



[2024] IEHC 555

THE HIGH COURT
PLANNING & ENVIRONMENT

[H.JR.2023.0001269]

IN THE MATTER OF SECTION 50, 50A AND 50B OF THE PLANNING AND DEVELOPMENT
ACT, 2000 AS AMENDED

BETWEEN

SHANNON LNG LIMITED

APPLICANT

AND

AN BORD PLEANÁLA, THE GOVERNMENT OF IRELAND,
THE MINISTER FOR ENVIRONMENT, CLIMATE AND COMMUNICATIONS, IRELAND AND
THE ATTORNEY GENERAL

RESPONDENTS

JUDGMENT of Humphreys J. delivered on Monday the 30th day of September 2024

1. Administrative decision-making requires the consideration of all relevant issues in a correct manner. That isn't too controversial. While the facts underlying these proceedings are complex, and the subject-matter important, that doesn't in itself lift the legal question here out of the ordinary. The central issue comes down to a fact-specific, case-specific application of the general requirement of correct administrative adjudication. As it happens, we are dealing here with refusal of a permission, but the need to apply the rules of administrative law is neutral and would apply equally to the grant of a permission. Nor does the potentially controversial nature of the project have any relevance to the legal analysis involved.

Judgment history

2. In *Friends of the Irish Environment v. An Bord Pleanála & Anor.* [2019] IEHC 80, 2 JIC 1501 (Unreported, High Court, 15th February 2019) Simons J. decided to refer questions to the CJEU concerning whether renewal of a permission engaged the habitats directive.

3. In the judgment of 9 September 2020, *Friends of the Irish Environment Ltd v An Bord Pleanála*, C-254/19, EU:C:2020:680, the CJEU in summary concluded that a renewal was potentially capable of requiring appropriate assessment. On foot of that, the extension of the permission was quashed by consent in the High Court.

4. In separate proceedings, *Friends of the Irish Environment CLG v. Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General & Shannon LNG Limited* [2020] IEHC 383, [2020] 9 JIC 1405 (Unreported, High Court, 14th September 2020) Simons J. refused to refer to the CJEU an issue regarding validity of the 4th Union list of Projects of Common Interest insofar as it includes the proposed Shannon LNG terminal and connecting pipeline. The list of projects of common interest had been adopted by the EU Commission by way of delegated regulation: Commission Delegated Regulation (EU) 2020/389.

5. In *Friends of the Irish Environment CLG v. Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General & Shannon LNG Limited* [2021] IEHC 177, [2021] 3 JIC 3003 (Unreported, High Court, 30th March 2020) Simons J. dismissed the balance of the challenge in respect of the List of Projects of Common Interest.

6. In *Friends of the Irish Environment CLG v. Minister for Communications, Climate Action and the Environment, Ireland and the Attorney General & Shannon LNG Limited* [2022] IECA 298 (Unreported, Court of Appeal, Binchy J., 8th December 2023), the Court of Appeal dismissed an appeal against Simons J.'s order declining to refer the issue of the List of Projects of Common Interests to the CJEU.

Geographical context

7. The development is proposed in the Shannon estuary about half-way between Ballylongford and Tarbert in Co. Kerry. A map is set out at <https://www.pleanala.ie/en-ie/case/311233>.

8. The development is an application for a Strategic Infrastructure Development comprising, *inter alia*, a gas-powered power plant; a battery energy storage system; and a Liquefied Natural Gas (LNG) Terminal.

Facts

9. When a consumer turns on the gas in their home, where does that come from? Mainly from the North Sea.

10. The longer answer is approximately 80% of gas imports come through two interconnector pipelines from Moffatt in Scotland which make landfall between Drogheda and North Co. Dublin (see map at https://irelandenergy2050.ie/questions/where-does-irelands-gas-come-from-and-what-determines-its-price/#:~:text=Once%20the%20gas%20arrives%20in,40%25%20of%20the%20final%20price.)).

11. The balance comes from the Corrib gas field. Kinsale is now shut and non-operational. Potentially of relevance in the event of an outage, there is also a pipeline from Scotland to Northern Ireland.

12. Approximately 56% of UK gas is imported, and 44% is indigenous. Of the imported gas, 42% is LNG which means that 24% of UK gas is imported LNG. Approximately 50% of the gas imported into the UK is hydraulically fractured.

13. Hydraulic fracturing ("fracking") is the process of fracturing rock by the use of fluids. "It has been used to specifically refer to the fracturing processes involved in the extraction of gas and oil trapped in sedimentary rock such shale" <https://www.gsi.ie/en-ie/geoscience-topics/energy/Pages/Fracking.aspx>.

14. However, the physical and geographical nature of the infrastructure means that the vast majority of the gas that comes into Ireland is either imported from Norway or produced in the UK. Public domain material indicates that most Scottish gas fields are in the UK continental shelf in the North Sea: <https://marine.gov.scot/sma/assessment/oil-and-gas-sector-and-infrastructure#:~:text=Most%20oil%20and%20gas%20fields,production%20and%20hosts%20wind%20turbines>.

15. Very little of the imported hydraulically fractured gas that comes to the UK actually comes to Ireland due to geographical factors.

16. Turning more specifically to the present application, we are now 17 years on from the first proposal for an LNG facility on this site.

17. The applicant first held pre-application discussions with the board on **2nd May 2007 and 27th June 2007** under s. 37B of the 2000 Act. On **11th September 2007**, the board served notice under s. 37B(4)(a) that it was of the opinion that the proposed development would fall within the scope of paras. 37A(2)(a) and (c) of the Act, *i.e.* it would be of strategic economic or social importance to the State or the region in which it would be situate and it would have a significant effect on the area of more than one planning authority. The formal application was made on **24th September 2007**.

18. On **31st March 2008**, the board granted permission to the applicant for strategic infrastructure comprising an LNG regasification terminal (Board ref. PL08.PA0002) (<https://archive.pleanala.ie/en-ie/case/Pa0002>). The permission was twice purportedly amended and extended (Board ref. PL08.PM0002 and PL08.PM0014) and has expired for reasons which we will get to shortly.

19. The Strategic Integrated Framework for the Shannon Estuary is a non-statutory inter-jurisdictional land and marine based framework plan to guide the future development and management of the Shannon Estuary. It was commissioned by Limerick City and County Council, Clare County Council, Kerry County Council, Shannon Development and the Shannon Foynes Port Company. The project was overseen by a multi-agency steering group comprised of the above and other key stakeholders with an interest in the estuary. The final Strategic Integrated Framework Plan for the Shannon Estuary was published following a public consultation process, and launched on 22nd November 2013.

20. On **17th February 2009**, the board granted approval to the applicant for strategic gas infrastructure comprising a 26 km pipeline between Ralappane, Co. Kerry and Leahy's, Co. Limerick (Board ref. PL08.GA0003). That approval has not expired.

21. On **9th July 2013**, the board granted permission to the applicant for strategic infrastructure comprising a 500 MW gas-fired power plant (Board ref. PL08.PA0028). Having regard to condition 2 of that permission, and s. 251 and 251A of the 2000 Act, the permission expired on 2nd December 2023.

22. The National Planning Framework, Project Ireland 2040 (<https://cdn.npf.ie/wp-content/uploads/Project-Ireland-2040-NPF.pdf>), published in **February 2018** (and currently under challenge in other proceedings), includes National Strategic Outcome 8 which addresses the Transition to a Low Carbon and Climate Resilient Society and includes the following policy aims:

"Deliver 40% of our electricity needs from renewable sources by 2020 with a strategic aim to increase renewable deployment in line with EU targets and national policy objectives out to 2030 and beyond. It is expected that this increase in renewable deployment will lead to a greater diversity of renewable technologies in the mix.

Reinforce the distribution and transmission network to facilitate planned growth and distribution of a more renewables focused source of energy across the major demand centres.

Strengthen energy security and resilience to support an island population of 8 million people through effective north-south electricity grid interconnection as well as exploring other EU interconnection options in the longer term to 2040.

Consideration of carbon neutral electricity generation that would be facilitated through harnessing carbon capture and storage (CCS).

National Interconnector (Sub-sea Ring around Ireland) or other solutions offer the potential to connect Ireland to the EU electricity grid System.

Roll-out of the National Smart Grid Plan enabling new connections, grid balancing, energy management and micro grid development.”

23. In addition, National Policy Objective 55 states that it is a policy to “promote renewable energy use and generation at appropriate locations within the built and natural environment to meet national objectives towards achieving a low carbon economy by 2050”.

24. On **16th August 2018**, the applicant purchased the 603-acre Shannon Landbank from the Minister for Transport, through his State agency, Shannon Commercial Enterprises DAC. The landbank was valued, marketed, and sold to the Applicant for €31.555 million, on basis that it was suitable for development of an LNG terminal.

25. In **October 2018**, the Department of Communications, Climate Action and Energy (as then titled), with support from the Commission for Regulation of Utilities (**CRU**), asked Gas Networks Ireland (**GNI**) and EirGrid to examine Ireland’s resilience to a prolonged gas disruption, and to make recommendations on how Ireland might future-proof its gas supply. The resulting Long Term Resilience Study (2018) (<https://www.gasnetworks.ie/docs/corporate/gas-regulation/Long-Term-Resilience-Study-2018.pdf>) concluded *inter alia*:

“The most economically advantageous option to improve the resilience of Ireland’s gas supply is a floating LNG terminal.

However, as the social benefits do not outweigh the costs. [*sic*] A detailed assessment of private benefits is required to determine whether such an investment would provide a broad societal benefit and a return for investors. Price and cost simulations and public consultation can be used to better understand the commercial interest in such a terminal. The analysis should include a robust Cost Benefit Analysis (CBA) including private benefits and consideration of possible funding and ownership options.

A floating LNG terminal would provide a direct connection for Ireland to the global LNG market and would allow Ireland to diversify its gas supply. However, greater exposure to the LNG market comes with price risk, which could result in usage of an LNG terminal fluctuating. This variability of utilisation needs to be considered in terms of cost recovery. We recommend further analysis, including multi scenario modelling of future LNG and pipeline gas prices to inform the level of utilisation and the private benefits associated with operating an LNG terminal.”

26. Separately, in or about **2018**, the CRU published the National Preventive Action Plan Gas 2018–2022 Ireland (https://energy.ec.europa.eu/system/files/2020-04/npap_ireland_2018_0.pdf), which stated, *inter alia*, that Ireland failed to meet the N-1 standard of energy security:

“In previous risk assessments, total disruption to the gas supply from the Moffat entry point constituted the largest gas infrastructure in relation to gas supply to Ireland. Projects are currently underway at Beattock and Brighthouse Bay compressor stations to eliminate the single point of failure which drove the existing failure mode i.e. total disruption to the gas supply from the Moffat entry point.

These mitigation works are scheduled for completion prior to gas year 2020/21 and will allow splitting of the entire SWSOS. This will result in a revision to the treatment of the N-1 calculation in that the loss of the largest piece of gas infrastructure will now constitute a partial disruption to the gas supply from the Moffat entry point. It can be seen that the result of the N-1 calculation is 85% and that Ireland fails to meet the criteria (i.e. if the supply of gas via Moffat is partially disrupted Ireland will be unable to deliver sufficient gas from other entry points to meet total demand on a 1 in 20 year peak-day).

In the event that an EU Member State cannot fulfil the N-1 infrastructure standard on a national basis, the Regulation permits the adoption of a regional approach in order to meet the Standard. Following a request from the CRU, BEIS agreed to adopt a regional approach between the UK and Ireland. The initial analysis indicates that the joint N-1 position for the UK and Ireland is 112%. Further information on this is provided in Section 8 ‘Regional Approach’.”

27. In *Friends of the Irish Environment CLG v. An Bord Pleanála* [2019] IEHC 80, [2019] 2 JIC 1501 (Unreported, High Court, 15th February 2019), Simons J. referred questions to the CJEU regarding whether the extension of the 2008 permission engaged the habitats directive. He noted that Barrett J. had held not in *Merriman v. Fingal County Council* [2017] IEHC 695, [2017] 11 JIC 2104 (Unreported, High Court, 21st November 2017) (and that leave to appeal had been refused in respect of that conclusion). Subsequently, in the judgment of 9 September 2020, *Friends of the Irish Environment Ltd v An Bord Pleanála*, C-254/19, EU:C:2020:680, the CJEU was to go on to hold to a contrary effect in certain circumstances, stating that:

"1. A decision extending the 10-year period originally set for carrying out a project for the construction of a liquefied natural gas regasification terminal must be regarded as an agreement of a project under Article 6(3) of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, where the original consent, having lapsed, ceased to have legal effect on expiry of the period originally set for those works and the latter have not been undertaken.

2. It is for the competent authority to assess whether a decision extending the period originally set for carrying out a project for the construction of a liquefied natural gas regasification terminal, the original consent for which has lapsed, must be preceded by the appropriate assessment of its implications under the first sentence of Article 6(3) of Directive 92/43 and, if so, whether that assessment must relate to the entire project or part thereof, taking into account, inter alia, previous assessments that may have been carried out and changes in the relevant environmental and scientific data as well as changes to the project and the existence of other plans or projects.

The assessment of a project's implications must be carried out where it cannot be ruled out, having regard to the best scientific knowledge in the field, that the plan or project might affect the conservation objectives of the site. A previous assessment of that project, carried out before the original consent for the project was granted, cannot rule out that risk unless it contains full, precise and definitive conclusions capable of removing all reasonable scientific doubt as to the effects of the works, and provided that there are no changes in the relevant environmental and scientific data, no changes to the project and no other plans or projects."

28. On **20th March 2019**, the applicant, as required by s. 37B(1) of the 2000 Act, entered into consultations with the board in respect of the proposed application for permission for the Project (Board ref. ABP-304007-19).

29. On **14th November 2019**, the Minister for Communications, Climate Action and Environment announced that he had received Government approval to initiate a review into the security and sustainability of Ireland's energy supply up to 2030.

30. On **15th June 2020**, the Government published the Programme for Government "Our Shared Future" (<https://www.gov.ie/en/publication/7e05d-programme-for-government-our-shared-future/?app=true>). At p. 36, with respect to natural resources, the following commitment was made regarding LNG:

"As Ireland moves towards carbon neutrality, we do not believe that it [makes] sense to develop LNG gas import terminals importing fracked gas. Accordingly, we shall withdraw the Shannon LNG terminal from the EU Projects of Common Interest list in 2021.

