

**THE HIGH COURT
JUDICIAL REVIEW**

[2021] IEHC 745

[2020 176 JR]

BETWEEN

SPECTRE (SHELBOURNE) LIMITED

APPLICANT

AND

AN BORD PLEANÁLA

RESPONDENT

AND

DUBLIN CITY COUNCIL

FIRST NOTICE PARTY

AND

FINANCE IRELAND

SECOND NOTICE PARTY

JUDGMENT of Ms. Justice Quinn delivered on the 23rd day of November, 2021

1. The applicant is the owner of a building at 23 Shelbourne Road, Ballsbridge, Dublin
4. On 24th May, 2019 the applicant entered into an agreement with the State of Israel with the intention of granting to it a lease of the fifth floor at 23 Shelbourne Road for use as an embassy office.
2. On 26th June 2019. the applicant requested and on 23rd July, 2019 the first notice party Dublin City Council made a declaration pursuant to s.5 of the Planning and Development

Act, 2000 that the proposed use of the 5th floor at 23 Shelbourne Road as an “embassy office” constitutes exempt development (the First Declaration).

3. The first notice party issued notice of this declaration on 25th July, 2019. The notice stated that “proposed change of use from ‘office’ to ‘embassy office’ constitutes exempted development.”

4. On the same day 25th July, 2019, the second notice party Finance Ireland, which was the tenant of the fourth floor of the property, made a second request to the first notice party for a declaration pursuant to s.5 in respect of the fifth floor. In making this request the second notice party submitted that the works comprised in the change of use from office to embassy office are not exempt development and that a planning permission must be obtained to allow such a change of use.

5. On 21st August, 2019, in response to the second request, the first notice party made a declaration again to the effect that the proposed change of use is exempt development. (the Second Declaration). On 17th September 2019 Finance Ireland referred the matter to the respondent for review pursuant to s. 5(3) of the Act, again submitting that the change of use is non-exempt development, again submitting that the change of use is non-exempt development.

6. On 22nd August 2019, another tenant of the building Transaction Network Services Limited made a third s.5 request regarding the same change of use of the 5th floor.

7. On 18th September, 2019 the first notice party decided again that the proposed change of use was exempted development (the Third Declaration).

8. On 6th February, 2020 the respondent made its decision on the s.5 (3) review requested by Finance Ireland, and declared that the change of use of the fifth floor to use as an embassy office is development and not exempted development (the Board Order).

9. The applicant seeks an order of *certiorari* quashing the Board Order and a declaration that the respondent erred in law, took into account irrelevant considerations and/ or failed to take into account relevant considerations and/ or acted irrationally and/ or unreasonably.

10. The application is made on the following grounds:

1. That the request pursuant to s. 5 made by the second notice party and the subsequent referral by it to the respondent was an impermissible collateral challenge to the First Declaration. That the applicant was entitled to rely on the First Declaration to the effect that the proposed embassy office use is exempted development. That a s. 5 declaration which has not been challenged in judicial review proceedings is binding and conclusive and the finding that a particular act of development is exempted development cannot be revisited in subsequent enforcement proceedings.
2. That the respondent erred in law in failing to consider whether to exercise its discretionary power under s. 138 of the Act to dismiss the referral in circumstances where the first notice party had previously determined the same question and where no new planning and/ or factual circumstances existed which would justify a new decision by the respondent.
3. That the respondent took into account irrelevant considerations and failed to take into account relevant considerations. Reliance is placed by the applicant on consideration by the Board of case law and previous decisions of the Board, which the applicant states related to considerations of the use of premises as an embassy, as distinct from an embassy office, which the applicant states is a use separately and distinctly defined in the statutory development plans of the first notice party. It is submitted that the

respondent's Inspector and the Board therefore took into account a different type of use to that which fell for consideration in the referral.

11. I have concluded that on the facts of this case the referral by the second notice party did not constitute an impermissible collateral challenge to the First Declaration, and the respondent had power to determine the referral.

12. The respondent's decision that the change of use of the fifth floor to use as an embassy office is not exempted development was made with reference to the finding by its Inspector that there is adequate precedent established by the respondent's previous decisions. Those previous decisions concerned the difference between the use of premises as an office and the use of premises as an embassy. Those precedents were not relevant, where the referral concerned change of use from office to embassy office, not to embassy. Use as "embassy office" and "embassy" carry a different definition in the first notice party's statutory Development Plan 2016 – 2022.

13. The Board concluded "having regard to case law, and to the nature of uses carried out in an embassy ... that an embassy does not constitute an office ..." This conclusion was stated to have been informed by considerations relevant to an embassy, including differing levels of pedestrian and vehicular traffic, altered hours of operation, including evening functions and other activity. In circumstances where the referral to it did not concern use as an embassy, the basis for this conclusion was irrational. Accordingly I shall make the order quashing the Board order.

Planning and Development Regulations, 2001 (SI 600(2001) ("the Regulations")

14. Section 4.1 of the Planning and Development Act 2000 identifies categories of development which are "exempted developments for the purposes of this Act".

15. Section 4.2 empowers the Minister to make regulations providing for any class of development to be exempted development for the purposes of the Act.

16. Article 2.10.1 of the Regulations governs change of use for the purpose of considering exempted development and provides as follows:

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

(a) involve the carrying out of any works other than works which are exempted development,

(b) contravene a condition attached to a permission under the Act,

(c) be inconsistent with any use specified or included in such a permission, or

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

17. Part 4 of Schedule 2 identifies eleven classes of use within which any change of use is exempt by reason of Article 2.10.1. Relevant to the submissions in this case are the following:

“CLASS 2

Use for the provision of—

(a) financial services,

(b) professional services (other than health or medical services),

(c) any other services (including use as a betting office),

where the services are provided principally to visiting members of the public.

CLASS 3

Use as an office, other than a use to which class 2 of this Part of this Schedule applies.”

Section 5 of the Act of 2000

18. This section governs requests and referrals to an authority and/or the Board for authoritative clarification of the planning status of a development or works where any question arises and provides as follows:

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

5 (2) (a) Subject to (paras. (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.

“5 (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.”

