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OUR REF	YOUR REF	DATE
BNMS\62970530.1	ABP-317419-23	19 July 2023

BY EMAIL - bord@pleanala.ie AND appeals@pleanala.ie
An Bord Pleanála
64 Marlborough Street
Dublin 1

cc. BY EMAIL – planning@limerick.ie AND enforcement@limerick.ie
Limerick City and County Council, Dooradoyle Road, Limerick

Our client - Shannon LNG Limited By Email

Request made by Mr John McElligott (otherwise "Safety Before LNG") under section 5 of the Planning and Development Act, 2000

Dear Colleagues

Your letter dated 23 June 2023 to our client has been passed to us for response.

By decision dated 17 February 2009, the Board granted approval to our client for a 26km gas pipeline between Ralappane, County Kerry, and Leahy's, County Limerick under section 182D of the Planning and Development Act, 2000 (as amended) (the "Planning Acts") (Board ref. PL08.GA0003) (for convenience, the "pipeline approval").

By request first made to Limerick City and County Council (the "Council") on 27 April 2023 (Council ref. EC33/23), and subsequent referral to the Board on 16 June 2023, Mr John McElligott has requested a declaration on the following question:

> "Whether any works carried out on the Shannon LNG pipeline from Foynes Co. Limerick to Tarbert Co. Kerry as described in the planning application granted by An Bord Pleanala under reference GA0003 on February 17th, 2009 carried out any time from today's date (and/or contrary to the consent conditions) is or is not development or is or is not exempted development"

For reasons explained in more detail below, we believe the request is misconceived and based on a mistaken understanding of both section 5 of the Planning Acts and the pipeline approval.

1. **The scope of section 5.**

1.1 There is no doubt about the scope of section 5 of the Planning Acts. Subsection (1) makes clear that it concerns only where a "question arises as to what, in any particular case, is or is not development or is or is not exempted development" within the meaning of the Planning Acts.

1.2 The Board's jurisdiction under section 5 does *not* extend to determining whether a particular development is unauthorised or whether a particular permission is extant.

1.3 Late last year, the Supreme Court addressed this emphatically in *Krikke & ors. v. Barranafaddock Sustainable Electricity Limited* [2022] IESC 41. The court delivered two judgments. Both referred to *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210, when confirming that:

(a) in the words of Hogan J., "it is clear from a long line of authority that the Board's s. 5 jurisdiction does not extend to determining that a particular development is unauthorised"; and,

(b) in the words of Woulfe J., "the question of whether the development comes within the scope of the planning permission, i.e. whether it was authorised, is not an issue that the planning bodies have jurisdiction to decide".

1.4 We make this point because the letter from Mr McElligott to the Council dated 26 April 2023, in support of his request under section 5, explains the essence of his request. In the final paragraph, he states that "[w]e are essentially asking if breaching a condition, or the impossibility of fulfilling a pre-commencement condition, going to the heart of [the pipeline approval], renders implementation of that [pipeline approval] unlawful and unauthorised development".

1.5 That request cannot be entertained by the Board. Put simply, the Board has no jurisdiction to answer that question.

1.6 It is acknowledged that the Board may reformulate the question asked: see, most recently, *Corajio Unlimited Company t/a Mr Price Branded Bargains v. An Bord Pleanála* [2023] IEHC 373. However, mere reformulation to ask whether works on the 26km pipeline are development or exempted development is meaningless.

1.7 It is self-evident that the pipeline works comprise development and are not exempted development. There is no dispute about that, and that is not the question asked.

1.8 If the Board did have jurisdiction to consider whether pipeline works are unauthorised development, which is denied, our clear and unequivocal answer is that those works are permitted development under and in accordance with the pipeline approval.

1.9 For clarity, under section 182D(11)(a) of the Planning Acts, no permission is required for development approved under section 182D. This is not a class of exempted development, such as those within section 4 of the Planning Acts, or the Second Schedule of the Planning and Development Regulations 2001 (as amended) (the "Planning Regulations"). It follows that interpretation of the pipeline approval, and forming a view on whether that approval remains extant, is not relevant to any question about exempted development and is not a matter for the Board.

1.10 Mr McElligott cannot use, or more correctly abuse, section 5 in the manner proposed. For these reasons, we invite the Board to exercise its discretion under section 138(1)(b) of the Planning Acts, to dismiss the referral on the basis that the referral should not be further considered by the Board having regard to "the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral".