We do not support the importation of fracked gas and shall develop a policy statement to establish that approach."

31. In **September 2020**, the Sustainable Energy Authority of Ireland published the "Energy Security in Ireland 2020 Report" (<https://www.seai.ie/publications/Energy-Security-in-Ireland-2020-.pdf>) stating that it "provides up to date data and information which can be used as an input to" the Security of Supply Review. This included analysis of Ireland's dependency on import from the United Kingdom (at pp. 28-29), analysis of the increasing amount of LNG in the gas supply of the United Kingdom (at pp. 29-30) and analysis of gas infrastructure in the European Union showing that LNG imports met 22% of gas demand in the European Union in 2019 (at p. 35).

32. On foot of the judgment of Simons J. in the *Friends* case, an order was made on **9th November 2020** quashing the amendment bearing reference no. PL08.PM0014, so the permission bearing reference no. PL08.PA0002 has expired.

33. On **24th February 2021**, the Minister for the Environment, Climate and Communications, in a written answer to a parliamentary question stated that the Security of Supply Review was scheduled for completion during "Q4 2021". I should make clear that references to parliamentary proceedings are for background only and there is no question of holding parliamentarians to account in that regard.

34. A broadly favourable inspector's report on the pre-application consultation was published in **April 2021**.

35. On **10th May 2021**, Cambridge Economic Policy Associates (**CEPA**) was commissioned by the Minister for the Environment, Climate and Communications "to undertake a technical analysis of physical security of supply to inform the Security of Supply Review".

36. On **18th May 2021**, the Minister published a press release stating that he had received Government approval for a "Policy Statement on the Importation of Fracked Gas". In the press release, the Minister stated that the policy included a "moratorium on the development of LNG import terminals pending the completion of review of security supply". The 2021 policy is entitled "Policy Statement on the Importation of Fracked Gas" (<https://www.gov.ie/en/publication/f3774-policy-statement-on-the-importation-of-fracked-gas/>).

- 37.** This states, *inter alia*:
 "Ireland imports much of its natural gas via the two interconnector pipelines from Moffat in Scotland, which provide the majority of natural gas currently used in Ireland. Given the level of fracked gas in the imports from Scotland is considered very low, the highest risk of fracked gas being imported into Ireland on a large-scale would be via liquefied natural gas (LNG) terminals, if any were to be constructed."
- 38.** On pp. 2-3, the policy envisaged a review of energy security:
 "The Minister for the Environment, Climate and Communications is currently carrying out a review of the security of energy supply of Ireland's electricity and natural gas systems which is focussing on the period to 2030 in the context of ensuring a sustainable pathway to net zero emissions by 2050.
 The Government's 2021 Climate Action Plan will increase ambition in reducing Ireland's [sic] greenhouse gas emissions in line with the Programme for Government. This will lead to a lower annual use of natural gas than would otherwise be the case thus reducing the potential risks to security of supply. This will be taken into account by the review.
 The review will consider if it would be appropriate, or not, to develop LNG terminals in Ireland. It will also consider, if any such terminals were to be developed, if they should only be in order to provide a backup to existing supply infrastructure. It is only on the completion of this review that the Government can conclude, with certainty, the role of any future potential LNG terminals and the type, ownership and use of such terminals.
 The review will include a technical analysis and a public consultation. The outcome of the review will be brought to Government for its approval."
- 39.** The policy statement concludes with the following:
 "2 Policy Decision
 The Government recognises that:
- fracked gas can have significantly higher greenhouse gas emissions than conventional natural gas, both nationally and globally, and the widespread use of fracked gas would not be consistent with Ireland's 2030 and 2050 climate objectives nor globally with the Paris Agreement;
 - the outcome of the review of the security of energy supply of Ireland's electricity and natural gas systems will inform how Ireland can ensure we will have secure energy systems focussing on the period to 2030 in the context of ensuring a sustainable pathway to net zero emissions by 2050;
 - the review will consider how the Government's increased ambition in renewable energy and the development of new indigenous clean energy sources, such as hydrogen from renewable sources and biomethane, will reduce fossil fuel use and how this can reduce the security of supply risks;
 - the review will consider the risk of stranded assets, including fossil fuel infrastructure, in the context of the Government commitment to net zero emissions by 2050; and
 - the review will inform whether it would be appropriate, or not, to develop LNG terminals in Ireland and, if any such terminals were to be developed, whether they should only be in order to provide a contingency supply in the event of failure of existing natural gas supply infrastructure.
- In order to implement the Programme for Government commitment that it does not support the importation of fracked gas, the Government has approved that:
- pending the outcome of the review of the security of energy supply of Ireland's electricity and natural gas systems, it would not be appropriate for the development of any LNG terminals in Ireland to be permitted or proceeded with;
 - the Government will work with like-minded European States to promote and support changes to European energy laws – in particular the upcoming revision of the European Union's Gas Directive and Gas Regulation – in order to allow the importation of fracked gas to be restricted; and
 - the Government will work with international partners to promote the phasing out of fracking at an international level within the wider context of the phasing out of fossil fuel extraction."

40. As regards how this is to be viewed legally, the applicant is correct to submit that:
 "21. In his press release to announce the Fracked Gas Policy, the Minister stated that the policy included a 'moratorium on the development of LNG import terminals pending the completion of review of security of supply'.
 22. As a matter of fact, and law, there is no such moratorium, or temporary prohibition, as suggested.
 ...

29. The Fracked Gas Policy is a mere expression of Government policy, from which the Board was free to depart. Although the phrase 'it would not be appropriate for the development of any LNG terminals in Ireland to be permitted or proceeded with' is expressed in blunt terms, that does not give to the Fracked Gas Policy any special priority or weight among the listed other relevant considerations for the Board. Also, the phrase 'would not be appropriate' does not comprise a prohibition, but rather an expression of desire or preference only."

41. It appears to be common ground between the parties that contrary to the wording used by the Minister, the Government policy does not constitute a moratorium. It follows that the document constituted a policy preference only, which the board is in law free to depart from because Government policy has only a have-regard-to status and not a comply-with status.

42. On **26th May 2021**, the Minister for the Environment, Climate and Communications, in a written answer to two parliamentary questions stated that the Security of Supply Review

"includes a technical analysis which will help inform a public consultation. The technical analysis includes identification and examination of the key risks to the security of supply in the electricity and natural gas systems; identification of options that could address or mitigate these risks in the period to 2030; and appraisal of these options in the context of ensuring a sustainable pathway to 2050. It is planned that the technical analysis will be published and the public consultation undertaken in the second half of this year. It is planned the review will be completed by the end of 2021, following which it will be submitted to Government."

43. On **2nd June 2021**, the board concluded that the project comprised development specified within the Seventh Schedule of the 2000 Act and fell within the scope of sub-paras. (a), (b) and (c) of s. 37A(2) of the 2000 Act. Accordingly, the project would be strategic infrastructure, so that an application for permission should be made to the board under s. 37E of the 2000 Act.

44. The National Marine Planning Framework (**NMPF**) (<https://www.gov.ie/en/publication/60e57-national-marine-planning-framework/>) was published on **30th June 2021**. The NMPF addresses Natural Gas Storage in Chapter 12. It is an objective of the NMPF to:

"Support the development of natural gas storage where appropriate in the context of the outcome of the review of the security of energy supply of Ireland's electricity and natural gas systems. This review is being carried out by Department of the Environment, Climate and Communications and is focusing on the period to 2030 in the context of ensuring a sustainable pathway to 2050."

45. Natural Gas Storage Policy 1 in the NMPF states:

"Subject to assessments required for the protection of the environment, and only where in keeping with the outcome of the review of the security of energy supply of Ireland's electricity and natural gas systems (which is being carried out by Department of the Environment, Climate and Communications), natural gas storage proposals should be supported."

46. The Energy Security of Supply Review is referenced at p. 119 of the NMPF as follows:

"Key issues for Marine Planning

The Department of the Environment, Climate and Communications is carrying out a review of the security of energy supply of Ireland's electricity and natural gas systems, which is focusing on the period to 2030 in the context of ensuring a sustainable pathway to 2050.

The outcome of this review will determine the need for natural gas storage and the policy context within which it could be developed in Ireland. It will also inform the need to update or develop the necessary regulatory frameworks.

Any such frameworks would need to take account of the Marine Planning Policy Statement in relation to, for example, the need for a robust, stable and effective regulatory regime to attract investment, demonstrate stability and ensure protection of the marine environment."

47. In addition, Chapter 15 of the NMPF is addressed to "Energy – Transmission". It is an objective of Chapter 15 to:

"Support the development of additional natural gas transmission/import infrastructure where it is in keeping with the outcome of the review of security of energy supply of Ireland's electricity and natural gas systems, and does not involve the importation of fracked gas. This review is being carried out by the Department of Environment, Climate and Communications (DECC) and is focussing on the period to 2030 in the context of ensuring a sustainable pathway to 2050."

48. Chapter 15 of the NMPF identifies Key Issues for Marine Planning in the context of energy transmission and states as follows in respect of natural gas:

"Natural Gas

Security of energy supply is a key imperative energy policy objective for Ireland and the European Union. However, security of supply cannot be examined in isolation from sustainability. That is why the review of the security of energy supply of Ireland's electricity and natural gas systems, which is being carried out by Department of the Environment, Climate and Communications, is focusing on the period to 2030 in the context of ensuring a sustainable pathway to 2050. It is also critical that any new natural gas transmission infrastructure does not involve the importation of fracked gas."

- 49.** Transmission Policy 6 of the NMPF states:
 "Subject to required assessments for the protection of the environment, and only where in keeping with the outcome of the review of the security of energy supply of Ireland's electricity and natural gas systems (which is being carried out by Department of the Environment, Climate and Communications), and not involving the importation of fracked gas, additional proposals for natural gas transmission/import infrastructure should be supported."
- 50.** On **6th July 2021**, the CRU Commissioner testified to the Oireachtas Joint Committee on Environment and Climate Action that:
 "When we talk about this diversity of supply we are being quite open. We have obligations around security of supply and we must consider all options. A relationship has been drawn between LNG and certain types of gas and I am not sure that this helps the overall discussion. LNG can be and could be natural gas. Another point on diversity of supply is the type of gas that is entering the system. We should also be considering what role indigenous biogas will have and what role blue hydrogen might have as we transition through a blended natural gas system to a system that might ultimately be decarbonised. There are many aspects to diversity of supply. I would neither rule in nor rule out that we might be discussing the role of LNG, but I emphasise that we should take the idea of fracked gas and separate it completely from the idea of LNG, to just consider LNG, if we are looking at that as a route for natural gas to ensure diversity and therefore security of supply."
- 51.** Notice of the present application was published in the *Irish Examiner* and the *Kerryman* newspapers on **25th August 2021**, and in the *Kerry's Eye* newspaper on **26th August 2021**. Notice of the application at the site was erected on **25th August 2021**. The application was available for inspection at the offices of the board and Kerry County Council. The entire of the application was hosted by the applicant on a website at <https://stepplanning.com/>. A copy was also hosted by the board on its website at <https://www.pleanala.ie/en-ie/case/311233>.
- 52.** On **27th August 2021**, the applicant formally made the application the subject of the proceedings. This was an application for permission for strategic infrastructure under s. 37E of the 2000 Act (Board ref. ABP 311233-21). The application was accompanied by an Environmental Impact Assessment Report (in four volumes: Volume 1 – Non Technical Summary, Volume 2 – Main Report, Volume 3 – Figures, Volume 4 – Appendices) and a Natura Impact Statement.
- 53.** As far as concerns the articulated Government policy against hydraulic fracturing, the EIAR stated:
 "In relation to the Policy Statement on the Importation of Fracked Gas, it is noted that most of the LNG in the world is not sourced from fracked gas. For context, all of the LNG required for the Proposed Development represents only 1% of the globally traded non fracked LNG. LNG is a globally traded commodity and there are 37 operational LNG terminals in Europe at present. Accordingly, the Proposed Development does not depend on fracked gas and the Applicant is confident that it can source gas from non-fracked sources to meet energy demand and ensure security of supply in Ireland."
- 54.** The application was open to observations from the public for a seven-week period from 3rd September 2021 to 22nd October 2021.
- 55.** In his submission to the board on the application for permission for the project, dated **19th October 2021**, the Minister stated *inter alia*:
 "I wish to make it very clear that I believe the permitting of this project would be in direct contravention to [*sic*] Government policy and therefore it should not, under any circumstances, be permitted."
- 56.** The applicant submits that the letter's "tone" is "remarkable" and reflects "strong antipathy" towards a commercial LNG facility.
- 57.** On **11th February 2022**, the board invited the applicant to confirm whether any rights or obligations arising from Regulation (EU) No. 347/2013 on guidelines for trans-European energy infrastructure (**TEN-E Regulation** or **PCI Regulation**) have a bearing on the consideration by the board of the project. On 23rd February 2022, the applicant confirmed to the board that the TEN-E Regulation did not apply, as the project was not contained on the "fourth list" of projects of common interest, within Commission Delegated Regulation (EU) 2020/389 of 31st October 2019 amending the TEN-E Regulation and that no application had been made to include the project on the "fifth list",

at the time described within proposed Commission Delegated Regulation (Commission ref. C(2021) 8409 final).

58. The Russian Federation's full-scale war of aggression against Ukraine commenced on **24th February 2022**.

59. On **8th March 2022**, the Commission communicated a proposed new policy named REPower EU (<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=COM:2022:108:FIN>).

60. This included the following:

"II. REPower EU: eliminating our dependence on Russian Fossil FUELS

Phasing out our dependence on fossil fuels from Russia can be done well before 2030. To do so, the Commission proposes a REPowerEU plan that will increase the resilience of the EU-wide energy system based on two pillars:

- Diversifying gas supplies, via higher LNG imports and pipeline imports from non-Russian suppliers, and higher levels of biomethane and hydrogen.
- Reducing faster our dependence on fossil fuels at the level of homes, buildings and the industry, and at the level of the power system by boosting energy efficiency gains, increasing the share of renewable and addressing infrastructure bottlenecks.

