



THE COURT OF APPEAL

Court of Appeal Record Number 2020/233

Neutral Citation Number [2021] IECA 307

**Woulfe J.
Costello J.
Collins J.**

BETWEEN

NARCONON TRUST

APPLICANT / RESPONDENT

- AND -

AN BORD PLEANÁLA

RESPONDENT / APPELLANT

- AND -

MEATH COUNTY COUNCIL

FIRST NOTICE PARTY

- AND -

BALLIVOR COMMUNITY GROUP

SECOND NOTICE PARTY

- AND -

TRIM MUNICIPAL DISTRICT COUNCIL

THIRD NOTICE PARTY

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

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

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

question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination?"

Background

2. The applicant/respondent, Narconon Trust ("Narconon") was incorporated as a company limited by guarantee in the UK and registered as a drug rehabilitation and education charity in 2005. It operates approximately forty drug rehabilitation facilities, providing drug prevention education and residential drug rehabilitation programmes. In and around 2015, Narconon decided to seek suitable property in Ireland for a new drug rehabilitation facility. On 11 December 2014, Meath County Council ("the council") issued a notification of a decision to grant planning permission, under reg. ref. no. TA140621, for the *"proposed change of use and refurbishment of the existing Old National School building to a proposed new nursing home"*. Narconon identified this property as a suitable possibility for one of its residential drug rehabilitation facilities. The trial judge accepted as uncontroverted evidence that Narconon was *"unwilling to spend millions of euros to develop 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"*. On 31 August 2016, Narconon sought a declaration from the council, pursuant to s. 5 of the PDA 2000, as to whether the change of use from a nursing home to a residential drug rehabilitation facility is exempted development. Under s. 4 of its application form to the council, Narconon stated:-

"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."

3. On 28 September 2016, a planning report was provided by Ms. Brenda O'Neill, executive planner to the council, which stated that *"the proposed development is considered to be*

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

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

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

4. Thereafter, Ballivor Community Group, (hereinafter "the second notice party") became aware of the identity of the developer of the lands and, on 16 February 2018, made an application, ref. no. ABP-301064-18, to the council for a s. 5 declaration concerning the "*use of the existing permitted 'nursing home' building by Narconon Trust for the purpose of providing a residential drug rehabilitation facility*". Attached to the application was a cover letter from HRA Planning, chartered town planning consultants, which set out the question put to the council as being "*[w]hether the use of the existing permitted 'nursing home' building by Narconon Trust for the purpose of providing a residential drug rehabilitation facility constitutes a material change of use which is not exempted development and for which planning permission would be required.*" The cover letter requested the council to consider the matter "**irrespective of the decision made previously by the council**", the 2016 declaration. Neither the application form, nor the cover letter state that there were any changes in the planning facts or circumstances.
5. On the same day, 16 February 2018, Trim Municipal District Council, (hereinafter "the third notice party") also made an application for a s. 5 declaration to the council, ref. no. ABP-301055-18. The question put to the council was set out in the following terms:-

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

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

the exemption granted fell "outside of the boundary of the permission granted". There was no reference to any changes in the planning facts or circumstances of the relevant property in the third notice party's application.

6. On 26 February 2018, the council wrote to the Board in relation to the two s. 5 applications of the second and third notice parties. The council stated that:-

"Given the fact that Meath County Council has 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 Pleanála 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."

No suggestion that there had been any changes in the planning facts or circumstances which may have occurred since the 2016 declaration was evidenced in the letter to the Board. The Board wrote two letters to Narconon on 12 March 2018 notifying it of the two s. 5 requests and inviting it to make submissions or observations to the Board in relation to the referral from the council in accordance with s. 129 of the PDA 2000. Solicitors acting on behalf of Narconon replied by letter dated 15 March 2018 wherein they requested:-

"... An Bord Pleanála to dismiss the ... 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."

7. An inspector's report was prepared on 12 September 2018 by Ms. Deirdre McGabhann, senior planning inspector with the Board, with the purpose of addressing the question: *"whether the change of use of a permitted nursing home ... to a residential drug rehabilitation facility is or is not development or is or is not exempted development."* The report states that a site inspection took place, and did not record that there were any changes in the planning facts or circumstances. The inspector's report summarised the arguments advanced by the second and third notice parties and assessed the Board's jurisdiction to determine the referral from the council, concluding that it was incumbent on the Board to determine the referrals and made a recommendation, in the form of a draft order, that:-

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

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

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

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

Judgment of the High Court

9. The trial judge found that the s. 5 applications in 2016 and 2018 were in substance the same. He further found as a fact that the s. 5 applications by the second and third notice parties included submissions in respect of matters which the council had considered and determined prior to issuing its 2016 declaration, that the applications made in 2018 were an attempt to bring about a different result to the 2016 declaration, and that they were made on the basis that the 2016 declaration was wrong. It was not contended that there had been any change in planning facts or circumstances in the interval and neither party was acting in the belief (mistaken or otherwise) that there were. The notice parties were each aware of the 2016 declaration and explicitly objected to it. The trial judge concluded that as a matter of fact they were each questioning the validity of the 2016 declaration by means of the s. 5 applications of 16 February 2018. He held that in *form* they sought answers as to the planning status of the development but in substance they were objecting to the 2016 decision on "*the self-same question*".
10. The trial judge held that s. 5 of the PDA 2000 and the power conferred on the Board cannot be properly understood in isolation; the section is part of a legislative framework and must be interpreted in the context of the PDA 2000 as a whole, including the provisions of s. 50. Section 50(2) states:-

"(2) A person shall not question the validity of any decision made or other act done by-

(a) a planning authority, a local authority or the Board in the performance or purported performance of a function under this Act,

...

otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts...".