The following further submissions are made without prejudice to the foregoing preliminary objection that the Board does not have jurisdiction to entertain this referral.

2. **The referenced exchanges between the Council and the Board.**

2.1 We note with surprise the letter from the Council to Mr McElligott dated 24 May 2023, in which reference is made to a written request made by the Council to the Board "to clarify the length of [the pipeline approval]".

2.2 We are surprised for two reasons. First, as explained, the duration of the pipeline approval cannot be the subject of a request under section 5. Second, where any public authority is curious about whether the approval granted to our client is existing, we believe that our client's formal views should be sought. In our view, it would be inappropriate for the Board to offer any view on matters of such interest to our client without first affording our client natural justice, and an opportunity to be heard.

2.3 We expect the written request is now moot, such that nothing from our client is required. However, if we are wrong, do please ensure that the request is provided to our client for comment.

3. **The duration of the pipeline approval.**

3.1 By way of preliminary observation, we note the recent Supreme Court judgment in *Ballyboden Tidy Towns Group v. An Bord Pleanála* [2022] IESC 47. There are several judgments with similar title, but concerning different permissions. This judgment concerns the approval granted by the Board for flood defence works along the Whitechurch stream under section 177AE of the Planning Acts. The approval was for an indefinite duration. The court dismissed a complaint that an approval of indefinite duration was incompatible with European law.

3.2 The court observed (at § 46), with reference to the Habitats Directive, that there is no temporal limitation on development consent under that European law. The same is true for other Directives that require environmental assessment.

3.3 After considering relevant case-law of the Court of Justice of the European Union ("CJEU"), the court concluded (at § 52) that "there are circumstances in which the grant of a permanent authorisation may be appropriate". There is no need for an approval to be temporary, because (as explained at § 54) "the possibility of changed environmental conditions subsequent to approval of a development is a matter to be dealt with under the "obligation of general protection" established under Article 6(2) of the Directive."

3.4 In particular, the court quoted from Case C-226/08 *Stadt Papenburg* and concluded (at § 58) that the CJEU accepted that a permitted activity "can be the subject of an indefinite permission". The Supreme Court was satisfied this point was so clear that no reference to the CJEU was necessary.

3.5 In the same way that an approval under section 177AE of the Planning Acts has indefinite duration, the pipeline approval under section 182D has indefinite duration.

3.6 The concept of duration is a creation of domestic law. Specifically, under section 40 of the Planning Acts, there is an "appropriate period" that limits the duration of a permission. Specifically, a permission:

> "shall on the expiration of the appropriate period (but without prejudice to the validity of anything done pursuant thereto prior to the expiration of that period) cease to have effect as regards—
>
> (a) in case the development to which the permission relates is not commenced during that period, the entire development, and
>
> (b) in case the development is commenced during that period, so much of the development as is not completed within that period."

3.7 The "appropriate period" is defined at section 40(3), in general, to mean five years beginning on the date of the grant of permission.

3.8 At the time when the pipeline approval was granted, on 17 February 2009, the definition of "permission" was that inserted by section 6(b) of the Planning and Development (Strategic Infrastructure) Act 2006 (the "2006 Act"). That was inserted with effect from 31 January 2007 (SI No. 684 of 2006).

3.9 The definition of "permission" was "a permission granted under section 34 or 37G, as appropriate". Section 34 concerns ordinary planning applications, and section 37G concerns applications for strategic infrastructure development.

3.10 At the relevant time, the definition of "permission" did not include approvals under section 182D.

3.11 It still does not. The definition was amended with effect from 1 October 2022 (SI No. 488 of 2022) by section 174 (and paragraph no. 1 of Schedule 12) to refer to permissions granted under sections 37N or 293.

3.12 For completeness, we note that there is a separate definition for "permission" that is limited in relevance to section 173C of the Planning Acts. For the purposes of that section, which concerns environmental impact assessment of waste water discharges, there is an expanded definition of "permission" that includes "approval for development under section 175, 177AE, 181B, 182D or 226".

3.13 The intention of the Oireacthas is clear. There is a range of decisions that have indefinite duration. This includes gas pipeline approvals under section 182D, the approvals of local authority projects on the foreshore approved under section 226, or those that require environment impact assessment under section 175 or appropriate assessment under section 177AE, certain state authority projects approved under section 181B, railway works and certain road authority development.

