S. 37

File With _____

SECTION 131 FORM

Appeal NO: ABP 310945-21 Defer Re O/H ☐

TO: SEO

Having considered the contents of the submission dated/ received 18/8/21 from Applicant I recommend that section 131 of the Planning and Development Act, 2000 ~~be~~ not be invoked at this stage for the following reason(s): no new material issues

E.O.: [signature] Date: 26/8/21

To EO: _____

Section 131 not to be invoked at this stage. ☐

Section 131 to be invoked – allow 2/4 weeks for reply. ☐

S.E.O.: _____ Date: _____

S.A.O: _____ Date: _____

M _____

Please prepare BP _____ - Section 131 notice enclosing a copy of the attached submission

to: _____

Allow 2/3/4weeks – BP _____

EO: _____ Date: _____

AA: _____ Date: _____

S. 37

File With _____

CORRESPONDENCE FORM

Appeal No: ABP 310945-21

M _____

Please treat correspondence received on 14/8/21 as follows:

1. Update database with new agent for Applicant/~~Appellant~~ Arnold Leahy Architects
2. Acknowledge with BP BL 20
3. Keep copy of Board's Letter ☐

1. RETURN TO SENDER with BP _____
2. Keep Envelope: ☐
3. Keep Copy of Board's letter ☐

Amendments/Comments

4. Attach to file
(a) R/S ☐ (d) Screening ☐
(b) GIS Processing ☐ (e) Inspectorate ☐
(c) Processing ☐

RETURN TO EO ☑

Ashling D to assess

	Plans Date Stamped ☐ Date Stamped Filled in ☐
EO:	AA: Patricia Boy
Date: 20/8/21	Date: 20/8/21

Garry Dorgan

Sent:	Bord Wednesday 18 August 2021 15:21
To:	Appeals2
Subject:	FW: Submissions in relation to referral ABP-310945-21
Attachments:	ABP Response Submission Ref. No. ABP-310945-21.pdf; Attachment - Legal Submissions on s.5 hierarchy.pdf; Attachment - Letter David Averill 22.06.21.pdf; Attachment - Letter Arnold Leahy Architects 21.06.21.pdf; A3 Site Map - Neighbouring rooflights & Windows.pdf

From: reception <reception@ala.ie>
Sent: Wednesday 18 August 2021 15:04
To: Bord <bord@pleanala.ie>
Cc: Michael Nugent <michaelnugentzam@gmail.com>
Subject: Submissions in relation to referral ABP-310945-21

Ref: Michael Nugent, 25 Mountainview Road, Dublin 6.
ABP Letter dated 27 July 2021 – Ref. No. ABP-310945-21.

Dear Sir/Madam,

Further to correspondence received from An Bord Pleanála inviting submissions or observations in writing to the Board in relation to the referral referenced above, we submit a cover letter, three attachments and A3 Site Map. We have also forwarded the same documentation via registered post on today's date.

Should you have any queries, please do not hesitate to contact me.

Kind regards

Arnold Leahy.
Arnold Leahy Architects Ltd.
061 315 989.
087 8569780.

Arnold Leahy Architects

VAT No. 9671561Q

1 Crescent Villas
O'Connell Avenue
Limerick.
Tel 061 – 315 989
reception@ala.ie

13th August 2021.

An Bord Pleanála
64 Marlborough Street
Dublin 1

Re: **An Bord Pleanála Reference Number: ABP-310945-21**
Planning Reference Number: 0208/21.
Applicants: Geert Jan Huuysmans & Maria Pilar Duncan
Location: 25 Mountain View Road, Ranelagh, Dublin 6.
Our client: Michael Nugent

Dear Sir/Madam,

We write in reference to the above and your letter dated 27th July last and enclose for your attention the following items of correspondence;

1. Legal Submission in regard to the irregular nature of this Section 5 Application.
2. Letter of David Averill dated 22nd June 2021 to the City Council in relation to this Section 5.
3. Letter of Arnold Leahy dated 21st June 2021 which accompanied the above referenced correspondence from David Averill.
4. Image of existing veluxes and windows overlooking applicants' property.

THE LEGAL POSITION

Essentially, our client's position is that the Board should, as a matter of law, dismiss this application under the power vested in the Board under s.138, as to proceed to determine this appeal would be illegal.

The veluxes referred to in this Section 5 are the exact veluxes which have already been granted the benefit of a Section 5 Declaration by Dublin City Council in January 2020 (Decision Order P2187). On foot of that Section 5 Declaration, the veluxes have been installed by our client. There are no changed facts. This application for a Section 5 Declaration by these applicants is in relation to the identical property and the identical veluxes as have already been granted a Section 5 Declaration. We submit that An Bord Pleanala is precluded, as a matter of well-established law, from making another, contrary, declaration on the same facts and therefore must reject the application itself. We refer you to the enclosed Legal Submission, dealing with the law on this aspect of the matter in some detail. The balance of our submissions in regard to this application are made without prejudice to the Legal position stated above. On that basis only, we refer to the enclosed letters, referenced at points 2 and 3 above which were also submitted to Dublin City Council, and to the balance of this letter.

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

A substantive proportion of the Appeal Submission lodged by the applicants, concerns an allegation that the applicants were deprived due process because they were not furnished with all of the documents relating to that Section 5 Application by Dublin City Council. These matters have been previously addressed at some length in the letters referenced at points 2 and 3 above and we would respectfully ask that The Board accept these enclosures as sufficient response to the points reiterated in this current appeal submission, but taking account also of the enclosed Legal Submission, in so far as it clarifies that the legislative provisions for Section 5 Declarations do not afford a right of participation to third parties, including the Applicants. As there is no right to make submissions afforded to the Applicants, they cannot complain that they were deprived of due process by not having that right.

THE COMPLAINT OF OVERLOOKING

The Applicants make extensive additional submissions in relation to overlooking, in relation to which we make the following points;

In Appendix I, photographs 1 and 2 of the Appeal Submission, the applicants indicate with arrows what is described as the view from their master bedroom window of the two Velux in question. We note, however, that no reference is made to the very obvious existence in those same photographs of multiple Velux on the neighbouring properties immediately adjacent. No reference is made to the four Velux on house number 27, which have a closer and more direct view towards the bedroom window in question, nor to the five Velux at house number 23 nor the five Velux at house number 21, nor to the single Velux on house 19 which is shown in their photograph. Neither is there reference to any of the back bedroom windows, many of which have a clear view of both the master bedroom window and the garden of the property at 64 Merton Drive.

The Applicants' Appendix I Photograph 2, shows an array of fourteen separate veluxes (apart from that which is the subject matter of this complaint) which all apparently have a view of their bedroom. Additionally, there are seven bedroom windows with the same view. The veluxes of which the applicants complain do not have a different view than these other Veluxes and windows. As the Applicants themselves demonstrate with their photographs, a certain degree of overlooking is inevitable and part of the nature of living in a built-up area.

Using the applicants' photographs 1 and 2 as a guide, we have plotted on a satellite image transposed on the site layout plan the 21 Veluxes and bedroom windows which have a view of the applicants' bedroom, not including those which are now the subject matter of this complaint. It is also clear from the Applicants' photographs, that the addition of two Veluxes is entirely consistent with the character and external appearance of the neighbouring properties.

Furthermore, Photograph 1 is described as being *"the view from the master bedroom at 64 Merton Drive"* but the distance in photographs 1 and 2 is markedly different, suggesting that the images are zoomed so as to show a distorted misrepresentation of the true distance between the properties. Photograph 3, showing an image of both Velux, has been taken from the boundary wall separating both gardens and again is very much zoomed.

It is also worth noting that in October 2020 (at the very same time that the applicants first made a complaint to Dublin City Council about the renovation works being carried out at 25 Mountain View Road overlooking their property) they cut down a large number of trees and a substantial amount of planting along the boundary wall between their garden at 64 Merton Drive and the subject property, which had previously acted as a very effective screen to reduce the degree of overlooking of their property from all neighbouring properties on Mountain View Road, including the subject property.

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

The photographs attached to this letter show the position before the trees were cut down (in October 2019) and after the trees were cut down (on 12th November 2020) and also show the remains of a number of the trees and plants which had been cut down. No doubt, if the Applicants were to let their trees and garden grow again (and if they do not deliberately cut them down) their garden will again enjoy greater screening from this planting.

It is also relevant that planning permission was sought by the Applicants in 2006 for the construction of a two-storey extension with ground floor living space and first floor bedroom. The planning file shows that that application attracted objections from numerous neighbours because of concerns that the floor-to-ceiling windows the Applicants proposed to their bedroom (and for which permission was granted) would overlook their neighbours on Mountain View Road. In objections made, neighbours cited over-looking, loss of privacy and visual amenity, extreme intrusion and lack of keeping with the character of the area as grounds for objection.

In seeking their own planning permission and building their extension, therefore, the applicants ignored the concerns of their neighbours (the very same concerns they are now citing in this application) and went ahead to install large floor-to-ceiling windows in their bedroom which open up their property to both the opportunity to overlook their neighbours - and to be overlooked by their neighbours. The Applicants are now arguing that because they elected to install a large intrusive window in their own bedroom that this should now take precedence over the potential amenity of their neighbours. They contend that they alone are entitled to severely overlook the living spaces, bedrooms and gardens of their nearest neighbours whilst no one else may have any potential view of their property. This is a particularly difficult complaint to understand in the context of 21 pre-existing veluxes and windows already having a view of their bedroom window.

In conclusion we would contend in relation to the overlooking complaint that;

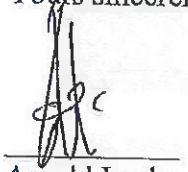
a) At least 21 Veluxes and windows have a view of the master bedroom and garden of 64 Merton Drive, apart from the two new Velux complained about in this appeal.

b) The addition of two new Velux to the 21 established views will not have a material detrimental effect on the privacy or amenity of the property in question.

c) The applicants' complaint regarding invasion of privacy is not supported on the facts and is discredited by their own photographs.

d) Privacy and amenity are reciprocal. By installing a floor to ceiling window in their own master bedroom the applicants generated a loss of privacy both to themselves and to the neighbours they overlook. Any potential loss of privacy to their bedroom may be overcome by closing the curtains.

