THE HIGH COURT
JUDICIAL REVIEW

IN THE MATTER OF SECTION 50 OF THE PLANNING & DEVELOPMENT ACT, 2000 AS AMENDED

[2023] IEHC 70

Record No.:2021/799 JR

BETWEEN:

THOMAS ALI YENNUSICK SNR AND SARAH YENNUSICK

APPLICANTS

-AND-

WEXFORD COUNTY COUNCIL AND AN BORD PLEANÁLA

RESPONDENTS

Judgment of Mr Justice Cian Ferriter this 13th day of February 2023

Introduction

1. This is my judgment on a contested application for leave to apply for judicial review pursuant to s.50 of the Planning and Development Act 2000 ("s.50" and "the 2000 Act").

2. The applicants seek leave to challenge two decisions relating to a planning application for the construction of a house in rural Wexford, being a decision of Wexford County Council ("the Council") dated 17 February 2021 ("the Council's decision"), and a decision of An Bord Pleanála ("the Board") dated 22 June 2021, on appeal from the Council's decision ("the Board's decision").

3. The application for planning permission was originally made to the Council on 18 December 2020. That application was for retention of: (a) an existing mobile home, (b) existing biocrete wastewater treatment system, and (c) all associated ancillary site works including provision of bored well water supply, and permission for: (d) erection of a serviced dwelling house and domestic garage/store, and (e) installation of a tertiary level polishing filter including all ancillary siteworks at a rural site not far from Enniscorthy, County Wexford ("the Wexford site").

4. That application was refused as set out in the Council's decision of 17 February 2021. On 12 March 2021, the applicants appealed that decision to the Board. An Inspector's report was prepared for the Board on 15 May 2021. The Board, in its decision of 22 June 2021, refused permission. In reaching the decision to refuse planning permission, the Board acted generally in accordance with the recommendation contained in the Inspector's report.

5. The application for leave to apply for judicial review was opened by the applicants before the Court on 2 September 2021, some 17 days after the expiry of the 8 week period stipulated in section 50(6) of the 2000 Act for bringing a leave application against the Board's decision, and many months after the expiry of the 8 week period for seeking leave to challenge the Council's decision. The applicants acknowledge that they have brought their application for leave outside the 8 week period and accordingly make an application pursuant to section 50(8) of the 2000 Act for extension of the time within which to bring their leave application. The Council and the Board oppose both the extension of time applications and the leave applications.

Background

6. The applicants are husband and wife. The first applicant is originally from Ghana and has been in Ireland since 1991. He suffers from autism and severe dyslexia. He recently successfully sat his final examinations for the barrister-at-law degree in King's Inns. The second applicant is originally from Tanzania and has been in Ireland since 1994. The applicants have had seven children, two of whom sadly died. Of their remaining five children, the three younger children suffer from autism, and have special needs, including environmental needs, as a result. Those children are aged 9, 13 and 19. The second applicant has no formal education. She has worked as the primary carer to their autistic children.

7. The applicants are of limited means. The applicants' family of seven are living in rented accommodation provided to them by Wicklow County Council under that council's rental accommodation scheme. Based on their submissions to the Council in their application for planning permission for the Wexford site, that accommodation is cramped and the applicants say that their current accommodation is totally unsuitable for them. They had been on the verge of homelessness when notified to leave their previous rented accommodation and are concerned that they are equally vulnerable in their current rental accommodation in the event their tenancy is terminated.

8. In 2019, the applicants acquired the Wexford site. The site is accessible via a private lane to which the applicants have a right of access. The applicants wish to make their family home there. They say that the site, in a rural location with plenty of outdoor space, will be of great benefit to, and is necessary for, the health and welfare of their autistic children and they tendered medical evidence in support of that position when applying for planning permission for the site. These three children have been attending school in Enniscorthy and the second applicant has been driving them there and back on a daily basis during school terms (a 150 km round trip) to ensure they are integrated into the community in Wexford.

9. The Council gave two reasons for refusing the applicants' planning permission application. The first was that the Council considered that the applicants were neither classified as a 'local rural person' or from the subject 'local rural area' "as irrespective of some interest in the area, this is limited and hence they do not comply with policy", the relevant policy including table 12 and policy objective RH01 of the applicable county development plan (table 12 and policy RH01, as explained further below, relate in essence to the conditions for the grant of individual rural housing in rural areas under strong urban influence). The Council held that the proposed development in the absence of "identified definable need" would contribute to random rural development in the area, against proper planning. The Council also relied on evidence of failed drainage conditions on the site leading to potential difficulties with disposal of effluent generated by the proposed development "with the potential result being that the proposed development gives rise to a health hazard."