3.14 There is no doubt that section 40 has no relevance to an approval under section 182D, including the pipeline approval. That being so, there is no "appropriate period", no limited duration, and no limited "life" to the approval.

3.15 For this reason, there is no doubt that the pipeline approval is existing, and development under and in accordance with the pipeline approval is not unauthorised.

3.16 The request made by Mr McElligott can be read to acknowledge this. He does not attempt to suggest that section 40 has any relevance, or that the Planning Acts or European law otherwise limits the duration of the pipeline approval. Indeed, he expressly acknowledges that section 40 does not apply to the approval.

3.17 His sole basis for complaint is that the cover letter for the application made under section 182C of the Planning Acts included the following line: "Shannon LNG is seeking planning permission for this development for a period of 10 years". Mr McElligott suggests that this statement in the cover letter dated 14 August 2008 is a binding commitment, expressed within the plans and particulars lodged with the application. He suggests that condition 1 of the pipeline approval means the pipeline development must be carried out in accordance with this binding commitment, and so cannot be carried out after 2019.

3.18 He does not cite any legal authority for the proposition that a statement in a cover letter, of this kind, could ever voluntarily circumscribe the indefinite duration provided under the Planning Acts.

3.19 The only authority cited is in his cover letter dated 15 June 2023, referring the matter to the Board. He refers to *Glassco Recycling Limited v. An Bord Pleanála* [2023] IEHC 293 and suggests that the court concluded that the documents submitted with a planning application are of "a nature designed to identify specific and precisely enforceable parameters for the development including its use".

3.20 That is *not* what the court concluded.

3.21 The court was quoting with approval the judgment of the Supreme Court in *Lanigan v. Barry* [2016] 1 IR 656 and [2016] IESC 46. In *Lanigan*, the court considered whether use of a motor racing circuit on certain days and times, and at a given frequency, had been prohibited.

3.22 In *Lanigan*, the Supreme Court considered whether a general condition, like condition 1 to the pipeline approval imposed, indirectly, a condition relating to the scale and timing for operation of a motor racing circuit.

3.23 The court explained (at § 4.1) that:

> "The starting point has to be to note that it would have been easy for the Planning Authority concerned, if it had wished so to do, to impose specific terms as to hours, scale and timing of use. This the Planning Authority did not do. While that is not, necessarily and in and of itself, an end to the matter, it nonetheless is, in my view, a significant factor to be taken into account. To interpret a general clause such as condition 1 (which imposes an obligation to carry out the development in accordance with the drawings and specifications submitted) in a way which imposes very specific obligations in the absence of a specific condition does, in my view, require that what might reasonably be considered to be the drawings and specifications be

clearly of a nature designed to identify specific and precisely enforceable parameters for the development (including its use)."

3.24 The court elaborated (at § 3.5 to 3.8) that:

> "[I]t is important, in my view, to distinguish between a general description of the *scale of operation of a facility which might be anticipated*, on the one hand, and a specific condition limiting the maximum scale of the operation concerned, on the other. The distinction may be easy to define in some cases but there may well be grey areas in other cases. For example, a retail unit might be described as being likely to attract a certain level of footfall. That description might, indeed, be relevant for planning purposes for it would undoubtedly affect traffic and potentially the amenity of other property occupiers in the vicinity. But such a description would be unlikely to be taken as imposing an absolute limit on the amount of customers which the retail unit would be permitted to entertain on any given day. Likewise, the documents filed in respect of a planning application might suggest that a retail unit was designed for daytime use. That might indicate the sort of use which might implicitly be approved by the granting of planning permission for the unit concerned. It is well settled that, in considering the use which may be regarded as being permitted, it is possible to look at the development for which permission has been granted together with any documents submitted in the context of the relevant planning application.
>
> In such a case the planning authority might choose to impose a specific condition concerning hours of opening. If it did so choose then the matter would be clear and it would be a breach of the relevant condition for the retail unit to open outside the hours as specified. However, even if no such specified opening hours were included as conditions attached to the planning permission, it would always be open to a court to consider whether opening significantly outside the parameters which were contemplated by the planning application itself might amount, in all the circumstances, to a sufficient intensification of use (over the use impliedly authorised by the permission) so as to justify a finding of a material change. However, in that latter case it would be necessary to take into account a range of factors, including the degree of difference from the use which it might be inferred had been permitted by the planning permission, so as to assess whether any variation from that contemplated use could be said to involve a material change of use." (Emphasis added.)