19. Subsections (4), (5), (6) and (7) govern the obligation of the authority and Board respectively to maintain a register of the declarations made pursuant to s. 5. Each authority and the Board is required to make information concerning such decisions available for inspection and purchase by members of the public for at least eight weeks from the date of issue of the relevant decision or declaration.

Section 50 of the Act

20. Section 50(2) of the Act provides that no person shall question the validity of any decision made or act done by a planning authority or the Board under the Act otherwise than by way of an application for judicial review under O.84 of the Rules of the Superior Courts. A s. 5 declaration or decision is such a decision or act.

Section 138 of the Act

21. Section 138 provides as follows:

“(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.

(emphasis added)

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

(3) The Board may, in its absolute discretion, hold an oral hearing under section 134 to determine whether an appeal or referral is made with an intention referred to in subsection (1)(a)(ii)."

Dublin City Development Plan 2016-2022

22. Appendix 21 to the Plan contains "Land Use Definitions". It states that the definitions of uses which appear in the plan "are for guidance only". A number of the definitions contained in that Appendix are relevant as follows:

“Embassy

A building, or part thereof, or land used by a foreign government for diplomatic purposes or conduct of relations between nations. The use may include a residential content for the staff of the embassy which is ancillary to the embassy activities. The use does not include a foreign trade delegation or trade office.

Embassy: Residential

A building, or part thereof, or land used by a foreign government for diplomatic purposes, primarily being a residence for embassy staff or consular officials where non-residential use is subordinate and ancillary to the use of that building as a

residence. The use does not include a foreign trade delegation or trade office.

Embassy: Office

A building or part thereof, or land used by a foreign government for diplomatic purposes, where the use of the building is primarily commercial and where the residential content is minimal, which may include a foreign trade delegation, trade office or public embassy offices.”

Chronology

23. Reliance is placed by the respondent on certain differences in the text of the question referred by the applicant and the second notice party respectively, and on other details of the chronology.

24. On 26 June 2019 the applicant made its request to Dublin City Council. The request was in a letter from the applicant’s planning consultant Mr. Ian McGrandles of IMG Planning. The letter opens by stating that Mr. McGrandles is instructed to seek a declaration pursuant to s. 5 (1) “with respect to the 5th Floor of 23 Shelbourne Road” “that the use of the above offices as embassy offices constitutes exempted development.’ The request continued as follows: –

“23 Shelbourne Road is a long-established six storey office building located on the western side of Shelbourne Road to the north of the Merrion Road junction.

Our client has received an expression of interest from a diplomatic mission to occupy the 5th floor of the building and use it as embassy offices.

It is noted that the City Council has previously issued declarations on the following properties confirming that the change of use from ‘office’ to ‘embassy : office’ (as defined in the Dublin City Development Plan 2016 – 2022) constitutes exempted development.

Reference 0023/12 – 8 Raglan Road, Dublin 4

Reference 0098/12 – 45 - 47 Pembroke Road

Reference 0174/13 – 65 Fitzwilliam Square North”

“On the basis of the foregoing it is submitted that in the subject case, as embassy offices fall within the same use class under the Planning Regulations as the authorised office use of the premises the proposed use is exempted development not requiring planning permission.”

The First Declaration and the Second Request

25. On 23 July 2019 the first respondent made its decision that the proposed change of use from office to embassy office was exempted development.

26. On 25 July 2019 two events occurred as follows:

(1) The first notice party issued to the applicant its Notification of the Declaration on Development and Exempted Development containing the decision made on 23 July 2019 that the proposed change of use from office to embassy office constituted exempt development.

(2) The second notice party made its request pursuant to s. 5. The request was supported by a planning report by Messrs. Hughes Planning and Development Consultants in which they identified the question before the Planning Authority as follows:

“Whether the change of use of the fifth floor number 23 Shelbourne Road Dublin 4 from offices to embassy office use is or is not a development and whether this change of use constitutes exempted development or not”.

27. Messrs. Hughes submitted that the relevant works did not constitute exempted development and that planning permission must be obtained to allow such change of use.

28. On 31st July, 2019 the first notice party wrote to the applicant notifying it of the application which had been made by the second notice party and providing it the opportunity to submit views or comments on the application. No submission was made by the applicant.

The Second Declaration

29. On 21st August, 2019 the first notice party made a decision to issue a declaration that the proposed change of use was considered exempt development.

30. On 23rd August, 2019 notification of that decision was given to the second notice party Finance Ireland.

The Third Declaration

31. On 22nd August, 2019 a third request was made for a s.5 declaration in relation to the intended change of use, this time by Transaction Network Services also a tenant of the building. It submitted that: *“the proposed change of use of part of the building from offices to embassy use is not exempt pursuant to Class 2 and Class 3 Part 4 and Article 10 of the Planning and Development Regulation 2001”* and it requested a declaration to that effect. On 18th September, 2019 the second respondent made a decision on that request declaring the proposed development exempt.

Was the same question referred?

32. The respondent submits that the applicant’s original request on 26 June, 2019 was for a declaration that “the use of the above offices as embassy offices constitutes exempted development” and that this did not present itself as a change of use question which was clearly the subject of the later requests. The first letter makes it clear in the fourth paragraph that it is referring to change of use when it cites that “the City Council has previously issued declarations on the following parties’ properties confirming that the change of use from office to embassy office (as defined in the Dublin City Development Plan 2016-2022) constitutes exempted development”. It then refers to the three precedents and continues “on

the basis of the foregoing it is submitted that in the subject case...the proposed use is exempted development not requiring planning permission”.

33. The First Declaration makes it clear that the first notice party regarded the request as relating to a change of use when it states in its reasons for the decision that “it is recommended that the applicant be informed that the proposed change of use from office to embassy office constitutes exempted development”.

34. The Finance Ireland request made on 25 July, 2019 expressly refers to a change of use from office to embassy office and the Second Declaration again recites the “change of use”.

35. In the case of each of the referrals to the first notice party the decision was made following a report by its Planning and Development Department that it considered that office use fell within Class 3 of the Regulations of 2001 and that embassy office use also came within Class 3 of those Regulations and therefore such use would be exempt. The report on the first referral concluded that no change of use would occur and the subject query would constitute exempt development. The reports on the second and third referrals concluded that the change of use constituted exempt development.