11. Heslin J. held that there was only one route 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 PDA 2000. He was not concerned with appeals to the Board. He said that:-

"80. ... *In my view, this necessarily means that, when performing its functions in accordance with s. 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 [PDA 2000], 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 s. 50(2) of the [PDA 2000] 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 s. 50(2) of the [PDA 2000], 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 s. 50(2). As such, the Board's 2018 decisions under s. 5 of the [PDA 2000] 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 [PDA 2000]."* (emphasis added)

12. The trial judge held that given the facts identified and which were apparent 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 PDA 2000."* He also held that the Board *"undoubtedly"* had express power not to determine the referrals in light of s. 138(1)(b) of the PDA 2000, which granted an absolute discretion to the Board to dismiss a referral where the Board was satisfied that it should not be further considered by it, having regard to the nature of the referral or any previous permission which in the Board's opinion was relevant.

13. In para. 85 of his judgment Heslin J. held:-

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

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

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

15. He concluded as follows:-

"90. In my view, the court is obliged to guard against situations whereby a party seeks to avoid complying with legislative obligations as regards the proper means of challenging a planning decision. If, in light of the particular facts of this case, the court was to permit a challenge to the 2016 s. 5 Declaration via the route of questions, identical in substance, raised in 2018, despite no change in planning facts or circumstances since 2016, it would set at naught the requirements of s. 50(2). It also seems to me that it would wholly undermine the concept of legal certainty and result in a patent unfairness if, despite having the benefit of a decision which was neither reviewed nor challenged in accordance with the mandatory route, including time limits, laid down by statute, a party could question the validity of the original decision, which they regarded as wrong, by asking the self-same question at some later point, ignoring the mandated route for a challenge

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."

16. Accordingly, he granted an order of *certiorari* by way of judicial review quashing the decisions of the Board of 19 November 2018.
17. On 31 July 2020, in an *ex tempore* judgment, he granted the Board leave to appeal in respect of the question drafted by the Board.
18. In his *ex tempore* decision granting leave to appeal to this court the trial judge said:-

*"I gave an answer to a question posed by Judge Simons [in *Krikke v. Barranafaddock Sustainability Electricity Ltd.* [2019] IEHC 825] in that I took the view that by reason of the facts which emerged from an examination of the evidence in this case, the respondent Board in my view lacked the jurisdiction to determine the s. 5 referral in this case, having regard to s. 50 of the [PDA 2000]. It is fair to say that in so doing this Court identified, in light of the facts as found, a jurisdictional bar to the Board determining a s. 5 referral, which is not explicitly provided for in the Act."*

He was satisfied that the Board's application for a certificate should be granted in respect of the question posed by the Board.

The relevant legislation

19. Section 4 of the PDA 2000 sets out the developments which are exempted development. Subsection (2) provides that the Minister may, by regulations, provide for any class of development to be exempted development for the purposes of the Act. This was done in the Planning and Development Regulations 2001 (S.I. No. 600/2001). The relevant class of exempted development is Class 9 of Schedule 2, Part 4 quoted in para. 2 above.

20. Section 5 provides:-

- "(1) If any question arises as to what, in any particular case, is or is not development or is or is not exempted development within the meaning of this Act, any person may, on payment of the prescribed fee, request in writing from the relevant planning authority a declaration on that question, and that person shall provide to the planning authority any information necessary to enable the authority to make its decision on the matter.*
- (2) (a) Subject to paragraphs (b), and (ba), a planning authority shall issue the declaration on the question that has arisen and the main reasons and considerations on which its decision is based to the person who made the request under subsection (1), and, where appropriate, the owner and occupier of the land in question, within 4 weeks of the receipt of the request.*
- (b) A planning authority may require any person who made a request under subsection (1) to submit further information with regard to the request in order to enable the authority to issue the declaration on the question ...*
- ...*
- (c) A planning authority may also request persons in addition to those referred to in paragraph (b) to submit information in order to enable the authority to issue the declaration on the question.*
- (3) (a) Where a declaration is issued under this section, any person issued with a declaration under subsection (2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.*
- (b) Without prejudice to subsection (2), in the event that no declaration is issued by the planning authority, any person who made a request under subsection (1) may, on payment to the Board of such fee as may be prescribed, refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subsection (2).*
- (4) Notwithstanding subsection (1), a planning authority may, on payment to the Board of such fee as may be prescribed, refer any question as to what, in any particular case, is or is not development or is or is not exempted development to be decided by the Board.*
- (5) The details of any declaration issued by a planning authority or of a decision by the Board on a referral under this section shall be entered in the register."*