10. The applicants appealed against the Council's decision to the Board. In their appeal, the applicants relied on an "exceptional health circumstances" permission criterion in the relevant policy documents (including table 12 and policy RH01 of the development plan) based on the fact that three of their children suffered from autistic spectrum disorder and the site was specifically chosen to best address the special needs including environmental needs of their autistic children. As noted, they had tendered expert medical evidence in support of this position.

11. The Board refused the applicants' appeal by its decision of 22 June 2021. In summary, the Board concluded that the proposed development (and related retention) would constitute random rural development in the area, contrary to planning policy; that the applicants did not come within the scope of the rural housing need criteria in the Wexford County Development Plan 2013-2019 as extended (i.e. the development plan), and other related national policy and guideline documents; and that the grant of permission would

conflict with objective RH01 of the development plan. Therefore, the Board concluded that the grant of permission would be contrary to the proper planning and sustainable development of the area. The Board further held that there was evidence of failed drainage conditions on site with the underlying subsoil potentially not capable of hydraulically disposing of the effluent generated by the proposed development, the potential result being that the proposed development gave rise to a health hazard.

The applications relating to the Council's decision

12. The applicants sought to advance a series of grounds of challenge to the Council's decision (which grounds are, in large part, also sought to be advanced against the Board's decision).

13. In my view, the Council is correct in its fundamental submission to the Court that the applicants are simply not in a position to seek leave to challenge the Council's decision in light of the provisions of s.37(1)(a) of the 2000 Act. That subsection provides that "*where an appeal is brought against a decision of the 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*". It has been made clear in the authorities that the effect of this provision is that once the Board hands down a decision on an appeal from a decision of the planning authority, the planning authority's decision is annulled: see e.g. *People over Wind v the Board* [2015] IEHC 271, para 272. This applies even where the Board's decision is subsequently held to be invalid: see *McCallig v An Bord Pleanála (no.1)* [2013] IEHC 60 (at para. 83).

14. As the applicants appealed the Council's decision to the Board, and the Board gave a decision on that appeal, the Council's decision is now a nullity. There is accordingly no basis for the court to entertain an application for leave to apply for judicial review in respect of that, now annulled, decision. It follows that the question of an extension of time to make such an application must also fail.

15. I propose therefore to focus on the applicants' application for leave to apply for judicial review of the Board's decision, and the related extension of time application.

Application for extension of time to seek leave to challenge Board's decision

Material facts

16. In order to put in context the applicants' application for an extension of time within which to seek leave to apply for judicial review of the Board's decision, it is necessary to set out the background facts relevant to that application.

17. The applicants received the Board's decision on 22 June 2021. The applicants were notified by the Board, at the time of communication of the Board's decision, of the provisions in relation to judicial review of the Board's decision, including the 8-week time limit for same.

18. On the same day as the applicants received the Board's decision, 22 June 2021, the first applicant received the results of his barrister-at-law degree exams from the King's Inns. He did not pass the exams and appealed the results to the King's Inns. The King's Inns directed that he was required to re-sit all 10 exams and notified him by letter of 9 July 2021 that those exams would take place between 9 August 2021 and 31 August 2021. He says that this left him with a very tight timeframe to prepare for these 10 exams, exacerbated by the fact that he is severely dyslexic, and as a result he cannot write down answers and has to use a transcriber when sitting exams.

19. On 24 June 2021, the applicants contacted the Board by email to enquire about the judicial review process and to inform the Board of their intention to judicially review the decision of the Board.

20. There followed a further exchange of emails between the applicants and the Board on 25 June 2021 when the applicants asked for confirmation of the deadline to submit an application to appeal the Board's decision by way of judicial review. By email dated 28 June 2021, the Board informed the applicants "that any application for judicial review must be made to the courts within 8 weeks of the decision of the Board." This email confirmed that "the papers must be both filed and the application for leave to apply for judicial review moved within the 8 weeks." A note in relation to judicial review

proceedings was attached to this email. The applicants acknowledged that email on the same date.

21. The applicants say that they began discussions with the Central Office in the Four Courts by email of 11 July 2021 with a view to gathering the necessary documents for their judicial review proceedings. They say they sought clarification as to how to seek an extension of time by email dated 26 July 2021. The first applicant began his exams of 9 August 2021 and sat his last exam on 31 August 2021. It appears that the applicants had not been in possession of the Board Inspector's report on their appeal until receipt of an email of 31 August 2021 from the Board (in response to an email sent by the applicants the previous day) which notified them that the file in relation to the appeal was on the Board's website. It appears therefore, as a matter of fact, that the applicants were not aware of the Inspector's report until 31 August 2021, some 15 days after the expiry of the 8 week period.

