- **OPINION** -

QUERIST: *Uplift*

AGENT: *Eoin Brady Solicitor, FP Logue Solicitors, 8-10 Coke Ln, Smithfield, Dublin, D7*

SUBJECT: *Re National Maternity Hospital and Possible CPO of lands*

Table of Contents

I PRELIMINARY

1. Querist 'Uplift – A People Powered Community CLG seeks advices regarding the potential for the State to acquire lands from St. Vincent's Healthcare Group DAC (SVHC DAC) or other entities as the case may be. Advices are sought in order to identify issues which might arise in the context of a contested application for a CPO for a new national maternity hospital and potential for delay to the provision of such hospital which might arise as a result of any legal challenges.

2. Querist has serious concerns about circumstances where a very significant capital outlay will be made by taxpayers (estimated at circa €1 billion in total) on a new national maternity hospital in circumstances where the property upon which the hospital is to be located may be under the ultimate control (through a legal mechanism) of a religious organisation, who could exert control or at least influence over the extent of and nature of medical services provided at that hospital. In that regard, Querist wishes the State in the last resort to utilise powers of compulsory acquisition to acquire the lands at Elm Park and to establish a co-located facility there with St. Vincent's.

3. On the prospect of the State utilising a power to CPO, Leo Varadkar TD In response to a recent question (15/07/21) in the Dáil from Ivana Bacik TD, said:

> *"It is important to say that negotiations are still under way and are about to resume soon. We are not ruling out CPO as an option but we need to understand that the outcome of a CPO process is not guaranteed and would certainly result in delay, with additional costs, if it is successful, on top of those the Deputy mentioned. Sometimes the perfect is the enemy of the good, and we need to have an open mind as to what the best option is with regard to the governance arrangements, the lease arrangements around the land and the ownership of the land".*

4. Querist's engagement with the Government on the issue of a CPO have indicated that certain legal difficulties arise although the precise nature of the same have not been clarified.

II BACKGROUND CHRONOLOGY

5. It is proposed to set out certain key background facts and chronology.

6. The Department of Health commissioned an independent report by KPMG into the *Review of Maternity and Gynaecology Services in the Greater Dublin Area Report* (2008) which recommended St. Vincent's as the proposed site for the new National Maternity Hospital. In 2013, the specific site within the St. Vincent's campus for the National Maternity Hospital was identified in a meeting with the former Minister of Health and the respective boards of St. Vincent's University Hospital, and Holles Street. The exact site location was chosen for clinical associations, and for the catchment areas which Holles Street would have served. However, a number of issues arose between the hospitals including relating to ownership and governance and the matter was referred to mediation.

Mulvey Mediation and Report

7. On 26th May 2016, Kieran Mulvey was requested by the Minister for Health to act as mediator between the National Maternity Hospital (NMH) and St. Vincent's Hospital Group (SVHG) in order to seek agreement on the location of NMH to St. Vincent's University Hospital campus. On the 21st November 2016, the Mulvey Report was issued. Section 4.0 sets out the Guiding Principles for Agreement which includes:

> *-Clarifying the ownership and use of facilities of the existing NMH operation on the SVHU campus*
>
> *-Recognising the reciprocal views of St. Vincent's on the issue of ownership/facilities…*
>
> *Protection of State investments and interests*

8. The Report sets out "terms of agreement" which it records at Section 5.5 as having been concluded and endorsed by the respective Executive Boards of both hospitals. Among the main terms of the agreement is that a new company should be established to operate a

new hospital, which would be Designated Activity Company (DAC). This will be a 100 % subsidiary of SVHG which is entitled "*The National Maternity Hospital at Elm Park DAC (limited by shares)*". The principal objects of the proposed company were stated to include:

> *(a) to provide a range of health services by the establishment and operation of a new maternity, obstetrics, gynacology and neonatal hospital in succession to the objectives and services provided by the current NMH.*
>
> *(b) to provide a range of health services in the community as heretofore, such operation and provision to be conducted in accordance with the newly agreed clinical governance arrangements for the National Maternity Hospital at Elm Park by providing as far as possible, by whatever manner or means from time to time available, for the health, happiness and welfare of those accepted as patients, without religious or ethnic or other distinction and by supporting the work of all involved in the delivery of care to such patients and their families or guardians, including research or investigation which may further such work.*

9. Insofar as (b) above is designed to ensure that health services supplied are not influenced by any religious ethos, the wording of the same is far from watertight and is arguably ambiguous. The reference to providing health service "…*without religious or ethnic or other distinction….",* could simply be interpreted as meaning that all persons will be provided the same health services and will not be discriminated against on grounds of religion. Clinical governance arrangement could decide that particular health services would not be provided to any persons at all and this would be in the interests of their health, happiness and welfare. Even if this decision is based on a particular religious ethos, this would arguably not be in breach of the wording above as the services would not be available to any person and so no distinction would be made on the basis of religion. However, all the health services provided would be available to all persons and no distinction would be made based on religion.

10. The report also outlines a number of subsidiary objectives and reserved powers which includes the provision of a 'golden share'. The reserved powers were stated to be exercised by all of the directors of NMH DAC and are designed to preserve the autonomy of the company in specific clinical and operational matters. These includes:

    - *clinical and operational independence in the provision of maternity, gynaecology, obstetrics and neonatal services (without religious, ethnic or other distinction) in the hospital and the provision of medical, surgical nursing, midwifery and other health services at Elm Park,*

Dublin, including strategic planning in relation to the development of such services in the future in accordance with developing best practice

In respect of the golden share, the report stated it is be provided that:

"*Those reserved power shall not be capable of amendment save with the prior written and unanimous approval of all the Directors of the Board and with the consent of the Minister for Health*." and

"*Either group of the respective Hospital Nominees may consult with the Minister for Health on any matter on which they may feel aggrieved in relation to the exercise or any limitation of these "Reserved Powers*".

11. Section 4.0 of the terms of agreement concerns the Board composition and provides that there shall be 9 Directors, one of whom will be nominated Chair. There shall be:
    - 4 Directors nominated by SVHG;
    - 4 Directors nominated by the NMH Chartered Trust, two of whom shall sit on the SVHG Board;
    - The Master shall one of the Directors nominated to the Board of the NMH;
    - One director shall be an independent international expert in obstetrics and gynaecolog;
    - The Chairperson will operate on a 3 year rotational basis, with the first rotation being one of the NMH nominated directors.

    Section 5.0 relates to "Ownership" and it says that SVHG will be the sole owner of the DAC (limited by shares), subject to the following:
    - The Minister for Health will hold a "Golden Share" with powers to protect the "Reserved Powers (Section 2.3), Constitution (Section 2.1) and Board Composition (Section 4.1);
    - The State will require a "lien" on the Hospital in accordance with whatever funding agreements are in place by the State for such capital projects.

12. Section 6.2 concerns the Relationship of NMH at Elm Park DAC to the Main SVHG Board and says:

    "The SVHG advances the valid point that it has overall responsibility for the effective and efficient operation of the totality of the hospital campus and which has many operation entities".

The report states that it is not unreasonable that some corporate "*oversight*" or "*integration*" as they suggest relate to all activities on the Hospital Campus, whilst at the same time recognising the earlier stated "reserved powers" for the new maternity hospital. The report states that in order to achieve this objective, assurances can be provided to the SVHG Board that:

-Annual plans are prepared and implemented for the NMH in line with an SLA between the Boards or a "Memorandum of Understanding";
- The operations at the NMH are being managed and run efficiently and effectively in accordance with the SLA/HSE Agreement for the NMH;
- The appropriate legal, financial, regulatory and risk assessments are up to date and undertaken in accordance with statutory requirements.

13. It is also recommended that the Board of the SVHG should include two nominees from the NMH Chartered Trust, who shall also be Directors on the NMH at Elm Park Board. The report then refers to the agreed system of clinical governance. Section 7.0 also recommends the transfer of significant statutory powers from the existing Governance Trust/Charter to the NMH DAC with certain retained activities. Section 8.1 concerns Project Design, Procurement and Construction and states that there will be a licence to build which will address construction matters. It further states that all normal costs will be borne by the HSE as principal funder and it is intended that no additional costs to SVUH will result from the project.

14. Insofar as one of the key issues was ownership, it should be observed that the report simply asserts SVHG will be the owner of the DAC, which in turn is to operate the hospital. There is no explanation as to why SVHG should be the owner. Moreover, the report does not address at all the question of the ownership of the lands on which the hospital is to be located.

Planning Permission

15. The HSE applied for planning permission for the new national maternity hospital which was granted by An Bord Pleanala on the 30th August 2017. The Board's inspector in his report refers at Section 3.1.6 to the document *Building a Recovery: Infrastructure and Capital Investment, 2016-2021* and states:

This is the Government's framework for investment in infrastructure for the period 2016 to 2021. The Capital Plan states that it prioritises spending on areas of greatest need as the economy continues its recovery, and includes just over €3 billion for investment in health infrastructure. Investment in health is focused on five main priority areas and these include: children and maternity. With regard to maternity services the Capital Plan makes specific reference to the relocation of the National Maternity Hospital to St. Vincent's University Hospital Campus and states in particular that "the Capital Plan supports a reorganisation of national maternity services. The National Maternity Hospital will be relocated to the St. Vincent's Campus, and towards the later years of the Plan the Rotunda, the Coombe and Limerick maternity hospitals will move to Connolly Hospital, St James's Hospital and University Hospital Limerick, respectively".

Report of Independent Group

16. In August 2017 the Minister for Health established an independent Group to examine the role of voluntary organisations in the provision of health and personal social services and to make recommendations on future evolution of their role. The Report issued in October 2018.

17. Among the many issues addressed in the Report, for present purposes these included Ownership, Governance and Ethos. Section 3.3 notes at pg. 22 that with regard to ownership, that there are seven voluntary acute hospitals with ownership structures in which faith-based organisations currently play a role, as shown in Table 2 (which Table includes St Vincent's University Hospital). It further notes, "*Furthermore, some voluntary organisations are currently in a state of transition related to wider health system developments. For example, the Sisters of Charity have announced their intention to end their involvement in St. Vincent's University Hospital and St. Michael's Hospital…".*

18. Section 6.3 addresses "Ownership of Assets" and notes at Section 6.3.1 concerning Disposal of Assets that:

> *"Where a voluntary organisation is a registered company, the assets are owned by the company as a separate legal entity. Where the company is a subsidiary of a holding company or one of a number of companies in a group, the question of ownership can become more complex and it can be difficult to ascertain exactly where ownership and control actually lies. Where the assets are held by a religious order, there may also be a Public Juridic Person (PJP) in existence. This is an organisation, comprised of both lay people and members of religious orders, created under canon law that is able to act in the name of the Church and has the right to acquire, retain, administer, and alienate ecclesiastical*

goods. In such cases, the members of the PJP act as trustees on behalf of the entity.

Section 6.3.2 relates to "Protection of State Investment" and states:

"Since the creation of the HSE in 2005, it is a requirement that the State takes a charge on all capital investments it funds in voluntary organisations77. Part 2 of the Service Arrangement with the HSE specifies "Where capital assets are funded/part funded by the HSE, the State's interest should be protected through entering into a grant agreement with the HSE and the asset should be used for the purpose as set out therein and will not be sold or used as security for any loan or mortgage without the prior agreement of the HSE". Voluntary organisations that return Annual Compliance Statements to the HSE (that is, all Section 38 organisations and Section 39 organisations receiving greater than €3 million in annual funding) are required to confirm that "where a capital asset is funded / part-funded by the Executive, the State's interest has been protected by the Provider through entering into a Grant Agreement prepared by the Executive which sets out the terms and conditions detailing the basis upon which the Executive has provided and the Grantee has accepted the Capital Grant including the security required by the Executive, to protect the State's interest in the asset.

We understand that the HSE holds a charge (usually for 40 years) on all capital assets which it funds. In the event of a breach of the agreement with the HSE, the charge would allow the HSE to recover the entirety of the capital grant, if necessary through the forced sale of the property or equipment. The charge generally only covers capital investment that has taken place since the establishment of the HSE and does not cover capital provided by the State prior to that time".

Section 6.3.3 relates to "Future State Investment" and states:

"The question of governance of the new National Maternity Hospital at Elm Park was the subject of extensive mediation between the National Maternity Hospital and the St. Vincent's Healthcare Group, which culminated in the Mulvey Agreement. In line with that agreement, a new company will be established to run the hospital – The National Maternity Hospital at Elm Park DAC (limited by shares) –which will be a 100% subsidiary of the St. Vincent's Healthcare Group. A legal framework to protect the State's considerable investment in the hospital is under development and this will be agreed with both hospitals. The proceeds of the sale of the Holles St. buildings will be invested in the new facility.

While each case of amalgamation or co-location of services is unique, we feel that some useful lessons could be drawn for the future from recent examples. For example, since the State is likely to be the main funder of both buildings and the services provided in any new case of amalgamation or co-location, we recommend that the State should always seek to own the land on which future hospitals or facilities will be built. The State can buy new greenfield sites or purchase sites from existing owners or receive land and buildings as donations.

This would cost the Exchequer more than in the past but would leave the State free to determine the ethos, guiding principles and governance of any future organisation. Where the State is unable to secure the purchase of land on which it intends to develop a new facility, any capital investment by the State should only be provided subject to compliance with a prior agreement on the services that will be delivered in the new facility and the governance arrangements that will apply. Such an agreement should be in place before the development goes ahead".

19. Among the recommendations include Recommendation 6.3 "Protection of future State investment in capital assets" which states:

> *i) Where the State decides to build any new hospital or facility, it should endeavour to ensure that it owns the land on which the hospital or facility is built.*
> *ii) Where the State is unable to secure the purchase of land on which it intends to develop a new facility, any capital investment by the State should only be provided subject to prior agreement on the services that will be delivered in this new facility and the governance arrangements that will apply.*

Also Chapter 7 concerning Ethos includes the following recommendations:

Recommendation 7.3, Access to information and services;

> *"i) The State should provide full information about the availability of, and timely access to, all lawful services as close as possible to the location of the service user.*
> *ii) All organisations, including any that decide not to provide certain lawful services on grounds of ethos, should ensure that they provide service users with adequate information on the full range of services available in the State and how and where to access such services.*
> *iii) All organisations should make available all relevant patient records to ensure the safe and timely transfer of care."*

20. Section 7.3.4 relates to the "Range of Lawful Services Provided" and states:

> *There is one clear area of potential difference between faith-based and secular voluntary organisations: the issue of refusal to provide certain lawful services on grounds of ethos or conscientious objection. This may be considered to be predominantly an issue in the acute hospital setting but it is also relevant in other*
> *areas of health and social care. The ethos of an organisation can lead it to oblige its employees to refuse to provide certain services which are lawful in the State. These could include, for example, termination of pregnancy, aspects of end of life care, and issues relating to sexual health and reproductive services, including for people with disabilities. This issue has come into sharp focus in Ireland following the outcome of the 2018 referendum on the repeal of*

the 8th Amendment to the Constitution and the decision to relocate the National Maternity Hospital.

In considering this issue further, we looked at the practical impact of ethos in relation to the availability of services. Given the historical dominance of the Catholic Church in the provision of health and social care in Ireland, we concentrated on Catholic-owned organisations. Although each Catholic-owned hospital has its own Board to make decisions as to what services may be provided in the hospital, there are some services which, if provided in those hospitals, would be inconsistent with the teaching of the Catholic Church. This is clear from the Irish Catholic Bishops Conference's Code of Ethical Standards for Healthcare which was published in June 2018. This Code states "…Catholic healthcare organisations may at times be asked to provide services not in keeping with the Church's moral teachings". The Code goes on to state that "no healthcare facility or practitioner should provide, or refer a patient for an abortion, i.e. any procedure, treatment or medication whose primary purpose or sole immediate effect is to terminate the life of a foetus or of an embryo before or after implantation". The Code is not solely applicable to termination of pregnancy, but would also be relevant in the provision of other healthcare services such as contraception, sterilisation, assisted human reproduction, access to clinical trials, genetic testing etc".

