APPROVED

THE HIGH COURT

[2024] IEHC 427

Record No. 2021/1119JR

BETWEEN/

PAUL FREENEY

APPLICANT

-AND-

AN BORD PLEANÁLA

RESPONDENT

-AND-

CWC FAIRGREEN LIMITED

FIRST NAMED NOTICE PARTY

-AND-

GALWAY CITY COUNCIL

SECOND NAMED NOTICE PARTY

JUDGMENT of Mr. Justice Conleth Bradley delivered on the 9th day of July 2024

INTRODUCTION

Preliminary

1. In these proceedings, Mr. Freeney ("the Applicant") seeks to challenge, by way of judicial review, a decision dated 1st November 2021 of An Bord Pleanála ("the Board") to grant planning permission to the First Named Notice Party ("the developer") for *a change of use* and related works to a premises located at Fairgreen House, Fairgreen Road (Bothar Pairc An Aonaigh), in Galway city.[1]

2. By way of further detail, this grant of planning permission was subject to ten conditions and was for a proposed development consisting of a change of use of the ground floor unit of the building at Fairgreen House from retail to gaming use, including the internal reconfiguration and fit out, construction of access and associated lobby area to an existing multi-storey carpark, external signage and branding and all associated and ancillary works and development at the premises known as, and located at, Fairgreen House.

3. Peter Bland SC and Evan O'Donnell BL appeared for the Applicant. Aoife Carroll BL appeared for the Board. The developer did not participate in the hearing. Christopher Hughes BL appeared for the Second Named Notice Party ("the City Council").

[1] As amended by the revised public notice received by the planning authority, on 6th May 2021, which provided further plans and particulars.

Background

4. The developer had initially applied for planning permission in and around 21st December 2020, for the change of use of the vacant ground floor of the building at Fairgreen House from its previous retail use for car sales to the proposed use as a gaming centre. As just mentioned, this included internal reconfiguration, raising of the floor level in the space facing onto Fairgreen Road, fit out, construction of an access and an associated lobby area adjacent to the multi-storey carpark, external signage and branding along with associated site works. The proposed main entrance was the entrance to the ground floor off Station Road with a secondary entrance being the entrance facing onto Fairgreen Road.

5. Upon consideration of this application, the Planning Authority, (the City Council), issued a Further Information ("FI") request on 14th April 2021 and this was responded to by the developer on 15th April 2021.

6. The Board's Senior Inspector, Ms. Jane Dennehy, sets out that FI exchange at pages 4 to 5 of her report dated October 2021, as follows:

> "*(1) clarification as to consistency with the City Centre (CC) zoning objective and encouragement of viability and vitality in that the proposal involves loss of a retail unit at ground level and would result in a substantial expanse of dead street frontage where it is desirable that active street frontage be maintained. It is submitted that the retail use should not be a constraint on the proposed development and the streets are not principal shopping streets: It is submitted that:- there could be limited expectation only of substantial active frontage even it*

put to retail use; Significant proportions of façades may be screened by retailers for example Brown Thomas and TK Maxx; Some amount of screening should therefore be totally acceptable and there is precedent to be taken from the adjoining Fairgreen building; It is common place to screen façades at entertainment type uses and revisions proposed are for additional footprint for the shopfront with a visually animated feature presented on the façade.

Similar arrangements for compliance by condition with regard to details was acceptable in the grant of permission under P. A. Reg. Ref. 02/525 for a bar nightclub and live venue. The proposed use is a valuable function in town and cities as demonstrated in ABP decisions for Castlebar. (ABP 308499 and 307948 refer). And with regard to a development in Galway under PL 242694. Extracts are provided.

(2) Clarification of the precise nature of use proposed having regard to the Gaming and Lotteries Act:- The precise layout of equipment is outside planning scope. Machines will vary from gaming or amusement functions including broadcast of live [sic.] *sports for adult use only and laid out according to licensing spacing requirements the applicant will comply with any requirements as to forms of entertainment other than gaming would be complied with.*

(3) Clarification as to hours of operation: - It is pointed out that the CDP provides for encouragement of public and private [recitation] [sic.] *and leisure and amenities with the city having a significant night-time economy. No facilities for smoking are to be provided and*

noise generated would be no different to that generated by retail stores. Noise levels have been shown to be below the levels generated in bars, night clubs and live venues as demonstrated under P.A. Reg. Ref. 02/525. The application [sic.] *would accept a condition for control of noise levels.*

(4) Clarification as to possible sale of alcohol: - It is confirmed that it is not intended to sale [sic.] *alcohol for consumption on the premises and is willing to accept a condition to that effect.*

(5) Clarification as to the status of compatibility with implementation of a grant of permission for a multi sports facility at basement level which includes a café and entrance at ground level: - (P. A. Reg Ref 17/91 refers.) use of the basement area. The applicant confirms that it is not intended to implement the grant of permission under P. A. Reg. Ref. 17/01 [sic.] *as it is no longer appropriate and compatible with regard to the proposed removal of access from the ground level*".[2]

7. The Board's Senior Inspector, in the October 2021 report, explains that after consideration of the initial application, the FI, the planning history of the site and the plans submitted, the City Council's planning officer indicated concerns as to the precise nature of the proposed use and the loss of potential retail use for the premises at ground floor level, loss of active and animated street frontage and potential adverse impact on regeneration and the vitality and viability of the area and negative impact on residential amenities due to noise and disturbance.

[2] This extract is quoted *verbatim* from the Inspector's report with the exception of inserts [sic.] *etc.,* which reference what appears to be typographical errors.

8. Thereafter, on 2nd June 2021, the City Council refused the developer's application for permission for two reasons: first, the proposed development could be accommodated at upper or lower levels and would result in twenty metres of dead or inactive street frontage on Fairgreen Road and twenty-five metres on Bothar Pairc An Aonaigh and the use would be contrary to Policy 10.2 of the County Development Plan; second, the proposed development, with no restriction on hours of operation, was likely to result in noise and disturbance in noise sensitive receptors, including apartments overhead and student accommodation, notwithstanding the location within the area zoned 'City Centre', and it would be contrary to the County Development Plan.

9. The developer submitted a first party appeal against that refusal.

10. As just set out, as part of the appeal process, the Board had assigned Ms. Jane Dennehy, a Senior Planning Inspector ("the Inspector") with the Board to make a written report on the appeal, including a recommendation, which the Board was required to consider before determining the matter. The Inspector carried out an inspection of the site on 15th September 2021 and prepared a report in or around October 2021. That report addressed the following matters: the site location and description, the proposed development, the initial decision of the City Council, the planning history, the policy context, the appeal, the Inspector's assessment, her recommendation including the reasons and considerations and recommended conditions. This report is considered in more detail later in this judgment.

11. As part of its decision-making process the Board sets out what is referred to as "*the Board Direction*" and the "*Board Order*". Together, the Inspector's Report, the Board Direction and the Board's Order *inter alia* comprise the process which explains how and why the Board arrived at its decision.

12. In this case, for example, the Board Direction was signed by the Board member, Dr. Maria Fitzgerald, and it was dated 29th October 2021. It explains that the submissions on this appeal ("this file") and the Inspector's report were considered by the Board at its meeting held on 29th October 2021 and that the Board, by a majority of 2:1, decided to grant permission generally in accordance with the Inspector's recommendation before it sets out the reasons and considerations for so deciding, together with the ten conditions to which the grant of planning was subject to. As referred to later in this judgment, the Board Direction dated 29th October 2021 (on page 4) also contained the following '*Note*' which stated:

> "*Note: in deciding to omit the temporary condition proposed by the Inspector, the Board considered that the proposed development would be effectively regulated through the function of the necessary licensing provisions for the development.*"

13. Thereafter, on 1st November 2021, the Board granted planning permission to the developer, subject to ten conditions, for the proposed development consisting of a change of use of the ground floor unit of the building at Fairgreen House from its previously permitted retail use to gaming use. As mentioned earlier, the grant of permission also provided for development which included internal reconfiguration and fit out, construction of access and associated lobby area to an existing multi-

storey carpark, external signage and branding and all associated and ancillary works and development at the premises at Fairgreen House, Fairgreen Road (Bothar Pairc An Aonaigh), in Galway city as amended by the revised public notice received by the planning authority[3] on 6th May 2021 providing for further plans and particulars.

14. The Board granted planning permission on 1st November 2021 in the following format and its reasons and considerations included the following matters –

- Having regard to the City Centre zoning objective CC for the site "[t]*o provide for city centre activities and particularly those which preserve the city centre as the dominant commercial area of the city*" as set out in the Galway City Development Plan, 2017-2023,
- to the transitional nature of the site location peripheral to the city centre's principal shopping streets
- and to the mix and range of uses in the existing Fairgreen House building and in the immediate vicinity

– the Board considered that, subject to *compliance with the conditions set out below*[4], the proposed development would comply with the zoning objective for the site, would not seriously injure the amenities of the adjoining properties or of the area. The proposed development would, therefore, be in accordance with the proper planning and sustainable development of the area:

[3] Galway City Council.

[4] Italics added.

Conditions

(1) The development shall be carried out and completed in accordance with the plans and particulars lodged with the application as amended by the further plans and particulars to the planning authority lodged on the 15th day of April 2021 and the 6th day of May 2021, except as may otherwise be required in order to comply with the following conditions. Where such conditions require details to be agreed with the planning authority, the developer shall agree such details in writing with the planning authority prior to commencement of development and the development shall be carried out and completed in accordance with the agreed particulars. *Reason: In the interest of clarity*.

(2) Prior to the commencement of development, details of all external finishes to the proposed development shall be submitted to, and agreed in writing with, the planning authority. *Reason: In the interest of visual amenity*.

(3) Prior to the commencement of the development, the applicant shall submit to, and agree in writing with, the planning authority, a floor plan at a scale of not less than [sic.] 1:100 showing full details of the internal layout for the proposed gaming use and full details of the machines to be installed for use by patrons. *Reason: In the interest of clarity*.

(4) Details of all external shopfronts and signage shall be submitted to, and agreed in writing with, the planning authority prior to the commencement of development. *Reason: In the interest of the amenities of the area/visual amenity*.

(5) The premises shall not be used for the sale of or the consumption of alcohol on or off the premises unless authorised by prior grant of planning permission.

Reason: In the interest of clarity and the protection of the amenities of the area.

(6) (a) All entrance doors in the external envelope shall be tightly fitting and self-closing.

(b) All windows and roof lights shall be double-glazed and tightly fitting.

(c) Noise attenuators shall be fitted to any openings required for ventilation or air conditioning purposes.

Details showing compliance with the above requirements shall be submitted to, and agreed in writing with, the planning authority prior to the commencement of development. *Reason: To protect the amenities of property in the vicinity*.

(7) Water supply and drainage arrangements, including the attenuation and disposal of surface water, shall comply with the requirements of the planning authority for such works and services. *Reason: In the interest of public health*.

(8) Prior to commencement of development, the developer shall enter into water and/or wastewater connection agreement(s) with Irish Water. *Reason: In the interest of public health*.

(9) Notwithstanding the exempted development provisions of the Planning and Development Regulations, 2001, and any statutory provision amending or replacing them, the use of the proposed development shall be restricted to the gaming use as specified in the lodged documentation, unless otherwise authorised by a prior grant of planning permission. *Reason: In the interest of residential amenity*.