22. While she had not sworn an affidavit in support of the applications, Mrs. Yennusick addressed the court at the hearing to explain her position in relation to an extension of time, in light of the Board's written submissions which contended that she had not offered good and sufficient reason for not moving an application for judicial review within the 8 week period. Very fairly, no objection was taken to this course of action by the Board at the hearing before me. Mrs. Yennusick explained that she had no formal education having left school in Tanzania at a young age. English was not her first language and she had to learn English when she came to Ireland. She explained that she had spent the period between receipt of the Board's decision on 22 June 2021 and 2 September 2021 as a full-time carer for their three autistic children. On school days, this involved getting up between 5am and 6am every morning to get the children cleaned, fed and ready for school. One of her autistic children is non-verbal and he requires a lot of attention. As they were in school in Enniscorthy, she was making a 150 km round trip every day during term to drop the children to school and to collect them after they finished school to bring them home. She did not expressly address the school holiday period (which would have overlapped with part of the 8 week period and some of the extra 17 day period) but her overall position was that she was flat out looking after her special needs children, rising very early in the morning and going to bed about 11pm at night. She said that she would not know where to begin with a putting together a legal challenge and that she fully relied on Mr. Yennusick to take care of that.

23. Mr. Yennusick also set out further factual matters in the applicants' written submissions and during the course of his own oral submissions (including the fact that he himself is autistic and suffers from severe dyslexia) and, again, very fairly, the Board did not object to those facts being before the Court on the application.

The legal test and applicable legal principles

24. The material terms of s.50 of the 2000 Act addressing time limits for judicial review applications against planning decisions are as follows.

25. Section 50(6) provides that:

> *"Subject to subsection (8), an application for leave to apply for judicial review under* [Order 84 RSC] *in respect of a decision or other act to which subsection (2)(a) applies* [i.e. a decision or act of, inter alia, a local authority in the performance of a function under the 2000 Act] *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."*

26. Section 50(8) provides that:

> *"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."*

27. There is no dispute as to the legal principles applicable to these provisions.

28. As I noted in *Geraghty v Leitrim County Council* [2022] IEHC 730 ("*Geraghty*"), the principles applicable to an extension of time application under s.50(8) have been addressed in a series of High Court cases including *Irish Skydiving Club Ltd v An Bord Pleanála* [2016] IEHC 448 ("*Irish Skydiving*"), *Sweetman v An Bord Pleanála* [2017] IEHC

46 ("*Sweetman*") and *SC SYM Fotovoltaic Energy SRL v Mayo County Council* [2018] IEHC 20 ("*Fotovoltaic*"). The applicable principles have very recently been authoritatively addressed by the Court of Appeal in the judgment of Donnelly J. in *Heaney v An Bord Pleanála* [2022] IECA 123 ("*Heaney*"). As noted in *Geraghty*, Donnelly J. clarified in *Heaney* (at para. 77) that, contrary to indications to different effect in the prior case law (e.g. in *Sweetman* at para. 6.8), the Court when dealing with an extension of time application under s.50(8) is required to consider "good and sufficient" reason first and thereafter to consider whether the circumstances which resulted in the failure to apply in time were outside the control of the applicant.

29. As noted in *Geraghty*, in relation to the first requirement in s.50(8), that of good and sufficient reason, I took the following principles as being applicable to the exercise of the Court's discretion under s.50(8) from the judgment of Donnelly J. in *Heaney* (the cited paragraph numbers are from that judgment in *Heaney*):

(i) The phrase "*good and sufficient reason*" incorporates a global consideration of the relevant issues (para. 89).

(ii) A non-exhaustive list of potentially relevant factors was identified by Clarke J. (as he then was) in *Kelly v. Leitrim County Council* [2005] 2 IR 404 ("*Kelly*") to include the length of time specified in the statute; the issue of third-party rights; the overall integrity of the planning process itself; blameworthiness (or lack thereof) and the nature of the issues involved (para. 79).

(iii) The merits of the case are irrelevant to a consideration of the good and sufficient reason question unless the underlying challenge is either unarguable or is highly meritorious based on a change in jurisprudence (para. 84).

(iv) The question of "*good and sufficient reason*" may include the nature of the issue before the Court (para. 84).

30. I further pointed out that Donnelly J., in her conclusion in *Heaney* (at para. 95), noted that, when assessing good and sufficient reason,

"…the Court is entitled to take a holistic view of all the relevant circumstances, which includes blame on the part of the applicant and that of the authorities, as well as the reasons for the delay. An applicant must engage with the reasons why the application was not made in the time allowed as well as any delay after the time limit expired."

31. In relation to the second requirement in s.50(8), that of circumstances being outside the control of the applicant, Donnelly J. noted in *Heaney* (at para. 80) that the requirement of "*absence of control*" is a requirement that "*goes beyond an assessment of "blameworthiness", or even lack thereof, as one factor amongst others; rather it requires absence of control by an applicant who seeks an extension*".

