

*Unapproved
No redactions needed*



THE COURT OF APPEAL

Neutral Citation Number: [2021] IECA 307

Court of Appeal Record Number 2020/233

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 Mr Justice Maurice Collins delivered on 17 November 2021

1. I agree with Costello J that this appeal should be dismissed. I agree with her that, in the circumstances here, section 50(2) of the Planning and Development Act 2000 (as amended) (the “PDA”) precluded An Bord Pleanála (“ABP”) from entertaining the questions referred to it under section 5 PDA. Doing so necessarily involved questioning the validity and effectiveness of the section 5 declaration issued by Meath County Council in September 2016 and the decisions made by ABP in November 2018 effectively negated that earlier declaration. That is not permissible having regard to the provisions of section 50(2) PDA.

2. I reach this conclusion with some regret. These proceedings highlight significant deficiencies in the section 5 procedure. A request for a declaration was made by Narconon, with the consent of the relevant landowners. Even if the landowners had a right to be heard – and section 5 is silent on that point – it was in their interest that the application should succeed. No public notice of the request was required under section 4 and no other party had any entitlement to participate in the process. Meath County Council duly issued the declaration sought. That declaration has significant legal effects: see, for instance, the decision of this Court in *Kilross Properties Ltd v Electricity Supply Board* [2016] IECA 207, [2016] 1 IR 541, as well as the decision of the Supreme Court in *Michael Cronin (Readymix) Ltd v. An Bord Pleanála* [2017] 2 IR 658. The declaration effectively precludes any party from maintaining that the change of user from nursing home to residential drug rehabilitation facility at the former old National School Site, Ballivor, Co. Meath constituted development for which planning permission was required. An application for planning permission would, of course,

have allowed for public participation.

3. To this it may be said that the issue before the planning authority here was a narrow and technical one, not involving any form of contestable planning assessment. The only question before Meath County Council was whether or not the proposed change of use came within Class 9 of Schedule 2 Part 4 of the Planning and Development Regulations 2001 (SI 600/2000) (*“the Planning Regulations”*) and, so it may be said, the task of the Council was simply to interpret and apply the relevant provisions of the Regulations. If the change of use fell within Class 9, it was exempted development; if it did not, then planning permission would be required. That may be correct as far as it goes. However, it is a striking feature of the proceedings here that Meath County Council and ABP reached contrary conclusions even on this supposedly straightforward issue.

4. Furthermore, in addition to issues as to what is *“exempted development”* the section 5 procedure encompasses determinations as to what, in any particular case, is or is not *“development.”* As the law reports demonstrate, complex and difficult issues frequently arise as to what constitutes *“development”* for the purposes of the PDA, particularly in relation to what constitutes a *“material change of use”*: see generally the discussion in Browne, *Simons on Planning Law* (3rd ed; 2021), chapter 2. The decision of the High Court (Laffoy J) in *Glancre Teoranta v Cafferkey (No 2)* [2004] IEHC 71, [2004] 4 IR 22 – itself an appeal from a decision made by ABP on a section 5 reference¹ – provides an illustration of the complexities that may arise in this context.

¹ An appeal to the High Court was provided for by section 5(2) of the Local Government (Planning and Development) Act 1963. However, when section 5 was re-enacted in section 5 PDA the appeal to the High Court was omitted.

5. The terms of section 5 themselves indicate that complex questions may fall to be determined by planning authorities and ABP under the section. Planning authorities (though not ABP) are subject to a general obligation to issue a declaration within 4 weeks of the request. However, section 5(2)(ba) PDA (inserted by the European Union (Planning and Development) (Environmental Impact Assessment) Regulations 2018 (SI 296/2018) (“*the 2018 Regulations*”) permits a planning authority to extend the time for determining an application where a decision within that period 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)*”. The section also contemplates – indeed requires – that in certain circumstances,² a planning authority or the Board shall specify whether the development or proposed development the subject of the request “*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*”: section 5(7A) (also inserted by the 2018 Regulations). Obviously, such a decision may have broad implications.
6. Some steps have been taken to improve the transparency of the section 5 process. Section 5(7B) PDA (inserted by the 2018 Regulations) now provides that where a planning authority issues a declaration, or ABP makes a decision on a referral, the relevant documents (including a copy of the declaration of the planning authority or the decision of ABP, as the case may be) must be published on their website within 3

² Where the request relates to a development or proposed development specified in Part 2 of Schedule 5 of the Planning Regulations.

working days and made available for inspection for a period of at least 8 weeks. That is in addition to the requirement in section 5(5) that the details of any declaration issued by a planning authority or of a decision by the Board on a referral be entered in the planning register. However, in circumstances where no public notice of the making of a request or referral is required, persons potentially affected by a declaration or decision may not have any reason to monitor the websites of the planning authority or ABP or to inspect their files or to examine the planning register. Furthermore, and in any event, these provisions of section 5 do not alter the fact that the section 5 process itself does not permit of any form of public participation, at least where (as here) the request for a declaration or referral is made by the person who has carried out the development, or who intends to carry out the proposed development, the subject of the request.

7. In such circumstances – and they are the circumstances here – a declaration or decision having potentially significant legal effects may issue without any opposing voice or contrary argument being heard. Even where a member of the public immediately becomes aware of the issuing of a section 5 declaration by a planning authority and wishes to object to it, they are not entitled to seek review by ABP. Only the person who made the request and the owner and occupier of the land (if different) may do so: section 5(3)(a) PDA. Judicial review proceedings may be brought and section 5(7B) PDA may facilitate the bringing of such proceedings. However, the scope for challenging the merits of the decision of the planning authority or ABP, as the case may be, in such proceedings will clearly be limited. In any event, once it is accepted that a section 5 declaration or decision may affect the rights and/or interests of third parties - and the entitlement of third parties to seek judicial review of such a declaration or decision seems necessarily to imply that such is the case – it seems difficult to justify their

exclusion from participation in the process leading to such declaration or decision: *In re Dellway Investments Limited v National Assets Management Agency* [2011] IESC 13 & 14, [2011] 4 IR 1. As entitlement to bring judicial review proceedings, potentially involving significant time and expense, would appear to be a poor substitute for an entitlement to be heard before the planning authority or ABP.

8. We were told that there are challenges to section 5 making their way through the courts but no challenge to the section is advanced in these proceedings, which concern only the validity of the decisions of ABP on the section 5 references made to it. The section 5 declaration issued by Meath County Council has not been challenged either. The questions referred to ABP were precisely the same as the question that had been referred to and answered by Meath County Council. In light of the provisions of section 50(2) PDA, I agree with Costello J that it was not open to ABP to entertain those questions and accordingly I agree that this appeal should be dismissed

Woulfe J has indicated his agreement with this judgment.