S. 37

File With _____

SECTION 131 FORM

Appeal NO: PL ABP-314088-22

Defer Re O/H ☐

TO:SEO

Having considered the contents of the submission dated/ received 8/8/2022

from

Connolly Real Estate Ltd I recommend that section 131 of the Planning and Development Act, 2000 be not be invoked at this stage for the following reason(s):. new issues

E.O.: _____ Date: 25/8/2022

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 RL 70 - Section 131 notice enclosing a copy of the attached submission

to: PA + 1st party

Allow 2/~~3~~/4weeks – BP RL 70

EO: _____ Date: 25/8/22

~~EO~~ EO: _____ Date: 25/8/22

Validation Checklist

An Bord Pleanála

Lodgement Number : **LDG-055950-22**
Case Number: **ABP-314088-22**
Customer: **Co[illegible]ly Real Estate Limited**
Lodgement Date: **08/08/2022 12:00:00**
Validation Officer: **Eoin O'Sullivan**
PA Name: **Dun Laoghaire Rathdown County Council**
PA Reg Ref: **Ref5222**
Case Type: **Section 5 Referrals**
Lodgement Type: **Observation / Submission**

Validation Checklist	Value
Confirm Classification	Confirmed - Correct
Confirm ABP Case Link	Confirmed-Correct
Fee/Payment	Valid – Correct
Name and Address available	Yes
Agent Name and Address available (if engaged)	Not Applicable
Subject Matter available	Yes
Grounds	Yes
Sufficient Fee Received	Yes
Received On time	Yes
Eligible to make lodgement	Yes
Completeness Check of Documentation	Yes

BP RL 40 to issue

✓ AS 10.08.22

Run at: 09/08/2022 17:03

Run by: Eoin O'Sullivan

Lodgement Cover Sheet - LDG-055950-22

An Bord Pleanála

Details

Lodgement Date	08/08/2022
Customer	Connolly Real Estate Limited
Lodgement Channel	Courier
Lodgement by Agent	Yes
Agent Name	Kiaran O'Malley & Co. Ltd. Town Planning Consultants
Correspondence Primarily Sent to	Agent
Registered Post Reference	

Lodgement ID	LDG-055950-22
Map ID	
Created By	Orlagh Kearney
Physical Items included	No
Generate Acknowledgement Letter	
Customer Ref. No.	
PA Reg Ref	

Categorisation

Lodgement Type	Observation / Submission
Section	Processing

PA Name	Dun Laoghaire Rathdown County Council
Case Type (3rd Level Category)	

Fee and Payments

Specified Body	No
Oral Hearing	No
Fee Calculation Method	System
Currency	Euro
Fee Value	0.00
Refund Amount	0.00

Observation/Objection Allowed?	
Payment	PMT-043486-22
Related Payment Details Record	PD-043384-22

Observation

Run at: 08/08/2022 12:09

Run by: Orlagh Kearney

Observation Lodged : 8/8/2022

observation deadline : 9/8/2022

Kiaran O'Malley + Co. Ltd.

Kiaran O'Malley and Co. Ltd.,
Town Planning Consultants,
Saint Heliers,
Saint Heliers Copse,
Stillorgan Park,
Blackrock, Co. Dublin.

DIRECTORS: JOHN O'MALLEY BA BAI MRUP Dip EIAMgt Dip Env Eng. MIEI, MIPI, MRTPI
RAYMOND O'MALLEY BA BAI MURP Dip EIAMgt. MIEI
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5th August 2022

The Secretary
An Bord Pleanála
Marlborough Street
Dublin 1

ABP Ref.: **ABP-314088-22**
Reg. Ref.: **Ref. 5222 [Section 5 Declaration]**
Re: **The Druids Chair, Killiney Village, Killiney Hill Road, Killiney, Co Dublin**

Dear Sir or Madam,

We refer to the above referral that was submitted to your office on 13th July 2022.