32. The Board in its submissions on the extension of time application also submitted that that, in light of the strict time limit, the threshold for granting an extension of time is regarded as a high one. The shortness of a delay is not a relevant factor: the Board in its submissions referenced by way of example: *Kelly*, where Clarke J. refused to grant an extension of 19 days; *Duffy v Clare County Council* [2016] IEHC 618 where Barrett J. refused to grant an extension of 17 days; *Cassidy v Waterford City and County Council* [2017] IEHC 711, where Eager J. refused to grant an extension of 25 days; *O'Riordan v An Bord Pleanála* [2021] IEHC 1, where Humphreys J. refused to grant an extension of 2 days and *Heaney v An Bord Pleanála* [2021] IEHC 201, where Barr J. refused to grant an extension of 5 days (upheld on appeal in Heaney).

33. In *O'Riordan v. An Bord Pleanála* [2021] IEHC 1 (referenced above), Humphreys J. stated that the fact that the Applicants are litigants in person does not lessen the threshold that is required to be met in an application to extend time.

Parties' submissions on extension

34. The applicants summarised the arguments in favour of the grant of an extension of time as follows:

(i) The applicants found out that Mr. Yennusick had not passed his King's Inns exams on the same day as the applicants received the Board's decision (22 June 2021). He had to spend time engaging with the King's Inns in relation to an appeal of the

results and then preparing intensely for the exams. Mr. Yennusick then spent the entire period preparing for and sitting these 10 exams.

(ii) Mr. Yennusick is himself autistic and suffers from severe dyslexia. When doing exams he would have to listen to the questions and then dictate his answers which would be written down by a scribe. The level of time required to study for the exams was exacerbated by his conditions.

(iii) Mrs. Yennusick spent the period in full-time care of their three autistic children.

(iv) The applicants are not wealthy and could not afford legal representation.

(v) The applicants had not initiated a judicial review before and had to familiarise themselves with the process and seek help from Courts Service staff.

(vi) Immediately following Mr. Yennusick finishing his exams on 31 August 2021, the applicants finalised their judicial review papers and moved the application before the High Court on 2 September 2021.

(vii) The application relates to a home for their special needs children and is accordingly a matter of grave importance to them.

35. The Board submitted that the applicants had not provided good and sufficient reason for the entire of the period of delay. It submitted that the length of the period of delay was irrelevant. While there was a third party objector in the application to the council, there was no third party objector involved in the appeal to the Board and the Board fairly accepted that it could not point to prejudice of third-party interests in the circumstances. The Board did however rely on the overall integrity of the planning process and the importance of adherence to time limits governing same.

Discussion and decision on extension application

First requirement: "good and sufficient reason"

36. It is clear from the authorities that the eight-week time-limit is regarded as a strict one (see *Fotovoltaic* at para. 72) and that the approach to the question of "good and sufficient" reason needs to respect the statutory policy objective of ensuring compliance with time limits in respect of planning matters (*Kelly*, p.412). The applicants clearly knew from early in the 8 week window that that they wished to bring a judicial review and the fact that the applicants did not have legal representation, and were not aware of the

existence of the Inspector's report on the Board's website until after the expiry of the 8 week period do not of themselves constitute good and sufficient reason, particularly where they had formed a view that they wished to bring a judicial review of the Board's decision and indeed had communicated that to the Board.

37. However, in my view that the applicants have made out good and sufficient reason for the failure to move their leave application before 2 September 2021 based on their exceptional medical and medical-related care circumstances in that period. As noted, the first applicant is autistic and suffers from severe dyslexia. He was required to prepare for and sit 10 exams where the study and exam sitting period coincided precisely with the eight-week leave (and some 15 days thereafter). Their three autistic children required full-time attention in that period, which overlapped with school holidays when they were sharing their cramped accommodation. The statutory criteria cannot be interpreted or applied so as to exclude the invocation of pressing medical and life circumstances which might render explicable and justifiable the failure to meet the statutory deadline. In my view, such circumstances are made out on the very particular facts here. The need for full-time care of their three special needs children, coupled with the first applicant's own special needs requirements at a time when he faced the daunting challenge of preparing for and sitting a set of demanding professional exams (which might reasonably be expected, if passed, to be life changing for him and his family), constitute good and sufficient reason within the meaning of s.50. These circumstances applied throughout the entire of the relevant period, being the 8-week period and the 17 days thereafter up to the date when their leave application was moved.