21. Section 7.4 relates to "Funding and Provision of Services" and states:

The full extent of the constitutional right of independently owned faith-based organisations to manage their own affairs has not yet been determined in the healthcare context by the Supreme Court. However, the State has an obligation to organise its health and social care services to ensure access to lawful services by all its citizens. Furthermore, health and social care organisations are obliged to comply with Irish law irrespective of their religious affiliation. Therefore, the State is legally entitled to attach reasonable conditions to any funding it provides and is free not to provide funding to organisations that refuse, on ground of ethos, to provide certain lawful services. Such a decision is essentially a political
rather than a legal one due to the fact that, given the significant level of services provided by Catholic hospitals in Dublin, Cork and Limerick, a decision not to provide any state funding to such hospitals would entail serious and prolonged disruption to the health service with consequent detriment to service users and the public. Although we agree on the State's right not to fund organisations that opt out of providing lawful services, we recommend avoiding the serious consequences that could ensue from such a decision.

….
Given the position taken by the Irish Catholic Bishops Conference in their Code of Ethical Standards for Healthcare, the issue of refusal to provide certain services may arise in Catholic-owned voluntary organisations in cases of procedures such as contraception, assisted human reproduction, genetic testing,

access to clinical trials, termination of pregnancy and sterilisation. In the event of a hospital refusing to provide lawful services, assuming that it would otherwise have the capacity and the trained staff available to carry out these services, the question arises of whether any state funding should be available for that hospital for other services it provides.

Section 7.4.1 concerns the provision of reproductive health services, while Chapter 8 concerns the relationship between the voluntary organisations and the State and includes under Recommendation 8.1 that "*A list of essential services to be funded by the State should be agreed in consultation with the voluntary sector"*.

22. Appendix 2 of the Report concerns "Ownership of Assets" which refers to St Vincent's Health Group (SHVG) and also St Vincent's University Hospital. In relation to "who owns the assets ?" it says, "*The land, property and buildings are owned by the Company - St Vincent's Heathcare Group SVHG (legal entity owns the assets)*". Appendix 3 refers to governance arrangements and for St Vincent's Healthcare Group in respect of "Who appoints the Board of Directors ?" it says:

> *"The Board based on recommendations of the Nominations and Remunerations Sub- Committee. At AGM, Board Directors are ratified by the shareholders. Currently the shareholders are the Religious Sisters of Charity but in the future (see row below) it is intended that three or more of the Directors of St. Vincent's Holding CLG will be the shareholders".*

Also "How Many Directors are nominated/appointed/approved by religious ?, it says:

> *"2 Directors nominated by Religious Sisters of Charity. Note: The 2 nominees of the Religious Sisters of Charity resigned from SVHG on 29/5/17 and the Religious Sisters of Charity have not been involved in SVHG since that date. The current constitution of SVHG will be amended accordingly. There is no religious representation on the current Board and nor will there be in the future (see row below)".*

Also as regards St Vincent's Healthcare Group (proposed future situation) it says:

> *"None. The constitution of St. Vincent's Holdings (CLG) and revised constitution of SVHG (DAC) will reflect compliance with national and international best practice guidelines on medical ethics and the laws of the Republic of Ireland. St. Vincent's Holdings CLG will not be subject to any religious influence, and will not have any Board members drawn from religious bodies"*

Transfer of Shares by RSC ?

23. On 26th May 2017 the Religious Sisters of Charity (RSC) issued a statement relating to the transfer of its shares in SVHG to a new company. It said that upon completion of the proposed transfer, the requirements set out in the SVHG Constitution to conduct the SVHG facilities in accordance with the *Religious Sisters of Charity Health Service and Ethical Code*, will be amended and replaced to reflect compliance with national and international best practice guidelines on medical ethics and law of the State. The RSC will no longer have a right to appoint directors to the Board of SVHG.

24. On the 16th March 2020 the Vatican granted the request 'for the reasons presented' for the proposed alienation of the property by RSC to St. Vincent's Holdings. The precise reasons presented have not been disclosed.

25. On the 8th May 2020, the RSC confirmed that they would transfer their shares in St Vincent's Healthcare Group (SVHG) to St. Vincent's Holding CLG (SVH CLG), which is a new company established in August 2020 by St. Vincent's Healthcare Group. The directors and members of SVH CLG are the shareholders of SVHG. It appears that the new Constitution of SVH CLG and revised constitution of SVHG have been approved by the Charities Regulator and Revenue.

26. However, it appears that RSC have not yet executed the transfer of the shares in St Vincent's Healthcare Group to St. Vincent's Holdings, insofar as this is pending it appears that certain steps are to be taken by the Minister for Health. In this regard they are reported to have called upon the Minister for Health to transfer management to the new National Maternity Hospital[1].

Draft Legal Documents

27. A briefing document provided to the NMH AGM on the 22nd June 2020 provides a summary of steps taken since the Mulvey Report. This is stated to include drafting of the legal document described as 'real estate document' and also the operating licence from the HSE to the NMC DAC and SVHG DAC. The real estate documents comprise a draft lease from SVHG DAC to HSE of the hospital facility for the term of 99 years and a grant

by the HSE to each of the NMH DAC (in respect of the maternity hospital) and SVHG DAC (where SVHG DAC and NMH DAC operate certain shared areas). The duration of the operating licence is 98 years with 4 consecutive renewable periods, with three of 25 year and one of 23 years. Also referenced are secondary documents which comprise enabling works and new hospital facility/fitting out equipment. It further refers to a number of "option documents" which include the option granted by the HSE to SVHG DAC to enable SVHG to acquire the HSE legal interest. This is said to arise where there is a dispute between the HSE and SVHG DAC, a failure by either party to comply with their respective obligations or occurrence of certain insolvency events.

Letter of Dr. Boylan to the Minister for Health

28. In a letter to the Minister for Health dated 3rd December 2020, Dr. Peter Boylan outlined certain concerns about material inconsistencies in statements relating to the National Maternity Hospital and the subsequent position being adopted. The letter drew attention to specific clauses in the Constitution of SVHG. These include clause 4.6 relating to core values; clause 4.3 that best outcomes will be achieved for 'patients and their families regardless of race, ethnicity, religion, gender or personal means' which refers to patients rather than procedures; clause 5.11 which confers the power on SVH to mortgage property of the company and section 5.29 which confers the power to establish and maintain links with international and national organisations having similar objectives.

29. Attention was also drawn to Clause 42 (ff) relating to the appointment of directors, which states that SVH (the new company) may have three directors. Three current directors of SVHG are directors of SVG and there are no public interest directors or directors representing the HSE. Clause 43 provides that five 'relevant bodies' must agree to the nomination of any Director to the Board of the company' which comprise the SVHG, UCD, RCPI, RCSI and Chartered Accountant Ireland and only two of the relevant bodies need to agree to the appointment of directors and the CEO of the relevant body may be the one who agrees. Clauses 55 to 58 concerns removal of directors and under clause 60 only two directors are required for a quorem.

III ROLE OF EACH ENTITY AND RELATIONSHIP

30. In the light of the foregoing it is important to attempt to bring clarity to the various entities which own, operate and govern the national maternity hospital. It is also important to identity who or what entity exercises ultimate control.

31. The relevant entities comprise:

- NMH DAC, this is the new company which will operate the NMH;
- St Vincent's Healthcare Group DAC (SVHG), which currently owns the St Vincent campus;
- St Vincent's Holdings CLG (SVH). This is newly established entity which will own SVHG and the director of which the will own SVHG.

Thus the arrangement will involve two new entities, the NMH DAC and also the SVH which is being created by the RSC. Due to the potential for confusion, I will refer to SVHG as "**St. Vincent Healthcare Group**" and SVH as "**St. Vincent's Holdings**". Other interested parties, include the HSE, the Minister for Health and also the National Maternity Hospital, established by Charter.

Who owns or will own the lands ?

32. In terms of ownership of the lands, the owner of the lands is St Vincent's Healthcare Group. There is no proposal to change this. The only change relevant to the same is the *shareholding* of St. Vincent's Healthcare Group. The RSC hold the shares in St Vincent's Healthcare Group and so RSC could be described as the ultimate owner of the lands. However, the RSC propose to transfer their ownership to the new company, which is St. Vincent's Holding. As St. Vincent's Holding will own all the shares in St Vincent's Healthcare Group, this will make St. Vincent's Healthcare Group a subsidiary of St. Vincent's Holding. As to who is the ultimate owner, Articles 2 and 3 of the Articles of Association addresses members and states:

Members

2. For the purposes of registration the number of members of the Company is taken to be the same as the number of Directors with each member being a Director and each Director being a member of the Company. The maximum number of members will be ten (10).

3. The members of the Company shall be (i) the subscribers to the Memorandum of Association and (ii) such other persons as the Directors shall from time to time admit to membership and as shall sign a written consent to become a member.

Thus it follows from the above that the directors of St. Vincent's Holding are the shareholders and so are the ultimate owner of the companies comprising St Vincent's Holding and St. Vincent's Healthcare Group and in so in turn are effectively the ultimate owners of the lands.

33. It appears that the arrangement proposed is that a lease of 99 years will be granted to the State (although whether this is the HSE is not entirely clear) and it is also proposed that this lease may be extendable for a further 50 years.

Who will own the National Maternity Hospital Building ?

34. In terms of ownership of the National Maternity Hospital building to be built on the lands, the starting point at common law is that an owner of a land owns the buildings located on such lands. This is encapsulated in the Latin maxim, *Cuius est solum, eius est usque ad coelum et ad inferos* ("*whoever's is the soil, it is theirs all the way to Heaven and all the way to Hell*"). However, this ownership can be severed and so a building can be in different ownership to the lands on which it is located. Thus property in the airspace rights above the ground can be conferred on another party, with ownership of the ground being retained by the owner of the lands. However, the mere fact that a person funds the construction of a building will not automatically confer ownership of the building on such person. It appears to be intended that the actual building will be owned by the State. However, I have not had sight of the draft legal documents or so called 'real estate' documents, so it is not entirely clear how ownership, or by what legal mechanism the actual ownership of the buildings by State, is going to be ensured. However, since ownership of the lands will include anything above the lands, unless transferred, if the State is to own the building, this would seem to necessitate a transfer of some element of ownership of the lands, being above the ground. However, I have seen no evidence of how this is to be accomplished, in particular in circumstances where the SVH/RSC have indicated that there will be no transfer of ownership of the lands, which it is assumed includes any element of the lands.

Who will operate the hospital ?

35. As regards the operation of the hospital, a licence is to be held by NMC DAC and St Vincent's Healthcare Group. However, NMC DAC is proposed to be owned by St. Vincent's Healthcare Group (although there is a "golden share" held by the Minister to protect amendments to reserved powers). The same chain of ownership/control applies to the operation as to ownership of the lands and so therefore ultimate control for the operation of the hospital is also to be held by the directors of the St. Vincent's Holding.

Who Controls St. Vincent Holdings ?

36. As can be seen from the description above, the new company to be known St. Vincent's Holding will be the ultimate owner of the lands (at least when the RSC transfers its share). It will further be described as the ultimate owner of NMH DAC, as the owner of St. Vincent Healthcare Group. As noted earlier the company is owned by its members who are the directors of the company. The identification and means of appointment of the directors is therefore of considerable importance.

37. Article 42 and 43 of the Articles of Association of St. Vincent's Holding concerns directors and states:

> *42. The number of the Directors shall be not less than three (3) and unless and until determined by the Company in general meeting, not more than ten (10). The first Directors shall be the persons named in the statement delivered to the Registrar of Companies pursuant to Section 22 of the Act.*
>
> *43. The Directors must be appointed after consultation with some or all of the following bodies. At least two of the bodies listed below (the "Relevant Bodies") (in the form of agreement or endorsement by their Board of Directors or Chief Executive Officer or lead executive) must agree to the nomination and appointment of any Director to the Board of the Company. The Company shall endeavour that the Relevant Bodies are consulted in a balanced manner that does not unduly favour or disfavour any of them in the nomination and appointment process.*

38. The final Constitution is dated 30th July 2020 and there was a change in the initial draft Article 43 where it had been previously provided that "*at least three*" of the listed bodies must agree to the nomination and appointment of the Board of the company and this was to change to "*at least two*" of bodies listed. Moreover, the bodies listed in the adopted Constitution comprised:

    - Chartered Accountants of Ireland

-Royal College of Physicians of Ireland

- Royal College of Surgeons of Ireland

- St. Vincent's Healthcare Group

- University College Dublin

39. I have been instructed that the initial three directors of St. Vincent's Holding who are described as a 'transition board' are directors of St. Vincent's Healthcare Group. These directors were to be replaced by the 22nd August 2021, although I understand that this has not occurred. Thus, it may be observed that St. Vincent's Holding has been established prior to RSC relinquishing their shareholding in the St. Vincent's Healthcare Group. It appears that the directors of the St. Vincent's Holdings, had been appointed by to St. Vincent's Healthcare Group at a time when RSC were the shareholders. This is in no way to impugn or question the integrity and independence of individual directors of St. Vincent's Holding who owe an independent duty to the St. Vincent's Holdings company. However, it is to observe that there is an ongoing chain of connection between the appointments made by RSC and St. Vincent's Holdings notwithstanding that RSC have no direct power to appoint directors of St. Vincent's Holdings. Dr. Boylan in his letter dated 20th December 2021 to the Minister for Health noted that of the relevant bodies, St. Vincent's Healthcare could not be considered independent and raised issues about professional and personal network connections with University College Dublin, the RCSI and RCPI. In fact, the connection with UCD could be said to a broader institutional connection, in views of its position as the principal teaching hospital of UCD.

IV COMPULSORY ACQUISITION: Legislative and Constitutional Context

40. Before considering the specific issues relating to the present matter, it is proposed to outline the most relevant statutory and constitutional provisions and case law relating to compulsory acquisition of lands. The HSE has certain powers for the compulsory acquisition of lands. The Minister for Health does not however have any general power

to compulsorily acquire lands[2]. Unlike for example local authorities, who have an overarching power to compulsorily acquire lands for their purposes, there are no general legislative provisions, which empower a Minister to compulsorily acquire lands for the purposes of the Department. Certain legislation confers powers on Ministers to do for certain narrow purposes including the Minister for Health. However, this would not embrace a potential for the Minister For Health in the current instance to compulsorily acquire. This is of some significance when considering the issue of the stated purpose for which the lands might be acquired. It therefore follows that the only potential body which could compulsorily acquire the lands is the HSE and so the scope of the legislative provisions relating to the HSE might be examined.

1. The Health Act 1947

41. Part VIII of the Health Act 1947 concerns acquisition of lands, etc. and was amended by the Health Act 2004 to provide that functions formerly performed by a 'health authority' (a council of a county or a corporation of a county borough[3]) were transferred to the HSE. Section 78 of the Act 1947 as amended therein, states:

> *"(1) The Health Service Executive may acquire land either —*
>
> *(a) by agreement, subject to any general directions given by the Minister with the consent of the Minister for Finance, or*
>
> *(b) compulsorily under this Part of this Act or the Acts incorporated with this Act.*
>
> *(2) Nothing in subsection (1) of this section shall be construed as affecting the operation of section 130 of the Transport Act, 1944 (No. 21 of 1944*)."

Schedule 6, item 4 of the 2004 Act only amends section 78 to substitute "HSE" for 'health authority'. It does not amend the subsequent provisions (ss. 79 to 84), which continues to refer to 'a health authority'. However, it is assumed that this is an oversight

[2] See the Tuberculosis (Establishment of Sanitoria) Act 1945 Section 8 where the Minister for Health is granted COP powers for the purposes of establishing a sanatorium

[3] Section 2(1)

and it is clear from section 78(1)(b) that the subsequent provisions are intended to apply to the HSE insofar as it refers to the HSE acquiring land "*under this Part of this Act*".