Yours sincerely,



Arnold Leahy.

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

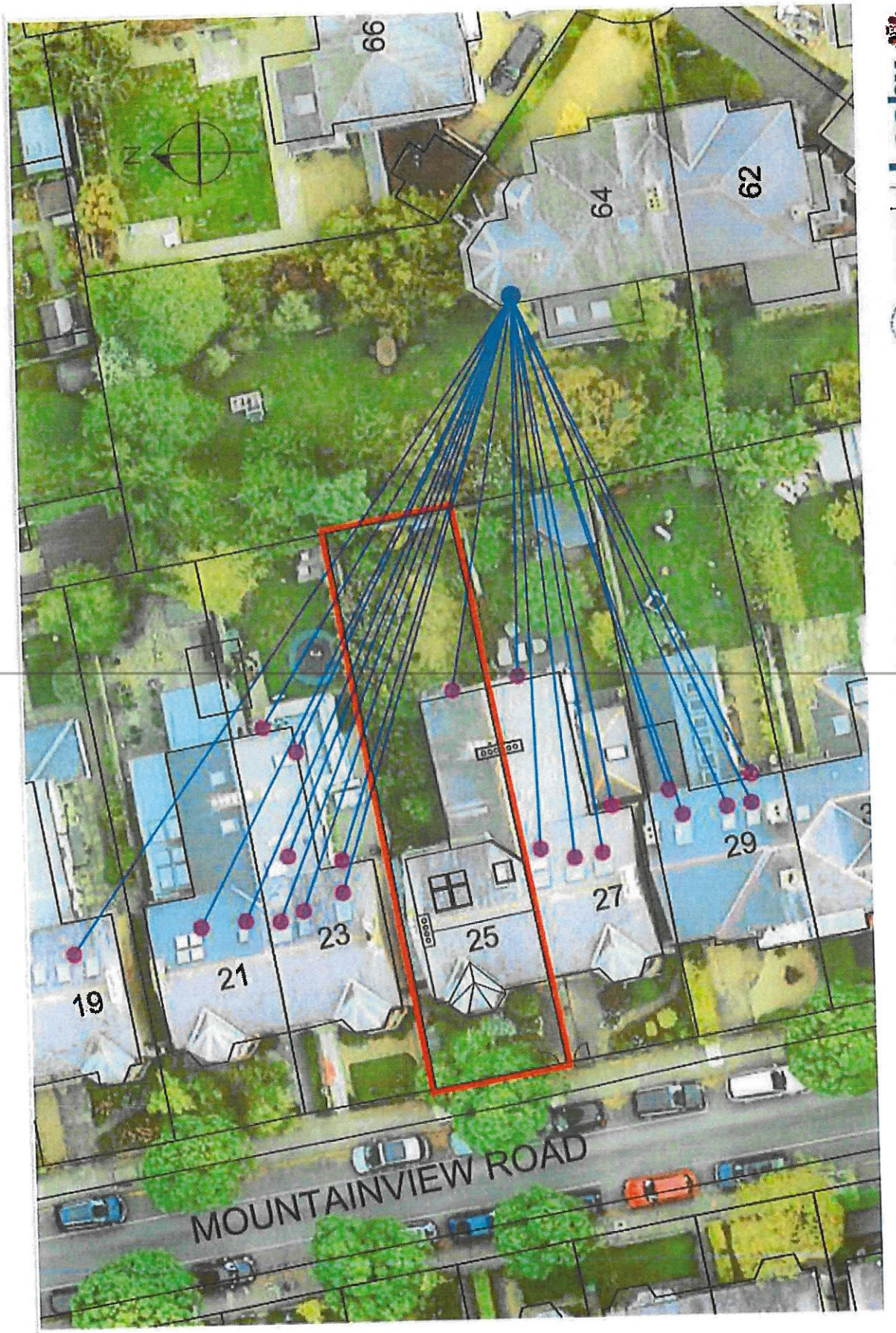
Image 1:
Photograph from window of 25 Mountain View Road of 64 Merton Drive, before trees cut. 23 Oct 2019

Image 2:
Photograph from same window of 25 Mountain View Road of 64 Merton Drive, after trees cut. 12 Nov 2020

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

Image 3:
Photograph of cut trees and stumps of 64 Merton Drive, after trees cut. 12 November 2020

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI



arnold Leahy ARCHITECTS

25 Mountainview Road,
Ranelagh.

Site Map - Neighbouring rooflights & Windows

Scale 1:200 @A3

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg.Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

ARCHITECTURE
CONSERVATION
INTERIORS

sheehan barry

88 RANELAGH, DUBLIN 6, IRELAND D06 Y2W6
T: 353 (1) 496 2888
F: 353 (1) 496 2923
E: post@sbl.ie

22.06.2021

Planning Department,
Dublin City Council,
Civic Offices,
Wood Quay,
Dublin 8.

re: **25 Mountainview Road, Ranelagh, Dublin 6:**
Application No. EXPP 0208/21
Applicants: Geert Jan Huuysmans & Maria Pilar Duncan
Registration Date: 04/06/2021

Dear Sir / Madam,

I refer to the above to which my client has asked me to review and respond to the above application. To that end I would note:

In reference to the above application for a Declaration under Section 5 of the Planning and Development Act 2000 (as amended). The Veluxes referred to are the exact Veluxes which have already been granted the benefit of a Section 5 Declaration by Dublin City Council. There are no changed facts. If Dublin City Council entertain this application they will be seeking to determine a matter which has already been decided and determined with finality, and upon which actions have been undertaken in reliance on that decision. On this basis we believe the current application is impermissable and that having already made a Section 5 Declaration in relation to these veluxes the Local Authority are precluded, as a matter of well established law, from making another, contrary, declaration on the same facts and therefore must reject the application itself.

The above should be the end of the matter, but in view of the criticisms made by the complainants, I enclose a letter from Arnold Leahy Architects Limited answering the criticism of their work in this connection. The information in this enclosed letter is offered without prejudice to the above contention.

sheehan barry

ARCHITECTURE
CONSERVATION
INTERIORS

88 RANELAGH, DUBLIN 6, IRELAND D06 Y2W6
T: 353 (1) 496 2888
F: 353 (1) 496 2923
E: post@sbl.ie

With regard to the windows on the first floor, I would note that I made a visit to the said property and met with the relevant planning enforcement inspector, Ms. Michelle Murphy. Our discussion included a review of the windows as installed and it was my clear understanding that the windows were acceptable and did not represent any identifiable loss of amenity for neighbouring properties and were indeed respectful of the character of the house and of the buildings planning status. To that end I would confirm my opinion that these windows are acceptable and that the applicants comments with regard to these window are not valid.

As noted above, I attach copy of letter from Arnold Leahy Architects Limited who submitted the approved Section 5 in which a detailed response to issues of complaint raised by the applicants of application ref. EXPP 0208/21. I would note that I have reviewed the detail of the application and complaints attaching. I would add my opinion that the details of the Velux as installed were clearly set out on the drawings and documentation as approved. The said form of Velux is not a working balcony and should not be considered as such.

Yours sincerely,

DAVID AVERILL

DA/da

LEGAL SUBMISSIONS

IN RELATION TO

Section 5 Application ABP-310945-21

1. These short submissions address the decisions of Simons J in *Krikke -v- Barrannafaddock Sustainability Electricity Ltd* [2019] IEHC 825 (6 December 2019) and Heslin J in *Narconon Trust -v- An Bord Pleanala* [2020] IEHC 25 (24 January 2020). Both judgments treat of the issue as how (in certain cases) a s.5 determination reached by a competent authority may bind another competent authority or a Court.

2. As matters stand *both* of these judgments are binding authority of the High Court and *both* say that it is not possible for a party to ask the Board to simply re-determine a prior s.5 that has already been determined and not challenged. The Board *did precisely* that in *Narconon* and the Board Decision was quashed.

3. As will be well known, s.5 contains a procedure whereby a party can – within the constraints of that section – seek in a declaration from a planning authority and *on appeal* from the Board as to whether a given matter is "development" within the meaning of the PDA and if so, whether that development is exempted within the PDA and, of course, the PDR.

4. In this respect, a "decision" on a s.5 referral is clearly an act of a planning authority or the Board under s.50 of the PDA. This means – without any question – that no person can question the validity of same save through the process of judicial review. In very basic terms this means that once a s.5 declaration has been made a party cannot – without more – simply ask the same question again and submit for a different result. By *definition* that involves precisely that which s.50 prohibits.

5. This is exactly what Heslin J held in *Narconon Trust -v- An Bord Pleanala* [2020] IEHC 25 (24 January 2020) and what Simons J in *Krikke -v- Barrannafaddock Sustainability Electricity Ltd* [2019] IEHC 825 (6 December 2019).

6. Indeed, in the latter Simons J held that s.5 would bind later s.160 proceedings because:-

The fact that both the High Court and An Bord Pleanála have jurisdiction, in certain circumstances, to determine whether a particular act is "development" or "exempted development" presents a potential risk of overlapping and unworkable jurisdictions.

7. That point is all the more forceful when considered against the possibility of a party simply putting the same question again, and again and again before a planning authority.

8. Of importance in *Narconon* is that Heslin J explained in great detail precisely why in that case there was absolutely no material difference between the two processes that lead to "competing" s.5 declarations in that case. The degree to which these findings were influential is clear from **[75]** and **[76]** where in terms the learned Judge sets out clear that absolutely nothing differed as between the prior reference to the planning authority (leading to a declaration on 29 September 2016) and the later reference to the Board (leading to a determination in 2018). Heslin J noted that *Krikke* had left over the question as to whether the *Board* would be bound to refuse to consider a request for a s.5 declaration when a prior one had been made by a planning authority. In the special facts of that case Heslin J said that Board could not consider the declaration request but, again, this was a case where everything was entirely identical. There was no argument for example, that the Board had regard to any materially different considerations. This was, in short, an example of where parties simply wanted a different result a second time around and where no particularly different considerations arose at all or, indeed, no particular matters of European law arose at all.