3.25 The court was reluctant to interpret a general clause such as condition 1 "in a way which imposes very specific obligations in the absence of a specific condition". The court elaborated that such an obligation would only arise where "it would be appropriate to construe the documents submitted by the applicant for planning permission as giving a clear and specific commitment rather than a general indication concerning the scale and timing of the operation" (§ 4.4).

3.26 In *Lanigan*, having considered the documents submitted with the planning application, the court concluded there was *no specific commitment* concerning scale and timing of operation. Instead, the information could only be used for the purposes of assessing the broad level of operation for which permission was granted "and thus for assessing the baseline by reference to which the materiality of any intensification or use can be judged".

3.27 The court explained (at § 3.10) that:

> "The distinction is between a specific requirement which must be obeyed more or less to the letter, on the one hand, and a general indication which may inform the baseline use by reference to which the materiality of an intensification of use may be judged. An assessment as to which of those two categories any particular description may fall into is one involving the proper construction of the planning permission as a whole including how that planning permission should be construed in the light of the documents filed by the applicant insofar as it can be said that those documents have been incorporated by reference into the permission itself."

3.28 When the text used is considered "in the context of the circumstances in which the document concerned was produced including the nature of the document itself" (§ 3.11), as with *Lanigan*, the remark in the cover letter cannot be read to comprise "drawings and specifications be clearly of a nature designed to identify specific and precisely enforceable parameters for the development".

3.29 The position in *Glassco* was very different. The court explained "[o]n the facts here, the content of the [remedial environmental impact statement] submitted in support of the substitute consent application clearly and repeatedly stated that the application related to an annual intake of up to 97,000 tonnes and this part of the application was, to use Clarke C.J.'s formulation [in *Lanigan*], of "a nature designed to identify specific and precisely enforceable parameters for the development including its use".

3.30 Mr McElligott is wrong. The court did not find that every line within any planning application document identifies a specific and precisely enforceable parameter. In fact, the court said the reverse. Not every line has this consequence. The only reason that the court in *Glassco* could find such a specific and precisely enforceable parameter is because the tonnage limitation was "clearly and repeatedly stated".

3.31 The same is not true for the pipeline approval.

3.32 There is no reference to any limitation of duration within any of the site notice, the environmental impact statement ("EIS"), the related non-technical summary or other planning documents.

3.33 The application documents relevant to the pipeline approval include only aspirational references to when it was hoped the construction period would commence. Those described when it was then "currently intended", "scheduled" or "intended" to carry out construction, thereby implying that the intention might change, and was not in any sense fixed.

3.34 Other times and periods are also discussed more generally: August to early November was described as an "ideal" period for felling trees (EIS, vol. 2, para 10.10.12, p. 129); it was "envisaged" that the pipes would be delivered in winter (EIS, vol. 2, para. 7.4.2, p. 67); removal of hedgerows "should" be removed between September and February (EIS vol. 2, para. 10.10.2, p. 130).

3.35 There is no suggestion, anywhere, that the pipeline work would be completed before 2019.

3.36 In fact, strictly, there is no reference to any limitation of duration in any of the "plans and particulars". The cover letter cannot, and should not, be read to comprise a plan or particular, of the kind to which condition 1 refers.

3.37 The single isolated line in a cover letter does not meet the threshold explained by the Supreme Court in *Lanigan* and applied by the High Court in *Glassco*. That single isolated line does not comprise anything of "a nature designed to identify specific and precisely enforceable parameters for the development". It follows that the general obligation in condition 1 of the pipeline approval cannot be read to deprive our client of an indefinite approval.

4. **Other matters.**

4.1 Although not stated in the "Section 5 Application" form, the letter from Mr McElligott to the Council dated 26 April 2023 suggests that condition 2 of the pipeline approval "cannot be complied with" because the planning permission for the LNG terminal to which it refers expired.