21. The following points emerge from this section:

- (1) Any person may apply in writing at any time to a relevant planning authority 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 the Act.
- (2) The question must relate to whether it is or is not development or it is or is not exempted development in any particular case.
- (3) The section 5 applicant is not required to have any interest in the land or the development or proposed development.
- (4) The section 5 applicant must provide any information necessary to the planning authority to enable it to make its decision on the matter.
- (5) The planning authority may require the section 5 applicant to submit further information with regard to the request in order to enable the authority to issue the declaration on the question. It may also request persons in addition to the section 5 applicant to submit information to that end.
- (6) The planning authority must set out the main reasons and considerations on which its decision is based.
- (7) The planning authority must issue its declaration to the section 5 applicant and, where appropriate, the owner and occupier of the land in question.
- (8) It must do so within 4 weeks of receipt of the request for a declaration.
- (9) Any person issued with a declaration under subsection (2)(a), being the section 5 applicant or the owner or the occupier of the land, may refer a declaration for review by the Board within 4 weeks of the date of the issuing of the declaration.
- (10) No other person is entitled to refer a declaration for review to the Board.
- (11) If a person who was not party to the referral wishes to challenge the declaration they may only do so by way of judicial review in accordance with s. 50.
- (12) If a planning authority fails to issue a declaration within the time provided, a section 5 applicant may refer the question for decision to the Board within 4 weeks of the date that a declaration was due to be issued under subs. (2).
- (13) A planning authority may refer any question as to what is or is not development or is or is not exempted development in any particular case to be decided by the Board. It may do so whether or not any other person has made a section 5 application to the planning authority.
- (14) The details of any declaration issued by a planning authority or of a decision by the Board must be entered in the register which is available for inspection by the public. No time for doing so has been prescribed, though they are generally required to fulfil obligations of this kind with reasonable expedition.

- (15) There is no other provision for public notification of a declaration or a decision.
- (16) There is no provision for public participation in the section 5 process (other than by an applicant), there is no entitlement to make submissions on the question referred and there is no requirement to publish the fact that an application has been made pursuant to s. 5 in respect of a development or intended development, which might alert the public that a declaration or decision (as the case may be) will issue shortly.
22. Section 7 of the PDA 2000 requires a planning authority to keep a register for the purposes of the Act, including particulars of any declaration made by a planning authority under s. 5 or any decisions made by the Board on a referral under s. 5. The planning authorities are required to make entries and corrections "as soon as may be" after the making of any decision (subs. (3)). The register incorporates a map for enabling a person trace any entry in the register. Planning registers may be inspected by members of the public at the offices of the planning authority.
23. Other sections of the PDA 2000 relevant to the debate in this appeal are sections 127 and 138. Section 127 provides:-
- "(2)(a) An appeal or referral which does not comply with the requirements of subsection (1) shall be invalid."*
24. Section 138 provides:-
- "(1) The Board shall have an absolute discretion to dismiss an appeal or referral—*
- (a) where, having considered the grounds of appeal or referral or any other matter to which, by virtue of this Act, the Board may have regard in dealing with or determining the appeal or referral, the Board is of the opinion that the appeal or referral —*
- (i) is vexatious, frivolous or without substance or foundation, or*
- (ii) is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducement by any person,*
- or*
- (b) where, the Board is satisfied that, in the particular circumstances, the appeal or referral should not be further considered by it having regard to—*
- (i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or*
- (ii) any previous permission which in its opinion is relevant."*
25. The Board is required to satisfy itself that the referral is valid and that it complies with the statutory requirements and thus, that it has jurisdiction to proceed; it cannot proceed on foot of an invalid referral. The review of the application is not purely as to the form of the

documents whether the referral is made within the prescribed time limits. Procedurally, the Board must conduct a preliminary assessment to satisfy itself that it has jurisdiction to conduct the referral.

26. Once it is satisfied that the referral complies with the requirements of s. 127, while assessing the referral, it may decide to dismiss the referral rather than determine the question referred on the merits. In this regard, the Board may consider the grounds upon which the referral is sought and the motives of the applicant for the referral, and assess whether the referral is vexatious, frivolous or without substance or foundation. It may also form a view as to whether, in the particular circumstances, the referral should not be further considered having regard to, *inter alia*, any question raised by the referral. In light of any of these factors, it may in its absolute discretion dismiss the referral. Thus, there is no absolute obligation to reach a decision on the merits on every referral received.
27. These sections are relevant to the contention of the Board that it would be unduly burdensome or unworkable to require the Board to determine whether, in cases where there is a prior section 5 declaration in respect of the development the subject of a subsequent referral, the subsequent referral is in respect of substantially the same development in respect of which there has been no or no material change of facts since the earlier declaration issued. It is apparent that the Act contemplates the Board evaluating referrals and dismissing referrals otherwise than on the merits if there is a failure to comply with the requirements of s. 127 or, in its assessment of the referral, it is appropriate to exercise its power under s. 138 to dismiss the referral. There is no absolute obligation on the Board to determine every referral on its merits.
28. The key issue for consideration in this case is the interaction between the provisions of s. 5 and s. 50(2). Section 50(2) provides:-