REPOWER TRACK	EU	FOCUS	FF55 AMBITION BY 2030	REPOWEREU MEASURE	REPLACED BY THE END OF 2022 (BCM equivalent) estimate	ADDITIONAL TO FF55 BY 2030 (BCM equivalent) estimate
GAS DIVERSIFICATION		NON-RU NATURAL GAS	-	LNG diversification	50*	50

61. The section on diversifying gas supplies begins as follows:

"2.1. Diversify gas supplies

2.1.1. LNG and pipe imports

An unprecedented LNG supply to the EU in January 2022 has ensured security of gas supply for this winter. The EU could import 50 bcm more of LNG (e.g. from Qatar, USA, Egypt, West Africa) on a yearly basis. Diversification of pipe sources (e.g. Azerbaijan, Algeria, Norway) could deliver another 10 bcm of yearly savings on Russian gas imports.

The Commission will assess as a matter of priority whether measures and investments are needed in hydrogen-ready gas infrastructure and interconnections to overcome bottlenecks to the full use of the EU's LNG capacity.

While diversifying supply, the EU fosters its international partnerships. The Commission will continue discussing within G7 and with major global purchasers of gas (Japan, South Korea, China, India) medium-term market developments."

62. The thrust of the Commission's approach is not something one would immediately reconcile with the Irish Government's anti-LNG policy of 2021.

63. The Versailles declaration of **10-11th March 2022** (<https://www.consilium.europa.eu/media/54773/20220311-versailles-declaration-en.pdf>) was a unanimous declaration of heads of State and Government of EU countries in which the Taoiseach participated. It noted that:

"Russia's unprovoked and unjustified military aggression against Ukraine grossly violates international law and the principles of the UN Charter and undermines European and global security and stability. It is inflicting unspeakable suffering on the Ukrainian population. Russia, and its accomplice Belarus, bear full responsibility for this war of aggression and those responsible will be held to account for their crimes."

64. On energy security, the declaration went on:

"14. Over the past few years, the European Union has set ambitious targets to reach the objective of climate neutrality by 2050.

15. As the EU works towards achieving that goal, the current situation calls for a thorough reassessment of how we ensure the security of our energy supplies.

16. In this respect, we agreed to phase out our dependency on Russian gas, oil and coal imports as soon as possible, in particular by:

- a) accelerating the reduction of our overall reliance on fossil fuels, taking into account national circumstances and Member States' choices of their energy mix;
- b) diversifying our supplies and routes including through the use of LNG and the development of biogas;
- c) further developing a hydrogen market for Europe;

- d) speeding up the development of renewables and the production of their key components, as well as streamlining authorisation procedures to accelerate energy projects;
- e) completing and improving the interconnection of European gas and electricity networks and fully synchronising our power grids throughout the EU;
- f) reinforcing EU contingency planning for security of supply;
- g) improving energy efficiency and the management of energy consumption, and promoting a more circular approach to manufacturing and consumption patterns.

We invite the Commission to propose a RePowerEU plan to this effect by the end of May.

17. In addition, we will continue working on the following strands:

- a) ensuring sufficient levels of gas storage and putting in place coordinated refilling operations;
- b) monitoring and optimising the functioning of the electricity market;
- c) channelling coordinated investment in energy systems, including providing LNG infrastructure;
- d) enhancing connectivity with our immediate neighbourhood.

18. We invite the Commission to put forward a plan to ensure security of supply and affordable energy prices during the next winter season by the end of March.

19. In parallel we will urgently address and consider concrete options, building on the Commission Communication of 8 March 2022, for dealing with the impact of increased energy prices on our citizens and businesses, especially our vulnerable citizens and SMEs, including at the next meeting of the European Council on 24-25 March 2022."

65. Heads of State and Government met again at the European Council later in March. The conclusions of the European Council of **24-25th March 2022** (<https://www.consilium.europa.eu/media/55082/2022-03-2425-euco-conclusions-en.pdf>)

(referenced in the National Energy Security Framework) include the commitment that:

"Refilling of gas storage across the Union should start as soon as possible, taking fully into account national preparedness measures. With a view to next winter, Member States and the Commission will urgently:

- a) establish the necessary solidarity and compensation mechanisms;
- b) work together on voluntary common purchase of gas, LNG and hydrogen, making optimal use of the collective political and market weight of the European Union and its Member States to dampen prices in negotiations. The common purchases platform will also be open for Western Balkan countries and the three associated Eastern Partners"

66. Again, let's not overlook the obvious point that Ireland had a seat at the table in the unanimous conclusions of the European Council.

67. In **April 2022**, the "Electricity Crises: A Risk Preparedness Plan for Ireland" (https://energy.ec.europa.eu/document/download/f42c4e4e-12f9-4f0a-aecf-88de0eaba892_en?filename=IE_%20RPP%20electricity.pdf&prefLang=bq) was published by the CRU under Regulation (EU) 2019/941 on risk preparedness in the electricity sector. This identifies (at p. 26) fossil fuel (including natural gas) shortage to have a "disastrous" impact, rated as "major".

68. On **13th April 2022**, the National Energy Security Framework (**NESF**) was published (<https://www.gov.ie/pdf/?file=https://assets.gov.ie/221399/86cb99f5-58e3-4821-bc4c-e1bb1fa706fb.pdf#page=null>).

69. The NESF summarises the European Council conclusions as follows:

"• set out that the European Union will phase out its dependency on Russian gas, oil, and coal imports as soon as possible (as set out in the Versailles Declaration) and that the European Commission will develop a comprehensive and ambitious plan, on a phased basis, by end of May;

- issued an invitation to Member States and the European Commission to continue to make best use of the Toolbox (see below) including the new State Aid temporary crisis framework;
- tasked the Council and the European Commission to consider the short-term options in the European Commission's REPowerEU communication (see below) and how they would contribute to reducing gas prices and addressing contagion effect on electricity markets;
- called on the European Commission to submit proposals that effectively address the problem of excessive electricity prices while preserving the integrity of the Single Market, maintaining incentives for the green transition, preserving the security of supply, and avoiding disproportionate budgetary costs;

• tasked the Council to examine the proposals by the European Commission on EU gas storage policy duly taking into account and addressing the interests of the Member States with significant storage capacity in order to ensure a fair balance and in relation to next winter Member States and the Commission will urgently:

- establish the necessary solidarity and compensation mechanisms;

- work together on voluntary common purchase of gas, liquified natural gas and hydrogen;
 - complete and improve our gas and electricity interconnections throughout the European Union; and
 - work on ensuring the security of supplies for all Member States.
- the European Commission to take any necessary initiatives by May 2022, also taking into account the final ACER and ESMA reports to ensure a robust and fully interconnected internal electricity market and a well-functioning carbon market.”
- 70.** The NESF states at p. 9:
 “Ireland’s imports of natural gas come from the UK and therefore not directly from Russia. However, the European gas market is an interconnected market from both a physical and wholesale price perspective. The physical supplies to, and the wholesale market price of natural gas in Ireland are therefore influenced by the supply of natural gas from Russia into the European market.
 The flow of physical gas throughout Europe is closely inter-related with disruptions in one part of the network having the ability to spread elsewhere. However, this interconnectedness is also a strength as countries are able to avail themselves of multiple ways of obtaining gas.
 There are four sources of gas supply potentially available to countries: indigenous production, imports via liquified natural gas terminals, imports via pipeline and prior gas production/imports held in storage facilities. Ireland has two of these: indigenous production and imports via pipeline. The UK by comparison has all four.”
- 71.** The NESF quotes the REPower EU policy on pp. 32-33:
 “In March 2022, the European Commission published REPowerEU – a Joint European Action for more affordable, secure and sustainable energy. The plan outlined a series of measures including:
- Mitigating the impact of high retail prices and supporting heavily exposed companies
 - Preparing for next winter by ensuring sufficient gas storage is available
- The plan also aimed to phase out dependence on Russian fossil fuels within the EU through two pillars:
- Diversifying gas supplies, via higher liquified natural gas and pipeline imports from non-Russian suppliers, and larger volumes of biomethane and renewable hydrogen production and imports;
 - Accelerating the reduction of the use of fossil fuels in our homes, buildings, industry, and power system, by boosting energy efficiency, increasing renewables and electrification, and addressing infrastructure bottlenecks”
- 72.** On diversifying gas supplies, the NESF conclusions are open-ended and certainly not anti-LNG:
 “7.3 Diversifying Fossil Fuel Supplies
 While the supply of natural gas required to meet Ireland’s energy needs has not, to date, been impacted by the war in Ukraine, there are security of supply risks. Ireland’s high dependence on imports from a single source in the UK, along with the high and growing reliance of the electricity system on natural gas supplies, has necessitated a review of security of supply, which is being carried out by the Department of the Environment, Climate and Communications.
 The review is considering the risks to both natural gas and electricity supplies, and a range of measures, including the need for additional capacity to import energy (such as liquified natural gas), energy storage, fuel diversification and renewable gases (such as hydrogen). The completion of the review is a key priority.
 Response 31: Prioritise the review of security of supply of Ireland’s electricity and natural gas systems
- Led by the Department of the Environment, Climate and Communications
 - Due for implementation: Q3 2022”
- 73.** It can be noted that notwithstanding the urgency of Versailles, and the statement that the Government would “prioritise” the review which was “due” in Q3 2022 (*i.e.*, by 30th September 2022), we are still waiting for the completion of the review two years later.
- 74.** On **28th April 2022**, the applicant wrote to the Minister seeking a meeting to discuss relevant issues in the wake of the Russian Federation’s full-scale invasion of Ukraine.
- 75.** On **16th June 2022**, the Minister’s office wrote to the applicant refusing the request to meet, without reasons:
 “On behalf of [the] Minister ... I would like to thank you once more for your correspondence and acknowledge your meeting request. Please forgive the extensive delay in reverting to

you. Unfortunately, the Minister is unable to facilitate a meeting and sends his regrets. Kind regards."

76. On **4th July 2022**, the elected members of Kerry County Council adopted the Kerry County Development Plan 2022 to 2028 (<https://cdp.kerrycoco.ie/>), which includes an express objective (KCDP 12-3, at p. 255) that supports the proposed development at this specific location as follows, "facilitates the sustainable expansion of the gas network, including the facilitation of a gas importation facility in the Tarbert/Ballylongford Landbank".

77. On **5th July 2022**, the board requested further information from the applicant, addressing the principal issues arising from the observations received by the board.

78. On **18th August 2022**, the applicant responded to the request. That response was open to observations from the public for a one-month period from 9th September 2022 to 10th October 2022.

79. During the public consultation periods in 2021 and 2022, a total of 76 observations were made.

80. On **19th September 2022**, the Minister for the Environment, Climate and Communications published the CEPA "Technical Analysis of the Security of Energy Supply of Ireland's Electricity and Natural Gas Systems", dated 16th September 2022, together with a non-technical summary for public consultation. A consultation then commenced on 28th October 2022. The accompanying consultation document, inviting submissions from the public, described the CEPA report (at p. 4) as follows:

"Supporting technical analysis has been conducted by Cambridge Economic Policy Associates Ltd (CEPA). The technical analysis consisted of three different stages of work, (i) the identification and examination of risks, (ii) the identification of options to address these risks, and (iii) the appraisal of these options. There are two reports of the technical analysis which are available to be reviewed in conjunction with this consultation document. This consultation will help inform the Department's review of the security of energy supply of Ireland's electricity and natural gas systems and the outcome of the review will be brought to Government for its consideration."

81. With reference to the 2021 policy, the consultation document states (at p. 26) that:

"It is foreseen that the outcome of the review of the security of energy supply of Ireland's electricity and natural gas systems would supersede the policy statement on the importation of fracked gas."

82. With reference to mitigation options for the security of gas supply, the consultation document states (at pp. 42-43) the following regarding LNG and a potential floating LNG storage and regassification unit (**FSRU**):

"Liquid natural gas (LNG) is natural gas which has been cooled down to a temperature that converts it from a gas to a liquid that is 1/600th of its original volume. LNG enables large volumes of natural gas to be stored and transported on specially designed vessels and therefore provides an alternative to transporting natural gas via pipeline. LNG provides access to alternative sources of natural gas. There is currently no import capability for LNG in Ireland. This mitigation option is based on a floating LNG storage and regassification unit (FSRU) which could be used on a non-commercial strategic basis. A FSRU is a non-fixed LNG storage facility with an onboard regassification plant that is capable of returning imported LNG to its original gaseous state and then supplying it directly into the onshore gas network. FSRUs are usually moored at a jetty and can be refilled by other LNG vessels that dock alongside it. When the FSRU [*sic*] is no longer required, it can be transported to another location without leaving a large piece of stranded infrastructure behind. This mitigation option assumes that the LNG FSRU could be leased for a limited period of time, as a medium-term solution to mitigate more immediate security of supply concerns.

An alternative option could be to have an FSRU which is operated on a commercial basis but with a mandated level of strategic storage held at all times so that in the event of a supply shock a level of gas supply would be available immediately for the purpose of mitigating the supply shock. An emerging advancement is the possibility to design hydrogen-ready LNG facilities. For example, hydrogen can be stored as a gas using high pressure tanks or as a liquid requiring cryogenic temperatures. A German utility is planning a 'hydrogen-ready' terminal for LNG in Germany which may incorporate a green ammonia terminal."

83. Appendix B sets out a long-list of mitigation options and indication of whether they would be shortlisted. A fixed LNG terminal (commercially operated) was not short-listed, for the following reasons:

- "The introduction of commercial LNG would likely result in the importation of fracked gas to Ireland.¹⁶⁸ This would be in direct contradiction to the Government's opposition to the use of natural gas produced from fracking.¹⁶⁹

- The additional energy requirements associated with LNG relative to natural gas supplies (including liquefaction, transport, and regasification) mean that the use of LNG in Ireland may have an adverse impact on the Government's decarbonisation targets¹⁷⁰ – e.g., the Programme for Government's commitment to delivering a 7% reduction in emissions each year to 2030).
- As storage stocks would be driven by market fundamentals, there would be no guarantee that stored gas volumes would be sufficient to cover a security of supply shock. This risk could be partially mitigated by requiring the LNG facility to hold a minimum volume of LNG in reserve to meet any emergent security of supply shocks."

