Neutral Citation Number: [2010] IEHC 13

THE HIGH COURT

JUDICIAL REVIEW

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 50 OF THE PLANNING AND DEVELOPMENT ACTS 2000 – 2006

2009 405 JR

2009 406 JR

BETWEEN/

JAMES TREACY

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

WATERFORD COUNTY COUNCIL AND NOEL FRISBY CONSTRUCTION LTD AND TJX (IRELAND) LTD T/A TK MAXX

NOTICE PARTIES

JUDGMENT of Mr. Justice John MacMenamin dated 22nd day of January, 2010.

1. Section 5 of the Planning and Development Act 2000 provides:

> "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.
>
> (2) (a) Subject to paragraph (b), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.
>
> (b) A planning authority may require any person who made a request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question and, where further information is received under this paragraph, the planning authority shall issue the declaration within 3 weeks of the date of the receipt of the further information.
>
> (c) A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question.
>
> (3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration…"

2. The applicant in these proceedings is James Treacy. He is the owner of lands at Cork Road, Butlerstown, Co. Waterford. On 12th July, 2006, the first named notice party ("Waterford County Council") granted permission (Planning register reference No. 06/522) for a retail warehouse park known as Butlerstown Retail Park. That permission, relating to the plaintiff's property, comprised nine single storey double height units, a three storey building comprising a showroom unit, restaurant unit with a DIY unit including a garden centre and builder's supply yard (units 2 – 9) together with associated works subject to 25 conditions. The nature of this "parent" permission is pivotal to this judgment. What is in question here is a "warehouse park" and not a shopping centre as normally understood.

3. Condition 22 of the permission provided that:

> "The use of the proposed retail units shall be subject to the approval of the planning authority."

4. On 4th April, 2007, the County Council granted a further permission (Planning Register reference No. 06/2026) for amendments to the permission granted on 12th July, 2006 (the first permission). This amendment was subject to 23 conditions. Condition 21 of the second planning permission (06/2026) provided that:

> "The use of the proposed retail units shall be subject to the agreement of the planning authority to allow the planning authority to examine all uses in accordance with the retail strategy and planning policies for the area."

This amendment is the starting point for consideration. As will be seen later, perhaps the fundamental issue in this case is what uses may, (or may not) be permissible in the context of, and derived from the "parent" permission.

5. On 13th June, 2008, the County Council issued a letter relating to the proposed use of one of the units in Butlerstown Retail Park by the well known business, Mothercare. This letter, from a council official stated:

> "I confirm acceptance of Mothercare to be an occupier of development reference no. PD/06/2026 subject to the sale of goods being limited of (*sic*) bulky household goods and goods generally sold in bulk in accordance with Annex 1 of the Retail Planning Guidelines. The sale of clothing is not appropriate."

6. The second named notice party herein is Noel Frisby Construction Ltd. ("Frisby Construction"). Frisby Construction is the owner of a shopping centre relatively close to the Butlerstown Retail Warehouse Park. It did not make any objection to the development of the retail warehouse park. It is said this was because it concluded that the nature of the business to be conducted at the park would be substantially different from, and not in competition with, businesses conducted in the shopping centre. That shopping centre owned and operated by Frisby Construction is within the Waterford City boundary; the warehouse park is outside that boundary.

7. Having regard to the planning amendment and previous correspondence, on 3rd July, 2008, Frisby Construction sought a declaration from Waterford County Council that the proposed use by Mothercare would be development and not exempted development. This application was made pursuant to s. 5 of the Planning and Development Act 2000 ("PDA 2000").

8. Waterford County Council did not accept this contention. By letter dated 21st April, 2008, it determined that, subject to a restriction on the sale of clothing, the proposed use by Mothercare would not be a material change of use to that already permitted on site and therefore did not constitute development.

9. Frisby Construction did not agree. On 15th August, 2008, it submitted an appeal to the Board against this decision by Waterford County Council in relation to the proposed use by Mothercare.

10. The Board took a quite different view from the Council. On 23rd February, 2009, it issued a determination on PL24.RL.2563 that Mothercare's intended use of Unit 4, Butlerstown Retail Park would in fact constitute a change of use from that permitted under Planning Register reference Nos. 06/522 and 06/2026; and that such user would be "development" and not "exempted development".

11. The applicant claims that the Board erred in seeking to determine whether the proposed use by Mothercare was a change of use from that permitted. It submits that the Board erred in not seeking to determine whether the proposed use was permitted pursuant to the planning permission and claims that there was error also in the determination that the proposed use constituted a change of use or a material change of use. The applicant claims that the only restriction on the type of use permitted in the development contained in the two planning permissions was the requirement to seek the prior approval of Waterford County Council to any proposed use; he contends that prior approval had been obtained in relation to the proposed use, and the proposed use by Mothercare did not therefore constitute a change of use. In essence it is argued that the Board was not empowered to "interpret" the two planning permissions so as to impose restrictions and conditions not contained therein and that it disregarded the County Council's prior approval of the proposed use by Mothercare.

<u>The TK Maxx case as notice party</u>

12. It will be convenient at this stage to deal with the factual background relating to the TK Maxx application, where the issues are very similar.

13. TK Maxx entered into negotiations with the applicant in relation to a lease for a trading outlet of a number of units at the same retail park. The planning permission which related to those units was governed by precisely the same parent permission, register reference 06/522. This granted permission for the construction of a retail warehouse park, the "use" of which was subject to the approval of the planning authority (condition 22) which was to the same effect as that outlined earlier, that is to say the proposed retail unit to be subject to the approval of the planning authority.

14. As in the case of Mothercare, permission was secured for various alterations to the parent permission and this elaborated on the assessment the planning authority would undertake prior to agreeing the use at condition 21 by stating:

> "The use of the proposed retail units shall be subject to the agreement of the planning authority to allow the planning authority to examine all uses in accordance with the retail strategy and planning policies for the area."

15. TK Maxx contend that the legal effect of the two permissions and conditions was that the planning authority had reserved unto itself the right to "agree" or "approve" the use of the proposed retail units.

16. TK Maxx say that before they executed the lease the applicant ("Treacy") entered into correspondence with Waterford County Council relating to the "use" condition. TK Maxx say that it was critical that it had proper planning permission to cover the type of goods sold in its stores and it did not intend to enter into any lease with the applicant unless it had what it terms "comfort" on this issue.