38. Taking a holistic view of all of the relevant circumstances, in my view the medical and care pressures which the applicants had to deal with in the relevant period provided good and sufficient reason as to why they could not devote the time and resources needed to get their application for leave to apply for judicial review finalised and moved within the 8 week period and a period of 17 days thereafter. I do not believe that accepting that the applicants had good and sufficient reason for their delay on the very particular facts of this case would undermine the overall integrity of the planning process given the quite *sui generis* nature of their circumstances. There were no third party interests engaged in the appeal to the Board. The applicants clearly regarded the planning process as potentially resulting in a life-changing situation for themselves and the proper care and development of their autistic children. In the circumstances, I am satisfied that good and sufficient reason is made out for the entire of the relevant period.

Second requirement: circumstances outside the control of the applicants?

39. Counsel for the Board sought to make the case that the "circumstances outside the control" requirement in s.50(8) addressed a situation where an applicant was not or could not have been aware within the 8 week period of the terms of the decision which is sought to be challenged (e.g. such as the s.5 declaration situation that applied in Sweetman), but did not address the situation here where the applicants were at all times aware of the decision and therefore in control of when they could bring their application. Given the wording of the provision (i.e. "*the circumstances that resulted in the failure to make the application for leave within the* [8 week] *period were outside the control of the applicant for an extension*"), it seems to me that it is necessary to assess in a fact-specific way whether the circumstances which are said to constitute good and sufficient reason are circumstances outside the control of the applicants. While such circumstances could embrace a scenario where an applicant was not or could not have been aware within the 8-week period of the decision which is sought to be challenged, I do not see that it is necessarily confined to such circumstances.

40. I am satisfied that the circumstances which I have found to constitute good and sufficient reason here were also circumstances outside of the control of the applicants. The applicants were not in control of their collective medical circumstances and the special needs arising therefrom and the challenges to mounting a timely judicial review stemming from those circumstances. (While subordinate to the medical circumstances issue, it can also reasonably be said that the timing of the complete set of repeat professional examinations which the first applicant had to undergo in the period was also a matter which was outside his control). This was not a situation such as applied in *Irish Skydiving* where the applicant, being aware of the planning decision, took time beyond the eight week period to come to a decision to commence litigation when it was within its control to take that decision within the 8 week period (see *Irish Skydiving* at paras. 50-52). Nor is it a situation such as applied in *Fotovoltaic* where a corporate entity had the wherewithal to establish when the s.5 declaration it sought to challenge had been made, and should have identified the relevant decision earlier, and therefore it was within its control to bring the challenge within the 8-week period.

41. In the circumstances, in my view, the applicants have satisfied the second requirement of s.50(8), that the circumstances that resulted in the failure to make the leave application before 2 September 2021 were outside their control.

Conclusion on extension of time application

42. In my view, a fair application of the statutory requirements to the very particular medical and life challenges which the applicants had to contend with in the 8-week period and the period of 17 days thereafter leads to the conclusion that both limbs of the requirements of s.50(8) are satisfied by the applicants here.

43. Being satisfied that an extension of time to seek leave to apply for judicial review against the Board's decision is appropriate, I will accordingly turn to the applicants' application for such leave to apply.

Application for leave to apply for judicial review of the Board's decision

The Legal test

44. Section 50A(3) of the 2000 Act provides that the court shall not grant leave under s.50 unless it is satisfied that there are "*substantial grounds*" for contending that the decision concerned ought to be quashed and that the applicant has a "*sufficient interest*" in the matter which is the subject of the application.

45. There is no dispute as to the legal test applicable to the "*substantial grounds*" requirement. As set out by Carroll J. in *McNamara v An Bord Pleanála (No. 1)* [1995] 2 ILRM 125 at 130, if a ground is to be substantial "*it must be a reasonable, it must be arguable, it must be weighty. It must not be trivial or tenuous*."

46. In relation to the requirement of "*sufficient interest*", it is common case that prior participation in the process before the decision-maker leading to the impugned decision is generally regarded as sufficient to give an applicant standing under s.50A(3). There is no dispute but that the applicants have such sufficient interest here.

47. The real focus of the hearing was accordingly on whether the applicants had made out substantial grounds justifying leave.

The Inspector's report

48. Before addressing the grounds on which the applicants seek leave to challenge the Board's decision it is useful to set out how the Inspector approached the appeal in her report, given that the Board in its decision adopted the Inspector's report.

49. The Inspector structured her report as follows: after setting out the site location and description of the proposed development, she summarised the Council's decision and the Council's reports. She then briefly addressed third party observations to the Council and the planning history of the site. She addressed the next section of her report to the "policy context". In this section, she made reference to *inter alia* national policy objective 19 of the national planning framework 2018. This objective requires planning authorities to ensure, in providing for the development of rural housing, "*that a distinction is made between areas under urban influence, i.e. within the commuter catchment of cities and large towns and centres of employment, and elsewhere*" and goes on to stipulate that planning authorities "*In rural areas under urban influence,* [shall] *facilitate the provision of single housing in the countryside based on the core consideration of demonstrable economic or social need to live in a rural area and siting and design criteria for rural housing in statutory guidelines and plans, having regard to the viability of smaller towns and rural settlements*".