4.2 Condition 2 of the pipeline approval imposes a requirement to submit details of "the phasing of the proposed development". Mr McElligott suggests that cannot be complied with because the phasing details are required to address how the pipeline development might overlap "the construction of the permitted liquefied natural gas terminal at Ralappane". Mr McElligott takes issue with the reference in the condition to the word "permitted".

4.3 Mr McElligott is correct that the original permission for the LNG terminal has expired. That refers to a permission for strategic infrastructure development granted to our client by the Board on 31 March 2008 (Board ref. PA08.PA0002). The permission was twice amended (Board ref. nos. PL08.PM0002 and PL08.PM0014). The validity of the second of those amendments was questioned in proceedings bearing the title *Friends of the Irish Environment CLG v. An Bord Pleanala* and record number High Court 2018 734 JR. The matter was referred to the Court of Justice of the European Union ([2019] IHEC 8 and Case C-254/19). Consequently, an order was made on 9 November 2020 quashing the amendment bearing reference no. PL08.PM0014, so the permission bearing reference no. PL08.PA0002 has expired.

4.4 However, Mr McElligott is wrong that expiry of that permission has any relevance to condition 2 of the pipeline approval. There is nothing to prevent a phasing plan that proposes construction of the pipeline before any terminal, or even absent any terminal at all. The use of the word "permitted" in the condition cannot mean the condition, or the approval, is ineffective soon as permission for the terminal expires.

4.5 For completeness, we note that a fresh application for permission for strategic infrastructure development comprising, as summarised by the Board, "Shannon Technology and Energy Park consisting of power plant, battery energy storage system, floating storage and regasification unit, jetty, onshore receiving facilities, above ground installation and all ancillary structures/works" (Board ref. ABP-311233-21) remains pending.

In conclusion, we believe the request is misconceived and based on a mistaken understanding of both section 5 of the Planning Acts and the pipeline approval.

We invite the Board to exercise its discretion under section 138(1)(b) of the Planning Acts, to dismiss the referral on the basis that the referral should not be further considered by the Board having regard to "the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral".

Without prejudice to the foregoing preliminary objection that the Board does not have jurisdiction to entertain this referral, we have demonstrated that the pipeline approval is indefinite, and has no

"appropriate period", no duration and no "life". Also, we have demonstrated that condition 1 to the pipeline approval cannot be read to deprive our client of an indefinite approval.

There is no reference to any limitation of duration within any relevant planning document. The application documents relevant to the pipeline approval include only aspirational references to when it was hoped the construction period would commence. Contrary to what Mr McElligott suggests, there is commitment at all that the pipeline work would be completed before 2019.

In fact, strictly, there is no reference to any limitation of duration in any of the "plans and particulars".

The single isolated line in a cover letter cannot, and should not, be read to comprise a plan or particular, of the kind to which condition 1 refers. Further, it does not meet the threshold explained by the Supreme Court in *Lanigan* and applied by the High Court in *Glassco*.

Yours sincerely

(sent by email, so bears no signature)

Brendan Slattery
McCann FitzGerald LLP

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Eoin.

Lita Clarke

From: Slattery, Brendan <Brendan.Slattery@mccannfitzgerald.com>
Sent: Wednesday 19 July 2023 11:17
To: Bord; Appeals2; secretary@pleanala.ie
Cc: planning@limerick.ie; enforcement@limerick.ie
Subject: ABP-317419-23 - Shannon LNG Limited [MCF-LIVE.FID1718035]
Attachments: 230719 shannon lng - section 5 - ABP-317419-23.pdf

Our client – Shannon LNG Limited
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Board ref. ABP-317419-23
Council ref. EC33/23

Dear colleagues,

On behalf of our client, Shannon LNG Limited, please see attached response to the letter dated 23 June 2023 from the Board, inviting submissions in response to this referral.

We are sending this by email to the Board, direct. We will also deliver a printed copy, by hand.

For the convenience of the Council, and out of courtesy, we are sending this by email to it also.

Best regards,

Brendan Slattery

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OUR REF	YOUR REF	DATE
BNMS\62970530.1	ABP-317419-23	19 July 2023

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Limerick City and County Council, Dooradoyle Road, Limerick

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For reasons explained in more detail below, we believe the request is misconceived and based on a mistaken understanding of both section 5 of the Planning Acts and the pipeline approval.

1. **The scope of section 5.**

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>
> (b) in case the development is commenced during that period, so much of the development as is not completed within that period."