42. These subsequent provisions contain standard provisions relating to the compulsory acquisition process and compensation. These include section 79 which provides that for the purpose of the acquisition of land under Part VIII of this Act by 'a health authority', the Lands Clauses Acts as amended shall be and are hereby incorporated. This relates to the assessment of compensation and appointment of an arbitrator. Section 81 provides:

> *(1) Where a health authority desire to acquire compulsorily under this Part of this Act any particular land, they may make an order that such land be acquired compulsorily under this Part of this Act.*
>
> *(2) A compulsory acquisition order shall be in the prescribed form and shall describe the lands to which it relates by reference to a map complying with the prescribed conditions.*

S.I. No. 314/1948 - Health (Compulsory Acquisition of Land) Regulations, 1948 prescribed the forms to be used as part of the compulsory acquisition process.

43. The procedure for compulsory acquisition is contained in sections 82 to 84 of the 1947 Act. This procedure under section 82 essentially involves the HSE making the CPO and publishing notice of its making and sending a copy of the CPO to owners, occupiers and prescribed bodies. The HSE will then apply to the Minister for Health for confirmation of the CPO. This is provided for in section 83 which states:

> *"Where an application is made under this Part of this Act to the Minister for an order confirming a compulsory acquisition order and the Minister is satisfied that the provisions of this Part of this Act relating to matters antecedent to such application have been complied with, the following provisions shall have effect—*
>
> *(a) if no objection (other than an objection which, in the opinion of the Minister, relates only to compensation) to the compulsory acquisition order is duly made to the Minister or every such objection so made is withdrawn, the Minister may, as he thinks proper, refuse to confirm the compulsory acquisition order, make an order confirming it without modification, or make an order confirming it with such modifications as he thinks proper;*
>
> *(b) in any case to which paragraph (a) of this section applies, the Minister may, if he so thinks fit, before dealing with the application cause an inquiry under this Act to be held in respect of the compulsory acquisition order;*

(c) if an objection (other than an objection which, in the opinion of the Minister, relates only to compensation) to the compulsory acquisition order is duly made to the Minister and is not withdrawn, the Minister shall cause an inquiry under this Act to be held in respect of the compulsory acquisition order;

(d) where an inquiry is held in pursuance of the next preceding paragraph, the Minister, having considered the report of the person by whom the inquiry was held and the objection or all the objections which occasioned the holding of the inquiry, may, as he thinks proper, refuse to confirm the compulsory acquisition order, make an order confirming it without modification, or make an order confirming it with such modifications as he thinks proper".

44. Insofar as the Minister for Health is the confirming authority from the HSE, the question may be raised as to whether this is constitutional in so far as it affords sufficient independence in the process.

45. Where a CPO is confirmed by the Minister, notice of confirmation must be published and sent to appropriate persons, as provided for in section 84[4]. Section 85 sets out the grounds of challenge by way of court proceedings of the confirmation of the CPO, stating:

(1) A person who or whose property is affected by a compulsory acquisition order may, within three weeks after the first publication by advertisement of notice of the confirmation of the order by the Minister, apply to the High Court for the complete or the partial annulment of the order, and the High Court, if it is satisfied that the order or any part thereof was made in excess of or was otherwise not authorised by the powers conferred by this Part of this Act or that the person making the application or any other person has been substantially prejudiced by any failure to comply in relation to the order with the provisions of this Part of this Act, may, as the High Court thinks proper, annul the whole of the order or annul a part thereof.

[4] 1. This. states: "As soon as may be after the Minister has made an order confirming (whether with or without modification) a compulsory acquisition order, the health authority by whom the compulsory acquisition order was made shall

(a) publish in one or more newspapers circulating in their functional area an advertisement in the prescribed form stating that the compulsory acquisition order has been confirmed by the Minister and that a copy thereof as so confirmed and the map referred to therein may be inspected at a specified place, an

(b) give to every person who appeared at the inquiry (if any) held in respect of the compulsory acquisition order to support an objection thereto made by him a written notice in the prescribed form containing the like statements as are mentioned in paragraph (a) of this section."

> *(2) Where an application to the High Court under this section is pending, the High Court may, if it so thinks proper, suspend the operation of the compulsory acquisition order to which the application relates until the application has been finally determined.*
>
> *(3) Save as is otherwise provided by this section, a compulsory acquisition order shall not be capable of being annulled, quashed, or otherwise questioned (whether before or after confirmation by the Minister) by any court.*

The 2004 Act therefore allows for a statutory appeal, on which similar grounds to judicial review might be raised insofar as it refers the order being annulled where it was "*…made in excess of or was otherwise not authorised by the powers conferred*…" by the Act. It also allows for certain procedural objections where a person has been "*substantially prejudiced*" by a failure to comply. It is also clear that insofar as there was any potential constitutional infirmity with the 2004 Act, (as will be returned to later), this provision could not have the effect of ousting any constitutional challenge.

46. It may be noted that under section 214 of the Planning and Development Act 2000, under CPO legislation listed in that section the confirmation function which was formerly performed by the relevant Minister was transferred to An Bord Pleanala. However, section 214 did not include the Health Act 1947 as among the legislation where this function was transferred and so for whatever reason, this function was retained by the Minister for Health. It would appear that the reason for the transfer of the function to An Bord Pleanala, may at least partly been in the interests of conferring such function on a body which is clearly independent. That is not to say for example, that local authorities are not independent in the performance of their functions from the relevant Minister. In fact this is expressly provided under section 63(4) of the Local Government Act 2001 which provides that "*Subject to law, a local authority is independent in the performance of its functions*". Apart from this express statutory provision, local authorities operate at a level of local government rather than central government, which would include any relevant Minister. Thus under the 1947 Act as originally enacted, where health authorities comprised local authorities, an argument could be made that there was a greater distance between the body making the CPO, the local authority and the confirming authority, namely the Minister for Health. However, the enactment of Health Act 2004, which simply substituted the 'HSE' for the 'health

authorities' arguably diluted this distance, although the relationship between the HSE and the Minister will be discussed later.

47. It is therefore unfortunate that not only would it appear that no attention appears to have been given to whether the function of confirming authority should be transferred to a different body such as An Bord Pleanala but that the actual substitution of the HSE for 'health authorities', itself also had implications in terms of arguably further diluting the independence of the respective functions in the CPO process.

2. Constitutional Context

48. It is self-evident that powers of compulsory acquisition are an interference with such constitutionally protected property rights.[5] In *Crosbie v Custom House Dock Development Authority*,[6] Costello P. noted that *"[t]he making and confirming of an order compulsorily to acquire an objector's property rights results in an interference with the objector's constitutionally protected rights".* In *Tormey v Ireland*,[7] Ó Dálaigh C.J. noted that "… *the acquisition provisions of the Act are an interference with private rights and accordingly the Court will look strictly at the terms of the Act*".[8] In *Clinton v An Bord Pleanála*,[9] Geoghegan J. noted:

> *"It is axiomatic that the making and confirming of a compulsory purchase order (CPO) to acquire a person's land entails an invasion of his constitutionally protected property rights."*[10]

He further said:

> *"The acquiring authority must be satisfied that the acquisition of the property is clearly justified by the exigencies of the common good."*[11]

[5] See *Prest v Secretary of State for Wales* (1982) 81 L.G.R. 193; *Tesco Stores Ltd v Secretary of State for the Environment, Transport and the Regions* (2000) 80 P. & C.R. 427; *R. (on the application of Clays Lane Housing Cooperative Limited) v The Housing Corporation* [2004] EWCA Civ 1658; *Maley v Secretary of State for Communities and Local Government, Stoke on Trent City Council* [2008] EWHC 2652 (Admin).
[6] [1996] 2 I.R. 531.
[7] Unreported, Supreme Court, December 21, 1972.
[8] This was cited with approval in *Blascaod Mór Teo. v Commissioner of Public Works (No. 3)*, unreported, High Court, Budd J., February 27, 1998.
[9] [2007] 4 I.R. 701.
[10] [2007] 4 I.R. 701 at 723.
[11] [2007] 4 I.R. 701 at 724.

49. The rights to property ownership are protected, in particular, under Arts 40.3.2°[12] and 43[13] of the Constitution. While the relationship between Art.40.3.2° and Art.43 has been described as not "free from difficulty",[14] in broad terms under Art.40.3.2°, the State seeks to protect as best it may from unjust attack, *inter alia*, the property rights of every citizen, while under Art.43, the State acknowledges and guarantees not to abolish private ownership. The latter therefore concerns the protection of the State afforded to the concept of the private ownership of external goods.[15] The rights to private ownership are however qualified by Arts 43.2.1° and 43.2.2° of the Constitution. Article 43.2.1° provides that:

> "*The State recognises, however, that the exercise of the rights" (in relation to property) "ought, in civil society, to be regulated by the principles of social justice*."

Art.43.2.2° further provides that:

> *"The State, accordingly, may as occasion requires, delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good."*[16][17]

50. Where the State is pursuing a social justice principle that it can limit property rights in the interests of the common good.[18] In *In Re Article 26 and the Employment Equality Bill, 1996*,[19] Hamilton C.J. stated:

---

[12] Article 40.3.2° provides that: "The State shall, in particular, by its laws protect, as best it may from unjust attack and in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."
[13] The relevant provisions in the Constitution are under the heading "Private Property". The Constitution contains the following at Art.43: "1.1 The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. 1.2 The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property. 2.1 The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice. 2.2 The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good." Also, Art.40.3 of the Constitution provides: "1 The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen. 2 The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."
[14] As was stated by Keane C.J. delivering the judgment of the Supreme Court in *In Re Article 26 and The Planning and Development Bill, 1999* [2000] 2 I.R. 321 at 347, "the interpretation of these Articles and, in particular, the analysis of the relationship between Article 40.3.2 and Article 43 have not been free from difficulty".
[15] See *Blake v Attorney General* [1982] I.R. 117 at 135 per O'Higgins C.J.
[16] Article 43.1.1° provides that: "The State acknowledges that man, in virtue of his rational being, has the natural right … to the private ownership of external goods".
[17] Article 43.1.2° provides that: "The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property."
[18] In *Shirley v AO Gorman*, [2006] IEHC 27, Peart J. noted: "Reference has already been made to the significance to be attached to the word 'accordingly' appearing in Article 43.2.2. It is therefore only where the State is pursuing a social justice principle that it may as occasion requires delimit the exercise of property rights with a view to reconciling their exercise with the exigencies of the common good."
[19] [1997] 2 I.R. 117 at 367.

> *"In reading Article 43 of the Constitution it is important to stress the significance of the word 'accordingly' which appears in Article 43, s.2, subsection 2. It is because the rights of private property 'ought' in civil society to be regulated by 'the principles of social justice' that the State may, as occasion requires delimit their exercise with a view to reconciling it with 'the exigencies of the common good'. It is because such a delimitation, to be valid, must be not only reconcilable with the exigencies of the common good but also with the principles of social justice that it cannot be an unjust attack on a citizen's private property pursuant to the provisions of Article 40, s.3 of the Constitution (see judgment of Walsh J. in Dreher v. Irish Land Commission (1984) ILRM 94)."*

51. State action that is authorised by Art.43 of the Constitution and conforms to that Article will not considered unjust for the purpose of Art.40.3.2°.[20]

52. In *Re Article 26 and Part V of the Planning and Development Bill, 1999*,[21] in considering a challenge to legislation on the basis that it is an unconstitutional limitation on property rights, Keane J. noted:

> *"It is no doubt the case that the individual citizen who challenges the constitutional validity of legislation which purports to delimit or regulate the property rights undertakes the burden of establishing that the legislation in question constitutes an unjust attack on those rights within the meaning of Article 40. It is also possible to envisage an extreme case in which the Oireachtas by some form of attainder legislation purported to confiscate the property of an individual citizen without any social justification whatever. In such a case, no inquiry would be called for as to whether the legislation also conformed to the requirements of Article 43. The challenge typically arises, however, as it has done here, in circumstances where the State contends that the legislation is required by the exigencies of the common good. In such cases, it is inevitable that there will be an inquiry as to whether, objectively viewed, it could be regarded as so required and as to whether the restrictions or delimitations effected of the property rights of individual citizens (including the plaintiff in cases other than references under Article 26) are reasonably proportionate to the ends sought to be achieved."*[22]

53. It is also well established that where an interference with property pursues a legitimate purpose, the means chosen to achieve such purpose must be proportionate. In the

[20] See *Dreher v Irish Land Commission* [1984] I.L.R.M. 94; *O'Callaghan v Commissioners of Public Works* [1985] I.L.R.M. 364; and *Madigan v Attorney General* [1986] I.L.R.M. 136 at 161.
[21] [2002] 2 I.R. 321.
[22] [2002] 2 I.R. 321 at 348.

frequently invoked passage in *Heaney v Ireland*,[23] Costello J. stated the mean chosen must:

> *"(a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;*
> *(b) impair the right as little as possible; and*
> *(c) be such that their effects on rights are proportional to the objective; see Chaulk v. R. [1990] 3 S.C.R. 1303, at pages 1335 and 1336."*[24]

In *Iarnród Éireann v Ireland*[25] Keane J. further stated:

> *"If the State elects to invade the property rights of the individual citizen, it can do so only to the extent that this is required by the exigencies of the common good. If the means used are disproportionate to the end sought, the invasion will constitute an 'unjust attack' within the meaning of Article 40, s. 3, sub-section 2."*[26]

54. However, how the principle of proportionality applies in the context of compulsory acquisition has not yet been clearly addressed. However, it is clear that it is a component of the analysis. The principle was implicit in the following summary of the principle relating to compulsory acquisition by McKechnie J in *Reid v IDA* [2015] 4 IR 494, who stated at pg. 517/518

> *"(i) The conferring and exercise of statutory powers in this regard must accord with the Constitution and must respect and implement the principles of both natural and constitutional justice. There has never been any doubt but that such applies to any state interference with property rights (Foley v. The Irish Land Commission And Another [1952] I.R. 118, Nolan v. Irish Land Commission [1981] I.R. 23).*
>
> *(ii) The impact on the right to private property, which can vary from the minimal to the absolute, as in this case where the entire holding including the family dwelling house is sought to be expropriated, must be justified or necessitated by the exigencies of the common good, which will of course have regard to the principles of social justice.*
>
> *(iii) Even where so justified, compensation will virtually always be an important aspect of constitutional protection.*

---

[23] [1994] 3 I.R. 593; *Daly v The Revenue Commissioners* [1995] 3 I.R. 1, as did Keane J. in *Iarnród Éireann v Ireland* [1996] 3 I.R. 321; *In Re Article 26 and Part V of the Planning and Development Bill, 1999* [2002] 2 I.R. 321 at 349, 350; Meadows v Minister for Justice, Equality and Law Reform [2010] 2 IR 701

[24] Such passage was cited with approval in *In Re Article 26 and The Planning and Development Bill, 1999* [2000] 2 I.R. 321; *Blehein v Minister for Health* [2009] 1 I.R. 275; *Murphy v IRTC* [1999] 1 I.R. 12. See also Christian v Dublin City Council, Unreported, High Court, Clarke J, April 27, 2012.

[25] [1996] 3 I.R. 321.

[26] [1996] 3 I.R. 321 at 361.