9. Indeed, Heslin J in *clear and express terms* recited that s.50 itself required this outcome. This must be correct. In the present case a s.5 declaration was issued by the planning authority. Then another party (who had no statutory right to be consulted in the first s.5 procedure) sought a s.5 declaration *on the same subject matter and positively contended for a different result*. This necessarily involves questioning the validity of the prior s.5. To ask the Board now to do the same on appeal necessarily involves asking the Board to ignore s.50 of the PDA. Indeed, [90] of *Narconon* is determinative of the matter:-

> In my view, the court is obliged to guard against situations whereby a party seeks to avoid complying with legislative obligations as regards the proper means of challenging a planning decision. If, in light of the particular facts of this case, the court was to permit a challenge to the 2016 s. 5 Declaration via the route of questions, identical in substance, raised in 2018, despite no change in planning facts or circumstances since 2016, it would set at naught the requirements of s. 50 (2). It also seems to me that it would wholly undermine the concept of legal certainty and result in a patent unfairness if, despite having the benefit of a decision which was neither reviewed nor challenged in accordance with the mandatory route, including time limits, laid down by statute, a party could question the validity of the original decision, which they regarded as wrong, by asking the self-same question at some later point, ignoring the mandated route for a challenge to that decision, and in the context of unchanged facts, have that question answered differently. If that were permissible the holder of a decision could have no confidence in it and I believe that the following observations by the Chief Justice in *Sweetman v. An Bord Pleanála* [2018] IESC 1 are particularly relevant, having regard to the facts in the present case: "*The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like*".

10. Adapting the language for the present situation, if the Board were to conclude that the s.5 appeal in this case should be entertained it is necessarily permitting the appellant here – in practical terms – to say the planning authority was not simply wrong in the s.5 it sought, but the prior s.5. This is exactly the kind of unworkable situation Simons J had in mind. If the Board then determines this as the appellant wants, does the property owner then have a right to seek another s.5, again in the same terms, repeating the cycle? The answer is surely no. In this case a s.5 declaration was made entirely in accordance with the statutory scheme *and no appeal was made to the Board.* No attempt was made to challenge it (despite judicial review being open). Rather, the appellant has instead contrived a situation where an appeal to the Board lies by re-agitating a closed matter. Indeed, there is *serious* policy concern here as Heslin J identified. On foot of a *prima facie* legitimate s.5, querist has carried out works. How can it possibly be the case that absent any appeal or challenge, same hang under a sword of doubt by reason of this purported invocation of the procedure? That is necessarily

contrary to the principle of law set out in *Sweetman* by the Supreme Court as Heslin J cited.

11. The Courts have always said one looks to the substance to see the object of a party's particular submission, case or application. In *Goonery v Meath County Council* (Unreported, High Court, Kelly J., July 15, 1999) for example, Kelly J considered the effect of the precursor of s.50 in a case where a party contended they were not *in truth* questioning the validity of the decision planning decision. Kelly J held

> Whatever about the way in which these are worded, they plainly seek to impugn the validity of the decision to grant permission. If these reliefs were granted, they would undoubtedly mean in practical terms that the decision of Meath County Council was invalid.

12. It may be some use to the Board to set out where the above principles *would not apply* because it tends to illustrate precisely why they *do apply* here.

13. In this respect, attention should be paid to *Cleary Compost and Shredding Ltd. v An Bord Pleanála* [2017] IEHC 458. In that case, the Board dismissed an appeal because it concluded it could not consider it further because the appeal before it concerned an application to extend an existing composting facility (and double its throughput) in circumstances where the Board had on several previous occasions already determined that the existing composting facility had developed without planning permission and, indeed, had not undergone the necessary and required assessments in respect of Environmental Impact Assessment and Habitats protection. The developer contended that it was entitled to rely on *older* s.5 declarations in respect of the goings on at the composting site. However, the Board *expressly* determined that matters had "moved on" since the original s.5's relied on. Indeed, one can access the Inspector's Report (Board Ref RL3029) and at pages 35-36 the Inspector's Report noted that there had been:

    a. A tenfold increase in the amount of material handled on the site;

    b. A change in the origin of the material being brought onto the site and a change in the final destination of the processed material;

c. A change in the purpose of activities being carried out (as a significant proportion of the activity related to processing of organic fines for research and development purposes, as opposed to green waste for composting);

d. A likely tenfold increase in traffic generation and significant increase in vehicular activity on the site;

e. Change arising from the provision of a weigh bridge and the use of a portacabin office, amongst other changes;

f. Changes in the number and type of conditions attached to the two waste permits that the facility operated on foot of; and

g. Change arising from the construction of new structures, i.e. surface water holding tanks and a wall at the boundary of the farmyard

14. In the Inspector's view all of the above indicated "significant intensification" of the activity and a "factual change" in the nature of the activity, which resulted in the facility being used for the purposes of a waste related project. This change was characterised by the Inspector as a material change of use and he held that this constituted development and, moreover, was not exempted development.

15. The Board subsequently agreed with the findings in the Inspector's report in respect of the referrals and decided that the described activities constituted development, which were not exempted, as per its decision of 5 September, 2013.

16. So, this shows precisely *when* the Board might depart from a prior s.5 – i.e. where things have changed and it is irrational to view the subject-matter candidate development as something it is not. The only matter which is "different" here is that the appellant was not involved in the first s.5, but that cannot matter because the scheme *prima facie* does not afford a right of participation. This is entirely clear on its face – there is no right to make submissions afforded to the appellant. It is impossible to see how a lack of involvement could justify a fresh s.5. It would necessarily follow then

that another third party not involved in either the first *or this* procedure, could then commence an identical procedure and then *another* party not involved in *that* could do the same and matters are endless.

17. If, for example, the developer here had of built some sky lights manifestly different to that which was the subject of the prior s.5, then these submissions could not be made. But he didn't, and therefore the point is very simple – the appellant simply cannot re-agitate this matter now. Nothing is different at all.

18. As to what the Board should do? Section 138 says as follows (emphasis added):-

> 138.—(1) The Board shall have an absolute discretion to dismiss an appeal or referral—
>
> (a) where, having considered the grounds of appeal or referral, the Board is of the opinion that the appeal or referral—
>
> (i) is vexatious, frivolous or without substance or foundation, or
>
> (ii) is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducement by any person,
>
> or
>
> (b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to
>
> (i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or
>
> (ii) any previous permission which in its opinion is relevant.
>
> (2) A decision made under this section shall state the main reasons and considerations on which the decision is based.
>
> (3) The Board may, in its absolute discretion, hold an oral hearing under section 134 to determine whether an appeal or referral is made with an intention referred to in subsection (1)(a)(ii).

19. The "particular circumstances" that arise here are that asking the Board to determine this matter is necessarily a breach of s.50 of the PDA. Absent a challenge to the first s.5 and absent a change of planning circumstances (none of which is made out or even properly asserted) it is illegal for the Board to give further consideration to this appeal it should be dismissed under the absolute discretion vested in the Board under s.138.

Arnold Leahy Architects

VAT No. 9671561Q

1 Crescent Villas
O'Connell Avenue
Limerick.
Tel 061 – 315 989
reception@ala.ie

21st June 2021

Mr. David Averill
Sheehan & Barry Architects
RIAI Conservation Grade One Practice
88 Ranelagh
Dublin 6.

Ref: **Application No. EXPP 0208/21**
Applicants: Geert Jan Huuysmans & Maria Pilar Duncan
Registration Date: 04/06/2021
Location: 25 Mountain View Road, Ranelagh, Dublin 6.

Dear David,

I am concerned by the above application for a Declaration under Section 5 of the Planning and Development Act 2000 as this is surely improper. The Veluxes referred to are the exact Veluxes which have already been granted the benefit of a Section 5 Declaration by Dublin City Council. Having already made a Section 5 Declaration in relation to these Veluxes, I believe that the Local Authority may not entertain another Section 5 Application on the same Veluxes. Will you please submit a reply along these lines on behalf of Michael Nugent?

As my own integrity has to some degree been impugned by the complainants, I also offer the following information by way of a full explanation for the Section 5 application I submitted and the Veluxes concerned.

The applicants in a cover letter accompanying their Section 5 claim that the works which have already been granted the benefit of a Section 5 Declaration were inaccurately described as "two Velux windows" as opposed to "two Velux balconies" but this is not true. As the Section 5 application document itself shows, the words "Velux windows" did not appear anywhere on the application. The Veluxes in question can have any number of descriptive titles including "Velux rooflights", "Velux roofwindows", "Velux cabrios" but "add *two Velux* to rear roof" was the description given on the Section 5 application form itself and this was then followed on the drawing with an accurate visual depiction and the full code "GDL SK19 SDOW1".

The level of descriptive detail provided on a planning application form is typically general, giving an overview of the works proposed, and not specific in terms of product specification. That information is usually provided on the plans and drawings that accompany the application and which are specially listed on the application form. This is particularly relevant on a Section 5 application form which is only two pages in length and provides only four lines to describe details of the proposed works. It is entirely unfair to suggest that because the specification numbers of the Veluxes were "omitted" from the Section 5 application form itself that there was a deliberate attempt to mislead and misrepresent the works to be carried out at 25 Mountainview Road.

To the contrary, there is absolutely no question that the application contained the precise details of the Veluxes that the Council were being asked to provide a ruling on. Drawings submitted with the application, and listed on the application form, clearly denote the Velux's unique product code. Furthermore, the split nature of the Veluxes having two separate panes is clearly drawn (architectural plans, sections and elevations do not show windows in an open position). The Veluxes themselves are highlighted in green with directional arrows linking them to the code which is written immediately adjacent. See Figure 1 below. They could not be more definitively and accurately described and if the code "GDL SK19 SDOW1" is entered into any on-line search engine images of the product immediately appear (both in an open and closed position) with links to both retail outlets and technical product information from the manufacturer.

