NAMED NOTICE PARTY

AND

PATRICK DOHERTY, ANSON LOGUE AND WILLIAM MOFFETT c/o THE JOINT RECEIVERS KEIRAN WALLACE AND PATRICK HORKAN

THIRD NAMED NOTICE PARTIES

JUDGMENT of Ms. Justice Baker delivered the 23rd day of October, 2014

1. The applicant operates a large store, of the type now commonly called a superstore, under the style of Homestore and More ("HSM") from premises at Unit 5, Sligo Retail Park, Carrowroe, Sligo and has done so since 28th October, 2011. Sligo Retail Park is currently in receivership and the joint receivers, Kieran Wallace and Patrick Horkan are third named notice parties to this application for judicial review. Neither they nor the other notice parties took any active part in the application before me.2. Peart J. on 8th July, 2013 gave leave to apply for judicial review in the form of an order of *certiorari* quashing the decision of the respondent made on 23rd May, 2013 that the use by HMS of Unit 5 for the type and class of goods being sold from the store was properly characterised as development, and that that development was not exempted. Leave was also given for an ancillary order remitting the decision to the respondent and a stay was granted on the decision pending the final determination of this application.

3. The decision of the Board was made pursuant to s. 5 of the Planning and Development Act 2000. Subsections (1) and (4) provide as follows:-

> *"5 (1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.*
>
> *(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board."*

4. It is well recognised in the authorities that the Board's function in determining a reference under s. 5 of the Act of 2000 is limited to a question of whether a particular use or the carrying out of any works constitutes development. The Board has no role in determining whether any use is authorised and this is clear from the judgment of Finlay Geoghegan J. in *Roadstone Provinces Limited v. An Bord Pleanála* [2008] IEHC 210 where she stated that on a s. 5(4) reference, the Board "may only determine what is or is not 'development'." Section 3(1) of the Act of 2000 defines development as meaning:-

> "carrying out of any works, on, in, over or under land or the making of any material change in the use of any structures or other land."

Planning history

5. Sligo Retail Park operates under parent planning permission granted by Sligo County Council on 1st August, 2003, for a retail warehouse park incorporating 12 units, and containing a DIY store and garden centre, leisure unit and fast food restaurant. The initial planning permission for Unit 5 was for leisure use, but by order of 26th October, 2004, the parent permission was altered to substitute the use for Unit 5 as a retail warehouse and which permitted an increase in the mezzanine floor area of the unit. That planning permission, which issued on appeal by the Board, contained condition 18 which provides as follows:-

"The retail element of the proposed development shall be restricted to retail warehousing development only. In this regard, the range of goods to be sold in the retail units shall be restricted to bulky household goods and goods generally sold in bulk (as defined in Annexe 1 of the Retail Planning Guidelines for Planning Authorities issued by the Department of the Environment and Local Government in December 2000), including carpets and floor coverings, furniture, electrical goods, computers and DIY items, including garden equipment."

6. The question before the Board on the reference was in simple terms whether the use of Unit 5 comprised a change of use from that permitted in this planning condition.

History of this reference

7. On 20th January, 2012, Sligo Chamber of Commerce sought a declaration from Sligo County Council under s. 5 of the Act of 2000 as to whether having regard to the planning permission a change of use had occurred by reason of the type and class of goods sold by HSM in Unit 5. Sligo County Council issued a declaration on 15th February, 2012, wherein it stated that the "change in the class of type of goods being sold" at Unit 5 did not constitute development.

8. On 13th March, 2012, Sligo Chamber of Commerce referred the declaration to the Board for review in accordance with s. 5(3) of the Act. The Board appointed an inspector who furnished her report on 20th July, 2012. The Board issued its decision on 23rd May, 2013, wherein it held that:

"the use of Unit number 5, Sligo Retail Park, Carrowroe, Sligo for the type and class of goods being sold by Homestore and More is development and not exempted development."

It is this decision that is challenged in this review.

Retail Planning Guidelines

9. Condition 18 in the relevant planning permission identified the range of goods permitted to be sold in Unit 5 as "bulky household goods and goods generally sold in bulk". How one is to understand the goods of this type is specifically referable to the definition in Annexe 1 of the Retail Planning Guidelines issued in December 2000. The definitions in those Guidelines are of note:-

"Retail Warehouse – A large single store specialising in the sale of bulky household goods such as carpets, furniture and electrical goods, and bulky DIY items, catering mainly for car-borne customers and often in out of centre locations.