50. The Inspector then noted in her report that the objective in policy RH01 of the development plan in relation to "Areas under strong urban influence" is "*to facilitate the development of individual houses in the open countryside in accordance with the criteria set down in table 12 subject to compliance with the normal planning and environmental criteria in the development management standards.*"

51. The reference to "table 12" is to Table 12 of Chapter 4 of the development plan which addresses "criteria for individual rural housing". This table sets out the types of permitted individual housing for "rural areas under strong urban influence". Three categories are specified. The first category relates to housing for "local people" who have a definable housing need and are building in their local rural area. The second category relates to housing for people working in rural areas who are building permanent residences for their own use and who have a definable housing need. The applicants accept that they do not come within either of these two categories. They made their case in appeal to the Board rather on the third category of permitted individual rural housing in such areas namely

"*Housing for people with exceptional health and/or family circumstances building permanent residences for their own use*." This is defined in table 12 as follows:

> "*Special consideration shall be given in cases of exceptional health circumstances – supported by relevant documentation from a medical practitioner proving that a person needs to live in a particular environment or close to family support, or requires a close family member to live in close proximity to that person. In cases where an applicant needs to reside near elderly parents so as to provide security, support and care, or where elderly parent(s) need to reside near an immediate family member, favourable consideration will also be given. Similar consideration will be given to a relative of an elderly person who has no children."*

52. In the next section of her report, the Inspector summarised the applicants' grounds of appeal including that "*the planning authority has failed to clarify how table 12 and Policy RH01 would be assessed… The health circumstances include autistic spectrum disorder and the site was specifically chosen because it is the best place for our children*"

53. In the "assessment" section of her report, the Inspector stated that she considers the main issues in the case to relate to "compliance with the development plan and national policy provisions" and "the suitability of the site for wastewater treatment" (in addition to some other issues which are not the focus of the grounds for which leave is sought).

54. In her assessment of the "policy" issues, the Inspector in her report (at section 7.2.1) expressed the view that "*the designation of the area in which the site is located as an Area under Strong Urban Influence is clearly justifiable*" having regard to the pattern of development in the area. She referenced the provisions of RH01 (i.e. single rural housing development in accordance with table 12) as being the most relevant local policy provision, noting this policy was in keeping with the principles set out under the Sustainable Rural Housing Guidelines, with similar requirements found in more recent national policy provisions emanating from the National Planning Framework.

55. The Inspector then (in section 7.2.3 of her report), stated as follows:

> "*The criteria set down in the development plan under table 12 permits housing for 'local rural people' who have a definable 'housing need' for building in their 'local rural*

area'. The applicant family does not meet these by reason of being recently resident in the county and not complying with other outlined circumstances. However, table 12 also provides for special consideration to be given in cases of exceptional health circumstances supported by relevant documentation. It is this matter which is at the heart of the grounds of appeal."

56. The Inspector then quoted from the part of table 12 (set out above) which stated that "special consideration shall be given in cases of exceptional health circumstances – supported by relevant documentation from a medical practitioner proving that a *person needs to live in a particular environment*" (emphasis added by Inspector).

57. The Inspector then stated:

"The Board will note the phrase which I have emphasised in italics. This in my opinion is the only criteria which might be relevant to the applicants' circumstances and if the board considers that the criteria are met, it would have considerable bearing on the first reason of the decision of the planning authority. The question is whether the need to reside in a particular environment is supported by the submitted facts. In this respect the first party submissions include reference to the benefits of outdoor space and the safety and security which can be provided on an enclosed gated site. Notwithstanding the stated benefits associated with living in this rural area, I am wholly unconvinced that this constitutes an actual need to live in the particular environment. I consider that it is not demonstrated that such benefits could not be achieved elsewhere away from an area under such significant development pressure or in a settlement in the locality. It is a high bar to demonstrate a need to live in a particular environment on the basis of exceptional health circumstances and in my opinion it is not met. I do not consider that this criteria or any of the other criteria in table 12 apply.

58. The Inspector then went on to address the case made by the applicants, by reference to national policy objective 19 of the national planning framework, that they had a social need for housing to avoid the risk of homelessness previously faced by them.

