[2020] IEHC 25

THE HIGH COURT
JUDICIAL REVIEW

[2019/ 16 J.R.]

BETWEEN

NARCONON TRUST

APPLICANTS

AND
AN BORD PLEANÁLA

RESPONDENT

AND
MEATH COUNTY COUNCIL

FIRST NOTICE PARTY

AND
BALLIVOR COMMUNITY GROUP

SECOND NOTICE PARTY

AND
TRIM MUNICIPAL DISTRICT COUNCIL

THIRD NOTICE PARTY

JUDGMENT of Mr.Justice Heslin delivered on the day of, 2019

Background

1. This case concerns an application for judicial review which is brought by the Applicant under s. 50 of the Planning and Development Act 2000, as amended (the "2000 Act"). The Applicant seeks judicial review in respect of two decisions made by the Respondent, An Bord Pleanála, (the "Board") on 19 November 2018 whereby the Board decided that the change of use from a nursing home to a residential drug rehabilitation facility at the former Old National School, Ballivor, Co. Meath is development and is not exempted development. These decisions by the Board were made in respect of two referrals, namely those by the Second and Third Notice Parties, such referrals having reference numbers ABP–301055–18 and ABP–301064-18. The Board's decisions were made pursuant to s. 5 of the 2000 Act. The decisions by the Board are reflected in two orders made by the Board, each of which is dated 19 November 2018. The Applicant argues that the Board was precluded from determining the two referrals made to the Board by the First and Second Notice Parties pursuant to s. 5 of the 2000 Act, in circumstances where the First Notice Party, Meath County Council, had previously determined a s. 5 referral and, on 26 September 2016, on foot of a request from the Applicant, issued a declaration pursuant to s. 5 that a change of use from a nursing home to a residential drug treatment centre is development and is exempted development. At the outset of the hearing I was informed that the First, Second and Third Notice Parties had decided to play no active part in the proceedings. That being so, the evidence before the court comprised the sworn affidavits on behalf of the Applicant and Respondent, respectively.

Reliefs sought by the Applicant

2. As appears from the Applicant's notice of motion dated 18 January 2019, the Applicant seeks the following reliefs: -

1. An order of *certiorari,* by way of judicial review, quashing the decisions made by the Respondent pursuant to section 5 of the Planning and Development Act, 2000, as amended, on 19 November 2018 in respect of the two referrals, (reg. ref. nos. ABP-301055-18 and ABP-31064-18), that the change of use of the nursing home development (permitted under planning authority reg. ref. no. TA/140621) to a residential drug rehabilitation facility, is development and is not exempted development.

2. A Declaration, by way of judicial review, that in making the impugned decisions, the Respondent erred in law, took into account irrelevant considerations and/or misunderstood or overlooked relevant considerations and/or acted irrationally and/or unreasonably and, consequently, the impugned decisions of the Respondent are invalid and have no legal effect.

3. If necessary, an Order continuing the Stay granted by the High Court (Noonan J.) by Order made on 14 January 2019, and perfected on 17 January 2019 on the implementation of, or reliance upon, the impugned decisions made by the Respondent, including in any enforcement proceedings commenced under Part VIII of the Planning and Development Act 2000, as amended, pending the final determination of these judicial review proceedings.

4. Further and other order.

5. Liberty to apply

6. The costs of these proceedings

Relevant legislation

3. Counsel, very helpfully, furnished the court with an unofficial consolidation of the 2000 Act, prepared by the Law Reform Commission and updated to 24 October 2019 as well as an unofficial consolidated version of the Planning and Development Regulations 2001-2019, prepared by the Department of the Housing, Planning and Local Government. Of particular relevance to the present case are the following provisions: -

> Planning and Development Act 2000, as amended:
>
> "Exempted development.
>
> 4.— (1) The following shall be exempted developments for the purposes of this Act—
>
> ...
>
> (2) (a) The Minister may by regulations provide for any class of development to be exempted development for the purposes of this Act where he or she is of the opinion that—

(i) by reason of the size, nature or limited effect on its surroundings, of development belonging to that class, the carrying out of such development would not offend against principles of proper planning and sustainable development, or

(ii) the development is authorised, or is required to be authorised, by or under any enactment (whether the authorisation takes the form of the grant of a licence, consent, approval or any other type of authorisation) where the enactment concerned requires there to be consultation (howsoever described) with members of the public in relation to the proposed development prior to the granting of the authorisation (howsoever described).

(b) Regulations under *paragraph (a)* may be subject to conditions and be of general application or apply to such area or place as may be specified in the regulations.

(c) Regulations under this subsection may, in particular and without prejudice to the generality of *paragraph (a*), provide, in the case of structures or other land used for a purpose of any specified class, for the use thereof for any other purpose being exempted development for the purposes of this Act.

(3) A reference in this Act to exempted development shall be construed as a reference to development which is—

(a) any of the developments specified in *subsection (1),* or

(b) development which, having regard to any regulations under *subsection (2),* is exempted development for the purposes of this Act."

"Declaration and referral on development and exempted development.

5.—(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 (*be*), 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 and, where further information is received under this paragraph, the planning authority shall issue the declaration within 3 weeks of the date of the receipt of the further information.

(ba)(i) Subject to *subparagraph (ii),* a planning authority shall not be required to comply with *paragraph (a)* within the period referred to in that paragraph where it appears to the planning authority that it would not be possible or appropriate, because of the exceptional circumstances of the development or proposed development (including in relation to the nature, complexity, location or size of such development) identified in the request under *subsection (1*) to do so.

(ii) Where *subparagraph (i)* applies, the planning authority shall, by notice in writing served on —

(I) the person who made the request under *subsection (1*), and

(II) each person to whom a request has been made under *paragraph (c),*

before the expiration of the period referred to in paragraph (a), inform him or her of the reasons why it would not be possible or appropriate to comply with that paragraph within that period and shall specify the date before which the authority intends that the declaration concerned shall be made.

(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.

(6) *(a)* The Board shall keep a record of any decision made by it on a referral under this section and the main reasons and considerations on which its decision is based and shall make it available for purchase and inspection.

(b) The Board may charge a specified fee, not exceeding the cost of making the copy, for the purchase of a copy of the record referred to in *paragraph (a).*

(c) The Board shall, from time to time and at least once a year, forward to each planning authority a copy of the record referred to in paragraph (a).

(d) A copy of the said record shall, at the request of a member of a planning authority, be given to that member by the chief executive of the planning authority concerned.

(7) A planning authority, before making a declaration under this section, shall consider the record forwarded to it in accordance with *subsection (6)(c).*

(7A) A planning authority or the Board, as the case may be, shall, in respect of a development or proposed development specified in Part 2 of Schedule 5 to the Planning and Development Regulations 2001, specify in its declaration or decision, as the case may be, whether the development or proposed development identified in the request under *subsection (1)* or in the referral under *subsection (3*) or (*4*) , as the case may be, would be likely to have significant effects on the environment by virtue, at the least, of the nature, size or location of such development and require an environmental impact assessment.

(7B) (*a*) Where the planning authority issues its declaration on a request under *subsection (1)* or the Board makes its decision on a referral under *subsection (3)* or *(4),* as the case may be, the following documents shall, within 3 working days, be placed on the planning authority's or Board's, as the case may be, website for inspection and be made available for inspection and purchase by members of the public during office hours at the offices of the authority or Board, as the case may be, for at least the minimum period referred to in paragraph *(b):*

(i) a copy of the question arising as to what is or is not development or is or is not exempted development within the meaning of this Act and any information, particulars, evidence, written study or further information received or obtained from any of the following:

(I) the person making the request or referral, as the case may be;

(II) the owner or occupier of the land in question;

(III) any other person;

(ii) a copy of any submissions or observations in relation to the question arising as to what is or is not development or is or is not exempted development within the meaning of this Act;

(iii) a copy of any report prepared by or for the authority or the Board, as the case may be, in relation to the request or referral;

(iv) a copy of the declaration of the authority or the decision of the Board, as the case may be, in respect of the question identified in the request under *subsection (1)* or in the referral under *subsection (3*) or *(4),* as the case may be.

(b) The minimum period for the purposes of *paragraph (a)* is 8 weeks from the date of the issue of the declaration by the planning authority or the date of the decision of the Board, as the case may be."

...

"Planning register.

7.— (1) A planning authority shall keep a register for the purposes of this Act in respect of all land within its functional area, and shall make all such entries and corrections therein as may be appropriate in accordance with *subsection (2*), and the other provisions of this Act and the regulations made under this Act.

(2) A planning authority shall enter in the register—

...

(*h*) particulars of any declaration made by a planning authority under *section 5* or any decision made by the Board on a referral under that section,

...

(3) The planning authority shall make the entries and corrections as soon as may be after the receipt of any application, the making of any decision or agreement or the issue of any letter, notice or statement, as appropriate.

(4) The register shall incorporate a map for enabling a person to trace any entry in the register.

(5) The planning authority may keep the information on the register, including the map incorporated under *subsection (4),* in a form in which it is capable of being used to make a legible copy or reproduction of any entry in the register.

(6) (a) The register shall be kept at the offices of the planning authority and shall be available for inspection during office hours."

..."

"Appeal to Board.

37. — (1) *(a)* An Applicant for permission and any person who made submissions or observations in writing in relation to the planning application to the planning authority in accordance with the permission regulations and on payment of the appropriate fee, may, at any time before the expiration of the appropriate period, appeal to the Board against a decision of a planning authority under *section 34 .*

(b) Subject to *paragraphs (c)* and *(d)* , where an appeal is brought against a decision of a planning authority and is not withdrawn, the Board shall determine the application as if it had been made to the Board in the first instance and the decision of the Board shall operate to annul the decision of the planning authority as from the time when it was given; and subsections *(1), (2), (3)* and (4) of *section 34* shall apply, subject to any necessary modifications, in relation to the determination of an application by the Board

on appeal under this subsection as they apply in relation to the determination under that section of an application by a planning authority.

(c) *Paragraph (b)* shall be construed and have effect subject to sections *133, 138* and *139*.

(d) In *paragraph (a)* and *subsection (6*), "the appropriate period" means the period of four weeks beginning on the day of the decision of the planning authority.

(5) (a) No application for permission for the same development or for development of the same description as an application for permission for development which is the subject of an appeal to the Board under this section shall be made before —

(i) the Board has made its decision on the appeal,

(ii) the appeal is withdrawn, or

(iii) the appeal is dismissed by the Board pursuant to section *133 or 138 .*

(b) Where an application for permission referred to in paragraph (a) is made to a planning authority, the planning authority shall notify the Applicant that the application cannot be considered by the planning authority and return the application and any other information submitted with the application in accordance with the permission regulations, and any fee paid."

...

"Judicial review of applications, appeals, referrals and other matters.

50.— (1) Where a question of law arises on any matter with which the Board is concerned, the Board may refer the question to the High Court for decision.

(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…

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order').

...

(6) Subject to *subsection (8),* an application for leave to apply for judicial review under the Order in respect of a decision or other act to which *subsection (2)(a)* applies shall be made within the period of 8 weeks beginning on the date of the decision or, as the case may be, the date of the doing of the act by the planning authority, the local authority or the Board, as appropriate.

...

(8) The High Court may extend the period provided for in *subsection (6)* or (*7*) within which an application for leave referred to in that subsection may be made but shall only do so if it is satisfied that—

(a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to make the application for leave within the period so provided were outside the control of the Applicant for the extension.

..."

"Provisions as to making of appeals and referrals.

127. — (1) An appeal or referral shall —

(a) be made in writing,

(b) state the name and address of the appellant or person making the referral and of the person, if any, acting on his or her behalf,

(c) state the subject matter of the appeal or referral,

(d) state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based,

(e) in the case of an appeal under *section 37* by a person who made submissions or observations in accordance with the permission regulations, be accompanied by the acknowledgement by the planning authority of receipt of the submissions or observations,

(f) be accompanied by such fee (if any) as may be payable in respect of such appeal or referral in accordance with *section 144* , and

(g) be made within the period specified for making the appeal or referral.