17. On 22nd January, 2008, the County Council issued a letter to Treacy, furnished to TK Maxx, in relation to the proposed user of units 1, 2 and 10. The Council official wrote:

> "I wish to confirm compliance with condition no. 22 of the permission subject to the following:
> 'The general range of goods relate to carpets, household goods, luggage, gifts, travel goods, toys, fitness and sport equipment, fitness and leisure apparel with ancillary wear and associated accessories'"

This letter had been amended following discussions between the County Council and TK Maxx to include the phrase "with ancillary wear" to include a percentage of formal wear permitted to be sold in the store.

18. On foot of this letter, TK Maxx contends that it was satisfied that it could comply with the user conditions and, it says, understood "leisure apparel" to encompass anything worn in one's leisure time. It says that it entered into an agreement on foot of this with Mr. Treacy on 15th July, 2008, and a permitted user under that lease reflected the

wording contained in the County Council's letter of 22nd January, 2008. TK Maxx proceeded to fit out the store and it says that this fit-out cost in excess of €2 million. It began trading. The store employs approximately 60 people. No evidence however has been adduced as to whether any portion of the expenditure made by TK Maxx was specifically attributable to its claimed understanding as to the terms of the user conditions.

19. TK Maxx criticise Frisby Construction for waiting until 3rd July, 2008 to seek a declaration from the Board pursuant to s. 5 of the Act of 2000, as amended, in respect of the use permitted under the letter of 22nd January, 2008. As in the case of Mothercare the reference was made in the first instance to the County Council.

20. The County Council gave its decision on 29th July, 2008. This had significant benefits for TK Maxx. The Council held that subject to a restriction on the sale of fashion, clothing and footwear, the use was not a material change of use in breach of the planning code. It further found that the amalgamation of the units was an "exempted" development.

21. Frisby Construction also appealed this decision to the Board pursuant to s. 5 (3) of the Planning and Development Act 2000 on 15th August, 2008.

22. By a decision dated 23rd February, 2009, the Board issued a determination on PL.24.RI.2562 that the use of units 1, 2 and 10 of Butlerstown Retail Park, Waterford by TK Maxx and the amalgamation of these units into one single unit, was a development and not an exempted development.

23. In view of the fact that both planning applications had very close factual similarities, and had fundamental legal issues in common it was determined by the Commercial Court (Kelly J.) that they be considered together albeit with TK Maxx as notice party to the proceedings. By consent, the parties agreed to a telescoped hearing, that is to say, one where the question of leave and, if appropriate, substantive relief could be considered and determined in one hearing.

24. For the purposes of this determination this judgment will focus on the Mothercare application. Many of the observations and findings which are made apply also to the TK Maxx planning application. Insofar as there are distinctions, the judgment will thereafter consider the TK Maxx planning application.

Mothercare's application

25. It is necessary then to analyse the basis of the Board's decision in relation to the Mothercare application. It focussed on the framework of the parent permission.

26. In a determination reached on 23rd February, 2009, the Board stated that it had paid particular regard to the:

> "Definition of retail warehouse set out in Annex 1 of the Retail Planning Guidelines for planning authorities issued by the Department of the Environment, Heritage and Local Government in January, 2005, namely:
>
> > 'A large single level 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.'"

27. The Board observed that the buildings intended to be used by Mothercare had a permitted use as retail warehouses on foot of the two permissions. But it concluded that the proposed user of the unit by Mothercare would constitute a change of use. In reaching that conclusion the Board noted that the retailing activity carried out by Mothercare (which includes the sale of baby, infant and maternity clothing and footwear, goods associated with feeding and bedding, toys and gifts, goods for personal care and other goods which are included in the definition of what are called "comparison goods" in Annex 1 of the Retail Planning Guidelines for Planning Authorities … did not come within the scope of the definition of activities of a retail warehouse as set out in the Retail Planning Guidelines; and furthermore that the change of use constituted development being a material change of use having regard to its character and its material external impacts (such as its possible impact on city centre retailing, traffic and parking) on the proper planning and sustainable development of the area.

28. It is necessary further to describe and identify the nature of the issues which were considered by the Board in its deliberation. This analysis would be of importance in determining whether the issues which have been placed before this Court are, (assuming *locus standi* is established), actually appropriate for determination by this Court or, rather, are "planning issues", more appropriate for determination by the planning authorities, even if a question or questions of law may arise. The material before the Board clearly involved an issue of mixed fact and law. As will be seen, very considerable weight was placed on what by any characterisation should be seen as "planning" matters.

The material the Board considered on the appeal

29. The Board had regard to the fact that the retail warehouse park has a total size of 14.16 hectares. It spans the length of the recently constructed Waterford outer Ring Road from Butlerstown Roundabout in the south to a roundabout in the north at the old Kilmeaden Road. It is bounded on the north by the N25 Cork Road from which a service access is available. The Mothercare unit is No. 2 of 8; it is 881 sq. metres in area, adjoined by units on both sides.

30. The development planned for the area is that of the Waterford County Development Plan 2005-2011. The appeal site is located in what are termed to be the Waterford City "Environs" identified in zone S3 Waterford City Boundary. The planning objective of this area is "to enable the provision of high quality, mixed use, industrial, commercial and retail development having regard to compatibility with adjoining land uses *and the impact that any such development would have on existing retail, commercial and industrial development in the vicinity*". One of the issues clearly relevant to any planning decision was its impact on neighbouring businesses, including by inference, one such as the shopping centre owned by Frisby Construction.

31. Through its planning consultants, Mr. Treacy had submitted to the Board that the s. 5 referral had arisen on the basis of a misconception. It said that the referral had arisen on the basis of what it described as being the "conventional" Mothercare designation of its business. However it requested the Board to make a determination on the basis of what it termed a narrower, "Mothercare World" format which, it said, was accepted in retail parks in the United Kingdom. It contended that in other such centres, the ratio of "bulky goods to others of 70%" had been accepted, and that clothing which would be sold in the unit would be minor and specialist. It indicated that Mothercare would continue to operate its

existing business in Waterford city centre with no adverse impact, and that the retailing of baby and maternity clothes could not be separated from the trade in other baby items including bulky goods. The applicant contended that it was never in the spirit of the guidelines to restrict the sale of clothing outright, and that other bulky retail operators, such as outdoor leisure firms, sold associated specialist clothing from their premises. Thus it claimed, by analogy, baby and maternity clothing could be sold with bulky baby and nursery goods.

32. However there is no escaping the fact that the true case being made by Mr. Treacy was that condition 22, quoted above, actually allowed the County Council to determine the end user and nature of the business, and that once that determination had been made by the Council itself, it was effectively fixed or "ring-fenced"; and that it followed therefore that the Board, on appeal, had exceeded its jurisdiction in purporting to give a ruling, the effect of which was to "oust" the determination of the County Council.