59. The Inspector said the following in the section of her report assessing the grounds of appeal relating to wastewater treatment (section 7.3)

"In my opinion it is clear from the extensive range of measures recommended that this site is inherently unsuitable for wastewater treatment. It requires complicated engineering and long-term maintenance of the Biocrete unit and the willow planting. Even if that were to be achieved, the issue raised by the planning authority is not readily amenable to a solution, namely, how to disperse the treated effluent given the characteristics of the subsoil, some of which will be removed. I am of the opinion that there is considerable merit to the decision of the planning authority to refuse permission and I recommend that the Board uphold reason number two."

60. The Inspector concluded her report by recommending that permission be refused for the reasons and consideration set out in her report.

The Board's decision and order

61. In its "direction" document dated 10 June 2021, the Board expressly stated that "*The submissions on this file and the Inspector's report were considered at a Board meeting held on 09/06/2021*" and stated that "*The Board decided to refuse permission, generally in accordance with the Inspector's recommendation*".

62. In the Board Order of 22 June 2021 (which contains the decision in respect of which leave is now sought to challenge by way of judicial review), the following "reasons and considerations" were set out:

"1. It is an objective of the planning authority to facilitate the development of individual houses in 'Areas under Strong Urban Influence' for those who comply with the criteria set out in the Sustainable Rural Housing Strategy as set out in Table Number 12 and Policy RH01 of the Wexford County Development Plan 2013-2019 (as extended), the Sustainable Rural Housing Guidelines for Planning Authorities issued by the Department of Environment, Heritage and Local Government in April 2005, National Policy Objective 19 of the National Planning Framework (2018), and the Regional Spatial and Economic Strategy for the Southern Region (January 2020). In this rural location, housing is restricted to persons demonstrating a definable rural housing need to live in the area in accordance with the afore-mentioned criteria. Having regard to the details submitted as part of the planning application and appeal, it is considered that the applicant is neither classified as a 'local rural person' as irrespective of some interest in the area, this is limited and hence they do not comply with policy. The proposed development and the

development proposed to be retained, in the absence of identified definable need, would contribute to random rural development in the area which would militate against the preservation of the rural environment and the efficient provision of public services and infrastructure. The proposed development and the development proposed to be retained would be contrary to Policy Objective RH01 of the development plan and would, therefore, be contrary to the proper planning and sustainable development of the area.

2. *There is evidence of failed drainage conditions on site with the underlying subsoil potentially not capable of hydraulically disposing of the effluent generated by the proposed development with the potential result being that the proposed development and the development proposed to be retained giving rise to a health hazard. The proposed development would, therefore, be prejudicial of public health."*

63. It might be noted at this point that in reason 1 above there is no express reference to "the exceptional health circumstances" criterion in table 12 or the case made by the applicants pursuant to that criterion which lay at the heart of the applicants' appeal.

Applicants' grounds

64. In their statement of grounds, the applicants plead the following grounds in relation to the Board's decision. (I have added my own enumeration after each ground of challenge for ease of explication).

"E13. The Second Named Respondent erred in fact and/or in law in failing to evaluate the Applicants' sensitive, personal and exceptional circumstances in their decision dated the 22nd day of June 2021 in light of the criteria as set out in Table 12 of the Wexford County Council Development Plan 2013-2019 in their planning permission application. [ground 1]

E14. The Second Named Respondent erred in fact and/or in law in failing to consider the wording contained in Table 12 which contains exceptions for those who do not fall under the traditional 'local needs criteria'. The Applicants satisfy the criteria in Table 12 as the Applicants' circumstances falls within the meaning of "…exceptional health circumstances – supported by relevant documentation from a medical practitioner

proving that a person needs to live in a particular environment or close to family support…". [ground 2]

E15. The Second Named Respondent has failed to address and clarify how Table 12 and Policy RH01 of the Wexford County Council Development Plan 2013-2019 was assessed in relation to the Applicant's planning permission application. [ground 3]

E16. The Second Named Respondent has incorrectly asserted that the proposed development at [the Wexford site] *would amount to "random rural development in the area".* [ground 4]

E17. The Second Named Respondent erred in fact/or in law by only and exclusively evaluating the Applicants' planning permission application by referencing to 'Areas Under Strong Urban Influence' without considering the exceptional health circumstances of the Applicants. As stated in the cover letter for the planning permission application, the Applicants were threatened with homelessness which is regarded as a social issue and homelessness would be in line with the National Policy Objective 19 of the National Planning Framework – Ireland 2040 Our Plan. [ground 5]

E18. The Second Named Respondent erred in fact and/or in law by failing to adequately consider the photographic evidence supplied in the appeal application which was a single photograph showing the outside of the site at [the Wexford site]*."* [ground 6]

Board's case as to lack of substantial grounds

65. It is the Board's position that the only complaint raised by the applicants concerns the conclusion that planning permission ought to be refused rather than any alleged error of law or process, and for that reason, leave to issue judicial review proceedings should be refused. The Board submits that no substantial ground is disclosed in the pleaded grounds in circumstances where it is clear from the Inspector's report that consideration was given to the applicants' case as to their sensitive personal circumstances and the exceptional health circumstances they contended for (in relation to the children's health), and also to the case relating to drainage and wastewater treatment.