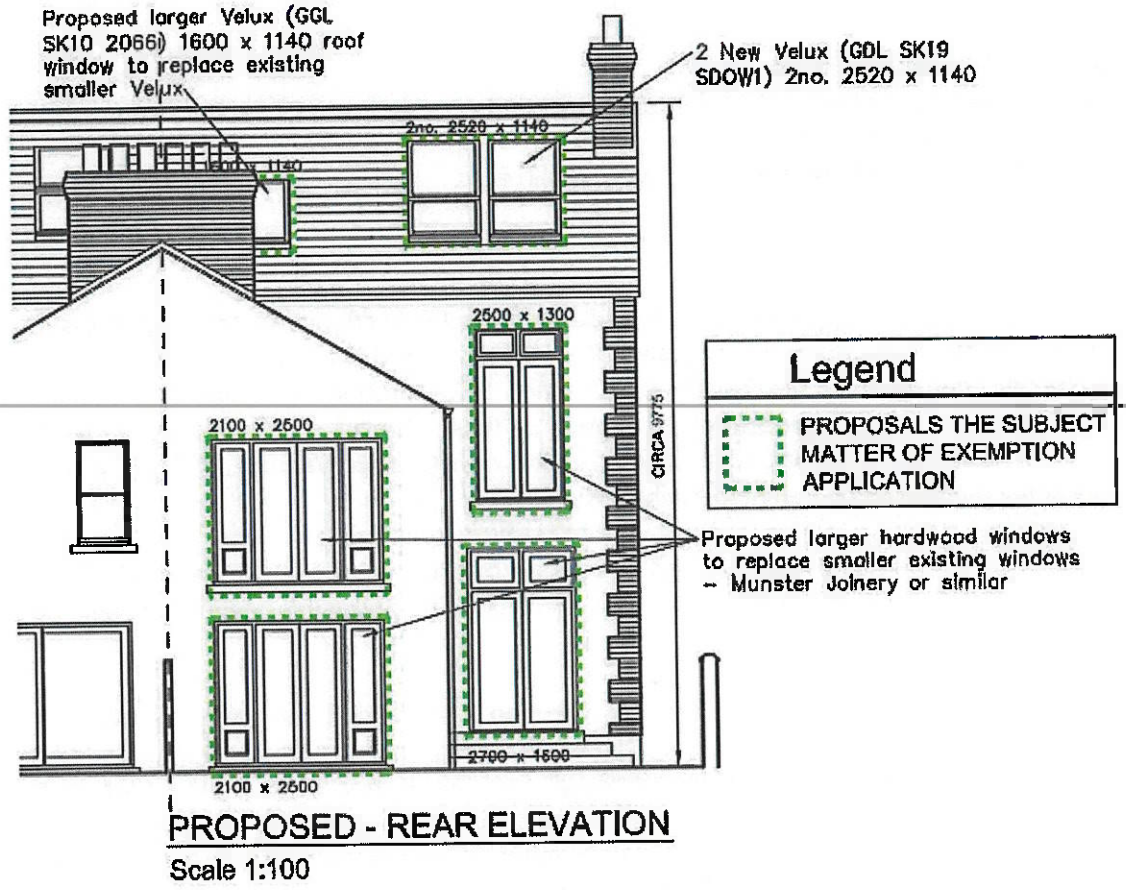


Figure 1. Extract from drawing submitted with Section 5 Application.

Dublin City Council, in their guidance notes on their website, state that a Velux on a rear roof is an exempted development. The City Council do not distinguish in their public documents between different types of Velux and they do not say, for example, whether they must be top or bottom hung, clear or opaque glass, nor whether the combination of top and bottom hung windows which we have utilised is an exception. They simply say that Veluxes on a rear roof are exempt. We should be able to rely on that. Additionally, however, we have a Section 5 Declaration for the Veluxes so we should not even have to be discussing this

Furthermore, the applicants have no control over which documents and drawings are made available for public view on Dublin City Council's website and it is completely unfair to insinuate that I or the applicant could manipulate the system in the way suggested. Crucially, the application was validly made and the decision and declaration validly given and a subsequent complaint that a document was not put on a website cannot invalidate that decision.

It should also be noted that these Veluxes are not balconies in the usual sense of that word. They are very much a normal Velux window which has an entirely normal internal and external appearance when closed. What makes them slightly unusual is that the top pane is top-hinged and the bottom pane is bottom-hinged and when both panes are in the open position additional head-space is created that allows the windows to be used in a fashion which is similar to a balcony, but which is different to a balcony in that the head-space is internal to the room, before being closed again. It is important to note that these Veluxes do not, when opened, create any additional open area or additional space on the roof at all, such as a balcony might do, but simply relieve more head-space inside the room than a centre-hinged window. Far from being a "balcony" as such (which is a space beyond the internal floor area of a room, and a permanent change to the roof structure) these windows are similar to a regular roof window, but which can be opened temporarily, to an internal balcony type of use, and therefore they are a compromise between a true balcony and a "normal" traditional roof window. All windows, when opened, allow some sort of additional use and space beyond what is possible when they are closed. It is, in any event, this transient / hybrid nature to which the complainants object.

Furthermore, it must be noted that these Veluxes, whether in the open position or in the closed position, offer no greater view towards the complainants' house than any other traditional Velux window, so that if a traditional top-hung Velux window would be an exempted development, there can be no greater offence of over-looking from these Veluxes, and there can be no reason why they might not also be exempt on the same basis. The Complainants seem opposed to all windows and Veluxes regardless of their attributes – and they have said as much in their previous written objections to planning permission.

Ultimately, regardless of whether the adjective used is "window" or "balcony", the identity of the Velux item itself, for which a Section 5 Declaration has already been made, is not and never was in dispute and was clearly stated in the application.

Other Matters;

There is a reference in the supporting letter of the complainants to the first floor rear windows being enlarged in breach of the Section 5 Declaration which stated that large floor to ceiling rear windows would not be exempt. While this complaint is not properly a part of this application this allegation is again a misrepresentation. The windows installed are very substantially smaller than the floor to ceiling windows for which a declaration was sought and refused. The windows now installed are much more normal and closer to the original size and indeed not alone are they not floor-to-ceiling windows but they are higher off the floor of the bedrooms than the original windows. I understand in any case that a Dublin City Council Planning Inspector declared herself to be happy with them during an on-site inspection following a complaint by the same individuals in relation to the first floor windows.

The complainants argue that the Veluxes are architecturally inappropriate to the area and will have a detrimental impact on their right to privacy. In this regard the Veluxes have no more material effect on the external appearance of the building than other roof lights or windows. When closed, these Veluxes are pretty much the same as all other roof windows. Similarly, all roof windows, and all outward-opening windows, project from the roof or façade on which they are installed when they are opened. Every single one of them therefore materially affect the external appearance of a structure when opened, but do not do so unduly when closed. These roof lights are no different in that respect, and are very different to the structure of a substantial balcony structure (or a dormer structure) which is a significant and separate structure which permanently changes the roof line on which they are placed. There are already a considerable number of houses in the immediate vicinity with Velux windows (and indeed with dormer windows that have been granted planning permission) and indeed most houses in the area seem to have Velux windows (including both neighbouring houses to number 25) and in that context it is unfair to suggest that these Veluxes are architecturally inappropriate to the area.

The complainant's contention that the new Veluxes will massively overlook their bedroom and home is also simply not true. The line of sight from the Veluxes to the objectors' home is in a South East direction, across the return of the property at 25 Mountainview Road, and through the chimney on the return in a downward direction. The distance between the Veluxes and the complainants' bedroom window is approximately 31.4m in horizontal distance. See dashed black line on the site location map and dashed red line on aerial photograph overleaf. I point out also that the neighbouring houses to number 25 Mountainview Road both have Veluxes already pointing in the same direction towards the complainants' house, and already overlooking their house and garden in a similar manner. No doubt the complainants use curtains or blinds in their bedroom the same as everyone else. The complainant's home and garden is also well concealed by existing foliage. Some degree of overlooking is inevitable in a city setting where all houses are in the view of other houses and I think it should be noted that no other neighbours in the area have raised any objections to any aspect of the works at this house.

Yours Sincerely,

Arnold Leahy.