Bulky goods – goods generally sold from retail warehouses where DIY goods or goods such as flat pack furniture are of such a size that they would normally be taken away by car and not being manageable by customers travelling by foot, cycle or bus or that large floor areas would be required to display them e.g. furniture in rooms sets, or not large individually but part of a collective purchase which would be bulky e.g. wallpaper, paint."

10. The Board made a determination that the retailing activity carried out by the applicant included the sale of substantial amounts of non-bulky household goods and that in the circumstances this retailing activity constituted a change of use from that contemplated by condition 18 of the planning permission. Accordingly, the Board took the view that the use of Unit 5 did constitute development, being a material change in use and that the material change of use was not exempted development.

11. Certain other definitions are relevant and the Guidelines define a retail park as a single development of at least three retail warehouses with associated car parking. Sligo Retail Park clearly comes within this definition.

12. Since the publishing of the Guidelines of 2000, further Guidelines were issued by the Department of the Environment in 2005 and more recently in 2012, Annexe 1 of which contains a glossary of terms in particular under A1.2 a glossary of types of retail goods. The relevant comparison goods identified under the subheading "bulky goods" is as follows:-

"Bulky goods – goods generally sold from retail warehouses where DIY goods or goods such as flatpack furniture are of such size that they would normally be taken away by car and not be portable by customers travelling by foot, cycle or bus, or that large floorspace would be required to display them e.g.

- repair and maintenance materials;

- furniture and furnishings;

- carpets and other floor coverings;

- household appliances;

- tools and equipment;

- bulky nursery furniture and equipment including perambulators;

- bulky pet products such as kennels and aquariums;

- audio visual, photographic and information processing equipment;

- catalogue shops and other bulky durables for recreation and leisure."

It is specifically said that the list is not exhaustive and that "bulky goods not mentioned in the list should be dealt with on their merits and in the context of the definition of bulky goods."

13. Bulky goods under the Guidelines of 2000 are goods "generally sold from retail warehouses". The definition in the Guidelines of 2012 adds to the definition that such goods would "normally" be taken away by car and imports an element of common experience or practice in relation to these types of goods, and another element relating to the need for large areas in a store for the display of such goods. It is clear that the goods do not need to be large individually, but they may be part of a collective and bulky purchase.

Store layout

14. The HSM store comprises a retail space laid out in room format or what is called "room sets", set up as bedrooms, kitchens,

bathrooms etc. and goods for sale are displayed in the relevant room space. A full list of type of goods sold in Unit 5 has been identified in the grounding affidavit of Jonathon Stanley and I list here a sample of the goods therein identified and listed. The goods include kitchen tools and equipment, boxed tableware, glass sets, mattresses, duvets, pillows and other bedroom items, bathroom cabinets and other bathroom items, vacuum cleaners, ironing boards, clothes airers, TV cabinets, rugs, doormats, plants, wall mirrors, picture frames, summer furniture, Christmas trees, barbeques, and Halloween figures.

15. Certain of the items are bulky items, but equally items such as teapots, coffee pots, mops and buckets, laundry pegs, wall clocks, Christmas decorative figures are individually not bulky, but may be part of a collectively bulky purchase.

The arguments
16. The applicant argues that the Board, and the inspector, failed to properly interpret the definition of bulky goods and that such an error is an error of law, amenable to review by this Court. The applicants further argue that the inspector failed to have regard to proper considerations and that she wrongly took account of, or gave undue weight to, the Guidelines of 2012. It is claimed that the report of the inspector contained irrational and arbitrary findings to such an extent that the Board decisions made in reliance on the report are invalid. It is also argued that the Board did not give an adequate statement as to the considerations that influenced its decision nor is there anything contained in the Board's decision that indicated that it did not adopt the errors alleged to be contained in the inspector's report.

