Appendix D

Summary of Relevant Case Law

The following six legal cases were identified as significant judgments relating to the imposition of planning conditions. Accordingly, a brief summary of the key issues of relevance to the Practice Note has been set out for each case.

As indicated at the outset this practice note cannot be relied upon as containing, or as a substitute for, legal advice.

1. *Houlihan v An Bord Pleanála*. (unreported) High Court, Murphy J., 4 October 1993)

Permission was granted by An Bord Pleanála for the erection of 22 holiday homes, a reception block and the diversion of a road at Ballyferriter, County Kerry, subject to 9 conditions. Brendan Houlihan, who had appealed the planning authority's permission, challenged the Board's decision on a number of grounds. In particular, he claimed that the conditions left so many matters to be agreed between the developers and the planning authority that they could result in a totally different development to that originally sought, and that leaving so many matters for agreement had removed his statutory right of appeal.

Judge Murphy noted that there were approximately twelve matters on which agreement with the planning authority was required. He considered that, in most cases, the matters were essentially technical or matters of detail which could be left to the planning authority and developer without invalidating the decision of the Board. He considered, however, that a condition which required the relocation of the effluent pipe *"in an easterly direction in a manner to be agreed with the planning authority"*, without specifying some location or corridor, was very wide in its scope and too vague. He considered that it was an improper abdication by the Board of its responsibilities.

2. *Boland v An Bord Pleanála* [1996] 3 I.R. 435

This case involved both High Court and Supreme Court decisions (9 December 1994 and 21 March 1996 respectively).

Permission was granted by An Bord Pleanála to the Minister for the Marine for development consisting of the extension and refurbishment of the existing ferry terminal at Dún Laoghaire Harbour, one of the major effects of which would be to increase greatly traffic coming to the terminal. A number of conditions were imposed requiring various details for the control and management of traffic movements to be agreed between the applicant and the planning authority, in the interest of orderly development, traffic and pedestrian safety, and to avoid congestion. Raymond Boland argued that the conditions constituted an improper abdication of the Board's functions to the planning authority, thereby depriving interested parties of the opportunity to be heard. The High Court held that the Board had not improperly abdicated its planning functions to the planning authority, agreeing with Murphy. J in *Houlihan* that it is a matter of degree in any given case whether or not such an abdication had occurred.

The High Court allowed an appeal to the Supreme Court on the following point of law of exceptional public importance:

"What are the criteria which distinguish those matters which may properly be left to the developer and planning authority to agree upon, and those matters which cannot be left to such parties in such fashion and must instead be decided by An Bord Pleanála itself....?"

The Supreme Court dismissed the appeal. It set out the following criteria to which the Board was entitled to have regard in deciding whether to impose a condition leaving a matter to be agreed between the developer and the planning authority:

- 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;
- 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 practical experience;
- the impracticability of imposing detailed conditions having regard to the nature of the development;
- the functions and responsibilities of the planning authority;
- whether the matters essentially are concerned with off-site problems and do not affect the subject lands;
- whether the enforcement of such conditions requires monitoring and supervision;
- whether any member of the public could have reasonable grounds for objecting to the work to be carried out pursuant to the condition, having regard to the substantive decision; the precise nature of the instructions in regard to the work laid down by the Board and having regard to the fact that the details of the work had to be agreed by the planning authority.

The Supreme Court stated that, in imposing a condition requiring matters to be agreed, the Board was obliged to set out the purpose of such details, the overall objective to be achieved by the matters left over for agreement, to state clearly the reason for the condition, and to lay down criteria by which the developer and planning authority could reach agreement.

Note: The judgment also stated that it would have been better if the conditions had stated that, in the event of disagreement, the matter would be determined by the Board. A provision to this effect was subsequently incorporated into Section 34(5) of the 2000 Act and has been amended by Section 23(4) of the 2018 Act, see section 2.3 Compliance Conditions above.

3. *Kenny v An Bord Pleanála* (No. 1) [2001] 1 I.R. 565

Permission was granted by An Bord Pleanála for a student accommodation complex at Trinity Hall Dublin, on the basis of revised plans submitted to the planning authority during its consideration of the planning application. The Inspector noted that there were some discrepancies, albeit of an insignificant nature, in the drawings. Condition no. 8 was imposed to address this issue. It required revised drawings of the development, with floor plans and elevations corresponding in detail, to be submitted to and agreed with the planning authority, prior to commencement of development. This condition was challenged by James Kenny, a local resident, on the grounds that it amounted to an unlawful delegation by the Board of its decision-making power because the condition allowed the appearance, nature and scale of the ultimate development to be agreed in private.