(10) The developer shall pay to the planning authority a financial contribution in respect of public infrastructure and facilities benefiting development in the

area of the planning authority that is provided or intended to be provided by or on behalf of the authority in accordance with the terms of the Development Contribution Scheme made under section 48 of the Planning and Development Act 2000, as amended. The contribution shall be paid prior to commencement of development or in such phased payments as the planning authority may facilitate and shall be subject to any applicable indexation provisions of the Scheme at the time of payment. Details of the application of the terms of the Scheme shall be agreed between the planning authority and the developer or, in default of such agreement, the matter shall be referred to An Bord Pleanála to determine the proper application of the terms of the Scheme. *Reason: It is a requirement of the Planning and Development Act 2000, as amended, that a condition requiring a contribution in accordance with the Development Contribution Scheme made under section 48 of the Act be applied to the permission.*

SUMMARY OF THE APPLICANT'S CASE

The Planning & Development Regulations 2001

15. In summary, the Applicant's first three arguments relate to whether or not there was compliance with the Planning and Development Regulations 2001, as amended ("the PDR 2001").

16. The central contention of the Applicant is that the developer's explanation of the proposed '*gaming use*' of the premises was inadequate and, as stated, failed to comply

with the requirements under the PDR 2001 in relation to floor plans, public notices and the description of the proposed works.

Floor Plans

17. First, the Applicant argues that the developer submitted what is described as '*indicative*' floor plans which are not in compliance with the PDR 2001. In this regard, reference is made to the letter from the developer's consultants dated 14th April 2021 in response to the request for FI in relation to '*Item No.2 – Nature of the Proposed Use*' and the response under the sub-heading '*Our Response*' that "[w]*e note that the floor plan layout is indicative in nature, as would be the case with any commercial layout, where the precise layout of equipment would not be within the scope of the Planning Authority's assessment*." However, immediately after this sentence, the letter continues as follows:

> "*This is all the more the case in this instance given that the proposed use is subject to a separate statutory licencing system, which is wholly independent of the planning process.*
>
> *In relation to the position of machines/equipment, the Applicant confirms that their function would vary from gaming to amusement (i.e non-monetary) function. The latter would also be for adult use only and would include video games, quiz or skill type challenges. The Applicant also confirms that the number and spacing of machines would be set out and determined as part of the licencing process.*
>
> *In relation to use, we submit that 'gaming' is a clearly and legally defined activity as set out in statute, and any further description could stray into speculative assignment of activities within the premises.*

In relation to 'forms of entertainment other than gaming', the Applicant confirms that this requirement would be complied with, which would be intended to be in the form of social/relaxation areas, where customers could mingle and avail of basic vending machine type amenities in terms of food and (non-alcoholic) drink, in addition to the above amusement (i.e. non-monetary) options.

Finally, live sports would also be available to watch, providing an alcohol free location for sports fans to watch same, where currently the typical option available is only in public houses.

In planning terms, we note that the 'forms of entertainment other than gaming' would be wholly ancillary to the gaming use".

18. In terms of the reference to 'indicative plans', it is submitted on behalf of the Applicant that the Gaming and Lotteries Act 1956 ("the 1956 Act"), where applicable, is limited to the certification by the District Court of an amusement hall and a funfair and can condition the type of gaming (which can cover a wide range of activities) and the hours and extent of gaming but cannot state where such machines, for example, should go: reliance is placed on the decisions in *Sweetman v An Bord Pleanála* [2021] IEHC 390; *Quinn v An Bord Pleanála* [2022] IEHC 699; *Balscadden Road SAA Residents Association Ltd v An Bord Pleanála (No.2)* [2020] IEHC 586; and *McCallig v An Bord Pleanála* [2013] IEHC 60.

19. It is further contended, on behalf of the Applicant, that the application for planning permission was invalid, as there was a failure to comply with Article 22(4)(b)(1) and (2) of the PDR 2001 as the site layout plan did not show the structures to be removed

and the structures to be constructed, that it was insufficient to rely on 'indicative plans' and that could not be cured by a planning condition in the subsequent permission: reliance was placed on the decision in *Quinn v An Bord Pleanála* [2022] IEHC 699. Mr. Bland SC submitted that you cannot rely on a 'Boland type condition' when the initial application was *void ab initio*. He further says that when the developer was asked for the detail, by way of a request for FI from the City Council (the planning authority), the response was essentially to suggest that the matters are governed by the 1956 Act, which it is said was erroneous, because the 1956 Act did not apply to this area. It is contended that the 1956 Act could not deal with the '*opening hours'* of the entire of the premises and was confined to the '*gaming*' part of the premises.

Public Notices

20. Second, the Applicant argues that there was insufficient detail of the 'use' (the change of use was from retail to 'gaming' use) of the proposed development in the public notices such that there was non-compliance with the PDR 2001. It is suggested that the developer intended other uses such as, for example, 'entertainment' and the televising of sporting events, which are not captured by the definition of gaming and, therefore, it was argued that there was an inadequate description of these intended uses in the public notices.

The proposed works

21. Third, it was argued that there was a failure by the developer to describe the proposed works in accordance with the PDR 2001 and where, for example, there was a change of use being sought, it was incumbent on the developer to show the '*before and after*'

situation with the proposed (new) works clearly delineated in different colours on a plan as per article 23 of the PDR 2001.

Alleged material contravention

22. Fourth, it was argued on behalf of the Applicant that the Board failed to apply the test set out in section 37(2)(b) of the Planning and Development Act 2000, as amended, ("the PDA 2000") and in this regard it was contended that the proposed development constituted a material contravention of the relevant Development Plan. It was also contended that reasons were required in the context of the alleged material alteration and the departure from the views of the Planning Authority.

Reasons

23. Fifth, it was submitted that the Board failed to give reasons for disagreeing with the Inspector's report that a temporary permission only be granted. It was contended that the Board did not include this condition and failed to set out why it disagreed with its Inspector in this regard.

24. It was contended, for example, that the planning authority decided to refuse permission for the proposed development because of the impact on amenities, particularly noise, and the zoning in the Development Plan. It was submitted that the Inspector recommended a temporary permission in order to allow the matter to be reviewed after five years, whereas the Board granted a permanent permission and did not set out why it disagreed with the Inspector. The point was further made that the Board addressed the issue by way of what was characterised, on behalf of the Applicant, as a '*postscript*' in the Board's direction which suggested that this matter

could be addressed under the 1956 Act. It was submitted that this did not address the entire of the use which was intended to be carried on in the proposed development.

Opening hours

25. Sixth, the Applicant interpreted the Inspector's report as rejecting (what the Applicant submits was) the developer's preference that there should be no restrictions on opening hours, but then failed to include this as a proposed condition in the recommendations set out in her report and that the Board omitted this matter entirely from its proposed conditions.

Alleged error of law

26. Seventh, it was contended that the consideration by the Board of the 1956 Act was defective.

Screening for AA

27. Eighth, it was alleged that the screening for Appropriate Assessment carried out by the Board was defective.

SUMMARY OF THE BOARD'S RESPONSE

28. It was submitted on behalf of the Board that the Applicant presented a number of arguments which could be differentially categorised as follows.

29. First, there was the category of matters which were not correctly or properly 'pleaded'. In short, it was submitted that these comprised, *inter alia*, the following

alleged matters: the *particularised* arguments, which were *now* sought to be advanced as to why it was contended that the initial planning application was invalid because of alleged non-compliance with the PDR 2001; the error of law alleged in relation to the 1956 Act; the reasons argument which was *now* sought to be made in relation to 'opening hours'; and laterally, the arguments in relation to the adequacy of the screening for Appropriate Assessment, including what was contended to be the lack of intelligible reasons.

30. Second, it was submitted on behalf of the Board that there was a category of arguments which comprised a *mischaracterisation* on behalf of the Applicant with the City Council's initial refusal decision and the Board's subsequent decision, on appeal, to grant permission.

31. This cohort of arguments included *inter alia* the material contravention argument and the relevance of section 37(2)(b) of the PDA 2000 and what was described as the evolving argument in relation to the alleged failure of the Board to give reasons for departing from the Inspector's recommendation and, in particular, on the issue of opening hours.

32. It was submitted that the third category of arguments comprised a discrete set of grounds which, it was said, have no basis because they have been raised in previous legal challenges and have been determined and dismissed in judgments of the Superior Courts. It was said that this category included, *inter alia*, the arguments in relation to the public notices and compliance with the PDR 2001 and the argument presented in relation to the screening for Appropriate Assessment ("AA"), *i.e.*, that the

screening for AA must be recorded in the Board's Order rather than in the Inspector's recommendation.

ASSESSMENT & DECISION

33. I am of the view, having regard to each of the eight grounds contended for on behalf of the Applicant, that this challenge to the Board's decision dated 1st November 2021 should be refused, for the following reasons set out in the remainder of this judgment. In addition to the Board's preliminary objection, I address each of the grounds of challenge sequentially.

Preliminary Objection

34. In terms of the Board's preliminary objection, as no application was made for any amendment to this challenge to the validity of the Board's decision dated 1st November 2021 by way of judicial review, the order of this court (Meenan J.) dated 31st May 2022 fixes the parameters of the challenge and this, in turn, is set out in the Statement of Grounds dated 21st December 2021.

35. This is made clear by the decision of the Supreme Court in *AP v Director of Public Prosecutions* [2011] IESC 2; [2011] 1 I.R. 729 at paragraphs 7-9 per Denham J. (as she then was) and Murray C.J., the provisions of *inter alia* sections 50 and 50A of the PDA 2000, Order 84 of the Rules of the Superior Courts 1986 ("RSC 1986") and the judgment of this court (Humphreys J.) in *Reid v An Bord Pleanála (No.7)* [2024] IEHC 27, where at paragraphs 48 to 58 of that judgment, Humphreys J. refers to many of the leading decisions of the Superior Courts which address the circumstances of

when, effectively, new grounds are sought to be argued for via legal submissions (written and oral) at the hearing and for which leave (or an amendment) has not been granted, or where there is insufficient particularisation of grounds contrary to the requirements of O. 84, r. 20(1) RSC 1986 and O. 84, r. 20(3) RSC 1986.[5]

36. At paragraph 58 of his judgment in *Reid v An Bord Pleanála (No.7)* [2024] IEHC 27, Humphreys J. observed, for example, that "[w]*hile exact specification of every jot and tittle of a case is an impossible standard, an applicant can only be permitted to advance at a hearing a point that is acceptably clear from the express terms of the statement of grounds, subject to the grant of any order allowing an amendment.*"

37. Accordingly, it is only fair that a respondent or notice party, or whomever the *legitimus contradictor* is, when responding to a challenge to the validity of a public law measure, knows what the case actually is that they have to meet (rather than a general plea which leaves open a range of arguments) and this applies *mutatis mutandis* to the challenge to the Board's decision dated 1st November 2021 in this application for judicial review.

38. Thus, while these matters are addressed in further detail in the remainder of this judgment, by way of brief overview, the following arguments posited at the hearing before me, on behalf of the Applicant, *extend impermissibly* beyond the grounds in the Statement of Grounds dated 21st December 2021: some of the arguments made at the hearing in relation to the validity of the application for planning permission, having

[5] Per paragraph 11 of the Board's Statement of Opposition dated 28th November 2022.

regard to the PDR 2001 and the floor plan; the arguments in relation to the error of law in the context of the 1956 Act; the reasons argument which was reformulated at the hearing in relation to opening hours; and, the reasons argument made during the hearing in relation to screening for Appropriate Assessment.

Omission of the temporary condition: reasons

39. Initially, in the Statement of Grounds at paragraph (9) (on page 5), the Applicant pleads that "[t]*he Board's decision issued on 1st November 2021 and neither the Board direction nor the Board decision contained any reasons for disagreeing with the Inspector's recommendation nor any basis for granting a permission in breach of the Statutory Development Plan.*"

40. At paragraph (7) (on page 11) of the Statement of Grounds, the Applicant pleads that: "[t]*he Respondent failed to comply with its obligations under* [s]*ection 34(10)(b) of the Planning and Development Act, 2000. The decision is different to that in the recommendation of the Inspector as contained in the Inspector's Report where the recommendation was that a temporary permission only be granted whereas the Board decided contrary to that recommendation that full planning permission be granted. Section 34(10)(b)* [sic.] *requires that in such circumstances the Board publish reasons why it disagreed with the Inspector's recommendation and the Board failed to consider section 34(10)(b) and or publish any reasons in that regard*".