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

(b) The requirement of *subsection (1)(d)* shall apply whether or not the appellant or person making the referral requests, or proposes to request, in accordance with *section 134* , an oral hearing of the appeal or referral."

...

"Submission of documents, etc. to Board by planning authorities.

128.— (1) Where an appeal or referral is made to the Board the planning authority concerned shall, within a period of 2 weeks beginning on the day on which a copy of the appeal or referral is sent to it by the Board, submit to the Board—

(a) in the case of an appeal under *section 37*—

(i) a copy of the planning application concerned and of any drawings, maps, particulars, evidence, environmental impact assessment report, other written study or further information received or obtained by it from the Applicant in accordance with regulations under this Act,

(ii) a copy of any submission or observation made in accordance with regulations under this Act in respect of the planning application,

(iii) a copy of any report prepared by or for the planning authority in relation to the planning application, and

(iv) a copy of the decision of the planning authority in respect of the planning application and a copy of the notification of the decision given to the Applicant,

(b) in the case of any other appeal or referral, any information or documents in its possession which is or are relevant to that matter.

(2) The Board, in determining an appeal or referral, may take into account any fact, submission or observation mentioned, made or comprised in any document or other information submitted under subsection (1)."

...

"Board may dismiss appeals or referrals if vexatious, etc.
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 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.

(2) A decision made under this section shall state the main reasons and considerations on which the decision is based."

...

Planning and Development Regulations 2001 - 2019
Changes of Use ¬—

10. (1) Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not—

(a) involve the carrying out of any works other Commented [i48]: Inserted by article 3 of S.I. No. 256/2008 – Planning and Development (Amendment) Regulations 2008 36 than works which are exempted development,
(b) contravene a condition attached to a permission under the Act,
(c) be inconsistent with any use specified or included in such a permission, or

(d) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.

(2) (a) A use which is ordinarily incidental to any use specified in Part 4 of Schedule 2 is not excluded from that use as an incident thereto merely by reason of its being specified in the said Part of the said Schedule as a separate use.

(b) Nothing in any class in Part 4 of the Schedule 2 shall include any use—

(i) as an amusement arcade,
(ii) as a motor service station,
(iii) for the sale or leasing, or display for sale or leasing, of motor vehicles,
(iv) for a taxi or hackney business or for the hire of motor vehicles,
(v) as a scrap yard, or a yard for the breaking of motor vehicles,
(vi) for the storage or distribution of minerals,
(vii) as a supermarket, the total net retail sales space of which exceeds 3,500 square metres in the greater Dublin Area and 3,000 square metres in the remainder of the State,
(viii) as a retail warehouse, the total gross retail sales space of which exceeds 6,000 square metres (including any ancillary garden centre), or
(ix) as a shop, associated with a petrol station, the total net retail sales space of which exceeds 100 square metres"

"CLASS 9

Use—

(a) for the provision of residential accommodation and care to people in need of care (but not the use of a house for that purpose),
(b) as a hospital or nursing home,
(c) as a residential school, residential college or residential training centre."

The Applicant's case

4. The Applicant argues that the Respondent Board was precluded from determining the s. 5 referrals submitted in 2018, in circumstances where the Council had previously determined, in September 2016, a s. 5 referral which asked the same question in respect of the same lands and where there had been no change in the factual or planning circumstances. The Applicant argues that the Board's s. 5 decisions are invalid for three reasons, which can be summarised as follows: -

1) The Board erred in law in considering and purporting to determine the s. 5 referrals as they amounted, in effect, to a collateral challenge to the earlier valid s. 5 declaration issued by the planning authority in respect of the same matter;

2) The Board's Inspector concluded that the Board did not have the power to decline to consider the s. 5 referrals which conclusion was accepted by the Board.

However, the Inspector and the Board failed to consider the provisions of s. 138(1)(b) of the 2000 Act and, accordingly, the conclusion of the Inspector and the Board in this regard was wrong in law; and

3) In making the impugned decisions, the Board took into account irrelevant considerations in determining that the use of the lands as a residential drug rehabilitation facility would be inconsistent with the use specified in the planning permission granted in respect of those lands.

5. The Applicant makes arguments based on what they regard as the binding and conclusive nature of section 5 declarations. The Applicant submits that the declaration issued by Meath County Council, dated 29 September 2016 determined that the change of use of the permitted nursing home to a residential drug rehabilitation facility at the former old national school site, Ballivor, constituted exempted development, as both the nursing home use and the residential drug rehabilitation facility fell within Class 9, Part 4 of Schedule 2 of the 2001 Regulations and points out that this decision by the Council was not referred to the Board, nor was it subject to challenge by way of judicial review. The Applicant submits that, where a planning authority has issued a section 5 determination that has not been referred to the Board under the 2000 Act and which has not been challenged by way of judicial review is binding and conclusive. Consequently, the Applicant contends that the two declarations sought by the Second and Third Notice Parties were a collateral attack on, and in effect sought a review of, the earlier decision made by the Council on 29 September 2016. The Applicant also contends that, in determining the section 5 referrals, the Board permitted a collateral attack to be made to the Council's declaration.

6. The Applicant relies on the High Court decision of Baker J. in *Daly v. Kilronan Windfarm Ltd.* [2017] IEHC 308 as authority for the proposition that a section 5 determination is binding where it relates to substantially the same development as the subject-matter of subsequent enforcement proceedings. The Applicant maintains that the binding and conclusive nature of the Council's determination under section 5 is of particular significance given that the Applicant expended €9,050,000 in reliance upon said declaration. The Applicant further relies on *Michael Cronin (Readymix) Ltd. v. An Bord Pleanála* [2017] IESC 36, wherein the Supreme Court held that a section 5 declaration was determinative of whether development was exempted or not. They further rely on the decision of Baker J. in *Cleary Composting and Shredding Ltd. v. An Bord Pleanála* [2017] IEHC 458, in which the Judge considered the interplay between three section 5 declarations made by Kildare County Council between 2009 and 2011 and three later section 5 declarations made by the Board between 2013 and 2014 and held that the Board's declarations were made in light of the evidenced before it and the extent of the activity had changed from the subject matter of the earlier declarations made by the Council in that case. The Applicant argues that, unlike the situation in *Cleary Composting,* there was no change in planning or factual circumstances between the Council's declaration, in September 2016, and the Board's decisions, in November 2018 which, the Applicant argue related to the same question.

7. The Applicant relies on the fact that the Council declaration of 2016 was not challenged by way of an application for judicial review. Instead, they argue, the Second and Third Notice Parties sought, in February 2018, to circumvent the procedural exclusivity of judicial review proceedings by seeking instead two new separate section 5 declarations, which were then referred by the Council to the Board. The Applicant places reliance on the Supreme Court's decision in *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2. IR 128, wherein Finlay C.J. explained the rationale behind prohibiting challenges against decisions where the relevant time limit for challenging the decision had elapsed and relies, in particular, on a passage from that judgment in which the then Chief Justice held that: -

> "...the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by planning authorities and in particular one must assume that it was intended that a person who has obtained planning permission should, in the absence of judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision."

8. The Applicant further relies on *Kilross Properties Ltd. v. Electricity Supply Board* [2016] 1. IR 541 in which Hogan J. held that it was not open to the High Court to go behind an otherwise valid section 5 determination as to the planning status of the development, in the context of proceedings under section 160 of the 2000 Act, seeking a planning injunction to restrain unauthorised development. Furthermore, the Applicant relies on the Supreme Court's decision in *Sweetman v. An Bord Pleanála* [2018] IESC 1 in which Clarke, CJ, considered the rationale for the jurisprudence on collateral attack and stated, *inter alia*: -

> "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".

9. The Applicant also relies on the application of the principles of res judicata principles to give finality to the Council's 2016 declaration, in circumstances where it says there has been no change in planning facts or circumstances and relies on the decision in *Ashbourne Holdings v. An Bord Pleanála* [2003] 2 I.R. 114 wherein the Supreme Court stated, *inter alia*, that "a decision of a planning authority is capable of giving rise to a res judicata, but that not every decision will do so".

10. The Applicant also argues that the Board, in adopting its Inspector's assessment and recommendation, erred in law in concluding that the Board was required to determine the referral made by the planning authority. The Applicant submits that it was not "incumbent on the Board to determine the section 5(4) referrals before it", as the Inspector states in her report. Rather, it was open to the Board to make use of its express power under section 138 of the 2000 Act to dismiss an appeal or a referral. The Applicant argues that

the Board erred in not considering its discretionary power under s. 138(1), which confers on the Board an absolute discretion to dismiss an appeal or referral where the Board is satisfied that the appeal or referral should not be considered by it having regard to its nature or any previous permission which, in the Board's opinion, is relevant. The Applicant also relies on *Stovin v. Wise* [1996] A.C. 923 as authority for the proposition that, prior to exercising any discretionary power lawfully, there is a duty upon an administrative body to consider whether it should exercise its power in the first place. The Applicant submits that the Board failed to consider exercising its powers under section 138.

11. The Applicant further submits that the Inspector, and thereafter, the Board, took into account irrelevant considerations, including the provisions of subsection 4(2) of the 2000 Act. The Applicant argues that the manner in which the Board interpreted the provisions of Article 10(1)(c) of the 2001 Regulations meant that, notwithstanding the fact that the Board accepted that both of the uses are within the same use class (being Class 9 of Part 4 of Schedule 2), the Board applied an unduly narrow construction of Article 10 (1) (c) which would effectively preclude change from one type of use to another type of use within the same class. According to the Applicant, the construction applied by the Board would defeat the entire purpose of the exemptions contained in Part 4 of Schedule 2 of the 2001 Regulations and is wrong in law.

The Respondent's case

12. The position of the Respondent Board is that its decision was made in accordance with the terms of the 2000 Act and that the Respondent's decision did not constitute an impermissible collateral attack on the 2016 s. 5 declaration. The Respondent argues that there is no express prohibition on the exercise of the board's jurisdiction under s. 5(4) of the 2000 Act, where a planning authority has previously issued a declaration under s. 5(2). The Respondent argues that there is nothing within s. 5 itself, or anywhere else within the 2000 Act, which precluded or prohibited the notice parties from submitting the s. 5 applications to the council or which precluded or prohibited the council from making the relevant s. 5 referral to the board or which precluded or prohibited the board from making a determination on the said referral. The Respondent submits that any referral made to the board must comply with the provisions of s. 127 (1) of the 2000 Act and submits that the Applicant does not make any case that the relevant referral submitted by the council to the board did not comply with the requirements of that section. The Respondent argues that, in essence, the board received a valid referral which fell to be determined by it in accordance with the provisions of the 2000 Act. The Respondent argues that it would be strange if, despite the absence of any express provision to this effect, the 2000 Act should be interpreted as imposing an absolute barrier on the consideration of further s. 5 referrals and submits that, if such were the case, it would and should have been expressly provided for in the Act. The Respondent also argues that the Applicant's contention that the board should have exercised its discretion, pursuant to s. 138(1)(b), and refused to determine a referral validly made, is misconceived.

13. The Respondent argues that the collateral attack jurisprudence has no application in the present case. The Respondent argues that neither the referral by the council, pursuant to s. 5(4), nor the decisions of the board in respect of the referral, involved a challenge to the s. 5 declaration of 2016. Nor, the Respondent argues, did they involve a challenge to the validity of that earlier determination. The Respondent argues that the board's decisions, which are the subject of the present proceedings, do not have the consequence that the 2016, s. 5 declaration was unlawful and do not cast doubt over the lawfulness of the council's declaration. The Respondent submits that whatever consequences flow from the making of the 2016 declaration by the council, subsist.