"(2) A person shall not question the validity of any decision made or other act done by-

(a) a planning authority or local authority of 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 (SI No. 15/1986) (the "Order")"

An application for leave to apply for judicial review must be made within the period of 8 weeks beginning on the date of the decision, or the date of the doing of the act, by the planning authority, local authority or the Board as appropriate (subs. (6)). Under subs. (8), the High Court may extend the period within which an application for leave may be made but shall only do so if it is satisfied that there is good and sufficient reason for doing so, and 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 of time.

The issues in the appeal

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

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

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

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

- (a) Is the Board precluded from determining a valid section 5 referral where substantially the same question has already been determined by the planning authority and where there is no evidence that there has been a change in planning facts and circumstances since the planning authority's determination?
- (b) Would a decision by the Board on such a section 5 referral impugn the validity of any such earlier determination by the planning authority on substantially the same question?
- (c) Could any such limitation on the Board's jurisdiction pursuant to section 5 operate to preclude a person who was not a party to an earlier section 5 declaration by a planning authority from seeking a subsequent declaration from the Board?

There is no issue of EU law engaged in the certified question and I have therefore not addressed the submissions which relate to theoretical issues of EU law which do not arise on the facts of this case, nor from the certified ground of appeal.

Discussion
Section 5 Declaration

32. The starting point is the legal effect of a section 5 declaration (which I shall use as short hand to refer to a section 5 declaration by a planning authority or a section 5 decision by the Board). A section 5 declaration declares whether a particular development is or not development, within the meaning of the PDA 2000, and whether it is or is not exempted development.
33. It is entered on the planning register. It declares to the world the planning status of the particular development at that particular moment in time.
34. In *Michael Cronin (Readymix) Limited v. An Bord Pleanála* [2017] IESC 36, [2017] 2 I.R. 658, O'Malley J. held that such a determination is an authoritative ruling on the issue:-
 - "42. *I am satisfied that the 2000 Act is not a penal statute in the sense of having as its objective the creation of a criminal offence, with the provision of a range of defences. The purpose and scheme of the 2000 Act is to create a regulatory regime within an administrative framework which, in the interests of the common good, places limits on the right of landowners to develop their land as they might wish. The principal objectives of the regime are proper planning and sustainable development, and the chief method of ensuring the attainment of those objectives is the planning permission process. It is based on the principle that developments that might have some significant impact, having regard to the range of factors encompassed within the concepts of proper planning and sustainable development, should go through the assessment process necessary for the grant of planning permission. The primary roles in that process are given to the planning authorities and the Board. The main powers of enforcement provided for in the 2000 Act are conferred on them.*
 43. *A crucial point, for the purposes of this case, is that those bodies are responsible for deciding what is or is not exempted development. They do so by exercising civil powers conferred by the 2000 Act, not in the context of a criminal prosecution. It is necessary to point out again that the issue in this case arises from a ruling made in the procedure provided under s. 5 of the 2000 Act. 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."*

35. As such, parties must be entitled to rely upon unchallenged authoritative decisions and the procedure accordingly assists in providing certainty upon which parties may safely act. Hogan J., speaking for the Court of Appeal, in *Killross Properties Limited v. Electricity Supply Board* [2016] 1 I.R. 541, [2016] IECA 207, at para. 13, held that absent a successful judicial review challenge, “the s. 5 references must be presumed to be valid and unimpeachable”.
36. It is important to emphasise the difference between a decision to grant planning permission and a section 5 declaration. A grant of planning permission is a development consent. A section 5 declaration, at most, is a decision that may mean that development consent is not required and that the owner or occupier of the lands may develop them in accordance with the declaration, without obtaining a grant of planning permission. To that extent it impacts upon the public, but it does so in a qualitatively different manner to a development which requires planning permission before it may proceed. It is a declaration of a right (or absence of a right) which exists anterior to the declaration. It is thus very different to a grant of planning permission. This is not to diminish the significance of a section 5 declaration, which may nonetheless have major consequences. A decision that development consent is not required has significant implications as it follows that some development and/or change of use may take place without the public being afforded a right to participate in the decision or to object to the development in question.
37. Second, the question addressed is limited: whether something is or is not development or is or is not exempted development. This may not always be straightforward and will involve the exercise of planning judgment. But, it does not involve evaluative consideration of proper planning and sustainable development in relation to the works or use in question, it is confined in its scope.
38. It is part of the planning history of the site and it enures for the benefit of the lands. It is binding on all parties. In *Daly v. Kilronan Wind Farm Limited* [2017] IEHC 308, Baker J. confirmed that a section 5 determination was binding where it relates substantially to the same development as the subject matter of subsequent enforcement proceedings.
39. The Board argued that it was not bound by the 2016 declaration and it was entitled to decide the 2018 referrals on the merits as a matter of principle. I am not satisfied that, absent a material change of facts, an unchallenged section 5 declaration does not bind a planning authority or the Board (save on a review pursuant to s. 5(3)), which is the effect of this submission. There is no reason in principle why a section 5 declaration should be considered binding upon all parties but nevertheless could be reviewed on the merits at any time in a further section 5 application, absent a material change of facts, simply because s. 5(1) provides that “any person” may make such an application at any time.
40. It is worth observing that the decision in *Cleary Compost and Shredding Limited v. An Bord Pleanála* [2017] IEHC 458, a case in which there were no less than six section 5 declarations, does not alter this conclusion. In *Cleary Compost*, there was a significant intensification of use and thus a change in the facts between the time when the planning