Analysis and decision

66. I have approached my assessment of the question of whether substantial grounds have been raised by the applicants based on the well-established position that the Inspector's report and the Board's decision should be read together, when the Board has made clear that it has had regard to the Inspector's report and has acted generally in accordance with the Inspector's recommendations (see e.g. *Porter v An Bord Pleanála* [2017] IEHC 783). I have also had regard to the well-established principle that where an applicant claims that a decision-making authority has, contrary to its express statement, ignored representations which it has received from the applicant, the applicant "*must produce some evidence, direct or inferential, of that proposition before he can be said to have an arguable case*" (Hardiman J. in *G.K. v Minister for Justice, Equality and Law Reform* [2002] 2 I.R. 418).

Grounds 1 to 5

67. It seems to me that grounds 1 to 5 (as I have enumerated them above) are all variations of a central proposition sought to be advanced by the applicants, which is that the Board failed to consider the exceptional health circumstances case made by the applicants in respect of their need to live at the Wexford site because of the medical condition of their three autistic children and that the special needs they had by virtue of that condition. Grounds 1 to 3 advance that proposition in express terms as does ground 5. Ground 4 (relating to the finding that the proposed development would amount to random rural development in the area) is in truth related to the exceptional circumstances case as if that case had been considered and accepted, it would have amounted to a permitted exception to what would otherwise be impermissible random rural development. It was also made clear by the applicants in their written submissions that they sought through these grounds to raise a "reasons" case, relying in this regard on the judgment of O'Donnell J. (as he then was) in *Balz v An Bord Pleanála* [2019] IESC 90.

68. In my view, the applicants have raised substantial grounds in respect of these five grounds, in the sense that the grounds are reasonable, arguable and weighty and not tenuous or trivial. I have reached that conclusion for the following reasons.

69. The applicants had submitted a medical report (which was before the Board) from a senior clinical psychologist with the HSE's "early intervention in school age disability

team" stating that the three children in question "have a diagnosis of autism spectrum disorder and require specialist and individualised supports, education and environmental accommodations" and expressed support for the applicants' application for permission to build their home on the site "as it would enable them to provide the stability and predictability required by the special needs children."

70. While the Inspector's report, as set out above, does expressly reference the exceptional health circumstances criterion in table 12 and, indeed, notes that this is "at the heart of the grounds of appeal", the Inspector then makes no reference at all in her assessment to the fact that the applicants have three autistic children with special needs and that there was expert medical evidence before the Board on the appeal seeking to substantiate the case that the applicants and their children needed to live on the Wexford site to allow them properly address their children's special medical needs. The absence of any such reference raises a substantial ground to the effect that this highly relevant material was simply not considered, or was improperly disregarded, by the Inspector when arriving at her recommendation.

71. As we have seen, the Board makes express reference in its Direction of 10 June 2021 to acting generally in accordance with the Inspector's recommendation to refuse permission. The Board's decision, while expressly referencing the other two criteria in Table 12, in fact makes no express reference at all (even in summary form) to the exceptional health circumstances criterion and the case made by the applicants under that criterion which lay at the heart of their appeal.

72. In the circumstances in my view, it is arguable (to the substantial grounds level) that the Inspector and the Board despite stating in general terms that the applicants' submissions were considered failed to lawfully consider the material relevant to the core of the applicants' case on the exceptional health circumstances criterion.

73. In arriving at that conclusion, I should not be taken as expressing any view as to the ultimate strength of those grounds given that the matter will now proceed to a full hearing on those grounds.

Ground 6

74. I do not believe that the applicants have demonstrated a substantial ground in respect of ground 6. The Board in its replying affidavit on the leave application set out what

photographs it received with the applicants' appeal and pointed out that the photographs alleged by the applicants in their grounding affidavit to have not been considered by the Board were in fact not contained with the applicants' appeal. The applicants did not meaningfully reply to the Board's averments in that regard. In the circumstances, in my view the applicants have not made out any basis for the contention sought to be advanced in this ground that the Board failed to consider the photographic evidence submitted to it with the appeal.

Conclusion

75. In conclusion, I refuse an extension of time to seek leave to challenge the Council's decision as there are no substantial grounds on which leave could be given to challenge that decision, which is a legal nullity in light of the applicants' appeal of that decision to the Board. I will grant an extension of time to seek leave to challenge the Board's decision on Grounds E13 to E17 inclusive of the applicants' Statement of Grounds but not on any other ground.