14. The Respondent argues that, simply because the board reached a different conclusion to that reached by the council, does not amount to a collateral attack on the earlier decision and that such an argument is inconsistent with the terms of the 2000 Act itself. The Respondent submits that the 2000 Act envisages the board exercising, in effect, an appellate function with respect to decisions of planning authorities on s. 5 referrals, pursuant to which the board can consider the merits of a referral. The Respondent argues that it is obvious that the board is free to disagree with the planning authority's declaration and to reach a different conclusion on the question referred and argues that there can be no question of the board being bound by a planning authority's decision on a s. 5 referral.

15. The Respondent argues that it is implicit in the Applicant's submission that there is no bar in principle to subsequent s. 5 referrals being made where it can be argued that there has been a change in factual or planning circumstances. On that basis, the Respondent submits, it would clearly be necessary for the board to consider the factual scenario and the submissions made in any referral, whether or not there has been a prior declaration by a planning authority. The Respondent submits that there has been no prior consideration by the board of the question posed or the decision made in the 2016 s. 5 declaration. The Respondent relies on the fact that no submissions were made by the notice parties or by any third parties to the Council and points out that there had been no opportunity to make such submissions prior to the s. 5 declaration of 2016 being made by the local authority. In light of the foregoing, the Respondent submits that the Applicant is forced to argue, in effect, that because the council had reached a view on the matter on the basis of information provided by the Applicant on an earlier occasion, the board was required not merely to have regard to that earlier determination but to exercise its discretion and to dismiss the referral which, according to the Respondent, would be to refuse to make a decision on a valid application. The Respondent submits that there is nothing in the 2000 Act or in the relevant jurisprudence which would suggest that the board, in exercising its functions pursuant to s. 5 of the 2000 Act, is so constrained.

16. The Respondent submits that, contrary to the position adopted by the Applicant, a third party could not have "challenged" the council's decision by means of a referral to the board pursuant to s. 5(3), even if it had known of the determination and submits that only a party to whom the declaration is issued can refer the matter to the board. The Respondent submits that third parties have no entitlement to be notified of a request for a

declaration, have no entitled to make submissions on such a request and have no entitlement to refer a declaration made by the council to the board. The Respondent argues that in light of the Applicant's decision not to engage the board's review jurisdiction, there has never been any engagement of the board's jurisdiction to determine the questions entrusted to it by the Oireachtas, prior to the s. 5 applications which are the subject of the present proceedings. The Respondent rejects what it characterises as the Applicant's proposition that the board's jurisdiction was ousted or exhausted without it ever having been engaged, because only the party in a position to engage it, namely the Applicant, elected not to do so.

17. The Respondent further argues that the case law relied upon by the Applicant does not support the contention that a s. 5 determination by a planning authority operates to preclude the consideration of any subsequent referrals under s. 5. The Applicant submits that in *Michael Cronin (Readymix) Limited v. An Bord Pleanála* [2017] 2 IR 658, the court was concerned with how it should treat a s. 5 determination in the context of enforcement proceedings and it is in that context that the courts have concluded that a court cannot go behind an unchallenged s. 5 determination in subsequent enforcement proceedings. The Respondent argues that, insofar as the court determined, in *Sweetman v. An Bord Pleanála* [2017] IEHC 46, that the Applicant was required to challenge the lawfulness of a s. 5 determination by way of judicial review, it was because its lawfulness could not be revisited by the board in a subsequent planning application. The Respondent also submits that it is apparent from the decision in Cleary Composting v. An Bord Pleanála [2017] IEHC 458, that there is no absolute preclusion on the board revisiting the merits of an earlier s. 5 declaration, even in the context of the board's assessment of a planning application.

18. The Respondent submits that the Applicant's argument concerning the board's alleged failure to consider its jurisdiction to dismiss pursuant to s. 138 of the 2000 Act is based on the Applicant's contention that the board was required to exercise that jurisdiction in the particular circumstances of this case. According to the Respondent, the Applicant has presented no evidence that the board erred in understanding the scope of its jurisdiction and is asking the court to infer from the board's failure to exercise a jurisdiction which, according to the Applicant, the board was required to exercise, the Respondent must have erred. According to the Respondent, if there was no such requirement to exercise the jurisdiction, no such inference can be drawn. The Respondent relies, inter alia, on the decision of Hedigan J. in *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226, wherein the court held that: -

> *"Once there is any reasonable basis upon which the planning authority or the Board can make a decision in favour of or against a planning application or appeal, or can attach a condition thereto, the Court has no jurisdiction to interfere"*

19. Reliance is also placed on authorities including *Weston Ltd. v. An Bord Pleanála & Anor* [2010] IEHC 255 regarding the proposition that courts have consistently deferred to the planning expertise of expert decision makers such as the board. The Respondent also

submits that the board's power under s. 138(1)(b) of the 2000 Act is a power which the board may exercise at its absolute discretion, which is subject to review on limited grounds only. The Respondent submits that the discretion afforded to the board under s. 138 is wide and arises both as to whether the board thought it appropriate to invoke s. 138 and/or how it should be applied. The Respondent submits that the Inspector gave express consideration to the question of jurisdiction to determine the referrals under s. 5(4) of the 2000 Act and correctly concluded that there was no provision in the said Act which specifically dealt with the particular circumstances of the case. The Respondent characterises the height of the Applicant's case as being that the Inspector did not expressly record that she had considered s. 138(1) but submits that the Inspector did consider whether there was any statutory power which precluded her from considering the referral under s. 5(4) and concluded that there was not. The Respondent makes submissions in relation to the power of the board to dismiss an appeal or referral, in accordance with its absolute discretion, having regard to decided authorities including the Cleary Compost case and the decision in *Friends of the Irish Environment Limited v. An Bord Pleanála* [2018] IEHC 136, which cases, say the Respondent, concerned the jurisdiction of the board when in fact it had invoked its powers under s. 138, in contrast to the present case where the Applicant contends that the board erred in law for not exercising its power under s. 138 to dismiss the referral.

20. Relying on the principles in *State (Lynch) v. Cooney* [1982] 1 IR 337, the Respondent submits that the Inspector's analysis was clearly bona fide, factually sustainable and was not unreasonable, given that she expressly considered the previous 2016 s. 5 declaration and the request by the Applicant to dismiss the referral. The Respondent submits that the power under s. 138(1) does not create a mandatory obligation and that the board was entitled to conclude that the s. 5 referral made by the council both could and should be further considered by the board. The Respondent argues that it is only where the board has concluded that an appeal or referral should not be further considered by it that the jurisdiction under s. 138 arises. The Respondent also relies on the fact that the board order clearly states that: -

> "In making its decision, the board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions". *The Respondent argues that the onus is on the Applicant to prove otherwise. The Respondent submits that the board acted lawfully in exercising its power to determine the s. 5 referral and was under no obligation, in the present case, to use or to consider using its power under s. 138 to refuse to determine the reference.*

21. The Respondent rejects the claim that the Board took into account irrelevant considerations and argues that the board exercised its planning jurisdiction in a lawful manner and was entitled to conclude that the drug rehabilitation facility use would be inconsistent with the permitted nursing home use. The Respondent submits that the Inspector expressly referred to Article 10 of the planning and development regulations

2001. The Respondent argues that Article 10(1)(c) contemplates that a change of use within a particular class can result in a change to a use which is not consistent with the permitted use and, therefore, not exempt. The Respondent submits that it is a matter for planning judgment as to whether a new proposed use could be regarded as being inconsistent with a permitted use and that the board was entitled to have regard to the factors referred to in the Inspector's report in exercising that judgment. The Respondent argues that the inspector and the board were lawfully entitled to consider the wider context in s. 4(2) of the 2000 Act in construing the exempted development provisions in Part 4 of Schedule 2 to the Regulations, having regard to the nature of the proposed drug rehabilitation facility and permitted nursing home. The board concluded that, while the permitted nursing home use is a class of use coming within the scope of Class 9(b) of Part 4 of Schedule 2 to the Regulations, the use as a residential drug rehabilitation facility would be a factual change of use simpliciter which would raise material planning considerations. In that context, the board concluded that, in the first instance, there would be a change of use which ordinarily would be exempted under Part 4 of Schedule 2 to the Regulations, subject to the restrictions in Article 10 of the Regulations and, the Respondent submits, that was a planning judgment which the inspector was entitled to reach. The Respondent submits that the board was entitled to consider the relative planning considerations of both the permitted nursing home use and the drug rehabilitation facility before coming to a determination as to whether the change in use from nursing home use to drug rehabilitation facility would be consistent with the permitted use in Planning Registry Reference Number TA/140621.

22. The Respondent submits that the board lawfully exercised its powers under s. 5 of the 2000 Act and that the Applicant is under an obligation to prove otherwise and has failed to discharge that obligation and is not entitled to any of the reliefs sought.

Evidence before the court and findings of fact

23. Mr. Massimo Angius is a director of the Applicant and swore an affidavit on 10 January 2019. Mr. Richard Hamilton, a chartered town planner, swore an affidavit on behalf of the Applicant, also on 10 January 2019. A replying affidavit was sworn by Mr. Chris Clarke, secretary of the Respondent, on 15 March 2019. Mr. Angius swore a further affidavit on 7 May 2019. Other than affidavits of service, the foregoing comprises the sworn evidence before the court. Having carefully considered the contents of all affidavits in these proceedings and the exhibits thereto, I am satisfied that the following is the factual position and, for the sake of clarity, I propose to examine the relevant documents, in chronological order, and to set out my findings of fact, as follows.

11 December 2014

24. On 11 December 2014, the First Notice Party, Meath County Council ("the Council") issued a notification of a decision to grant planning permission. The notification of decision was in the following terms: -

> "In pursuance of the powers conferred upon them by the above-mentioned Act, Meath County Council has by Order dated 11.12.14 decided to grant permission to the above named for development of land, in accordance with the documents

submitted namely: - proposed change of use and refurbishment of the existing Old National School building to a proposed new nursing home and with the provision of additional extensions over two phases. The proposed change of use to a nursing home development is to provide for adequate day, dining, office, staff, spiritual and support space requirements. A Phase 1, 512.5m2 single storey extension is proposed to the rear of the existing and will consist of 13 no. single and 1 no. double accessible ensuite bedrooms with sanitary support spaces around a single garden courtyard arrangement and will require the demolition of the existing 23.5m2 bicycle shed in combination with a new landscaping arrangement to include for a horticulture area, the provision of solar/PV panels on the existing roof, together with the provision of 11 no. on-site parking spaces and all ancillary development works. An additional Phase 2 1795m2 single storey extension is proposed to the rear and will consist of 31 no. single and 5 no. double accessible ensuite bedrooms, additional day, staff, and sanitary spaces around a second garden courtyard arrangement and will require monitor alteration to the internal layout of the existing structure, created for the Phase 1 development. A 36m2, double height foyer space to the front of the elevation of the existing facade is also proposed under Phase 2 of the development, 27 no. additional parking spaces are to be provided to the rear of the proposed, together with all associated site and ancillary development works. Significant further information/revised plans submitted on this application At Old National School, Ballivor, Co. Meath, subject to the 25 conditions set out in the schedule attached.

Provided there is no appeal against this DECISION a grant of planning permission will issue at the end of four weeks."

No appeal was brought within the relevant four-week period.

25. Uncontroverted evidence is given in the affidavit of Massimo Angius that the Applicant was unwilling to spend millions of Euro to develop the relevant property without first ascertaining whether the property, which had the benefit of permission authorising works and use as a nursing home, could be used as a residential drug rehabilitation centre. The uncontroverted evidence by Mr Angius is that, prior to acquiring the property and lands, Narconon Trust sought confirmation from the Respondent that the property could be used as a residential drug rehabilitation centre, specifically by seeking a declaration pursuant to the provisions of s. 5 of the 2000 Act as to whether the change of use to a nursing home, previously permitted under planning permission reference EA 140621, to a residential drug rehabilitation facility is exempted development.