84. The footnotes are:

"168 We note that the Office of the Attorney General concluded in 2021 that it is not possible for Ireland under the European Treaties or EU Directive to ban the import into Ireland of fracked gas (available on gov.ie). Even if legally viable, it may be extremely difficult in practice to isolate fracked gas within global LNG supply chains. For example, the majority of US gas production is from fracking with injection into transportation infrastructure before being exported. Restricting fracked gas would effectively mean banning US LNG imports, which would restrict imports from one of the largest and most reliable sources of LNG.

169 DECC (2021) 'Policy Statement on the Importation of Fracked Gas', available on gov.ie

170 For example, the UK North Sea Transition Authority has estimated that LNG imports into GB are on average over double the emission intensity of UK gas production and pipeline gas imports from Norway. Available on nsauthority.co.uk."

85. A floating LNG FSRU was also rejected for similar reasons (p. 140).

86. In passing, the logic of footnote 168 isn't totally clear. Does it make sense to say that we shouldn't import LNG from the US so therefore we shouldn't import LNG at all? The word "may" in the phrase "may be extremely difficult" seems to be doing a lot of work.

87. More immediately, the logic for distinguishing quite so markedly between a commercial facility (bad) and a state facility (good) is not overwhelmingly clear. Assuming that private sector recourse to hydraulically-fractured gas or more general stimulation of demand for gas would be a problem, it isn't immediately obvious why that couldn't be mitigated by planning conditions or some other form of contractual or legal regulation, or if not, perhaps it could be explained why not.

88. On **26th September 2022**, the two Nord Stream gas pipelines linking Germany to the Russian Federation were sabotaged.

89. On **25th October 2022**, the Irish Academy of Engineering made a submission. They criticised the failure to examine the technical or financial feasibility of the supply mitigation options, stating that "[h]olding a consultation on options which have not been technically or financially examined is totally inappropriate in a context where the likely cost will be measured in billions and the consequences of doing nothing are likely to result in major load shedding across the country". On the possible gas supply mitigation option of strategic LNG storage, they stated:

"FSRU's are not designed for long term storage as such units, of necessity, lose up to 0.2% of their gas per day, due to the fact that LNG is stored at minus 162°C. This is described as 'Boil Off Gas' (BOG). This gas is normally injected into the gas grid. An FSRU with a typical capacity of 160,000 m³ could lose 20% of its cargo (32,000m³) over a 4 month period. If long term storage is envisaged, BOG would need to be captured and injected into the gas grid to avoid venting to the atmosphere. In this case the FSRU becomes an import facility with an artificially constrained delivery."

90. They stated that the assessment was "very much informed (or misinformed) by supposed Government policy" and continuing:

"In short, the LNG option was eliminated due to Government policy. But this is not what Government policy states. The Policy Statement on the Importation of Fracked Gas (May 2021) references the ongoing review of the security of Ireland's energy supply and stated that:

'The review will inform whether it would be appropriate, or not, to develop LNG terminals in Ireland and, if any such terminals were to be developed, whether they should only be in order to provide a contingency supply in the event of failure of existing natural gas supply infrastructure'.

CEPA should have examined the LNG option in an objective manner.

It makes absolutely no sense to rule out an Irish land-based LNG terminal on the basis of reduced imports of fracked gas. Precisely the same quantity of fracked gas will be delivered to the EU gas grid one way or another and we in Ireland will soon be 100% dependent on that gas."

- 91.** The applicant made a submission on the technical analysis on **28th October 2022**.
- 92.** The submission points out the following:
 “The impact of an outage affecting the gas interconnectors is, and always has been, the key risk to Ireland's energy systems. While there are 2 separate pipelines, they join or pass near each other at numerous points both onshore and subsea.”
- 93.** The applicant made the case for a FSRU in its submission, and concluded *inter alia* that:
 “Ireland must take the lead from other EU countries and bring all stakeholders together to implement the most beneficial and viable projects without any ideological thinking getting in the way of rational decision making.”
- 94.** On **28th October 2022**, Engineers Ireland, formerly the Institute of Engineers in Ireland, made a submission that is published on their website. The first “key recommendation” (at p. 2) is “[t]o balance the risks of natural gas supply to Ireland, it is prudent in the near term to deploy one or more LNG floating storage and regasification units (FSRU) to achieve diversification of natural gas supply routes”. With respect to any concern about LNG sourced from hydraulic fracturing, they state (at p. 10) that “this specific risk can be largely avoided by direct national and/or EU oversight and regulation”.
- 95.** On **8th November 2022**, the Minister for the Environment, Climate and Communications, in a written answer to a parliamentary question, stated that over 400 responses had been received. He stated that “[t]he completion of the review is a key priority. I will bring my security of energy supply recommendations to Government once the review process has been completed”. On **21st February 2023**, in a written answer to a parliamentary question, the Minister stated that there had been “over 450 responses”.
- 96.** On **28th March 2023**, the Minister for the Environment, Climate and Communications, in a written answer to a parliamentary question, stated: “[t]he consultation responses have been reviewed and analysed and have provided important insights with regard to energy security risks, mitigation options and policy measures. I will bring my recommendations on energy security to the Government shortly”.
- 97.** On **5th April 2023**, EirGrid plc and SONI Limited, in their capacity as system operators of the Single Electricity Market on the island of Ireland, published the results of the 2026/2027 T-4 Capacity Auction (EirGrid ref. PCAR2627T-4) to ensure power generation capacity to meet security of supply for the period 1st October 2026 to 30th September 2027 (<https://www.eirgrid.ie/news/eirgrid-group-publishes-t-4-capacity-auction-results>). Of the 7,204 MW cleared for award in the auction, 5,496 MW (76%) was from gas-fired power generation units. The results include an award of capacity to the applicant for 353.2 MW (EirGrid ref. GU_404590 and GU_404860).
- 98.** On **9th April 2023**, when asked if commercial LNG infrastructure would have to be built in Ireland in the years ahead, the Minister for the Environment, Climate and Communications was quoted as follows (*Sunday Business Post*, 9th April 2023, <https://www.businesspost.ie/news/ryan-mulls-green-policy-u-turn-on-commercial-lng-terminal/>):
 “The world changed a year ago when those Nord Stream gas pipelines were blown up in the Baltic [Sea]. The concern about energy security and particularly gas pipelines was heightened. So we do need a form of storage and an alternative gas supply route and gas supply source so that, should anything happen, we have some protection. We can’t protect against everything, but we do have a security issue there we have to address ... The metrics we will look at are: how much security can you get? Are you certain you can get an alternative source of supply? How low-carbon is it? Because you can’t do something if it is in breach of your climate limits. And what is the price? Those are the three things to consider in any energy trilemma. We will look at it on that basis.”
- 99.** On **27th April 2023**, the Minister, in a written answer to a parliamentary question, stated: “I will bring recommendations arising from the review to Government in Q2 for their consideration”.
- 100.** On **16th May 2023**, the “Long-term Strategy on Greenhouse Gas Emissions Reduction” was published. This was prepared by the Department of Environment, Climate and Communications under Regulation (EU) 2018/1999 on the governance of the energy union and climate action. This acknowledges the importance of “security of gas supply infrastructure, particularly in the context of electricity generation”, and “gas importation infrastructure (LNG)” among the mitigation solutions.
- 101.** On **24th May 2023**, in a written answer to a parliamentary question, the Minister stated that would happen “in the near future”. On 15th June 2023, he stated that the Department was “finalising the completion of the review, as a matter of priority”.
- 102.** On **31st May 2023**, the board invited the applicant to make a submission on the observations received.
- 103.** On **12th June 2023**, the applicant responded to this request, including by pointing out that the technical analysis was not itself Government policy.

104. The inspector's report on the present application is dated **14th June 2023**, and recommended that the board refuse permission for part of the project, comprising the proposed floating storage and regasification unit, jetty and onshore receiving facilities. The report recommended that the board grant permission for the balance of the project, comprising the 600 MW power plant, 120 MW battery energy storage system, above ground installation and all ancillary structures/works.

105. The decision recites "policy documents" which it considered:

"5.0 Policy and Context

Regard is had to the following national, regional and local policy documents:

National

- National Planning Framework 2018
- National Development Plan 2021-2030
- National Marine Planning Framework 2020
- The Climate Action and Low Carbon Development (Amendment) Act 2021
- Climate Action Plan 2023
- National Adaptation Framework (NAF) (January 2018)
- Sectoral Emission Ceiling Limits (Sept 2022)
- The National Energy and Climate Plan (NECP) 2021-2030
- Government Policy Statement on the Importation of Fracked Gas (May 2021)
- Policy Statement on Security of Electricity Supply (November 2021)
- National Energy Security Framework (April 2022)
- Review of the security of energy supply of Ireland's electricity – Consultation Papers (2022)
- National Ports Policy (2013)

Other Energy Sector Reports

- All-Island Generation Capacity Statement 2022-2031
- CRU Information Paper Security of Electricity Supply – Programme of Actions
- SEAI Energy Security in Ireland (2020)
- Long Term Resilience Study 2018

Regional and Local Policy

- Regional Spatial Economic Strategy for the Southern Region
- Strategic Integrated Framework Plan for the Shannon Estuary (SIFP)
- Kerry County Development Plan 2022-2028
- Listowel Municipal District Local Area Plan 2020 – 2026"

106. On pp. 81-82, the inspector reinforces this by saying that:

"It is therefore useful to identify some of the current policy provisions most relevant to this case:

- The National Planning Framework 2018 promotes renewable energy use and generation and identifies the single point of connection to the UK gas network in Scotland and our limited gas storage capacity, as a risk to security of supply.
- The National Development Plan identifies the delivery of c.2GW of new conventional generation capacity to support a predominantly wind/solar electricity system, as a strategic investment priority. The review of the security of energy supply of electricity and natural gas systems will inform Government policy in relation to security of supply and the need for further investment.
- The Programme for Government (2020) states that as Ireland moves towards carbon neutrality, it does not make sense to develop LNG gas import terminals importing fracked gas.
- Targets and actions set out in the Climate Action Plan 2023 include the delivery of c.2 GW of new flexible gas-fired power stations by 2030 and supports the phasing out of hydraulic fracking at an international level.
- The Government Policy Statement on the Importation of Fracked Gas states that it would not be appropriate for LNG terminals to be permitted or proceeded with pending the outcome of the review of the security of energy supply of Ireland's electricity and natural gas systems. The National Energy & Climate Action Plan 2021-2030 notes that increased penetration of wind energy will increase reliance on the gas network.
- The National Energy Security Framework 2022 notes that completion of the review of security of energy supply, which will consider LNG import capacity, is a priority.
- The National Marine Planning Framework supports additional natural gas transmission / import infrastructure where it is in keeping with the outcome of the review of the security of energy supply and not involving the importation of fracked gas.

- The Policy Statement on Security of Electricity Supply (November 2021) identifies the development of new conventional as a national priority and should be permitted and supported to ensure security of supply and support the growth of renewable electricity generation.
- The Review of the Security of Energy Supply of Ireland's Electricity And Natural Gas Systems identifies options to mitigate risk of disruption to gas supply and electricity generation, including strategic FSRU and Strategic gas storage capacity. (A public consultation phase has closed and the review is currently being considered by the Dept.)"

107. The applicant particularly complains about the last of these which it says is not a statement of national policy. The board in submissions accepted that the consultation paper is not national policy, but said that reference to it was not material to the decision and merely a statement of fact.

108. The applicant also complains that a critical policy statement to which the Government was a party, the Versailles Declaration, is not mentioned.

109. The inspector's analysis on the key issue is:

"10.3.1. General Policy Context

Policy in relation to energy security and supply, and climate change is a complex and evolving area, subject to environmental, economic and geopolitical influences. It is not the role of the Board to set policy and, in this regard I note that under s.143(1) of the 2000 Act, as amended, the Board is required to have regard to:

- (a) the policies and objectives of the Government, State authority, Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,
- (b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and
- (c) the National Planning Framework and any regional spatial and economic strategy for the time being in force.

Furthermore, the Climate Action and Low Carbon Development (Amendment) Act 2021 requires that public bodies perform their functions in a manner consistent with, inter alia, the most recent approved climate action plan, national long term climate action strategy and the furtherance of the national climate objective. These matters are considered in further detail below. It is therefore useful to identify some of the current policy provisions most relevant to this case:

- The National Planning Framework 2018 promotes renewable energy use and generation and identifies the single point of connection to the UK gas network in Scotland and our limited gas storage capacity, as a risk to security of supply.
- The National Development Plan identifies the delivery of c.2GW of new conventional generation capacity to support a predominantly wind/solar electricity system, as a strategic investment priority. The review of the security of energy supply of electricity and natural gas systems will inform Government policy in relation to security of supply and the need for further investment.
- The Programme for Government (2020) states that as Ireland moves towards carbon neutrality, it does not make sense to develop LNG gas import terminals importing fracked gas.
- Targets and actions set out in the Climate Action Plan 2023 include the delivery of c.2 GW of new flexible gas-fired power stations by 2030 and supports the phasing out of hydraulic fracking at an international level.
- The Government Policy Statement on the Importation of Fracked Gas states that it would not be appropriate for LNG terminals to be permitted or proceeded with pending the outcome of the review of the security of energy supply of Ireland's electricity and natural gas systems.
- The National Energy & Climate Action Plan 2021-2030 notes that increased penetration of wind energy will increase reliance on the gas network.
- The National Energy Security Framework 2022 notes that completion of the review of security of energy supply, which will consider LNG import capacity, is a priority.
- The National Marine Planning Framework supports additional natural gas transmission / import infrastructure where it is in keeping with the outcome of the review of the security of energy supply and not involving the importation of fracked gas.
- The Policy Statement on Security of Electricity Supply (November 2021) identifies the development of new conventional as a national priority and should be permitted

and supported to ensure security of supply and support the growth of renewable electricity generation.

- *The Review of the Security of Energy Supply of Ireland's Electricity And Natural Gas Systems* identifies options to mitigate risk of disruption to gas supply and electricity generation, including strategic FSRU and Strategic gas storage capacity. (A public consultation phase has closed and the review is currently being considered by the Dept.)