In accordance with section 130(1)(a) of the Planning and Development Act 2000 (as amended), this is an observation to that referral on behalf of our client ***Connolly Real Estate Limited, Eagle House, Killiney Hill Road, Killiney, Co. Dublin*** who previously submitted a declaration (Ref. 3522) for the same or materially the same development to the Dun Laoghaire Rathdown County Council. We attach a cheque for € 50 in respect of the prescribed fee. We respectfully request the Board to consider the following points:

1. The referrer, Dr Cosgrave, included three documents in his declaration to the Council that were prepared by our office for our client Connolly Real Estate Limited. The three documents are the site location map (1: 1,000), site layout plan (1: 500), and a 1st April 2022 photograph – two of these documents even have our name, address, etc. on them. Dr Cosgrave does not have any authority to use those documents in respect of his declaration or his referral to your office. They remain the property of our office and our client, and the Board is invited to disregard them. It is noted that a new site location map has been added to the referral (which confirms the external area subject of the referral is the same as that subject of our client's declaration) but the 1st April 2022 photograph has again been re-used without the appropriate consent.

2. It is alleged at point 10. of the declaration cover letter dated 20th May 2022 submitted to the Council that "*The previous section 5 by Connolly Real Estate Limited was misrepresented.*" This allegation is not expanded upon by the applicant. Further, it is inconsistent with his improper use of our documentation that identifies the same area of land outside The Druids Chair Pub. If he is referring to enforcement case ENF 14221, a review of our client's section 5 declaration will confirm that case was identified in response to question 7 on the section 5 declaration form.

3. The planning authority letter of 1st October 2021 merely relates to an enforcement case. It does not amount to a planning decision of the local authority. Our client was shocked with the content of

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that letter and similar to what the referrer is doing now, they choose to submit a formal declaration to the Council to obtain a definitive answer in accordance with the planning legislation. It should be noted that our client's declaration was copied in full to Dr. Cosgrave and it was available to the Council to also issue him with a copy of their declaration decision thus affording him a right to refer the decision to An Bord Pleanála.

4. It is noted that this referral has confirmed the date (year) the unauthorised works and change of use took place at The Druids Chair Pub. In the last paragraph on page 1 of the referral, it states;

> *"With the onset of the Covid pandemic in 2020, the owners decided to formalise the area as an outdoor hospitality area and to remake it as an attractive outdoor alternative to drinking and socializing indoors. To this effect they relegated all parking to their existing parking area on the other side of Victoria Road and upgraded the area in front of the premised* [sic] *to by the installation of outdoor tables and seating. Also as can be seen in the appended photograph, they installed all-weather synthetic grass carpeting over the entire area and delineated the boundary between the area and the road by a low timber white-painted picket fence."*

Our client concurs with the description of the unauthorised works and change of use that took place at The Druids Chair Pub and welcomes the referrer's confirmation of the date or approximate date in 2020 that this unauthorised development was implemented.

5. Section A on page 3 of the referral questions the issue of (the change of) use. It would appear that the Council has determined that the change of use of part of the car park does constitute a material change of use and thus is development and it is not exempt development. This issue has been subject of a number of previous section 5 referral cases at An Bord Pleanála including:

- RL2185 at 'The hanging Head' Public House, Drogheda St, Collon, Co. Louth
- RL2188 at Turners Cross Tavern, 1 Evergreen Road, Cork City
- ABP-307112-20 at Lamplighters Pub, 79 The Coombe / 1 Brabazon Street, Dublin 8

In each of these three cases, the Board was asked to assess whether or not the provision of a beer garden was development, and if so, was it exempt development or not. In all three cases, the Board determined the beer garden constituted development and was not exempt development. From the RL2185 and RL2188 cases, the following is directly relevant from the Board's decisions:

> ***(c) the use of part of the yard of the licensed premises as a beer garden has material consequences in terms of the proper planning and sustainable development of the area, and (d) the said use as a beer garden constitutes a material change of use, being an extension of the net floorspace of the commercial activity and, consequently, an intensification of use of the land.***

It occurs to us that the same assessment and determination should apply to the beer garden/outdoor drinking area at The Druid's Chair Pub.

6. Without prejudice to the above observations, as this declaration and now referral, is effectively a re-hearing of our client's declaration, the Board is reminded of the judgement in the Narconon Trust v An Bord Pleanála and Others judicial review case (High Court Judicial Review 2019/16 J.R. and Court of Appeal Record Number 2020/233). From the Court of Appeal judgement (copy attached), it was held that:

> *"The Board was precluded from determining a section 5 referral in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination."*

Dr Cosgrave has not presented any new evidence, material or otherwise, in his declaration to the Council or his referral to the Board. There has been no change in the planning facts as they relate to the question now before the Board. On that basis, it should therefore follow that the Board is precluded from determining this section 5 referral.