41. I do not agree, for example, that the following reference in the Board's Direction dated 29th October 2021 (on page 4) – *"Note: in deciding to omit the temporary condition proposed by the Inspector, the Board considered that the proposed*

development would be effectively regulated through the function of the necessary licensing provisions for the development" – was such as to render the decision unlawful or that it was insufficiently reasoned in the manner contended for.

42. On behalf of the Applicant, for example, it was also contended that this was *a post-script* and could not form part of the requirement on the Board to explain its reason for not agreeing with the Inspector's 'recommendation' and 'proposed condition 2' because it was contained in the "Board Direction" as distinct from the Board Order.

43. I do not believe that this was an after-thought in the manner suggested on behalf of the Applicant or that it was, in any sense, unclear. For example, in the Inspector's 'Recommendation' at paragraph 8.0 on page 13 of the Report dated on or about October 2021, the following is stated "[i]*n view of the foregoing, it is considered reasonable for permission to be granted but that it would be advisable for the duration of the grant of permission to be limited to a five-year period so as to allow for a further planning review in the interest of the amenities of the area and the proper planning and sustainable development*" and that "*Reasons and Considerations and Conditions follow.*"

44. Condition 2 then states that "*the duration of the grant of permission shall cease five years from the date of the order and the premises shall be cleared of all furnishings, equipment and signage and vacated unless, a prior grant of permission for continuation of the use has been obtained*" and the "*Reason*" given is "[i]*n order to allow for further planning review in the interests of the amenities of the area*."

45. When the Board met to consider the entire appeal, it was recorded in the Board direction that "*Note: in deciding to omit the temporary condition proposed by the Inspector, the Board considered that the proposed development would be effectively regulated through the function of the necessary licensing provisions for the development.*"

46. The function of the licensing provisions of the 1956 Act are considered later in this judgment. Leaving aside the practical consequence of those '*necessary licensing provisions*' for the operation, in whole or in part, of the development in the context of the change of use applied for and granted in the Board's decision dated 1st November 2021, I am of the view that the Board's decision to omit the temporary condition recommended by the Inspector, as set out in the "*Note*" contained in the "*Direction*" in fact explains why it did so, notwithstanding that in the circumstances of this case it was not expressly required to do so, insofar as the provisions of section 34(10) of the PDA 2000 are concerned.

47. In this context, for example, section 34(1) of the PDA 2000 (which applies to the Board by virtue of section 37 of the PDA 2000) provides that "[w]*here—(a) an application is made to a planning authority in accordance with permission regulations for permission for the development of land, and (b) all requirements of the regulations are complied with – the authority may decide to grant the permission subject to or without conditions, or to refuse it*."[6]

[6] Emphasis and underlining added.

48. The obligation to give reasons under section 34(10)(b) of the PDA 2000 arises where there was a recommendation to grant or refuse a permission in a report of the Board's Inspector, and the Board then makes a different decision to grant or to refuse permission but no such obligation arises in relation to conditions, which are non-EIA conditions[7], and whilst the Board was not obliged, having regard to the facts of this case, to give reasons in relation to not including condition 2 (and the temporary permission), it in fact did so (as set out above).

49. In *Dunne and MacKenzie v An Bord Pleanála & Ors* [2006] IEHC 400, the applicants complained that the Board had not given any reasons for departing from the Inspector's recommendation that a condition be attached requiring the omission of a balcony from a proposed development which included demolition on the site of the former Chester Beatty Library on Shrewsbury Road, Dublin 4 and which involved a recommended condition to the grant of permission rather than a reason for the recommendation or refusal for permission. It was argued that section 34(10)(b) of the PDA 2000 did not require the Board to give reasons for departing from the Inspector's recommendations regarding the imposition of conditions.

50. This court (McGovern J.) after setting out the provisions of section 34(10)(b) of the PDA 2000 stated at paragraph 28 of its judgment that "[i]*t seems to me that the submission of the* [Board[8]] *is correct and that there is no obligation on the* [Board] *to*

[7] By virtue of section 34(10)(c) of the PDA 2000, such an obligation to give reasons arises where the Board differs from its Inspector where the application is accompanied by an EIAR and the condition is an environmental condition arising from a consideration of the EIAR.

[8] The judgment referred to the First Named Respondent.

give reasons why it disagreed with its Planning Inspector on a particular condition which was recommended by the Inspector to be imposed".

Opening hours

51. It was fairly (and correctly) accepted on behalf of the Applicant, on the second day of the hearing before me, that the arguments made on the Applicant's behalf in relation to opening hours (as set out above), strictly speaking, was not a point of challenge to the decision of the Board.

52. It was contended on behalf of the Applicant, however, that it was an issue that fell to be addressed in the context of what was described as the textual analysis in the consideration of the 'reasons' point and having regard to the Board disagreeing with the recommendation of the Inspector and in the context of the reference to the 1956 Act.

53. By reference to paragraph 7.1.5 of the Inspector's report, for example, it was submitted on behalf of the Applicant that an application for a Gaming Licence (pursuant to the 1956 Act) could only regulate the 'gaming part of the use' which had not been particularised in the application for a change of use and could not apply to the entire of the proposed change of use as not all of that intended use was captured by the definition of 'gaming' in the 1956 Act.

54. It was further contended, on behalf of the Applicant, that the first sentence of paragraph 7.1.5 of the Inspector's October 2021 Report, appeared to envisage the articulation of a planning condition in relation to opening hours – "[a]*s regards hours*

of business, for which the applicant seeks no restrictions but suggests that the matter which is subject of the Gaming Licence which would be required, it is considered reasonable for restrictions on hours of operation, if determined to be warranted on planning grounds to be taken into consideration and if warranted, for conditions to be imposed in this regard" – but that none is set out in the initial twelve conditions which were recommended by the Inspector. This, it was submitted, stands in contrast to the second and third sentence in paragraph 7.1.5 of the Inspector's report, while sharing a similar syntax to the first sentence in paragraph 7.1.5 – "[m]*atters as restriction of use to adults only and as to the sale of alcohol are licensing matters to be addressed under the separate licences to be obtained by the applicant. However, if warranted on planning grounds it would be reasonable, if permission is granted, to attach a condition omitting bar facilities and consumption of alcohol on the premises for the purpose of clarity and the amenities of the area by way of avoidance of potential for noise and disturbance within the public realm by patrons*" – was, in contrast, ultimately reflected in a recommended subsequent condition in the Inspector's report, *i.e.* recommended Condition 6 which provided that "[t]*he premises shall not be used for the sale or the consumption of alcohol on or off the premises unless authorised by prior grant of planning permission. Reason: In the interest of clarity and the protection of the amenities of the area.*"

55. Notwithstanding the nature of the robust and particularised oral arguments of counsel on behalf of the Applicant in relation to the Inspector's report, as these arguments are not pleaded, they, strictly speaking, do not arise for consideration in this judicial review challenge. As mentioned earlier, in principle, this is accepted by counsel on behalf of the Applicant, but a somewhat more nuanced argument which, as

mentioned, involved a forensic and critical assessment of the language and logic used in the October 2021 report seeks to segue into the broader legal arguments posited on behalf of the Applicant.

56. Even if these arguments were pleaded in the Statement of Grounds, for the reasons which I have set out in this judgment, I do not accept that they provide a basis for successfully impugning the Board's decision of 1st November 2021 having regard, in particular, to the correct interpretation of section 34(10)(b) of the PDA 2000 as set out in *Dunne & MacKenzie v An Bord Pleanála & Ors* [2006] IEHC 400, insofar as 'reasons' are concerned, and having regard to the licensing regime prescribed by the 1956 Act and the effects of section 34(13) of the PDA 2000, which is addressed later in this judgment.

57. Further, the fact that section 34(4)(q) of the PDA 2000 provides a discretion for the planning authority and the Board, that conditions under section 34(1) of the PDA 2000 *may* (without prejudice to the generality of section 34(1) of the PDA 2000) include conditions for regulating the hours and days during which a business premises may operate does not mean that (a) not including a condition to that effect or (b) leaving it over to another code, renders the approach of the Board, or its decision to grant permission, unlawful.

The alleged material contravention

58. Section 37 of the PDA 2000 deals with appeals to the Board and section 37(2)(a) of the PDA 2000 provides that "*subject to* [section 37(2)(b)] *the Board may in determining an appeal under this section decide to grant a permission even if the*

proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates."

59. The Board can, therefore, grant a permission which contravenes a Development Plan. Where material contravention applies, there is a further prescribed process which the Board has to comply with, in addition to a statutory requirement to provide reasons which is provided for in section 37(2)(b) PDA 2000 as follows:

> "*(b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—*
>
> *(i) the proposed development is of strategic or national importance,*
>
> *(ii) there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or*
>
> *(iii) permission for the proposed development should be granted having regard to regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or*

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

(c) Where the Board grants a permission in accordance with paragraph (b), the Board shall, in addition to the requirements of section 34(10), indicate in its decision the main reasons and considerations for contravening materially the development plan."[9]

60. I am of the view that the 'material contravention' process does not apply to the circumstances of the Board's decision and that the Applicant's arguments in this context are incorrect. Further, and contrary to the submission made on behalf of the Applicant, the City Council, in its decision dated 2nd June 2021, did *not* refuse planning permission because there was a *material contravention* of the Galway City Development Plan.

61. In *Nee v An Bord Pleanála (No.1)* [2012] IEHC 532, this court (O'Malley J.) addressed a similar argument made in that case and stated as follows from paragraphs 34 to 44:

"*(34) The issue that arises is whether or not the decision of the first notice party to refuse permission, which refers to contravention of the Development Plan, was on account of a material contravention of the Plan.*

[9] Emphasis added.

(35) Somewhat surprisingly, the Council has chosen not to file any submissions in these proceedings and has declined to address the court on the question of the meaning of its own decision. That is of course its right, and the other parties are no doubt correct in saying that its decision should speak for itself. I simply observe that it adds a certain unreality to the task of the court.

(36) That task, it should made clear, is not to decide whether or not the contravention found by the Council was in the view of the Court material but rather whether the council decided it was so.

(37) The applicant makes a simple case on this issue. The legislation does not require the use of any particular formula of words by the planning authority. He argues, with force, that each of the contraventions identified must be considered to be material because otherwise permission would not have been refused.

(38) The Board and the second notice party make the case that the word "material" is a term of art. They point to, for example, the difference between "a change of use" and a "material change of use."

(39) They further argue that if the Council had considered the contraventions to be material it would have used the word. That it had its attention drawn to the question is clear from the fact that it had been pleaded as an issue in the original judicial review proceedings. The Council also had the opinions of Counsel for the parties, both of which referred to the argument, before it.

(40) It seems to me that the Act itself does maintain a distinction between material and non-material contraventions. The section relied on specifically provides that the Board may grant permission "even if" the refusal is for a material contravention. That would make little sense if every refusal by a planning authority for contravention of a Plan was to be deemed to be for a material contravention. It would also have the effect of very significantly reducing, if not abolishing, the jurisdiction of the Board in cases not coming within the excepted categories. I do not believe that to be the intent of the section.

(41) I concur with the view of the second inspector that the formulation adopted by the council was loose. I note his view that the proposal under consideration did not contravene any objective of the Development Plan, and the view of the first inspector that it accorded with the "principles of the policies" of the plan. I also take into account the fact that the Council did not make any representation in the appeal process.

(42) There is also no doubt but that the Council was aware, when approaching its decision in this case for the second time, that if it did not use the word "material" the Board was likely to conclude that that the identified contravention was not considered to be such. The word was not used and I have come to the conclusion that this must have been by deliberate choice on the part of the Council. The refusal of permission by the Council was not, therefore, by reason of a material contravention.