Judge McKechnie noted that the Supreme Court in *Boland* had endorsed the decision in *Houlihan* and summarised the criteria set out in the Supreme Court decision in *Boland*. He found that the Board, in imposing condition no. 8, had not abdicated its responsibility to the planning authority. The condition was held to be validly imposed because it was essentially designed to meet the discrepancies outlined by the Inspector and it could not be assumed that the planning authority would exceed its role *"which is to further the faithful, true and core implementation of the permission"* (p. 77).

4. Weston Limited v An Bord Pleanála [2008] IEHC 71

Permission was granted by An Bord Pleanála for retention of a number of *"non-airside"* developments at Weston Aerodrome in west Dublin, a licensed airport. Permission was granted subject to conditions. One of the conditions was to the effect that development, normally specified as exempted development in airports, must not be carried out without a prior grant of planning permission. The reason given for the condition was *"In the interests of orderly development"*.

The owners of the airport sought judicial review to set the condition aside. It was argued that the condition was ultra vires the powers of the planning authority or the Board. The Court held that, whilst the imposition of such a condition was not per se ultra vires, the reason given for the condition was not adequate.

Judge MacMenamin noted that the condition did not fall within any of the 17 types of conditions described in subsection 34(4) of the 2000 Act. He held that, in these circumstances, the Board was under *"an enhanced obligation"* to state the main reasons for the condition to ensure that it was within the four walls of the 2000 Act as a whole. He considered that the rationale for the condition must be explicit.

The judge held that in the particular case, where there were suggestions of previous unauthorised development contained in some documentation, there was:

> *"...an obligation to state reasons for the condition clearly, cogently and in a manner to eliminate any reasonably held doubt as to whether there had been an error in law, a misunderstanding or other unlawful basis for the condition..... The specific solution did not allow for a formulaic mantra or a ritualistic form of words as being a sufficient rationale."*

The applicant's case was upheld on this point.

While he stated *"This finding is on the facts of this case"*, a general principle can also be found earlier in the judgment. In acknowledging that the requirement is simply to state the main reasons in respect of conditions, Judge MacMenamin had cautioned:

> *"This does not detract from the requirement that the rationale for the condition must be explicit."*

5. ***Holohan and Others v An Bord Pleanála*. (CJEU) C-461/17**

Approval was granted under the 1993 Roads Act by An Bord Pleanála to Kilkenny County Council for an extension of the Kilkenny City Ring Road in July 2014. Brian Holohan sought judicial review to set the approval aside on a number of grounds. The Irish High Court requested a preliminary ruling from the Court of Justice of the European Union in relation to various issues arising from the Board's decision various issues arising from the Board's decision (Holohan and Others v An Bord Pleanála [2017] IEHC 268). As the applicant for the road project was the local authority, in this case there was no requirement to agree details with the planning authority but some details of the design were left to be determined at a later stage. The particular question, of relevance to this Practice Note, posed to the EU Court was:

> *"Whether it is compatible with the attainment of the objectives of [the Habitats Directive] that details of the construction phase (such as the compound location and haul routes) can be left to post-consent decision, and if so whether it is open to a competent authority to permit such matters to be determined by unilateral decision by the developer, within the context of any development consent granted, to be notified to the competent authority rather than approved by it;"*

On this question, the preliminary ruling of the CJEU, issued on 7 November 2018, is as follows:

> *"Article 6(3) of Directive 92/43 must be interpreted as meaning that the competent authority is permitted to grant to a plan or project consent which leaves the developer free to determine subsequently certain parameters relating to the construction phase, such as the location of the construction compound and haul routes, only if that authority is certain that the development consent granted establishes conditions that are strict enough to guarantee that those parameters will not adversely affect the integrity of the site".*

The Board's decision was quashed by order of the High Court on 21 December 2018.

6. ***Eircell v Bernstoff*. (unreported) High Court, Barr J, 18 February 2000**

A temporary five year permission was granted by An Bord Pleanála to Eircell for a phone mast and ancillary buildings in January 1999, subject to conditions. Condition no. 6 required details of the colour scheme for the structures to be agreed; condition no. 7 required lodgement of security covering the cost of removing the mast at the end of the five year period. In both cases, the requirements were to be met prior to commencement of development but were not satisfied until a few days after work started. Members of the local community sought a planning injunction. Therefore, this was an enforcement case relating to compliance with conditions.

Judge Barr did not accept the arguments that the pre-commencement conditions should be strictly interpreted or that subsequent compliance does not make legal what was already an unlawful development. He held that:

> *"No court should make an order which is potentially futile. If the mast were declared to be an unlawful development, no doubt application would be made to the planning authority for a retention order and <u>in the circumstances</u> that would be granted for the asking."*

Emphasis added.