17. The respondents argue that the Board had sufficient information before it to make a decision, that the inspector did not make an error of interpretation, and the error, if there be such in her report, did not find its way into the decision of the Board,

The role of the court
18. It is not my function to substitute my decision for that of the Board and my role is confined to asking itself whether the decision of the Board was arrived at following improper considerations or as a result of a failure to take into account relevant considerations or as a result of an incorrect interpretation of the planning permission. The matter was succinctly explained by Kearns J. (as he then was) in *Evans v. An Bord Pleanála* (Unreported, 7th November, 2003):-

> *"In an application of this nature, the Court is not concerned, nor is it permitted, to substitute itself for An Bord Pleanála and to ask if it would have reached the same decision on the identical material. The Court is only concerned with the decision making process itself. That being so, the Court may only ask: was there material upon which the decision maker could make the decision which it did make? If so, was the decision taken one which flew or which flies in the face of fundamental reason?"*

19. It is submitted by the applicant that the Board took various irrelevant matters into consideration, and the focus of the applicant's submissions was on the inspector's report. It was argued she had wrongly taken the view that condition 18 of the revised planning permission fell to be interpreted in the light of what she viewed as the more restrictive Guidelines of 2012 and her decision was accordingly wrong in law. With this in mind, I turn to examine the report of the inspector.

The role played by the Guidelines in the report of the inspector
20. The s. 5 reference asked the Board to determine whether the goods sold by the applicant from Unit 5 are those permitted to be sold pursuant to condition 18 of the permission. Condition 18 identified certain goods which were permitted to be sold by reference in particular to two separate phrases, "bulky household goods" and "goods generally sold in bulk". McCarthy J. in *In re XJS Investments Limited* [1986] I.R. 750 at 756 made it clear that planning documentation did not come to be interpreted with the benefit of the canons of construction applicable to Acts of the Oireachtas or subordinate legislation and went on then to say:-

> *"They are to be construed in their ordinary meaning as it would be understood by members of the public, without legal training as well as by developers and their agents, unless such documents, read as a whole, necessarily indicate some other meaning."*

21. However, I accept the proposition advanced by counsel for the applicant that condition 18 did import an extended or technical meaning to bulky goods, in that the phrase used in the condition was expressly linked to and said to be defined by Annexe 1 of the Guidelines of 2000. I accept that the words so properly understood do not connote merely goods which are physically bulky.

22. It is not disputed by the parties that in the interpretative process must look to the Guideline expressly identified in the text of condition 18 itself i.e. the Guidelines of 2000. What is not agreed by the parties is the impact of the Guidelines of 2012. Section 28 of the Act of 2000 requires the Board to have regard to the guidelines when performing any of its functions under the Act "where applicable".

23. In *McEvoy v. Meath County Council* [2003] 1 I.R. 208, Quirke J. considered the meaning of the phrase "have regard to" in the context of s. 27(1) of the Act of 2000 which required that a planning authority should have regard to any regional planning guidelines when making a development plan. Quirke J. stated the following at p. 223:-

> *"It is clear from the foregoing authorities and in particular the decision of the Supreme Court in Glencar Exploration plc. v. Mayo County Council (No. 2) [2002] 1 I.R. 84, that the obligation imposed upon the respondent by s. 27(1) of the Act of 2002 to 'have regard to' the guidelines when making and adopting its development plan does not require it rigidly or 'slavishly' to comply with the guidelines' recommendations or even necessarily to adopt fully the strategy and policies outlined therein."*

24. He went on to say at p. 224 that the duty imposed upon a planning authority was "to inform itself fully of and give reasonable consideration to any regional planning guidelines", and that while it was desirable the planning authorities should when making and adopting development plans, seek to accommodate the objectives and policies contained in regional and planning guidelines, they were not bound to comply with guidelines.

25. Clarke J. adopted this view in *Tristor Limited v. Minister for the Environment, Heritage and Local Government* [2010] IEHC 397. He noted that the retail planning guidelines in that case were for entirely understandable reasons expressed in general terms, and said that a requirement that a deciding authority have regard to guidelines is not the same as requiring it to apply that guideline, and that it cannot be said that the Board is bound by the retail guidelines in coming to its decision.

26. It seems to me that s. 28 does not always require the Board to have regard to the most up to date Guidelines if other, or, as here, earlier, Guidelines are those applicable to the matter before it. The meaning of condition 18 is expressly limited to the Guidelines of 2000 and it is these which are relevant in the interpretation process. The requirement in s. 28 that the Board and, *ipso facto*, an

inspector carrying out a Board appointed function, have regard to the Guidelines cannot have the effect that the express words of condition 18 are to be read as containing a reference to the later Guidelines. This does not mean that the Guidelines of 2012 cannot inform the interpretative process, and it seems to me that the effect of s.28 is to mandate the Board to consider them, and in particular to take note of any clarification or interpretative assistance offered by them. But if an application of the Guidelines of 2012 leads to a result which differs from that which would result from the Guidelines of 2000 the latter must prevail. To hold otherwise would mean that the express language of the condition could be displaced or replaced by a later administrative act of the Minister in issuing new Guidelines