> *(iv) The conferring and exercise of such power must be granted and carried out in such a way that the impairment of the individual's rights must not exceed that which is necessary to attain the legitimate object sought to be pursued. In other words, the interference must be the least possible consistent with the advancement of the authorised aim which underlines the power.*
>
> *(v) Such power must be expressly conferred by statute on the body which seeks to implement it. Further, where constitutional rights are abrogated by statutory intervention, such provisions must be construed in a way which gives full effect to the above principles.*
>
> *(vi) As the Act of 1986 is a post-constitutional statute, there is a presumption, inter alia, that all steps taken within and as part of the compulsory process will be duly compliant with the aforesaid principles (East Donegal Co-Operative Livestock Mart Ltd. v. Attorney General [1970] I.R. 617)".*

There are a number of different ways the proportionality principle could be applied in a CPO context which include the following. Firstly, that the notion of proportionality is inherent in the notion of "necessity". If an acquiring authority demonstrates that the acquisition is necessary to achieve its public purpose, then this would mean that it is proportionate. Secondly, it might involve an analysis as to whether there are other alternatives to compulsory acquisition of the lands which would achieve the same public purpose. The question might involve arguably considering other lands or a more limited form of interference with property which does not involve compulsory acquisition. Thirdly, it might involve an assessment of the precise scheme for which the lands are being acquired and whether some modifications to the scheme would be required to ensure that it interferes with existing property rights to the least extent possible.

55. It should be said that there is no indication as yet in the case law that the proportionality principle would extend as far as considering the second and third scenarios above. Thus the application of the principle of proportionality is unlikely to involve any radical redrawing of the principles insofar as it arguably implicit in the notion of necessity. However, the question has not been considered in any depth by the Courts.

56. A person whose land is compulsorily acquired will be entitled to compensation. In *In Re Article 26 and The Planning and Development Bill, 1999*,[27] Keane C.J. said:

[27] [2000] 2 I.R. 321.

> *"There can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property."*[28]

Subject to certain qualifications, the basic rule of compensation under the Acquisition of Land (Assessment of Compensation) Act 1919 is open market value.[29] The express provision of compensation further means that the Act cannot be challenged on this basis. [30] However, the mere fact that market value compensation is provided does not in itself mean that a compulsory acquisition can be justified in interests of the common good. In *Clinton v An Bord Pleanála*,[31] where Geoghegan J. stated:

> *"It is sufficient to state that I accept the analysis of the case law put forward by the applicant and, of course, I particularly accept that compensation as such is no substitute for the property itself".*

3. Procedural Safeguards

57. Apart from the actual substantive principles as to whether a compulsory acquisition can be justified, it is also clear that fair procedures also apply to the compulsory acquisition process. Thus a landowner or person with an interest in land must be given proper notice, an opportunity to object and a confirmation process. The precise elements of this latter requirement, in particular the requirement of independence, will be addressed later in these advices, as to whether the Health Act 1947 meets the relevant standards.

4. Diversion of Property of Religious Denomination

58. In addition to the protection of property, the compulsory acquisition of lands owned by a religious institution, also raises the particular protection in the Constitution afforded to diversion of religious property. This is contained in Article 44.2. 5° and 6° which states:

---

[28] [2000] 2 I.R. 321 at 352.

[29] Section 2(2) states that: "The value of land shall, subject as hereinafter provided, be taken to be the amount which the land if sold in the open market by a willing seller might be expected to realise: Provided always that the arbitrator shall be entitled to consider all returns and assessments of capital value for taxation made or acquiesced in by the claimant."

[30] However, there have been cases where the court has upheld interference with property rights without compensation. See *O'Callaghan v. Commissioners of Public Works* [1985] I.L.R.M. 364; *Dreher v Irish Land Commission* [1984] I.L.R.M. 94. Although in *ESB v Gormley* [1985] I.R. 129, where a statutory power of the plaintiff to erect masts to carry electricity power lines across the defendant's lands, though not a power to lop trees and branches, without payment of compensation, was held to be unconstitutional.

[31] [2007] 4 I.R. 701.

5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.

6° *The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation"*

59. The scope of this provision has been subject to only limited judicial consideration. In *Christian v Dublin City Council* [2012] 2 IR 506, which concerned a challenge to the zoning of property owned by a religious institution, this article in the Constitution was raised. Clarke J stated at pg. 564:

> *"Finally, it is appropriate to deal with the argument under Article 44.2. 6°. The text of that provision has already been cited. What is outlawed by that provision of the Constitution is the "diversion" of the property of any religious denomination or educational institution except where the diversion concerned is necessary for works of public utility and on payment of compensation. The real debate between the parties under this heading was as to the meaning of the word "diversion". Is it merely an antiquated form of a description for something in the nature of compulsory acquisition? Can property be said to have been diverted by some lesser form of interference?*
>
> *[135] On the applicants' case, the extent of the interference with their ability to use their lands brought about by the Z15 zoning amounts to such a significant restriction on their ability to use the lands in question in a beneficial way such as to render it a "diversion" of the lands in question. Obviously the Z15 zoning does not carry with it any compensation nor could it be said that the zoning is necessary for works of public utility. It follows that if the Z15 zoning does amount to a diversion, then it is an impermissible diversion having regard to the terms of Article 44.2. 6°.*
>
> *[136] It does not seem to me to be necessary, for the purposes of this case, to reach a definitive conclusion on whether there might not be measures short of the full transfer of ownership of all interests in land or property away from a religious or educational institution that might amount to a "diversion" for the purposes of the Article in question. It appears likely, for example, that a requirement without compensation to enter into a form of lease which would give the right to occupy institutional property to some third party even though not removing full ownership would amount to a "diversion".*
>
> *[137] However, it does not seem to me that a restrictive form of zoning, otherwise justified and proportionate, could amount to a "diversion" for the purposes of the Article. The lands in question still remain fully owned by the institution concerned. The lands can, in the main, still be used for their existing purposes be it school, hospital or the like. Where it is necessary to further develop the lands for those institutional purposes, then permission can be obtained. Where some limited form of non-institutional development is found to be necessary to support the institution on the lands in question, then permission*

may also be granted. While the Z15 zoning is, undoubtedly, a significantly restrictive form of zoning, it seems to me that those restrictions fall far short of any type of transfer of the benefit of ownership of lands which might be regarded as a "diversion" for the purposes of Article 44.2. 6°.

60. The above therefore offers limited guidance, other than perhaps that it indicates that the scope of Article 44.2.6° is not wide ranging but it will be returned to later in this Opinion when applying it to the present circumstances.

V ASSESSMENT

61. It follows from all of the above that there are at least four main issues which require consideration in terms of the potential for the compulsory acquisition of Elm Park lands for the purposes of the National Maternity Hospital which comprise as follows:

1. The Test for justifying the CPO of lands

2. Independence and Constitutionality of Health Act 1947

3. Article 44.2. 6° and diversion of religious property

4. Delay

1. Whether the CPO of Elm Park Can be justified ?

62. It is clear from the current proposal that the State, whether in the form of the HSE or the Minister for Health, will not own the land on which the National Maternity Hospital is to be located. It is proposed to be owned by a private company in which the State has no input whatsoever in terms of appointment of directors. It also is not entirely clear as to by what mechanism ownership of the building itself will be secured to the State. As noted earlier, ownership of the land generally brings with it ownership of buildings located on the same, although this can be severed. I have not seen any draft legal documents under which this separate ownership is sought to be achieved and if this is to be accomplished

this would seem to necessarily involve some transfer of the property interests of RSC or the company to the State.

63. There is no doubt that under the Constitution the compulsorily acquisition of lands must be justified in the interests of the common good. However, other than in these broad terms, the manner in which this more precisely translates into a test for justifying the compulsory acquisition of lands is not entirely clear. The relevant statutes, including the 1947 Act as amended, do not prescribe a specific test. There has also been limited recent case law of assistance, in particular on the extent to which and/or the manner in which the principle of proportionality may be incorporated into the test for justifying a compulsory acquisition (if at all). Simons, *Planning and Development Law*, commenting on what the Board has to determine in considering whether to confirm a CPO observed at 8-419:

> *"One of the greatest mysteries of compulsory purchase law is as to what precisely it is that An Bord Pleanala must be satisfied of before it confirms a compulsory purchase order. In particular, there is little guidance as to the nature and extent of the considerations which An Bord Pleanala is to take in account in reaching its decision"*

It is clear from the case law examined earlier, that a compulsory acquisition must be considered "necessary". See *Crosbie v Custom House Development Authority* [1996] 2 IR 531. In addition it must be necessary to achieve some public purposes or the exigencies of the common good. See *In Re Article 26 and The Planning and Development Bill, 1999*.

64. The principle of proportionality is now a well established principle in terms of assessing interference with property rights and it also has a role to play in assessing whether a compulsory acquisition is justified. In the High Court in *Reid v An Bord Pleanala*, Hedigan J accepted the application of the principle of proportionality, while McKechnie J in the Supreme Court in outlining general principles (cited earlier) included that a power must be granted and carried out in such a way that the impairment of the individual's rights must not exceed that which is necessary to attain the legitimate object sought to be pursued. However, again as described earlier, it is the application of such a principle to a CPO context which involves a degree of uncertainty.

65. Subject to the above caveats concerning uncertainty in the law, it is nonetheless proposed to examine whether the compulsory acquisition of the lands in question could be justified.

In the present instance, the lands have been identified as the appropriate location for the national maternity hospital. The State also proposes to expend some €800 million to build the hospital on the lands. The fact that some arrangement may be arrived at with the owner of the lands who may grant a long lease, does not mean that it is not necessary to compulsory acquire the lands or that there are other reasons justifying the same. Much of the debate has been concerned about governance issues and ownership in the context of potential impact on the ethos of the hospital and the availability of particular services. The assurances related to these matters include that the RSC will transfer their interests in SVHG to SVH and also that the constitution of NMH DAC will include a golden share provision. It has been suggested that the withdrawal of the RSC from any shareholding of St Vincent's Healthcare Group and the new St. Vincent's Holdings will mean that there can be no such influence. This is of course disputed and it not possible to resolve this with any certainty at this juncture. The company structure and governance issues are labyrinthine, the process which led to the withdrawal of the RSC from the SVHG is not entirely transparent and the fact of historical appointments, are not conductive in providing certainty. Arguably the matter is of such importance to the State, that there is a legitimate state interest in achieving certainty which could only be secured by the State having full control through ownership of the relevant land and assets.

66. However, it is arguably not necessary to resolve such a contentious matter relating to ethos and clinical independence in order to justify compulsory acquisition. There are a number of factors which in themselves would appear to create a compelling case as why the State could meet a test for the compulsory acquisition of these lands. Firstly, the acquisition of the lands would be for the purpose of delivering a very important development in the public interest which is the relocation of the National Maternity Hospital. The status and function of the NMH arguably means that State should own the lands, insofar as there are is any uncertainty and doubts, even if remote, relating to governance and clinical independence arising from absence of ownership. Secondly, the State is expending very substantial monies, estimated to be €800 million (and likely to be more) in building the National Maternity Hospital. Therefore from a purely financial perspective in protecting an investment, there would be a public interest again in ensuring ownership of the underlying land. Thirdly, these particular lands have been identified as the appropriate location of the NMH. It was recommended in the KPMG report in 2008 due to the co-location benefits and the clinical benefit of co-location were summarised

and accepted by An Bord Pleanala in the planning application in 2017. The report of the Board's inspector provides a useful summary of the same, with respect to Co-Location & Alternative Locations, where the inspector noted:

> *6.3.7.1. The third matter of relevance is co-location and alternative locations. Reference is made, within the documentation presented to the Board, to the current model of service delivery and to international best practice which seeks to achieve optimal clinical outcomes in maternity services by way of co-location with adult acute healthcare services. The need for co-location was outlined in the 2008 KPMG review as outlined above. Co-location is stated to enable immediate access to the full range of medical and surgical facilities of an adult acute hospital for critical and routine medical issues. The submission by Professor Higgins to the oral hearing also addresses co-location and Government policy for such co-location. I would note in particular Professor Higgins statement that from his years of clinical experience practising in the field of obstetrics and gynaecology that he is firmly of the opinion that the benefits to be derived from direct co-location with an adult hospital for maternity services are truly significant. I consider that the argument for co-location has been clearly outlined by the applicant. The provision of direct links from the proposal into the acute hospital at the 4th level of the facility for critically ill patients cannot be met by the location of the facility on a nearby alternative site.*
>
> *6.3.7.2. The clinical synergies which are facilitated by same cannot be replicated, notwithstanding the proximity of some nearby sites which may or may not be available. While I do not consider that any reasonable evidence has been presented to support the exploration of alternative sites for the proposed development, particularly in light of the clinical advantages provided by colocation, I would note that I address alternative sites as it relates to EIA specifically at section 7 below.*

The Report of the Independent Review Group, cited earlier, which states:

> *"…since the State is likely to be the main funder of both buildings and the services provided in any new case of amalgamation or co-location, we recommend that the State should always seek to own the land on which future hospitals or facilities will be built. The State can buy new greenfield sites or purchase sites from existing owners or receive land and buildings as donations. This would cost the Exchequer more than in the past but would leave the State free to determine the ethos, guiding principles and governance of any future organization".*

The option of the purchase of a new greenfield site is not feasible due to the need for co-location and so the need for acquisition of this particular lands arises.

67. The reasons which may be advanced against the need for compulsory acquisition might be said to be twofold. Firstly, that the various interests of the State can be accomplished

by certain other arrangements such as the grant of a lease and other structures proposed and so there is no necessity for the State therefore to compulsory acquire the lands. However, whether these objectives are or will in fact be met by these arrangements is contentious and complicated. As was noted in the Report of the Independent Review Group at 6.3.1

> "*Where a voluntary organisation is a registered company, the assets are owned by the company as a separate legal entity. Where the company is a subsidiary of a holding company or one of a number of companies in a group, the question of ownership can become more complex and it can be difficult to ascertain exactly where ownership and control actually lies*".

Similar complications arise with respect to governance.

68. The fact that a set of labyrinthine arrangements have to be devised, where the construction and implications of the same are contentious and doubtful, is highly unsatisfactory. Considering the importance of the NMH and vast monies being expended by the State, there would seem to be a significant public interest in certainty in relation to these matters.

69. The second reason which may be cited against the compulsory acquisition related to SVHG's purported interest in retaining ownership of the lands. It appears that the reason why the RSC or the company will not sell the lands to the State, relates to the integration of the building with the existing hospital on the campus. It should be said that this interest which relates to an oversight interest over the campus is somewhat vague and not clearly articulated. Nonetheless, it is acknowledged from these purposes that there is such an interest. Therefore, this interest would require to be balanced against the State's interest. As noted earlier, the Mulvey report does not address ownership of the lands. However, it does address the interest of SVHG in maintaining overall control of the campus. Section 6.2 of the Report states:

> *"The SVHG advances the valid point that it has overall responsibility for the effective and efficient operation of the totality of the hospital campus and which has many operation entities.*
>
> *They require to retain a corporate unitary oversight of all campus utilities and services.*
>
> *They also refer to their co-operative and oversight arrangements with SVPH and SVUH/SMH Dun Laoghaire*

It is not unreasonable that some corporate oversight or integration as they suggest, relates to all activities on the Hospital Campus while at the same recognizing the earlier stated "reserved powers for the new maternity hospital.

To achieve this objective/intent, I believe that this can best be achieved by providing assurance to the SVHG that:

- *Annual plans are prepared and implemented for the NMH in line with an SLA between the Boards or a "Memorandum of Understanding".*
- *The operations at the NMH are being managed and run efficiently and effectively and in accordance with the SLA / HSE Agreement for the NMH.*
- The appropriate legal, financial, regulatory and risk assessments are up to date and undertaken in accordance with statutory requirements.

70. Thus, the report recommends a number of measures to address these concerns which do not relate to retaining to ownership of the lands. Therefore insofar as these assurances or arrangements are provided, it not apparent as to why retaining ownership of the lands would be necessary or that the transfer of ownership would adversely affect such interests.