36. The report of the inspector to the Board made on 21 January, 2020 recites as part of the planning history the First Declaration to the effect that “the proposed change of use from office to embassy office constitutes exempted development”. It refers also briefly to the Third Declaration in similar terms. The inspector concludes that the “material change of use from the fifth floor from office use to embassy office is not exempted development.”

37. The Board order also recites the question as concerning a “change of use”.

38. The submission that the question first referred by the applicant was not the same as the question referred to the respondent or that there has been a change in facts or circumstances is based on a limited and artificial reading of the applicant’s request letter dated 26 June, 2009 quoted above. I am satisfied that the question determined by the Board

was the same question which had been requested by the applicant and determined in the First Declaration.

Correspondence

39. On 1 July 2019 the applicant wrote to Finance Ireland notifying it that it had completed the acquisition of 23 Shelbourne Road and that it had retained the services of HWBC as its property management agent for the property.

40. On 8 July 2019 Finance Ireland replied to the applicant acknowledging the correspondence. Finance Ireland continued:

“We understand that the fifth floor of the property is intended to be let to the Israeli Embassy. As you will appreciate this is a matter of some concern to all existing tenants of the property, given the manner in which we understand this embassy operates and manages its consular premises. Under the terms of our lease of the fourth floor of the property we are entitled to the quiet enjoyment of our demise and are anxious to ensure that no steps are taken by you, as our landlord, to jeopardise that position.”

The letter continued by noting that certain works had already commenced on the fifth floor and that agreement has been reached or is imminent with the embassy of Israel. The letter then requested confirmation that no steps would be taken which would adversely affect their occupation and they referenced such matters as access for staff and visitors, security, services and service charges.

41. On 12 July 2019 Amoss Solicitors on behalf of Finance Ireland wrote to the applicant, referring to their client’s letter of 8 July 2019 and referring also to an article which had appeared in the Irish Times on 11 July 2019 and a planning notification filed on 26 June 2019 “in respect of a proposed change the use of the fifth floor from office use to embassy offices”.

42. Messrs. Amoss expressed their client's concern that the presence of the Israeli Embassy may make the premises a target for anti-Israeli and anti-Semitic agents and creates a security risk for its client, its staff and visitors. Messrs. Amoss then identified seven particular concerns which their client held and requested a reply as a matter of urgency.

43. On 18 July 2019 the applicant responded to Finance Ireland noting its concerns. They stated that they were satisfied that the operation of the embassy would not affect the notice party's quiet enjoyment of the premises, communal areas and car park. They then gave certain further information and assurances in relation to the management of any works to enable occupation by the embassy.

44. On 29 July 2019 Messrs. Amoss wrote again to the applicant, referring to the previous correspondence and stated as follows:

“Notwithstanding the decision of Dublin City Council (the Council) that the proposed change of use of the fifth floor of the property by Spectre Shelbourne Limited (the Landlord) is an exempted development, our client is of the view that planning permission for the proposed change of use is required and has lodged a section 5 application with the Council seeking confirmation of this.

Pending the decision on that application, and any referral to An Bord Pleanála, our client is advised that the works being undertaken in order to facilitate the unauthorised change of use also require planning permission and we reserve our client's position in this regard.”

Referral to Respondent

45. On 17th September, 2019 the second notice party referred the matter to the respondent for review pursuant to the provisions of s. 5.(3) of the Act.

46. The referral was made on behalf of the second notice party by Messrs Hughes Planning and Development Consultants. In their submission they requested that the Board set

aside the decision of the first notice party and issue a declaration stating that the proposed use of the fifth floor as an embassy office does not constitute exempted development.

47. The submission of Messrs Hughes examined the planning history of the property, the development provisions of the Dublin City Development Plan, zoning, definitions of exempted development and submitted that a number of the precedent cases relied on by the applicant in its original submission were not precedents for change of use from office to embassy office.

48. On 20th September, 2019 the respondent notified the applicant of the referral and informed it of its right to make submissions or observations in writing to the board in relation to the referral. No such submissions were made.

49. On 23 September, 2019 the first notice party furnished to the respondent a file of documentation, including the three declarations which had been made by it.

Inspector's report 21st January, 2020

50. The Board's inspector Brid Maxwell in her report concluded that "the material change of use of the fifth floor from office use to embassy office is not exempted development" and concluded as follows "neither the Act nor the Regulations provide for a change of use from office to embassy office as exempted development. Accordingly, I conclude that the material change of use of the fifth floor from office use to embassy office is not exempted development."

51. The inspector referred to the planning history of the property including the first declaration dated 23rd July, 2019 and the third declaration dated 18th September, 2019. She referred to the Dublin City Development Plan 2016 to 2022 and the land use definitions in Appendix 21, including the definitions of "embassy", "embassy: residential" and "embassy: office".

52. The inspector referred to two decisions of the Board which she considered relevant.

53. In ABP 304696-19 relating to St. Heliers, Stillorgan Park, Blackrock, the Board had decided that the change of use of an office building to use as an embassy was development and not exempted development. In that case the permitted existing use was offices together with a caretaker's flat. The Board concluded that the change to use as an embassy would be a factual change of use which raised material issues relevant to the proper planning and sustainable development of the area and would therefore constitute a material change of use. The Board had concluded that an embassy does not constitute an office and therefore does not fall within the scope of Class 3 of Part 4 of Schedule 2 to the Regulations.

54. PL29S227769 and PL29S227770 related to applications for development permission consisting of refurbishment and extension of existing offices and alteration and refurbishment of the interior and exterior of offices and ancillary site works at 43 Ailesbury Road, Dublin 4.

55. A condition imposed by the authority to restrict the use of the entire premises for use as an embassy and not to be used as general offices or any other uses, was upheld by the Board. The Board decided in that case that the established permitted use of the site was as an embassy and that such use did not come within the meaning of office use as defined in Class 3.

56. The decision of the Board was upheld by this court (Dunne J.) on judicial review. (Quinlan v. An Bord Pleanala & Anor [2009] IEHC 228) The inspector cites that judgment as authority for the proposition "that the issue of what does not come within the scope of office use is quintessentially a matter for the planning authority and the Board and not the court".