Energy security is described by the International Energy Agency (IEA) as 'the uninterrupted availability of energy sources at an affordable price'. Security is subject to variation and risk in terms of demand for energy and supply thereof. Key variables on the supply side include physical infrastructure (e.g. terminals, distribution networks) and international supply chains. In considering the proposed development, it is useful to note the distinction between security of gas supplies and security of electricity supply / generation. While there are dependencies between these areas, recent concerns in relation to the capacity of the national grid to meet demand for electricity relate primarily to electricity generation capacity rather than supply of fuel.

At EU level, policy measures aim to provide for integration in the energy market, security of energy supply and a sustainable energy sector. Regulations were introduced in 2010 and 2017 requiring Member States to undertake security of gas supply risk assessments and ensure that adequate preventive action plans and emergency plans are developed to mitigate identified risks. I note that such risks have intensified in the past year. RePower (2022) aims to end reliance of the European market on Russian fossil fuels, including increased deployment of renewables and diversification of gas supplies via pipelines and LNG imports.

The technical report informing the *Review of the Security of Energy Supply of Ireland's Electricity and Natural Gas Systems* Consultation Paper (September 2022) notes the interconnected nature of the European gas network and of supplies within the European market. Notwithstanding the EU N1 standard, it would appear that the key gas supply risk for Ireland relates to the risk of disruption to the single point of connection to the UK and wider European gas market."

- 110.** At p. 239 onwards the inspector concludes:

"That permission be refused for the following elements of the development:

- A proposed Floating Storage and Regasification Unit (FSRU), with a Liquefied Natural Gas (LNG) storage capacity of 170,000 m³ (up to 180,000m³), 292.6m long and 43.4m wide, with a scantling draft water line of 12.9m.
- A proposed jetty, the deck of which will be set at +9 m OD (Malin Head), and ancillary structures.
- Proposed onshore receiving facilities.

for the reasons and considerations set out below.

It is Government policy, as set out in the *Policy Statement on the Importation of Fracked Gas* (May 2021), that it would not be appropriate to permit or proceed with the development of any LNG terminals in Ireland pending completion of the review of the security of energy supply of Ireland's electricity and natural gas systems. Other policy statements, including the National Marine Planning Framework 2020, National Energy Security Framework (2022) and the National Energy & Climate Action Plan 2021-2030 confirm that completion of the review is a key priority in considering risks to energy supply, and the need for energy storage, fuel diversification and additional capacity to import energy."

- 111.** On **3rd August 2023**, the "National Risk Assessment 2023: Overview of Strategic Risks" was published by the Government. This recognises (at p. 16), with respect to sources for the supply of energy, the "lack of diversity of supply sources and storage is a risk for security of supply".

112. A board direction (Board ref. BD-013610-23) was made on **7th September 2023**, which stated that the submissions on file and the inspector's report had been considered at board meetings held on 29th May 2023, 31st August 2023, and 7th September 2023. It is recorded that the board decided, by a majority of 8:2, to refuse permission for the project.

113. By order of the board (Board ref. ABP-311233-21), dated **13th September 2023**, the board refused permission for the project.

114. Departing from the inspector's recommendation, the board refused permission outright rather than in part only. Critically, the decision states:

"Reasons and Considerations

It is Government policy, as set out in the *Policy Statement on the Importation of Fracked Gas* (May 2021), that it would not be appropriate to permit or proceed with the development of any Liquefied Natural Gas terminals in Ireland pending completion of the review of the security of energy supply of Ireland's electricity and natural gas systems. Other policy

statements, including Project Ireland 2040 National Marine Planning Framework, National Energy Security Framework (2022) and the National Energy and Climate Action Plan 2021-2023 confirm that completion of the review is a key priority in considering risks to energy supply, and the need for energy storage, fuel diversification and additional capacity to import energy.

The Review of the Security of Energy Supply of Ireland's Electricity and Natural Gas Systems (Department of the Environment, Climate and Communications Sept 2022) has been subject to public consultation and the initial technical analysis does not support the development of a commercially operated Liquefied Natural Gas Floating Storage and Regasification Unit. The review has not yet been completed.

Having regard to the above and to the nature and form of the proposed development which constitutes an overall integrated facility incorporating an Liquefied Natural Gas terminal and with a clear focus on the use of Liquefied Natural Gas as the primary fuel source for related elements such as the proposed power station, it is considered that the development at this time would be contrary to current government policy, and in the absence of such policy support, such development would be contrary to the proper planning and sustainable development of the area."

115. On **14th November 2023**, the Minister finally published the results of the Security of Supply Review (<https://www.gov.ie/en/consultation/dbe14-review-of-the-security-of-energy-supply-of-irelands-electricity-and-natural-gas-systems/>) comprising a report entitled "Energy Security in Ireland to 2030, Energy Security Package" (**Energy Security Report**) and annexes, including (as Annex 2) a report entitled "Securing Ireland's Gas Supplies" (**Gas Supply Report**).

116. The applicant effectively stated that it was suspicious that the publication of the review was held up until after the board decision.

117. The Energy Security Report identifies, as Action 17, the need to create a "Strategic Gas Emergency Reserve to protect Ireland in the event of a gas supply disruption". It is noted that by 2030, Ireland's natural gas supplies are expected to be almost entirely from UK imports and that should there be an interruption in supply on a day of peak gas demand due to low availability of renewable sources, there is potential for up to 35% of gas demand being unmet, which would result in "severe economic and social impacts". It is stated that, based on the Department's preliminary analysis, it is anticipated that an FSRU will best meet the criteria set out. It is noted that this solution is preferred by many EU Member States. However, the report also indicates that this is to be "State-led", meaning "commissioned by the State via GNI within a regulatory framework overseen by the CRU". The 2021 policy is listed in Appendix 2 as one of the "Major Policy Statements 2015-2023".

118. The 2023 review oddly enough has minimal express reference to LNG apart from mentioning the 2021 policy, but it includes the following:

"Based on preliminary analysis of the Department, it is anticipated that a floating reserve (FSRU) will best meet these criteria, a solution preferred by a range of EU Member States. However, this will be examined in detail by GNI with a substantive proposal by Q2 2024. The optimum solution to deliver this strategic reserve project will be subject to final approval by Government."

119. The Gas Supply Report refers in §5 to the Technical Analysis. It refers at §§5.4-7 to the choice of short-listed mitigation options from the long list, noting at §5.6 that only an FSRU could fully mitigate unserved demand in the various shock scenarios considered, and at §5.7 that although commercial LNG was long-listed, it was rejected for reasons including: "a) They would likely result in the importation of fracked gas". No further consideration is given to a commercial FSRU in the Gas Supply Report; only a State-led FSRU is addressed. Mitigation Option E is "Offshore Gas Emergency Reserve", in the form of a FSRU. The Gas Supply Report notes, at §7.52:

"Introduction of this policy measure would require a change in policy which presently does not allow for the development of LNG facilities."

120. The applicant complains that since the 2021 document was only meant to be an interim statement pending a review, its content should not have been relied on decisively to limit the options to be considered in the review.

121. Despite publication of the Energy Security Report and its annexes, the 2021 policy has not been formally terminated. The State's submissions say this is because the Government has yet to make a final decision.

122. The applicant has made two further applications to the board that are currently pending. Application dates, ABP reference numbers and the links to those applications are as follows:

- (i) **19th April 2024** – ABP-319566 - a 600 MW Powerplant, 120 MW Battery Energy Storage System, Above Ground Installation and associated ancillary works <https://www.pleanala.ie/en-ie/case/319566>; and
- (ii) **29th July 2024** – ABP-320300 - a Gas Insulated Switchgear (GIS) substation compound <https://www.pleanala.ie/en-ie/case/320300>.

123. Both files are currently with an inspector for completion of a report.

Procedural history

124. The proceedings were filed on 6th November 2023. On 7th November 2023, I allowed a pre-leave amendment of the statement of grounds.

125. The matter was listed again on 13th November 2023, when leave was granted on standard terms with the motion returnable for two weeks' time.

126. The originating notice of motion was filed on 16th November 2023.

127. On 27th November 2023, the matter was adjourned for discussion regarding directions, costs and whether Friends of the Irish Environment (who were, as noted above, litigants in previous cases involving permissions in favour of the applicant) would get involved.

128. On 4th December 2023, the parties confirmed that costs protection applied, and Friends of the Irish Environment expressly indicated that they were not getting involved. The matter was adjourned to 18th December 2023.

129. On 18th December 2023, a timetable for directions was agreed between parties. The matter was adjourned to March 2024.

130. At the list to fix dates on 11th March 2024, the court allocated a hearing date of 16th September 2024. The matter was adjourned to 8th April 2024 for mention.

131. The first named respondent filed its opposition papers on 12th March 2024.

132. The second, third, fourth and fifth named respondents filed their opposition papers on 12th April 2024.

133. On 15th April 2024, further directions were agreed, with the matter for mention on 29th July 2024 to confirm papers were in order.

134. The applicant filed its replying affidavit on 16th May 2024.

135. The applicant filed its written submissions on 3rd July 2024.

136. The first named respondent filed its written submissions on 18th July 2024.

137. The second, third, fourth and fifth named respondents filed their written submissions on 31st July 2024.

138. In the light of the general reduction in hearing times set out in PD HC126, the time allocation was reduced to two days. On foot of that, the matter was listed for mention on 9th September 2024 to attempt to focus the issues. Following that, the applicant sought liberty to put in a further affidavit exhibiting relevant material.

139. The matter was then heard on 16th and 17th September 2024. The applicant's solicitor's late affidavit was formally admitted on 17th September 2024 on the basis that the State would have an opportunity to reply in the event of a further module, and judgment was reserved on that date.

Relief sought

140. The reliefs sought in the amended statement of grounds are as follows:

"1. An Order of certiorari quashing the decision of the First Respondent, An Bord Pleanála (the 'Board'), made on 13 September 2023 (ref. ABP-311233-21) refusing permission for strategic infrastructure development, comprising the Shannon Technology and Energy Park consisting of 600 MW power plant, 120 MW battery energy storage system, floating storage and regasification unit, jetty, onshore receiving facilities, above ground installation and all ancillary structures/works, at Kilcolgan Lower and Ralappane, Ballylongford, Co. Kerry (the 'Project').

2. A declaration that the decision of the Second Respondent, the Government of Ireland (the 'Government'), at the request of the Third Respondent, the Minister for Environment, Climate and Communications, made on 18 May 2021 to adopt within the 'Policy Statement on the Importation of Fracked Gas' a policy statement that 'pending the outcome of the review of the security of energy supply of Ireland's electricity and natural gas systems, it would not be appropriate for the development of any LNG terminals in Ireland to be permitted or proceeded with' is invalid. Strictly in the alternative, an Order of certiorari quashing the said decision.

~~3. In the alternative, a declaration that the Project is not contrary to the said policy statement of 18 May 2021.~~

3. If necessary, an Order, pursuant to Order 84, rule 21(3) of the Rules of the Superior Courts, extending the time to seek the relief at paragraph 2 above.

4. Such declaration(s) as to the legal rights and/or legal position of the Applicant and (if and insofar as legally permissible and appropriate) persons similarly situated and/or of the legal duties and/or legal position of the Respondent as the court considers appropriate.

5. A declaration that protective cost provisions of section 50B of the Planning and Development Act 2000 (as amended) (the '2000 Act') and/or sections 3 and 4 of the Environment (Miscellaneous Provisions) Act 2011, and/or Order 99 and/or section 169 of Legal Services Regulation Act 2015, as interpreted in light of Article 9 of the Aarhus Convention, apply to these proceedings.

6. Further or other order.
7. Liberty to Apply.
8. An Order in respect of the costs of these proceedings."

Grounds of challenge

141. The core grounds of challenge are as follows:

"(1) Domestic Law Grounds

Grounds with respect to the relief sought at (d)(1), (3) to (8)

1. The decision of the Board made on 13 September 2023 (ref. ABP-311233-21) refusing permission for the Project (the 'Board Decision') is invalid as the Board slavishly adhered to a single policy statement of the Government, the 'Policy Statement on the Importation of Fracked Gas' made on 18 May 2021 (the 'Fracked Gas Policy'), to which the Board was, in accordance with section 37G(2)(g) and 143 of the 2000 Act, obliged to 'have regard' and/or 'consider' only. The Board applied the Fracked Gas Policy as if it were an over-riding consideration and/or prohibition, and thereby abdicated its decision-making function. Further particulars of which are set out in Part 2 below.

2. The Board Decision is invalid as the Board misinterpreted and misapplied the Fracked Gas Policy, in particular by determining that the proposed development would be contrary to the policy of discouraging the import of fracked gas and/or ensuring the State does nothing to encourage or facilitate fracking elsewhere. The Board failed to properly interpret the Fracked Gas Policy, which, in express terms, records that, on advice provided by the Attorney General, 'a legal ban on the importation of fracked gas could not be put in place at this time'. The Fracked Gas Policy, and the commitment in the Programme for Government to which it purports to give effect, are concerned only with the import of natural gas extracted by 'fracking'. The policy objective is to prevent import of fracked gas and/or to ensure the State does nothing to encourage or facilitate fracking elsewhere. In the alternative, the Board failed to consider whether that policy objective can be achieved by other means, including by way of condition. Further particulars of which are set out in Part 2 below.