71. In fact, these assurances could be given a more formal status in agreement with the State and could be included with the hospital licences or other arrangement. Thus, it would seem to follow that such interest can be protected without retention of ownership of the lands. In fact, the approach of the RSC in declining to sell would appear to be based on the cautious and prudential principle that in not transferring ownership to the State these interests would best be served and ownership provides more certainty and control. A similar cautionary approach might be said to underlie concerns over State ownership of the lands in the interests of preserving clinical independence and protecting its investment. However, the clear difference in terms of these interests, is that one is a private interest which can likely be satisfied and the other is a public interest where it is open to be questioned whether it will be satisfied by the arrangements proposed. The hospital being built is a national maternity facility which is being wholly funded by the State. It would therefore seem clear that the State's interest in ownership substantially outweighs the interest of the RSC or St. Vincent's Healthcare Group in retention of ownership, in particular where the interest in retention of ownership is vague and can be met by other formal agreements, arrangements or assurances.

72. Therefore subject to the caveats relating to the law discussed earlier, in conclusion I am of the view that the State could present a compelling case to meet the test to justify the compulsory acquisition of the Elm Park site.

2. Independence and Constitutionality of the Health Act 1947

73. As indicated earlier, a significant issue relates to whether the procedure under the Health Act 1947 is constitutional in affording for sufficient independence in the process for confirming a CPO. This relates to the fact that the CPO is made by the HSE with objections then being made as to the Minister for Health as to whether or not to confirm the CPO. The first matter which might be examined is the extent to which the HSE is independent of the Minister for Health. Secondly, the case law on the requirement for independence arising from the Constitution and the European Convention on Human Rights might be examined and thirdly, these principles might be assessed in the context of the present circumstances.

(i) Is the HSE independent from the Minister for Health ?

74. The HSE was established under the Health Act 2004. Section 6(2) provides that the HSE is a body corporate with perpetual succession and a seal and may, *inter alia*, sue and be sued in its corporate name. The Minister for Health is corporate sole under section 2 of the Ministers and Secretaries Act, 1924. It is therefore clear that the HSE and the Minister for Health are therefore distinct legal entities. However, whether it follows from this that the HSE could be described as "independent" to the Minister for Health requires further consideration. There is no express provision which states that the HSE is independent in the performance of its functions save whether otherwise provided, although this might arguably arise by implication from consideration of its functions.

75. The functions of the HSE are broadly set out under section 7(1) of the 2004 Act which states that the object of the HSE is to use the resources available to it in the most beneficial, effective and efficient manner to improve, promote and protect the health and welfare of the public. Section 7(4) further provides that the Executive shall manage and

shall deliver, or arrange to be delivered on its behalf, health and personal social services in accordance with this Act and shall—

(a) integrate the delivery of health and personal social services,

(b) to the extent practicable and necessary to enable the Executive to perform its functions, facilitate the education and training of—

(i) students training to be registered medical practitioners, nurses or other health professionals, and

(ii) its employees and the employees of service providers, and

(c) provide advice to the Minister in relation to its functions as the Minister may request.

Under section 7(5) it is to have regard to certain matters in performing its functions. Under section 10, the Minister may issue a direction to the HSE in any purposes under the Act or other enactment, while under section 10A the Minister may specify priorities to which the HSE is to have regard and also performance targets. Section 10B provides that directions cannot be given in respect of any particular person. Under section 16N (as inserted by Health Service Executive (Governance) Act 2019) the chairperson, the deputy chairperson and the ordinary members of the Board shall be appointed by the Minister. Under section 16R and the Minister can remove a member of the Board or all of the Board from office.

76. The question of the relationship between the HSE and the Minister for Health, was examined in the context of exemption for rates in *Health Service Executive (HSE) v Commissioners for Valuation* [2010] 4 IR 23. The issue in that case was the legal status of the HSE itself, in particular whether it was 'the State'; an 'office of State; ' or a 'semi-State' body? The answers to these questions determine if its property came within the terms of exempt, or 'relevant property' within the definitions contained in the Valuation Act. McMenamin J stated at para. 60:

> *"60. I find that a consideration of the establishing statute of the HSE demonstrates that, as a matter of law and fact, it is not a 'semi-State body' however defined. It is impossible to state that its functions are peripheral from the central activities of Government. They are at its epicentre. Furthermore, the Executive has features which are otherwise unique to governmental departments or bodies which are very closely integrated into the process of government. Whether or not some of those statutory authorities are 'independent' in their functions such as the Attorney General or the Director of*

Public Prosecutions is not material; what is essential is the degree of integration of such authorities to the core functions of government, to be determined and identified in accordance with the definition of "the State," on decided authority and in accordance with the statutory provisions of the Health Act of 2004".

He further set out his finding at Para. 64:

"64. I find the State exercises its central functions in providing for a health service through the HSE (which for this purpose may hold property as the State itself). The HSE thus surmounts the identified thresholds of State and governmental function, accountability and integration. It is therefore, for the purposes of the Act of 2001 'the State' itself. It follows, therefore, that insofar as the Tribunal found that the HSE was an 'office of State', such determination was incorrect in that respect".

The Court made no finding regarding whether the HSE could be described as independent to the Minister for Health but found that the HSE was the State, noting that the health service is provided through the State. It is noted that the Court did acknowledge that may offices or officers which are independent but nonetheless constitute the State. However, irrespective of whether the HSE is to a certain extent technically independent from the Minister, there is no doubt that the HSE and Minister interests are closely aligned in particular since the State's health service is delivered through the HSE.

77. Moreover, in the present context of the State having an interest in compulsory acquisition, it is the broad interests of the State and the public interest which is being asserted. Insofar as the HSE were to compulsory acquire the lands, it is clearly not its independent interest divorced from the State which would be asserted. The State's interest would be expressed through the HSE. In fact that same interest may be attributed to the Minister for Health as it would to the HSE. It would therefore seem to follow from this that the 1947 Act in providing that the confirming authority is the Minister of the Health, does not provide for a determination by a confirming authority which is independent to the acquiring authority.

78. However, it does not necessarily follow from this that the 1947 Act is unconstitutional insofar as the 1947 Act as a whole requires to be considered, in particular the entitlement to appeal under section 85. Equally, the extent to which a requirement of independence applies to the compulsory acquisition process might be examined. The matter of independence in the CPO process, was the subject of comments by the Supreme Court in

Reid v IDA, albeit on an *obiter* basis. It is proposed therefore to consider that decision and other case law mentioned in the judgment. That judgment also made reference to the European Convention on Human Rights and whether that might impact on the requirement of independence. The case law relating to the same will also thereafter be considered.

(ii) Reid v IDA

79. The case of *Reid v Industrial Development Agency* [2015] 4 IR 494, concerned Section 16(1) of the Industrial Development Act 1986, as amended, which empowered the IDA to, *inter alia*, compulsorily acquire land for the purpose of "providing or facilitating the provision of sites or premises for the establishment, development or maintenance of an industrial undertaking. The IDA invoked the provisions to acquire, by statutory compulsion, certain lands in Maynooth for the IDA. The 1986 Act did not prescribe any particular procedure or confirming authority. Nonetheless the IDA adopted an *ad hoc* procedure which is summarized by McKechnie J of the Supreme Court judgment at para. 14 as follows:

> *By document in writing dated the 8th March, 2012, the IDA served, inter alia, on the appellant a notice entitled "Notice of intention: [for the] compulsory acquisition of land".*
>
> *• Having stated that such was an exercise of the powers conferred by s. 16 of the Act of 1986 and the second schedule thereto, the notice once again repeated the IDA's opinion that:-*
>
> > *(i) "Industrial development will or is likely to occur as a result of the acquisition of the land to which this notice relates, and*
> >
> > *(ii) such industrial undertakings conform (sic) or will conform to the criteria set out in subs. (3) and (4) of s. 21 and s. 25" of the Act of 1986 (the s. 16 proviso).*
>
> *• The notice invited representations in respect of the proposal and stated that such would be considered before any decision was made;*
>
> *• Finally, it also stated that the landowner would be informed of the IDA's decision and the reasons therefor "following an independent consideration and assessment".*
>
> *(ii) In April, 2012, Mr. Conleth Bradley, senior counsel, was engaged by the IDA to act as an independent adjudicator/rapporteur into what the letter of appointment said was the IDA's consideration as to whether it would be appropriate to compulsory acquire the subject lands: he was asked to submit a report in respect thereof.*

(iii) On the 21st May, 2012, following the publication of a notice in the local newspapers of his appointment, a preliminary hearing was conducted by Mr. Bradley S.C. to explain the remit of his engagement. A second such meeting took place on the 5th June, 2012.

(iv) Over three days ending on the 6th July, 2012, a hearing was conducted under the auspices of the adjudicator during which an opening statement from the IDA was made and evidence was given by and on behalf of the IDA as well as other interested parties including the appellant and his mother, Mrs. Reid. Those who gave such evidence were subject to cross-examination, with the extensive documentation which had passed, or which otherwise had been exchanged, also available for consideration. Closing submissions were made by the parties, including for this purpose Kildare County Council, which obviously also had a particular interest in this matter.

[15] On the 15th October, 2012, the independent adjudicator submitted a comprehensive report, running to over 60 pages, to the IDA. The same contained a detailed account of the background to the exercise by the IDA of its powers under s. 16 of the Act of 1986, the appointment of and the preliminary steps taken by Mr. Bradley S.C., the exchange of correspondence between the IDA and those who would be affected by the compulsory purchase order, the statements, evidence, documentation and submissions made or given to the adjudicator by the parties, including Kildare County Council, and a number of clarifications resulting from the adjudicator's own intervention. In addition, the report contained a very learned summary of the history and current position of compulsory purchase, highlighting the fact that the vast majority of such statutory schemes had by now incorporated into the process an external body with power to annul, confirm or amend a compulsory purchase order. However, despite the extensive nature of the report, it must be stressed that the role of Mr. Bradley S.C. was only one of rapporteur: it did not involve any decision making power or adjudicative function or even some or any role of an advisory nature.

[16] On the 14th November, 2012, the IDA at its board meeting decided to compulsorily acquire the subject lands. Its decision was reduced into written form in a document dated the 23rd November, 2012, and signed by its chairman, Mr. Liam O'Mahony. After reciting the background, and having stated that the board considered the report of the independent adjudicator and the other material referred to, as well as the objections and representations received against its March, 2012 decision, the document goes on to record that:-

> *"The board concluded in all of the circumstances that industrial development was or is likely to occur as a result of the acquisition of the lands in question and that any such undertaking conforms or will conform to the criteria in s. 21 or s. 25 of the Act of 1986 (as amended)."*

The board of the IDA:-

> *"decided to compulsorily acquire all of the lands comprised in Folio 1104…under s. 16 of the Act of 1986 …"*

80. One of the grounds of challenge in the proceedings included that the Applicant's right to constitutional justice had been breached because there was no independent arbiter who

had the power to review, by way of amending, confirming or quashing the decision of the IDA to exercise its powers of compulsory acquisition. In the High Court, Hedigan J was satisfied that this ground of complaint was answered comprehensively by *O'Brien v. Bord na Móna* [1983] I.R. 255, in which it was held that the exercise by Bord na Móna of its compulsory powers, which are similar to those vested in the IDA, was an administrative and not a judicial act. In the *O'Brien* case (which will considered below) the Supreme Court rejected the views of Keane J., the trial judge, on this point. Therefore, the principle *of nemo iudex in causa sua* did not apply. Further, the interference with the appellant's property was the minimum necessary so as to achieve the acquisition purposes of the IDA.

81. In *Reid* the Supreme Court decided in favour of the Applicants on grounds relating to absence of statutory power of the IDA to acquire lands for certain future purposes and also relating a conflict of interest of an individual member of IDA. The Court did not therefore consider it necessary to determine the grounds of challenge on independence based on principle of judicial restraint which applies to constitutional matters. The comments of McKechnie J are therefore obiter. These comment are set out below pg. 532:

> *"[84] As will be noted from what has previously been stated, the IDA is the only body involved under the Act of 1986, from commencement to finalisation, with the process of compulsorily acquiring lands of an objecting landowner. It is the entity which identifies what lands might be suitable for its purposes, and the body which decides whether or not to acquire, either by way of agreement or as in this instance by compulsion. If the agreement route proves successful, then the matter is at an end. However, where recourse to the alternative vehicle is required, the resulting process necessarily involves the making of a decision where the interest of the acquiring body stands at one corner and the property rights of the landowner at the other. A major conflict is thus created which must be decided upon. Even allowing for O'Brien v. Bord na Móna [1983] I.R. 255, where the court's decision was that the making of a compulsory purchase order is an administrative act and not a judicial act, nonetheless it has become increasingly obvious since that decision that by far the most satisfactory way of having this conflict resolved, is to separate the decision making process between the policy driver on the one hand and the acquisition decider on the other. Much like the exercise of power by a planning authority and other bodies, where the external adjudicator is An Bord Pleanála. That board is, and importantly is seen as, objectively impartial in its decision making function, positioned as it is between the body's interest in ultimately advancing the public good and the landowner's vested interest in preserving his constitutionally protected rights. Such intervention of an independent third party inspires overall confidence in the process and, unless made practically impossible or exceedingly difficult by compelling countervailing circumstances, should be provided for.*

[85] The desirability of achieving this separation of function can be seen from the fact that there remains only a handful of statutory regimes where some external body is not involved in the ultimate decision of the process. In his knowledgeable report dealing with this matter, Mr. Bradley S.C. identifies the scheme underlying O'Brien v. Bord na Móna [1983] I.R. 255, and refers to the IDA as being probably one of the only two substantial bodies where the legislature has not moved to adjust these outdated practices: so as to bring them more in conformity with what is now regarded as being a more enlightened approach to providing both the procedural and substantive protection which the Constitution affords to personal property rights.

[86] It must also be recalled that since O'Brien v. Bord na Móna [1983] I.R. 255, the State has incorporated the European Convention on Human Rights into our domestic law in the manner specified in the Act of 2003. Whether giving a direct cause of action or via the interpretive obligation contained in s.3 therein, the obligation so undertaken by the enactment of this legislation may well influence any future decisions on the constitutionality and/or Convention compliance of a statutory scheme, such as that which is involved in this case.

[87] As stated however, these are but observations and are not intended otherwise. In particular, if and when the issue should become necessary to resolve, the entire matter would have to be considered afresh."

82. It is evident from the passage above, that McKechnie J without definitively determining the matter, raised significant doubts about whether the then 1986 Act afforded sufficient independence. McKechnie J noted the *ad hoc* procedure adopted by the IDA of a special rapporteur but commented that such report made recommendations and it was still a matter for the IDA to decide whether to make the compulsory acquisition. It is to be noted that since that judgment, the 1986 Act was amended by Industrial Development (Amendment) Act 2018, to provide that An Bord Pleanala would determine any objections to compulsory acquisition by the IDA. It also applied the procedures in terms of notice etc. contained in the Third and Fourth Schedule to the Housing Act 1966.

83. Nonetheless it is noted that the High Court upheld the constitutionality of the 1986 Act and it did so in reliance upon the previous Supreme Court judgment of *O'Brien v Bord Na Mona* which decided that a decision on the compulsory acquisition of lands involves an administrative act and not the administration of justice. However, a question may be raised as to whether this decision requires to be re-assessed in particular in the light of the expansive construction given to the notion of administration of justice in the recent Supreme Court judgment in *Zalewski v. Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24.