57. The inspector then concluded as follows "*Having regard to the foregoing I consider that there is adequate precedent established by the Board's previous decisions which set out the distinction between use as an office and use as an embassy office to allow the Board to conclude that the use of the fifth floor of 23 Shelbourne Road as embassy offices raises*

matters different from those that would arise under use as an office and is materially different and therefore constitutes development.”

58. *“Neither the Act nor the Regulations provide for a change of use from office to embassy office as exempted development. Accordingly, I conclude that the material change of use of the fifth floor from office use to embassy office is not exempted development”.*

59. Both of the precedents cited concerned the difference between use as an office and use as an embassy. This referral did not concern use as an embassy.

The Board Order 6 February 2020

60. On 30th January, 2020 the Board met to consider the referral. It considered the report of the inspector and decided that the change of use to use as an embassy office is development and is not exempted development.

61. On 6th February, 2020 the Board Order issued.

62. The order recites that the Board in considering the referral had regard to the provisions of ss. 2, 3 and 4 of the Act, Articles 5, 6, 9 and 10 of the Regulations, Part 4 of Schedule 2 of the Regulations and in particular Classes 2 and 3 of that Part. The recital continues:

“(d) Previous decisions of An Bord Pleanála under file references numbers PL29S227769, PL29S227770 (Ailesbury Road) and ABP305471-19 (St. Heliers) and (e) relevant case law, and in particular the judgment of the High Court in the case of Derek Quinlan v. An Bord Pleanála & Anor. [2009] IEHC 228.”

“And whereas An Bord Pleanála has concluded that

(a) the permitted use of the subject premises is as offices. Such office would come would come within the scope of Class 3 of Part 4 of the 2nd Schedule to the Planning and Development Regulations 2001, as amended;

- (b) *the change of use of the premises to use as an embassy would be a factual change of use, and this change of use raises material issues relevant to the proper planning and sustainable development of the area, including differing levels of pedestrian and vehicular traffic and of the potential for impacts on the amenities of the area through altered hours of operation, including evening functions and other activity and would, therefore, constitute a material change of use and is development; (emphasis added)*
- (c) *having regard to case law, and to the nature of uses carried out in an embassy, it is considered that an embassy does not constitute an office and, therefore, does not come within the scope of Class 3 of Part 4 of the 2nd Schedule to the Planning and Development Regulations 2001, as amended, or any other class of use set out in Part 4; (emphasis added)*
- (d) *accordingly, the development in this instance cannot avail of the exemption provided for under Article 10(1) of the Planning and Development Regulations 2001, as amended, and*
- (e) *there are no other provisions, in the Act and Regulations, by which the development in this case would constitute exempted development.*

NOW THEREFORE An Bord Pleanála, in exercise of the powers conferred on it by s.5(3)(a) of the 2000 Act, hereby decides that the change of use of the fifth floor of an office building to use as an embassy office at 23 Shelbourne Road, Ballsbridge, Dublin 4 is development and is not exempted development.

Matters considered

In making its decision, the Board had regard to those matters to which, by virtue of the Planning and Development Acts and Regulations made thereunder, it was

required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions”.

63. On its face, the order is stated to have regard to the nature of uses carried out in an “embassy”, whereas the referral concerned change to an “embassy office”, those uses being differently defined in the first notice party’s Development Plan.

Standing of the applicant to bring these proceedings

64. The respondent makes a preliminary objection that because the applicant elected not to make any submissions or representations to the respondent or to the first notice party, the applicant lacks the standing to challenge the Board Order.

65. The respondent cites the judgment of Keane J (as he then was) in *Lancefort Limited v. An Bord Pleanála (No. 2)* [1999] 2 IR 270 where he stated: -

“It would, in my opinion be a significant injustice to a party in the position of the notice party to be asked to defend proceedings on the ground of an alleged irregularity which could have been brought to the attention of all concerned at any time prior to the granting of permission, but which was not relied on until the application was made for leave to bring the proceedings”.

66. The applicant relies on the judgment of the Supreme Court in *Grace and Sweetman v. An Bord Pleanála & Ors.* [2007] IESC 10. The court in that case considered the evolution of s.50 of the Act and in particular the introduction in 2000 of an express statutory requirement for prior participation followed by the express repeal of that provision in 2006 and continued “it can no longer be held that *Lancefort* provides authority for any general preclusion of standing in the absence of prior participation of an appropriate explanation for the lack of it”.

67. The respondent submits that although *Grace and Sweetman* makes it clear that the failure to participate in the process before the Board was not automatically fatal in that case,

it does not stand as authority for the proposition that an applicant can decide not to participate and not to raise issues and yet advance those arguments in judicial review proceedings.

68. The combined effect of these authorities is that failure to participate in the administrative procedures, being the s. 5(1) request and the s. 5(3) referral, cannot of itself form the basis of excluding an applicant which clearly has the “sufficient interest” required by Order 84 Rule 20 (5). Nonetheless, the principle identified by Keane J. in *Lancefort* must still carry relevance in so far as it engaged a consideration of whether a “significant injustice” is created when the respondent or a notice party is faced with defending its decisions by reference to grounds of irregularity which were not brought to its attention prior to making the decision. To establish whether such injustice arises, it is appropriate to assess the balance between the interests of the applicant on the one hand and the respondent and the notice party on the other hand. The notice parties have not participated in the hearing of this application.

69. In *Grace and Sweetman*, having concluded that failure to participate in the process before the Board did not itself deprive the applicant of locus standi the court turned its attention to the broader question of standing of the particular applicants and their respective interests. The existence of a sufficient interest is not in dispute in the case of the landowner itself.

70. Neither *Lancefort* or *Grace and Sweetman* concerned s. 5 referrals. A particular feature of s.5 is that a s.5(3) referral to the Board may only be made by parties to whom a declaration has been issued by the planning authority, being the party making the request and, where appropriate, the owner and occupier of the land in question. The applicant was on notice of the Finance Ireland request under s.5 (1) and its referral to the respondent pursuant to s.5(3) and notice was given to it by the first notice party in accordance with the provision of s. 5(2)(c) for inviting such submissions or information. It therefore had every opportunity to make its representations at each stage of the process.

71. By the time the deadline passed for the applicant to make submissions to the respondent, namely 18th October 2019, the first notice party had made three Declarations favourable to the applicant. The applicant had no reason to assume that the respondent would simply make the same decision. There is no evidence that it made any such assumption, less still as to whether the existence of three favourable declarations informed its decision not to make submissions to the respondent.