33. Mr. Treacy claimed that by reason of the Council's decision, the Board could not then seek to regulate against "non-bulky operators"; that there in fact was no prohibition on retail warehouse parks containing units retailing non-bulky goods; that the use of the unit in question permitted the retail of both bulky *and* non-bulky goods, and that the presence of Mothercare World would add to the broad mix of uses. The applicant claimed that the relevant unit was granted permission under the first permission where condition 22 applied, and that Frisby Construction had waited until considerable financial expenditure had been outlaid, in circumstances where its motives were questionable in the light of its ownership of what it saw as a "competing" retail park.

The report from the Board's Inspector

34. The reasoning for the Board's decision is best interpreted by reference to a report of the Board's inspector. Neither accepted that the Council's original decision, nor any amendment could potentially act as a "stepping stone" to an alteration in user – if such gloss was put on it.

35. Mr. Treacy had made the case that there was no specific condition limiting the sale of goods in the unit to bulky goods, and that condition 22 of the parent permission required that "the use of the proposed retail units shall be subject to the approval of the planning authority". The Board took a different view. It considered that a clear limit should be drawn on the basis of the parent permission.

36. Neither the inspector nor the Board were persuaded that condition 22 allowed for such flexibility in the interpretation. The inspector observed in relation to the applicant's contentions:

> "In my opinion the condition requiring the planning authorities' approval to the sale of the retail unit cannot be construed to mean that *any type of retail use or the sale of any type of retail goods in acceptable*. *The parent permission provided for the construction of retail warehouse units. This is a specific type of retail unit and one which is specifically defined in the Retail Planning Guidelines* …"

The inspector then made a further significant observation to the effect that:

> "… The nature of the retail use proposed determined the nature of the assessment of the proposal and the ultimate decision. This is evidenced in the Retail Impact Assessment carried out as part of the environmental impact assessment of the proposed development, the statement of which was submitted with the original planning application (ref. 06/522). I would note as an aside that the applicant appears to be clear as to the nature of the retail permission pertaining on the site on the basis of the application made (currently on appeal and attached) *for a change of use of unit 2 under Reg. Ref. 08/170 (PL.24/229121) from retail warehouse use to catalogue retail use to include comparison goods*." (emphasis added).

She added:

> "Notwithstanding, it is clear from the parent permission pertaining on the site that the use permitted provides for *retail warehouse units*." (emphasis added).

The inspector commented:

> "Furthermore one must consider the nature of goods sold by the retailer in question, in this instance, Mothercare. I would note that the permission does not provide for an open retail use and therefore the nature of goods to be sold is not at the applicant's discretion. On the basis of other Mothercare or Mothercare World stores around the country there is an established pattern of goods which are normally retailed from these stores. These include baby, infant and maternity clothing and footwear, goods associated with feeding and bedding, toys and gift sets, etc. I would note that bulkier goods such as nursery furniture and pushchairs are also traded."

37. The inspector then turned to the issue as to whether the proposed development was exempted. She directed herself to the definition of "development" contained in s. 3 (1) of the Planning and Development Act 2001 as meaning:

> "… except where the context otherwise requires, the 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."

She advised that in her mind the use of the retail unit for retail use, other than that for retail warehouse use would comprise a "material change of use". She directed herself to four tests as to whether there would be a change of user. These included whether the proposal would be inconsistent with any use specified or included in such permission.

38. She then expressed her view as follows:

> "In my opinion the use proposed i.e. the use of a unit by a retailer for the sale of clothing and other goods contained in the definition of comparison goods (Annex 1 Retail Planning Guidelines) would be inconsistent with the use included in the permission sought and granted which was for the construction of a retail warehouse park."

She concluded:

> "In my opinion the use proposed *i.e.*, the use of a unit by a retailer for the sale of clothing and other goods contained in the definition of comparison goods (Annex 1 Retail Planning Guidelines) would be inconsistent with the use included in the permission sought and granted which was for the construction of a retail warehouse park."

39. As can be seen therefore the inspector and the Board directed themselves in particular, to what is termed the parent permission. They deprecated any attempted or purported "ring-fencing" of the Council permission, insofar as that permission might be interpreted as allowing for an ultimate change of user. They did not find that the Council's decisions

were wrong. The finding of the Board was to that extent pre-emptive.

40. The applicant says that an impermeable framework for any jurisdiction to be exercised by the Board had been determined by the letter of 13th June, 2008 from Waterford County Council to James Treacy referred to above. He says that the Board erred in jurisdiction in failing to advert to this letter, which, he says, effectively, should have defined the parameters for the Board's decision-making process in this case. Particular emphasis also is laid on the fact that there was no reference in the Board's decision, or the planning inspector's report to the letter of 13th June, 2008.

41. The rationale for the Board's decision was derived clearly from the Retail Planning Guidelines of 2005. These set out planning policy guidelines applicable to this form of retail and warehouse development. They contain a number of observations and guidelines in relation to such parks and warehouses. It is observed (Guideline 78) that such retail warehouses do not easily fit into town centres given their size requirements, and the need for good car parking; that experience elsewhere in Europe suggests there are benefits to be gained in grouping retail warehouses selling bulky goods in planned retail parks to minimise the number of trips by car and outside the town centre so that there is relief from additional traffic and that:

> " … Generally speaking the evidence is that planned retail parks do not have any material impact on town centres *provided that the range of goods sold is limited to truly bulky household goods or goods generally sold in bulk. Where the range of goods sold from retail warehouse parks extends to the type of non-bulky durables which is retailed from town centres then there is much more potential for an adverse impact on a nearby town centre*." (emphasis added).

42. The policy considerations are therefore clearly identified. The range of goods sold and the nature of the user is a critical consideration in preventing adverse impact on the viability and integrity of traditional town centres. At Guideline 80 it is recommended:

> "Planning authorities when considering applications for non-food retail parks need to consider the impact on existing town centres. If the range of goods sold is conditioned only to the sale of bulky household goods including carpets, furniture, automotive products and white electrical goods and D.I.Y. items then it is unlikely that a retail park development in the range 88,000 to 15,000 sq. metres would have a material adverse impact on the more important town centres in the retail hierarchy…"

At Guidelines 83 it warned:

> "When it is considered warranted, local authorities should impose appropriate conditions to *prevent the provision of single, large units either through new development, coalescence or the linking together of two or more stores*. In general, coalescence or linking together of stores would be considered to be development and therefore subject to a requirement for planning permission."

The policy considerations affecting this form of development is discernible from the guidelines themselves, particularly the passages in emphasis. What were Mothercare seeking to achieve? Was it to navigate a path around or through the guidelines?