3.7 The "appropriate period" is defined at section 40(3), in general, to mean five years beginning on the date of the grant of permission.

3.8 At the time when the pipeline approval was granted, on 17 February 2009, the definition of "permission" was that inserted by section 6(b) of the Planning and Development (Strategic Infrastructure) Act 2006 (the "2006 Act"). That was inserted with effect from 31 January 2007 (SI No. 684 of 2006).

3.9 The definition of "permission" was "a permission granted under section 34 or 37G, as appropriate". Section 34 concerns ordinary planning applications, and section 37G concerns applications for strategic infrastructure development.

3.10 At the relevant time, the definition of "permission" did not include approvals under section 182D.

3.11 It still does not. The definition was amended with effect from 1 October 2022 (SI No. 488 of 2022) by section 174 (and paragraph no. 1 of Schedule 12) to refer to permissions granted under sections 37N or 293.

3.12 For completeness, we note that there is a separate definition for "permission" that is limited in relevance to section 173C of the Planning Acts. For the purposes of that section, which concerns environmental impact assessment of waste water discharges, there is an expanded definition of "permission" that includes "approval for development under section 175, 177AE, 181B, 182D or 226".

3.13 The intention of the Oireacthas is clear. There is a range of decisions that have indefinite duration. This includes gas pipeline approvals under section 182D, the approvals of local authority projects on the foreshore approved under section 226, or those that require environment impact assessment under section 175 or appropriate assessment under section 177AE, certain state authority projects approved under section 181B, railway works and certain road authority development.

3.14 There is no doubt that section 40 has no relevance to an approval under section 182D, including the pipeline approval. That being so, there is no "appropriate period", no limited duration, and no limited "life" to the approval.

3.15 For this reason, there is no doubt that the pipeline approval is existing, and development under and in accordance with the pipeline approval is not unauthorised.

3.16 The request made by Mr McElligott can be read to acknowledge this. He does not attempt to suggest that section 40 has any relevance, or that the Planning Acts or European law otherwise limits the duration of the pipeline approval. Indeed, he expressly acknowledges that section 40 does not apply to the approval.

3.17 His sole basis for complaint is that the cover letter for the application made under section 182C of the Planning Acts included the following line: "Shannon LNG is seeking planning permission for this development for a period of 10 years". Mr McElligott suggests that this statement in the cover letter dated 14 August 2008 is a binding commitment, expressed within the plans and particulars lodged with the application. He suggests that condition 1 of the pipeline approval means the pipeline development must be carried out in accordance with this binding commitment, and so cannot be carried out after 2019.

3.18 He does not cite any legal authority for the proposition that a statement in a cover letter, of this kind, could ever voluntarily circumscribe the indefinite duration provided under the Planning Acts.

3.19 The only authority cited is in his cover letter dated 15 June 2023, referring the matter to the Board. He refers to *Glassco Recycling Limited v. An Bord Pleanála* [2023] IEHC 293 and suggests that the court concluded that the documents submitted with a planning application are of "a nature designed to identify specific and precisely enforceable parameters for the development including its use".

3.20 That is *not* what the court concluded.

3.21 The court was quoting with approval the judgment of the Supreme Court in *Lanigan v. Barry* [2016] 1 IR 656 and [2016] IESC 46. In *Lanigan*, the court considered whether use of a motor racing circuit on certain days and times, and at a given frequency, had been prohibited.

3.22 In *Lanigan*, the Supreme Court considered whether a general condition, like condition 1 to the pipeline approval imposed, indirectly, a condition relating to the scale and timing for operation of a motor racing circuit.

3.23 The court explained (at § 4.1) that:

> "The starting point has to be to note that it would have been easy for the Planning Authority concerned, if it had wished so to do, to impose specific terms as to hours, scale and timing of use. This the Planning Authority did not do. While that is not, necessarily and in and of itself, an end to the matter, it nonetheless is, in my view, a significant factor to be taken into account. To interpret a general clause such as condition 1 (which imposes an obligation to carry out the development in accordance with the drawings and specifications submitted) in a way which imposes very specific obligations in the absence of a specific condition does, in my view, require that what might reasonably be considered to be the drawings and specifications be

clearly of a nature designed to identify specific and precisely enforceable parameters for the development (including its use)."