84. In *O'Brien v Bord na Móna* [1982] IESC 1, [1983] IR 255, the Turf Development Act 1946 allowed Bord Na Mona to acquire lands permanently without confirmation by an external authority. Keane J in the High Court declared this unconstitutional finding that the Board, when considering whether to make a compulsory purchase order under the Act of 1946, is engaged in performing a function which is, in essence, of a judicial nature and which requires due compliance with the maxim *nemo judex in causa sua*. This was reversed by the Supreme Court which held that although the defendant Board was obliged to act judicially when performing its functions under the Act of 1946, the Board was performing essentially an administrative act when it was deciding whether or not to acquire land compulsorily for the purposes of that Act. O'Higgins CJ stated at pg. 282/283:

> *The long title of the Act of 1946 and the provisions of s. 17 of the Act, which have already been quoted, make it clear that the purpose of the statute was to make available the considerable natural resource of turf in this State in the best possible fashion for the use of the nation. Both on the terms of the statute itself and, indeed, on the events which have since occurred in the development of the activities and work of Bord na Móna, it is clear that the dominant method by which that overall purpose was to be achieved, and has been achieved, was by the acquisition of boglands and other ancillary lands by Bord na Móna and the working of them by Bord na Móna itself so as to produce turf and turf products. It seems clear that it was by this procedure that a major source of energy was intended to be, and has been, harnessed for the use of society in general. The control of this operation and, specifically, the decision as to whether any particular piece of land should or should not be acquired vests ultimately under the terms of the statute in Bord na Móna. Its members, chairman and its managing director are appointed by the Government and hold office at the will of the Government.*
>
> *The statute must, therefore, be viewed as constituting a decision that the common good requires that bogland should be available for compulsory acquisition. The task of securing that objective was vested in Bord na Móna, a statutory corporation.*
>
> *Viewed in that light, it would appear clear that the decision as to whether or not any particular area of land should be acquired for the attainment of that objective should be effectively vested in Bord na Móna. There is not any other authority of the State, executive or judicial, which should make the decision in principle as to whether, balancing the desirability of the production of turf on the one hand and the interests of an individual owner of land on the other, the production of turf or the agricultural interests of the landowner should prevail.*
>
> *Such a view of the purpose and effect of the statute does not vest in Bord na Móna an arbitrary or capricious power. Nor is it exempt in any way from review by the Courts should it, in any particular instance, act from an indirect or*

improper motive or without due fairness of procedure or without proper consideration for the rights of others.

This Court is satisfied that, subject to these very considerable restrictions, the making of, or refusal to make, an order for compulsory acquisition is essentially an administrative act.

85. The judgment is itself open to question in the light of the five-point test for the administration of justice set out in *McDonald v. Bord na gCon* [1965] I.R. 217 which is not analysed in the judgment, and which refers to:

> (i.) a dispute or controversy as to the existence of legal rights or a violation of the law;
> (ii.) the determination or ascertainment of the rights of parties or the imposition of liabilities or the infliction of a penalty;
> (iii.) the final determination (subject to appeal) of legal rights or liabilities or the imposition of penalties;
> (iv.) the enforcement of those rights or liabilities or the imposition of a penalty by the court or by the executive power of the State which is called in by the court to enforce its judgment;
> (v.) the making of an order by the court which, as a matter of history, is an order characteristic of courts in this country.

86. Also not cited in the judgment are a number of cases where it was held that certain determinations in a planning context, constitute the administration of justice, albeit of a limited nature permitted under Article 37 of the Constitution. In *Central Dublin Development Association v. The Attorney General* ((1975) 109 I.L.T.R. 69), Kenny J. held that the ministerial power exercisable under the Local Government (Planning and Development) Act 1963 to decide if a development was an exempted development was an administration of justice, but covered by Article 37. Also subsequently, *An Blascaod Mór Teo. & Ors. v. Commissioners of Public Works* & Ors.[1998] IEHC 38 (Unreported, High Court, Budd J., 27th of February, 1998)), Budd J. found that the power of the property arbitrator to assess compensation under the Acquisition of Land (Assessment of Compensation) Act 1919 was an administration of justice, but permitted under Article 37. The level of interference or significance of determination property rights involved in these two cases, would appear to be far less reaching that a determination whether a public authority can justify the compulsory acquisition of private lands which is the most significant interference.

87. More recently in *Zalewski v. Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24. involved claims arising from alleged unfair dismissal before the WRC. O'Donnell J cited the 5 part test of *McDonald v. Bord na gCon* [1965] I.R. 217O' and went on to criticise the last of the 5 part test outlined by Kenny J in *McDonald v. Bord na gCon*. stating at para. 96:

> *"The administration of justice is not, however, to be defined by, or limited to, those areas traditionally dealt with by the courts. The proper scope of the administration of justice is not determined simply by analogy with what was done by the courts as a matter of history, and still less by the form of orders traditionally made by them. It may be possible to say, even if no single test can be advanced, that an area is something intrinsically within the scope of the administration of justice"*

. O'Donnell J set out the further noted at para. 98:

> *"First, it is necessary to recall that the parties agree that the first three limbs of the McDonald v. Bord na gCon test are satisfied. A jurisdiction is established to make binding determinations of legal disputes between private parties according to law. That, in itself, is normally a core business of the courts. Once invoked by a claimant, the jurisdiction is established.*

Commenting on the WRC under the 2015 Act, the O'Donnell J stated at para. 107:

> *"The issue to be decided was not a matter of discretion, or what was advisable or desirable in the future for industrial peace or good employer/employee relations: it was, rather, a determination of the legal rights of parties in relation to the past events. The deciding body had power to determine, for the purpose of its decision, the facts which had occurred, and to apply the law to such facts. Indeed, if the tribunal failed to do so correctly, it would be open to correction, not because the decision it had reached was unwise or inadvisable, but simply because it was wrong or impermissible as a matter of law".*

The above observations are arguably equally applicable to a party making a determination whether to confirm a compulsory acquisition order.

88. Also of note are the observations of O'Donnell J of the requirement of independence of a body exercising a judicial function, even of limited nature. O'Donnell J stated a para. 138:

> *"However, the function being performed and the power being exercised must comply with the fundamental components of independence, impartiality, dispassionate application of the law, openness, and, above all, fairness, which are understood to be the essence of the administration of justice. It might be said that this is encompassed in the requirement that any decision-maker act judicially and adhere to the principles of constitutional justice."*

Also para. 147, O'Donnell J stated:

> *Independence and impartiality are fundamental components of the capacity to administer justice….*
>
> *These considerations are not peculiar to the Irish constitutional order: guaranteed impartiality and independence are also essential requirements for any adjudication within the scope of European law, or in accordance with Article 6 E.C.H.R. and the jurisprudence of the E.Ct.H.R".*

O'Donnell J noted the relevance of the availability of judicial review stating at para. 117:

> *"I think it is appropriate to have regard to the limitation imposed by the fact that the W.R.C. is a body subject to judicial review. While this might be said to be common to any body exercising a power or function under public law today, that does not mean that it is not a significant limitation on the exercise of the powers and functions of such a body".*

89. It is submitted that it follows from the above, that there is a distinct prospect that notwithstanding the Supreme Court judgment in *O'Brien v Bord na Mona*, that in the event of a determination of the Minister for Health whether to confirm the CPO, the Minister will be deemed to have engaged in the administration of justice, albeit of a limited nature. Insofar as this the case, it is doubtful whether the Minister for Health could be considered independent from the HSE as is required in the administration of justice.

90. The principal argument which might be advanced against the unconstitutionality of the 1947 Act is that an independent determination is provided for under section 85 of the 1947 Act insofar it provides for an entitlement to appeal to the High Court from a decision of the Minister. As noted earlier, the scope of this appeal is wide and would at least encompass matters which might be raised by way of judicial review. In *Clinton v An Bord Pleanala*, Geoghegan J. indicated that Courts will apply a heightened level of review in the context of compulsory acquisition standard and so the *O'Keeffe* standard would not be appropriate. The availability of an appeal to the Court is a consideration which has found favour in the jurisprudence of the European Court of Human Rights which will be examined below.

(ii) European Convention on Human Rights

91. Private companies or legal entities are protected under the European Convention on Human Rights. Insofar as property rights are also protected under the European Convention on Human Rights, similar arguments raised in the constitutional context regarding the justification for compulsory acquisition and proportionality will also be relevant in considering whether there is a breach of rights protected under European Convention. While the Convention is not part of domestic law, s.3(1) of the European Convention on Human Rights Act 2003 provides that "*subject to any statutory provision (other than this Act) or rule of law, every organ of the State shall perform its functions in a manner compatible with the State's obligations under the Convention provisions*".[32] Thus a statutory provision is required to be given a Convention construction if possible. If such construction is reasonably open it should prevail over other constructions.[33]

92. There are two articles which are potentially engaged or of relevance to the present circumstances. The first is Article 1 of Protocol 1 of the Convention concerning peaceful enjoyment of property and the second is Article 6 of the Convention which concerns certain procedural guarantees in the determination of civil rights and obligations.

93. Article 1 of Protocol 1 to the Convention grants an entitlement to a person to the peaceful enjoyment of possessions providing that:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*
> *The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.*

[32] In *J McD v PL*, unreported, Supreme Court, December 10, 2009, Murray C.J. said: "First of all, the European Convention on Human Rights is not generally part of domestic law and is not directly applicable. As outlined above the Convention, and associated case-law, may be relied upon for the purpose of interpreting a 'statutory provision' or 'rule of law' as provided for, and subject to the limitations in s. 2 of the Act. Secondly, provisions of the Convention may also be relied upon in a claim pursuant to s. 3 for damages against an 'organ of the State' as specially defined in that section. Finally the Convention's provisions may be relied upon for the purposes of a declaration that a statutory provision or rule of law is incompatible with the State's obligations under the Convention. Claims under s. 3 and 5 are not relevant to the present proceedings."

[33] See *Donegan v Dublin City Council*, unreported, Supreme Court, February 27, 2012 at para.105.

The concept of possession includes not only ownership rights over corporeal and incorporeal matters but also rights in rem which would include the benefit of a restrictive covenant or receipt of an annual rent.[34] Corporate bodies, as well as natural persons, may invoke the article.[35] However, it has been recognised that the State is to be afforded a wide margin of appreciation in implementing social and economic policies that have the effect of interfering with the right to property.[36] The European Court of Human Rights has described art.1 of the First Protocol as comprising three distinct rules. In *Sporrong and Lönnroth v Sweden*,[37] which concerned expropriation permits (which meant that the property might in the future be expropriated) and prohibitions on construction (which prevented any construction of any kind), the court stated:

> *"That Article [art.1 of Protocol 1] comprises three distinct rules. The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph."*[38]

94. In order to be justified, any interference with the right to property must serve a legitimate objective in the public, or general, interest and must also be proportionate. In *Sporrong and Lönnroth v Sweden*,[39] the court stated:

> *"… the Court must determine whether a fair balance was struck between the demands of the general interests of the community and the requirements of the protection of the individual's fundamental rights … The search for this balance is inherent in the whole of the Convention and is also reflected in the structure of Article."*[40]

---

[34] See *Gasus Dosier und Fördertechnik GmbH v Netherlands* [1995] ECHR 7.
[35] This is clear from the wording of the first line of art.1: "Every natural or legal person is entitled …" See *Agrotexim v Greece*, unreported, European Court of Human Rights, (A330-A (1995)).
[36] *James v United Kingdom* (1986) 8 E.H.R.R. 123 (A98 (1986)) at para.46. "Because of their direct knowledge of their society and its needs, the national authorities are in principle better placed than the international judge to appreciate what is 'in the public interest'. Under the system of protection established by the Convention, it is thus for the national authorities to make the initial assessment both of the existence of a problem of public concern warranting measures of deprivation of property and of the remedial action to be taken … Here as in other fields to which the safeguards of the Convention extend, the national authorities accordingly enjoy a certain margin of appreciation."
[37] Unreported, European Court of Human Rights, (A52 (1982)).
[38] Paragraph 61.
[39] *Sporrong and Lonnroth v Sweden*, unreported, European Court of Human Rights, (A52 (1982)).
[40] Paragraph 69.

On the facts on that case the court found that the applicants had borne an individual and excessive burden which could have been rendered legitimate only if they had had the possibility of seeking a reduction of the time limits or of claiming compensation. In *James v United Kingdom*,[41] the court held that the taking of property pursuant to a policy calculated to enhance social justice within the community could properly be described as being in the public interest. It was further noted that the decision to enact laws expropriating property will commonly involve consideration of political, economic and social issues on which opinions within a democratic society may differ widely.[42] The court also noted that art.1 generally requires compensation for a taking of property.[43] In *AGOSI v United Kingdom*,[44] the court noted that the striking of a fair balance depends on many factors, and that the behaviour of the owner of property (in relation to smuggling), including the degree of fault or care which he displayed, is one element in the entirety of circumstances which should be taken into account.

95. However, for present purposes relating to the issue of independence the most relevant provision is Article 6(1) of the Convention which states:

> "*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law*….".

96. The reference to an "*independent and impartial tribunal*" is therefore of significance. For the purposes of Article 6 § 1 a "tribunal" need not be a court of law integrated within the standard judicial machinery of the country concerned (*Ali Rıza and Others v. Turkey*, §§ 194-195 and §§ 202-204). For the purposes of Article 6 § 1 of the Convention, the "tribunal" must have "jurisdiction to examine all questions of fact and law relevant to the

[41] *James v United Kingdom* (1986) 8 E.H.R.R. 123 (A98 (1986)) where the court stated at para.46: "… although the Court cannot substitute its own assessment for that of the national authorities, it is bound to review the contested measure under Article 1 of Protocol No. 1 and, in so doing, to make an inquiry into the facts with reference to which the national authorities acted."

[42] On the facts of that case the court went on to find that the aim of the Leasehold Reform Act 1967—greater social justice in the sphere of housing—was a legitimate aim in the public interest.

[43] At para.54 the court stated: "… under the legal systems of the Contracting States, the taking of property in the public interest without payment of compensation is treated as justifiable only in exceptional circumstances not relevant for present purposes. As far as Article 1 [of Protocol 1] is concerned, the protection of the right to property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicant."

[44] Unreported, European Court of Human Rights, (A108 (1986)) at para.52.

dispute before it" (*Ramos Nunes de Carvalho e Sá v. Portugal* [GC], §§ 176-177). The power to give a binding decision which may not be altered by a non-judicial authority to the detriment of an individual party is inherent in the very notion of a "tribunal" (Van de Hurk v. the Netherlands, § 45). Both independence and impartiality are key components of the concept of a "tribunal" as was clarified in *Guðmundur Andri Ástráðsson v. Iceland* [GC], §§ 231 et seq.).

97. Where an administrative body determining disputes over "civil rights and obligations" does not satisfy all the requirements of Article 6 § 1, no violation of the Convention can be found if the proceedings before that body are "subject to subsequent control by a judicial body that has full jurisdiction and does provide the guarantees of Article 6 § 1", that is, if any structural or procedural shortcomings identified in the proceedings before the administrative authority are remedied in the course of the subsequent review by a judicial body with full jurisdiction (*Ramos Nunes de Carvalho e Sá v. Portugal* [GC], § 132).

98. It has been recognized that the courts have limited jurisdiction as to the facts, but may overturn the administrative authorities' decision if it was based on an inference from facts which was perverse or irrational. Article 6 of the Convention does not require access to a level of jurisdiction that can substitute its own opinion for that of the administrative authority (see, for example, in relation to countryside planning, *Zumtobel v. Austria*, §§ 31-32, and town planning, *Bryan v. the United Kingdom*, §§ 44-47; environmental protection, *Alatulkkila and Others v. Finland*, § 52; regulation of gaming, *Kingsley v. the United Kingdom* [GC], § 32. In *Fazia Ali v. the United Kingdom*, (Application no. 40378/10, October 15, 2015), where a Homelessness Review Officer had upheld a decision of the Council that the applicant's refusal of the offer of accommodation discharged the. It was alleged, *inter alia*, that a Homeless Review Officer was not independent and so in breach of Article 6(1):

> *74. The Court notes at the outset that the Homelessness Review Officer in the present case was an officer of the Council which was alleged to owe the duty to the applicant and, as such, her role was to conduct an internal review to determine the extent of the Council's statutory obligations. Although there is no reason to doubt the Officer's impartiality (compare, for example, the position in Tsfayo, where the members of the Housing Benefit Review Board had a direct financial interest in the outcome of the review), the Court does not consider that*

she can be regarded as an "independent tribunal" within the meaning of Article 6 § 1 of the Convention. Indeed, the Court recalls that this was the conclusion reached by the House of Lords in Runa Begum (see paragraph 36 above) and that conclusion was not in dispute before the domestic courts in the present case.