72. In finding a balance between the interests of the applicant as the owner of the subject property, and those of the respondent and the notice parties I have concluded that any prejudice to the respondent and first notice party would be outweighed by the direct hardship which would be imposed on the applicant by denying its standing . Therefore the balance of justice favours permitting the applicant to advance these proceedings.

Impermissible collateral challenge to First Declaration

73. The grounds advanced by the applicant under this heading may be summarised as follows: -

- (1) A s.5 declaration which has not been challenged in judicial review proceedings is binding and conclusive and the finding that a particular act of development is exempted development cannot be revisited in subsequent enforcement proceedings. (emphasis added). These are not enforcement proceedings, although the applicant readily acknowledges that they are brought in order to address its potential exposure in any later enforcement proceedings.
- (2) The s. 5(1) request by the second notice party and its subsequent s. 5(3) referral to the respondent amount to an impermissible attempt to make a collateral challenge to the First Declaration.

- (3) The factual and planning circumstances considered by the respondent on to the second notice party's referral were identical to those considered by the first notice party in its consideration of the First Declaration. The First Declaration is a valid lawful decision which forms part of the planning history of the lands.
- (4) The appropriate manner for Finance Ireland to challenge the First Declaration was to refer that matter to the Board and/or to challenge that decision by way of application for judicial review. (Finance Ireland was not a party to whom the First Declaration issued and therefore had no standing to refer it to the respondent pursuant to s. 5(3).)
- (5) The First Declaration was a conclusive decision subject only to a right of referral to the Board or a challenge by way of judicial review and the Board erred in law in considering and purporting to determine the referral which had been the subject of an earlier adjudication by the Council under the comprehensive self-contained statutory code which is s.5 of the Act.
- (6) The applicant made its request for a s.5 declaration in order to have the planning status of the embassy office use determined and to obtain an authoritative ruling on the question posed in its request made on 26th June, 2019.
- (7) In purporting to perform its functions in accordance with s.5 of the Act on the referral made to it by Finance Ireland, the Board did not have the power to decide the matter and unlawfully permitted a question as to the validity of the First Declaration.
- (8) The applicant is entitled to rely on the First Declaration to the effect that the proposed embassy office use is exempted development, and did so by expending €1,077,741.69 on the property by way of fit out and security works.

74. The respondent denies that the referral to the Board was an impermissible collateral challenge. It says that s.5 does not prohibit a question being referred to a planning authority or to the Board more than once.

75. The respondent relies also on the following : -

- (1) The First Declaration was only notified to the applicant on the same day as the Finance Ireland request was made and the July declaration was not uploaded to the website of Dublin City Council until 1 August 2019 at the earliest. Therefore, the request of Finance Ireland could not have been intended as a challenge to the July declaration.
- (2) The respondent says that there is no evidence that Finance Ireland was aware of the July 2019 declaration when it made its referral of the August 2019 declaration to the Board for review. This is factually incorrect. The applicant has exhibited a letter of 29th July, 2019 from the solicitors acting for Finance Ireland Limited, Amoss referring to the decision of the Council that the proposed change of use of the fifth floor is exempted development.
- (3) The respondent asserts that the factual or planning circumstances considered by the Board in relation to the Finance Ireland referral were not identical to those considered by the Council on the applicant's request. It asserts that the question asked was not the same and the information before the Board was not the same as the information before the Council. In this regard it refers to the submission made to the Board by Hughes Planning and Development Consultants on behalf of Finance Ireland. I have concluded that in substance the question was the same question.

76. The respondent says that insofar as the applicant now contends that there was no change in the planning facts and circumstances between the making of the First Declaration

and the Board Order that was a factual matter for the applicant to establish prior to the Board making its determination and that having elected not to make that case it is not now open to the applicant to rely on those facts.

77. The respondent states that “at almost all times subsequent to the making of the First Declaration (and at latest since being notified of Finance Ireland’s request on 29 July, 2019) the applicant has been on notice that the question of whether its proposed change of use from office to embassy office was exempted development, has been put in issue by Finance Ireland’s invocation of the statutory jurisdiction to determine such questions in s.5 of the Act.”

78. The respondent states that there is no prohibition on the exercise of the Board’s jurisdiction pursuant to s.5(3) in a case where the planning authority has previously issued a declaration pursuant to s.5(2). Accordingly, the jurisdiction of the respondent to determine such a referral is not ousted by a previous determination of the planning authority.

Narconon Trust v. An Bord Pleanála and others

79. The applicant relied heavily on the judgment of Heslin J in *Narconon Trust v. An Bord Pleanála & Ors.* [2020] IEHC 25, delivered on 24 January, 2020, six days before the respondent met to consider the referral, and 14 days before the Board order. Extensive submissions were made by both parties in relation to the effect of this judgment.

80. On 31 August, 2016, the applicant *Narconon* made a request to Meath County Council for a declaration pursuant to s.5 of the Act to the effect that a change of use from “nursing home” to “residential drug rehabilitation facility” was exempted development.

81. On 29 September, 2016 Meath County Council issued a declaration that the proposed change of use from nursing home to drug rehabilitation facility was exempt. The evidence was that following the issue of that declaration the applicant proceeded with the purchase of

the subject property and carried out significant construction works at the property, raising and expending approximately €9m on the facility.

82. On 16 February, 2018 two separate applications were made to Meath County Council pursuant to s.5, by third parties namely the Ballivor Community Group and the Trim Municipal District Council requesting a determination as to whether the change of use from nursing home to residential drug rehabilitation facility was exempted development.

83. In February 2018 Meath County Council referred the matter to An Bord Pleanála pursuant to s.5(4) of the Act. It noted that it had already issued a determination on the matter and that two subsequent requests for declaration had been received and therefore it was referring this application to the Board pursuant to s.5(4).

84. On 19 November, 2018 the Board issued an order deciding that the change of use in that case was development and not exempted development.

85. Heslin J reviewed the existing case law on s.5. He found that in that case the applicant had made the first s.5 application in 2016 in order to have the planning status of the proposed development determined and to obtain an authoritative ruling on the question posed by it. He noted that that declaration could have been challenged by way of judicial review proceedings pursuant to s.50, which were not brought within the time limited. He was satisfied that the 2016 declaration constituted an authoritative ruling on the question which had been put.