43. The Departments 2005 advice is relevant in one other area also. This is in relation to the categorisation of goods which may be sold in retail warehouses. As explained earlier, such warehouses are to specialise in the sale of bulky household goods such as carpets, furniture, and electrical goods and bulky D.I.Y. items catering mainly for car-borne customers. "Bulky goods" are defined as:

> "Goods generally sold from retail warehouses where DIY goods or goods such as flat-back furniture are of such a size that they would normally be taken away by car and not be manageable by customers travelling by foot, cycle or bus, or that large floor areas would be required to display them, e.g., furniture and room sets, are not large individually, but part of a collective purchases which would be bulky, *e.g.*, wallpaper, paint.

There is a further category of goods known as "comparison". These include:

> " - clothing and footwear
>
> - furniture, furnishings and household equipment (excluding non-durable household goods)
>
> - medical and pharmaceutical products, therapeutic appliances and equipment
>
> - educational and recreation equipment and accessories
>
> - books, newspapers and magazines
>
> - goods for personal care and goods not elsewhere classified."

44. The applicant asserts that the goods identified in these two categories are not necessarily mutually exclusive, and that there may be a degree of permissible overlap in categories such as "household equipment" and "educational recreation equipment and accessories" as well as being goods not elsewhere classified. This raises the question as to whether the term "comparison goods" may act as a form of conduit, and afford a greater degree of flexibility as to the nature of the goods that may be sold in premises in a warehouse park. Frisby Construction would contend such definitions and interpretations are being deployed by the applicant, Mothercare and TK Maxx to drive "a coach and four" through the parent permission, and the guidelines and the assessment which provided the basis for such original permission.

The statutory jurisdiction of the court

45. The judicial review proceedings which were brought by the applicant are pursuant to the statutory scheme provided for under s. 50 and s. 50 (A) of the PDA 2000 (as amended in 2006 by S. 13 of the Planning and Development (Strategic Infrastructure) Act 2006. Under the new s. 50 (A) (3) of the Act of 2006, the jurisdiction is now defined as follows:

" …(3) The Court shall not grant s. 50 leave unless it is satisfied that –

> (a) There are substantial grounds for contending that the decision or act concerned is invalid or ought to be quashed, and

(b) (i) the applicant has a substantial interest in the matter which is the subject matter of the application …"

It is also relevant to note the provisions of subs. 50 (A)(4) which provides:

"(4) A substantial interest for the purposes of subsection (3) (b) (i) is not limited to an interest in land or other financial interest."

For leave purposes the Court must decide whether there are "substantial grounds", and whether the applicant has a "substantial interest".

Locus standi

46. The Board raises a number of preliminary points relying on alleged want of issue-specific "*locus standi*". The Board say that Mr. Treacy as applicant in these proceedings never submitted to it on appeal that it was statutorily constrained to approach the matter only within the framework which had been laid down by the County Council approval. It is said the applicant cannot raise this point in these review proceedings. This will be considered later.

47. However, in the first instance, the Board says the applicant does not have "substantial grounds" relying on the well known dicta of Carroll J. in *McNamara v. An Bord Pleanála* [1995] 2 I.LR.M. 25 that in order for a ground to be substantial:

> "… it must be reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous."

I have little difficulty in rejecting this part of the submission. In my view for the purposes of leave application (which is what I must consider at this point) the issue which is raised by the applicant is reasonable, arguable and weighty. It is by no means trivial or tenuous. Thus I think the Board fails on the first leg of the *locus standi* argument, that is substantial grounds.

48. I turn then to the question of whether there is a form of effective issue specific "estoppel" derived from alleged failure to raise the "framework" point before the Board. Effectively the applicant says now that the County Council's decision formed a "ring-fence" outside which the Board was not entitled to go, and that on appeal the Board was empowered only to determine the issues which had been placed before it, that is to say whether there was a material contravention, or change of use, and no other issues.

49. For the purposes of this case, it is unnecessary to embark on a broad excursus as to the interpretation and range of the new s. 50 now embodied in the 2006 Act. The question for the Court now to determine, therefore, is whether as well as establishing substantial grounds, the applicant can establish a "substantial interest".

50. I take into account the observation of Keane J. when speaking for the majority in *Lancefort v. An Bord Pleanála* (No. 2) [1999] 2 I.R. 270 he observed at p. 315:

> "But it would in my opinion be a significant injustice to a party in the position of the notice party to be asked to defend proceedings on the ground of an alleged irregularity which could have been brought to the attention of all concerned at any time prior to the granting of permission, but which was not relied on until the abdication was made for leave to bring the proceedings."

51. In my view the substantial interest test introduced by the PDA 2000 did no more than copper fasten the rule that an applicant for judicial review could not rely on a ground that could have been, but was not raised during the course of the proceedings before the decision maker. In particular this principle applies to points that could have been made during the appeal process (*Ryanair v. An Bord Pleanála* [2004] I.E.H.C., Ó Caoimh J.; *Quinlan v. An Bord Pleanála* (Unreported, High Court, Dunne J., 13th May, 2009). This same fundamental approach was affirmed by Macken J. (then) in the High Court in *Harrington v. An Bord Pleanála* [2005] I.E.H.C. 344; and was more recently considered by Irvine J. in *Cicol v. An Bord Pleanála* [2008] I.E.H.C. 146. Each of the foregoing authorities fully outline the test which an applicant will normally have to meet.

52. However, to my mind, the *factual* issue which arises here is more analogous to that which arose in *Harding v. Cork County Council* [2006] IEHC 295, Clarke J. In *Harding*, Clarke J. identified the participation requirement as being an integral part of "substantial interest", and did not consider it to be dependent on a separate statutory provision.

53. He pointed out at para. 3.8 of Harding:

> "3.8 As pointed out by Macken J. in *Harrington* the interest which the applicant must have is one he has expressed as being peculiar or personal to him. It seems to me that it, therefore, follows that the interest which an applicant asserts as conferring standing on him must either be one which he has asserted in the course of the planning process (*either expressly or by implication as deriving from the case he makes) or as one where there is a reasonable basis to assume that the matters giving rise to the relevant interest would have been asserted by the applicant concerned were his involvement in the process not interfered with by the matters which are contended for in the proceedings to represent a breach of proper process in the planning application*." (emphasis added).