75. The Court recalls that even where an adjudicatory body determining disputes over "civil rights and obligations" does not comply with Article 6 § 1 in some respect, no violation of the Convention can be found if the proceedings before that body are subject to subsequent control by a judicial body that has "full jurisdiction" and does provide the guarantees of Article 6 § 1 (Albert and Le Compte v. Belgium, 10 February 1983, § 29, Series A no. 58 and Sigma Radio Television Ltd, cited above, § 151).

76. Both the Commission and the Court have acknowledged in their case-law that the requirement that a court or tribunal should have "full jurisdiction" ("pleine juridiction" in French) will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it (see, amongst many authorities, Zumtobel v. Austria, 21 September 1993, §§ 31-32, Series A no. 268-A; Bryan, cited above, §§ 43-47; Müller and others v. Austria (dec.), no. 26507/95, 23 November 1999; and Crompton v. the United Kingdom, no. 42509/05, §§ 71 and 79, 27 October 2009).

77. In adopting this approach the Convention organs have had regard to the fact that in administrative-law appeals in the Member States of the Council of Europe it is often the case that the scope of judicial review over the facts of a case is limited and that it is the nature of review proceedings that the reviewing authority reviews the previous proceedings rather than taking factual decisions. It can be derived from the relevant case-law that it is not the role of Article 6 of the Convention to give access to a level of jurisdiction which can substitute its opinion for that of the administrative authorities. In this regard, particular emphasis has been placed on the respect which must be accorded to decisions taken by the administrative authorities on grounds of "expediency" and which often involve specialised areas of law (for example, planning – Zumtobel, §§ 31 and 32, and Bryan, § 47, both cited above; environmental protection – Alatulkkila and Others v. Finland, no. 33538/96, § 52, 28 July 2005; regulation of gaming – Kingsley v. the United Kingdom [GC], no. 35605/97, § 32, ECHR 2002-IV).

78. As has been explained in previous case-law (for example, Sigma Radio Television Ltd, cited above, § 154), in assessing the sufficiency of a judicial review available to an applicant, the Court will have regard to the powers of the judicial body in question (see for example, Gradinger v. Austria, 23 October 1995, § 44, Series A no. 328-C; Bryan, §§ 44-45, cited above; Potocka and Others v. Poland, no. 33776/96, § 55, ECHR 2001-X; and Kingsley, § 32, cited above), and to such factors as (a) the subject-matter of the decision appealed against, in particular, whether or not it concerned a specialised issue requiring professional knowledge or experience and whether it involved the exercise of administrative discretion and if so, to what extent; (b) the manner in which that

decision was arrived at, in particular, the procedural guarantees available in the proceedings before the adjudicatory body; and (c) the content of the dispute, including the desired and actual grounds of appeal (see, inter alia, Bryan, §§ 44, 45 and 47, and Crompton §§ 71 – 73 and 77, both cited above).

99. Also of note is the earlier case of *Bryan v The United Kingdom, 2 November 1995, Series A no. 335-A* concerned an appeal from an enforcement notice to the Minister who appointed an inspector to consider the appeal. It was argued that the inspector, in carrying out his review, did not fulfil the requirements of independence stated in Article 6 para. 1 (art. 6-1) of the Convention: the inspector, a member of the salaried staff of the Department of the Environment, exercised delegated authority from the Secretary of State who had the power to withdraw a case from an inspector at any time (see paragraphs 10, 20 and 23 above). In these circumstances, the appeal to the Secretary of State remained an appeal to the Executive, and more particularly an appeal from local to central government. The Court found that whatever about these shortcoming, the appeal to the High Court on points of law, even if limited, meant there was compliance with Article 6(1) of the Convention. The Court upheld the extent of review, stating:

44. The Court notes that the appeal to the High Court, being on "points of law", was not capable of embracing all aspects of the inspector's decision concerning the enforcement notice served on Mr Bryan. In particular, as is not infrequently the case in relation to administrative-law appeals in the Council of Europe member States, there was no rehearing as such of the original complaints submitted to the inspector; the High Court could not substitute its own decision on the merits for that of the inspector; and its jurisdiction over the facts was limited (see paragraphs 25 and 26 above). However, apart from the classic grounds of unlawfulness under English law (going to such issues as fairness, procedural propriety, independence and impartiality), the inspector's decision could have been quashed by the High Court if it had been made by reference to irrelevant factors or without regard to relevant factors; or if the evidence relied on by the inspector was not capable of supporting a finding of fact; or if the decision was based on an inference from facts which was perverse or irrational in the sense that no inspector properly directing himself would have drawn such an inference (ibid.).

45. Furthermore, in assessing the sufficiency of the review available to Mr Bryan on appeal to the High Court, it is necessary to have regard to matters such as the subject-matter of the decision appealed against, the manner in which that decision was arrived at, and the content of the dispute, including the desired and actual grounds of appeal.

46. In this connection the Court would once more refer to the uncontested safeguards attending the procedure before the inspector: the quasi-judicial

character of the decision-making process; the duty incumbent on each inspector to exercise independent judgment; the requirement that inspectors must not be subject to any improper influence; the stated mission of the Inspectorate to uphold the principles of openness, fairness and impartiality (see paragraph 21 above). Further, any alleged shortcoming in relation to these safeguards could have been subject to review by the High Court.

47. In the present case there was no dispute as to the primary facts. Nor was any challenge made at the hearing in the High Court to the factual inferences drawn by the inspector, following the abandonment by the applicant of his objection to the inspector's reasoning under ground (b) (see paragraphs 11 to 13 above). The High Court had jurisdiction to entertain the remaining grounds of the applicant's appeal, and his submissions were adequately dealt with point by point (see paragraph 12 above). These submissions, as the Commission noted, went essentially to questions involving "a panoply of policy matters such as development plans, and the fact that the property was situated in a green belt and a conservation area".

100. Furthermore, it was noted that even if the High Court could not have substituted its own findings of fact for those of the inspector, it would have had the power to satisfy itself that the inspector's findings of fact or the inferences based on them were neither perverse nor irrational. The scope of review of the High Court was therefore sufficient to comply with Article 6 para. 1 (art. 6-1).

(iv) Conclusion on Independence

101. It would seem clear that the process of confirmation of the CPO by the Minister for Health could not be considered an independent or impartial determination. Furthermore, the decision of the Supreme Court in *O'Brien v Bord Na Mona* that compulsory acquisition does not involve the administration of justice, even of a limited nature, must be subject to doubt in particular in the light of subsequent judicial developments. Nonetheless it is arguable that the entitlement to appeal to the High Court under section 85 of the 1947 Act could be said to provide for an independent adjudication. The case law of the European Court on Human Rights would appear to support this. The provision of such an appeal may mean that the procedure under the 1947 Act is arguably in compliance with the requirement of the European Convention for an independent and impartial tribunal. The entitlement to appeal may for the same reason be said to reject any challenge to the constitutionality.

102. Nonetheless it remains the case that this matter remains untested. The observations of McKechnie J certainly raises significant doubts. While therefore there are substantial grounds to resist a constitutional challenge to the 1947 Act, the risk and consequence may be considered too significant.

103. However, these concerns about the independence under the current legislation framework of the 2004 Act, could very simply be addressed by conferring the function of the Minister as confirming authority on An Bord Pleanala. There is a clear template for doing so, insofar as this has been done for numerous other CPO legislation and could be accomplished with minimal legislative intervention. Section 214 of the Planning and Development Act 2000 could be simply amended by adding the Health Act 2004 to the list of statutes contained in section 214 where An Bord Pleanala exercises the function formally performed by the Minister. In this regard section 214 of the 2000 current provides:

> *214.—(1) The functions conferred on the Minister in relation to the compulsory acquisition of land by a local authority under the following enactments are hereby transferred to, and vested in, the Board and any reference in any relevant provision of those Acts to the Minister, or construed to be a reference to the Minister, shall be deemed to be a reference to the Board except that any powers under those enactments to make regulations or to prescribe any matter shall remain with the Minister:*
>
> *Public Health (Ireland) Act, 1878;*
> *Local Government (Ireland) Act, 1898;*
> *Local Government Act, 1925;*
> *Water Supplies Act, 1942;*
> *Local Government (No. 2) Act, 1960;*
> *Local Government (Sanitary Services) Act, 1964;*
> *Housing Act, 1966;*
> *Derelict Sites Act, 1990;*
> *Roads Acts, 1993 and 1998;*
> *Dublin Docklands Development Authority Act, 1997".*

104. In the alternative, the 1947 Act could be amended along similar lines to the Industrial Development Act 1986 by the Industrial Development (Amendment) Act 2018 following the *Reid* judgment, although it would not require the same extent of amendments, as the original 1986 Act did not include any procedural provision such as notice or compensation. Amendments to the 1947 Act might therefore involve repealing sections 82 to 85 and inserting new statutory provisions similar to sections 16C and D of the 1986 Act (as inserted by the Industrial Development (Amendment) Act 2018) which transfer

the function of confirmation to An Bord Pleanala and also incorporates the statutory provisions relating to the Board contained under the Planning Acts.

105. Insofar as there might be a concern that the law is being changed effectively to enable or address the compulsory acquisition of specific lands, I do not believe there is a danger to a challenge on such basis. Firstly, the change in the law would apply to any potential acquisition of lands by the HSE under the 2004 Act and not simply particular lands. Secondly, the mere fact that there was a change in the law to confer the function on An Bord Pleanala, would not involve any prejudgment. In fact entirely to the contrary, the purpose of the change would be to safeguard the procedural rights of a landowner and so to ensure independence.

106. As any legislative change is minimal, there is no reason why this might not be accomplished expeditiously and could possibly be accomplished by the amendment of an existing Bill going through the Oireachtas as opposed to introducing a standalone bill, although the latter would be preferable.

3. *Article 44.2. 6° and Diversion of Religious Property*

107. As noted, a further issue which requires consideration is that the compulsory acquisition of lands is owned by a religious institution, which raises the particular protection in the Constitution afforded to diversion of property of religious denominations. To reiterate, Article 44.2. 5° and 6° states:

> 5° Every religious denomination shall have the right to manage its own affairs, own, acquire and administer property, movable and immovable, and maintain institutions for religious or charitable purposes.
>
> 6° The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation"

108. This provision has not been substantively considered by the Court. The only case in which it was contemplated was in *Christian v Dublin City Council*, where Clarke J.

considered that zoning of lands owned by religious order did not violate this provision as it did not amount to "*diversion*". However, the provision was examined by the All Party Oireachtas Committee on the Constitution *Ninth Progress Report on Property* (2004). A number of comments relating to the same may be noted. This includes at pg. 58:

> *"As previously noted, the original version of this clause dates back to the Home Rule Bills and a virtually identical version of this provision was contained in section 5 of the Government of Ireland Act 1920, Article 16 of the 1921 Anglo-Irish Treaty of 1921 and Article 8 of the Constitution of the Irish Free State.*
>
> *Article 44.2.6° was, of course, designed as an important safeguard for minority churches against potentially oppressive state behaviour. The committee considers it fair to observe that such a threat, in so far as it ever existed, has long since passed. However, apart from recommending one minor technical amendment,73 the Constitution Review Group saw no reason for change".*

The Committee recommended that the word "*diverted*" be changed to compulsory acquired. As regards the meaning of "*works of public utility*", the Report stated at pg. 59:

> *"The words 'necessary works of public utility' gives rise to more difficulties. Article 8 of the 1922 Constitution referred to 'roads, railways, lighting, water or drainage works or other works of public utility' and although this phraseology was not repeated in Article 44.2.6, it is surely legitimate to invoke Article 8 as a guide to the scope of this phrase. It has been suggested that the acquisition of lands to facilitate local authority housing might not come within this phrase75, but this would seem too narrow a view of 'necessary works of public utility'. The Kenny Report suggested that Article 44.2.6 precluded the acquisition of property by a public authority for transfer to private builders for the construction of factories or houses and this view seems correct"*

109. A number of observations may be made with respect to the meaning of Article 44.2.6°. Firstly, it would seem reasonable to interpret Article 44.2. 6° in the light of the context of Article 44 as whole which is generally to protect the practice of religion and also to prevent undue interference by the State. This includes the entitlement of a religious denomination under Article 44.2. 5° to manage its own affairs, own, acquire and administer property under and so not to have its property "diverted" save for necessary works of public utility. Article 44 concerns religion in general and not property. Secondly, the word "diverted" would certainly include compulsory acquisition and perhaps lesser forms of interference. While the general provisions of Article 40.3 and 43 protect private property and act as a protection against compulsory acquisition, they are not directed specifically towards governing compulsory acquisition. Article 44.2.6 offers

a more focused form of protection of property rights of religious denominations. Thirdly, it is clear that the prohibition against diversion is not absolute and so for present purposes the main issues relates to the meaning of "*necessary works of public utility*". It is not necessary to decide whether the Kenny Report is correct in suggesting that this prohibits acquiring property to transfer to private builders. In the current state of the housing market, there as arguably a public utility attached to the same.

110. As regards whether the choice of word "*public utility*" means that it is confined to acquiring land for utilities in the narrow sense of electricity, gas, water, etc, this seems an unlikely interpretation. Firstly, there is no logical reason why diversion of property would be permissible for such services but not for other works in the public interest. Secondly, the wording of Article 44.2.6° is that it refers to "works **of** public utility" rather than "public utilities". It would seem much more reasonable to interpret the reference to "public utility" in the broader sense of public works or works which are useful to the public or of public use. Thirdly, I do not believe much significance may be attached to the choice of the words "public utility" as opposed to "common good". Insofar as there is a limitation it arises from the word "works" as opposed to "public utility". The fact that Article 44.2. 6 precludes a diversion except for "works" means that the State cannot compulsorily acquire lands simply to deprive the religious denomination of assets unless it is to carry out certain works. Thus, the purpose of Article 44.2.6 is primarily directed towards State oppression of religious or specific religious orders or discrimination. The acquisition of lands to carry out certain works in the public interest which are not "utilities", does not involve oppression of the religious denomination.

111. The National Maternity Hospital would clearly constitute works of public utility in this broad sense of public use. I therefore do not consider Article 44.2.6° presents an obstacle to the compulsory acquisition of the Elm Park. I would consider the narrow approach to the meaning of "work of public utility" is very unlikely to be adopted by the Irish Courts.

4. Delay

112. A further consideration as to why the State may be reluctant to invoke the compulsory acquisition powers is that it could entail delay in the delivery of the National Maternity Hospital. It is understood that there is a pressing need to move to more suitable and upgraded facilities. However, in terms of delay it should be observed that the Elm Park

site was identified some eight years ago in 2013 and it has been a further 5 years since the Mulvey report was delivered. Considering the delay thus far, it may therefore be queried whether any further delay entailed by a compulsory acquisition process is significant in the scheme of things, especially in the light of the importance of this matter. Moreover, the current proposed arrangements appear mired in controversy and so there is likely to be even further delays in terms of these proposed arrangements. Minister for Health, Stephen Donnelly in response to Dail Question stated on the 1 July, stated:

> *"Timelines for the new hospital are subject both to satisfactory finalisation of the legal arrangements, and approval of the business case, and therefore not yet available".*

The public procurement process for the building of the hospital has also not commenced.

113. Insofar a decision might be made to proceed with compulsory acquisition, the first matter is whether the State wished to proceed under the existing unamended legislation. This obviously presents some risks as outlined earlier that it could be considered unconstitutional due to the lack of independence, although substantial grounds can be advanced that it is not.