authority gave its section 5 declarations and those to be considered by the Board. Thus, it is to be distinguished from the facts in this case. The point is supported by the observations of Baker J. at para. 83 of her judgment:-

"I do not accept the argument of the applicant that the Board ought to have favoured the earlier s. 5 declarations [of the planning authority] over the later ones [of the Board], and while such an argument might have been made in a challenge to the s. 5 declaration made by An Bord Pleanála, such a challenge was not made, and the s. 5 decisions of the Board are valid and not now open to challenge."

Baker J. acknowledged that it would have been open to the landowner to raise the argument that the earlier valid declarations were binding on the Board when it came to consider the later applications, which argument has been raised in these proceedings. Her answer was to say that the argument should have been made in a challenge to the later decisions of the Board but, as this had not occurred, those later decisions were no longer open to challenge. She did not reject the argument and the case is not authority for the proposition that it is permissible to have a series of section 5 declarations in respect of the same development/change of user where there has been no change in the planning facts or circumstances. It is clear that Heslin J. did not disagree with this authority and would not have held that, in similar circumstances, the Board was precluded from reaching a decision on the section 5 referral.

Do the 2018 referrals question the validity of the 2016 declaration?

41. Section 5 must be construed as part of the PDA 2000 and not in isolation. This means that the correct interpretation of s. 5, and more particularly, the implications of a section 5 declaration must be considered in light of the provisions of, *inter alia*, s. 50(2) which says that a person may not question the validity of any decision of a planning authority otherwise than by way of judicial review. It is common case that there was no judicial review of the 2016 declaration. The Board says that the new section 5 applications of the same issue on the same facts do not "*question the validity*" of the 2016 declaration and therefore s. 50(2) has no application to the facts in this case. By definition, the Board says, the section 5 procedure does not question the validity of the earlier section 5 declaration and it makes no ruling on the lawfulness of that decision.
42. Prior to the commencement of s. 5 of the PDA 2000, it was the Minister and then subsequently the Board who had the sole authority to make a declaration as to whether development is or is not development or is or is not exempted development. Section 5 of the PDA 2000 for the first time gave the planning authority jurisdiction to determine a section 5 declaration. Section 50(2) was subsequently extended to:-

"any decision made or other act done by –

(a) a planning authority ... in the performance or purported performance of a function under this Act."

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

43. The essential issue in this case is whether the request for a section 5 declaration by the second and third notice parties in 2018 questioned the validity of the 2016 declaration within the meaning of s. 50(2). Narconon says that they do, and they amounted to an impermissible collateral attack on the 2016 declaration because the referrals raised the same question or substantially the same question and there were no changes in the facts or the planning status in the intervening period.
44. In the first instance, it is important to note that the trial judge made a finding, which he described as a finding of fact, that they were in substance challenging the validity of the 2016 declaration. The Board has advanced no basis upon which this court could set aside this finding, nor argued that it was not a finding which the court was entitled to make. Neither does it address the implications of this finding for its argument.
45. The question of collateral challenges to decisions was considered by the Supreme Court in *Sweetman v. An Bord Pleanála* [2018] 2 I.R. 250; [2018] IESC 1. Clarke CJ. quoted from the decision of Kelly J. in *Goonery v. Meath County Council* [1999] IEHC 15 where an applicant sought declarations relating to the determination of a planning application and did not directly challenge the validity of the determination. Kelly J. stated: -

"Whatever about the way in which these are worded, they plainly seek to impugn the validity of the decision to grant permission. If these reliefs were granted, they would undoubtedly mean in practical terms that the decision of Meath County Council was invalid. This is particularly so in the case of relief No. 11. The mere fact that an order was not sought quashing the permission in question does not mean that the validity of the permission was not being questioned. It was, and so the provisions of the section applied and were complied with since the application was moved before Budd J. ex parte and not on notice as the section requires."

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

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

is invalid, or, to use the words of s. 5 itself, has had its validity successfully questioned."