(43) It would be desirable, having regard to the potential impact of the section, if planning authorities expressed themselves more directly on this issue.

(44) It follows that I do not consider that s.37 (2) has application in the present case".

62. In the application before me, the City Council's Senior Executive Planner, Liam Blake, on 1st June 2021, carried out a planning assessment and ultimately recommended that planning permission be refused for application 20/351 for two reasons which were adopted by planning authority, the City Council, in its refusal decision dated 2nd June 2021 as follows:

"*(1) The proposed site occupies a prominent double fronted location in an area zoned City Centre with an objective "To provide for city centre activities and particularly those, which preserve the city centre as the dominant commercial area of the city". While uses such as the gaming facility can be accommodated in the City Centre zone, it is considered that the proposed development, which could readily be accommodated at upper or lower levels rather than at prime ground floor level, by reason of its size, location and extensive double frontage, which would have to be artificially screened off, would result in 20m of dead/inactive frontage to Fairgreen Road and a further 25m of dead/inactive frontage to Bothar Pairc An Aonaigh. The proposed use for gaming purposes would be contrary to Policy 10.2 of the Galway City Council Development Plan 2017-2023 and the proper planning and sustainable development of the area.*

(2) The proposed gaming facility for which no restrictions on hours of operation are sought and is indicated to be likely to operate late into the evening and early morning, would, notwithstanding its location in an area zoned City Centre with an objective "To provide for city centre activities and particularly those, which preserve the city centre as the dominant commercial area of the city" have the potential to result in noise and disturbance to surrounding noise sensitive receptors including the apartments overhead and the student accommodation opposite. This would be contrary to the provisions of the Galway City Council Development Plan 2017-2023 and the proper planning and sustainable development of the area".

63. Notwithstanding the submissions on behalf of the Applicant which seek to distinguish the decision in *Nee (No.1)* from the facts here, and noting that the decision of this court (Simons J.) in *Redmond v An Bord Pleanála* [2020] IEHC 151 concerned a challenge to the validity of the Board's decision to grant planning permission for a residential development of 134 units under the Planning and Development (Housing) Act 2016, the issue which arises here was essentially captured in *Nee (No.1)* and *Nee v An Bord Pleanála (No.2)* [2013] IEHC 584, where at paragraph 11, the High Court (O'Malley J.) observed that "[t]*he issue that arose in this respect was whether the decision of the first notice party,*[10] *referring as it did to contravention of the Development Plan, meant that permission had been refused because of a material contravention. It is noted in the judgment*[11] *that the Council did not make any*

[10] Galway County Council.

[11] *Nee v An Bord Pleanála (No.1)* [2012] IEHC 532.

submission in the proceedings and declined to address the court on the issue. The other parties submitted that the decision had to speak for itself. The question to be determined by the court was, not whether in the view of the court the contravention was material, but whether the Council had decided that it was so."

64. In this case, the decision of the Council dated 2nd June 2021 and the report of the Senior Executive Planner dated 1st June 2021 upon which it is based, did *not* find that there was a material contravention of the Development Plan and the submission/response of the City Council dated 28th July 2021 in the appeal before the Board as summarised at paragraph 6.1.2 (pages 8 and 9) of the Inspector's October 2021 report recorded that "[a] *submission was lodged by the planning authority on 28th July, 2021 according to which …* [t]*he proposed use would be more suited to the upper floors rather than the ground floor retail unit as the location is on the edge of the city core. The proposed use would result in extensive inactive street frontage on both streets in a newly developed area in which new retail use is being encouraged…. The examples in Castlebar provided in the appeal relate to smaller retail unit for which the duration of the grant of permission was limited to three years*".

65. Here, contrary to the submissions made on behalf of the Applicant, the City Council in its decision dated 2nd June 2021 did not refuse planning permission on the grounds that the proposed development materially contravened the Development Plan (the Galway City Council Development Plan 2017-2023).

66. Separate to my finding that the City Council in its decision dated 2nd June 2021 did not refuse planning permission on the grounds that the proposed development

materially contravened the Development Plan, when asked rhetorically by counsel for the Applicant during his submissions to the court, counsel for the City Council submitted that the position in relation to the alleged material contravention raised on behalf of the Applicant was that as set out in the decision of the City Council dated 2nd June 2021 and this did not refer to the term '*material contravention*'.

67. Again – separate to my finding that the City Council in its decision dated 2nd June 2021 did not refuse planning permission on the grounds that the proposed development materially contravened the Development Plan – it is noted that in response to *a submission* from Fairgreen Road Office Ltd which had *inter alia* submitted that "[t]*he proposed development would materially contravene the strategic retail objective of the CDP for protection and reinforcement of the strategic role of the city centre as the prime retail area in the city, County and Western region*" – the Inspector under the subheading "*Assessment*" in the October 2021 report stated the following at the end of paragraph 7.1.1 that "[i]*t is not evident, having regard to the details of uses permissible and open to consideration within the CDP, that the proposed use would be in material contravention of the City Centre zoning objective.*"

68. Notwithstanding the submissions made on behalf of the Applicant, the position in *Balz and Heubach v An Bord Pleanála & Ors* [2016] IEHC 134 is not analogous to the case before me. This was indeed recognised by Barton J. who referred to the judgments of O'Malley J. in *Nee (No.1)* and Haughton J. in *People Over Wind & Anor v An Bord Pleanála & Ors* [2015] IEHC 271, at paragraphs 94 to 97 of his judgment in *Balz and Heubach*, as follows:

"*(94) In Nee v An Bord Pleanála [2012] IEHC 532, an issue which arose as to whether or not the decision of the planning authority to refuse permission on the grounds that the proposed development would be "a contravention of the Development Plan" constituted and meant a 'material' contravention of the plan. The Court considered that the absence of the word 'material' in the decision of the planning authority was intentional and legally significant. In the view of O'Malley J:*

> *"...the section relied on specifically provides that the Board may grant permission "even if" the refusal is for a material contravention. That would make little sense if every refusal by a Planning Authority for contravention of a plan was to be deemed to be for a material contravention. It would also have the effect of very significantly reducing, if not abolishing, the jurisdiction of the Board in cases not coming within the excepted categories. I do not believe that to be the intent of the section."*

Accordingly, she went on to find that s.37 (2) had no application to the case.

(95) More recently the provisions of s.37 (2) were considered by this Court in People Over Wind and anor. v. An Bord Pleanála and ors [2015] IEHC 271. The planning authority had decided to refuse planning permission on the ground that the proposed development would have 'contravened' the Laois County development plan. An

argument similar to that advanced on behalf of the Applicants in this case was advanced; namely, that as the local authority had refused planning permission on the ground that the proposed development would contravene the development plan, the Board was restricted to granting planning permission in the manner and way set out in s. 37(2) (b) and (c) ; having failed to have regard to those provisions and the decision of the planning authority, the decision of the Board was ultra vires , void and of no legal effect.

(96) Just as in the case of Nee, the absence of the word 'material' in the decision of the planning authority was considered by the Court to be intentional and legally significant. Haughton J. observed that the effect of s.37 (1) (b) was "...to annul the decision of the planning authority as from the time when it was given". Given that the decision of the Board made after carrying out its own AA had the effect of annulling the decision of the Council to the effect that there was no adequate AA, the question of considering whether or not there was a material contravention no longer arose for consideration or decision by the Board and therefore s.37 (2) (b) was not relevant.

(97) Having regard to the conclusion on the facts in those cases that the provisions of S. 37 (2) were not applicable , I find these decisions are of limited assistance in the task of construing the provision save that it would seem to follow from them that where a planning authority has refused permission on the basis that the proposed development contravenes the development plan but does not find that the contravention is a 'material' contravention, and the Board

concludes likewise or decides that a material contravention is not involved, the provisions of S. 37(2) (a) (b) and (c) have no application to the exercise by the Board of its jurisdiction to grant permission under S.37 (1) (b)".

69. In *South West Regional Shopping Centre v An Bord Pleanála* [2016] IEHC 84; [2016] 2 I.R. 481, Costello J. emphasised that it was fundamental to the PDA 2000 (and its predecessors) that appeals to the Board were heard *de novo* and made the following observation, having regard to the facts of that case, in relation to section 37(2)(b) of the 2000 Act, at paragraphs 94 and 95 of the court's judgment:

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

Rather, the provisions of this section are designed to limit the Board's jurisdiction to grant a permission in material contravention of the development plan where the Board itself forms the view that the proposed grant would materially contravene the development plan and the complex statutory procedure set out in section 34 has not been followed.

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

The Gaming and Lotteries Act 1956

70. On 18th January 2021, the Applicant wrote to the Planning Department of the City Council and *inter alia* stated that "[i]*t is my understanding that Gaming (Casinos) has been rescinded or is not allowed in Galway city*". In a similar vein, in his letter to the Board dated 23rd July 2021 the Applicant *inter alia* stated that "*I pointed out in my first observation, that Galway City had supposedly rescinded Amusement Arcades (Gambling in This Case) within the City. Finally, the 1956 Gaming and Lotteries Act was quoted in correspondence by the applicants and I would like to point out that it states that forms of entertainment other than gambling should be provided. I do not see any provision within the plan*".

71. The point was also made on behalf of the Board that the potential presence of gaming machines was the sum total of Mr. Freeney's objections to both the City Council and the Board, whereas in contrast a number of new and additional grounds were sought to be advanced in this judicial review, including, for example, the three questions in relation to the validity of the initial application before the Planning Authority, which go far beyond his initial submissions.

72. In addition, it was submitted on behalf of the Board, for example, that the argument made on behalf of the Applicant that the gaming machines were structures and therefore, were not correctly identified in the plans in the application thus rendering the application invalid, was made for the first time during this hearing and that a similar argument was rejected by this court (Humphreys J.) in *North Great George's Street Preservation Society v An Bord Pleanála & Ors* [2023] IEHC 241. In that case, it had been argued if an archway and side access formed part of a protected structure of a building, which was at issue in that case, then it necessarily followed that the planning application was void *ab initio* and that the Board had no jurisdiction to deal with it because of the failure to comply with the mandatory notice obligation under article 18(1)(d)(iii) of the PDR 2001.

73. Ultimately, Humphreys J. rejected that argument, holding *inter alia* that unless the issue – in that case in relation to the curtilage of a building – arose from the materials that were, or should have been, before the decision-maker, the decision-maker should have been afforded the opportunity to deal with it rather than it being raised for the first time before a court:

"*(59) The doctrine that the decision-maker should be given a fair chance to consider any relevant issue…*[12] *is flexible enough to allow for certain exceptions, where someone else has put the issue up or where the issue would be apparent to a reasonable expert body. But the doctrine is not infinitely flexible.*

(60) Nobody and certainly not this applicant made the specific argument that since No. 36 was a protected structure, No. 36a was protected as being either a part of it or within the curtilage of the main house (as opposed to the historic mews curtilage). So it isn't open to this applicant to complain that the [B]*oard didn't consider this point. The central case of gaslighting a decision-maker is failing to make a point that the decision-maker wasn't otherwise required to consider, either at all or in sufficiently specific terms, and then seeking to condemn the decision for failing to consider such a point. That, unfortunately, is what we are looking at here*".

74. In Mr. Freeney's case, the arguments at the hearing which were made for the first time in relation to the validity of the application but which were not captured in the Statement of Grounds are addressed later in this judgment, by reference to the judicial review principles adumbrated by Holland J. in *Environmental Trust Ireland v An Bord Pleanála & Others* [2022] IEHC 540. These principles share the same objectives as

[12] Humphreys J. referred to *Clonres CLG v An Bord Pleanála & Ors* [2021] IEHC 303 at paragraph 87; *Reid (No. 1) v An Bord Pleanála* [2021] IEHC 230 at paragraphs 15 and 16; and *Jahangir v Minister for Justice and Equality* [2018] IEHC 37 at paragraph 7.

those identified by Humphreys J. in *North Great George's Street Preservation Society v An Bord Pleanála & Ors* [2022] IEHC 540.