If the Board is permitted to determine this referral, it is requested to decide that the change of use and works are both development and are not exempt development.

Please acknowledge receipt of this observation and direct all future correspondence in this matter to our office.

Regards,

Raymond O'Malley
Kiaran O'Malley & Co. Ltd.
ROM: rom

Enclosures
1. A cheque for € 50 in respect of the prescribed fee
2. Copy of Court of Appeal Record Number 2022/233 judgement (25 pages)

THE COURT OF APPEAL

Court of Appeal Record Number 2020/233
Neutral Citation Number [2021] IECA 307

Woulfe J.
Costello J.
Collins J.

BETWEEN

NARCONON TRUST

APPLICANT /RESPONDENT

- AND -

AN BORD PLEANÁLA

RESPONDENT / APPELLANT

- AND -

MEATH COUNTY COUNCIL

FIRST NOTICE PARTY

- AND -

BALLIVOR COMMUNITY GROUP

SECOND NOTICE PARTY

- AND -

TRIM MUNICIPAL DISTRICT COUNCIL

THIRD NOTICE PARTY

JUDGMENT of Ms. Justice Costello delivered on the 17th day of November 2021

1. This is an appeal against the judgment of the High Court (Heslin J.) dated 24 January 2020 granting an order of *certiorari* quashing two decisions of An Bord Pleanála ("the Board") made on 19 November 2018, pursuant to s. 5 of the Planning and Development Act 2000 ("PDA 2000"), whereby the Board decided that the change of use from a nursing home development to a residential drug rehabilitation facility is development and is not exempted development. On 31 July 2020, a certificate for leave to appeal, pursuant to s. 50A(7) of the PDA 2000, was granted on the following point of law:-

> *"Is it ultra vires the Board to determine a section 5 referral in circumstances where a planning authority has previously determined the same or substantially the same*

development and is exempted development within the meaning of the Planning and Development Acts 2000-2015 ... [and] according to Schedule 2, Part 4, Exempted development – Classes of Use, Class 6 (sic) of the Planning and Development Regulations 2001-2015". The report recommended that an exemption certificate be granted. On 29 September 2016, the council issued a declaration ("the 2016 declaration") stating:-

> *"In pursuance of the powers conferred upon them by the Planning and Development Acts 2000-2015, Meath County Council have by order dated 29.9.2016 decided to Declare the proposed development is EXEMPT, in accordance with the documents submitted namely: change of use of the permitted nursing home to a residential drug rehabilitation facility at former old National School Site, Ballivor, Co. Meath."*

Under s. 5(3)(a) of the PDA 2000, any appeal against the 2016 declaration was to be made within four weeks from the date of issue. In the circumstances, no appeal was brought against the declaration which therefore became final. On 6 December 2016, Narconon purchased Folio MH 69873 F "*comprising substantially completed yet unoccupied nursing home ... located in Ballivor, Co. Meath.*" for €1.3m, in reliance on the declaration. Narconon then proceeded to develop the lands and expended €7,750,000 on construction works and fit out of the facility.

4. Thereafter, Ballivor Community Group, (hereinafter "the second notice party") became aware of the identity of the developer of the lands and, on 16 February 2018, made an application, ref. no. ABP-301064-18, to the council for a s. 5 declaration concerning the "*use of the existing permitted 'nursing home' building by Narconon Trust for the purpose of providing a residential drug rehabilitation facility*". Attached to the application was a cover letter from HRA Planning, chartered town planning consultants, which set out the question put to the council as being "*[w]hether the use of the existing permitted 'nursing home' building by Narconon Trust for the purpose of providing a residential drug rehabilitation facility constitutes a material change of use which is not exempted development and for which planning permission would be required.*" The cover letter requested the council to consider the matter ***"irrespective of the decision made previously by the council"***, the 2016 declaration. Neither the application form, nor the cover letter state that there were any changes in the planning facts or circumstances.

5. On the same day, 16 February 2018, Trim Municipal District Council, (hereinafter "the third notice party") also made an application for a s. 5 declaration to the council, ref. no. ABP-301055-18. The question put to the council was set out in the following terms:-

> *"... whether the change of use of the permitted nursing home under TA 140621 to a residential drug rehabilitation facility is exempted development."*

The third notice party's application was accompanied by a letter from Mr. Noel French, councillor on behalf of the third notice party, also dated 16 February 2018. The letter made reference to the 2016 declaration, stating that the councillors ***"object to the exemption granted under the [2016 declaration]"*** and that it was their opinion that

"[The Board], in exercise of the powers conferred on it by section 5(4) of the 2000 Act, hereby decides that the change of use from nursing home to drug rehabilitation facility is development and s [sic] not exempted development."