86. Heslin J decided as a fact that the question asked in the 2018 requests was the same question which the applicant had referred in 2016 and that the effect of the 2018 referrals was that the referrers wanted the same question answered in a different way than it had been answered in 2016.

87. Heslin J concluded that the effect of the 2018 requests was to question the validity of the decision made by the Council on 29 September, 2016 by means of a s.5 application dated 16 February, 2018, and that this would circumvent the exclusivity of the remedy of judicial

review expressly provided for in s.50 of the Act. He continued: *“The intention of the Oireachtas, as expressed in section 50, is unambiguous. By enacting Section 50, the Oireachtas made it clear that only one route was available to those who wished to question the validity of any decision made by a local authority in the performance of a function under the 2000 Act. In my view, this necessarily means that, when performing its functions in accordance with section 5, the Board lacks the power to decide a question if that question is in fact an attempt to question the validity of a prior decision by a local authority made by same in the performance of a function under the 2000 Act, other than in accordance with the mandatory requirements of s. 50 of the Act, including s. 50 (2)”*.

88. Heslin J concluded that the parties making the s. 5 requests in 2018 were in fact by that method making a collateral challenge to the Council declaration of September 2016 and the court could not permit such a collateral attack.

89. Heslin J. continued: -

*“...s. 5(4) of the 2000 Act confers wide powers on a planning authority to refer any question as to what, in any particular case, is or is not development, or is or is not exempted development to be decided by the Board. It may be that the Board is not automatically precluded, in all circumstances, from entertaining a s. 5 reference by virtue of the existence of a prior, extant unappealed declaration made by a local planning authority pursuant to a separate reference. If, for example, relevant planning facts or circumstances had changed between the issuing of the local authority’s Declaration and the subsequent referral, the factual position would be materially different than in the present case. Importantly, however, this is not the factual situation in the present case and it is not necessary to decide wider questions in order to resolve the issues which arise in the present case but insofar as Mr. Justice Simons, in *Krikke v. Barranafaddock Sustainability Limited* [2019] IEHC 825,*

observed that: “...questions remain as to whether...An Bord Pleanála would be precluded from entertaining a reference by virtue of the existence of an earlier unappealed declaration made by a local planning authority pursuant to a separate reference”, the answer in the present case is in the negative, having regard to the facts identified and for the reasons set out in this judgment.”

90. Finally, Heslin J. expressed the following 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”.”

91. Two important points emerge from the passages I have quoted above.
92. Firstly, it is clear that Heslin J. was finding that the Board is not automatically precluded in all circumstances from entertaining a s. 5 reference by the existence of a prior unappealed declaration. He cited a change of planning facts or circumstances as an “*example*” of a case where a subsequent referral could be entertained. That does not arise here, but it cannot be treated as an exhaustive description of such circumstances.
93. Secondly, Heslin J. makes the point that it would be impermissible for a party to raise the same question “*at some later point*”. In this case, Finance Ireland did not wait until “some later point” of their choosing or allow any time whatsoever to pass. When they made the initial request to Dublin City Council, they were not aware of the result of the first referral. Rather than awaiting its results, when its remedy would have been limited to judicial review, it took the initiative of commencing the s.5 process at a time when there was no bar, either statutory or otherwise, to doing so.

Conclusion as to collateral challenge

94. Finance Ireland had the right at any time up to 16 September, 2019 (being the expiry of eight weeks from the date of the First Declaration) or perhaps later to challenge that declaration by way of judicial review. Such a challenge would not of course concern the planning merits of the First Declaration but an analysis by reference to the usual tests for judicial review. As it was not a party to whom that declaration had issued Finance Ireland had no standing to refer that declaration for review by the Board pursuant to s.5(3). Therefore it had no opportunity to have the First Declaration tested as regards its merits from a planning and development perspective. Instead of moving directly for judicial review, it took the

initiative of making its own s. 5(1) request, thereby bringing into operation the entire mechanics of s. 5, including the facility for review of the merits pursuant to s. 5(3).

95. There is no doubt that on the day on which Finance Ireland made its request to Dublin City Council pursuant to s.5(1) it was aware that the applicant's request for a declaration was pending. It may even have anticipated the result of that request but it did not have that result and there is no evidence before the court that when lodging its request on 25 July, 2019 Finance Ireland was aware of the outcome of the applicant's request, an outcome which became known to the applicant only that day.

96. There is no concept of an "anticipatory collateral challenge" identified in any of the authorities and I am not persuaded that the making of a request pursuant to s.5(1) on 25 July 2019 in circumstances where the legislation does not preclude the making of such a referral, can then be characterised as a collateral challenge. This is entirely different to *Narconon*, where the parties making s.5 requests in 2018, knew for well over one year of the first declaration, had taken no action arising from it, and then sought a different answer to the same question. In this case the Finance Ireland referral was made on the same day that the First Declaration had been notified to the applicant, and there is no evidence that its contents were then known to Finance Ireland. The First Declaration had not therefore attained the status of an unimpeachable declaration. A period of 8 weeks and possibly more, would pass before it would become unsusceptible to judicial review.

97. The position had altered by the date on which Finance Ireland made its referral to the Board pursuant to s.5(3) on 17 September, 2019. At that time Finance Ireland was aware not only of the outcome of its own request to the City Council but of course of the First Declaration. At least up until the day before it made the referral to the Board, Finance Ireland still had available to it the remedy of an application for judicial review in relation to the First Declaration. Instead, it had already taken the initiative of invoking s.5 before it or the

applicant were aware of the First Declaration. A s. 5(3) referral was the next stage prescribed by statute for the examination of the question on its planning merits. The s.5(1) request was entirely within the scheme of s.5. Making the referral pursuant to s.5(3), to the intent that the respondent would review the question on its merits, was a permitted next step in the statutory framework in a process validly commenced by Finance Ireland on 25 July, 2019 and was notified to the applicant. To find otherwise would mean that having made a timely request under s.5(1) the requesting party would be deprived of the next stage of the s.5 procedure, and instead ought to have pursued judicial review of the First Declaration.