31 August 2016

26. On 31 August 2016, the Applicant sought a declaration from the Council pursuant to s. 5 of the 2000 Act. A three – page form was completed by the Applicant which form is entitled "Application form – Declaration on Development & Exempted Development – Part 1 Section 5 of the Planning and Development Act 2000 – 2015, as amended.". This seems to be a standard form, containing pre-printed questions, 1 – 12, which the Applicant

completed. The question put to the Council, in the context of the Applicant's request for a declaration, can be seen from section number 4 of the application and was as follows: -

> **"4. Description of development:**
> The planning authority is asked to determine whether the change of use of the permitted nursing home at the subject site to a "*residential drug rehabilitation facility*" is exempted development.
>
> Schedule 2 Part 4 of the Planning & Development Regulations 2001-2016 lists 11 classes of uses, under which the change from one use to another use within each class may be considered exempted development.
>
> We refer to Class 9 of Schedule 2 Part 4 of the Regulations:
>
> *Class 9*
>
> *Use-*
>
> *(a) for the provision of residential accommodation and care to people in need of care (but not the use of a house for that purpose),*
> *(b) as a hospital or nursing home,*
> *(c) as a residential school, residential college or residential training centre.*
>
> We refer the attached letter from the Narconon Trust which details the proposed use. This clearly corresponds with Class 9(a) – "the provision of residential accommodation and care to people in need of care."
>
> The planning authority is therefore requested to issue a formal declaration confirming that the change of use from "nursing home" to "residential drug rehabilitation facility" is therefore exempted development".

27. When submitting this application, the Applicant's interest in the site was stated, in response to question 10, to be that of "Potential Purchaser". The application was accompanied by a number of items including a letter of consent from the then owner of the property, certain architectural drawings and a letter from the Applicant, dated 30 August 2016, signed by Mr Angius, which stated the following: -

> "As discussed Narconon provides a drug-free residential drug-rehabilitation programme which typically lasts 3 months per client.
>
> Narconon (as the name suggests) has zero tolerance with drugs and alcohol. The centre does not distribute medicines or methadone to its clients. It does not accept day-type clients but operates only by prior appointment. Therefore there would not be traffic of clients in and out of the facility on a daily basis.

While participating in the programme, clients are not allowed to leave the facility except towards the end of the programme, they may take a walk accompanied by a member of staff. Unauthorised permission from the building results in immediate expulsion from the programme. The programme consists of three phases:

(a) Withdrawal. This is done without drugs, but intake of vitamins and minerals which tend to alleviate withdrawal symptoms. This is a 24-7 supervised phase and must be supervised by a doctor. Once a person can sleep 7 hours a night and eat well, they go to the next phase. This may last 7-10 days.

(b) Detox/Sauna. The next phase consists of going into a sauna daily for 2-3 weeks or more and sweating out of the body all of the drug residues still in the body. Due to the hours in the sauna and the physical stress involved, this phase must also be authorised by the doctor after a thorough physical examination. The doctor is typically an independent outside professional.

(c) Study. In this phase the client studies several courses to learn how to choose his friends, how to improve conditions and how to begin his life afresh.

I am available to meet with planning officials to discuss in more detail if required to do so."

28 September 2016

28. In the context of considering the application for a declaration, a "Planning Report" was provided by a Ms. Brenda O'Neill, executive planner, dated 28 September 2016 which was addressed to a Mr. Pádraig McGuire, senior executive planner. This 4 – page report began as follows: -

> "The Applicant is seeking a declaration as to whether the change of use from permitted nursing home to a residential drug rehabilitation facility at the old National School Site in Ballivor is or is not exempted development, in accordance with s. 5 of the Planning and Development Act 2000 – 2015".

The report went on to set out information under the following headings: -

> "Site location", "Site history", "Relevant legislation", "Assessment", and "Conclusion and Recommendation".

The Conclusion and Recommendation section stated the following: -

> "In considering this application, regard has been had to ;
>
> - Section 3(1) of the Planning and Development Acts 2000-2015;
> - Section 4(1)(h) of the Planning and Development Acts 2000-2015;
> - Article 6(1) of the Planning and Development Regulations 2001-2015;
> - Article 9(1) of the Planning and Development Regulations 2001-2015;
> - Schedule 2, Part 4, Exempted development – Classes of Use, Class 6 of the Planning and Development Regulations 2001-2015.

The proposed development is considered to be development and is exempted development within the meaning of the Planning and Development Acts 2000-2015.

It is recommended that an exemption certificate be granted as the proposed development constitutes development that is exempted development according to Schedule 2, Part 4, Exempted development – Classes of Use, Class 6 of the Planning and Development Regulations 2001-2015.

29 September 2016

29. On 29 September 2016, Meath County Council issue a "DECLARATION" to the Applicant (hereinafter "the declaration"). This one – page document has "Planning Reference Number: TA/S51639" and records the "Application Receipt Date: 05/09/2016". The Declaration states as follows: -

> "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".

The declaration contained two notes as follows: -

1) "Any appeal against a Declaration of a Planning Authority under s. 5, subs. 3(a) of the Planning and Development Act 2000 may be made to

   An Bord Pleanala by the Applicant WITHIN FOUR WEEK beginning on the date of issue of the Declaration.

2) Appeals to be addressed to An Bord Pleanala, 64 Marlborough Street, Dublin 1. An appeal by the Applicant should be accompanied by this form. The fee for an appeal against a declaration of the planning authority is €220".

There was no appeal made in respect of the declaration.

30. Having regard to the provisions of s. 50 (2) (a) of the 2000 Act and the evidence in this case, I am satisfied that the Council's Declaration dated 29 September 2016 was a *"decision made*" by the Council "*in the performance…of a function*" under the 2000 Act.

31. There is no evidence that the Council failed to publish for inspection on its website or failed to make available for inspection and purchase the relevant information required by Section 5(7B) (a) of the 2000 Act. There is no evidence that the particulars of the Council's section 5 Declaration were not entered in the appropriate register, in accordance with the mandatory requirements imposed by Section 7 (2) (h) of the 2000 Act. Nor is there any evidence that the relevant register was not kept at the offices of the planning authority and available for inspection during office hours, as also provided for under section 7.

32. It is also a fact that no party sought to challenge the Council's 2016 Declaration by way of an application for Judicial Review under section 50 of the 2000 Act. Nor did any party seek an extension of time with regard to the bringing of an application for Judicial Review.

6 December 2016

33. The Applicant has exhibited a copy of a contract, dated 6 December 2016, in respect of the purchase, for €1.3 million, of property described as "*All that and those the entire Folio MH 69873 F comprising substantially completed yet unoccupied nursing home known as Raspberry Wood Nursing Home and located at Ballivor, Co. Meath"* and this is not disputed by the Respondent. The date of this contract post-dates the Council's s. 5 Declaration.

34. I accept the uncontroverted evidence by Mr. Angius that the Applicant proceeded with the purchase of the relevant property on the basis that the Council had issued a s. 5 declaration that the proposed use of the property as a residential drug rehabilitation centre was exempted development. I accept the uncontroverted evidence that the Applicant has carried out significant construction works at the property, pursuant to planning permission reference TA 140621 in reliance upon the decision made by the Council in 2016 that the use of the property as a residential drug rehabilitation centre is exempted development. I accept, also, the uncontroverted evidence given by Mr. Angius in his second affidavit that, as of 10 January 2019, the Applicant has raised and expended approximately €9,050,000 on the facility at Ballivor, including €1.3 million for the purchase price of the relevant property, with the remainder, some €7,750,000.00, having been expended on construction works and fit-out of the facility.

16 February 2018

35. On 16 February 2018, an application was made to the Council by the Second Notice Party, Ballivor Community Group, in a form entitled "Application form – Declaration on Development & Exempted Development – Part 1 Section 5 of the Planning and Development Act 2000 – 2015, as amended.". The address given for Ballivor Community Group is "c/o Mr. Noel French, 10 Kells Road, Trim, Co. Meath". The format of the application is standard, in that the pre-printed questions, 1 – 12, are identical to those questions in the application form which was completed by the Applicant on 31 August 2016. Section 4 of the 16 February 2016 application form contains standard wording, in bold, followed by the Second Notice Party's input, as follows:

> "4. Description of development: Use of the existing permitted "nursing home" building by Narconon Trust for the purpose of providing a residential drug rehabilitation facility".

36. The 2-page form does not refer to any change in planning facts, such as the height, area, design or location of the relevant development. In response to questions 7, 8 and 9 on the form, which seek information as to the *"height of structure", "the floor area of the proposed development" and the "List of plans/drawings etc submitted*", the Second Notice Party has stated "*n/a".*

Section 12 of the form asks the applicant "Are you aware of any previous planning application/s on this site?" in response to which the second named Respondent has placed a "tick" after the word "YES". Question 12 (b) of the form states "If "YES" please supply details", to which the second named Respondent has said "reference Cover Letter". The application was accompanied by a 6-page letter, dated 14 February 2018, from HRA Planning, chartered town planning consultants, addressed to the Council. The title of the said letter contains a question which is put in the following terms: -

> "Section 5 Request for Declaration on Development
>
> Whether the change of use and activity of "Narconon Trust" as a residential drug rehabilitation facility at the Old National School, Ballivor Village, Co. Meath is 'development' and is not 'exempted development'".

The letter makes it clear that Ballivor Community Group is comprised of a number of individuals who are listed in the letter as being Mr. Noel French, Karen Traynor, Sinead McGrath, Ann Corrigan, Linda Wilson, Melanie Drake, Sue Davis and Claire O'Meara. The letter goes on to set out information under the headings of "INTRODUCTION", "THE QUERY", "BACKGROUND", "MATERIAL CONSIDERATION UPON WHICH THE QUERIES ARE BASED", and "CONCLUSION". The query in the body of the letter is stated in the following terms: -

> "2.0 THE QUERY:
>
> Whether 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."

37. I am satisfied that, as a matter of fact, the question put to the Council in the s. 5 application by Ballivor Community Group, dated 16 February 2018, is the same, in substance, as the question put to the Council by the Applicant in its s. 5 application dated 31 August 2016, which question the Council previously answered by way of the Council's declaration, dated 29 September 2016, wherein the Council declared the relevant development to be "EXEMPT".

38. I am satisfied, as a matter of fact, that when asking the Council the same question, in 2018, as had been decided in 2016, the Second Notice Party was aware of the Council's 29 September 2016 Declaration. This is apparent from paragraph 1.0 on the second page of the HRA Planning letter which explicitly requests the Council to consider the matter ". . . *irrespective of the decision made previously by the Council under* TA/S51639". TA/S51639 is the planning reference number for the Council's declaration dated 29 September 2016. In fact, the 14 February 2018 letter from HRA Planning contains no less than three references to "TA/S 51639", being the planning reference number for the Council's 29 September 2016 declaration.

39. I am also satisfied that the HRA planning letter, dated 14 February 2018, which accompanied the s. 5 application form submitted by Ballivor Community group contains, inter alia, specific references to information and documentation which was previously submitted to the Council, in 2016, in the context of the Applicant's s. 5 request and the Council's Declaration under planning reference number TA/S 51639. I am satisfied that, as a matter of fact, HRA Planning put forward arguments on behalf of the Second Notice Party, in their 14 February 2018 letter, which are based at least in part on the very same information which was submitted to the Council by the Applicant in 2016 and that this was done in an effort to persuade the Council to reach a different decision, in 2018, than the Council had come to in the Council's Declaration dated 29 September 2016, under planning reference TA/S 51639. By way of example, internal para. 3.3 of the HRA planning letter states the following: -

> **"3.3 Proposed Use of the Property**
> It is proposed to operate a drug rehabilitation facility from the premises. As stated in previous correspondence submitted to the Council under TA/S 56139, Narconon provides a drug – free residential rehabilitation programme which typically lasts three months per client. It is stated that the facility does not distribute medicines or Methadone to its clients and that the programme is run in three phases including withdrawal, detox/sauna and study. Phase 1 & 2 of the programme including withdrawal and detox/sauna must be authorised by a qualified doctor. However, it would appear that there are no doctors on site, as documentation on file TA/S 51639 states that, a doctor is typically an independent, outside professional".