8. On 19 November 2018, the Board issued its decision and order, ref. ABP-301055-18 stating:-

> *"... in exercise of the powers conferred on it ... hereby decides that the change of use of the permitted nursing home under planning permission register reference TA/140621 to a residential drug rehabilitation facility ... is development and is not exempted development."*

These proceedings were initiated by notice of motion on 5 March 2019 by Narconon seeking an order of *certiorari*, pursuant to s. 50 of the PDA 2000, by way of judicial review quashing the 19 November 2018 decision of the Board. Narconon argued that the Board was precluded from determining the referrals in circumstances where the council had previously determined a s. 5 referral and issued a declaration in this regard on 29 September 2016 stating that a change of use from a nursing home to a residential drug rehabilitation facility is development and is exempted development.

Judgment of the High Court

9. The trial judge found that the s. 5 applications in 2016 and 2018 were in substance the same. He further found as a fact that the s. 5 applications by the second and third notice parties included submissions in respect of matters which the council had considered and determined prior to issuing its 2016 declaration, that the applications made in 2018 were an attempt to bring about a different result to the 2016 declaration, and that they were made on the basis that the 2016 declaration was wrong. It was not contended that there had been any change in planning facts or circumstances in the interval and neither party was acting in the belief (mistaken or otherwise) that there were. The notice parties were each aware of the 2016 declaration and explicitly objected to it. The trial judge concluded that as a matter of fact they were each questioning the validity of the 2016 declaration by means of the s. 5 applications of 16 February 2018. He held that in *form* they sought answers as to the planning status of the development but in substance they were objecting to the 2016 decision on *"the self-same question"*.

10. The trial judge held that s. 5 of the PDA 2000 and the power conferred on the Board cannot be properly understood in isolation; the section is part of a legislative framework and must be interpreted in the context of the PDA 2000 as a whole, including the provisions of s. 50. Section 50(2) states:-

> *"(2) A person shall not question the validity of any decision made or other act done by–*
>
> *(a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,*
>
> ...

"... In my view, the absence of an express prohibition in s. 5(4) [of the PDA 2000] on the exercise of the [Board's] jurisdiction under s. 5(4) where a planning authority has previously issued a Declaration under s. 5(2) does not mean that s. 5(4) can be properly interpreted to mean that the [Board] is entitled to ignore the requirements of s. 50 of the [PDA 2000] and has the power to ***decide*** *on a referral which, as a matter of fact, questions the validity of a decision made by the local authority in the performance of a function under the same Act, other than in accordance with the method mandated by s. 50. In my view, such an interpretation of s. 5 would render meaningless the ability of a person to have planning status determined by employing the clause (sic) 5(1) procedure and is an interpretation which is impermissible, having regard to* ***the limitation on the Board's section 5 powers which necessarily flow from the explicit provisions of section 50(2)****, both of which sections are part of the framework in respect of which both a local authority and the Board exercise their functions under the [PDA 2000]."* (emphasis added)

14. He observed in para. 88 of the judgment that:-

"... s. 5(4) of the [PDA 2000] confers wide powers on a planning authority to refer any question as to what, in any particular case, is or is not development, or is or is not exempted development to be decided by the Board. It may be that the Board is not automatically precluded, in all the circumstances, from ***entertained*** *(sic) a s. 5 reference by virtue of the existence of a prior, extant unappealed declaration made by a local planning authority pursuant to a separate reference. If, for example, relevant planning facts or circumstances had changed between the issuing of the local authority's Declaration and the subsequent referral, the factual position would be materially different than in the present case. Importantly, however, this is* ***not*** *the factual situation in the present case and it is not necessary to decide wider questions in order to resolve the issues which arise in the present case...".* (emphasis added)

15. He concluded as follows:-

"90. 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

20. Section 5 provides:-

"*(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.*

(2) (a) Subject to paragraphs (b),and (ba), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.

(b) A planning authority may require any person who made a request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question ...

...

(c) A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question.

(3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.

(b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).

(4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.

(5) The details of any declaration issued by a planning authority or of a decision by the Board on a referral under this section shall be entered in the register."