54. For this test it is unnecessary to look further than a letter of 12th September, 2008, written by Mr. Peter Thompson, the planning consultant retained on behalf of the applicant. There he specifically referred to the question of attempted compliance to condition 22 of the planning permission. He extensively described discussions which he had held with officials of Waterford County Council. He discussed the proposed "bulky goods" "Mothercare World format", said to be significantly different from conventional Mothercare stores. The letter referred specifically to the Council's letter of 13th June, 2008, wherein, in the context of Mothercare, (as opposed to Mothercare World), it was stated that the intended use was acceptable, and, (to quote), "subject to the sale of goods being limited to bulky goods and goods generally sold in bulk in accordance with Annex 1 of the Retail Planning Guidelines". It referred to the sale of clothing not being permitted. The letter made specific reference to condition 22 and under the rubric of "the referrer's case" specifically made the following points on behalf of Mr. Treacy:

- the Council is entitled to determine the end user and nature of their business in order to regulate the overall mix of uses within the retail park;

- that condition 22 of the permission stated that "the use of the proposed retail units shall be

subject to the approval of the planning authority";

and finally, and most directly to the *locus standi* issue:

- "the council is entitled to determine the end user and the nature of their business in order to regulate the overall mix of uses within the retail park …"

Applying the "*Harding*" criteria, I think this clearly and sufficiently raises the "ring-fence" or jurisdictional issue as to the power of the Board. The letter requested that the Board issue a decision that confirmed Mothercare World would not require an application for change of user and that as there was no development involved the question of exempt development did not arise. Section 50 A (4) previously referred to, defines a substantial interest for the purposes of subs. 3 (b) (i) as being "not limited to an interest in land or other financial interest". Clarke J. in *Harding* specifically referred to "a case being made either *expressly or by implication* as deriving from the case he (made) in the passage quoted. I am persuaded that on the basis of this letter the jurisdiction point is precisely one which to quote Clarke J. would have been "asserted by the applicant concerned were his involvement in the process not interfered with by the matters which are contended for in the proceedings to represent a breach of proper process in the planning application." It is the clear implication of the letter.

55. I find on the facts of this case:

(i) that the Mr. Treacy has a substantial interest and/or a financial interest in the property;

(ii) that the issue which he seeks to raise was placed before the Board either expressly or by implication in the course of the letter of 12th September, 2008. The natural inference from each and all of the quotations was that the consultant was seeking to stand on the conditions which the County Council had granted. The planning consultant may not have explicitly said words to the effect "… and the Board is not entitled to go behind these" but the implication was clear enough to establish *locus standi* for the purposes of this case.

56. For completeness, I reiterate that on 29th July, 2008, the Council issued the s. 5 declaration that the uses intended by Mothercare and TK Maxx did not constitute a material change of use from that permitted by the revised planning permission and therefore were exempted development. On 12th August, 2008, Frisby Construction appealed both s. 5 declarations to the Board. On 23rd February, 2009, the Board upheld Frisby Construction's appeals deciding that the uses by Mothercare, and TK Maxx, constituted a material change of use from that permitted by the terms of the revised planning permission.

57. The notice party too, rely on the decision of the County Council as irrevocably setting the "framework". The questions were sufficiently pleaded in the applicant's statement of grounds seeking relief at paras. (x-xii). It is unnecessary to recite these.

58. Having determined the question of *locus standi*, it is then necessary to consider whether the Court has jurisdiction to deal with the issues which gave rise to this case.

A further question of jurisdiction – were the issues raised in this judicial review actually matters for the Board?

59. In *Grianán an Aileach Interpretative Centre Company Ltd. v. Donegal County Council* 2 I.R. 204 625, the Supreme Court had to consider the question of jurisdiction in relation to s. 5 of the Act of 2000.

60. The plaintiff there had been granted planning permission by the defendant for the development of a visitor centre. It furnished for the purposes of the consent of the defendant a schedule of indigenous and foreign activities which it proposed to hold there. The defendant refused to consent with the proposed activities on the ground that they did not fall within the permissible uses. The plaintiff then obtained a declaration of the High Court that the proposed activities fell within the range of permissible uses. The defendant appealed to the Supreme Court, submitting that the High Court had not jurisdiction to grant such relief, and alternatively, that the trial judge had erred in a decision that the planning permission authorised the activities in question. It argued that the plaintiff should have either applied for permission for the activities in question, or referred the matter to the planning authority under s. 5 of the Planning and Development Act 2000.

61. In allowing the appeal, the Supreme Court (Keane C.J., Murray and McGuinness JJ.) held that: (1) that under s. 5 of the Act of 2000, a determination as to whether the proposed uses constituted an unauthorised development was capable of being made by a planning authority or An Bord Pleanála; (2) that consistent with the approach adopted by the Superior Courts to legislation conferring jurisdiction in planning matters on bodies other than the courts, the High Court should have refrained in the circumstances of the case from adjudicating upon the proper construction of the planning permission; and that (3) to permit the High Court to determine whether proposed uses constituted unauthorised development would create the danger of overlapping and unworkable jurisdictions. Do these criteria apply here?

62. In order to address the questions raised by the s. 5 reference, the Board and its inspector assessed among other matters, the character of the uses intended by Mothercare and TK Maxx; the differences between these and those permitted by the revised planning permission, and the materiality of such differences. These are all matters that raise questions of expert planning judgment and which, normally would fall within the scope of the Board's discretion. The question which would arise is "what is the nature of the issue which this Court has been invited to determine?" Clearly it is mixed fact and law. But it is useful here to consider a number of passages from the judgment of Keane C.J. in *Grianán an Aileach* at p. 635. Having outlined the facts and the provisions of s. 5 of the Act of 2000 he expressed himself in this way:

"In the present case, the issue that has arisen between the plaintiff and the defendant is as to whether the proposed uses are authorised by the planning permission. I am satisfied, however, that although the issue has arisen in that particular form, *it necessarily requires the Tribunal which determines it to come to a conclusion as to whether what is being proposed would constitute a material change in the use of the premises. If it would not, then the question as to whether the particular uses were authorised by the permission simply would not arise*. In the present case, the defendant at all times has been contending, in effect, that the proposed uses would *constitute a material change* in use which is not authorised by the present planning

> permission. Equally, for its part, the plaintiff has been contending that *the uses are authorised* by the existing planning permission but has not contended that, if that were not the case, it would in any event be entitled to carry them out as not constituting a material change of use. *It would seem to follow that the question as to whether planning permission is required in this case necessarily involves the determination of the question as to whether the proposed uses would constitute "a development" i.e.* a question which the planning authority and An Bord Pleanála are empowered to determine under s. 5 of the Act of 2000." (emphasis added).

One might legitimately ask where are the significant differences between the matters emphasised and held to be capable of decision by the Board, and the questions the Board had to consider in this case?