In that case, Mr. Nawaz sought to challenge the invalidity of the underlying legislation under which a deportation order had been made. Clarke J. held that this "*can be described as a challenge which has the potential to question the validity of the relevant measure.*"

46. In *Sweetman*, in para. 38 and following, the Chief Justice considered the rationale for the jurisprudence on collateral attack:-

"[38] The rationale behind the collateral attack jurisprudence is clear. A party who has the benefit of an administrative decision which is not challenged within any legally-mandated timeframe should not be exposed to the risk of having the validity of that decision subsequently challenged in later proceedings which seek to quash the validity of a subsequent decision on the basis that the earlier decision was invalid. Like consideration would apply to a State decision maker who has rejected an application or other similar decisions.

[39] 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.

[40] However, the application of that general principle can become complex in circumstances where there is a two or more stage process leading to the substantive administrative decision concerned. In such a case is it permissible to leave a decision made at an earlier stage in the process go unchallenged and then raise a point which could have been made in respect of that initial decision at a later stage in the process? In such a case it seems to me that it is necessary to analyse the process concerned for the purposes of determining whether it is the overall intent of the scheme in question that the relevant issue or question be definitively and finally decided at the first stage with no capacity to revisit the issue at any subsequent stage in the process.

...

*[42] While the distinction which I have just identified may be relatively easy to express in general terms, the analysis which may be required to decide on the proper characterisation of any particular scheme may not always be quite so easy. This may particularly be so where the scheme is not express in its terms as to whether particular issues are capable of being raised at various stages in the process or alternatively are to be taken to be definitively determined at a particular point. But in an overall sense I am satisfied that the **proper approach for the court to take is to consider whether, taking the scheme as a whole and having regard to its express***

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

47. It seems to me that the rationale identified in para. 38 applies equally to a subsequent administrative decision which would have the same implication. If it would deprive the party of the benefit of the earlier administrative decision which had not been challenged within the established timeframe there may be the same objectionable result. The fact that the challenge might be by way of a subsequent administrative, as opposed to court, procedure does not alter the substance of the challenge or the ultimate impermissible effect.
48. The effect of permitting the 2018 declaration of the Board to stand would mean “*in practical terms*” that Narconon was deprived of the benefit of the 2016 declaration upon which it acted bona fide in reliance on its validity. In addition, the 2018 declaration potentially exposes Narconon to enforcement proceedings pursuant to s. 160 of the PDA 2000, which would be clearly unjust in the circumstances.
49. The implications of the binding nature of valid section 5 determinations as to the planning status of a development was considered by the Court of Appeal in *Killross Properties* in the context of s. 160 proceedings. Hogan J. held as follows:-
- “[30] ... it could equally be said that the s. 160 application represents a collateral attack on the decision of the planning authority, since it effectively invites the court to revisit the merits of the issue which had already been determined in the course of the s. 5 determination. This is further reinforced so far as the present proceedings are concerned, since Killross elected to challenge the validity of three of the s. 5 determinations in judicial review proceedings and failed in that endeavour.”*
50. The legal certainty granted by a valid section 5 determination may be undermined by subsequent administrative proceedings – as here – just as much as by legal proceedings. If the Board’s 2018 decision stands, it sets at naught the decision of 2016, a decision which is unimpeachable, binding and authoritative. The fact that the section 5 referrals and the decision of the Board do not question the *lawfulness* of the 2016 declaration is irrelevant. What is important is the substance. As the trial judge correctly recognised, the second and third notice parties were engaged in a collateral attack upon the decision

of 2016. Their intent was that the decision of the Board should supersede that of the Council, and that Narconon no longer would be able to rely upon the decision of 2016.

51. In this instance, the Board is not deciding an appeal in respect of the 2016 declaration. It is dealing with the 2018 referrals, albeit that the same question in respect of the same facts was raised. The fact that the Board could have reached a different conclusion to the Council in 2016 had the question at that time been referred to the Board for review is irrelevant. The Board is not free to disagree with the Council's determination of 2016 and reach a different conclusion on the referral of 2018 precisely because the 2016 declaration is presumed valid, is authoritative and the time for challenging it had long since expired.

Implications of the Board's interpretation of section 5

52. The Board's interpretation of s. 5 (and the interaction or non-interaction with s. 50(2)) facilitates inconsistent section 5 declarations in respect of the same development on the same facts. In its written submissions, Narconon highlight four consequences of the Board's construction of s. 5:-
- (1) The strict time limit established in s. 5 for referring a declaration made by a planning authority to the Board or applying for judicial review in respect of such a decision would be rendered "*meaningless*" in circumstances where any person could, at any time after a section 5 declaration or decision had been made by a planning authority or the Board, simply make another request for a declaration on the same question.
 - (2) Subsection 50(2) would be entirely circumvented.
 - (3) Decisions made under s. 5 would be deprived of finality and no section 5 declaration could be relied on for the purposes of investment in, or financing of, any development to which the declaration relates.
 - (4) It would set at naught the purpose of the s. 5 procedure which is to provide certainty to parties as to whether, in any particular case, something is or is not development and is or is not exempted development which, absent a change in circumstances, governs the development in question into the future.
53. There is considerable force in these submissions. Furthermore, the Board's interpretation clearly undermines the utility of the section 5 procedure and is not conducive to the objective of the procedure, identified in *Readymix*, of providing an authoritative ruling of whether a particular development is or is not development or is or is not exempted development. This object cannot be attained if there is the possibility of a series of conflicting decisions, as was identified in *Killross*.
54. The Board's suggestion that "[a]ny difficulty caused by an apparent change in the status of development can be addressed by an application for planning permission or through the flexibility which exists in the enforcement mechanisms", is incorrect in my judgment.