21. The following points emerge from this section:

(15) There is no other provision for public notification of a declaration or a decision.

(16) There is no provision for public participation in the section 5 process (other than by an applicant), there is no entitlement to make submissions on the question referred and there is no requirement to publish the fact that an application has been made pursuant to s. 5 in respect of a development or intended development, which might alert the public that a declaration or decision (as the case may be) will issue shortly.

22. Section 7 of the PDA 2000 requires a planning authority to keep a register for the purposes of the Act, including particulars of any declaration made by a planning authority under s. 5 or any decisions made by the Board on a referral under s. 5. The planning authorities are required to make entries and corrections *"as soon as may be"* after the making of any decision (subs. (3)). The register incorporates a map for enabling a person trace any entry in the register. Planning registers may be inspected by members of the public at the offices of the planning authority.

23. Other sections of the PDA 2000 relevant to the debate in this appeal are sections 127 and 138. Section 127 provides:-

> *"(2)(a) An appeal or referral which does not comply with the requirements of subsection (1) shall be invalid."*

24. Section 138 provides:-

"(1) The Board shall have an absolute discretion to dismiss an appeal or referral—

(a) where, having considered the grounds of appeal or referral or any other matter to which, by virtue of this Act, the Board may have regard in dealing with or determining the 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."

25. The Board is required to satisfy itself that the referral is valid and that it complies with the statutory requirements and thus, that it has jurisdiction to proceed; it cannot proceed on foot of an invalid referral. The review of the application is not purely as to the form of the

within the period so provided were outside the control of the applicant for the extension of time.

The issues in the appeal

29. The trial judge certified one question to this court and the appeal is confined to the issues arising from consideration of that question. The issues may not be expanded beyond the question certified, as Narconon alleged the Board sought to do. I repeat the question for convenience:-

> *"Is it ultra vires the Board to determine a section 5 referral in circumstances where a planning authority has previously determined the same or substantially the same question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination?"*

30. The issue for this court is predicated on certain established facts: that the council made a section 5 declaration in September 2016 in respect of the lands; there is no evidence – and it is not asserted – that there has been a change in planning facts and circumstances since that declaration; the question in respect of the 2018 referral is the same or substantially the same; the second and third notice parties were each questioning the validity of the 2016 declaration by means of the s. 5 applications of 16 February 2018; that in form they sought answers as to the planning status of the development but in substance they were objecting to the 2016 decision on "*the self-same question*". No application for judicial review of the decision of 2016 was ever brought and there was no application for an extension of time in which to seek judicial review under s. 50(8) PDA 2000. There was no evidence of when the 2016 declaration was entered on the planning register or when or how either of the second or third named notice parties became aware of the 2016 declaration or the change of use of the lands from a nursing home to a residential drug rehabilitation facility. The second notice party referred to it becoming aware of the identity of the developer as the trigger to its application, not of the development or change of use.

31. The Board identified three issues it said arose in the appeal:

(a) Is the Board precluded from determining a valid section 5 referral where substantially the same question has already been determined by the planning authority and where there is no evidence that there has been a change in planning facts and circumstances since the planning authority's determination?

(b) Would a decision by the Board on such a section 5 referral impugn the validity of any such earlier determination by the planning authority on substantially the same question?

(c) Could any such limitation on the Board's jurisdiction pursuant to section 5 operate to preclude a person who was not a party to an earlier section 5 declaration by a planning authority from seeking a subsequent declaration from the Board?

35. As such, parties must be entitled to rely upon unchallenged authoritative decisions and the procedure accordingly assists in providing certainty upon which parties may safely act. Hogan J., speaking for the Court of Appeal, in *Killross Properties Limited v. Electricity Supply Board* [2016] 1 I.R. 541, [2016] IECA 207, at para. 13, held that absent a successful judicial review challenge, "*the s. 5 references must be presumed to be valid and unimpeachable*".

36. It is important to emphasise the difference between a decision to grant planning permission and a section 5 declaration. A grant of planning permission is a development consent. A section 5 declaration, at most, is a decision that may mean that development consent is not required and that the owner or occupier of the lands may develop them in accordance with the declaration, without obtaining a grant of planning permission. To that extent it impacts upon the public, but it does so in a qualitatively different manner to a development which requires planning permission before it may proceed. It is a declaration of a right (or absence of a right) which exists anterior to the declaration. It is thus very different to a grant of planning permission. This is not to diminish the significance of a section 5 declaration, which may nonetheless have major consequences. A decision that development consent is not required has significant implications as it follows that some development and/or change of use may take place without the public being afforded a right to participate in the decision or to object to the development in question.