3. The Board Decision is invalid as the Board failed to consider and/or have regard, properly or at all, to, and/or failed to give reasons that address, relevant considerations that support the proposed development and/or contradict the Fracked Gas Policy, including:

(i) Kerry County Development Plan 2022 to 2028, which includes an express objective (KCDP 12-3, at page 255) that supports the proposed development at this specific location as follows, 'facilitates the sustainable expansion of the gas network, including the facilitation of a gas importation facility in the Tarbert/Ballylongford Landbank';

(ii) The 'Electricity Crises: A Risk Preparedness Plan for Ireland' prepared by the Commission for Regulation of Utilities ('CRU') under Regulation (EU) 2019/941 on risk preparedness in the electricity sector and published in April 2022, which identifies (at page 26) fossil fuel (including natural gas) shortage to have a 'disastrous' impact, rated as major';

(iii) The most recent 'National Preventive Action Plan for Gas' prepared by the CRU under Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply (the 'N 1 Regulation'), which identifies measures to safeguard security of gas supply, and acknowledges (at pages 37-38) that the State does not satisfy the N-1 requirement for security of gas supply;

(iv) The Versailles Declaration made by European Union leaders on 10 and 11 March 2022, on the Russian aggression against Ukraine, as well as reducing energy dependencies, which expressly requires 'diversifying our supplies and routes including through the use of LNG and the development of biogas' and 'providing LNG infrastructure';

(v) The 'Long-term Strategy on Greenhouse Gas Emissions Reduction' prepared by the Department of Environment, Climate and Communications under Regulation (EU) 2018/1999 on the governance of the energy union and climate action, and published by the United Nations ('UN') on 16 May 2023, which acknowledges the importance of 'security of gas supply infrastructure, particularly in the context of electricity generation', and 'gas importation infrastructure (LNG)' among the mitigation solutions; and/or,

(vi) The National Risk Assessment 2023: Overview of Strategic Risks' published by the Government on 3 August 2023, which recognises (at page 16), with respect to sources for the supply of energy, the 'lack of diversity of supply sources and storage is a risk for security of supply'.

Further particulars of which are set out in Part 2 below.

4. The Board Decision is invalid as the Board had regard to an irrelevant consideration, namely, the initial technical analysis prepared for the Minister for Environment, Climate and Communications as part of the ongoing 'Review of the Security of Ireland's Electricity and Gas System' published for public consultation on 19 September 2022 (the 'Security of Supply Review'). Pending completion of the review, including the submissions received in response to the publication consultation, these technical materials should be considered drafts that are not relevant to the decision-making function of the Board. Further particulars of which are set out in Part 2 below.

5. Without prejudice to core ground 4 above and in the alternative, the Board Decision is invalid as the Board failed to properly interpret the initial technical analysis prepared as part of the ongoing Security of Supply Review. The technical analysis does, in fact, consider a gas supply mitigation option, including by reference to floating LNG terminal (commonly called a Floating Storage and Regasification Unit ('FSRU')), as proposed within the Project. In particular, it contemplated expressly '[a]n alternative option could be to have an FSRU which is operated on a commercial basis but with a mandated level of strategic storage held at all times so that in the event of a supply shock a level of gas supply would be available immediately for the purpose of mitigating the supply shock.' Further particulars of which are set out in Part 2 below.

6. The Board Decision is invalid as the Board failed to properly consider the recommendation made by its inspector to grant permission for part of the proposed development, comprising the proposed power plant. The reasons given by the Board for departure from the recommendation of its inspector do not justify, properly or at all, the decision to refuse permission for the power plant. In particular, the Board's reference to the Strategic Integrated Framework for the Shannon Estuary is misplaced, in circumstances where that was considered by Kerry County Council when making the Kerry County Development Plan 2022 to 2028, which includes an express objective (KCDP 12-3) that supports the proposed development at this specific location as follows, 'facilitates the sustainable expansion of the gas network, including the facilitation of a gas importation facility in the Tarbert/Ballylongford Landbank'. Further particulars of which are set out in Part 2 below.

(2) EU Law Grounds

7. The Board Decision is invalid as, notwithstanding that the Fracked Gas Policy was adopted by the Government without complying with the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (SI No. 435 of 2004) (as amended) and/or Directive 2001/42/EC on strategic environmental assessment, and notwithstanding that the environmental effects of the policy were not considered before the policy was adopted, or applied by the Board, the Board has applied the Fracked Gas Policy as if it were a plan or programme that sets the framework for consents that require environmental impact assessment and further as if it were a plan or programme that amends plans or programmes that were subject to environmental assessment under the aforesaid Regulations and Directive. Further particulars of which are set out in Part 2 below.

(3) Validity Grounds

Grounds with respect to the relief sought at (d)(2) to (8)

Without prejudice to core ground 2 above, and in the alternative:

8. The Fracked Gas Policy is invalid as the policy is a plan or programme that sets the framework for consents that require environmental impact assessment, as it has exerted decisive influence over the planning process for the proposed development, a project that requires environmental impact assessment. The policy has been adopted in breach of the European Communities (Environmental Assessment of Certain Plans and Programmes) Regulations 2004 (SI No. 435 of 2004) (as amended) and/or Directive 2001/42/EC on strategic environmental assessment. Further particulars of which are set out in Part 2 below.

9. The Fracked Gas Policy is invalid as, although the policy is expressed to apply to all LNG terminals, there is only one such terminal proposed, the proposed development. Section 30(1) of the 2000 Act provides that 'the Minister [for Housing, Local Government and Heritage] shall not exercise any power or control in relation to any particular case with which a planning authority or the Board is or may be concerned'. The policy is a decision of Government, a cabinet of Ministers that includes the Minister for Housing, Local Government and Heritage. The policy is therefore in breach of section 30. Further, the policy is akin to a Bill of Attainder that singles out an individual person, Shannon LNG Limited, for burdensome treatment in breach of its rights to natural justice and/or to property under Article 40.3 and 43 of the Constitution. Further particulars of which are set out in Part 2 below.

10. The Fracked Gas Policy is invalid as the policy that 'it would not be appropriate for the development of any LNG terminals in Ireland to be permitted or proceeded with' is not rationally connected to, and extends beyond, the recited evidential basis for the policy. It is not necessary to prohibit a terminal of the kind proposed, where the objective is to ban the import of fracked gas. Further particulars of which are set out in Part 2 below.

11. The Fracked Gas Policy is invalid as the policy acknowledges that it would not be lawful to impose a ban on the import of fracked gas, simpliciter. The policy that 'it would not be appropriate for the development of any LNG terminals in Ireland to be permitted or proceeded with' is designed as a measure having equivalent effect, targeting only import of LNG at a terminal, not import by interconnector pipeline or by ferry. Further particulars of which are set out in Part 2 below."

Two fact specific issues

142. Given the multiplicity of issues in the case and most critically the fact that the policies at issue are something of a moving target, it makes sense not to rush into deciding all possible issues but first to address the two aspects that are highly specific to the facts, namely:

- (i) failure to consider a Government policy document that was adopted between the inspector's report and the board decision (core ground 3(vi)); and
- (ii) miscategorising a consultation document as a policy document and having regard to that in the inspector's recommendation (core ground 4).

Core ground 3(vi)

143. To set the context, the full text of Core ground 3 is:

"The Board Decision is invalid as the Board failed to consider and/or have regard, properly or at all, to, and/or failed to give reasons that address, relevant considerations that support the proposed development and/or contradict the Fracked Gas Policy, including:

- (i) Kerry County Development Plan 2022 to 2028, which includes an express objective (KCDP 12-3, at page 255) that supports the proposed development at this specific location as follows, 'facilitates the sustainable expansion of the gas network, including the facilitation of a gas importation facility in the Tarbert/Ballylongford Landbank';
- (ii) The 'Electricity Crises: A Risk Preparedness Plan for Ireland' prepared by the Commission for Regulation of Utilities ('CRU') under Regulation (EU) 2019/941 on risk preparedness in the electricity sector and published in April 2022, which identifies (at page 26) fossil fuel (including natural gas) shortage to have a 'disastrous' impact, rated as 'major';
- (iii) The most recent 'National Preventive Action Plan for Gas' prepared by the CRU under Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply (the 'N 1 Regulation'), which identifies measures to safeguard security of gas supply, and acknowledges (at pages 37-38) that the State does not satisfy the N-1 requirement for security of gas supply;
- (iv) The Versailles Declaration made by European Union leaders on 10 and 11 March 2022, on the Russian aggression against Ukraine, as well as reducing energy dependencies, which expressly requires 'diversifying our supplies and routes including through the use of LNG and the development of biogas' and 'providing LNG infrastructure';
- (v) The 'Long-term Strategy on Greenhouse Gas Emissions Reduction' prepared by the Department of Environment, Climate and Communications under Regulation (EU) 2018/1999 on the governance of the energy union and climate action, and published by the United Nations (UN') on 16 May 2023, which acknowledges the importance of 'security of gas supply infrastructure, particularly in the context of electricity generation', and 'gas importation infrastructure (LNG)' among the mitigation solutions; and/or,
- (vi) The 'National Risk Assessment 2023: Overview of Strategic Risks' published by the Government on 3 August 2023, which recognises (at page 16), with respect to sources for the supply of energy, the 'lack of diversity of supply sources and storage is a risk for security of supply'."

144. The parties' positions as recorded in the statement of case are summarised as follows:

"Core Ground 3 – Failure to have regard to, and give reasons that address, relevant positive policies

Applicant

Ground 3 is related to Grounds 1 and 2, which allege that the Board accorded overwhelming significance to the Fracked Gas Policy and failed to interpret that Policy correctly. This Ground alleges that the Board failed adequately to consider material that supported the proposed development and contradicted the Policy. In the alternative, it is alleged that the Board failed to give adequate reasons for implicitly rejecting this material. Reliance is placed on the following material:

- (i) Kerry County Development Plan 2022 to 2028, which includes an express objective (KCDP 12-3, at page 255) that supports the proposed development at this specific location

as follows, 'facilitates the sustainable expansion of the gas network, including the facilitation of a gas importation facility in the Tarbert/Ballylongford Landbank';

(ii) The 'Electricity Crises: A Risk Preparedness Plan for Ireland' prepared by the Commission for Regulation of Utilities ('CRU') under Regulation (EU) 2019/941 on risk preparedness in the electricity sector and published in April 2022, which identifies (at page 26) fossil fuel (including natural gas) shortage to have a 'disastrous' impact, rated as 'major';

(iii) The most recent 'National Preventive Action Plan for Gas' prepared by the CRU under Regulation (EU) 2017/1938 concerning measures to safeguard the security of gas supply (the 'N 1 Regulation'), which identifies measures to safeguard security of gas supply, and acknowledges (at pages 37-38) that the State does not satisfy the N-1 requirement for security of gas supply;

(iv) The Versailles Declaration made by European Union leaders on 10 and 11 March 2022, on the Russian aggression against Ukraine, as well as reducing energy dependencies, which expressly requires 'diversifying our supplies and routes including through the use of LNG and the development of biogas' and 'providing LNG infrastructure';

(v) The 'Long-term Strategy on Greenhouse Gas Emissions Reduction' prepared by the Department of Environment, Climate and Communications under Regulation (EU) 2018/1999 on the governance of the energy union and climate action, and published by the United Nations ('UN') on 16 May 2023, which acknowledges the importance of 'security of gas supply infrastructure, particularly in the context of electricity generation', and 'gas importation infrastructure (LNG)' among the mitigation solutions; and/or,

(vi) The 'National Risk Assessment 2023: Overview of Strategic Risks' published by the Government on 3 August 2023, which recognises (at page 16), with respect to sources for the supply of energy, the 'lack of diversity of supply sources and storage is a risk for security of supply'.

It is submitted that no reasons were given for rejecting the policy material referred to above, or subordinating it wholly to the Board's (flawed) interpretation of the Fracked Gas Policy. On this basis also, the Board Decision is invalid.

First Respondent

This ground is premised on a selective listing of a range of matters which the Applicant asserts are relevant considerations. The contention is that the Board failed adequately to consider these matters, which the Applicant says militated in favour of a grant of permission, and/or failed to give adequate reasons for 'implicitly rejecting' these matters.

The Applicant's complaints in respect of this ground are, in truth, merits-based submissions dressed up as complaints that the Board failed to consider certain matters. In substance, the Applicant seeks to reargue the position advanced in its application (which was rejected) for the purpose of contending that more weight should have been attributed to certain matters. This ground fails to understand that, subject to irrationality (which does not arise), the Court 'does not attempt to reassess the weight to be attached to relevant factors' – per *Sweetman v. An Bord Pleanála* [2008] 1 I.R. 277. As noted by the Court in *Cork County Council* (§57):

'...The duty to have regard to something doesn't automatically create a duty to give reasons for not giving that matter more weight. That follows from the entitlement of the decision-maker to assess the weight to be given to the various matters which it is considering'

In terms of reasons, the Applicant's complaint '...makes the classic error of confusing lack of narrative discussion with failure to have regard to something' – *Protect East Meath v Meath County Council* [2022] IEHC 395). The Inspector and the Board engaged with the Applicant's submissions and clear reasons were provided for not accepting same.

Insofar as the various matters listed by the Applicant reiterate similar issues with regard to security of energy supply – such as, for example, 'diversifying...supplies' and risk of over-reliance on a single source of gas supply from the UK – it is clear that the substance of these matters was considered by the Board in the information and policy documentation considered (including the National Energy Security Framework, National Energy and Climate Action Plan). The obligation to consider such matters – including the Development Plan, per s.37G(2)(c) of the 2000 Act – is not an obligation of outcome, nor is it for the Applicant to dictate the weight that the Board ought to have attributed to a particular matter or consideration. There was no breach by the Board of its obligations under s.37G(2) or s.143 and the Applicant has not established same by reference to the various matters it lists in respect of this ground.

Further, where the various matters referred to by the Applicant largely reiterate the same point and reflect issues already considered in policy documents (including those before the Board), there is no obligation on the Board to repetitively address/continuously repeat same in its decision when the substance of the issues is clearly dealt with.

The Inspector's Report and Board's Decision clearly indicate that the application documentation and submissions were considered, with reference to relevant context and documentation. The mere listing of matters by the Applicant does not amount to evidence that the Inspector and the Board did not have regard to such issues. The Board provided clear reasons for its conclusions – this ground is without substance.

Second, Third, Fourth and Fifth Respondents

Core Ground No. 3 is directed at the Board and is not addressed by the State Respondents."

145. In the context of SID development such as this, the board is required to consider the matters contained in s. 143 of the 2000 Act:

"37G.—(1) When making a decision in respect of a proposed development for which an application is made under section 37E, the Board may consider any relevant information before it or any other matter to which, by virtue of this Act, it can have regard.