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

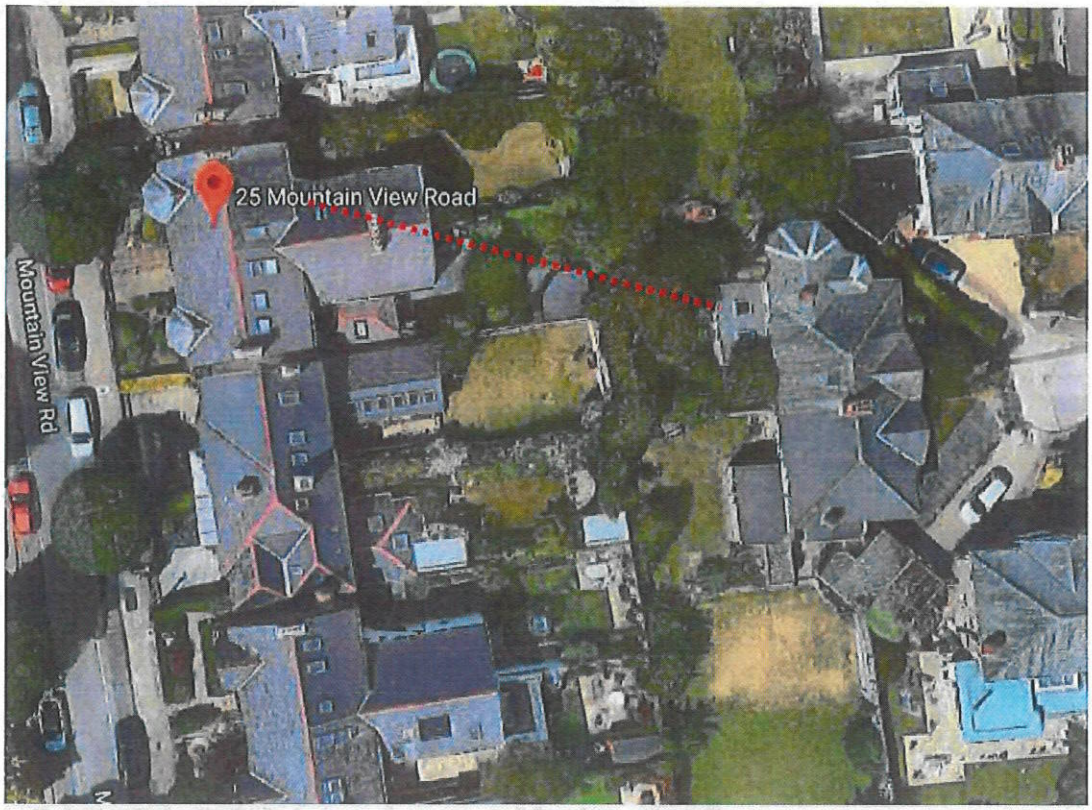
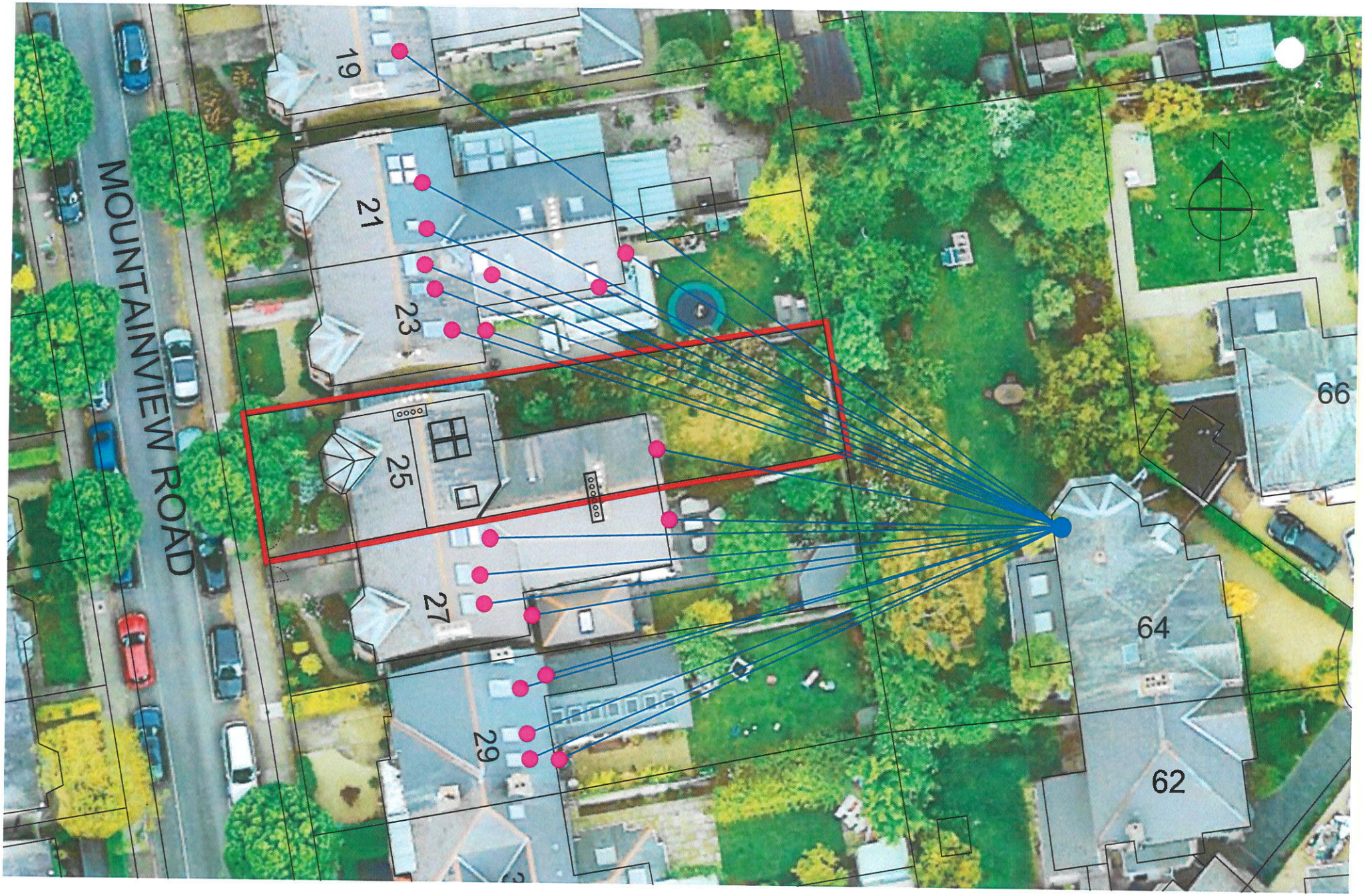


Figure 2: Site location map/aerial view.



Site Map - Neighbouring rooflights & Windows
Scale 1:200 @A3

25 Mountainview Road,
Ranelagh.

arnold Leahy
ARCHITECTS
RIBA

Arnold Leahy Architects

VAT No. 9671561Q

1 Crescent Villas
O'Connell Avenue
Limerick.
Tel 061 – 315 989
reception@ala.ie

13th August 2021.

An Bord Pleanála
64 Marlborough Street
Dublin 1

Re: **An Bord Pleanála Reference Number: ABP-310945-21**
Planning Reference Number: 0208/21.
Applicants: Geert Jan Huuysmans & Maria Pilar Duncan
Location: 25 Mountain View Road, Ranelagh, Dublin 6.
Our client: Michael Nugent

Dear Sir/Madam,

We write in reference to the above and your letter dated 27th July last and enclose for your attention the following items of correspondence;

1. Legal Submission in regard to the irregular nature of this Section 5 Application.
2. Letter of David Averill dated 22nd June 2021 to the City Council in relation to this Section 5.
3. Letter of Arnold Leahy dated 21st June 2021 which accompanied the above referenced correspondence from David Averill.
4. Image of existing veluxes and windows overlooking applicants' property.

THE LEGAL POSITION

Essentially, our client's position is that the Board should, as a matter of law, dismiss this application under the power vested in the Board under s.138, as to proceed to determine this appeal would be illegal.

The veluxes referred to in this Section 5 are the exact veluxes which have already been granted the benefit of a Section 5 Declaration by Dublin City Council in January 2020 (Decision Order P2187). On foot of that Section 5 Declaration, the veluxes have been installed by our client. There are no changed facts. This application for a Section 5 Declaration by these applicants is in relation to the identical property and the identical veluxes as have already been granted a Section 5 Declaration. We submit that An Bord Pleanala is precluded, as a matter of well-established law, from making another, contrary, declaration on the same facts and therefore must reject the application itself. We refer you to the enclosed Legal Submission, dealing with the law on this aspect of the matter in some detail. The balance of our submissions in regard to this application are made without prejudice to the Legal position stated above. On that basis only, we refer to the enclosed letters, referenced at points 2 and 3 above which were also submitted to Dublin City Council, and to the balance of this letter.

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

A substantive proportion of the Appeal Submission lodged by the applicants, concerns an allegation that the applicants were deprived due process because they were not furnished with all of the documents relating to that Section 5 Application by Dublin City Council. These matters have been previously addressed at some length in the letters referenced at points 2 and 3 above and we would respectfully ask that The Board accept these enclosures as sufficient response to the points reiterated in this current appeal submission, but taking account also of the enclosed Legal Submission, in so far as it clarifies that the legislative provisions for Section 5 Declarations do not afford a right of participation to third parties, including the Applicants. As there is no right to make submissions afforded to the Applicants, they cannot complain that they were deprived of due process by not having that right.

THE COMPLAINT OF OVERLOOKING

The Applicants make extensive additional submissions in relation to overlooking, in relation to which we make the following points;

In Appendix I, photographs 1 and 2 of the Appeal Submission, the applicants indicate with arrows what is described as the view from their master bedroom window of the two Velux in question. We note, however, that no reference is made to the very obvious existence in those same photographs of multiple Velux on the neighbouring properties immediately adjacent. No reference is made to the four Velux on house number 27, which have a closer and more direct view towards the bedroom window in question, nor to the five Velux at house number 23 nor the five Velux at house number 21, nor to the single Velux on house 19 which is shown in their photograph. Neither is there reference to any of the back bedroom windows, many of which have a clear view of both the master bedroom window and the garden of the property at 64 Merton Drive.

The Applicants' Appendix I Photograph 2, shows an array of fourteen separate veluxes (apart from that which is the subject matter of this complaint) which all apparently have a view of their bedroom. Additionally, there are seven bedroom windows with the same view. The veluxes of which the applicants complain do not have a different view than these other Veluxes and windows. As the Applicants themselves demonstrate with their photographs, a certain degree of overlooking is inevitable and part of the nature of living in a built-up area.

Using the applicants' photographs 1 and 2 as a guide, we have plotted on a satellite image transposed on the site layout plan the 21 Veluxes and bedroom windows which have a view of the applicants' bedroom, not including those which are now the subject matter of this complaint. It is also clear from the Applicants' photographs, that the addition of two Veluxes is entirely consistent with the character and external appearance of the neighbouring properties.

Furthermore, Photograph 1 is described as being *"the view from the master bedroom at 64 Merton Drive"* but the distance in photographs 1 and 2 is markedly different, suggesting that the images are zoomed so as to show a distorted misrepresentation of the true distance between the properties. Photograph 3, showing an image of both Velux, has been taken from the boundary wall separating both gardens and again is very much zoomed.

It is also worth noting that in October 2020 (at the very same time that the applicants first made a complaint to Dublin City Council about the renovation works being carried out at 25 Mountain View Road overlooking their property) they cut down a large number of trees and a substantial amount of planting along the boundary wall between their garden at 64 Merton Drive and the subject property, which had previously acted as a very effective screen to reduce the degree of overlooking of their property from all neighbouring properties on Mountain View Road, including the subject property.

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

The photographs attached to this letter show the position before the trees were cut down (in October 2019) and after the trees were cut down (on 12th November 2020) and also show the remains of a number of the trees and plants which had been cut down. No doubt, if the Applicants were to let their trees and garden grow again (and if they do not deliberately cut them down) their garden will again enjoy greater screening from this planting.