The foregoing is not new information. It is the same information which was put to the Council by the Applicant as part of its 2016 s. 5 application, but it is put to the Council again in 2018 in the context of the Second Notice Party's s. 5 application which seeks a different answer to the same question.

40. I am satisfied that the 2018 application by the Ballivor Community Group includes submissions in respect of matters which the Council had regard to, prior to issuing its 2016 declaration and I am also satisfied that, as a matter of fact, these submissions were made in 2018 in an effort to bring about a different result than confirmed in the Council's 2016 declaration. By way of example, the following is a verbatim extract from internal page 5 of the HRA Planning letter which accompanied the Second Notice Party's application form:

> **"4.2 Whether Development is Exempted Development**
> Consideration as to whether development is exempted or not as a consequence of the proposed use and activity is based on an interpretation of the provision of Schedule 2, Part 4, Exempted Development – Classes of Use and in particular Class 9. Article 10(1) of the Planning and Development Regulations 2001 – 2018 states that "*development which consists of a change of use within any of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act*" subject to certain limitations and restrictions.

Class 9 use includes: -

(a) Use for the provision of residential accommodation and care to people in need of care (but not the use of a house for that purpose).
(b) As a hospital or nursing home.
(c) As a residential school, residential college, or residential training centre.

It is submitted that the use of the subject site and building by Narconon Trust as a drugs rehabilitation facility does not fall within any of the uses detailed under Class 9 and therefore the change of use cannot be deemed to be exempted development".

41. The foregoing submission which was made in 2018, to the effect that the use of the relevant site and buildings by the Applicant as a drugs rehabilitation facility does not fall within any of the uses detailed under Class 9 is made regarding an issue which, as a matter of fact, the Council considered and determined in September 2016. Indeed, p. 3 of the Planning Report by Ms. Brenda O'Neill, Executive Planner, dated 26 September 2016, explicitly refers to the foregoing classes of use (a), (b) and (c) before going on to make an assessment of the issue, on p. 4 of the Planning Report, as follows: -

> "A nursing home use is within the same class as a use for the provision of residential accommodation and care to people in need of care (but not the use of a house for that purpose). A residential drug rehabilitation facility is considered to be a use consistent with a use for the provision of residential accommodation and care to people in need of care".

42. The Second Notice Party was, as a matter of fact, making a submission, in 2018, on an issue which the Council had previously considered and determined in 2016. I am also satisfied that, as a matter of fact, the Second Notice Party was arguing, in 2018, that the Council's 2016 decision was wrong. The same issue was being raised again, in 2018, to try and obtain a different result than the one given by the Council in 2016. Another instance of matters being raising, in 2018, which the Council must have considered and determined in 2016, in an effort by the Second Notice Party to obtain a different – i.e. what they regarded as the correct - answer, can be seen from the final paragraph of clause 4.1 of the HRA planning letter, which states: -

> "It is submitted that by reason of its client base serving a narrow and restricted section of society, its unregulated operation, and its non – interactive, secluded and secure environment, the proposed use of the building as a drugs rehabilitation facility by Narconon Trust would result in a material change of use and would, therefore, constitute development within the meaning of s. 3 of the Planning and Development Act 2000."

43. The foregoing submission is not based any new or changed planning facts or circumstances which arose or were alleged to have arisen since the Council issued its 2016 Declaration, and there is no evidence before the court of any such change. Rather, it is an argument, made in 2018, on the basis of unchanged facts, in circumstances where

the Council previously decided the same issue in 2016. Having regard to the evidence, I am also satisfied that, as a matter of fact, the Second Notice Party was not operating on a belief, even a mistaken belief, that there had been any change in planning facts or circumstances between the Council's declaration in 2016 and the submission of their s. 5 application in 2018. I am equally satisfied that, as a matter of fact, the Ballivor Community Group did not purport to rely, for the purposes of their 2018 s. 5 application to the Council, on any change in any planning facts or circumstances alleged to have occurred since the Council issued its declaration in 2016.

44. I also find, as a matter of fact, that at the time of submitting their 2018 s. 5 application to the Council, the Ballivor Community Group explicitly objected to the 2016 Declaration. This is evident from the first sentence on the second page of the HRA planning letter dated 14 February 2018 which states: -

> *"Attached to this submission is a copy of a petition objecting to this proposal signed by more than 600 residents of Ballivor."*

It is clear that "*this proposal*" is a reference to the operation of a drug rehabilitation facility by the Applicant which, according to the Council's 2016 declaration, constituted exempted development. There is no evidence before the court that all or any of those 600 residents referred to on the second page of the HRA Planning letter or that all or any of the members of the Ballivor Community Group named on the first page of the letter were unaware of the making of the Council's 2016 at the time it was made. No evidence is before the court that the members of the Ballivor Community Group did not have access to the register maintained by the Council under section 7 of the 2000 Act. No evidence is before the court as to when the Second Notice Party became aware of the Council's 2016 Declaration but it is clear from the contents of the Second Notice Party's 2018 s.5 application that they regarded the Council's 2016 Declaration as wrong.

45. It is not disputed that the Second Notice Party did not challenge the 2016 Declaration by way of an application for judicial review, in accordance with s. 50 of the 2000 Act. It is also a matter of fact that the Second Notice Party did not bring any application, pursuant to s. 50 (8) of the 2000 Act, to seek an extension of time to bring judicial review proceedings.

16 February 2016

46. A second s. 5 application was made to the Council which is also dated 16 February 2018. This was made by the Third Notice Party, Trim Municipal District Council. There is plainly a commonality between the two s. 5 applications dated 16 February 2018. The Third Notice Party's application was signed by Mr. Noel French whom, I note, is also a member of the Second Notice Party and was named as such in the HRA Planning letter, dated 14 February 2018, referred to above. The same address, namely "c/o Mr Noel French 10 Kells Rd, Trim, Co. Meath" is given on both of the s. 5 application, made by the Second and Third Notice Parties, respectively, dated 16 February 2018.

47. The application form is, again, a standard one and the question put to the Council is described in the following terms at section 4 of the Third Notice Party's application form: -

> **"4. Description of Development:**
> The planning authority is asked to determine whether the change of use of the permitted nursing home under TA 140621 to a residential drug rehabilitation facility is exempted development".

48. I am satisfied that, as a matter of fact, there is no material difference between any of the three questions put to the Council in the three s.5 applications i.e. the application dated 31 August 2016 by the Applicant herein and both applications dated 16 February 2018. This is evident when one compares the wording of each question and, for ease of reference, I now set out the three questions, verbatim, as follows: -

> **The question asked, in 2016, in the s. 5 application by Narconon Trust: -**
> *"The planning authority is asked to determine whether the change of use of the permitted nursing home at the subject site to a "residential drug rehabilitation facility" is exempted development".*
>
> **The question asked, in 2018, in the s. 5 application by Ballivor Community Group (paragraph 2.0 of HRA Planning letter): -**
> *"Whether 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 question asked, in 2018, in the s. 5 application by Trim Municipal District Council: -**
> *"The planning authority is asked to determine whether the change of use of the permitted nursing home under TA 140621 to a residential drug rehabilitation facility is exempted development".*

I am satisfied that, as a matter of fact, these three questions are, in substance, the same. Each is the same question which was put to the Council by the Applicant on 31 August 2016 and which the Council answered by way of its 29 September 2016 Declaration.

49. Section 12 of the Third Notice Party's application form contains the following standard question: *"Are you aware of any previous planning application/s on this site?*", to which the Applicant has placed a "tick" opposite the "YES" option. At section 12(b) of the application form, in response to "*If "YES" please supply details*" the Third Notice Party has stated "*TA 140621*", which is the planning reference number for the Council's decision to grant permission, by Order dated 11 December 2014, for the change of use from a National School building to a proposed new Nursing Home.

50. The Third Notice Party's application form was accompanied by a 16 February 2018 letter on the headed paper of "Trim Municipal District Council". This letter was signed by

Councillor Noel French on behalf of the Third Notice Party and was addressed to the Council. Among other things, the 16 February 2018 letter evidences the fact that the Third Notice Party was aware, at that point, of the existence and effect of the s. 5 Declaration granted by the Council on 29 September 2016 under planning reference number TA/S 51639. This is clear from the following statement in the letter: -

> "The Councillors for the area were shocked to find out that a new owner of the property is able to continue to develop this site using the existing exception (sic) despite a material change to the use of the development. The exemption granted for a drugs rehabilitation care facility, in our opinion falls outside of the boundary of the permission granted".

51. I am satisfied that the reference in this letter to "*the exemption granted*" is a reference to the 29 September 2016 declaration issued by the Council. I also find, as a matter of fact, that the Third Notice Party was explicitly making an objection, in 2018, to the declaration which the Council had issued in 2016. This is clear from the first sentences in the 16 February 2018 letter, in which the Third Notice Party stated the following: -

> "The Councillors of the Trim Municipal District are writing this letter to accompany our section 5 form to object to the exemption granted under the existing planning reference File Number TA 140621. We have several concerns about this application and would like to briefly outline them . . ."

Reference number TA 140621 concerns the 2014 grant of change of use, but I am satisfied that the words "…*to object to the exemption granted*…" states an objection to the 2016 declaration. This is also plain from the first extract of the 16 February 2018 letter which I have quoted above in which Mr. French states: "*The exemption granted for a drugs rehabilitation care facility, in our opinion falls outside of the boundary of the permission granted"* By making the foregoing assertion, the Third Notice was, in fact, saying that the Council had made an incorrect decision when it issued it's 29 September 2016 Declaration and the Third Notice Party was asking the Council to change its answer to the one which accorded with the Third Notice Party's view.

52. The fact that, in 2018, the Third Notice Party regarded, as wrong, the Council's 2016 Declaration is also clear from other statements in the 16 February 2016 letter which contains, inter alia, the following: -

> "Care for the elderly involves clear care giving but where medical interventions are required, the residents fall under the care of the HSE. Indeed, residents requiring medical care beyond a GP visit would be transported to hospital. The standards in this type of facility would be set down by the HSE and a number of support services would be in place.
>
> However, a drug rehabilitation facility does not have any regulatory controls imposed on it. Most drug rehabilitation facilities are run by the HSE and medical care of those with addictions are planned and agreed with medical practitioners.

The proposed facility does not operate on this basis, in fact quite the opposite, there is secrecy, no inter-agency working and no approved medical programme. As Councillors in the area we have a duty of care to both the community and the potential users of this service. Based on our knowledge of this programme we feel that Meath County Council will be lacking in its care for the users of this service by granting an exemption when the use is so materially different from that originally granted".

53. None of the foregoing could be said to be new material or information arising since 29 September 2016. Despite the fact that Trim Municipal District Council was aware, on 16 February 2018, of the existence of the 2016 s.5 declaration, the foregoing statements were clearly made by the Third Notice Party in an effort to persuade the Council to give a different answer, in 2018, to the same question it had considered and answered, in 2016, in circumstances where the Third Notice Party clearly regarded the Council's 2016 answer as wrong.

54. Mr. French, on behalf of the Third Notice Party, offered a number of other views in the 16 February 2018 letter and in the document which accompanied it, entitled "Narconon Ballivor", which document ended with the statement "Information complied by Noel French", but I am satisfied that none of the material which comprised the Third Notice Party's s. 5 application could fairly be said to comprise evidence of any new or changed planning facts or circumstances regarding the property, since the date of the Council's 29 September 2016 s. 5 declaration. I am satisfied that, as a matter of fact, the Third Notice Party did not purport to rely, for the purposes of their 2018 s. 5 application to the Council, on any change in planning facts or circumstances alleged to have occurred since the Council issued its declaration in 2016. Having regard to the evidence, I am also satisfied that, as a matter of fact, Trim Municipal District Council was not operating on a belief, even a mistaken one, that there had been any change in planning facts or circumstances between the Council's declaration of 2016 and the submission of their s. 5 application in 2018.