27. The inspector in her report made express reference to the Guidelines of 2012 and makes no express mention of the Guidelines of 2000. She does, however, use the language of the Guidelines of 2000 and it seems to me that the Guidelines of 2012 do not form the only element in her decision. She did however accept the argument made in an opinion of counsel which was available to her that there was a certain lack of clarity in the Guidelines of 2000 which she said has been "recognised", and that the Guidelines of 2012 had removed "the degree of flexibility" in the definition of bulky goods by removing express reference to goods which required large floor areas to display them or goods which while not large individually are part of a collective purchase that would be considered bulky.

28. Insofar as the inspector did come to her conclusion and recommendation based on what she perceived to be the less flexible test found in the Guidelines of 2012, she was applying, in my view, an incorrect or irrelevant test and the interpretative process had been guided primarily by the Guidelines of 2000 as these were the ones expressly identified as relevant in condition 18 itself. If the inspector's decision or her recommendation were substantially based on a view that the Guidelines of 2012 imported a tightening of the definition of bulky goods, she would have fallen into error. I accept the argument of the applicant that such an error would be an error of law were it to find its way into the decision making process.

The facts as identified by the inspector

29. The inspector factually identified the various sets or shopping areas in the store and noted that many of the items sold were what she described as "small non-bulky commodities" that are "manageable by customers without necessitating car transport". She identified certain items such as bathroom equipment which again she said included a high proportion of non-bulky merchandise. She described the bedroom set as being devoted to the display of bed linens, pillows, duvets etc. and noted the fact that, while beds form part of the display, the more bulky items such as beds and mattresses were not for sale in the store. She went on to identify certain items which were bulky such as garden equipment, mats, large storage boxes and items of furniture which she accepted were bulky. She took particular note of the fact that one wall in this part of the store was dedicated to the display of a particular type of scented candle.

30. Her conclusion was that Unit 5 was used for the sale of both bulky and non-bulky items of merchandise. She took the view in the light of her identification of certain non bulky items that the store did not "specialise" in the sale of bulky goods and she pointed to the fact that a large portion of the store was devoted to the sale of what she described as non-bulky products that can easily be carried away on foot.

31. I further note that the inspector goes on to compare such goods to those which could "easily be carried away on foot" and in my view, while the report lacks some clarity of expression, the inspector identified two ends of the spectrum, goods that were easily transported on foot and those necessitating car transport, and this was a proper approach. Of significance is the fact that the inspector took the view that while certain items on sale in store did require large display areas, the space requirements of the store arose largely from the volume of goods displayed and not the bulky nature of the individual items, and she identified that there were large areas in the store dedicated to the display of small items such as candles, dust pans and cooking utensils.

32. The applicant argues that the inspector misdirected herself in the test, and that her understanding of what constituted bulky goods was overly focused on the physical size of those goods and that she failed to have regard to the second and third part of the definition of bulky goods in Annexe 1 of the Guidelines of 2000, namely that bulky goods include goods the display of which required large floor areas, or which while not large individually are often part of a collective purchase which itself may be bulky.

33. It is argued by the applicant that the inspector wrongly linked the definition of bulky goods to those necessitating car transport, and that it was incorrect to treat the form of transport as central in the definition. I accept this argument and bulky goods as defined in the Guidelines of 2000 are goods which would normally be taken away by car, and not ones which of necessity should be taken away by car.

34. The applicant also argues that the inspector makes no reference whatsoever to the third element in the test identified in the Guidelines of 2000 namely individual items that would not be themselves bulky but which would be part of a collective purchase which would be bulky. No express reference was made to this test, although the inspector did say that the removal of this particular identifying feature by the Guidelines of 2012 tightened the scope and "removes ambiguity" as to the meaning of bulky goods. In placing emphasis on she describes as the "tightening" of the scope of bulky goods by the Guidelines of 2102, the inspector did fall into error. What she described as the less flexible and narrower definition in the Guidelines of 2012 ought not have informed her decision, as the exercise in which the inspector was engaged was an interpretation of planning condition 18, in which the Guidelines of 2000 were expressly incorporated. Thus, insofar as the inspector did take the view that goods had to be bulky, and disregarded the element of the definition which included non-bulky items which ordinarily formed part of the collective purchase, she fell into error and the error is one of law or interpretation.