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

55. Further, the suggestion that "*[s]uch an interpretation puts the onus on the party carrying out the development to firstly, decide what reliance to place on a s. 5 declaration from a Council and, secondly, how to address a subsequent decision to different effect*" seems to me to underscore the argument that the Board's position undermines the utility of the s. 5 procedure. No authority as to why the onus of making such decisions should be placed on a developer was opened, nor was it explained why, as a matter of principle, this should be so. The argument "*that it is inherently more fair to interpret the statutory scheme as putting this onus on the party carrying out the development rather [than] on third parties who likely will have had no role and no opportunity to play a role in the earlier s. 5 process*" is both wrong in principle, as a matter of statutory interpretation, and unsupported by the statutory scheme provided in s. 5 in my judgment.
56. Section 138 is relevant to the consideration of the issues arising in the circumstances of this case. It seems to me that in enacting s. 138, the Oireachtas expressly empowered the Board to dismiss referrals, such as arose in this case, where, by reason of the fact that in substance the referral in fact was a challenge to the earlier declaration, it was not appropriate to determine the 2018 referrals on their merits. While the Board was not obliged by the terms of s. 138 to dismiss the referrals, once it was clear that the same question in substance as had been decided in 2016 was again being referred on the same facts, the effect of a contrary decision would be to deprive Narconon of the benefit of the 2016 declaration and, accordingly, was an impermissible collateral attack on the 2016 declaration; that declaration was authoritative and binding, including on the Board, and in those circumstances it was appropriate to dismiss the referral and decide that it was precluded from determining the application on its merits.

Public participation?

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

a section 5 declaration is "*shut out*" by the decision of the trial judge. The public are bound by a decision in which they could have no input and no opportunity to be heard on the merits and to have their views considered.

58. Section 5 is not under challenge. The issue before this court is the correct interpretation of s. 5 considered in light of the Act as a whole, and whether the High Court correctly applied it. I believe that this emphasis on an alleged right of the public to participate in the procedure (other than as I have identified in para. 21) is not persuasive.
59. Second, it is important to note that this point was not argued by either the second or the third named notice parties. They did not participate in these proceedings and they have not challenged the PDA 2000 for failing to provide them the right to avail of the s. 5 procedure in the manner and on the basis contended by the Board. The Board is thus advancing a position on behalf of parties who have chosen not to make the case for themselves. While it may be accepted that it is open to the Board to advance these arguments, the fact that they have not been made by the parties directly affected is a matter to be weighed in assessing the strength of the case.
60. Third, the Oireachtas has not provided for public participation in the s. 5 procedures, save as I have outlined above. This is in marked contrast to the extensive public consultation in relation to the adoption of development plans and in relation to applications for planning permission where there are elaborate procedures in place guaranteeing the right of the public to make submissions and be heard in relation to these matters based on national law, EU law and International Treaties. There are good reasons to make this distinction. There are significant differences between a decision to grant planning permission and a section 5 declaration. A grant of planning permission is a development consent. A section 5 declaration is, at most, a decision that may mean that development consent is not required and that the owner or occupier of the lands may develop them in accordance with the declaration without obtaining a grant of planning permission. In those circumstances, there will be no application for planning permission which would afford the public a right to participate in the decision-making process, and to object to the proposal if they saw fit. To that extent, a section 5 declaration impacts the public, but it does so in a qualitatively different manner to a development which requires planning permission before it may proceed. It is a declaration of a right (or absence of a right) which exists anterior to the declaration. It is thus very different to a grant of planning permission. The question addressed is limited; whether something is or is not development or is or is not exempted development. It does not involve evaluative consideration of proper planning and sustainable development in relation to the works or use in question.
61. Fourth, there is no requirement that the public be facilitated to participate in, or have an opportunity to make submissions on, all decisions under the planning code. In *Krikke v. Barranafaddock Sustainability Electricity Limited* [2021] IECA 217, the Court of Appeal held the public was bound by a compliance decision of a planning authority in relation to conditions to be agreed with the planning authority in a grant of planning permission