(2) Without prejudice to the generality of subsection (1), the Board shall consider—

(a) the [environmental impact assessment report] submitted under section 37E(1), any submissions or observations made, in response to the invitation referred to in section 37E(3), within the period referred to in that provision, the report (and the recommendations and record, if any, attached to it) submitted by a planning authority in accordance with section 37E(4), any information furnished in accordance with section 37F(1) and any other relevant information before it relating to—

(i) the likely consequences of the proposed development for proper planning and sustainable development in the area in which it is proposed to situate the development, and

(ii) the likely effects on the environment of the proposed development,

(b) any report or recommendation prepared in relation to the application in accordance with section 146, including the report of the person conducting any oral hearing of the proposed development and the written record of any meeting referred to in section 37F(3),

(c) the provisions of the development plan or plans for the area,

(d) the provisions of any special amenity area order relating to the area,

(e) if the area or part of the area is a European site or an area prescribed for the purposes of section 10(2)(c), that fact,

(f) if the proposed development would have an effect on a European site or an area prescribed for the purposes of section 10(2)(c), that fact,

(g) the matters referred to in section 143,

(h) any relevant provisions of this Act and of any regulations made under this Act."

146. Section 143 includes the policies and objectives of the Government or the Minister as well as the national interest and matters of strategic importance:

"Board to have regard to certain policies and objectives.

143.—(1) [The Board shall, in the performance of its functions (other than functions conferred by Chapter III of Part XXI), have regard to]—

(a) the policies and objectives for the time being of the Government, a State authority, the Minister, planning authorities and any other body which is a public authority whose functions have, or may have, a bearing on the proper planning and sustainable development of cities, towns or other areas, whether urban or rural,

(b) the national interest and any effect the performance of the Board's functions may have on issues of strategic economic or social importance to the State, and

(c) the [National Planning Framework] and any [regional spatial and economic strategy] for the time being in force.

(2) In this section "public authority" means any body established by or under statute which is for the time being declared, by regulations made by the Minister, to be a public authority for the purposes of this section.]"

147. It can be noted that the wide terms of having regard to policies and objectives of a broad range of entities goes well beyond the much more focused statutory provision referable to government policy considered in *R. (Friends of the Earth Ltd) v. Heathrow Airport Ltd* [2020] UKSC 52, [2021] 2 All E.R. 967, [2021] P.T.S.R. 190, [2020] 12 WLUK 212 (Lord Hodge and Lord Sales SCJJ.) regarding s. 5(7) and (8) of the Planning Act 2008:

"(7) [An NPS] must give reasons for the policy set out in the statement.

(8) The reasons must (in particular) include an explanation of how the policy set out in the statement takes account of Government policy relating to the mitigation of, and adaptation to, climate change."

148. The UK Supreme Court related this, in context, to formally constituted formal statements of government policy. Leaving the concept of "Government policy" as being too open-ended would

create a trap for planning decision-makers which would make the process unworkable. At para. 105:

“Parliament cannot have intended to create a bear trap for ministers by requiring them to take into account any ministerial statement which could as a matter of ordinary language be described as a statement of policy relating to the relevant field.”

149. At para. 106:

“106. In our view, the epitome of ‘Government policy’ is a formal written statement of established policy. In so far as the phrase might in some exceptional circumstances extend beyond such written statements, it is appropriate that there be clear limits on what statements count as ‘Government policy’, in order to render them readily identifiable as such. In our view the criteria for a ‘policy’ to which the doctrine of legitimate expectations could be applied would be the absolute minimum required to be satisfied for a statement to constitute policy’ for the purposes of section 5(8). Those criteria are that a statement qualifies as policy only if it is clear, unambiguous and devoid of relevant qualification: see for example *Inland Revenue Comrs v MFK Underwriting Agents Ltd* [1990] 1 WLR 1545, 1569 per Bingham LJ; *R (Gaines-Cooper) v Comrs for Her Majesty’s Revenue and Customs* [2011] UKSC 47; [2011] 1 WLR 2625, paras 28 and 29 per Lord Wilson of Culworth, delivering the judgment with which the majority of the court agreed, and para 70 per Lord Mance.”

150. Without in any way taking from the compelling point that something would need to be unambiguous in order to qualify as being a policy on which reliance can be placed by a plaintiff asserting legitimate expectations, it doesn’t necessarily follow that such a criterion applies in order for a document to qualify as a policy *simpliciter*. Indeed it is not altogether obvious that being clear, unambiguous and devoid of qualification are qualities that can realistically be attributed to many governmental policy statements.

151. While one can have some sympathy with the bear-trap concern, it’s hard to get away from the different context which is that the Irish legislation is wider. It applies not just to policies but to objectives. Insofar as it would be argued that that is unworkable, that doesn’t follow. The board would on such an analysis be required to keep itself informed autonomously of formal policy statements, and in addition to have regard to more informal statements of policy and objectives to which its attention is directed. It is not the case that the board is required to continuously monitor all media to look out for new policy nuances in informal statements. However, we don’t need to worry about the outer contours of the doctrine because the National Risk Assessment policy that was adopted after the inspector’s report and immediately prior to the board’s decision *is* a formal government policy even on the board’s more formal *Heathrow Airport*-type threshold.

152. That National Risk Assessment (at <https://www.gov.ie/en/press-release/311d3-government-publishes-national-risk-assessment-2023-outlining-top-strategic-risks-facing-ireland/> - not, it has to be said, a very well proof-read document) opens by invoking the war against Ukraine:

“Foreword

2023 marks nine years since the publication of the first National Risk Assessment, and three years since the start of the pandemic. During this time, we have also seen the return of war in Europe, with Russia’s full scale invasion of Ukraine and its effects playing out on a global level. Given all this, our appreciation for the unpredictability and precarious nature of risks has certainly deepened in recent years.

Despite the risk of a pandemic and a breakdown in international peace having been included in previous iterations of the National Risk Assessment, the occurrence [*sic*] of such risks remained almost inconceivable in our minds as they were something many of us had not experienced in our lifetimes. However, life has taught us the lesson of not underestimating the likelihood or the impact of risks, no matter how implausible they may initially [*sic*] seem. This highlights the value of the National Risk Assessment exercise.

The National Risk Assessment 2023 is a systematic overview of national level risks we face as a country. It outlines the many events or threats which may or may not come to pass in the months and years ahead. The National Risk Assessment is an exercise which has the wellbeing of our society at its heart. It seeks to identify the national level strategic risks we may face, in order that they be appropriately considered, pre-empted, and planned for, to ensure the best possible outcomes for our country.

The National Risk Assessment is intended to be an enabler of a wider conversation, within the political sphere, amongst policy makers, and more generally in society, promoting awareness of risks and acting as an inputus [*sic*] for futher [*sic*] risk management by Government Departments and Agencies, insitutions [*sic*] and businesses. The National Risk Assessment 2023 has been developed to ensure wide ranging consideration of the risks that Ireland may face, utilising a public consultation to faciliate [*sic*] inputs from a broad range of stakeholders.

The list of 25 risks outlined in this year's National Risk Assessment vary in nature, ranging from unavoidable global risks, such as climate change, to acute hazards, such as chemical, biological, radiological and nuclear threats. Many of the risks identified for 2023 have been identified in previous iterations of the National Risk Assessment, however many of these have evolved, given a changed social and economic context. Some risks have increased in significance, including those related to the security of our energy supply, fiscal sustainability, and protectionism and deglobalisation, and there are newer risks relating to the proliferation of disruptive technology, such as Artificial Intelligence. Despite the varying nature of the identified risks, all require our awareness and our consideration, so that we can better prepare for their possible occurrence [*sic*]."

153. The policy went on to refer to risks to gas supplies:

"7. Disruption to a secure and sustainable energy supply

Due to our geographic location and our current high reliance on imports to meet the majority of our energy needs, Ireland is highly vulnerable to the impact of disruptions in the supply of energy. In addition, there are increasing energy demands from a growing population and economy with overall demand for electricity expected to increase 37 per cent by 2031. As part of measures to meet our climate change obligations, Ireland is also working to electrify parts of the transport and heat sectors, which will further increase reliance on the electricity network.

The majority of natural gas currently consumed in Ireland is imported from a single source in Scotland. Unlike other European countries, Ireland has limited diversity of supply and no gas storage. By 2030, with the continued reduction in production from the Corrib Gas Field, Ireland's dependence on natural gas imports, and associated undersea infrastructure, via Scotland is expected to increase to over 90 per cent. Notwithstanding the increased use of renewables and energy efficiencies to be achieved over this time, Ireland will continue to rely on gas as we remove coal and peat from the electricity system in the first half of this decade. The lack of diversity of supply sources and storage is a risk for security of supply. Risks in relation to secure and sustainable energy supplies have been heightened and intensified by the war in Ukraine and sanctions on Russian supply resulting in a considerable price shock on global energy markets.

In addition, a combination of deteriorating performance of the stock of existing thermal electricity generating power plants, the recent problems of delivery of planned thermal generation capacity through auction processes and unanticipated planning and technical difficulties, has left the outlook for Ireland's electricity supply in a very challenging state.

Failure to reconcile increasing demand, decarbonisation and our climate and energy commitments, with associated investment requirements, and the need to ensure a secure and sustainable energy supply, remains a risk."

154. On any view, the risk assessment of 2023 was a formal published policy of the Government which the board was obliged to take into account. It would have met the *Heathrow Airport* test relatively easily. Given its publication post the inspector's report and immediately prior to the board decision, and the total absence of reference to it in the decision or the exhibited papers before the board, no possible basis can arise to suggest that this was considered by the board. The 2000 Act requires the documents relating to the matter to be published and these have been exhibited. The absence of any reference to this policy, reinforced by the last-minute timing, creates an inference that it wasn't considered.

155. Contrary to the board's submission, on the particular facts here that is not a case "of confusing lack of narrative discussion with failure to have regard to something" – *Protect East Meath v. Meath County Council* [2022] IEHC 395, [2022] 7 JIC 0108 (Unreported, High Court, 1st July 2022). It is a case of not considering it at all.

156. It is established law that a decision-maker must take into account relevant considerations (see illustratively, among many cases, *Dimbo v. Minister for Justice Equality and Law Reform* [2008] IESC 26, 27 ILT 231, [2008] 5 JIC 0101 *per* Denham J.), provided that we distinguish between things a decision-maker must consider autonomously and things that she must consider only if they are brought to her attention. A formal policy statement is in the former category by virtue of s. 37G of the 2000 Act. In addition, there is a third and very wide category of things that a decision-maker *may* take into account as part of evaluative discretion but is free to consider or not.

157. As to the board's argument that this doesn't matter, and that the substance was considered, such an argument only makes sense if one starts from the point of view that the 2021 statement is the only significant consideration. On a more open-minded view (and failure to acknowledge that one has a discretion is a reviewable error – see illustratively the recent decision in *Yoon v. Minister for Enterprise* [2024] IEHC 548 (Unreported, High Court, Barry O'Donnell J., 18th September 2024), one would have to keep open the possibility that a significant and recent formal policy reiteration of

the risks to energy security could tip the matter over the line towards a more sympathetic consideration of an application to enhance such security.

158. The board finally relies on a judgment of Barrett J., *Board of Management of Temple Carrig Secondary School v. An Bord Pleanála* [2017] IEHC 452, [2017] 7 JIC 1109 (Unreported, High Court, 11th July 2017):

"13. Second, there are only so many ways that one can assert the need for children to 'eat healthy in order to be healthy'. So even if An Bord Pleanála, despite its being clear as to anti-obesity (healthy eating) being a public policy of relevance, did not have regard to a particular document in which that policy was touched upon in broadly similar terms to such documentation as that to which An Bord Pleanála did have regard, it does not seem to the court that it follows, as a consequence, that a breach of s.143 necessarily arises. Regard was expressly had by the planning inspector, in his report, to the National Policy Framework for Children and Young People 2014/2020 which seeks, inter alia, to reduce childhood obesity; complaint is made that although the Healthy Ireland Strategy of March, 2013, which also touches, inter alia, on childhood obesity, was before the planning inspector, express reference was not made to same in his report. The court respectfully does not consider that a failing by a planning inspector to refer expressly to one public policy document, the objectives of which are broadly echoed in another public policy document to which he does expressly refer, necessarily yields a breach of s.143 when An Bord Pleanála later largely endorses the planning inspector's report, at least absent suggestion (of which there is none here) that some critical plinth or tenet of applicable public policy has been missed in the process."

159. Everything has to be read in context. The critical factual context as set out in that paragraph is that "the Healthy Ireland Strategy of March, 2013 ... was before the planning inspector, [but] express reference was not made to same in his report". That's the complaint the court in *Temple Carrig* was dealing with. In other words, it wasn't a case of lack of consideration, but of lack of narrative reference ("failure to refer expressly"). This wasn't a case about lack of consideration *at all*.

160. The distinction between failure to consider something and failure to discuss it narratively is foundational to the whole administrative law approach to reasons. An applicant isn't entitled to a narrative, discursive treatment of issues *per se*, but merely to the main reasons for the main issues. Everything relevant has to be considered, but not everything relevant has to be referred to expressly. That doctrine works in favour of decision-makers such as the board here about 99% of the time. Applicants, empirically speaking, often fallaciously misunderstand the distinction. These terms are not equivalent.

161. Insofar as the board's argument has the consequence of reading the above-quoted comments as equating lack of "express reference" with failure the board to "have regard" (sub-s. (1) of s. 143 of the 2000 Act) to certain matters, such a reading by the board presupposes a similar confusion. Faced with the choice between on the one hand saying that the court in *Temple Carrig* misconstrued that distinction, or on the other hand that the reference to having regard, read in context, means having express regard, the obviously preferable reading is to say the latter. This construes the comment in its correct and actual context. Failure to consider something *at all* simply didn't arise in the *Temple Carrig* case so the court's particular choice of words shouldn't be read as relating to, still less as excusing, such a failure.

162. In any event, the fact-specific context here was such as to make some consideration (even without narrative discussion) important. The coming into existence of an updated and contemporary national policy is not an irrelevant footnote in the context where the 2021 policy decisively relied on by the board is expressly merely in interim position. In such a context it would have been open to the board to find that such a policy had been diluted by subsequent policy statements. So all contemporary and updated, even repeated, policy statements pulling in a different direction to the 2021 policy should have been at least taken into account. It is not just the *content* of such statements, but the *fact of their being made* in such a context and the more recent timing of such statements that is potentially relevant – that relevance can't be dismissed *in limine* on the basis that the board considered earlier similar points, which is what the board's submission comes down to. That sort of error by way of failure of consideration was analogously what underlay cases such as *Balz v. An Bord Pleanála* [2019] IESC 90, [2020] 1 I.L.R.M. 367, [2019] 12 JIC 1202 (O'Donnell J.).