37. Second, the question addressed is limited: whether something is or is not development or is or is not exempted development. This may not always be straightforward and will involve the exercise of planning judgment. But, it does not involve evaluative consideration of proper planning and sustainable development in relation to the works or use in question, it is confined in its scope.

38. It is part of the planning history of the site and it enures for the benefit of the lands. It is binding on all parties. In *Daly v. Kilronan Wind Farm Limited* [2017] IEHC 308, Baker J. confirmed that a section 5 determination was binding where it relates substantially to the same development as the subject matter of subsequent enforcement proceedings.

39. The Board argued that it was not bound by the 2016 declaration and it was entitled to decide the 2018 referrals on the merits as a matter of principle. I am not satisfied that, absent a material change of facts, an unchallenged section 5 declaration does not bind a planning authority or the Board (save on a review pursuant to s. 5(3)), which is the effect of this submission. There is no reason in principle why a section 5 declaration should be considered binding upon all parties but nevertheless could be reviewed on the merits at any time in a further section 5 application, absent a material change of facts, simply because s. 5(1) provides that "any person" may make such an application at any time.

40. It is worth observing that the decision in *Cleary Compost and Shredding Limited v. An Bord Pleanála* [2017] IEHC 458, a case in which there were no less than six section 5 declarations, does not alter this conclusion. In *Cleary Compost*, there was a significant intensification of use and thus a change in the facts between the time when the planning

Thus, the Oireachtas clearly intended that all decisions of a planning authority, including those made under s. 5, should be protected against attempts to challenge their validity, otherwise than by means of judicial review in accordance with s. 50(2) of the PDA 2000. Despite the fact that s. 5 was amended in 2011, and again in 2018, the Oireachtas did not take the opportunity to exclude section 5 declarations from the purview of s. 50(2).

43. The essential issue in this case is whether the request for a section 5 declaration by the second and third notice parties in 2018 questioned the validity of the 2016 declaration within the meaning of s. 50(2). Narconon says that they do, and they amounted to an impermissible collateral attack on the 2016 declaration because the referrals raised the same question or substantially the same question and there were no changes in the facts or the planning status in the intervening period.

44. In the first instance, it is important to note that the trial judge made a finding, which he described as a finding of fact, that they were in substance challenging the validity of the 2016 declaration. The Board has advanced no basis upon which this court could set aside this finding, nor argued that it was not a finding which the court was entitled to make. Neither does it address the implications of this finding for its argument.

45. The question of collateral challenges to decisions was considered by the Supreme Court in *Sweetman v. An Bord Pleanála* [2018] 2 I.R. 250; [2018] IESC 1. Clarke CJ. quoted from the decision of Kelly J. in *Goonery v. Meath County Council* [1999] IEHC 15 where an applicant sought declarations relating to the determination of a planning application and did not directly challenge the validity of the determination. Kelly J. stated:-

> *"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. This is particularly so in the case of relief No. 11. The mere fact that an order was not sought quashing the permission in question does not mean that the validity of the permission was not being questioned. It was, and so the provisions of the section applied and were complied with since the application was moved before Budd J. ex parte and not on notice as the section requires."*

The Chief Justice endorsed the substance over form approach and noted that it was applied by Smyth J. in *Lennon v. Cork City Council* [2006] IEHC 438. He considered the issue of an indirect or collateral attack in the case *of Nawaz v. Minister for Justice* [2013] 1 I.R. 142, [2012] IESC 58. The issue in that case was whether the applicant's challenge fell within the statutory judicial review procedures under s. 5 of the Illegal Immigrants (Trafficking) Act 2000. Having considered the judgment in *Goonery* Clarke J. (as he then was) said:-

> *"It seems to me that the approach of Kelly J. in that case was correct. The question to be asked is whether, if the relief is granted, it will amount to a determination to the effect that a particular type of measure specified in the section*

terms and any additional matters which can properly be implied, it can be said that it is clear that a particular question or issue is to be definitively determined at an earlier stage so that there is no possibility to have that issue or question re-opened at a later stage. In such a case it is appropriate to require anyone who wishes to challenge that initial decision to do so within any relevant statutory time limit or time provided for in rules of court. Any failure to do so within such time limit, including any extended time limit which the court may, in accordance with its jurisdiction, permit, will render the initial decision incapable of challenge and will further preclude any challenge to any subsequent decision made in the process which is based on a contention that the initial decision was not lawfully made." (emphasis added)

47. It seems to me that the rationale identified in para. 38 applies equally to a subsequent administrative decision which would have the same implication. If it would deprive the party of the benefit of the earlier administrative decision which had not been challenged within the established timeframe there may be the same objectionable result. The fact that the challenge might be by way of a subsequent administrative, as opposed to court, procedure does not alter the substance of the challenge or the ultimate impermissible effect.