63. Keane C.J. considered that his conclusion was reinforced by the decision of the High Court in *Palmerlane v. An Bord Pleanála* [1999] 2 I.L.R.M. 514, a case which concerned the change of user of retail premises. He referred to the judgment of Henchy J. in *Tormey v. Ireland* [1985] I.R. 289 to the policy consideration that where parliament committed certain matters or questions to the jurisdiction of the District Court or the Circuit Court the function of hearing and determining those matters and questions might, expressly or by necessary implication be given exclusively to those courts.

64. The then Chief Justice referred to his own judgment in *Criminal Assets Bureau v. Hunt* [2003] 2 I.R. 168, where, having referred to the range of tribunals and other bodies which were entrusted with exercising "limited functions and powers of a judicial nature" he observed:

> "It is not uncommon for the legislation establishing such tribunals to provide for a limited form of appeal to the High Court from its decisions, usually confined to questions of law. However in every case the High Court retains its power under the Constitution to determine whether such bodies have acted in accordance with the Constitution and the law and such a jurisdiction cannot be removed from the High Court by Statute. Subject to that qualification, it is clear, as was found in *Tormey v. Ireland* [1985] I.R. 289 that the Oireachtas may confer on such bodies, expressly or by implication, an exclusive jurisdiction to determine specific issues."

Keane C.J. referred to the observation of Henchy J. in *Tormey* to the effect that at least in certain instances the jurisdiction of such bodies should be exercised to the exclusion of that of the High Court, otherwise the allocation of jurisdiction would be overlapping and unworkable. Returning to the facts of *Grianán an Aileach* Keane C.J. observed:

> "Thus in the present case if the jurisdiction of the planning authority or An Bord Pleanála under s. 5 were invoked and they were invited to determine whether the uses in controversy were within the uses contemplated by the planning permission or constituted a material change of use for which a new planning permission would be required, either of those bodies might find itself in a position where it could not exercise its statutory jurisdiction without finding itself in conflict with the determination by the High Court. No doubt a person carrying out a development which he claims is not a material change of use is not obliged to refer the question to the planning authority or An Bord Pleanála and may resist enforcement proceedings subsequently brought against him by the planning authority on the ground that permission was not required. In that event if the enforcement proceedings are brought in the High Court that Court may undoubtedly find itself having to determine whether there has been a material change of use or whether a development is sanctioned by an existing planning permission as happened in *O'Connor v. Kerry County Council* [1988] I.L.R.M. 660. But for the High Court to determine an issue of that nature as though it were the planning authority or An Bord Pleanála in proceedings such as present would seem to me to create the danger of overlapping an unworkable jurisdictions referred to by Henchy J.

65. Finally, Keane C.J. observed at p. 639 of the report:

> "Some responsibility may be attributed to the defendant for the difficulties that have arisen in determining to what uses the premises may be put without a further planning permission: they might well have been avoided by the use of more precise language when the permission was being granted. I am satisfied, however, that the High Court cannot resolve these difficulties, in effect as a form of planning tribunal. As I have already indicated, if enforcement proceedings were brought in the High Court, that Court might find itself having to determine whether particular operations constituted a 'development' which required permission and the same issue could arise in other circumstances, e.g. where a commercial or conveyancing document containing a particular term dealing with compliance with planning requirements was the subject of litigation. *But in every such case, however it came before the Court, the Court would resolve the issues by determining whether or not there had been or would be a development within the meaning of the planning code. The only circumstance in which the Court could find itself making a declaration of the kind ultimately granted in this case would be where it had been drawn into a role analogous to that of a planning authority granting him permission.* That is difficult to reconcile with the law as stated thus by Finlay C.J. in *O'Keefe v. An Bord Pleanála* [1993] 1 I.R. 39 at pp. 71 and 72:
>
> 'Under the provisions of the planning Acts the legislature has unequivocally and firmly placed questions of planning, questions of the bounds between development and the environment and the proper convenience and amenities of an area within the jurisdiction of the planning authorities and [An Bord Pleanála] which are expected to have special skill, competence and experience on planning questions. The Court is not invested with that jurisdiction, nor is it expected to, nor can it, exercise discretion with regard to planning matters.'" (emphasis added)

66. Again the observations made by Keane C.J. apply equally in the instant case. The fundamental questions here are: whether there is a change of user, the planning considerations that arise; the extent of the parent permission, and the jurisdiction of the Board. The preponderance of them are planning matters requiring planning expertise, they are matters for the Board.

67. In an effort to avoid this policy issue embodied in statutory form, the applicants rely on the decision of Fennelly J., speaking for the Supreme Court in *Kenny v. Dublin City Council and Another* (Supreme Court, Fennelly J., 5th March, 2009) where the judge observed there is no doubt that the "interpretation" of a planning permission is a legal matter. A planning permission is, of course, capable of being objectively interpreted. The issue of its correct interpretation is a matter of law which can be decided only by the Court.

68. Fennelly J. addressed the issue in this way:

> "26. It follows from the principle of objective interpretation that the correct interpretation is a matter of law and can ultimately be decided only by the Court. In *Gregory v. Dunlaoghaire Rathdown County Council* (Unreported, Supreme Court, 28th July, 1977), to which I will refer shortly in more detail, the respondent planning authority had submitted that the interpretation it had placed on a planning condition, even if erroneous, was reasonable. Murphy J., speaking for the majority of this Court described that argument as '*unsustainable*'. He explained:
>
> 'The proper function of the Council was the implementation of the condition imposed by the Board. If they erred in that regard the error was as to the nature of their duties rather than the performance thereof. The only power exercisable by the Council was to agree details in relation to the revision of plans on the basis of the implementation of the condition imposed by the Board. Any agreement reached without that condition having been fulfilled was necessarily '*ultra vires* the Council.'"

He continued:

> "27. However an objective interpretation will not provide the complete answer in every case. It is not a synonym of literal interpretation. All parties to the present appeal accepted the following statement of McCarthy J. in *Re XJS Investments Ltd. v. Dun Laoghaire Corporation* [1986] I.R. 750 at 756:
>
> 'Certain principles may be stated in relation to the true construction of planning documents:
>
> (a) To state the obvious they are not acts of the Oireachtas or subordinate legislation emanating from skilled draftsmen and inviting the accepted canons of construction applicable to such material;
>
> (b) They are to be construed in their ordinary meaning as will 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 indicates some other meaning…'"

Fennelly J. concluded:

> "28. A court, in interpreting a planning permission, may need to go no further than the planning document itself, or even the words of a condition in issue within the context of the permission. The words may be clear enough. However, it will very often need to interpret according to context."

69. The "context" question now comes to the forefront of this case. I have already commented on the similarity of the issues in this case to those which Keane C.J. held were capable of being Board matters.

70. Based on these and on the content and context of the s. 5 decision in suit, a fundamental issue arises whether, absent a clear error of law going to jurisdiction, the claim falls within the remit of this Court. Was there then an error of law going to jurisdiction?