163. Consequently I would uphold core ground 3(vi) to that extent.

Core ground 4

164. Core ground 4 is:

"4. The Board Decision is invalid as the Board had regard to an irrelevant consideration, namely, the initial technical analysis prepared for the Minister for Environment, Climate and Communications as part of the ongoing 'Review of the Security of Ireland's Electricity and Gas System' published for public consultation on 19 September 2022 (the 'Security of Supply

Review’). Pending completion of the review, including the submissions received in response to the publication consultation, these technical materials should be considered drafts that are not relevant to the decision-making function of the Board. Further particulars of which are set out in Part 2 below.”

165. The parties’ positions as recorded in the statement of case are summarised as follows:

“Core Ground 4 - Technical analysis as irrelevant consideration

Applicant

The Applicant alleges that the Board was not entitled to have regard to the Technical Analysis. The Technical Analysis was prepared as part of an ongoing review that was pending when the Board considered the application. The Technical Analysis was akin to work in progress or draft materials, to which no regard should have been had by the Board.

It is submitted that the Technical Analysis falls within the category of preliminary, scoping, proposed, or consultative documents, which must be excluded from consideration. It is not an expression of Government policy or a guideline to be followed. Rather, it was explicitly recognised as an input to an ongoing review, which was not then complete.

The Board expressly relied on the Technical Analysis. On this basis also, the Board Decision is invalid.

First Respondents

The Applicant claims the Board had regard to an irrelevant consideration – the initial technical analysis prepared for the Minister as part of the ongoing Review (‘the Technical Analysis’). The Applicant asserts that ‘the Board expressly relied on the Technical Analysis’ in its decision, thus falling into error. With respect, this complaint is subtended on a misinterpretation and mischaracterisation of the Board’s Decision. The comments of the Court in *O’Donnell v An Bord Pleanála* [2023] IEHC 381 are particularly apt – one must read the decision ‘not solely from an applicant’s point of view (an impossible standard), but from the starting point of it being valid rather than invalid where possible. One has to stand back and ask what the decision is fundamentally saying’. When this is done, it is clear this ground is without substance.

The Applicant’s assertion that the Inspector and Board relied’ on the Technical Analysis in determining the application is not correct. Same misunderstands the Inspector’s Report and Board’s Decision which only referred to the Technical Analysis for the purposes of outlining that the Review was not yet complete and that the Fracked Gas Policy remained the relevant policy in such circumstances. This comprises nothing more than a correct statement as to the status of the Review –there was no legal error in the Board’s approach.

Second, Third, Fourth and Fifth Respondents

Core Ground No. 4 is directed at the Board and is not addressed by the State Respondents.”

166. While there is an analogy with *Element Power Ireland Ltd v. An Bord Pleanála* [2017] IEHC 550, [2017] 9 JIC 2802 (Unreported, High Court, Haughton J., 28th September 2017) in terms of the issue of reliance on draft documents, there is an underlying dimension to that complaint which is in effect error in the record by the classification of the consultation document as an instrument of “national policy”.

167. The basic problem with the inspector’s report is that it lists a mere departmental consultation document under the heading of “national ... policy”. That is the inspector’s term, not mine, and the lack of an alternative analysis in the board decision implies reliance on the inspector’s report.

168. The board didn’t seek to defend the concept that the consultation document was national policy. Rather it pleaded that it was contextual or something of that nature. But the indiscriminate listing of the document as an instrument of national policy is clearly an error on the face of the record. If the board is determined to base its decisions on policy, it needs to be able to clearly, lawfully and accurately relate any given instrument to the appropriate category of document to which it is directed to have regard under the 2000 Act. That was not done here because of the misclassification of this document as one of national policy.

169. Compounding this, it is clear that the technical analysis is in part relied on in coming to the inspector’s conclusions:

“The Review of The Security of Energy Supply of Ireland’s Electricity and Natural Gas Systems (Department of the Environment, Climate and Communications Sept 2022) has been subject to public consultation and the initial technical analysis does not support the development of a commercially operated Floating LNG FSRU. The review has not yet been completed.”

170. The context of this statement is as part of the reasoning, and not a mere background detail. So this can’t be dismissed as a mere immaterial side-note. Both the misclassification in itself, and the regard in the operative reasoning to a draft document (returning to Haughton J. in *Element Power Ireland Ltd v. An Bord Pleanála*), constitute reviewable legal error.

171. The board's argument in reliance on Hogan J. in *Killegland Estates Ltd v. Meath County Council* [2023] IESC 39, [2023] 12 JIC 2109 (Unreported, Supreme Court, 21st December 2023) doesn't apply here, particularly because the review is wired in to the critical section of the inspector's reasoning. This isn't immaterial. And even counterfactually if it could be viewed as such, the board didn't plead in their statement of opposition that any error should be disregarded as immaterial.

172. Consequently I would uphold core ground 4 on this basis.

Conclusion on the decision

173. Having regard to the specific grounds being upheld as above, it is not necessary in the particular circumstances to address the remaining grounds of challenge (see also Practice Direction HC126 para. 123). I can note for completeness that core ground 6 was withdrawn.

Challenge to the Policy

Whether the challenge to the policy arises having regard to the foregoing

174. The threshold issue under this heading is, given that the board's decision is being quashed, whether the court should proceed to entertain a challenge to the policy. The State submits:

"3. As already noted, the proceedings primarily relate to the validity of the decision of the Board to refuse planning permission and the challenge to the Policy Statement is brought in the alternative. Consequently, pursuant to the principle of judicial restraint, the challenge to the Policy Statement will only be required to be addressed where the Applicant does not obtain relief against the Board."

175. What was agreed by the parties was that if the applicant was unsuccessful against the board, there would be a second module against the State, but if the applicant was successful the court could indicate a provisional view as to the necessity for a second module and the parties could have liberty to apply.

176. In that regard, the State's position, logically, was that the challenge to the policy could be postponed so that it would only arise in the event that the applicant didn't succeed against the board. The applicant and the board seemed to think that the policy should be assessed either way.

177. My provisional view subject to contrary argument is as follows.

178. The normal rule is that when a decision is quashed, it is not necessary or prudent to go on to examine the validity of a measure of general application which fed into the decision. If a fresh decision is made on remittal, and is then challenged and found to be *intra vires*, the challenge to any measures of general application could more properly be considered at that hypothetical future point. That process ensures that the court does not rush into assessing the validity of legislation or other measures of general application unless it is actually necessary to do so. That is for a number of reasons – separation of powers more generally, plus the lack of any power vested in the court to fill any vacuum that it might create by invalidating a general measure. So that's the conclusion promoted by the principle of judicial restraint.

179. That conclusion is reinforced here by a couple of context-specific factors.

180. Firstly, the number of moving parts and the fact that matters have somewhat evolved since the bare 2021 policy, which has the effect that any reconsidered application would be dealt with in a different policy context whatever happens. At a minimum, one can see the argument that the 2021 document in isolation ceased to represent the totality of government policy in this area no later than March 2022. And policy continues to evolve.

181. It seems unfortunate that the 2023 review was not available when the board made its decision. On the face of things, the application is basically consistent with the outcome of the 2023 review, particularly if the identity of the owner of any particular facility is taken not to be a proper planning consideration. The State on one view impliedly accepted this by saying that "The ownership of the facility isn't the issue it's the function of the facility". The State's concern essentially is that a commercial facility would import and store more LNG than strategically necessary whereas a State-led facility would be confined to what was necessary for energy security as opposed to anything that would increase demand for fossil fuels. But again it is not obvious that constraints on the use of the facility could not be put in place in some way such as by condition.

182. Relatedly, the applicant alleges that the board didn't adequately consider whether the application could have been allowed notwithstanding the language of the 2021 document (essentially a *Yoon*-type issue). Whether that's correct or not, something I don't need to decide, the legal proposition certainly is correct that the board isn't bound by Government policy, which means that remitted application is not necessarily doomed to the same fate, even if the 2021 policy is allowed stand for the time being.

183. In addition, the fact that two further applications have been made to the board by the applicant may dilute the case to review the 2021 policy at this stage.

184. A final factor is the somewhat exiguous nature of the pleaded challenge, which the applicant has sought to expand in the written submissions and then to contract somewhat in the oral submission, in that it didn't seem to be pressing ground 11 as currently drafted. That ground sought to assert, rather than establish (by reference to specific legislation), that prohibition of LNG facilities

would be contrary to EU law. This is not as obvious a proposition as the applicant seems to have thought, and isn't established merely because the Government thought that too. Post-2021 policy developments are not challenged in the present proceedings. Indeed, many of the applicant's complaints about the Government policy and actions aren't embodied in pleaded grounds in the present case. For instance, it isn't suggested that the policy is factually unreasonable, or that the Government delay in finalising the review is unreasonable and contradictory of its acceptance at European level that changes to energy policy are urgent, or that there was a suspicious delay in advancing the review so that the application would be refused. Insofar as there are dimensions to the 2021 policy and subsequent statements that are puzzling and unexplained, it would be up to an applicant to evidentially develop that. To the extent that the applicant has made various criticisms of the Government which don't correspond to specific legal pleas, there wouldn't be a whole lot that a court could do about that in any event. In such circumstances an examination of the validity of the 2021 policy on foot of the present challenge might be unsatisfactory at best. But that is without prejudice to the applicant's right to complain about the 2021 policy or any subsequent policy instrument in any hypothetical future proceedings should that become necessary.

Conclusion and summary

185. In concluding, I emphasise that I wouldn't wish to be taken as commenting for or against the merits of the project for which permission was sought. With that overarching point firmly in mind, and with all due respect to all interested parties whether before the court or not, if comment of any sort can be forgiven I would confine it to emphasising the potential advantages of some fairly neutral values (which we do make some efforts to embody at the judicial end of things), specifically the benefits of a hearing, of dialogue, and of efficiency in decision-making.

186. As regards the need for giving interested parties a hearing, I don't want to either endorse or criticise the review process, about which people will have to make their own minds up for now. The applicant complains effectively that the review was rigged by a kind of *Balz-type a priori* exclusion of a commercial LNG terminal, not on the basis that it doesn't make sense economically, environmentally or in terms of energy security, but because it was contrary to the interim Government policy. Since the policy was meant to be interim pending the review, the applicant effectively characterises that as circular reasoning and "Kafkaesque". Defenders of the process might say that there is no point in this context or any context on wasting time examining options that have been ruled out politically. Whatever one's point of view, and one could argue the desirability of such ruling-out either way, on the documents before the court and the express conclusions in the review material, it's obvious that whatever it was, the review clearly wasn't an entirely open-minded and thorough consideration of all economic and environmental pros and cons of all potential options. The applicant's preference was effectively ruled out (if not quite *in limine*) on Government policy (*i.e.*, political) grounds. That's just a fact as it appears from the material before the court. That isn't criticism of the consultants. It's up to the Government in the first instance to make its own decision as to whether that is the appropriate basis for any final policy stance. Again, to repeat, I'm not criticising the Government's policy positions, which are a matter for them; merely being clear factually that insofar as concerns ruling out a commercial LNG terminal, the review doesn't rationally provide an independent foundation for that conclusion because the interim policy has significantly influenced the outcome of the review, which is therefore a *consequence of* rather than a support for the *a priori* policy stance.

187. As far as dialogue is concerned, it's true that the Minister wasn't in a position to meet the applicant at a particular point in time. But a lot has happened since then, and if and insofar as there might be any prospect of dialogue in the reasonable medium term between the applicant and the Government at whatever level and perhaps other institutional stakeholders as to the options for the future of this site, whatever they might be, and whether or not in the Government's view those options include the precise project for which consent was sought, can I be forgiven for encouraging that – in the interests of reducing the amount of future litigation on these issues if nothing else.

188. Finally, as regards efficiency in decision-making, it would appear on the face of things desirable for there to be an actual conclusion to the review of energy security and gas supply policy that has been ongoing for the best part of two and a half years. The State in submissions effectively sought to attribute the delay to the Russian Federation's full-scale invasion of Ukraine, but that should be a reason to speed matters up, not to slow them down. If a decision isn't made, the board on remittal of the application would be left, yet again, without a final policy position to assist it to the extent that assistance is legally relevant. But, even acknowledging that there may well be a case for some further thought and analysis, if nonetheless the proceedings result in encouragement to the executive to take the plunge in the relatively near future into final decisions and actions, they will perhaps have been worthwhile beyond the legally conventional and relatively unremarkable issues formally being addressed.

189. On those fairly unremarkable issues, in outline summary, and without taking from the more specific terms of this judgment:

- (i) the board failed to consider the National Risk Assessment policy that was adopted after the inspector's report and immediately prior to the board's decision and which was in principle capable of being assessed as giving additional and recent policy support to the application;
- (ii) the board misclassified a consultation document by listing it under the heading of national policy and relatedly incorrectly considered such draft consultation material as part of the substantive decision, which is an error in lawful consideration;
- (iii) accordingly, core grounds 3(vi) and 4 are being upheld individually and collectively to the extent outlined in the judgment; and
- (iv) in the light of the foregoing, it is not necessary to decide the remaining grounds of challenge or, subject to any further argument to the contrary, to address the challenge to the 2021 policy document, to which the principle of judicial restraint applies.

Order

190. For the foregoing reasons, it is ordered that:

- (i) there be an order of *certiorari* in terms of relief 1;
- (ii) unless any party applies otherwise by written legal submission within 14 days from the date of this judgment:
 - (a) the matter be remitted to the first named respondent for reconsideration and decision in accordance with law;
 - (b) there be no order on the other reliefs claimed save as otherwise provided, without prejudice to the applicant's right to seek such reliefs in future hypothetical proceedings;
 - (c) the foregoing order be perfected forthwith thereafter on the basis of an order for costs (including the costs of written submissions and certifying for two counsel in respect of any applications) being awarded to the applicant against the first named respondent, and no order as to costs in favour of or against any other party; and
- (iii) the matter be listed at 09:30 on Monday 14th October 2024 to confirm the foregoing.