- The making of the CPO by the HSE;
- Public Advertisement and sending of notices;
- Preparation of evidence to be presented at the likely oral hearing;
- Determination by the Minister as to whether to confirm the CPO;
- Exercise of any appeal under section 85 of the 1947, including the possibility of an appeal from the High Court.

While it is not possible to place a precise estimate on the process above, the main delays would be involved in the gathering of evidence and preparation for an oral hearing/inquiry. Insofar as an appeal was made to the High Court this must be exercised within 3 weeks of the confirmation of the order. Also, it might be expected that any proceedings would be given a high priority and expeditious hearing date before the Courts.

114. If the 1947 Act was amended to transfer the function to An Bord Pleanála, the only further additional delays to the above, would be the delay in the passage of any

amendment to the 1947 Act. In addition, there is generally an 8 week (as opposed to three weeks) period to judicially review the decision of Board which commences on the date of publication of its confirmation decision. A decision of An Bord Pleanála to confirm a CPO, is subject to the limitations under section 50 including the absence of an automatic right of appeal from a decision in the High Court. In order for a party to be entitled to an appeal, they must obtain a certificate from the trial judge that there is a point of law of exceptional public importance and that it is desirable in the public interest that an appeal be taken. If a certificate is refused, a party may also seek leave from the Supreme Court to appeal, where the test is that there is a point of law of general importance. This limitation on an appeal might be another reason as to why it would be advantageous that the function of the Minister be transferred to An Bord Pleanala.

VI CONCLUSION

115. It is proposed to set out main conclusion in these advices which are as follows:

(1) Insofar as ownership of the lands are not obtained, the proposed arrangements are byzantine in their complexity, almost Kafkaesque, from which it is difficult to clearly ascertain with certainty key matters of matters of ownership, control and governance.

(2) The proposed arrangements involve the establishment of a new company NMH DAC which will be owned by St Vincent Healthcare Group (SVHG), which in turn will be wholly owned by another new company established by St. Vincent's Holdings (SVH), which will be owned and controlled by its directors.

(3) The new company to be known as St. Vincent's Holdings will be the ultimate owner of the lands (at least when the RSC transfers its share in SVHG to it). It will further be described as the ultimate owner of NMH DAC, as the owner of St. Vincent Healthcare Group. Neither the HSE, the Minister for Health or the State in any form have an entitlement to appoint a director to the SVH.

(4) It appears to be the intention that the State, will own the NMH building, although it is not clear how this is proposed to be accomplished as I have not had sight of the draft legal documents, which include real estate documents. The mere fact that a person

funds the construction of a building will not automatically confer ownership of the building. Ownership of the lands will generally include ownership of anything above or on the lands, unless this is severed. While lands and the buildings on it can therefore undoubtedly be in different ownership, this would seem to necessitate a transfer of some element of ownership such as the airspace from the SVHG or SVH (as the proposed new owner) to the State. However, it is not clear whether there is any willingness to voluntary transfer any aspect of ownership of the lands to the State.

(5) The RSC in a public statement have declined to sell the lands to the State, which appears to be based on their interest of retaining overall control of the St. Vincent's campus. This interest is somewhat vague and not clearly articulated. However, it is noted that the Mulvey Report, states that this interest can be met by providing certain "assurances" to SVHG which are recommended in the report. There is no indication in that report that retention of ownership of the lands is necessary to meet such interest. These assurances could be incorporated in a more formal agreement or arrangements.

(6) One of the main areas of concern relates to whether a religious ethos could still influence clinical services being provided at the new NMH. Under the proposed arrangement this is said to be safeguarded by firstly, a golden share held the Minister for Health under which the Minister's consent is required to be obtained before there is any change in the reserved powers and secondly, by virtue of the RSC transferred their shares in SVHG to a new company SVH. However, the wording of the proposed reserved powers if it designed to avoid any religious ethos influencing clinical independence is not watertight and is ambiguous. Moreover, the labyrinthine company structure and governance issues, the lack of transparency in the process which led to the proposed withdrawal of the RSC (including approval from the Vatican) when coupled with the fact of historical appointments which provides threads of potential influence to subsequent appointments, are all not conductive in providing certainty on this matter. Arguably the matter is of such importance to the State, that there is a legitimate state interest in achieving certainty which could only be secured by the State having full control through ownership of the relevant land and assets.

(7) The proposed arrangement whereby the State will not own the lands is not in accordance with the recommendation by the Independent Review Group Report of August 2018 Report which was established by the Minister for Health to examine the role of voluntary organisations, where at least the desired outcome is ownership of lands by the State. That Report states at Section 6.3.3:

> "*We recommend that the State should **always** seek to own the land on which future hospitals or facilities will be built. The State can buy new greenfield sites or purchase sites from existing owners or receive land and buildings as donations. This would cost the Exchequer more than in the past but would leave the State free to determine the ethos, guiding principles and governance of any future organisation*". [emphasis added]

While the report also says that where the State is unable to secure the purchase of land on which it intends to develop a new facility, any capital investment by the State should only be provided subject to compliance with a prior agreement on the services that will be delivered, it is clear that ownership of the lands is the optimal circumstance. The report does not address the prospect of compulsory acquisition, where voluntary purchase cannot be agreed.

(8) In broad terms the State can compulsorily acquire constitutionally protected property (albeit subject to compensation) where this can be justified in the interest of the common good. This involves the State demonstrating that it is necessary in the public interest or in the interest of social justice. However, other than these broad parameters, the case law on compulsory acquisition is not entirely clear in terms of a more refined test including the application of the principle of proportionality or how this translates in the analysis of the justification for compulsory acquisition. On the one hand, the notion of proportionality could be said to be inherent in the concept of "necessity" and there is no need for further analysis. On the other hand, proportionality may require a more in depth analysis of balancing the objectives sought to be achieved by the State with the interest of the landowner such as an assessment of whether the State's objective can be achieved by certain arrangements which avoid the need for compulsory acquisition. This is a matter which requires further clarification by the Courts.

(9) Subject to above caveats in terms of the state of the law, a number of factors would appear to create a compelling case as to why the State could meet a test for the compulsory acquisition of these lands. Firstly, the acquisition of the lands would be for the purpose of delivering a very important development in the public interest which is the relocation of the National Maternity Hospital. The status and function of the NMH arguably means that State should own the lands, insofar as there are is any uncertainty and doubts, even if remote, relating to governance and clinical independence arising from the absence of ownership. Secondly, the State is expending very substantial monies, estimated to be €800 million (and likely to be more) in building the National Maternity Hospital. Therefore from a purely financial perspective in protecting an investment, there would be a public interest again in ownership of the underlying land. Thirdly, these particular lands have been identified as the appropriate location of the NMH. It was recommended in the KPMG report in 2008 due to co-location benefits and the clinical benefit of co-location were summarised and accepted by An Bord Pleanala in the planning application in 2017.

(10) The reasons which may be advanced against the need for compulsory acquisition might be said to be twofold. Firstly, that the various interests of the State can be accomplished by certain other arrangements such as the grant of a lease and other structures proposed and so there is no necessity for the State therefore to compulsory acquire the lands. However, whether these objectives are or will in fact be met by these arrangements is contentious and complicated. The fact that a set of complex arrangements have to be devised, where the construction and implications of the same are contentious and doubtful, would seem highly unsatisfactory. Considering the importance of the NMH and vast monies being expended by the State, there would seem to be a significant public interest in certainty in relation to these matters.

(11) The second reason which may be advanced against the compulsory acquisition relates to SVHG's purported interest in retaining ownership of the lands. This appears to relate to the integration of the building with the existing hospital on the campus and so having oversight over the entire campus. However, this interest is vague and not clearly articulated and in any case it would appear it could be met by the assurance recommended in the Mulvey Report being provided to the SVHG. That report does

not recommend that it be a requirement for SVHG to retain ownership of the lands to protect such interests.

(12) Overall, I am of the view that the State could present a compelling case to meet the test to justify the compulsory acquisition of the Elm Park site.

(13) Insofar as the State proposes to compulsory acquire the lands, the appropriate legislation is under the Health Act 1947 which confers on the HSE the power to compulsorily acquire lands. However, significant issues relate to whether the procedure under Health Act 1947 is constitutional in affording sufficient independence in the process for confirming a CPO. This relates to the fact that the CPO is made by the HSE with any objections then being made to the Minister for Health as to whether or not to confirm the CPO. While most CPO legislation has been updated to provide that the confirmation function is conferred on An Bord Pleanala, the 1947 Act remains something of an anomaly.

(14) While the HSE and the Minister for Health are distinct legal entities and the HSE may be considered to be technically independent, the State exercises its central functions in providing for a health service through the HSE. In the present context of the State having an interest in compulsory acquisition, it is the broad interests of the State and the public interest which is being asserted. If the HSE were to compulsory acquire the lands, it is clearly not its independent interest divorced from the State which would be asserted. The State's interest would be expressed through the HSE. In fact that same interest may be attributed to the Minister for Health as to the HSE. It would therefore seem to follow from this that the 1947 Act in providing that the confirming authority is the Minister of the Health, does not provide for a determination by a confirming authority which is independent to the acquiring authority.

(15) In *Reid v Industrial Development Agency* [2015] 4 IR 494, the Supreme Court in considering the Industrial Development Act 1986 under which the IDA would make a compulsory acquisition order without any confirming authority, McKechnie J noted the conflict and said that the most satisfactory way of having this conflict resolved, is to separate the decision making process between the policy driver on the one hand

and the acquisition decider on the other. However, the Court made no definitive ruling on the matter and the constitutionality of Act was upheld in the High Court.

(16) In *Reid*, the High Court upheld the constitutionality in reliance upon the previous Supreme Court judgment of *O'Brien v Bord Na Mona* which decided that a decision on the compulsory acquisition of lands involves an administrative act and not the administration of justice. However, a question may be raised as to whether this decision requires re-assessment, in particular, in the light of the expansive construction given to the notion of administration of justice in the recent Supreme Court judgment in *Zalewski v. Adjudication Officer and WRC, Ireland and the Attorney General* [2021] IESC 24. It would seem difficult to contend that the adjudication of an entitlement to compulsory acquire lands would not involve the administration of justice, albeit of a limited nature and so would therefore bring with it a requirement for independence in adjudication.

(17) There are, however, differences between the Health Act 1947 and the Industrial Development Act 1986 which was examined in the Reid case, in particular section 85 of the 1947 Act which allows for an appeal to the High Court from a decision of the Minister. The IDA Act did not provide for any appeal. The scope of this appeal is wide and would at least encompass matters which might be raised by way of judicial review. In *Clinton v An Bord Pleanala*, Geoghegan J. indicated that Courts will apply a heightened level of review in the context of compulsory acquisition standard and so the *O'Keeffe* standard would not be appropriate.

(18) It is arguable that the entitlement to appeal to the High Court under section 85 of the 1947 Act could be said to provide for an independent adjudication. The case law of the European Court on Human Rights would appear to support this. The provision of such an appeal may mean that the procedure under the 1947 Act is arguably in compliance with the requirement of the European Convention for an independent and impartial tribunal. For the same reason, the entitlement to appeal therefore presents grounds for saying that the 1947 Act is constitutional in allowing for an independent adjudication.

(19) While therefore there are substantial grounds to resist a constitutional challenge to the 1947 Act, the risk and consequence of successful challenge may be considered

too significant. However, these concerns about the independence under the current legislation framework of the 2004 Act, could very simply be addressed by conferring the function of the Minister as confirming authority on An Bord Pleanála. There is a clear template for doing so, insofar this has been done for numerous other CPO legislation and could be accomplished with minimal legislative intervention. Section 214 of the Planning and Development Act 2000 could be simply amended by adding the Health Act 2004 to the list of statutes contained in section 214 where An Bord Pleanála exercises the function formally performed by the Minister.

(20) In the alternative, the 1947 Act could be amended along similar lines to the Industrial Development Act 1986 (which was amended by the Industrial Development (Amendment) Act 2018 following the Reid judgment), although it would not require the same extent of amendments, as the original 1986 Act did not include any procedural provisions such as notice or compensation. Amendments to the 1947 Act might therefore involve repealing sections 82 to 85 and inserting new statutory provisions similar to section 16C and D of the 1986 Act (as inserted by the Industrial Development (Amendment) Act 2018) which transfer the function of confirmation to An Bord Pleanála and also incorporates the statutory provisions relating to the Board contained under the Planning Acts.

(21) A further issue which requires consideration is that the compulsory acquisition of lands is owned by a religious institution, which raises the particular protection in the Constitution afforded to diversion of property of religious denominations under Article 44.2. 6° which states: " *The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation*". The precise parameters of this provision have not been fully considered by the Courts but it would clearly include a protection against compulsory acquisition save for necessary works of public utility

(22) It would seem unlikely that the choice of word "*public utility*" means that it is confined to acquiring land for utilities in the narrow sense of electricity, gas, water, etc, Firstly, there is no logical reason why diversion of property would be permissible for such services but not for other works in the public interest. Secondly, the wording of Article 44.2.6° is that it refers to "works **of** public utility" rather than "public utilities". It would seem much more reasonable to interpret the reference to "public

utility" in the broader sense of public works or works which are useful to the public or of public use. Thirdly, I do believe much significance may be attached to the choice of the words "public utility" as opposed "common good", 'public interest' or social justice'. Insofar as there is a limitation it arises from the word "works" as opposed to "public utility". The fact that Article 44.2. 6 precludes a diversion except for "works" means that the State cannot compulsorily acquire lands simply to deprive the religious denomination of assets unless it is to carry out certain necessary works. Thus, the purpose of Article 44.2.6 is primarily directed towards State oppression of religious or specific religious orders or discrimination.

(23) The National Maternity Hospital would clearly constitute works of public utility in this broad sense of being of public use or usefulness. I therefore do not consider Article 44.2.6° presents an obstacle to the compulsory acquisition of the Elm Park. I would consider the narrow approach to the meaning of "work of public utility" is very unlikely to be adopted by the Irish Courts.

(24) A further consideration as to why the State may be reluctant to invoke the compulsory acquisition powers is that it could entail delay in the delivery of the National Maternity Hospital. It is understood that there is a pressing need to move to a more suitable and upgraded facility. However, in terms of delay it should be observed that the Elm Park site was identified some eight years ago in 2013 and there has been a further 5 years delay since the Mulvey report was delivered. Considering the delay thus far, it may therefore be queried whether any further delay entailed by a compulsory acquisition process is significant in the scheme of things, especially in the light of the importance of this matter. Moreover, the current proposed arrangements appear mired in controversy and so there is likely to be even further delays in terms of the current proposed arrangements. However, the significance of any potential delays is more a practical or even political judgment.

(25) If a decision was made to make a CPO under the current legislation, the steps involved comprise:

a. The making of the CPO by the HSE
b. Public Advertisement and sending of notices
c. Preparation of evidence to be presented at the likely oral hearing

d. Determination by the Minister as to whether to confirm the CPO
e. Exercise of any appeal under section 85 of the 1947, including the possibility of an appeal from the High Court.

While it is not possible to place a precise estimate on time involved the process above, the main delays would be the gathering of evidence and preparation for an oral hearing/inquiry. Insofar as an appeal was made to the High Court this must be exercised within 3 weeks of the confirmation of the order and so proceedings would have to issue in an expedited manner. Also, it might be expected that any proceedings would be given a high priority and an expeditious hearing date before the Courts.

(26) If the 1947 Act was amended to transfer the function to An Bord Pleanála, the only further additional delays to the above, would be the delay in the passage of any amendment to the 1947 Act. In addition, there is generally an 8 week (as opposed to three weeks) period to judicially review the decision of Board which commence on the date of publication of its confirmation decision. A decision of An Bord Pleanála to confirm a CPO, is subject to the limitations under section 50 including there were be no automatic right of appeal from a decision in the High Court.

STEPHEN DODD SC

29th October 2021