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

62. Fifth, as a matter of fact, there has been no exclusion of a "*right to independently avail of the procedure*" in s. 5 in this case. If the identical question has been authoritatively answered and there has been no change of facts, then there is no need to raise the question again. If it was reached unlawfully, then it may be challenged by way of judicial review under s. 50 and the intending applicant can apply to extend time to do so pursuant to subs. (8). If they are successful, the earlier decision may be quashed and it may then be possible to reconsider the question on the merits. There is no right in any party to revisit the merits of the question on the same facts with a view to obtaining a different outcome outside of any appeal (or in this case review) process. The real complaint is the fact that the process does not involve publication of an application under s. 5, nor does it afford members of the general public a right to make submissions, even if they become aware of an application. Thus, a binding decision, with possibly significant implications, may be validly reached without any input from the local community. But it does not follow that there is, in effect, a right to revisit the identical question on the identical facts in order that a party excluded from the previous process may reverse the decision otherwise validly reached. To hold otherwise is to introduce a process of third party involvement which is not provided for in the Act, however unsatisfactory the operation of the section may be perceived to be.
63. Sixth, in this case there was a valid section 5 declaration from 2016. The same question on the same facts was considered by the Board in 2018 who then reached a different conclusion to that reached by the Council. If the Board's submissions in this appeal are correct, this is an outcome permitted and intended by the Oireachtas in enacting s. 5 of the PDA 2000. In my judgment, it is not, for the public's right to seek a section 5

declaration does not extend to an impermissible attempt to reverse a valid declaration with which they disagreed and to circumvent the provisions of s. 50(2).

64. Finally, it is not for the Board or the court to usurp the function of the Oireachtas and to construe s. 5 in a manner not provided by the Oireachtas with a view to conferring a right of public participation which the Oireachtas has not chosen to bestow. Section 5 was amended in 2011 and 2018 and the Oireachtas did not take the opportunity to insert public participation procedures or rights. The European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (S.I. 296 of 2018) amended section 5 of the PDA 2000 with effect from 1 September 2018. It specified the documents which the planning authority or the Board, as the case may be, is required to place on their website for inspection and to be made available for inspection within three working days from the issuing of the declaration or decision. It does not confer a right of public participation in the process beyond the existing limited scope. It is not open to either the Board or the court to provide such rights where the Oireachtas conspicuously has not.

Limits of the decision of the High Court

65. It is important to note that the trial judge did not hold that there was a jurisdictional bar to the Board **determining** the referrals. The question was formulated by the Board. The trial judge, in fact, stated in para. 88 of his judgment that the Board was not *automatically* precluded in all circumstances from entertaining a s. 5 reference by reason of a prior extant unappealed declaration made by a planning authority pursuant to a separate reference. The trial judge did not find that the decision of the Board on the 2018 referral breached s. 50(2), rather, it was the bringing of the section 5 applications by the second and third notice parties which attempted to question the validity of the prior decision of the council made in the performance of one of its functions under the PDA 2000 which breached the provisions of s. 50(2). In those circumstances, the Board was required to conduct the assessment which the inspectors in *Cleary Compost* actually carried out on the section 5 applications before the Board to ascertain whether there had been a material change of facts since the 2016 declaration. In light of the undisputed fact that the same question in respect of the same development on the same facts arose for consideration in 2018, as was authoritatively determined in 2016, the Board was thereafter precluded from determining the 2018 referral on the merits.
66. Neither the Board nor a planning authority is precluded from considering a section 5 application in respect of a development where there already exists a section 5 declaration or decision in all circumstances. There may have been changes which alter the situation from a planning perspective such as intensification of use or development use other than in compliance with a grant of planning permission (see *Cleary Compost*). The trial judge in no way dissented from the decision in *Cleary Compost*. But, once it is apparent either that no such changes are alleged or that, in fact, there are no such changes material to the question whether the development at issue is or is not development or is or is not exempted development, then the Board (or the planning authority) is bound by the prior

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

Conclusion

67. The Board was precluded from determining a section 5 referral in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination. It had jurisdiction to receive the referral and to commence its determination. Once it became apparent that the question referred was the same, or substantially the same, and in respect of the same land, and that there was no evidence of any change in the planning facts or circumstances, it ought to have concluded that: the referral by the notice parties amounted to an impermissible attack on the 2016 declaration, which, in substance, amounted to questioning the validity of the section 5 declaration other than by way of s. 50; that such a challenge is prohibited by s. 50(2); and that for the Board to proceed further to determine the referral on the merits amounted to facilitating a breach of s. 50(2) and was, accordingly, *ultra vires*.
68. The trial judge correctly interpreted ss. 5 and 50(2) of the PDA 2000 and applied the provisions to the facts in this case. He was correct to quash the decision of the Board of November 2018 for the reasons he set out in his judgment. For these reasons, I would dismiss the appeal.
69. I have read the concurring judgment of Collins J. and I agree with his judgment.
70. My provisional view as to costs is that Narconon has succeeded on this appeal and accordingly is entitled to the costs. If any party wishes to contend that the court should make a different order in respect of the costs, it should contact the office of the Court of Appeal within 14 days of delivery of this judgment and a time will be fixed for a short hearing. If a party request such a hearing and is unsuccessful in obtaining a different order as to costs, they may be required to pay the costs of the additional hearing.
71. Woulfe and Collins JJ. have read and approved this judgment.