Did the inspector misunderstand the meaning of bulky goods?

35. The applicant also urges on me the argument that the inspector failed to understand the definition of bulky goods in that she failed to have regard to the fact in particular that the Guidelines of 2012 identified "furniture and furnishing", "household appliance" and "tools and equipment for the house and garden" as being relevant categories of goods which would be characterised as bulky. It is not doubted that the store does not sell what might generally be speaking the terms "household appliances", such as washing machines, fridges *etc.* nor does it sell furniture such as beds, tables *etc.* It is argued, however, that the store does sell furnishings and tools and equipment for the house and garden.

36. I do not accept that the Retail Guidelines intended every item of household equipment or furnishing to qualify as bulky goods. Nor do I accept what is urged by counsel for the applicant that bulky goods must simply be read as items "needed for the house and garden". This interpretation ignores the simple fact that the Guidelines, whether they be the Guidelines of 2000 or 2012, clearly envisage that the goods either be individually bulky, in the sense that they are bulky or large in size, or that they be sold normally as part of a bulky purchase. A candle could not be defined as a bulky good in either sense, although on a broad interpretation a candle is an item of equipment for the house or garden. Equally, not all furniture is bulky and furniture could be distinguished from a fixture by reference to the fact that a fixture is not movable.

37. Reference was made in the submissions to the Board that some of the goods sold in the IKEA store are goods which are not individually bulky. The inspector made reference to the IKEA comparison, and stated that unlike in IKEA the bulky items of furniture in Unit 5 are not themselves available for sale, while the IKEA store is primarily involved in the sale of bulky flat pack furniture. It seems to me that the inspector did fall into error in considering the IKEA comparator in that condition 18 leaves no scope for the sale of a given percentage of non-bulky goods such as in the IKEA profile. Condition 18 restricts the retail element to retail warehousing development only and restricts the range of goods to bulky household goods and goods generally sold in bulk. The restriction does not allow a percentage of non-bulky goods to be sold, and no such element of mixed retail goods is found in condition 18. Accordingly, it seems to me that the IKEA market hall does not offer any guidance in the interpretation of condition 18, and the inspector was incorrect to consider IKEA as an appropriate comparator.

38. The inspector then, it seems to me, did fall into error in her reliance on the Guidelines of 2012 and in failing to have proper regard to the fact that certain goods envisaged by condition 18 may not themselves be bulky but may be part of a bulky purchase. She also erroneously considered the IKEA comparator. However, she did not fall into error in her view that not all items of household equipment are to be considered bulky for the purpose of the interpretative process.

The role of the inspector
39. It is the Board's decision that is challenged and is open to challenge in this judicial review and not the report of the inspector. I return below to consider whether the Board did as a matter of fact make its decision in reliance on the inspector's report or whether the Board engaged in an exercise of developed reasoning and what process was engaged by the Board in its conclusion, and I turn now to examine the interplay between the Board and the inspector in planning matters.

40. Section 146(1) of the Act of 2000 allows the Board to assign a person to report in any matter and the inspector was appointed pursuant to that section. Subsection 2 requires the person so assigned to make a written report which shall include a recommendation. Of more significance is the fact that the Board is required to consider the report and the recommendations before determining the matter, but this does not always mean that the Board must be taken to have based its decision on the inspector's report

41. The interplay between the Board and the inspector was examined by Ryan J. in *Michael Cronin (Readymix) Limited v. An Bord Pleanála* [2009] IEHC 553 and by Kelly J. in *Cork City Council v. An Bord Pleanála* [2006] IEHC 192. In particular, Kelly J. took the view that as the Board did not differ from the recommendations of the inspector, and where there was no dissent from her line of thought it was reasonable to conclude that the Board had adopted the reasoning of the inspector in arriving at its decision.