48. The effect of permitting the 2018 declaration of the Board to stand would mean *"in practical terms"* that Narconon was deprived of the benefit of the 2016 declaration upon which it acted bona fide in reliance on its validity. In addition, the 2018 declaration potentially exposes Narconon to enforcement proceedings pursuant to s. 160 of the PDA 2000, which would be clearly unjust in the circumstances.

49. The implications of the binding nature of valid section 5 determinations as to the planning status of a development was considered by the Court of Appeal in *Killross Properties* in the context of s. 160 proceedings. Hogan J. held as follows:-

> *"[30] ... it could equally be said that the s. 160 application represents a collateral attack on the decision of the planning authority, since it effectively invites the court to revisit the merits of the issue which had already been determined in the course of the s. 5 determination. This is further reinforced so far as the present proceedings are concerned, since Killross elected to challenge the validity of three of the s. 5 determinations in judicial review proceedings and failed in that endeavour."*

50. The legal certainty granted by a valid section 5 determination may be undermined by subsequent administrative proceedings – as here – just as much as by legal proceedings. If the Board's 2018 decision stands, it sets at naught the decision of 2016, a decision which is unimpeachable, binding and authoritative. The fact that the section 5 referrals and the decision of the Board do not question the *lawfulness* of the 2016 declaration is irrelevant. What is important is the substance. As the trial judge correctly recognised, the second and third notice parties were engaged in a collateral attack upon the decision

There could be a myriad of difficulties in applying for planning permission, possibly years after a party has acted in reliance on a prior section 5 declaration, which could result in great unfairness to a party, who, it must be acknowledged, would have acted lawfully in relying on the section 5 declaration at the time. There is no guarantee that permission or substitute permission in the terms sought in respect of the development would be granted. The relevant development plan may have changed in the interim so that permission could not now be granted, save in accordance with the exceptional procedures governing material contraventions of development plans. The reference to the flexibility which exists in enforcement mechanisms is surprising and does not address the issue: any person may bring s. 160 proceedings and there is very limited "flexibility" in such an application if there is a (subsequent) section 5 declaration that the development in question is not exempt. In this regard, it must be remembered that s. 160 exposes the developer to criminal liability.

55. Further, the suggestion that *"[s]uch an interpretation puts the onus on the party carrying out the development to firstly, decide what reliance to place on a s. 5 declaration from a Council and, secondly, how to address a subsequent decision to different effect"* seems to me to underscore the argument that the Board's position undermines the utility of the s. 5 procedure. No authority as to why the onus of making such decisions should be placed on a developer was opened, nor was it explained why, as a matter of principle, this should be so. The argument *"that it is inherently more fair to interpret the statutory scheme as putting this onus on the party carrying out the development rather [than] on third parties who likely will have had no role and no opportunity to play a role in the earlier s. 5 process"* is both wrong in principle, as a matter of statutory interpretation, and unsupported by the statutory scheme provided in s. 5 in my judgment.

56. Section 138 is relevant to the consideration of the issues arising in the circumstances of this case. It seems to me that in enacting s. 138, the Oireachtas expressly empowered the Board to dismiss referrals, such as arose in this case, where, by reason of the fact that in substance the referral in fact was a challenge to the earlier declaration, it was not appropriate to determine the 2018 referrals on their merits. While the Board was not obliged by the terms of s. 138 to dismiss the referrals, once it was clear that the same question in substance as had been decided in 2016 was again being referred on the same facts, the effect of a contrary decision would be to deprive Narconon of the benefit of the 2016 declaration and, accordingly, was an impermissible collateral attack on the 2016 declaration; that declaration was authoritative and binding, including on the Board, and in those circumstances it was appropriate to dismiss the referral and decide that it was precluded from determining the application on its merits.

Public participation?