71. Counsel for the applicant, and for TK Maxx, have argued, that what is in issue here is a matter of law going to jurisdiction. The submission however had a somewhat Beckettian aspect – a question of jurisdiction was posed, no error of law by the Board was identified.

72. The thrust of the applicant's case was that the Board's decision was invalid because it was inconsistent with the Council condition which left certain matters to be agreed by the Council. In his written submissions the applicant contends:

> "The Board is not entitled to disregard that provision or to seek to invoke some general undefined restriction on use."

But in the context of this case the question is why not? It is not sufficient simply to assert that the Board should not have addressed the fundamental question of what the parent permission really meant. Was that not precisely the Board's function? I do not think the Board invoked any "general undefined" jurisdiction. In fact I consider that the Board referred to a specifically defined restriction and reminded itself of that. That restriction was the "parent" permission. It is the parent permission which must determine whether any subsidiary determination is one of 'detail'. Issues of "detail" cannot be used as a process of metamorphosis as to the nature of the parent permission.

73. Condition 21 of the amended planning permission provided that:

> "The use of the proposed retail units shall be the subject of the agreement of the planning authority to allow the planning authority to examine all uses in accordance with the retail strategy and planning policies for the area."

This was not a "carte blanche". It cannot be divorced from the parent permission which was for a *retail warehouse* park and for no other project. The Board, in its decision stated that it had particular regard to the:

> "Definition of retail warehouse set out in Annex 1 of the Retail Planning Guidelines etc. …", already quoted earlier.

No planning authority operating within *the framework* of that vital definition could be empowered to confer on itself a form of roving jurisdiction with the result that "matters of detail" could take premises outside the realm of those which come appropriately within the description "a retail warehouse park". A third party found with such a situation would justifiably consider itself aggrieved by such a broad and ill defined "condition" which begged the question as to whether the Council was seeking to confer on itself what was aptly termed in argument here as being an "extravagant jurisdiction". I do not believe the changes which apparently were envisaged by the applicant were either ones of detail, or that they flowed "inexorably" from the parent permission. (*O'Connor v. Dublin Corporation* [2000], I.E.H.C. 680, O'Neill J.)

74. One distinction drawn in *O'Connor* is vital in this case – it is as to the function of the County Council. Just as in *O'Connor* what is in question here is, or should be, what was categorised as being at the "tail end" of the planning process. The determination as to the "faithful adherence" to matters of "detail" is, or should be, judicial in nature and

limited. It involves planning expertise and discretion. Matters of "detail" cannot fundamentally alter the nature of the planning process. (See paras. 51 and 52 of *O'Connor*.)

75. A further question is whether such a condition would "fairly and reasonably" relate to the development permitted (*Ashbourne Holdings v. An Bord Pleanála* [2002] I.L.R.M. 321, Kearns J. at p. 335. A condition can only be imposed for a statutory purpose and not for an ulterior purpose however well intentioned.

76. Section 39 (2) of the Act of 2000 provides that where permission is granted for a structure the permission may specify the purposes for which the structure may or may not be used. Section 34 (5) of the Act provides that:

> "Points of detail relating to a grant of permission may be agreed between the planning authority and the person carrying out the development."

77. Insofar as a matter of law arises at all in this case it is critical to observe that the statutory power invested in a planning authority relates to "points of detail" only. This is not to say that the Council had arrogated to itself an *ultra vires* power, but rather to clarifying that the gloss which the applicant was putting on the amendments could if actually applied result in an *ultra vires* outcome.

78. I do not consider that s. 39 (2) or s. 34 (5) can be read in such a manner so as to allow a matter of detail turn the framework or substance of the grant of permission on its head. Any matter of detail must perforce fall within the four walls of the parent grant of permission. It cannot denature it.

79. In *Boland v. An Bord Pleanála* [1996] 3 I.R. 435 Hamilton C.J. speaking on behalf of the Supreme Court identified principles governing the jurisdiction of planning authorities to "leave matters over" for agreement. He summarised the position in this way:

> " 1. The Board is entitled to grant permission subject to conditions.
>
> 2. The Board is entitled in certain circumstances to impose a condition on the grant of a planning permission in regard to a contribution or other matter and to provide that such contribution or other matter be agreed between the planning authority and the person to whom that permission or approval is granted.
>
> 3. Whether or not the imposition is of such a provision in a condition imposed by the Board is abdication of the decision-making powers of the Board depends on the nature of the "other matter" which to be the subject matter of agreement between the developer and the planning authority.
>
> 4. The "matter" which is permitted to be the subject matter of agreement between the developer and the planning authority *must be resolved having regard to the nature and the circumstances of each particular abdication and development*.
>
> 5. In imposing a condition that a matter be left to be agreed between the developer and the planning authority the Board is entitled to have regard to:
>
> • a) the desirability of leaving to a developer who is hoping to engage in a complex enterprise a certain *limited degree of flexibility* having regard to the nature of the enterprise;
>
> • b) the desirability of leaving *technical matters or matters of detail* to be agreed between the developer and the planning authority, particularly when such matters or such details are within the responsibility of the planning authority and may require re-design in the light of the practical experience;
>
> • c) the impracticability of imposing detailed conditions having regard to the nature of the development;
>
> • d) the functions and responsibilities of the planning authority;
>
> • e) whether the matters essentially are concerned with off-site problems and do not affect the subject lands;
>
> • f) whether the enforcement of such conditions require monitoring or supervision.
>
> 6. In imposing conditions of this nature the Board is obliged to set forth the purpose of such details, the overall objective to be achieved by the matters which have been left for such agreement, to state clearly the reasons therefore and to lay down criteria by which the developer and the planning authority can reach agreement."

80. It is then appropriate to revert to observations of Fennelly J. in *Kenny*. At para. 20 of that judgment he said:

> "20. While the planning authority or An Bord Pleanála on appeal grants a permission it is a common feature of permissions especially for large developments, that additional detail is necessary in order to carry the development into effect as such detail often in the form of further plans, drawings, specifications or other explanations will require approval by the planning authority prior to commencement of the development. There is an obvious practical necessity for a procedure whereby matters of detail can be agreed between the planning authority and the developer. This ensures supervision but allows a degree of flexibility *within the scope of the permitted development*." (Emphasis added).

He added:

> "21. The distinction between the statutory and quasi-judicial function to grant permission and the ministerial function to approve details is clear as a matter of principle. It may be a difficult line to draw in practice.