98. Nowhere has it been suggested that Finance Ireland had identified any grounds to challenge the First Declaration by way of judicial review. Therefore it would be unjust to penalise Finance Ireland for not pursuing judicial review when it had, properly, invoked the s.5 procedure at a time when, as I have found, this was not impermissible, thereby placing the question before the authorised planning decision makers charged with determining the merits of the question from a planning and development perspective.

99. I have no doubt that when Finance Ireland made its request, and obviously when it made its referral to the respondent, these steps were taken with the objective of securing an outcome adverse to the applicant's interests. Nonetheless, having found that the s. 5(1) request was permissible, I cannot be persuaded that invoking the ordinary route of s.5(3) within the architecture of s.5 was not open to Finance Ireland, or that the power of the respondent to determine the referral was ousted by the existence in this case of the First Declaration.

Legal certainty and reliance

100. The applicant submits that in circumstances where the First Declaration was unchallenged either by way of a referral pursuant to s. 5(3) (a route which was not open to

Finance Ireland as it was not a party to whom the First Declaration had issued) or by way of judicial review, it was entitled to rely on the First Declaration.

101. Much emphasis was placed by the applicant on the rationale behind the prohibition of challenges to planning decisions after the expiry of relevant time limits. I have been referred to the *dictum* of Finlay C.J. in *K.S.K. Enterprises Ltd v. An Bord Pleanála* [1994] 2 IR 128, at 135 where he stated: -

“...the intention of the legislature was greatly to confine the opportunity of persons to impugn by way of judicial review decisions made by the Planning Authorities and in particular one must assume that it was intended that a person who has obtained a planning permission should at a very short interval after the date of such decision, in the absence of a judicial review, be entirely legally protected against subsequent challenge to the decision that was made and therefore presumably left in a position to act with safety upon the basis of that decision.”

102. The rationale was further expanded on by Clarke C.J. in *Sweetman v. An Bord Pleanála* [2018] 2 IR 250, where he stated the following: -

“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.”

103. These principles were cited and relied on also by Heslin J. in *Narconon*.

104. The mischief which these principles are intended to avoid does not arise on the facts of this case.

105. The grounding affidavit of Arlene Van Bosch, sworn 28th February, 2020, states that:-
“Certain fit out and security works have been carried out at the property in reliance on the decision of the Council that the use of the property as Embassy Office is exempted development. In the circumstances to date Spectre has expended €1,077,741.69 on the property.” (emphasis added)

106. In a supporting affidavit sworn on 28th February, 2020, Mr. Ian McGrandles states that he is aware that certain fit out and security works have been carried out at the property in reliance on the First Declaration.

107. There is no evidence before the court as to the time period over which such expenditure was committed or made, other than the statement of Ms. Van Bosch to the effect that the amount quoted has been expended “*to date*”, meaning to the date of swearing of her affidavit on 28th February, 2020.

108. It is clear from the correspondence exhibited in Ms. Van Bosch’s supplemental affidavit sworn on 15th June, 2020 that from 29th July, 2019, at the latest, the applicant was aware that Finance Ireland differed from the view taken by Dublin City Council on the matter, intended to take the matter further and had itself lodged a s. 5 application with the Council.

109. In the letter of 29th July, 2019, Messrs Amoss reserved their client’s position “*pending the decision on that application and any referral to An Bord Pleanála*”. This was

no mere statement of reservation or threat. The legal step of making a section 5 request had been made.

110. It may be, as always, a matter of debate, as to whether *Narconon* is no more than statement of the existing law regarding successive s. 5 requests and collateral challenges. However, such heavy reliance is placed by the applicant on that judgment that the applicant cannot truly assert that from 25th July, 2019 onwards, it believed it could rely on the First Declaration as unassailable. On the contrary, it is clear from the judgment of Simons J. in *Krikke* that questions still remained as to whether the Board would be precluded from entertaining a reference by virtue of the existence of an earlier unappealed declaration made by an authority pursuant to separate reference. In this case, from the very day on which the First Declaration was issued the applicant was on notice of the controversy and had no reason to believe that it was incapable of being challenged.

Failure to consider power under Section 138 to dismiss a referral

111. The applicant submits that the respondent failed to consider the provisions of s. 138(1)(b) of the Act which allows the Board to dismiss a referral, *inter alia*: -

“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.”* (emphasis added)

112. S. 138(1)(b)(ii) draws attention to and requires that regard be had to “*any previous permission which in its opinion is relevant*”. A s. 5 declaration is not a “*permission*” and it seems to me, therefore, that reliance on s. 138(1)(b)(ii) would be misplaced. However, the applicant invokes the section in a more general way and does not limit this submission to

“any previous submission”. At its core, this ground is the failure of the respondent to evidence any consideration of the exercise of the power.

113. The applicant says that in circumstances where the Board was aware of the July Declaration, it was open to it to consider the exercise of its discretion to dismiss the referral on the basis that the same question had been determined by the Council and there was no change in the factual or planning circumstances that would warrant a new decision by the Board.

114. The applicant states that the Board erred in law in failing to give any consideration as to whether to dismiss the referral. It submits that there is no evidence before the court of such consideration having been undertaken.

115. The respondent says that this ground is advanced on a misconception that, in the circumstances of this case, it would have been appropriate for the Board to exercise the power of dismissal.

116. The respondent says also that, if the applicant is correct and the Board erred in law in determining the referral, then the question of the exercise of the Board’s jurisdiction under s. 138 does not add anything to the case and the Board’s decision would be unlawful.

117. As regards the absence of evidence of consideration of the s. 138 discretion, the respondent says that it is clear from the Inspector’s Report and the Board order that the history of referrals on the question was noted and taken into account by it.

118. The applicant places reliance again on *Narconon* in which Heslin J., having noted that the Board was not on the facts of that case obliged to determine the s. 5(4) referral and lacked the power to do so lawfully, also noted that the Board, as he put it, “*undoubtedly had the express power not to determine the referrals, in light of s. 138(1)(b) of the same Act*”.

119. The applicant submits that was under a positive duty to consider the exercise of the discretionary s.138 power in the first place, see *Stovin v. Wise* [1996] AC 923, where Lord

Hoffman stated “A public body almost always has a duty in public law to consider whether it should exercise its powers”.