57. The Board placed great reliance on an alleged right of the public to participate in the s. 5 procedure, based on the fact that under s. 5(1) any party may make an application in respect of any development at any time. The Board focused on the consequences if there is no public involvement in the s. 5 process. It submitted that third parties' right to seek

notwithstanding that it was reached between the developer and the planning authority with no possibility of public input into the detail of the decision. The public had the opportunity to participate in the process leading to the grant of permission, the terms of the planning permission alerted interested members of the public that compliance issues had been left over and, thirdly, the service of a commencement notice would have alerted members of the public to the fact that agreement had been reached (para. 101). It was a valid decision unless it was challenged by way of judicial review, notwithstanding the fact that the public may have had no notice of when the decision was reached or of the substance of the decision. While the facts are not precisely analogous, in my judgment, the principle applies equally in this case. The public was afforded the same opportunity to object to the application to develop the old national school as a nursing home, that is for change of use and development, and permission was so granted. The 2016 declaration did not involve any change to the development, it related solely to the change of use. Not all changes of use require planning permission. The PDA 2000, and the Regulations, permit changes of use within classes in Schedule 1 of the Regulations without the need for planning permission, and thus without any public participation. Unless there is a principle which requires that the public have a right to participate in the s. 5 process – as opposed to the compliance process, and I do not accept that there is – the principle as to the validity of the compliance decision applies also to section 5 declarations.

62. Fifth, as a matter of fact, there has been no exclusion of a *"right to independently avail of the procedure"* in s. 5 in this case. If the identical question has been authoritatively answered and there has been no change of facts, then there is no need to raise the question again. If it was reached unlawfully, then it may be challenged by way of judicial review under s. 50 and the intending applicant can apply to extend time to do so pursuant to subs. (8). If they are successful, the earlier decision may be quashed and it may then be possible to reconsider the question on the merits. There is no right in any party to revisit the merits of the question on the same facts with a view to obtaining a different outcome outside of any appeal (or in this case review) process. The real complaint is the fact that the process does not involve publication of an application under s. 5, nor does it afford members of the general public a right to make submissions, even if they become aware of an application. Thus, a binding decision, with possibly significant implications, may be validly reached without any input from the local community. But it does not follow that there is, in effect, a right to revisit the identical question on the identical facts in order that a party excluded from the previous process may reverse the decision otherwise validly reached. To hold otherwise is to introduce a process of third party involvement which is not provided for in the Act, however unsatisfactory the operation of the section may be perceived to be.

63. Sixth, in this case there was a valid section 5 declaration from 2016. The same question on the same facts was considered by the Board in 2018 who then reached a different conclusion to that reached by the Council. If the Board's submissions in this appeal are correct, this is an outcome permitted and intended by the Oireachtas in enacting s. 5 of the PDA 2000. In my judgment, it is not, for the public's right to seek a section 5

valid decision and may not reach a different conclusion on the same facts. It must decline to revisit the merits of the decision which was previously, authoritatively, determined.

Conclusion

67. The Board was precluded from determining a section 5 referral in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination. It had jurisdiction to receive the referral and to commence its determination. Once it became apparent that the question referred was the same, or substantially the same, and in respect of the same land, and that there was no evidence of any change in the planning facts or circumstances, it ought to have concluded that: the referral by the notice parties amounted to an impermissible attack on the 2016 declaration, which, in substance, amounted to questioning the validity of the section 5 declaration other than by way of s. 50; that such a challenge is prohibited by s. 50(2); and that for the Board to proceed further to determine the referral on the merits amounted to facilitating a breach of s. 50(2) and was, accordingly, *ultra vires*.

68. The trial judge correctly interpreted ss. 5 and 50(2) of the PDA 2000 and applied the provisions to the facts in this case. He was correct to quash the decision of the Board of November 2018 for the reasons he set out in his judgment. For these reasons, I would dismiss the appeal.

69. I have read the concurring judgment of Collins J. and I agree with his judgment.

70. My provisional view as to costs is that Narconon has succeeded on this appeal and accordingly is entitled to the costs. If any party wishes to contend that the court should make a different order in respect of the costs, it should contact the office of the Court of Appeal within 14 days of delivery of this judgment and a time will be fixed for a short hearing. If a party request such a hearing and is unsuccessful in obtaining a different order as to costs, they may be required to pay the costs of the additional hearing.

71. Woulfe and Collins JJ. have read and approved this judgment.