It is also relevant that planning permission was sought by the Applicants in 2006 for the construction of a two-storey extension with ground floor living space and first floor bedroom. The planning file shows that that application attracted objections from numerous neighbours because of concerns that the floor-to-ceiling windows the Applicants proposed to their bedroom (and for which permission was granted) would overlook their neighbours on Mountain View Road. In objections made, neighbours cited over-looking, loss of privacy and visual amenity, extreme intrusion and lack of keeping with the character of the area as grounds for objection.

In seeking their own planning permission and building their extension, therefore, the applicants ignored the concerns of their neighbours (the very same concerns they are now citing in this application) and went ahead to install large floor-to-ceiling windows in their bedroom which open up their property to both the opportunity to overlook their neighbours - and to be overlooked by their neighbours. The Applicants are now arguing that because they elected to install a large intrusive window in their own bedroom that this should now take precedence over the potential amenity of their neighbours. They contend that they alone are entitled to severely overlook the living spaces, bedrooms and gardens of their nearest neighbours whilst no one else may have any potential view of their property. This is a particularly difficult complaint to understand in the context of 21 pre-existing veluxes and windows already having a view of their bedroom window.

In conclusion we would contend in relation to the overlooking complaint that;

a) At least 21 Veluxes and windows have a view of the master bedroom and garden of 64 Merton Drive, apart from the two new Velux complained about in this appeal.

b) The addition of two new Velux to the 21 established views will not have a material detrimental effect on the privacy or amenity of the property in question.

c) The applicants' complaint regarding invasion of privacy is not supported on the facts and is discredited by their own photographs.

d) Privacy and amenity are reciprocal. By installing a floor to ceiling window in their own master bedroom the applicants generated a loss of privacy both to themselves and to the neighbours they overlook. Any potential loss of privacy to their bedroom may be overcome by closing the curtains.

Yours sincerely,

Arnold Leahy.

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

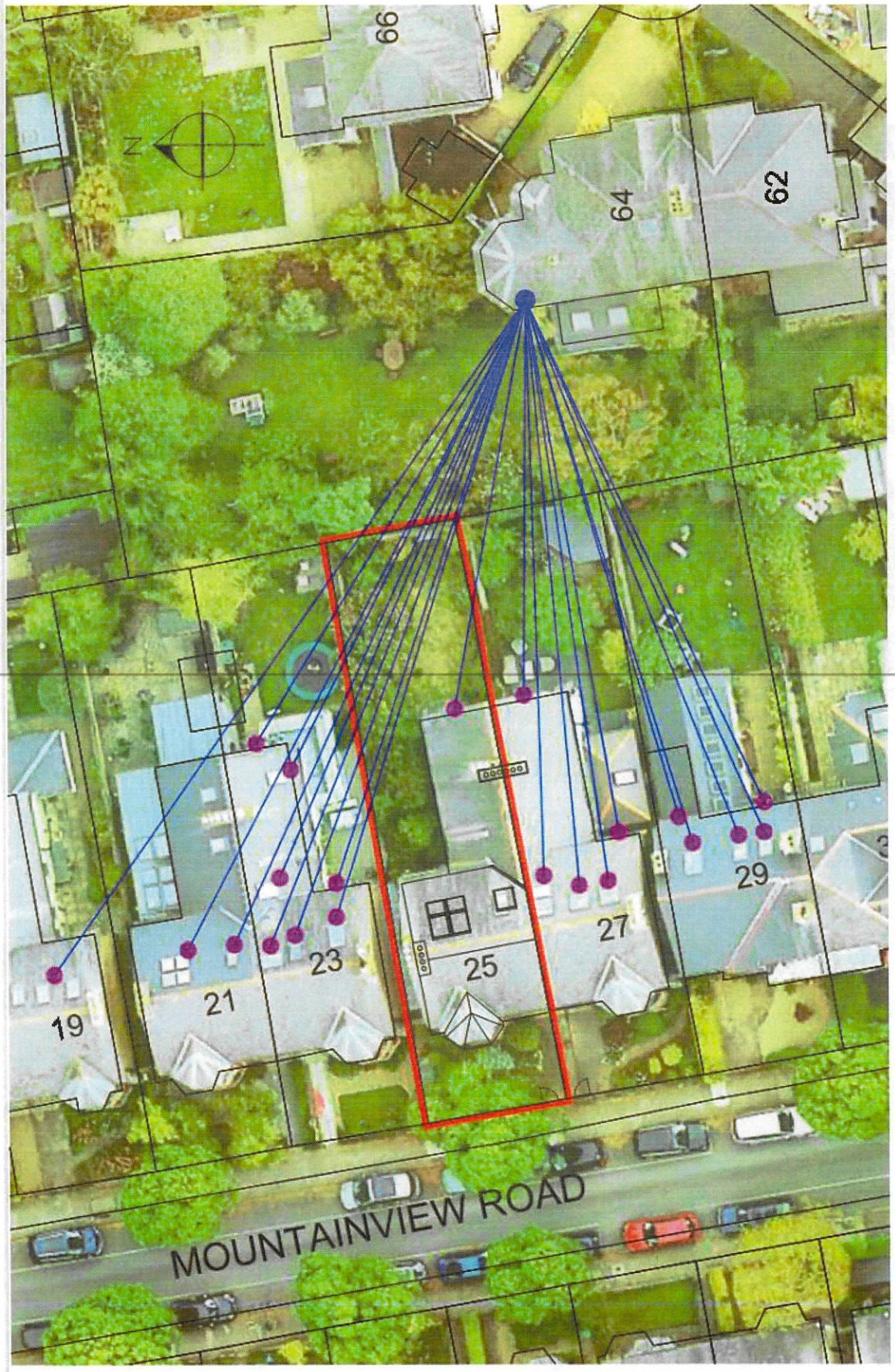
Image 1:
Photograph from window of 25 Mountain View Road of 64 Merton Drive, before trees cut. 23 Oct 2019

Image 2:
Photograph from same window of 25 Mountain View Road of 64 Merton Drive, after trees cut. 12 Nov 2020

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

Image 3:
Photograph of cut trees and stumps of 64 Merton Drive, after trees cut. 12 November 2020

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI



arnold Leahy ARCHITECTS

25 Mountainview Road,
Ranelagh.

Site Map - Neighbouring rooflights & Windows

Scale 1:200 @A3

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

LEGAL SUBMISSIONS

IN RELATION TO

Section 5 Application ABP-310945-21

1. These short submissions address the decisions of Simons J in *Krikke -v- Barrannafaddock Sustainability Electricity Ltd* [2019] IEHC 825 (6 December 2019) and Heslin J in *Narconon Trust -v- An Bord Pleanala* [2020] IEHC 25 (24 January 2020). Both judgments treat of the issue as how (in certain cases) a s.5 determination reached by a competent authority may bind another competent authority or a Court.

2. As matters stand *both* of these judgments are binding authority of the High Court and *both* say that it is not possible for a party to ask the Board to simply re-determine a prior s.5 that has already been determined and not challenged. The Board *did precisely* that in *Narconon* and the Board Decision was quashed.

3. As will be well known, s.5 contains a procedure whereby a party can – within the constraints of that section – seek in a declaration from a planning authority and *on appeal* from the Board as to whether a given matter is "development" within the meaning of the PDA and if so, whether that development is exempted within the PDA and, of course, the PDR.

4. In this respect, a "decision" on a s.5 referral is clearly an act of a planning authority or the Board under s.50 of the PDA. This means – without any question – that no person can question the validity of same save through the process of judicial review. In very basic terms this means that once a s.5 declaration has been made a party cannot – without more – simply ask the same question again and submit for a different result. By *definition* that involves precisely that which s.50 prohibits.

5. This is exactly what Heslin J held in *Narconon Trust -v- An Bord Pleanala* [2020] IEHC 25 (24 January 2020) and what Simons J in *Krikke -v- Barrannafaddock Sustainability Electricity Ltd* [2019] IEHC 825 (6 December 2019).

6. Indeed, in the latter Simons J held that s.5 would bind later s.160 proceedings because:-

The fact that both the High Court and An Bord Pleanála have jurisdiction, in certain circumstances, to determine whether a particular act is "development" or "exempted development" presents a potential risk of overlapping and unworkable jurisdictions.

7. That point is all the more forceful when considered against the possibility of a party simply putting the same question again, and again and again before a planning authority.

8. Of importance in *Narconon* is that Heslin J explained in great detail precisely why in that case there was absolutely no material difference between the two processes that lead to "competing" s.5 declarations in that case. The degree to which these findings were influential is clear from **[75]** and **[76]** where in terms the learned Judge sets out clear that absolutely nothing differed as between the prior reference to the planning authority (leading to a declaration on 29 September 2016) and the later reference to the Board (leading to a determination in 2018). Heslin J noted that *Krikke* had left over the question as to whether the *Board* would be bound to refuse to consider a request for a s.5 declaration when a prior one had been made by a planning authority. In the special facts of that case Heslin J said that Board could not consider the declaration request but, again, this was a case where everything was entirely identical. There was no argument for example, that the Board had regard to any materially different considerations. This was, in short, an example of where parties simply wanted a different result a second time around and where no particularly different considerations arose at all or, indeed, no particular matters of European law arose at all.