55. There is no evidence before the court that the members of the Third Notice Party were unaware of the making of the Council's 2016 declaration at the time it was made. There is no evidence that the Third Notice Party did not have access to the particulars on the relevant register maintained pursuant to section 7 of the 2000 Act. There is no evidence before the Court as to when the Third Notice Party learned of the making of the Declaration. It is not in dispute that the Third Notice Party did not challenge the 2016 Declaration by way of an application for judicial review, in accordance with s. 50 of the 2000 Act. Nor did the Third Notice Party bring any application, pursuant to s. 50 (8) of the 2000 Act, to seek an extension of time to bring judicial review proceedings.

26 February 2018

56. On 26 February 2018, Meath County Council wrote a letter, to an Bord Pleanála in relation to "Planning and Development Act s. 5(4) referral TAS 51806 & TAS 51807 – Ballivor Community Group/Trim Municipal District". The letter stated as follows: -

"Dear Sir,

I refer to the attached s. 5 applications lodged with Meath County Council on 19th February 2018.

The subject development consists of change of use of the permitted Nursing Home under planning reference TA 140621 to a residential drug rehabilitation facility at Ballivor Co. Meath.

Meath County Council issued a Declaration reference TA/S51639 on 29/09/2016 stating that "the change of use of the permitted nursing home to a residential drug rehabilitation facility" at the former Old National School site at Ballivor, was Exempt. Copy of declaration, Planners Report & application form attached.

Given the fact that Meath County Council have already issued a determination on this matter and two subsequent requests for a declaration have been received, Meath County Council refers this application to An Bord Pleanala pursuant to s. 5(4) of the Planning and Development Acts 2000 – 2017 and seeks a declaration as to whether change of use of the permitted nursing home under planning reference TA 140621 to a residential drug rehabilitation facility constitutes exempted development.

I enclose the requisite fee.

Yours faithfully".

57. The said 26 February 2018 letter from the Council did not refer the Board's attention to any change in planning facts or circumstances which might have occurred between the Council's s. 5 Declaration dated 29 September 2016 and the two requests made to the Council by the Second and Third Notice Parties, dated 16 February 2019. The Council's letter did not suggest that there had been any change in planning facts or circumstances whatsoever since the Council issued its declaration. Nor did the letter refer to any alleged change in planning facts or circumstances between 16 February 2018, when the s.5 applications were submitted to the Council by the Second and Third Notice Parties, and the date of the Council's letter to the Board, being 26 February 2018.

12 March 2018

58. The Respondent Board wrote to the Applicant by letter dated 12 March 2018, in accordance with s. 129 of the 2000 Act, inviting the Applicant to make ". . . *submissions or observations in writing to the Board in relation to the referral within a period of 4 weeks* . . ." The Respondent's letter described the relevant question in the heading of the letter in the following terms: -

"Re: Whether the change of use of the permitted nursing home under register reference number TA/140621 to a residential drug rehabilitation facility is or is not development or is or is not exempted development".

59. A second letter, also dated 12 March 2018 was sent to the Applicant, reflecting the fact that two separate s. 5 requests had been submitted by the Second and Third Notice Parties, respectively. In the second letter, the relevant question was stated in the heading to be as follows: -

> "Re: Whether the change of use of a permitted nursing home (permitted under TA/140621) to a residential drug rehabilitation facility is or is not development or is or is not exempted development".

I am satisfied that there is no material difference whatsoever between the two questions in the letters dated 12 March 2018. I am also satisfied that this is the same question which was asked by the Applicant in 2016, answered by the Council by way of its 29 September 2016 declaration, put to the Council, again, by the Second and Third Notice Parties, on 16 February 2018 and referred by the Council to the Board, on 26 February 2018.

15 March 2018

60. On 15 March 2018, a submission was made to the Respondent Board on behalf of the Applicant by Noel Smyth & Partners, solicitors, in a letter which made clear that a single response was being made in respect of the two letters dated 12 March 2018. Extracts from the 15 March 2018 submission include the following: -

> "The purpose of this letter is to request An Bord Pleanála to dismiss the above entitled s. 5 referrals as invalid in circumstances where the precise question raised by the referrals is the subject of an earlier s. 5 declaration issued by Meath County Council. This earlier declaration is dated 29 September 2016 and bears the planning register reference TA/S51639 …
>
> "The 2016 declaration was subject neither to review by An Bord Pleanála under s. 5(3) of the PDA 2000, nor to judicial review by the High Court under s. 50 of the PDA 2000. The relevant statutory time – limits have long since expired. Accordingly, the 2016 declaration is now conclusive and is binding upon An Bord Pleanála. An Bord Pleanála does not have jurisdiction to question the validity of the 2016 declaration, and the board must therefore dismiss the above entitled referrals as invalid".

25 June 2018

61. A submission was made on behalf of the Second Notice Party, by way of a letter dated 25 June 2018 from Clarke Jeffers & Co., solicitors, paragraph number 1 on the second page of which began as follows: -

> "1. This is a Response to the submission of Noel Smyth, solicitors on behalf of Narconon Trust dated the 15th March 2018. There is no basis for the request that the appeal be dismissed as invalid. The submission is based on a misunderstanding of the case law cited in particular the judgment in Killross and also the Sweetman case. The submission purports to advancing the entirely novel proposition that An Bord Pleanála is some way bound by a prior determination of the planning authority

– a proposition which has no basis in either the text of the Planning and Development Act, case law and/or practice. It is also worth observing that insofar as it is contended that An Bord Pleanála has no jurisdiction because of the earlier Meath County Council declaration, Meath County Council does not itself share such a view, as it was Meath County Council which referred the matter to An Bord Pleanála due to its earlier declaration. If it was of the view that An Bord Pleanála had no jurisdiction in such circumstances, it would not have referred the matter on to An Bord Pleanála".

12 September 2018

62. An Inspector's report was prepared by Ms. Deirdre McGabhann, senior planning inspector with An Bord Pleanála. As is clear from the first page of the Report, it was prepared to address the following question: -

> "Whether the change of use of a permitted nursing home (permitted under TA/140621) to a residential drug rehabilitation facility is or is not development or is or is not exempted development".

I am satisfied that this is the same question which the Applicant raised in 2016, which the Council answered by way of the 2016 Declaration, which the Second and Third Notice Parties put to the Council again in 2018 and which the Council referred to the Board. I am satisfied that the Inspector's report does not identify any change in planning facts or circumstances between 29 September 2016, when the Council issued its s. 5 declaration, and 19 February 2018, when the Council received the s. 5 applications from Trim Municipal District Council and Ballivor Community Group, respectively. Section 7.0 of the Inspector's report is entitled "The Referral". Section 7.1.1 begins as follows:-

> "In their s. 5 application form for a declaration on the change of use of the permitted nursing home to a drug rehabilitation facility, Trim Municipal District Council set out the following arguments:"

63. This is followed by a summary of the arguments put forward by the Third Notice Party, none of which are based on any change in planning facts or circumstances alleged to have occurred since the 2016 Declaration. This is then followed by section 7.1.2, which begins: -

> "The following arguments are set out by Ballivor Community Group. Their submission includes a petition signed by over 600 residents".

A summary is then given of the arguments advanced by the Second Notice Party, none of which are based on any change in planning facts or circumstances occurring since the 2016 s. 5 declaration.

64. It is clear from the contents of the Inspector's report that a site inspection took place. Clause 1.1 of the Inspector's report states: -

"At the time of site inspection, the redevelopment and extension of the buildings was underway".

The senior planning inspector does not make reference in her report, to any change in planning facts or circumstances, as a result of the site inspection or otherwise, which would constitute additional matters to be considered in 2018, which were not considered, in 2016.

In section 9.0 under the heading "Assessment", the Inspector summarises the task in the following terms: -

"9.1 This assessment concerns three matters; (i) Does the Board have jurisdiction to determine the referrals made? (ii) Is the proposed change of use development, and (iii) If it is development, is the proposed change of use exempted development. I examine the matters in turn".

65. The Inspector then examined what she considered to be the board's jurisdiction to determine the referrals and, after commenting on both the *Killross* and *Sweetman* decisions, came to the following conclusions: -

"9.2.6 Those cases highlight the status of a s. 5 declaration, in its own right, the inability of any party to challenge this after the expiry of statutory time limits and its status in the context of enforcement action for the same development.

`9.2.7 However, in this instance, the planning authority has referred the s. 5 applications by Ballivor Community Group and Trim Municipal District Council to the Board under s. 5(4) of the Act, i.e. there is no review sought of the planning authority's previous declaration. Further, and importantly, there are no provisions in the Act (or case law) which specifically cater for the circumstances before the Board or legal constructs which prevented adjudicating on the referral cases before it, despite the previous earlier determination by the planning authorities in respect of the same development. I am of the opinion therefore that it is incumbent on the Board to determine the s. 5(4) referrals before it".

Section 11.0 of the Inspector's report contains her Recommendation in the form of a draft order, which draft concludes with the following words:

"NOW THEREFORE An Board Pleanala, 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."

19 November 2018

66. On 19 November 2018 the Board issued an Order under reference ABP-301055-18. The final paragraph of the second page states as follows:

"NOW THEREFORE An Board Pleanala, in exercise of the powers conferred on it by section 5(4) of the Planning and Development Act, 2000, as amended, 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, at the old National School, Ballivor Village, County Meath, is development and is not exempted development."

In addition to being satisfied that there is no evidence of any change in planning facts or circumstances between the Council's 29 September 2016 declaration and the submission by both Notice Parties of their s. 5 applications on 16 February 2018, I am also satisfied that there is no evidence of any change in planning facts or circumstances between the submission, on 16 February 2018, of the Second and Third Notice Parties' s. 5 applications, and 19 November 2018, when the Board made its orders.

Discussion and Decision

67. Counsel for the parties have very helpfully furnished the court with an agreed book of authorities and I find the following of particular assistance in approaching the issues which arise in this case.

68. In *Killross Properties Limited v. ESB & Anor* [2016] 1 IR 541, at p.551, Mr Justice Hogan, who was then in the Court of Appeal, analysed the Supreme Court's decision in *Grianán an Aileach Centre v. Donegal County Council* [2004] IESC 43, [2004] 2 I.R. 625. At para. 25 of his judgment, Hogan J. stated: -

"[25] This question was, however, considered by me as a judge of the High Court in *Wicklow C.C. v. Fortune (No.3)* [2013] IEHC 397 (Unreported, High Court, Hogan J., 5 September 2013). In that case one of the issues was whether in s. 160 proceedings the High Court had a jurisdiction to determine whether a particular development constituted exempted development where the relevant local authority had already determined following a s. 5 reference that the development in question was not exempted development. I nevertheless expressed the view at p. 9 that the effect of *Grianán an Aileach v. Donegal County Council (No.2)* [2004] IESC 43, [2004] 2 I.R. 625 was that:

'12 . . .This decision must be taken impliedly to preclude the High Court from dealing with this matter in enforcement proceedings *in these precise circumstances* where a s. 5 application for a certificate of exemption has been refused and has not been quashed in judicial review proceedings.

13. Here it must be recalled that a s. 5 refusal forms part of the formal planning history and the details of the refusal are entered on a public register: see s. 5(3) of the 2000 Act. If this Court could grant a form of declaration in enforcement proceedings that the development was exempt, there would be in existence two contradictory official determinations of this question, with the real potential for confusion and uncertainty of the very kind which so exercised the Supreme Court in *Grianán an Aileach Centre v. Donegal County Council (No.2)* [2004] IESC 43, [2004] 2 IR 625.'" (emphasis added).

69. The facts in the present case are different to those in the *Kilross* and in the *Grianan an Ailieach* cases, but if it is permissible for the Board to issue a different decision, in 2018, despite the existence of a valid and lawful declaration, in 2016, which was made in response to the same question in respect of the same property, notwithstanding the absence of any change in planning facts or circumstances during the intervening period, the type of "*confusion and uncertainty*" referred to by Mr Justice Hogan is precisely what would arise.