75. On 12th February 2021, a letter was furnished to the City Council's Planning Department by the developer's planning consultants, the second numbered paragraph of which *inter alia* stated that: "[g]*aming in Galway City – one observer refers to "gaming (casinos) being rescinded or not allowed in Galway city." The Applicant confirms that Galway City Council have a resolution in force adopting (on 8th September 1986) Part III of the Gaming and Lotteries Act, 1956 which has not been rescinded.*" Footnote 2 further states that "[i]*n any event, such is not a planning matter, but a licencing matter, separate to the planning code, and can be considered separately as per Section 34(13) of the Planning and Development Acts, 2000-2020. The Applicant is amenable to the inclusion of a condition of planning permission, requiring for instance that development not operate in the absence of Gaming Licence, and specifically prohibiting the sale or consumption of alcohol on the premises.*"

76. An Affidavit of Deirdre Courtney, Solicitor on behalf of the Applicant, sworn on 22nd March 2024 in addition to exhibiting such maps as were available, sought to take issue with the assertion that a resolution under the 1956 Act was in place at the location of Fairgreen House. The Board objected to reliance being placed on such objections including those which referenced the results of a law searcher being retained by Ms. Courtney.

77. The City Council have at all times been a notice party to these proceedings but had not participated until I requested clarification on this issue on the second day of the hearing, when counsel appeared on behalf of the City Council towards the close of that day's hearing. At that stage it was agreed by the parties that an affidavit from the City Council could be sworn clarifying the status of the location of the premises by reference to the 1956 Act and that I would receive this on a *de bene esse* basis and, if necessary, hear submissions from the parties. When the hearing resumed on 15th May 2024, an affidavit of Patrick Foley, an Administrative Officer with Galway City Council, was furnished and this *inter alia* set out the following at paragraphs 23, 24 and 25:

> "*(23) It would appear from the foregoing that in addition to certain individual premises, large open spaces around the city like South Park, Eyre Square and Fair Green were adopted under Part III of the 1956 Act in the 1950s to cover Circuses, Fairs and Amusements which were held in these locations from time to time. Unfortunately, there are no maps of the areas in question in the Minute Books so it is difficult to say definitively that Fair Green House is located in the area adopted.*
>
> *(24) As is apparent from the foregoing extracts from the Council Minutes, in the 1980s, Elected Members had concerns that abuses under the 1956 Act were occurring and the Members agreed that steps should be taken to rescind previous resolutions adopting Part III of the 1956 Act and of its intention to adopt Part III of the 1956 Act in respect only of premises in possession of licences.*

(25) There is no record, in any of the documents retrieved by the Council, of any resolution rescinding the resolution of the Council Members in 1956 to adopt Part III of the said Act for specified parts of the Administrative Area of Galway Corporation – including the "Galway Fair Green." As outlined above, unfortunately there was no map attached to the Council Minutes for the purposes of highlighting the areas adopted under the Act".

78. Section 34(13) of the PDA 2000 provides that "[a] *person shall not be entitled solely by reason of a permission under this section to carry out any development.*" Its predecessor provision, section 26(11) of the Local Government (Planning and Development) Act 1963, as amended, ("the 1963 Act") provided that "[a] *person shall not be entitled solely by reason of a permission or approval under this section to carry out any development.*"

79. Similar arguments to that made, on behalf of Mr. Freeney, as to the implication of the 1956 Act have been made in other planning cases.

80. In *Keane v An Bord Pleanála* [1998] 2 I.L.R.M. 241 at 246 and 247, for example, the Supreme Court (Keane J., as he then was),[13] before referring to the legal effects of section 26(11) of the 1963 Act, set out the arguments of the parties, in that case, as follows:

"*On behalf of the applicants, Mr. Iarfhlaith O'Neill SC submitted that it was clear from the decision of this Court in Frescati Estates v*

[13] Hamilton C.J. and Barrington J. concurring.

Walker [1975] I.R. 177 that neither a planning authority nor An Bord Pleanála had any jurisdiction to grant planning permission to an applicant who was incapable in law of carrying out the development. On behalf of the commissioners, Mr. Sreenan SC submitted that the decision in that case went no further than saying that an application for planning permission must have an estate or interest in the land which was the subject of the proposed development. It was clear from other provisions of the planning code that it might be necessary for an applicant, such as the commissioners, to obtain other consents before proceeding with the authorised development".

81. In the case before me (and as referred to earlier in this judgment), in the "*Assessment*" part of the October 2021 report, at paragraph 7.1.5, the Inspector states that "[a]*s regards hours of business, for which the applicant seeks no restrictions but suggests that the matter which is subject of the Gaming Licence which would be required, it is considered reasonable for restrictions on hours of operation, if determined to be warranted on planning grounds to be taken into consideration and if warranted, for conditions to be imposed in this regard. Matters as restriction of use to adults only and as to the sale of alcohol are licensing matters to be addressed under the separate licences to be obtained by the applicant. However, if warranted on planning grounds it would be reasonable, if permission is granted, to attach a condition omitting bar facilities and consumption of alcohol on the premises for the purpose of clarity and the amenities of the area by way of avoidance of potential for noise and disturbance within the public realm by patrons*".

82. The ‘planning merits’ of the ‘gaming use’ were further assessed by the Inspector in the Assessment section of the report at paragraph 7.1.4 as follows:

> “*It is not apparent from the planning officer report that a gaming business, with patrons using slot machines, which would come within recreational and leisure and entertainment would generate a serious problem of noise and disturbance within the immediate vicinity, particularly given that the mixed-use character of the area. Separately, it is not evident based on the information available that there is a basis for concern as to likelihood that the introduction of gaming or similar entertainment use which appears to be proposed would undermine, interfere with or adversely affect the operation of business by other tenants (such as a permitted café or gym at ground level and basement levels and current the Language School and daytime office uses in the building or residential development in the vicinity, for example at the Elms, to the south-east. In this regard it is of note that the site location is not an area in which night-time use such as nightclubs, entertainment bars and takeaway restaurants are clustered and predominant.*”

83. As mentioned, in *Keane v An Bord Pleanála* [1998] 2 I.L.R.M. 241 at 246 and 247, the Supreme Court set out the arguments of the parties and the effect of the predecessor section (section 26(11) of the 1963 Act) of section 34(13) of the PDA 2000.

84. The Supreme Court (Keane J., as he then was) confirmed that the fact that a further consent – (in the application before me this includes, for example, *inter alia* a certificate and a gaming licence under the 1956 Act) – may be required before a development can commence *does not prevent* the Board (or a planning authority) from granting the permission provided the requirements of the relevant planning legislation have been addressed:

> "*In many cases, including the present, a person who has been granted planning permission will be unable to proceed with the development until he has obtained a relevant permission. This may arise either as a matter of public law or private law. For example, a company may apply for permission for the erection of a hotel including bar and restaurant facilities. In terms of planning law, the grant of permission will authorise, not merely the construction of the building, but also its use as a hotel, restaurant and bar. As a matter of public law, however, that use cannot lawfully commence until such time as the necessary licences are obtained under the codes dealing with the licensing of bars and restaurants. Similarly, a fire safety certificate may be required under the Building Control Act, 1990 before any development can commence. As a matter of private law, the company may find, after permission has been granted, that the objects in its memorandum do not authorise it to carry on such a business and consequential amendments may have to be effected. Where the land is lease-hold, there may be covenants affecting the proposed development which may require the consent of the lessor to be obtained.*

The fact that such permissions or consents may be required before the development may lawfully commence does not preclude the planning authority, or An Bord Pleanála, from granting the permission, provided all the relevant requirements of the planning legislation are met. S.26(11) of the Local Government (Planning and Development) Act 1963 (hereafter 'Principal Act') acknowledges at least by implication that such further permissions under public or private law may be required by providing that: "A person shall not be entitled solely by reason of a permission or approval under this section to carry out any development."

The scheme of the legislation is clear. A planning permission does no more than assure the applicant that, quoad the planning legislation, his development will be lawful. The policy of the legislation is to ensure, not merely that harmful development is prevented, but that beneficial development takes place. An applicant who obtains permission but finds that he is unable to proceed with the development, for whatever reason, may dispose of his interest in the land to someone else who may be in a position to proceed with the development, as is made clear by s.28(5) of the Principal Act which provides, inter alia, that: 'Where permission to develop land …is granted under this Part of this Act, then, except as may be otherwise provided by the permission, the grant of permission shall enure for the benefit of the land or structure and of all persons for the time being interested therein".

85. The Inspector's Report dated in or around October 2021 recognises that whilst the planning code and, in this instance, the gaming and lotteries code, are separate and distinct, there can, of course, be interaction between them.

86. For example, in the "*Assessment*" section of the Inspector's report reference is made, in the context of the assessment of the City Council's planning officer that "[f]*urther clarification as to full details for the internal layout of the gaming area could be addressed by condition*" (paragraph 7.1.3), it was "*not evident based on the information available that there is a basis for concern as to likelihood that the introduction of gaming or similar entertainment use which appears to be proposed would undermine, interfere with or adversely affect the operation of business by other tenants*" (paragraph 7.1.4) and in relation to "*hours of business, for which the applicant seeks no restrictions but suggests that the matter which is subject of the Gaming Licence which would be required, it is considered reasonable for restrictions on hours of operation, if determined to be warranted on planning grounds to be taken into consideration and if warranted, for conditions to be imposed in this regard*" (paragraph 7.1.5).

87. In addition, in terms of the proposed conditions recommended at paragraph 10 of the Inspector's report, proposed condition 4 states that "[p]*rior to the commencement of the development, the applicant shall submit and agree with the planning authority, a floor plan at a scale of not less than 1:100 showing full details of the internal layout for the proposed gaming use and full details of the machines to be installed for use by patrons. No additional mezzanine floor gaming use shall be permitted unless authorised by a prior grant of planning permission. Reason: In the interest of clarity*",

and proposed condition 11 states that "[n]*otwithstanding the exempted development provisions of the Planning and Development Regulations, 2001, and any statutory provision amending or replacing them, the use of the proposed development shall be restricted to gaming use as specified in the lodged documentation, unless otherwise authorised by a prior grant of planning permission. Reason: In the interest of residential amenity.*"

88. In *In re Tivoli Cinema Ltd* [1992] 1 I.R. 412, at pages 418-419, in proceedings which related to an appeal brought by local residents against a Circuit Court Order granting to the operators a certificate under section 3 of the Licensing (Ireland) Act 1902 in the context of the refurbishment of a former cinema on Francis Street, in Dublin city and its use as a theatre with a limited wine licence, one of the objections made by the residents, which has similarities to that raised on behalf of Mr. Freeney, was described and addressed by this court (Lynch J.) as follows:

> "*The premises have been constructed in accordance with planning and bye-law requirements. The point made however is that such approval is for use only of the existing bar on the mezzanine floor as a bar and that no other part of the premises has approval for such use. The area of such bar is only 810 square feet whereas the remainder of the theatre has an area of 9,763 square feet including staircases, stage, toilets etc. The intoxicating liquor licence is being sought for the whole of such premises. The reason for seeking a licence for the whole theatre is to comply with garda requirements that the gardaí should have proper and effective rights of entry and inspection to ensure that the licensing laws are being observed.*

Neither the garda authorities nor the local authorities nor fire authorities have any objection to the application. I have come to the conclusion that this ground of objection must fail. The planning code and the licensing code are separate and distinct codes of law and the fact that the area to be licensed may exceed that authorised for use as a bar by the planning permission does not prevent the licence from being granted for the greater area. However a use of any part of the premises other than the bar for supplying and/or consuming intoxicating liquor would involve an unauthorised use of such other part of the premises which could be restrained under the planning code and might then be used as a ground of objection to renewal of the licence if such wrongful use were to be allowed by the applicant".