> 22. It is obvious that neither the planning authority nor An Bord Pleanála can determine each and every aspect of a development. The Board in particular determines the *fundamental issues* conditions frequently imposed modifications on the developer and provide that details can be worked out in agreement with the planning authority."

81. There is no dichotomy between Fennelly J.'s observations and those of Hamilton C.J. in *Boland*. But both are to be seen in the context of Keane C.J.'s outline of the functions which the Board may perform as provided for under s. 5 of the Act of 2000.

82. The permission granted in this case cannot be divorced from its premise and "context". That permission was for a "retail warehouse park". That definition refers back to the Retail Planning Guidelines which define such a park. Once the provenance of the permission is established, subsequent conditions cannot alter it fundamentally.

83. While the Council might be empowered to examine "all uses" in accordance with Retail Strategy and Planning Guidelines for the area, this could only be in accordance with those guidelines which provide a context which makes sense of the planning document. It was legitimate for the Board to focus on these matters. The environmental impact statement which accompanied the applicant's initial application for planning permission emphasised that the development would be consistent with the retail planning guidelines that it would sell bulky goods. The applicant's submissions in the s. 5 process places particular reliance on the retail planning guidelines themselves. One cannot gloss over or ignore the fact that the applicant actually applied for change of user from "retail warehouse" use to "catalogue retail use" to include comparison goods. The question is why?

84. Having taken the approach it did in the grant of planning permission it would not have been open to the Council to expand the category of retail uses beyond that encompassed by the term "retail warehouse" as commonly understood in a planning context and, as defined in the statutory guidelines. I find the Board did not disregard condition 21 or invoke a general undefined jurisdiction, but rather it properly interpreted the planning permission by giving to the term "retail warehouse park" its proper lawful meaning as defined in the Guidelines to which condition 21 makes reference. In my view, the Board had no alternative but to conclude that the proposed uses by TK Maxx and Mothercare would constitute a change of use.

85. Insofar as a legal issue arises, the Board made a determination thereon. I find it was correct in that interpretation. The applicant has not made any substantive assertion that the Board were incorrect. Whether the issues in this case are characterised as a matter of fact, law, or mixed fact and law, the outcome is the same.

86. The observations of Keane C.J. in *Grianán an Aileach* identify the narrowness of the purely legal issue in this judicial review. In themselves they could have been determinative. But the legal question is conclusive. This was not a question of the Board having addressed itself to the "wrong question" (*White v. Dublin Corporation* [2004], 1 I.R. 545). In fact it was the applicants who sought to pose the wrong question or to impose parameters on the Board which might have prevented it giving the "right answer". The applicants claim will be dismissed on these grounds therefore.

Proper consideration of the uses actually approved by the Council

87. Insofar as the applicant makes a narrower argument, to the effect that the Council's letters to TK Maxx and to Mothercare were not properly considered by the Board, the question must be asked whether, in light of the finding just made this could have made any difference. The Board was correct in its interpretation. Did Mothercare and TK Maxx suffer a detriment? If the Board was correct in its legal determination, these letters could have had no bearing on its determination. The County Council's letter to TK Maxx limited the general range of goods. The letter to Mothercare provided that the sale of clothing was not appropriate. But the Board did not err in its jurisdiction. Thus any ancillary point as to the detail of the Board's consideration is immaterial.

88. For completeness I turn to certain aspects of the TK Maxx case as notice party, advanced in oral submissions. It is true TK Maxx were never a party to the section 5 procedure and received no notice of it. It says that as a result of this procedure, it was going to be, and was, ultimately, significantly affected. It complains as to the time elapse involved. TK Maxx asserts that if Frisby had wished to judicially review the decision of the County Council, time would have begun to elapse for the bringing of such judicial review, as and from 21st January, 2008. As a matter of inference, therefore, such judicial review proceedings might have to have been initiated prior to 21st March, 2008. Instead, TK Maxx contend that it was only on 3rd July, 2008, that Frisby made the two s. 5 references to the Council as to whether the envisaged use by Mothercare and the use by TK Maxx was consistent with the revised planning permission.

89. On 29th July, 2008, the Council issued a s. 5 declaration that the two uses did not constitute a material change of use from that permitted by the revised planning permission and therefore were exempted development. On 12th August, 2008, Frisby appealed both s. 5 declarations to the Board. On 23rd February, 2009, the Board upheld Frisby's appeals, deciding that the uses by Mothercare and TK Maxx constituted a material change of use from that permitted of the terms of the revised planning permission.

90. But these are not points against the Board – but the Council. The conduct of the Council is not criticised by TK Maxx.

91. It is undoubtedly true that the *Council* could have requested TK Maxx to provide information to it pursuant to s. 5(2)(ii)(c) of the Act. However, it decided that it would not do so. This decision was not made by the Board. Given that the contractual relationship between TK Maxx and the applicant, and their identity of interests on the issue, it assumed that the applicant was representing TK Maxx's concerns to the Council. It is not shown this was unreasonable. To say otherwise would be to make a distinction without a difference. It has not been shown there was any fundamental distinction in the interests or the real issues in this case.

92. TK Maxx, submits also, it expended substantial sums on the properties leased from the applicant.

93. The date of its lease was 14th July, 2008. However prior to that date, on 3rd July, 2008, Frisby Construction had already sought a declaration pursuant to s. 5 of the Planning and Development Act 2000, from Waterford County Council, that the proposed use was a development and not exempted, and that the amalgamation of a number of units into one unit constituted development and was therefore not exempted.

94. Negotiations took place between TK Maxx and the director of services for Waterford County Council, dating back as far as 25th January, 2007. TK Maxx contend that it was critical for it that it had proper planning permission to cover the types of goods that it sold in its stores, and that it did not intend to enter into any leases unless it had "comfort" on this issue.

95. But all this begs the question "What did this mean?" It cannot avail an applicant if the "comfort" envisaged might have involved a material contravention. Any subjective interpretation placed on events and the interpretation of correspondence must be subservient to the legal position as now found. It is not necessary therefore to consider the sequence of events in any more detail.

96. Furthermore, I am not persuaded any of this is material. Once the Council's decision was appealed, TK Maxx was entitled to make submissions or observations pursuant to s. 130 of the Act of 2000. However, it chose not to do so.

97. In other circumstances, one could envisage a hypothetical situation where a procedure of this type, might have the effect of constituting an unwarranted prejudice or detriment to the interests of a party not properly informed or on notice – but not in this case. It was TK Maxx's choice not make submissions before the Board. Consequently, I do not think it can complain of prejudice at this stage.

98. I am not persuaded that these submissions assist the applicant's case.

99. I do not think that TK Maxx's submissions advance the factual or legal basis of the claim further.

100. For these reasons the application for judicial review will be declined.