70. In *Michael Cronin (Readymix) Limited v. An Bord Pleanala* [2017] IESC 36, O'Malley J. commented on the procedure provided under s. 5 of the 2000 Act, at para [41] as follows: -

> "That provision sets out a scheme whereby, in the first instance, any person may apply to the relevant planning authority for a declaration as to whether what has occurred in a particular development is or is not development, or whether it is exempted development. A planning authority may, on its own initiative, make a similar application to the Board. The procedure is an expedient method of determining the status, within the regulatory regime, of a particular development about which some doubt may exist.
>
> [42] In *Grianán an Aileach Centre v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 I.R. 625 the Supreme Court held that, having regard to the availability of the s. 5 procedure, the High Court had no jurisdiction to grant a declaration that certain proposed activities at a venue were covered by the terms of its planning permission. While such a question might legitimately come before the courts in, for example, enforcement proceedings, the jurisdiction to determine the issue in the first place had been conferred on the planning authority and on the Board. In *Wicklow County Council v. Fortune* [2013] IEHC 397, Hogan J. held at para. 12, p. 9, that this reasoning must be taken as impliedly precluding the High Court from finding that a development was exempted where there was an unchallenged decision by the Board that it was not. I agreed with his conclusion in my judgment in Wicklow County Council v. O'Reilly [2015] IEHC 667.
>
> [43] It follows that the primary role in determining whether a development is exempted or not is given to (depending on the circumstances) either the planning authority or the Board. A decision by one of those bodies is an authoritative ruling on the issue, subject to the potential for judicial review." [emphasis added]

71. On the evidence before me, it is clear that the Applicant made its s. 5 application in order to have the planning status of its then proposed development determined and to obtain an authoritative ruling on the question posed in the 2016 application. The Declaration which the Respondent issued in 2016 could have been challenged by way of judicial review proceedings brought pursuant to s. 50 of the 2000 Act. No such proceedings were brought within the relevant time limit. That being so, I am satisfied that the 2016 declaration constituted an authoritative ruling of the question which had been put.

72. In his judgment delivered on 2 February 2017, in the case of *Sweetman v. An Bord Pleanála* [2017] IEHC 46, Mr. Justice Haughton stated the following at para. 11.1 of his decision: -

> "Section 5 does not require that there be any public notification of a referral, and there are no statutory consultees, and no right of the public to participate. The evidence that the Applicant was unaware of the s. 5 referrals, or the declarations of exemption made on 1st April, 2015 and 6th May, 2015, until some date in September 2015, was not contested. The absence of notification or publication in the circumstances meant that the Applicant could not have, and could not reasonably be expected to have, known about these declarations.
>
> 11.2 On these facts it is clear that the Applicant satisfied the test at s. 50(8)(b) namely that the circumstances that resulted in his failure to make an application for leave to seek judicial review of the s. 5 declarations within the period of eight weeks from the date of those declarations 'were outside the control of the Applicant for the extension'".

73. The present case has a number of distinguishing features. Firstly, Haughton J.'s findings were in the context of an application for an extension of time to seek judicial review. This is not being sought in the present case. Nor has any evidence been put before this Court to the effect that the Second or Third Notice Parties were unaware of the making, by the First Notice Party, of the s. 5 Declaration in 2016. This is so, despite the provisions in the 2000 Act by which the Oireachtas has provided a means for members of the public to access both the facts and contents of a section 5 declaration. I have previously referred to and have quoted the provisions in section 5 (7b) and in section 7 of the 2000 Act. In particular, section 7 of the Act requires the planning authority to keep a register in respect of all lands within its functional area and to enter in the register, pursuant to section 7 (2) (h): "*particulars of any declaration made by a planning authority under section 5 or any decisions made by the Board on a referral under that section*".

74. Between paras. 57 and 95 of his recent judgment in *Krikke v. Barranafaddock Sustainability Electricity Limited* [2019] IEHC 825, Mr Justice Simons provides a very detailed and helpful analysis of the nature of a s.5 declaration, which I adopt. At para. 79 of his judgment, Simons J. states the following in relation to the status of a s. 5 declaration and identifies a question which is of relevance in the present case: -

> "The current legal position is, therefore, that enormous significance now attaches to a s. 5 declaration. The existence of an (unchallenged) declaration will, in certain circumstances be dispositive of many of the issues which arise in enforcement proceedings. The precise implications of all of this have not been fully teased out. In particular, questions remain as to whether, for example, An Bord Pleanála would be precluded from entertaining a reference by virtue of the existence of an earlier unappealed declaration made by a local planning authority pursuant to a separate reference." [emphasis added]

75. As a result of an examination of the evidence in this case, a number of facts emerge in relation to the Second Notice Party and their section 5 application, including the following. The Second Notice Party was aware, in 2018, of the Council's 2016 section 5 Declaration, dated 29 September 2016. The Second Notice Party had an explicit objection to it and voiced this objection in their section 5 application, in 2018. The Second Notice Party was requesting the Council to consider, in 2018, the same question which the Council had previously answered in 2016 by way of the 2016 Declaration, which the Second Notice Party regarded as wrong. The Second Notice Party wanted that same question answered a different way in 2018 than it had been answered in 2016, i.e. *"…irrespective of the decision made previously by the Council under TA/S51639"*, to quote from the HRA Planning letter dated 14 February which accompanied the Second Notice Party's application. There is no evidence that planning facts or circumstances had changed between the 2016 declaration by the Council and the submission, in 2018, of the Second Notice Party's s. 5 application. There is no evidence that the Second Notice Party was operating under a genuine, even if mistaken, belief that there had been any such change, between 2016 and 2018, of relevant planning facts or circumstances. The Second Notice Party did not purport to rely, for the purposes of their section 5 application, on any change in planning facts or circumstances alleged to have occurred between the 2016 declaration and the submission, in 2018, of their s. 5 application. Rather, against the background of unchanged planning facts and circumstances during the intervening period, arguments were put forward by the Second Notice Party, and by HRA Planning on their behalf, in an attempt to persuade the Council to give a different answer, in 2018, than the answer given in 2016 in respect of the same question, including arguments based on identical material which the Council had already considered and determined in 2016. In reality, the Second Notice Party was not looking for an *answer* to their question. There already was an answer to the self-same question, which answer they objected to. They regarded the Council's 2016 answer as wrong and wanted the Council, in 2018, to give them a *different* answer to the same question. In light of the facts which emerge from my examination of the evidence as detailed in this judgment, I am satisfied that, as a matter of fact, Ballivor Community Group was questioning the validity of the decision made by the Council on 29 September 2016, by means of a s.5 application dated 16 February 2018.

76. With regard to the Third Notice Party, an analysis of the evidence reveals a number of facts, including the following. The Third Notice Party was aware, in 2018, of the Council's 2016 Declaration. In 2018, the Third Notice Party was objecting to the Council's 2016 declaration, which they regarded as wrong. The Third Notice Party's section 5 application was an explicit request that the same question which the Council answered in 2016 be considered again in 2018, notwithstanding the 2016 Declaration. The Third Notice Party sought, in 2018, to persuade the Council to give a different answer than the answer given in 2016 in respect of the very same question. There is no evidence of a change in planning facts or circumstances, since the Council's 29 September 2016 Declaration, and the Third Notice Party did not advert to or purport to rely on any alleged change in planning facts or circumstances when making its s. 5 application, on 16 February 2018. There is no evidence that the Third Notice Party was operating under a genuine belief,

even a mistaken one, that there had been a change in planning facts or circumstances between 2016 and 2018. Rather, the Third Notice Party was knowingly asking the same question in 2018 which the Council had answered in 2016 but hoped to persuade the Council to give a different answer, despite the fact that the relevant facts and circumstances had not changed. The Third Notice Party knew that the Council had answered the self-same question as theirs, by means of its 2016 Declaration. They did not like that answer. In 2018, the Third Notice Party was not seeking an answer from the Council but, rather, was arguing for a *different* answer than the one the Concil had given. The Third Notice Party was, as a matter of fact, in 2018, adopting the stance that the correct answer was the one they argued for and that the Council's 2016 decision was wrong. Based on the evidence, I am satisfied that Trim Municipal District Council was, as a matter of fact, questioning the validity of the decision made by the Council on 29 September 2016, by means of a s.5 application dated 16 February 2018.

77. At para. 9.2.7 of the senior planning Inspector's report dated 12 September 2018, the Inspector came to the following conclusion: -

> " . . . in this instance the planning authority had referred the s. 5 applications by Ballivor Community Group and Trim Municipal District Council to the board under s. 5(4) of the Act, i.e. there is no review sought of the planning authority's previous declaration".

If the foregoing is true in *form*, I am satisfied it is not true in *substance*, in circumstances where the following can be said in relation to both the Second and Third Notice Parties and their s.5 applications. The Second and Third Notice Parties were explicit about their objections to the planning authority's previous Declaration. They sought to change it. It is clear from their s. 5 applications that they regarded the Council's 2016 answer as wrong. Each of the Second and Third Notice Parties raised the self-same question in 2018 as the local authority had answered in 2016, by way of the Council's Declaration. They advanced no new evidence by way of changed planning facts or circumstances and I am satisfied that they were not operating in a belief, even if incorrectly held, that relevant planning facts or circumstances had changed. In reality, neither notice party was looking for an answer to their question. There was already an answer to their question, namely the 2016 declaration. What the Notice Parties wanted was not an answer to a question, but a *different* answer to the answer which had been given in 2016 in respect of the same question. To that end, and against the background of no relevant change in the factual position, the Notice Parties put forward arguments as to why the previous answer was wrong and should be set aside and why they should be given a different answer. In *form*, the 2018 s. 5 applications by the Second and Third Notice parties sought answers as to planning status but in substance they were objections to the Council's 2016 answer of the self-same question, comprised in the Council's Declaration, dated 29 September 2016. I am also satisfied that all of the foregoing facts were available to the Respondent's Senior Planning Inspector, as of 12 September 2018, and to the Respondent Board when it made its decisions, on 19 November 2018, because all of these facts are disclosed by the contents of the relevant documentation which was, by those dates, in their respective

possession and which has been exhibited in these proceedings and examined in this judgment.

78. In *Cleary Compost and Shredding Limited v. An Board Pleanála* [2017] IEHC 458, Ms. Justice Baker referred to the decision of Mr. Justice McKechnie in *Kiely v. Kerry County Council* [2015] IESC 97 and commented on the principles regarding the exercise of a statutory function by an administrative body, as developed since the seminal decision in *The State (Lynch) v. Cooney* [1982] 1 I.R. 337. At para. 62 of her judgment in *Cleary Compost* Baker J. gave the following description:

> "The principle is that, even when a person or body is entitled as a matter of statute to make a decision in its absolute discretion, the exercise of the statutory power must comply with certain basic requirements of fairness and 'accord with the statutory parameters within which the underlying power is conferred'. McKechnie J. identified this as a fourth requirement viz. 'that the decision does not breach the legislative framework within which the power is given'. (para. 71)"

79. Section 5 of the 2000 Act, and the power which that section confers on the Board, do not exist and cannot be properly understood in isolation. Section 5 is part of a legislative framework and must be interpreted in the context of the 2000 Act, as a whole, including, in particular, the provisions of Section 50 of the same Act. The provisions of section 50 are clear, sub section (2) of which 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,*
>
> *…otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986) (the 'Order')."*

80. The intention of the Oireachtas, as expressed in section 50, is unambiguous. By enacting Section 50, the Oireachtas made it clear that only one route was available to those who wished to question the validity of any decision made by a local authority in the performance of a function under the 2000 Act. In my view, this necessarily means that, when performing its functions in accordance with Section 5, the Board lacks the power to decide a question if that question is, in fact, an attempt to question the validity of a prior decision by a local authority made by same in the performance of a function under the 2000 Act, other than in accordance with the mandatory requirements of s. 50 of the same Act, including s. 50 (2). By making the 19 November 2018 decisions, the Board permitted the Second and Third Notice Parties to question the validity of the Council's 29 September 2016 decision, regarding the same question, in respect of the same property, in the absence of any change in relevant facts or planning circumstances, between the 2016 and 2018 decision, notwithstanding the provisions of section 50(2) of the 2000 Act and the Notice Parties' failure to comply with the statutory regime mandated under s. 50 for a challenge by way of judicial review.