89. As mentioned earlier, under the sub-heading "*Assessment*", beginning at paragraph 7 (page 11) of the Report dated October 2021, the Inspector addressed the merits of, for example, of the impact of the development on amenities. At paragraph 7.1.4 of the Report, the Inspector stated that "[i]*t is not apparent from the planning officer report that a gaming business, with patrons using slot machines, which would come within recreational and leisure and entertainment would generate a serious problem of noise and disturbance within the immediate vicinity, particularly given that the mixed-use character of the area. Separately, it is not evident based on the information available that there is a basis for concern as to likelihood that the introduction of gaming or similar entertainment use which appears to be proposed would undermine, interfere with or adversely affect the operation of business by other tenants (such as a permitted café or gym at ground level and basement levels and current the Language*

School and daytime office uses in the building or residential development in the vicinity, for example at the Elms, to the south-east. In this regard it is of note that the site location is not an area in which night-time use such as nightclubs, entertainment bars and takeaway restaurants are clustered and predominant".

90. In considering the submissions made on behalf of the Applicant and the expressed preference for the approach of the planning authority and the planning officer of the City Council to this application for a change of use, it must be recalled that when a matter is appealed to the Board, section 37(1)(b) of the PDA 2000 provides that "[s]*ubject to paragraphs (c)*[14] *and (d)*[15]*, where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given; and subsections (1), (2),(3), (4),and (4A) of section 34 shall apply, subject to any necessary modifications, in relation to the determination of an application by the Board on appeal under this subsection as they apply in relation to the determination under that section of an application by a planning authority*".

[14] Section 37(1)(c) of the PDA 2000 provides that "[p]*aragraph (b) shall be construed and have effect subject to sections 133, 138 and 139*." Section 133 of the PDA 2000 deals with the consideration by the Board of further information after a notice has been served requesting submissions or observations. Section 138 of the PDA 2000 deals with the Board's power to dismiss appeals or referrals if they are vexatious. Section 139 of the PDA 2000 deals with appeals against conditions.

[15] Section 37(1)(d) of the PDA 2000 provides that "[i]*n paragraph (a) and subsection (6), "the appropriate period" means the period of four weeks beginning on the day of the decision of the planning authority*."

91. The Board considered, having regard to the overall planning assessment of the Inspector, including, for example, the impact on amenities as set out above in paragraph 7.1.4 that in deciding to omit the temporary condition proposed by the Inspector, the proposed development would be effectively regulated through the function of the necessary licensing provisions for the development. The application of section 34(13) of the PDA 2000, in these circumstances, means that the operation of the development as proposed is conditional upon the necessary resolutions, certificates and licences being issued under the 1956 Act. Whether or not the requisite components under the 1956 Act are in place for that to happen does not detract from the Board's assessment of the proposed development *qua* planning but may, of course, have implications for the operation and use of the building in the manner envisaged. The 1956 Act, for example, is *layered* in the sense of requiring a number of *consequential and conditional actions* for gaming to be deemed lawful including *inter alia*: (i) a necessary resolution of the elected members of the City Council under Part III of the 1956 Act to permit the operation of gaming at a particular location in its functional area; (ii) consequent upon that resolution, the District Court has jurisdiction to grant a certificate authorising the issuing of a gaming licence and the imposition of conditions; and (iii) the Revenue Commissioners are then required to grant a gaming licence, which is considered on an annual basis, on payment of the appropriate excise duty.

92. These requirements – and the Board's awareness, or lack of awareness, of the details of such matters or whether or not they are in place and applicable at Fairgreen House, Fairgreen Road/Bothar Pairc An Aonaigh, Galway – does not detract from the planning assessment which took place or render the decision of the Board *ultra vires.*

Irrelevant and relevant considerations

93. This issue also arose in the context of the Applicant's claim that the Board considered irrelevant matters. At pages 8 and 9 of the Statement of Grounds, the following is pleaded:

> "*The Respondent Planning Appeal Board had regard to inappropriate and irrelevant matters in its consideration particularly having regard to its consideration of gaming in Galway City which was relied upon by the Respondent at paragraph 7.1.5 of the Inspectors Report of the Respondent. The submission of the Notice Party under paragraph 3 of its response to further information of 15th February 2021 stated that "the Applicant confirms that Galway City Council have a resolution in force adopting (on 8th September 1986) Part 3 of the Gaming and Lotteries Act, 1956 which has not been rescinded." There was no evidence that the lands, the subject matter of the application were designated and evidence was submitted by the developer other than a mere assertion.*
>
> *The said submission represented that the lands the subject matter of the application are designated under the Gaming and Lotteries Act but this appears not to be the case and this site, which requires to be specifically designated under the approach adopted by the City Council, has not been so designated.*
>
> *The absence of any designation and or any evidence of the said designated* [sic.] *was required to be considered in the interpretation of*

the zoning provision which in the absence of any designation under the Gaming and Lotteries Act is a relevant consideration in interpreting the zoning provision, and whether the use of gaming machines is a use consistent with the zoning in circumstances where that particular use is for gaming and gambling machines is specifically excluded having regard to the provisions of the Gaming and Lotteries legislative scheme and which prohibition was in place at the date of the adoption of the zoning, and both of which functions are reserved to the elected members, particularly in circumstances where this use is not specifically identified and cannot as a matter of law be constructed as being included in the zoning objective CC.

The Respondent Planning Appeals Board at paragraph 7.1.5 of the Inspector's Report relied on the activity being regulated and/or being the subject matter of a gaming licence and/or the licensing and/or the licensing laws and on that basis considered that it would not be appropriate notwithstanding that hours of operation are not a normal planning consideration to impose any such limitation".

94. The Inspector set out at paragraph 7.1.5 of her October 2021 report that "[a]*s regards hours of business, for which the applicant seeks no restrictions but suggests that the matter which is subject of the Gaming Licence which would be required, it is considered reasonable for restrictions on hours of operation, if determined to be warranted on planning grounds to be taken into consideration and if warranted, for conditions to be imposed in this regard. Matters as restriction of use to adults only*

and as to the sale of alcohol are licensing matters to be addressed under the separate licences to be obtained by the applicant. However, if warranted on planning grounds it would be reasonable, if permission is granted, to attach a condition omitting bar facilities and consumption of alcohol on the premises for the purpose of clarity and the amenities of the area by way of avoidance of potential for noise and disturbance within the public realm by patrons".

95. I have already addressed the legal consequences of the 1956 Act earlier in this judgment. Further, I consider that the Inspector and also the Board addressed the planning merits of this application for a change of use and related works. I do not consider that the Inspector or the Board abdicated their respective functions *qua* planning to the licensing process envisaged under the 1956 Act.

Floor Plans & Articles 22(4)(b)(1) and (2) of the PDR 2001

96. To recap, it was sought to be argued that the application for planning permission was invalid because of the developer's alleged failure to comply with Articles 22(4)(b)(1) and (2) of the PDR 2001 in that the site layout plan did not show the structures which were to be removed and the structures which were to be retained and that the floor plans were inadequate because they were 'indicative'.

97. Article 22 of the PDR 2001 provides for the content of planning applications generally. Article 22(4)(b)(1) and (2) of the PDR 2001 provides that "[s]*ubject to Articles 24 and 25 – a planning application for any development consisting of or mainly consisting of the making of any material change in the use of any structure or other land, or for the retention of any such material change of use, shall be*

accompanied by- (i) a statement of the existing use and of the use proposed together with particulars of the nature and extent of any such proposed use, (ii) where the development to which the application relates comprises the carrying out of works on, in, over or under the structure or other land, 6 copies of such plans (including a site or layout plan and drawings of floor plans, elevations and sections which comply with the requirements of article 23), and such other particulars, as are necessary to describe the works proposed, and (iii) such plans and such other particulars as are necessary to identify the area to which the application relates."

98. Article 23 of the PDR 2001 deals with the requirements for particulars to accompany an application under Article 22 of the PDR 2001 and *inter alia* provides that "[p]*lans, drawings and maps accompanying a planning application in accordance with Article 22 shall all be in metric scale and comply with the following requirements: …(e) plans relating to works comprising reconstruction, alteration or extension of a structure shall be so marked or coloured as to distinguish between the existing structure and the works proposed*".

99. The first reference to the issue is on page 7 of the Applicant's Statement of Grounds,[16] which *inter alia* states that "[t]*he plans for particulars lodged were entirely inadequate with no or no adequate layout of the proposed development having been submitted and where* [P]*art 6 of the application lodged was for the internal*

[16] The copy of the Statement of Grounds document referred to at the hearing and referenced in this judgment was that as agreed between the parties during the hearing and was numbered from pages 2 to 12 and on its front page had the stamp '*Cancelled dated 21/12/2021 and signed*.'

configuration. In those circumstances the application failed to comply with Articles 22 & 23 of the Planning and Development Regulations and was invalid".

100. The second reference is found at page 10 (paragraph 3 of the Legal Grounds) of the Statement of Grounds. It states that:

> "*(3)The proposed development fails to comply with the mandatory requirements of* [the PDR 2001] *and in particular –*
>
> *(i) The Notice published does not describe the nature and extent of the activities and in particular the reference to "gaming use" does not describe the nature or the extent of the proposed development. The Notice should have specified the nature of the gaming activity that would be carried out and in particular the use of amusement and/or slot machines and the number of such machines to be installed as is required under the requirement, in a public Notice to describe both the nature and extent of the development.*
>
> *(ii) Provide appropriate layout plans showing the distribution of the said amusement/slot machines within the said premises at an appropriate scale.*
>
> *(iii) Show, by use of appropriate colours or hatching, the works that were intended to be carried out both by way of a description on the plans and by way of elevations, plans and sections*
>
> *– and in the absence of these details the application lodged does not comply with the mandatory requirements of the Planning and Development Regulations 2001 (as amended) and in particular Article 18 to 23 of the said Regulations. The said application does not*

amount to a valid application for the purposes of the Planning and Development Act (as amended) and the Regulations made thereunder."

101. In addition to the authorities and Rules of Court referred to earlier, the principles to be applied when considering whether or not arguments made in a judicial review application have been captured by 'the pleadings' were addressed by this court (Holland J.) in *Environmental Trust Ireland v An Bord Pleanála & Others* [2022] IEHC 540 where, at paragraph 211, Holland J. observed that O. 84, r. 20(3) RSC 1986 "*requires that an applicant for judicial review state precisely each ground of challenge, giving particulars where appropriate, and identify in respect of each ground the facts or matters relied upon as supporting that ground. Order 84, rule 23(1) provides that no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement of grounds.*"

102. In paraphrasing the extract of the judgment of Holland J. (who referenced a number of decisions of the Superior Courts), the following extensive principles (some of which overlap) were emphasised at paragraphs 212 to 215 of his judgment in *Environmental Trust Ireland v An Bord Pleanála & Others*:

- the pleading rules in judicial review are strict and necessary;
- it is essential that an applicant for judicial review sets out clearly and precisely each and every relief sought and the grounds upon which they are sought;
- there is an absolute necessity for a precise defining of the grounds which are required to be set out in the Statement of Grounds themselves and not in a replying affidavit;

- the rules are stringent and allows little room for manoeuvre after leave to seek judicial review has been granted;
- the Statement of Grounds defines the scope of the claim made and fixes both issues and evidence in the dispute as between the parties and the parameters of the review to be carried out by the court of the legality of the decision under challenge and the court's jurisdiction and, in this sense, the Statement of Grounds is considered a 'pleading';
- the definition of issues by pleadings and limiting the evidence only to those issues is particularly important in judicial review, which is a powerful weapon of review of administrative action;
- having regard to the requirement to obtain leave to bring judicial review on the grounds pleaded, the requirement for clarity and specificity in pleadings and the extent to which the statement of grounds defines and confines the issues to be determined at trial could be regarded as stricter than in other types of proceedings;
- the relevant jurisprudence would suggest that the High Court is not entitled to determine a point for which leave has not been granted, which was not pleaded, where no application was made to amend pleadings, and where no consideration was given before the point was argued as to whether the time limits in judicial review, or other gateway requirements might be a bar to relief;
- the order giving leave to seek the various reliefs on the grounds set out in the Statement of Grounds is what determines the jurisdiction of the court to conduct the review;

- the pleading rules apply with even greater force in a planning judicial review having regard to section 50A(5) of the PDA 2000 which provides that if a court grants leave to apply for judicial review in respect of a planning decision, no grounds shall be relied upon in the application for judicial review under O. 84 RSC other than those determined by the court to be substantial under section 50A(3)(a) of the PDA 2000 on the application for leave;
- the pleading rules are particularly important in the judicial review of AA issues as such cases involve issues of very considerable complexity and give rise to issues under EU Directives, such as the Habitats Directive and the EIA Directive and it is particularly important in those types of cases, involving such complex issues, that the applicant's case is clearly and precisely pleaded;
- a party can only pursue grounds set out in his or her pleadings;
- a party cannot introduce new grounds of claim or opposition by affidavit; and
- any new grounds or reliefs have to be sought by amendment of the statement of grounds and likewise for any new points of opposition.