42. The Board is required to have regard to the report but, to borrow the phrase of Quirke J in *McEvoy v. Meath County Council*, it may not do so by slavishly following the report. As stated by O'Neill J. in *Stack v. An Bord Pleanála* (Unreported, High Court, 11th July, 2000):-

> *"it is well settled that the Board, need not accept a recommendation of an inspector and has no obligation to explain a rejection of an inspector's recommendation. All that is required of the board is that there be some material to support its decision and that it gives reasons for its decision."*

The test for judicial review
43. The test that I must apply in considering whether *certiorari* lies is well settled. In *O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39, Finlay C.J. at p. 72 identified the threshold which is required to be passed by an applicant in an application for judicial review on the grounds of unreasonableness:

> *"I am satisfied that in order for an applicant for judicial review to satisfy a court that the decision making authority has acted irrationally, it is necessary that the applicant should establish to the satisfaction of the court that the decision making authority had no relevant material which would support its decision."*

44. Charleton J. in *Weston Limited v. An Bord Pleanála* [2010] IEHC 255, identified the class of material which must be available to a decision making body to support its decision:-

> *"The presence in the planning file, including the report to the manager, or in the case of An Bord Pleanála, the report of the inspector, of any material which could rationally justify a refusal… is sufficient to support the lawfulness of a decision."*

45. The test then establishes quite a high threshold, the decision will be impugned for lack of reasonableness only if it can be shown that there was no material before a decision making body which could have led it to the conclusion reached. With admirable clarity, Kearns J. in *Evans v. An Bord Pleanála* identified the court's concern as being with the decision making process itself and in that context he identified the sole question for the court as:-

> *"Was there material upon which the decision maker could make the decision which it did make? If so, was the decision taken, one which flew or which flies in the face of fundamental reason."*

Judicial review will also lie if the Board fell into an error of interpretation, or an error of law. I turn now to examine to decision of the Board and its process

The reasoning process of the Board
46. The decision of the Board expressly stated that it had regard to the report of the inspector. The Board met on 12th March, 2013 and considered the submissions on the file and the report of the inspector, and deferred the case for consideration at a further Board meeting which was held on 16th April, 2013. The Board direction identified eight matters to which it had regard, including the submissions on file "in relation to the collective purchase of goods". It also expressly made reference to the Guidelines of 2000 and its conclusion was linked to Annexe 1 of those Guidelines.

47. It is noteworthy, and was drawn to my attention by counsel for the respondent, that the draft decision of the Board had made reference to the Guidelines of 2012 and the definition of retail warehouse and bulky goods in those Guidelines rather than those of 2000. That reference was not found in the final report and was urged upon me that this shows the Board had engaged in a process of reasoning and had removed the reference to the Guidelines of 2012. I accept that proposition, and it seems to me that the Board did not slavishly follow the inspector's report and was not influenced by the error which I have identified in that report, namely the view was taken by the inspector that she was to be guided in her understanding of goods which were truly characterised as bulky by the

Guidelines of 2012 rather than, or as well as, those of 2000. Further, the Board did have regard to the second and third element of the definition in the Guidelines of 2000, namely that certain goods not large or bulky in themselves may form part of a collective purchase which is itself bulky, or that certain goods not individually bulky may generally be sold in bulk, or require large floor space for display..

48. In my view, the Board did have regard to the inspector's report but did not do so slavishly and the error which I have identified in the inspector's report did not find its way into the decision of the Board and accordingly the decision of the Board was not impacted by that error.

49. The Board further identified as matters to which it had consideration, the submissions on file, including submissions in relation to the collective purchase of goods and did have regard to the class of goods normally purchased in bulk. In that regard, it must be noted that the applicant made very substantial submissions to the Board on 11th April, 2012, and supplemental submissions on 8th May, 2012, by way of a response to the observations submitted by Sligo County Council and the Board had these before it as part of its consideration. Part of that material included submissions "in relation to the collective purchase of goods", and this is the precise phrase used in the Guidelines of 2000 which the inspector identified as having been removed or altered by the Guidelines of 2102. The Board in my view had regard to goods which are part of a collective purchase, and shows the procees by which it distinguished its view from that of the inspector.

50. In *Evans v. An Bord Pleanála*, Kearns J. pointed to the legislative requirement that the Board have regard to certain matters as permissive in nature and creating an obligation to consider something rather than requiring that the condition be followed or slavishly adhered to. The Board had regard to the Guidelines of 2000 and that was its primary function in the context of the reference to those Guidelines in condition 18. The planning permission is expressly referable to those Guidelines and not to any later guidelines. Equally, the Board had regard to the Guidelines of 2012 and the Board expressly made reference to these Guidelines in its final determination. These Guidelines were identified in the various submissions received by the Board and to which it expressly said it has regard.