9. Indeed, Heslin J in *clear and express terms* recited that s.50 itself required this outcome. This must be correct. In the present case a s.5 declaration was issued by the planning authority. Then another party (who had no statutory right to be consulted in the first s.5 procedure) sought a s.5 declaration *on the same subject matter and positively contended for a different result*. This necessarily involves questioning the validity of the prior s.5. To ask the Board now to do the same on appeal necessarily involves asking the Board to ignore s.50 of the PDA. Indeed, [90] of *Narconon* is determinative of the matter:-

> In my view, the court is obliged to guard against situations whereby a party seeks to avoid complying with legislative obligations as regards the proper means of challenging a planning decision. If, in light of the particular facts of this case, the court was to permit a challenge to the 2016 s. 5 Declaration via the route of questions, identical in substance, raised in 2018, despite no change in planning facts or circumstances since 2016, it would set at naught the requirements of s. 50 (2). It also seems to me that it would wholly undermine the concept of legal certainty and result in a patent unfairness if, despite having the benefit of a decision which was neither reviewed nor challenged in accordance with the mandatory route, including time limits, laid down by statute, a party could question the validity of the original decision, which they regarded as wrong, by asking the self-same question at some later point, ignoring the mandated route for a challenge to that decision, and in the context of unchanged facts, have that question answered differently. If that were permissible the holder of a decision could have no confidence in it and I believe that the following observations by the Chief Justice in *Sweetman v. An Bord Pleanála* [2018] IESC 1 are particularly relevant, having regard to the facts in the present case: "*The requirements of legal certainty make clear that a person who has the benefit of a decision which is not challenged within whatever time limit may be appropriate is entitled to act on the assurance that the decision concerned is now immune from challenge subject to very limited exceptions such as fraud and the like*".

10. Adapting the language for the present situation, if the Board were to conclude that the s.5 appeal in this case should be entertained it is necessarily permitting the appellant here – in practical terms – to say the planning authority was not simply wrong in the s.5 it sought, but the prior s.5. This is exactly the kind of unworkable situation Simons J had in mind. If the Board then determines this as the appellant wants, does the property owner then have a right to seek another s.5, again in the same terms, repeating the cycle? The answer is surely no. In this case a s.5 declaration was made entirely in accordance with the statutory scheme *and no appeal was made to the Board.* No attempt was made to challenge it (despite judicial review being open). Rather, the appellant has instead contrived a situation where an appeal to the Board lies by re-agitating a closed matter. Indeed, there is *serious* policy concern here as Heslin J identified. On foot of a *prima facie* legitimate s.5, querist has carried out works. How can it possibly be the case that absent any appeal or challenge, same hang under a sword of doubt by reason of this purported invocation of the procedure? That is necessarily

contrary to the principle of law set out in *Sweetman* by the Supreme Court as Heslin J cited.

11. The Courts have always said one looks to the substance to see the object of a party's particular submission, case or application. In *Goonery v Meath County Council* (Unreported, High Court, Kelly J., July 15, 1999) for example, Kelly J considered the effect of the precursor of s.50 in a case where a party contended they were not *in truth* questioning the validity of the decision planning decision. Kelly J held

> Whatever about the way in which these are worded, they plainly seek to impugn the validity of the decision to grant permission. If these reliefs were granted, they would undoubtedly mean in practical terms that the decision of Meath County Council was invalid.

12. It may be some use to the Board to set out where the above principles *would not apply* because it tends to illustrate precisely why they *do apply* here.

13. In this respect, attention should be paid to *Cleary Compost and Shredding Ltd. v An Bord Pleanála* [2017] IEHC 458. In that case, the Board dismissed an appeal because it concluded it could not consider it further because the appeal before it concerned an application to extend an existing composting facility (and double its throughput) in circumstances where the Board had on several previous occasions already determined that the existing composting facility had developed without planning permission and, indeed, had not undergone the necessary and required assessments in respect of Environmental Impact Assessment and Habitats protection. The developer contended that it was entitled to rely on *older* s.5 declarations in respect of the goings on at the composting site. However, the Board *expressly* determined that matters had "moved on" since the original s.5's relied on. Indeed, one can access the Inspector's Report (Board Ref RL3029) and at pages 35-36 the Inspector's Report noted that there had been:

    a. A tenfold increase in the amount of material handled on the site;

    b. A change in the origin of the material being brought onto the site and a change in the final destination of the processed material;

c. A change in the purpose of activities being carried out (as a significant proportion of the activity related to processing of organic fines for research and development purposes, as opposed to green waste for composting);

d. A likely tenfold increase in traffic generation and significant increase in vehicular activity on the site;

e. Change arising from the provision of a weigh bridge and the use of a portacabin office, amongst other changes;

f. Changes in the number and type of conditions attached to the two waste permits that the facility operated on foot of; and

g. Change arising from the construction of new structures, i.e. surface water holding tanks and a wall at the boundary of the farmyard

14. In the Inspector's view all of the above indicated "significant intensification" of the activity and a "factual change" in the nature of the activity, which resulted in the facility being used for the purposes of a waste related project. This change was characterised by the Inspector as a material change of use and he held that this constituted development and, moreover, was not exempted development.

15. The Board subsequently agreed with the findings in the Inspector's report in respect of the referrals and decided that the described activities constituted development, which were not exempted, as per its decision of 5 September, 2013.

16. So, this shows precisely *when* the Board might depart from a prior s.5 – i.e. where things have changed and it is irrational to view the subject-matter candidate development as something it is not. The only matter which is "different" here is that the appellant was not involved in the first s.5, but that cannot matter because the scheme *prima facie* does not afford a right of participation. This is entirely clear on its face – there is no right to make submissions afforded to the appellant. It is impossible to see how a lack of involvement could justify a fresh s.5. It would necessarily follow then

that another third party not involved in either the first *or this* procedure, could then commence an identical procedure and then *another* party not involved in *that* could do the same and matters are endless.

17. If, for example, the developer here had of built some sky lights manifestly different to that which was the subject of the prior s.5, then these submissions could not be made. But he didn't, and therefore the point is very simple – the appellant simply cannot re-agitate this matter now. Nothing is different at all.

18. As to what the Board should do? Section 138 says as follows (emphasis added):-

> 138.—(1) The Board shall have an absolute discretion to dismiss an appeal or referral—
>
> (a) where, having considered the grounds of appeal or referral, the Board is of the opinion that the appeal or referral—
>
> (i) is vexatious, frivolous or without substance or foundation, or
>
> (ii) is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducement by any person,
>
> or
>
> (b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to
>
> (i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or
>
> (ii) any previous permission which in its opinion is relevant.
>
> (2) A decision made under this section shall state the main reasons and considerations on which the decision is based.
>
> (3) The Board may, in its absolute discretion, hold an oral hearing under section 134 to determine whether an appeal or referral is made with an intention referred to in subsection (1)(a)(ii).

19. The "particular circumstances" that arise here are that asking the Board to determine this matter is necessarily a breach of s.50 of the PDA. Absent a challenge to the first s.5 and absent a change of planning circumstances (none of which is made out or even properly asserted) it is illegal for the Board to give further consideration to this appeal it should be dismissed under the absolute discretion vested in the Board under s.138.

ARCHITECTURE
CONSERVATION
INTERIORS

sheehan barry

88 RANELAGH, DUBLIN 6, IRELAND D06 Y2W6
T: 353 (1) 496 2888
F: 353 (1) 496 2923
E: post@sbl.ie

22.06.2021

Planning Department,
Dublin City Council,
Civic Offices,
Wood Quay,
Dublin 8.

re: **25 Mountainview Road, Ranelagh, Dublin 6:**
Application No. EXPP 0208/21
Applicants: Geert Jan Huuysmans & Maria Pilar Duncan
Registration Date: 04/06/2021

Dear Sir / Madam,

I refer to the above to which my client has asked me to review and respond to the above application. To that end I would note:

In reference to the above application for a Declaration under Section 5 of the Planning and Development Act 2000 (as amended). The Veluxes referred to are the exact Veluxes which have already been granted the benefit of a Section 5 Declaration by Dublin City Council. There are no changed facts. If Dublin City Council entertain this application they will be seeking to determine a matter which has already been decided and determined with finality, and upon which actions have been undertaken in reliance on that decision. On this basis we believe the current application is impermissable and that having already made a Section 5 Declaration in relation to these veluxes the Local Authority are precluded, as a matter of well established law, from making another, contrary, declaration on the same facts and therefore must reject the application itself.

The above should be the end of the matter, but in view of the criticisms made by the complainants, I enclose a letter from Arnold Leahy Architects Limited answering the criticism of their work in this connection. The information in this enclosed letter is offered without prejudice to the above contention.

sheehan barry

ARCHITECTURE
CONSERVATION
INTERIORS

88 RANELAGH, DUBLIN 6, IRELAND D06 Y2W6
T: 353 (1) 496 2888
F: 353 (1) 496 2923
E: post@sbl.ie

With regard to the windows on the first floor, I would note that I made a visit to the said property and met with the relevant planning enforcement inspector, Ms. Michelle Murphy. Our discussion included a review of the windows as installed and it was my clear understanding that the windows were acceptable and did not represent any identifiable loss of amenity for neighbouring properties and were indeed respectful of the character of the house and of the buildings planning status. To that end I would confirm my opinion that these windows are acceptable and that the applicants comments with regard to these window are not valid.

As noted above, I attach copy of letter from Arnold Leahy Architects Limited who submitted the approved Section 5 in which a detailed response to issues of complaint raised by the applicants of application ref. EXPP 0208/21. I would note that I have reviewed the detail of the application and complaints attaching. I would add my opinion that the details of the Velux as installed were clearly set out on the drawings and documentation as approved. The said form of Velux is not a working balcony and should not be considered as such.

Yours sincerely,

DAVID AVERILL

DA/da

Arnold Leahy
Architects

VAT No. 9671561Q

1 Crescent Villas
O'Connell Avenue
Limerick.
Tel 061 – 315 989
reception@ala.ie

21st June 2021

Mr. David Averill
Sheehan & Barry Architects
RIAI Conservation Grade One Practice
88 Ranelagh
Dublin 6.

Ref: Application No. EXPP 0208/21
Applicants: Geert Jan Huuysmans & Maria Pilar Duncan
Registration Date: 04/06/2021
Location: 25 Mountain View Road, Ranelagh, Dublin 6.

Dear David,

I am concerned by the above application for a Declaration under Section 5 of the Planning and Development Act 2000 as this is surely improper. The Veluxes referred to are the exact Veluxes which have already been granted the benefit of a Section 5 Declaration by Dublin City Council. Having already made a Section 5 Declaration in relation to these Veluxes, I believe that the Local Authority may not entertain another Section 5 Application on the same Veluxes. Will you please submit a reply along these lines on behalf of Michael Nugent?

As my own integrity has to some degree been impugned by the complainants, I also offer the following information by way of a full explanation for the Section 5 application I submitted and the Veluxes concerned.