103. When applied to the facts of *Environmental Trust Ireland v An Bord Pleanála & Others*, Holland J. observed at paragraph 216 of the judgment that "[o]*f course, a case coming within a "fair and reasonable reading" of the pleadings should not be excluded – St. Audoen's*[17]*. But I do not see that such a reading avails ETI here to allow it to run a case, based on inadequate identification of the hydrological route and/or ignoring other possible such routes, which simply wasn't pleaded, even though the point had been expressly made in ETI's submission to the Board*".

[17] *The Board of Management of St. Audoen's National School v An Bord Pleanála* [2021] IEHC 453 (Simons J.).

104. In a similar vein, the following principles were identified by the Supreme Court (Murray J.) in *Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála & Ors* [2024] IESC 28 and discussed at paragraphs 41, 42 and 43 of the court's judgment:

- the Statement of Grounds required to initiate an application for leave to seek judicial review must identify the relief sought, and the "*particular grounds upon which each such relief is sought*" (O. 84, r. 20(2)(ii) RSC 1986);
- it is not sufficient for these purposes to give as a ground "*an assertion in general terms of the ground concerned*", but must "*state precisely each such ground*"(O. 84, r. 20(3) RSC 1986);
- a Statement of Grounds may be amended both at the time of the leave application (O. 84, r. 20(4) RSC 1986) or thereafter (O. 84 r. 23(2) RSC, 1986), but absent such an amendment the Rules are emphatic in their stipulation that "*no grounds shall be relied upon or any relief sought at the hearing except the grounds and relief set out in the statement*"(O. 84 r. 23(1) RSC 1986);
- It is because of these provisions that it has been stressed that judicial review is a procedure in which "*leave must be sought in relation to specific reliefs aimed at specific decisions, on specific grounds*" (*Khashaba v Medical Council* [2016] IESC 10 (per O'Malley J. at paragraph 56);

105. The Supreme Court (Murray J.), citing the observations of that court in *Casey v Minister for Housing, Planning and Local Government* [2021] IESC 42 per Baker J. at paragraphs 29-32 of her judgment, stressed the importance of the manner in which

a claim was pleaded and the strictness with which that requirement will be enforced. The contours of a case were defined by the pleaded case as per O. 84 r. 20(3) RSC 1986 (this was particularly so where there was a claim of a failure to transpose an obligation of EU law: see *Sweetman v An Bord Pleanála* [2020] IEHC 39 per McDonald J at paragraph 103 per McDonald J.). In *Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála & Ors* [2024] IESC 28, Murray J. described the onus on the parties in a judicial review application as follows at paragraph 43 of his judgment:

> "*The parties are expected to identify the alleged legal frailties in a challenged decision before they seek leave for judicial review and, where they have not done so in some respect and the justice of the case so requires, the Court may in certain circumstances enable the pleadings to be amended (the Appellant has never applied to either amend its pleadings, or to seek permission to argue new points on appeal).The purpose of proceedings by way of judicial review is thus to enable a party who has identified a legal error in a decision of, or process undertaken by, a public body to challenge the legality of that decision on the basis thus identified. The grant of leave is the extension of a permission to pursue that ground of challenge, not the opening of an investigation into whether the decision or process is unlawful on any grounds that might subsequently present themselves in the course of the ultimate hearing of the matter*".

106. In Mr. Freeney's case, the focus of the grounds as pleaded is on the distribution of the slot machines on the plans and the scale of the plans. There is not, however, any reference to structures or to the question of structures (which are referred to on behalf of the Applicant as the 'gaming machines') being removed or installed, which is the essence of the complaint made in oral argument at the hearing on behalf of the Applicant. There is no specific reference to Article 22(4)(b)(2) of the PDR 2001, again relied upon in argument at the hearing, and the reference in the Statement of Grounds is generally to articles 18 to 23 of the PDR 2001. Further, in relation to the grounds which *are* pleaded the maps and plans exhibited are properly coloured (new works in pink and change of use in green) and set out and identify, for example, works in the lobby and carpark and the change of use.

107. Accordingly, such arguments made on behalf of the Applicant which are not captured by the Statement of Grounds fail to comply with the principles identified by Holland J. in *Environmental Trust Ireland v An Bord Pleanála & Others* and more recently by the Supreme Court (Murray J.) in *Concerned Residents of Treascon and Clondoolusk v An Bord Pleanála & Ors* [2024] IESC 28 and the requirement of notifying the *legitimus contradictor* – in this case, the Board – of the actual case they are required to meet.

108. Additionally, as it is entitled to do so, in its decision dated 1st November 2021, the Board included a condition (at condition 3) which addressed the issue of floor plans as follows: "[p]*rior to the commencement of the development, the applicant shall submit to, and agree in writing with, the planning authority, a floor plan at a scale of not less than 1:100 showing full details of the internal layout for the proposed gaming use and*

full details of the machines to be installed for use by patrons. Reason: In the interest of clarity."

109. This is consistent with the decision of the Supreme Court in *Boland v An Bord Pleanála* [1996] 3 I.R. 435 where Hamilton CJ. discussed the rationale of such conditions at 466-467 of the judgment, as follows:

> "*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.*"

110. Even leaving aside the pleading objections, the decisions in *Sweetman v An Bord Pleanála* [2021] IEHC 390 and *Quinn v An Bord Pleanála* [2022] IEHC 699, relied upon on behalf of the Applicant, concerned proposals in relation to wind farm developments. In the *Sweetman* case, for example, the dimensions of the proposed turbines were based on a "*dynamic range of dimensions*" and this "*widely-variable-design application*" did not meet the required plans and particulars required by the PDR 2001 or the "*Rochdale envelope*" (described by Humphreys J. at paragraph 61 of his judgment in *Sweetman v An Bord Pleanála* [2021] IEHC 390, *inter alia*, as "*an application for development consent that is of variable dimensions up to a specified maximum*": see the judgment of Holgate J. in *R v Rochdale Metropolitan Borough Council ex p Milne* [2001] Env. L.R. 406), in particular in assessing the height of these structures from the ground and there is no comparison with this and the layout of slot machines in this application.

Public Notices

111. It was contended on behalf of the Applicant that the reference to 'gaming' was amorphous and did not explain what the activity was, and, for example, the Planning Authority was required to look for FI.

112. Article 26 of the PDR 2001 deals with the procedure on receipt of a planning application and provides that "[w]*here, following consideration of an application under sub-article (1), a planning authority considers that (a) any of the requirements of articles 18, 19(1)(a) or 22 and, as may be appropriate, of Article 15J, 24 or 25 has not been complied with, or (b) the notice in the newspaper or the site notice, because*

of its content or for any other reason, is misleading or inadequate for the information of the public, the planning application shall be invalid."

113. Article 26(5) of the PDR 2001 *inter alia* requires a planning authority shall as soon as may be after receipt of an invalid application - (a) by notice in writing - (i) inform the applicant that the application is invalid and cannot be considered by the planning authority, (ii) indicate which requirements of the permission regulations have not been complied with, and (iii) request the applicant to remove the site notice or notices erected or fixed pursuant to article 17(1)(b); (b) return to the applicant the planning application, including all particulars, plans, drawings and maps, and (c) enter an indication on the register that an invalid application has been made.

114. Article 18 of the PDR 2001 deals with the requirements of a newspaper notice and article 19 of the PDR 2001 deals with the requirements in relation to a site notice.

115. Article 18 of the PDR 2001 provides that a notice published in accordance with article 17(1)(a) shall be published in a newspaper approved for this purpose in accordance with sub-article (2), shall contain as a heading the name of the planning authority to which the planning application will be made and shall state (a) the name of the applicant, (b) the location, townland or postal address of the land or structure to which the application relates (as may be appropriate), (c) whether the application is for permission for development, permission for retention of development, outline permission for development or permission consequent on the grant of outline permission (stating the reference number on the register of the relevant outline permission), (d) a brief description of the nature and extent of the development,

including – (i) where the application relates to development consisting of or comprising the provision of houses, the number of houses to be provided, (ii) where the application relates to the retention of a structure, the nature of the proposed use of the structure and, where appropriate, the period for which it is proposed to retain the structure, (iii) where the application relates to development which would consist of or comprise the carrying out of works to a protected structure or proposed protected structure, an indication of that fact, (iv) where the application relates to development which comprises or is for the purposes of an activity requiring an integrated pollution control licence, an industrial emissions licence or a waste licence, an indication of that fact, (v) where a planning application relates to development in a strategic development zone, an indication of that fact, (vi) where the application relates to an LRD, an indication of that fact and include the web address referred to in Article 20A, and (e) that the planning application may be inspected, or purchased at a fee not exceeding the reasonable cost of making a copy, at the offices of the planning authority during its public opening hours and that a submission or observation in relation to the application may be made to the authority in writing on payment of the prescribed fee within the period of 5 weeks beginning on the date of receipt by the authority of the application.

116. In this case, the application form completed by the developer required at paragraph 7 a '*description of proposed development*' and a '*brief description of nature and extent of development*', which was completed as follows: "*Permission for development for change of use of ground floor unit from (permitted) retail to gaming use at Fairgreen House, Fairgreen Road/Bothar Pairc An Aonaigh, Galway City. The proposed development also includes internal reconfiguration and fit out, construction of access*

and associated lobby area to existing adjoining multistorey car park, external signage and branding, and all associated and ancillary works and development."

117. The application form completed by the developer described at paragraph 19 'Details of Public Notice' as follows: "[a]*pproved newspaper in which notice was published: Galway City Tribune. Date of publication: Friday, 18th December 2020. Date on which site notice was erected: Friday, 18th December 2020. Note: the planning application must be made within 2 weeks of publication of newspaper notice.*"

118. In addition, the layout of the proposed development and requisite details of the works and change of use are fully set out in both the initial planning application drawing (Drawing No. 60002-PA-003) and the FI drawing (60002 -PA-FI-003) ('Existing and Proposed Plans & Elevations' from Cronin Architects) both endorsed with the Board's date stamp of 7th July 2021, properly coloured, containing the requisite information and legend referring to the area of application, the proposed change of use to existing unit and proposed area (of the new build). Reference is also made to '*indicative arcade fit-out*' on these drawings.