51. There was before me the draft order, an incomplete direction, both of them undated, the complete direction signed on 13th May, 2013, and the final decision. It is clear from this sequence of documents and from the matters which were omitted in the later documents, that the Board did have regard to the Guidelines of 2012 and regarded them as not being determinative of its interpretative process. In this, the Board was correct and fell into no error in its process or error of interpretation.

Possible impacts on town centre retailing: an irrelevant consideration?
52. The Board also noted that the change of use it identified in HSM could have had "material external impacts", such as a possible impact on town centre retail development and parking and traffic. The applicant argues that the Board had no evidence on which to come to this conclusion which it is said was speculative.

53. The Guidelines, *inter alia*, aim to protect the viability and vitality of city and town centres by identifying particular classes of goods that may be sold in retail warehouses and shopping centres in out-of-town locations. They identify a general view that retail warehouses do not fit easily into town centres given their size requirements and the need for car parking *etc*. For that reason, and to weigh the different objectives and policy considerations and to avoid unnecessary damage to high street retail units in towns and cities, the Guidelines for retail and warehouse development limited these to the sale of bulky household goods.

54. Matters such as traffic and parking are planning concerns. According to the judgment of MacMenamin J. in *Tracey v. An Bord Pleanála* [2010] IEHC 13 the policy considerations identified are

> *"a critical consideration in preventing adverse impact on the viability and integrity of traditional town centres"*

55. In my view the Board was entitled to take into account such general planning considerations, and it did so specifically for the purposes of analysing the use of Unit 5 and coming to a conclusion that the use had changed materially. This is a planning consideration and one within the competence of the Board to make and indeed had the Board failed to have regard to this consideration it might well have failed to fully consider the meaning and import of condition 18.

Conclusion
56. On the face of the documentation before me, the Board did have sufficient and ample material before it on which to make its decision. It did have the inspector's report and substantial submissions from the applicant. It had photographs, an opinion from senior counsel, the relevant planning condition itself and the history of the site. I must ask myself whether the decision to which it came flies in the face of fundamental reason, or arose from an interpretative error.

57. In my view, the Board was entitled to take the view that it did and it had before it facts upon which it could reasonably come to the conclusion now sought to be challenged. The Board had evidence and submissions to which it had regard and indeed its process was shown. The Board is a decision making body and its process must be judged as having properly been made if it can be shown that it did engage with these facts and came to its decision based on these facts not by way of a slavish adherence to the material but as a result of a reasonable analysis.

58. I find that the inspector's report did contain an interpretative error in that she incorrectly placed emphasis for the purposes of her analysis on the Guidelines of 2012. Those Guidelines were relevant only and insofar as that they do not differ from the Guidelines of 2000 which are specifically referred to in condition 18 sought to be analysed and interpreted by the Board. The Guidelines of 2012 are an interpretative tool but in any conflict between those of 2000 and those of 2012 the Guidelines of 2000 must prevail. The error of the inspector, however, in my view, did not find reflection in the Board's decision and this fact shows the extent to which the Board engaged in a reasoned analysis of the fact before it, and the extent to which it correctly and properly weighed the evidence and submissions in coming to its reasoned conclusion.

59. The Board's decision may be set aside if it is unreasonable or irrational, or was made following a mistake of law. It would be unreasonable had it been made without evidence and I find it not unreasonable in this sense. It would have been irrational had it been made following a blind acceptance of any one or other of all the material before it. It was not irrational in that sense. Had the Board failed to properly take account of the Guidelines of 2000 in the interpretative process, it would have fallen into an error of interpretation amenable to review by the court. The decision did not so fail.

60. I adopt the analysis of O'Neill J. in *M&F Quirke & Sons v. An Bord Pleanála* [2009] IEHC 426, with regard to the import of errors in an inspector's report. At para. 9.9 he said the following:-

> *"In my judgement, any error on the part of the inspector in this regard, could not vitiate the entirely separate exercise*

by the respondent of its self contained statutory jurisdiction to make the decision required from it. The status of the error in question was no more than that of any other piece of mistaken information which the respondent was free to consider and reject in the overall discharge of its statutory function. The decision of the respondent, on its face, contains no such error …"

61. It goes without saying that the Board is the body which enjoys the statutory power to make a decision pursuant to s. 5. It did not fall into any error of process. Insofar as there is an error of interpretation in the inspector's report, it did not find its way into the decision of the Board. The decision to which the Board came was one which was within jurisdiction and was neither irrational nor unreasonable, nor was it made as a result of a mistake of law.

62. I refuse the relief sought.