81. Given the facts in this case and the provisions of Section 50 (2) of the 2000 Act, I am satisfied that the Board did not have the power to make decisions in respect of what was, in fact, an attempt by the Notice Parties to question, in 2018, the validity of the Council's 2016 decision concerning the same matter, other than by way of an application for Judicial review as mandated by section 50 (2). As such, the Board's 2018 decisions under section 5 of the 2000 Act breached the legislative framework within which the Board's powers are given. The Board could not lawfully decide the 2018 s. 5 requests and acted *ultra vires* in furnishing determinations on foot of them in circumstances where, as a matter of fact, each constituted an impermissible attempt to circumvent the mandatory s. 50 (2) procedure to question the validity of a decision made by the Council in 2016, other than by way of an application for Judicial Review in the manner mandated by the 2000 Act.

82. In the Inspector's report to the Board, the opinion expressed was that *"…it is incumbent on the Board to determine the s. 5(4) referrals before it".* Doubtless, this was a genuinely held view offered in good faith but, having regard to the statutory framework in which the Board's powers arise, it is not correct. The Oireachtas, by enacting section 138(1)(b) of the 2000 Act, granted an absolute discretion to the Board to dismiss a referral where the Board is satisfied that it should not be further considered by it, having regard to the nature of it or any previous permission which in the Board's opinion is relevant. The evidence, all of which was available to the Respondent, demonstrates that the Second and Third Notice parties were, as a matter of fact, questioning of the validity of a decision made by the Council, in 2016, in the performance of a function under the 2000 Act, and were doing so, in 2018, by means of their s. 5 applications, despite the provisions of section 50 (2) of the same Act and the failure of the Second and Third Notice Parties to comply with same. Given the facts identified in this judgment, which were available to the Board, the Board was not obliged to determine the s. 5(4) referrals and lacked the power to do so, lawfully, in light of the limitations on the Board's s. 5 powers necessarily imposed by s. 50 (2) of the 2000 Act, but undoubtedly had the express power not to determine the referrals, in light of section 138(1)(b) of the same Act.

83. At para. 24 of his judgment, in *Killross Properties Limited v. ESB & Anor* [2016] 1 IR 541, at p.551. Mr Justice. Hogan J. stated the following: -

> "[23] It is true that the underlying issues in *Grianán an Aileach v. Donegal County Council (No. 2)* [2004] IESC 43, [2004] 2 IR 625. were slightly different than those presented in the present appeal. It seems clear, nevertheless, from this statement of principle that the Supreme Court envisaged that the courts should be careful not to trespass into the exclusive domain of the planning authorities as envisaged by the s. 5 jurisdiction". [emphasis added].

84. I am very conscious that the court should be extremely reluctant to trespass into the exclusive domain of decision-makers. However, it seems to me that the Board should be careful not to trespass on the jurisdiction of the Council, in light of the powers conferred on the latter by s. 5 of the 2000 Act and the extent of the Board's powers under the same

section, having regard to the statutory framework in which the Board's powers arise, which framework includes section 50(2) of the same Act. The foregoing care, it seems to me, must be exercised by the Board even if, as in the present case, the Council made the reference to the Board, in 2018, of the question it had, itself, determined in 2016.

85. Section 5 of the 2000 Act envisages a declaration issuing in a number of ways, each of which are specified in the wording of that section. Firstly, a declaration may be issued by a planning authority on a request under s. 5(1), which section makes reference to *"a declaration on that question"* and refers to the local authority making *"its decision on the matter*". Secondly, where any person is issued with a declaration from a planning authority (under subsection (2) (a)), they may refer a declaration for review by the Board under s. 5(3). Thirdly, if a planning authority fails to issue a declaration, any person who made a section 5 (1) request may refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued. The fourth manner in which a declaration may issue is following a referral to the Board under s. 5(4) of "*…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".* Despite the use of the word "*any*" in s. 5(4), the Respondent's powers under under s. 5(4) are not without limit, having regard to other provisions in the 2000 Act. For example, s.127 of the 2000 Act cannot be ignored, as the Respondent lacks the power to consider a referral which does not comply with the provisions of s. 127. In my view, the absence of an express prohibition in s. 5 (4) on the exercise of the Respondent'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 Respondent is entitled to ignore the requirements of s. 50 of the 2000 Act 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 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 2000 Act.

86. In para. 12.4 of his judgment in *Sweetman*, Haughton J. commented on the decision by the Court of Appeal in *Killross v. ESB* [2016] IECA 207 in which Hogan J. considered the nature and status of a s. 5 declaration. At para. 12.5 of his judgment Haughton J. stated the following:

> "While it might have been thought, before *Killross*, that a s. 5 declaration was no more than a declaration that a particular development was exempt from the requirement of planning permission or approval, it clearly does have a status in itself. It establishes that a particular development is not 'unauthorised', and the High Court cannot go behind that, and cannot permit a collateral attack. As the Court of Appeal found, a s.160 application in respect of an 'exempted' development

is bound to fail. Although not adverted to in Killross, because it did not arise, it must logically follow from s. 4(4) of the 2000 Act (which provides that a development cannot be an exempted development if an EIA or AA is required) that the High Court cannot entertain a collateral challenge to a s. 5 declaration on the basis that an EIA or AA is required. The s.5 declaration is a matter that can only be reviewed by appeal to the Board, or by judicial review brought in time in the High Court, and after that it is beyond attack". [emphasis added]

87. I am also satisfied that the court has been presented with what can be fairly described as a collateral attack, by both of the Second and Third Notice Parties, on the Council's 29 September 2016 s. 5 Declaration using, as a vehicle, their 2018 s. 5 requests, which were initially submitted to the Council and which ultimately resulted in the decisions by the Board and, in my view the Court cannot permit such a collateral attack, having regard to the facts in the present case which I now summarise, as follows:

1. The Council provided an answer, on 29 September 2016, in the form of a s. 5 Declaration, in response to a question as to planning status and this was a decision made by the local authority in the performance of a function under the 2000 Act;

2. The 2016 Declaration was neither referred to the Board, nor challenged by way of judicial review in accordance with s. 50 (2) of the 2000 Act and the Applicant relied on the Declaration;

3. There is no evidence before the court that the second or third notice parties were unaware of the making of the 2016 Declaration at the time it issued;

4. There is no evidence that the provisions of section 5(7B) (a) and or 7(2)(h) of the 2000 Act were not complied with in respect of public access to information concerning the fact or content of the 2016 Declaration;

5. There is no evidence before the court as to when the notice parties became aware of the 2016 s. 5 Declaration, but they were certainly aware, when making their s. 5 applications in 2018, of the Declaration issued by the Council in 2016;

6. The questions posed by the Second and Third Notice Parties in 2018 are the very same in substance as the question which was put by the Applicant in 2016 and answered by the Council in the form of its Declaration dated 29 September 2016;

7. Each of the Second and Third Notice Parties' 2018 s. 5 applications contained an explicit objection to the Council's 2016 Declaration;

8. It is clear from the contents of their respective s. 5 applications, dated 16 February 2018, that both of the Second and Third Notice Parties regarded the Council's 2016 decision, in the form of the 29 September 2016 Declaration, as incorrect;

9. Each of the Second and Third Notice Parties' s. 5 applications amounted to a request that the same question which the Council answered in 2016 be answered in

a different manner in 2018, regardless of the 2016 Declaration, namely in a manner which the Notice Parties regarded as correct;

10. There is no evidence before the court of any material change in planning facts or circumstances between the 2016 Declaration and the 2018 s. 5 applications made by the Second and Third Notice Parties;

11. There is no evidence that the Second or Third Notice Parties believed, even mistakenly, that there had been a change in planning facts or circumstances between the Council's Declaration, dated 29 September 2016, and the submission of their s. 5 applications, dated 16 February 2018;

12. Neither of the Second or Third Notice Parties purported to rely on any change in planning facts or circumstances alleged to have occurred between the Council's 2016 Declaration and the submission of their s. 5 applications in 2018;

13. Matters which the Council had previously considered in 2016 were raised again by the notice parties in 2018 in an attempt to secure a different answer to the same question which the Council decided in 2016;

14. There is no evidence of any change in planning facts or circumstances between 16 February 2018, when the notice parties submitted their s. 5 applications, and 19 November 2018, when the Board made its Orders;

15. Against the foregoing background, the Second and Third Notice Parties' s.5 applications were, in fact, attempts to question the validity of a prior decision made by the local authority in the performance of a function under the 2000 Act, other than in accordance with the explicit provisions of section 50(2) of the 2000 Act;

16. All of the foregoing facts were available to the Board, prior to the Board purporting to make the decisions, dated 19 November 2018, which are the challenged in the present proceedings.

88. By way of observation, s. 5(4) of the 2000 Act 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 circumstances, from entertained 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 but insofar as Mr. Justice Simons, in *Krikke v. Barranafaddock Sustainability Limited* [2019] IEHC 825, observed that: *"…questions remain as to whether…An Bord Pleanála would be precluded from entertaining a reference*

by virtue of the existence of an earlier unappealed declaration made by a local planning authority pursuant to a separate reference", the answer in the present case is in the negative, having regard to the facts identified and for the reasons set out in this judgment.

89. Uncontroverted evidence is before the court that the Applicant has spent approximately €9,050,000.00 on the facility at Ballivor, inclusive of the €1.3 million purchase price in reliance on the 2016 Council Declaration. Such expenditure does not, of itself, entitle the Applicant to the relief sought. It does, however, bring into sharp focus the damage to individual rights which might arise if the court was to permit a challenge to the Council's 2016 decision other than in accordance with the method which the Oireachtas has mandated pursuant to section 50(2) of the 2000 Act and I consider the reliance placed by the Applicant on the 2016 Declaration and the very significant sums of money expended by the Applicant on the facility at Ballivor to be relevant in the context of the exercise by the court of what is a discretionary jurisdiction.

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 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*". In light of the facts in the present case, the Second and Third Notice Parties were, in reality, seeking to question the validity of the Council's 2016 decision, to which they explicitly objected, which they regarded as incorrect and which they sought to change, and were seeking to do so two years after it had issued, on the basis of no new or changed planning facts or circumstances, whilst ignoring the procedure and time limits mandated by statute in s. 50 of the 2000 Act. In my view, to permit this would be to allow a breach of explicit statutory provisions, would be offensive to the concept of legal certainty and would result in an injustice.

91. Having regard to the facts in this case and my findings as detailed above, it is not necessary for this court to consider the question of whether it could be said that the Respondent Board made decisions which were "unreasonable" in the sense in which that term is used in administrative law. The foregoing involves an analysis of whether a decision-maker considered all materials required to be considered and excluded from consideration any matters not properly to be taken into account. That question does not arise, in circumstances where the Board lacked the power to make the decisions complained of and which are reflected in the Respondent Board's Orders dated 19 November 2018 and, hence, it is not necessary to consider the manner in which those decisions were approached by the Respondent.

Conclusion

92. For the reasons detailed in this judgment, I consider it necessary to grant an Order of *certiorari*, by way of judicial review quashing the decisions made by the Respondent on 19 November 2018 pursuant to section 5 of the 2000 Act, in respect of referrals ABP-301055-18 and ABP-31064-18, whereby the Respondent purported to decide that the change of use from a nursing home development to a residential drug rehabilitation facility, permitted under planning authority reference no. TA/140621, at the former Old National School site in Ballivor, County Meath is development and is not exempted development.