119. In *Byrnes v Dublin City Council* [2017] IEHC 19, this court (Baker J.) rejected an argument that that the public notices published and posted by the Council failed to comply with section 179(2)(a) of the PDA 2000 and article 81 of the PDR 2001 by being too broad and general in their description, and failed to identify the full extent of the change of use intended at Longfield House at Fitzwilliam Street Lower, Dublin 2 from a former hotel to supported temporary accommodation for single persons and

couples comprising a total of 30 bedspaces and common living and support rooms to be operated by the Dublin Simon Community.

120. After reviewing the leading authorities, including *Monaghan Urban District Council v Alf-a-BET Promotions Ltd* [1980] I.L.R.M. 64, *Crodaun Homes v Kildare County Council* [1983] I.L.R.M. 1, *Blessington & District Community Council Ltd v Wicklow County Council* [1997] 1 I.R. 273, *Ratheniska Timahoe and Spink Substation Action Group & Anor v An Bord Pleanála* [2015] IEHC 18 and having regard to the guidelines for planning authorities published by the Department of the Environment Heritage & Local Government in June, 2007 which at paragraph 3.4 dealt with the purpose of site notices, Baker J. referred to the purpose of the public notices, at paragraphs 80 and of her judgment, as follows:

> "*(80) In the light of the authorities, what is envisaged by the legislation is that a notice should alert a vigilant or potentially interested party to the general nature of what is proposed. While the guidelines issued by the Department of the Environment do not have statutory force, albeit they are issued under a statutory power, they correctly identify the various objectives that need to be achieved, and the importance of having a sufficiently clear but not over detailed notice, which is likely to inform but not confuse, a potentially interested person. A notice must be site and development specific, it must alert the persons who are likely to be interested in that particular development as to the general nature of the development proposed, be sufficiently concrete to raise an interest or concern as to the development, and invite further queries and inspection of the*

detailed documents. The intention is to give sufficient information to lead a person to make enquiries and thereafter to consider whether to make objection to the proposed development. The notice is not intended to be or comprise all of the information on foot of which an objection would be framed, or to inform a person who is wholly ignorant of the character of an area…"

…(81) I consider it relevant that the applicant has not said on affidavit that he personally was misled by the notices. I have read the submissions made by other interested parties and each of them contains arguments of the class made by Mr. Byrnes with regard to the suitability of the area and/or buildings for the class of supported accommodation intended. These parties appear to have had sufficient knowledge of the type of accommodation proposed to make submissions with regard to its suitability having regard to the particular character of the area".

121. In my view, and paraphrasing the observations of the High Court (Baker J.) in *Byrnes v Dublin City Council* [2017] IEHC 19, the notices in the case before me were adequate in the detail and description of the proposed change of use and this was evidenced by the submissions made in the planning process. Notwithstanding the argument which is now made on behalf of the Applicant that the notices did not contain an express reference to the 1956 Act, in his submissions to both the City Council and to the Board, the Applicant expressed his objections in relation to gaming and was in no sense misled or prejudiced by the notices and made no complaint in relation to the notices.

122. In *Dunne and MacKenzie v An Bord Pleanála* [2006] IEHC 400 (referred to earlier) which concerned the omission of a balcony from a proposed development which included demolition on the site of the former Chester Beatty Library on Shrewsbury Road, Dublin 4, this court (McGovern J.) rejected two arguments in relation to the site notice in that case, namely that the site notice was not erected in sufficient time and should have been on a yellow background and stated that he was *inter alia* satisfied that there was no prejudice to the applicants because they knew in sufficient time of the development and were able to make objections before the planning authority and, on the facts of that case, subsequently appeal the matter to the Board.

123. As mentioned, in the application before me, the Applicant raised no issues in relation to the site notice or the newspaper notice and clearly, he has knowledge of the issues involved in gaming. The City Council's planners report also addressed the nature of the intended gaming and the site notice directed the Applicant to the City Council's planner's report.

Screening for AA – the pleaded case

124. The Board's Direction dated 29th October 2021 made it clear that by a majority of 2:1, it had decided "*to grant permission generally in accordance with the Inspector's recommendation*".

125. At pages 12 and 13 of her report, the Inspector addresses "*Environmental Impact Screening*" at paragraph 7.1.6 and "*Appropriate Assessment Screening*" at paragraph 7.1.7.

126. In relation to the latter, the Inspector finds that "[h]*aving regard to and to the nature of the proposed development and the serviced inner urban site location, no Appropriate Assessment issues proposed development would not be likely to have a significant effect individually or in combination with other plans or projects on a European site.*"

127. On behalf of the Applicant, criticism is made of the syntax used in this paragraph by the Inspector. Whether or not the word '*arise*', or the coordinating conjunction '*and the*' or indeed a comma, were omitted so that the sentence should read "*no Appropriate Assessment issues arise, and the*", adopting and paraphrasing the observations of Barniville J. (as he then was) in *Eoin Kelly v An Bord Pleanála & Anor* [2019] IEHC 84 at paragraph 100 of the court's judgment, consideration should be given to "*the substance of the screening report and the inspector's report rather than to focus on the particular use or rather non-use of certain words*".

128. In *South West Regional Shopping Centre v An Bord Pleanála* [2016] IEHC 84; [2016] 2 I.R. 481, (referred to earlier) Costello J. observed (at paragraph 135) (in the context of an EIA) that "[i]*t is clear that the question as to whether or not an EIA was required was raised in the papers before the Board. It was thoroughly addressed in the Inspector's Report. The Board adopted the Inspector's Report. It is well-established that a court may impute the reasons set out in an inspector's report to the Board where the Board accepts the recommendations of the Inspector and does not differ from the inspector's report in reaching its decision. In those circumstances, I am satisfied that the Board carried out a proper screening as required by the provisions*

of Class 13(c) and Class 14 in this case, reaching the decision on the basis of its expertise and within its jurisdiction that no EIS (and thus no EIA) was required and a decision to that effect was available to the public".

129. In *Redrock Developments Limited (In Voluntary Liquidation) & Belcarrig Quarries Ltd v An Bord Pleanála* [2019] IEHC 792, Faherty J. quoted the above extract at paragraph 132 of her judgment before adding at paragraph 133 that she accepted "*the above dictum as support for the proposition that there is no requirement for the Board in its decision to specifically say that it carried out an EIA, once it is discernible that the requisite exercise was carried out. This is also clear from the dictum of Barrett J. in Board of Management of Temple Carrig Secondary School v An Bord Pleanála [2017] IEHC 452: -"Planning decisions are not a form of incantation whereby a valid planning permission is conjured up solely through the recitation of a particular form of words; a court must be attentive to the substantive truth of matters presenting in any one set of proceedings ... An Bord Pleanála, on the facts as described, has clearly done what is required of it at law, and has clearly stated what it has done, even if it has not done so in the form that Temple Carrig contends for.*"

130. In *Ardragh Windfarm Limited v An Bord Pleanála* [2019] IEHC 795, Simons J. applied these authorities to circumstances, analogous to the Board's decision in the application before me, where the Board's direction dated 2nd July 2014 in that case referred *inter alia* to "[t]*he Board, by majority of 2:1, decided to refuse permission generally in accordance with the Inspector's recommendation*", Simons J. referred to the fact that while many of the authorities cited referred to a context where the formula of words used by An Bord Pleanála fell short of formally of "*adopting*" the

Inspector's report, the term "*generally in accordance with the Inspector's recommendation*" was held to be sufficient and he referred to the following extract from *Buckley v An Bord Pleanála* [2015] IEHC 572, where at paragraphs 117 and 118, Cregan J. observed as follows:

> "*(117) On the facts of the present case, it is clear that the inspector carried out an Environmental Impact Assessment. Indeed the Applicant accepts that were this 'adopted' by the Board then its argument would fall away. In circumstances however, where the Board in its decision, at the very outset, stated that it decided to grant permission 'generally in accordance with the inspector's recommendations for the following reasons and considerations and subject to the following conditions' and that it had regard to 'the report of the inspector' and that it adopted all 25 conditions in the Inspector's Report, I am of the view that it is clear that the Board did 'adopt' the Inspector's Report and carry out an appropriate EIA in accordance with its statutory obligations.*
>
> *(118) I would therefore conclude that the Applicants' submission in this regard is not well founded*".

131. Further, in *Ardragh Windfarm Limited v An Bord Pleanála* [2019] IEHC 795, Simons J., commencing at paragraph 45 of the judgment, also considered and applied the judgment of the Supreme Court in *Connelly v An Bord Pleanála* [2018] IESC 31; [2021] 2 I.R. 752, and held at paragraph 52 of his judgment that "[a]*pplying these principles to the facts of the present case, I am satisfied, first, that it is appropriate to read the formal board decision in conjunction with the inspector's report; and,*

secondly, that the recording of the EIA and the reasons for the decision to refuse planning permission by reference to the significant negative impacts of the proposed development are to be found in these materials".

132. The Applicant's challenge to this part of the Board's decision must be seen through the prism of the Statement of Grounds. Having regard to the caselaw set out earlier in this judgment, in relation to pleading requirements in the context of judicial review applications, the Applicant is not entitled to argue that the screening for AA was inadequate because of what was contended, at the hearing of this matter, to be an alleged lack of intelligible reasons. Further, I do not accept that this criticism has been, in any event, established on behalf of the Applicant such as to render the screening process inadequate or the decision of the Board unlawful.

133. In paragraph 4 (page 10) of the Legal Grounds in the Statement of Grounds the Applicant states that the Board "*erred in law and acted contrary to the requirements of Council Directive 92/43/EEC in failing to carry out a screening for Appropriate Assessment ("AA") and/or an AA for the purposes of the Directive and/or failing to direct its mind to its obligations under the requirements of that provision prior to the determination of the application.*" In paragraph 5 (pages 10 and 11) of the Legal Grounds in the Statement of Grounds, the Applicant states that the Board "*insofar as it purports to rely on the Inspector's report in respect of and coherence with the requirements and Council Directive 92/43 EEC failed to carry out screening for AA in accordance with the requirements of Council Directive 92/43/EEC as the said assessment set out at paragraph 7.1.7 of the Inspector's report is not a screening assessment for the purposes of the said Directive*." In paragraph 6 (page 11) of the

Legal Grounds in the Statement of Grounds, the Applicant states that the Board "*by virtue of the failure to submit appropriate plans and particulars detailing the development which is explicitly acknowledged insofar as these obligations are the subject matter of conditions could not in the light of the extent of the information provided have carried out an AA screening that would comply with the requirements of Council Directive 92/43/EEC and in those circumstances the* [Board] *failed to ensure that the information submitted was adequate for the purposes of complying with its statutory obligations in that regard.*"

134. As referenced earlier, in *Eoin Kelly v An Bord Pleanála & Anor* [2019] IEHC 84, at paragraph 98 of the court's judgment, Barniville J. (as he then was) considered that the essential test was whether the particular development was likely to have a significant effect on a European site, either individually or in combination with other plans or projects, it must be subjected to appropriate assessment. Equally, if the development was not likely to have a significant effect on a European site, an appropriate assessment was not required. The Inspector found the latter to be the case at paragraph 7.1.7 of her report.

135. Accordingly, in examining the substance of the Inspector's report (rather than focusing on the use or non-use of particular words or phrases, statutory or otherwise) as the proposed development was for a change of use of a building located in a built up area with limited works in a serviced site within an existing urban network, the Board did not act unlawfully in adopting the Inspector's assessment, at paragraph 7.1.7 of the October 2021 report, that no AA issues arose and that the proposed

development would not be likely to have a significant effect individually or in combination with other plans or projects on a European Site.

136. For the reasons set out in this judgment, I refuse the Applicant's application for the reliefs claimed by way of judicial review.

PROPOSED ORDER

137. In the circumstances, I shall make an order refusing the Applicant's application for the reliefs claimed by way of judicial review.

138. I shall put the matter in for mention before me on Tuesday 15th October 2024 at 10:30 to deal with any ancillary and consequential matters.