The applicants in a cover letter accompanying their Section 5 claim that the works which have already been granted the benefit of a Section 5 Declaration were inaccurately described as "two Velux windows" as opposed to "two Velux balconies" but this is not true. As the Section 5 application document itself shows, the words "Velux windows" did not appear anywhere on the application. The Veluxes in question can have any number of descriptive titles including "Velux rooflights", "Velux roofwindows", "Velux cabrios" but "add *two Velux* to rear roof" was the description given on the Section 5 application form itself and this was then followed on the drawing with an accurate visual depiction and the full code "GDL SK19 SDOW1".

The level of descriptive detail provided on a planning application form is typically general, giving an overview of the works proposed, and not specific in terms of product specification. That information is usually provided on the plans and drawings that accompany the application and which are specially listed on the application form. This is particularly relevant on a Section 5 application form which is only two pages in length and provides only four lines to describe details of the proposed works. It is entirely unfair to suggest that because the specification numbers of the Veluxes were "omitted" from the Section 5 application form itself that there was a deliberate attempt to mislead and misrepresent the works to be carried out at 25 Mountainview Road.

To the contrary, there is absolutely no question that the application contained the precise details of the Veluxes that the Council were being asked to provide a ruling on. Drawings submitted with the application, and listed on the application form, clearly denote the Velux's unique product code. Furthermore, the split nature of the Veluxes having two separate panes is clearly drawn (architectural plans, sections and elevations do not show windows in an open position). The Veluxes themselves are highlighted in green with directional arrows linking them to the code which is written immediately adjacent. See Figure 1 below. They could not be more definitively and accurately described and if the code "GDL SK19 SDOW1" is entered into any on-line search engine images of the product immediately appear (both in an open and closed position) with links to both retail outlets and technical product information from the manufacturer.

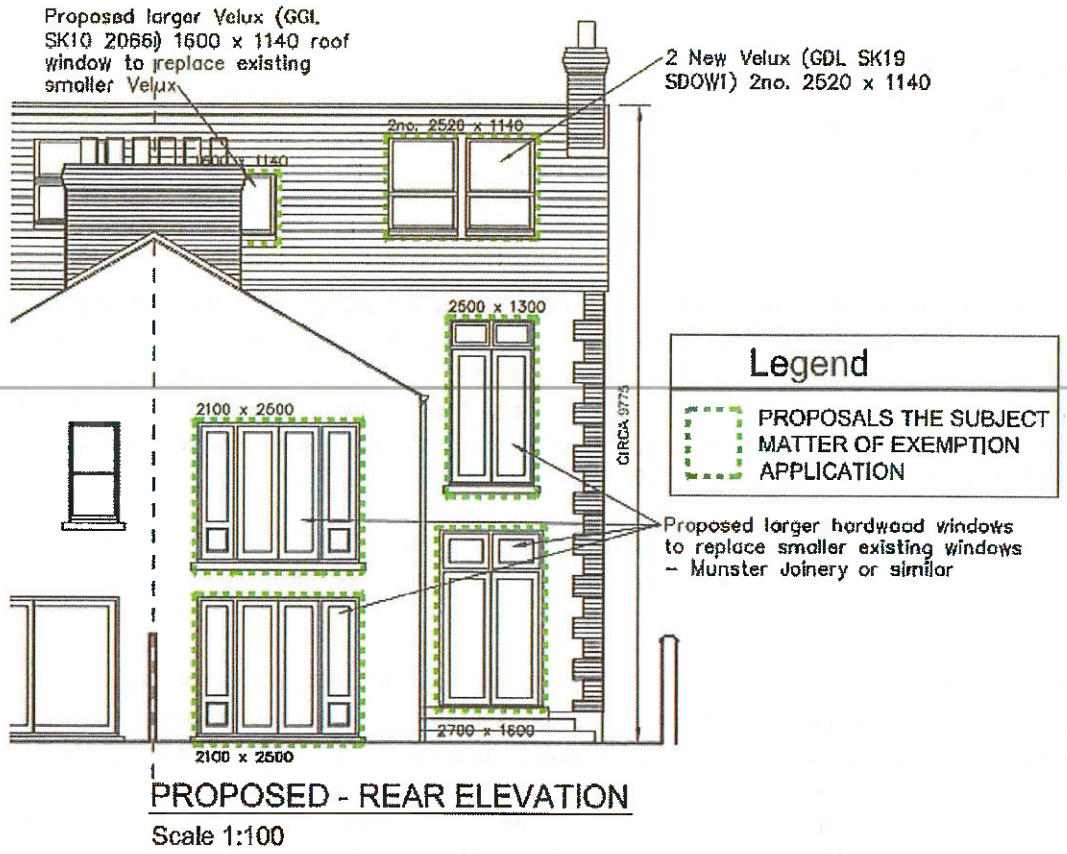


Figure 1. Extract from drawing submitted with Section 5 Application.

Dublin City Council, in their guidance notes on their website, state that a Velux on a rear roof is an exempted development. The City Council do not distinguish in their public documents between different types of Velux and they do not say, for example, whether they must be top or bottom hung, clear or opaque glass, nor whether the combination of top and bottom hung windows which we have utilised is an exception. They simply say that Veluxes on a rear roof are exempt. We should be able to rely on that. Additionally, however, we have a Section 5 Declaration for the Veluxes so we should not even have to be discussing this

Furthermore, the applicants have no control over which documents and drawings are made available for public view on Dublin City Council's website and it is completely unfair to insinuate that I or the applicant could manipulate the system in the way suggested. Crucially, the application was validly made and the decision and declaration validly given and a subsequent complaint that a document was not put on a website cannot invalidate that decision.

It should also be noted that these Veluxes are not balconies in the usual sense of that word. They are very much a normal Velux window which has an entirely normal internal and external appearance when closed. What makes them slightly unusual is that the top pane is top-hinged and the bottom pane is bottom-hinged and when both panes are in the open position additional head-space is created that allows the windows to be used in a fashion which is similar to a balcony, but which is different to a balcony in that the head-space is internal to the room, before being closed again. It is important to note that these Veluxes do not, when opened, create any additional open area or additional space on the roof at all, such as a balcony might do, but simply relieve more head-space inside the room than a centre-hinged window. Far from being a "balcony" as such (which is a space beyond the internal floor area of a room, and a permanent change to the roof structure) these windows are similar to a regular roof window, but which can be opened temporarily, to an internal balcony type of use, and therefore they are a compromise between a true balcony and a "normal" traditional roof window. All windows, when opened, allow some sort of additional use and space beyond what is possible when they are closed. It is, in any event, this transient / hybrid nature to which the complainants object.

Furthermore, it must be noted that these Veluxes, whether in the open position or in the closed position, offer no greater view towards the complainants' house than any other traditional Velux window, so that if a traditional top-hung Velux window would be an exempted development, there can be no greater offence of over-looking from these Veluxes, and there can be no reason why they might not also be exempt on the same basis. The Complainants seem opposed to all windows and Veluxes regardless of their attributes – and they have said as much in their previous written objections to planning permission.

Ultimately, regardless of whether the adjective used is "window" or "balcony", the identity of the Velux item itself, for which a Section 5 Declaration has already been made, is not and never was in dispute and was clearly stated in the application.

Other Matters;

There is a reference in the supporting letter of the complainants to the first floor rear windows being enlarged in breach of the Section 5 Declaration which stated that large floor to ceiling rear windows would not be exempt. While this complaint is not properly a part of this application this allegation is again a misrepresentation. The windows installed are very substantially smaller than the floor to ceiling windows for which a declaration was sought and refused. The windows now installed are much more normal and closer to the original size and indeed not alone are they not floor-to-ceiling windows but they are higher off the floor of the bedrooms than the original windows. I understand in any case that a Dublin City Council Planning Inspector declared herself to be happy with them during an on-site inspection following a complaint by the same individuals in relation to the first floor windows.

The complainants argue that the Veluxes are architecturally inappropriate to the area and will have a detrimental impact on their right to privacy. In this regard the Veluxes have no more material effect on the external appearance of the building than other roof lights or windows. When closed, these Veluxes are pretty much the same as all other roof windows. Similarly, all roof windows, and all outward-opening windows, project from the roof or façade on which they are installed when they are opened. Every single one of them therefore materially affect the external appearance of a structure when opened, but do not do so unduly when closed. These roof lights are no different in that respect, and are very different to the structure of a substantial balcony structure (or a dormer structure) which is a significant and separate structure which permanently changes the roof line on which they are placed. There are already a considerable number of houses in the immediate vicinity with Velux windows (and indeed with dormer windows that have been granted planning permission) and indeed most houses in the area seem to have Velux windows (including both neighbouring houses to number 25) and in that context it is unfair to suggest that these Veluxes are architecturally inappropriate to the area.

The complainant's contention that the new Veluxes will massively overlook their bedroom and home is also simply not true. The line of sight from the Veluxes to the objectors' home is in a South East direction, across the return of the property at 25 Mountainview Road, and through the chimney on the return in a downward direction. The distance between the Veluxes and the complainants' bedroom window is approximately 31.4m in horizontal distance. See dashed black line on the site location map and dashed red line on aerial photograph overleaf. I point out also that the neighbouring houses to number 25 Mountainview Road both have Veluxes already pointing in the same direction towards the complainants' house, and already overlooking their house and garden in a similar manner. No doubt the complainants use curtains or blinds in their bedroom the same as everyone else. The complainant's home and garden is also well concealed by existing foliage. Some degree of overlooking is inevitable in a city setting where all houses are in the view of other houses and I think it should be noted that no other neighbours in the area have raised any objections to any aspect of the works at this house.

Yours Sincerely,

Arnold Leahy.

Arnold Leahy Architects Ltd. Trading as Arnold Leahy Architects
Registered in Ireland no. 448522
Reg Office: 1 Crescent Villas, O'Connell Avenue, Limerick
A. J. Leahy BA Arch Dip Arch MRIAI RIBA ARB
E. Leahy BE CEng MIEI

Figure 2: Site location map/aerial view.