3.24 The court elaborated (at § 3.5 to 3.8) that:

> "[I]t is important, in my view, to distinguish between a general description of the *scale of operation of a facility which might be anticipated*, on the one hand, and a specific condition limiting the maximum scale of the operation concerned, on the other. The distinction may be easy to define in some cases but there may well be grey areas in other cases. For example, a retail unit might be described as being likely to attract a certain level of footfall. That description might, indeed, be relevant for planning purposes for it would undoubtedly affect traffic and potentially the amenity of other property occupiers in the vicinity. But such a description would be unlikely to be taken as imposing an absolute limit on the amount of customers which the retail unit would be permitted to entertain on any given day. Likewise, the documents filed in respect of a planning application might suggest that a retail unit was designed for daytime use. That might indicate the sort of use which might implicitly be approved by the granting of planning permission for the unit concerned. It is well settled that, in considering the use which may be regarded as being permitted, it is possible to look at the development for which permission has been granted together with any documents submitted in the context of the relevant planning application.
>
> In such a case the planning authority might choose to impose a specific condition concerning hours of opening. If it did so choose then the matter would be clear and it would be a breach of the relevant condition for the retail unit to open outside the hours as specified. However, even if no such specified opening hours were included as conditions attached to the planning permission, it would always be open to a court to consider whether opening significantly outside the parameters which were contemplated by the planning application itself might amount, in all the circumstances, to a sufficient intensification of use (over the use impliedly authorised by the permission) so as to justify a finding of a material change. However, in that latter case it would be necessary to take into account a range of factors, including the degree of difference from the use which it might be inferred had been permitted by the planning permission, so as to assess whether any variation from that contemplated use could be said to involve a material change of use." (Emphasis added.)

3.25 The court was reluctant to interpret a general clause such as condition 1 "in a way which imposes very specific obligations in the absence of a specific condition". The court elaborated that such an obligation would only arise where "it would be appropriate to construe the documents submitted by the applicant for planning permission as giving a clear and specific commitment rather than a general indication concerning the scale and timing of the operation" (§ 4.4).

3.26 In *Lanigan*, having considered the documents submitted with the planning application, the court concluded there was *no specific commitment* concerning scale and timing of operation. Instead, the information could only be used for the purposes of assessing the broad level of operation for which permission was granted "and thus for assessing the baseline by reference to which the materiality of any intensification or use can be judged".

3.27 The court explained (at § 3.10) that:

> "The distinction is between a specific requirement which must be obeyed more or less to the letter, on the one hand, and a general indication which may inform the baseline use by reference to which the materiality of an intensification of use may be judged. An assessment as to which of those two categories any particular description may fall into is one involving the proper construction of the planning permission as a whole including how that planning permission should be construed in the light of the documents filed by the applicant insofar as it can be said that those documents have been incorporated by reference into the permission itself."

3.28 When the text used is considered "in the context of the circumstances in which the document concerned was produced including the nature of the document itself" (§ 3.11), as with *Lanigan*, the remark in the cover letter cannot be read to comprise "drawings and specifications be clearly of a nature designed to identify specific and precisely enforceable parameters for the development".

3.29 The position in *Glassco* was very different. The court explained "[o]n the facts here, the content of the [remedial environmental impact statement] submitted in support of the substitute consent application clearly and repeatedly stated that the application related to an annual intake of up to 97,000 tonnes and this part of the application was, to use Clarke C.J.'s formulation [in *Lanigan*], of "a nature designed to identify specific and precisely enforceable parameters for the development including its use".

3.30 Mr McElligott is wrong. The court did not find that every line within any planning application document identifies a specific and precisely enforceable parameter. In fact, the court said the reverse. Not every line has this consequence. The only reason that the court in *Glassco* could find such a specific and precisely enforceable parameter is because the tonnage limitation was "clearly and repeatedly stated".

3.31 The same is not true for the pipeline approval.

3.32 There is no reference to any limitation of duration within any of the site notice, the environmental impact statement ("EIS"), the related non-technical summary or other planning documents.

3.33 The application documents relevant to the pipeline approval include only aspirational references to when it was hoped the construction period would commence. Those described when it was then "currently intended", "scheduled" or "intended" to carry out construction, thereby implying that the intention might change, and was not in any sense fixed.

3.34 Other times and periods are also discussed more generally: August to early November was described as an "ideal" period for felling trees (EIS, vol. 2, para 10.10.12, p. 129); it was "envisaged" that the pipes would be delivered in winter (EIS, vol. 2, para. 7.4.2, p. 67); removal of hedgerows "should" be removed between September and February (EIS vol. 2, para. 10.10.2, p. 130).

3.35 There is no suggestion, anywhere, that the pipeline work would be completed before 2019.

3.36 In fact, strictly, there is no reference to any limitation of duration in any of the "plans and particulars". The cover letter cannot, and should not, be read to comprise a plan or particular, of the kind to which condition 1 refers.

3.37 The single isolated line in a cover letter does not meet the threshold explained by the Supreme Court in *Lanigan* and applied by the High Court in *Glassco*. That single isolated line does not comprise anything of "a nature designed to identify specific and precisely enforceable parameters for the development". It follows that the general obligation in condition 1 of the pipeline approval cannot be read to deprive our client of an indefinite approval.

4. **Other matters.**

4.1 Although not stated in the "Section 5 Application" form, the letter from Mr McElligott to the Council dated 26 April 2023 suggests that condition 2 of the pipeline approval "cannot be complied with" because the planning permission for the LNG terminal to which it refers expired.

4.2 Condition 2 of the pipeline approval imposes a requirement to submit details of "the phasing of the proposed development". Mr McElligott suggests that cannot be complied with because the phasing details are required to address how the pipeline development might overlap "the construction of the permitted liquefied natural gas terminal at Ralappane". Mr McElligott takes issue with the reference in the condition to the word "permitted".

4.3 Mr McElligott is correct that the original permission for the LNG terminal has expired. That refers to a permission for strategic infrastructure development granted to our client by the Board on 31 March 2008 (Board ref. PA08.PA0002). The permission was twice amended (Board ref. nos. PL08.PM0002 and PL08.PM0014). The validity of the second of those amendments was questioned in proceedings bearing the title *Friends of the Irish Environment CLG v. An Bord Pleanala* and record number High Court 2018 734 JR. The matter was referred to the Court of Justice of the European Union ([2019] IHEC 8 and Case C-254/19). Consequently, an order was made on 9 November 2020 quashing the amendment bearing reference no. PL08.PM0014, so the permission bearing reference no. PL08.PA0002 has expired.

4.4 However, Mr McElligott is wrong that expiry of that permission has any relevance to condition 2 of the pipeline approval. There is nothing to prevent a phasing plan that proposes construction of the pipeline before any terminal, or even absent any terminal at all. The use of the word "permitted" in the condition cannot mean the condition, or the approval, is ineffective soon as permission for the terminal expires.

4.5 For completeness, we note that a fresh application for permission for strategic infrastructure development comprising, as summarised by the Board, "Shannon Technology and Energy Park consisting of power plant, battery energy storage system, floating storage and regasification unit, jetty, onshore receiving facilities, above ground installation and all ancillary structures/works" (Board ref. ABP-311233-21) remains pending.

In conclusion, we believe the request is misconceived and based on a mistaken understanding of both section 5 of the Planning Acts and the pipeline approval.

We invite the Board to exercise its discretion under section 138(1)(b) of the Planning Acts, to dismiss the referral on the basis that the referral should not be further considered by the Board having regard to "the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral".

Without prejudice to the foregoing preliminary objection that the Board does not have jurisdiction to entertain this referral, we have demonstrated that the pipeline approval is indefinite, and has no

"appropriate period", no duration and no "life". Also, we have demonstrated that condition 1 to the pipeline approval cannot be read to deprive our client of an indefinite approval.

There is no reference to any limitation of duration within any relevant planning document. The application documents relevant to the pipeline approval include only aspirational references to when it was hoped the construction period would commence. Contrary to what Mr McElligott suggests, there is commitment at all that the pipeline work would be completed before 2019.

In fact, strictly, there is no reference to any limitation of duration in any of the "plans and particulars".

The single isolated line in a cover letter cannot, and should not, be read to comprise a plan or particular, of the kind to which condition 1 refers. Further, it does not meet the threshold explained by the Supreme Court in *Lanigan* and applied by the High Court in *Glassco*.

Yours sincerely

(sent by email, so bears no signature)

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