120. The respondent emphasises that s. 138 uses the phrase “*absolute discretion*” and submits that any challenge based on the failure of the Board to exercise the discretion must establish that it was irrational for the Board not to have done so. It says that the inspector and the Board were aware of and considered the existence of the First Declaration. It also points out that no case was ever made to the Board that it should have invoked its powers under s. 138 to dismiss the referral.

121. In *Cleary Compost and Shredding Ltd v. An Bord Pleanála* [2017] IEHC 458, Baker J. noted the absence of authority regarding the operation of s. 138. She said that “*The principles are well established and in broad terms a decision-making power must be exercised bona fide and in a manner which is not unreasonable and is factually sustainable*”.

122. Baker J. continued: -

“I accept as a matter of general principle that the exercise of the power to dismiss an appeal is one that should be carefully exercised and the discretion of the Board is neither unfettered nor immune from review. This arises also from the fact that the dismissal of an appeal must be for stated reasons and considerations: s. 138(2): the decision should state ‘the main reasons and considerations’ on which the decision is based.”

123. In, *Cleary Compost*, the court was concerned with a decision of the Board to dismiss an appeal in exercise of the discretionary power contained in s. 138(1)(b)(i). It had been argued that the Board was not entitled to come to its decision having regard to the planning history of the site. Baker J. noted that as a matter of fact in that case, the reports of the inspectors and other documents before the Board contained sufficient references to and

details of various s. 5 declarations made by the planning authority and concluded that the Board did have regard to those prior decisions.

124. Heslin J. in *Narconon* identified s.138 as a discretionary power. Insofar as Heslin J. found that the Board ought to have exercised its power pursuant to s. 138 to dismiss the referral, it seems to me that this finding was in turn dependent on the finding that the 2018 requests and the referral were, on the facts of that case, an impermissible collateral challenge to the 2016 declaration. Therefore, the failure of the Board to consider the exercise of the power was an error in that case.

125. Although the criteria for exercising the discretion in s.138 are not limited to a consideration of the prior planning history, the Oireachtas chose to include among the criteria any previous “permission”, and did not extend this to any previous “decision”, or “act” which it could have done if it had considered previous decisions or declarations to be as relevant as previous permissions. Nonetheless the respondent in fact had regard to the planning history, including the First Declaration.

126. Although there is no evidence that the respondent considered in terms the manner in which it would exercise the discretion conferred by s.138, I have concluded that in circumstances where the inspector and the respondent were aware of and considered the planning history and the three declarations which were contrary to the submissions of Finance Ireland the absence of a decision to dismiss the referral in exercise of that discretion was not irrational or unreasonable and does not render the Board’s decision infirm on that ground.

Failure to take into account relevant considerations/ taking into account irrelevant considerations

127. The grounds relied on by the applicant under this heading are three:

- (a) That the inspector and the Board had regard to precedent decisions of the Board and of the court which were not relevant.
- (b) Failure to take account of relevant decisions of the court including the *Narconon* judgment.
- (c) Consideration of the materiality of the proposed change of use in determining whether the development the subject of the referral was or was not exempted development.

Precedent decisions of the Board and court

128. The Board Order refers to the decisions made by it under file reference numbers PL29S.227769, PL29S.227770 (both Ailesbury Road) and ABP - 305471-19 (St. Heliers). These precedents are considered in the report of the Inspector. The Inspector refers to the adjudication of these cases. I have already quoted from the land use definitions contained in Appendix 21 to the Dublin City Development Plan 2016 to 2022. That plan contains different definitions for each of “embassy”, “embassy: residential” and “embassy: office”. The Inspector refers to the Plan and Appendix 21. She quotes definitions of “office” and “embassy: office”, but not of “embassy” or “embassy residential”.

129. The Inspector’s report contains no discussion of the detail of St. Helier’s other than a brief recital of the decision of Dun Laoghaire Rathdown County Council to the effect that the use of the premises at St. Heliers as an embassy was not exempted development. The Board had upheld the determination.

130. The inspector considers the referrals relating to 43 Ailesbury Road. In that case the planning authority had imposed as a condition of permission for refurbishment and extension works a requirement that the entire premises be used solely for use as an embassy and not as general offices. In that case there was no discussion of the question of a distinction between an office and an embassy office.

131. The Inspector also referred to three precedent decisions, cited by the applicant in its original request, and sought to be distinguished by Finance Ireland in its referral, concerning change of use from office to embassy office. Finance Ireland had submitted that each of those was distinguishable because they related to proposed change of use of an entire building.

132. The Inspector stated that “the extent of information provided to the Board is limited to terms of the specific nature of the existing and proposed use of the property. The considerations are solely based on the limited detail provided regarding established “office” use and intended “embassy office” use.”

133. The Inspector continued:

“The Board has adjudicated on three cases which are relevant to the consideration of the current proposal as outlined above (reference St. Heliers and Ailesbury Road (2)). The Board’s decisions in relation to 43 Ailesbury Road which were subsequently upheld in judicial review proceedings concluded that embassy office use does not constitute an office and does not come within the scope of Class 3 of Part 4 of Schedule 2 the Planning and Development Regulations 2001, as amended, or any other class of use set out in Part 4. The Board notices that use as an embassy raises material issues relevant to the proper planning and sustainable development of the area including differing levels of pedestrian and vehicular traffic and the potential for impacts on residential amenities of neighbouring property through altered hours of operation including evening functions and other activities.” (emphasis added)

134. The references to traffic and, more significantly, “the potential affects of altered hours of operation including evening functions and other activities”, being features characteristic of an embassy, reveal that the Inspector was substantively considering “embassy” use and not “embassy office” use.

135. The Inspector continued:

“Having regard to the foregoing I consider that there is adequate precedent established by the Board’s previous decisions which set out the distinction between use as an office and use as an embassy office to allow the Board to conclude that the use of the fifth floor of 23 Shelbourne Road as embassy offices raises matters different from those that would arise under use as an office and is materially different and therefore constitutes development”.

136. It is clear even from the Inspector’s own report that the “foregoing” precedent decisions in both St. Helier’s and Ailesbury Road concerned not the difference in use between office and embassy office, but between office and embassy use. This had two consequences:

137. Firstly, the Inspector was informed by and regarded as relevant precedents concerning embassy use, which were not relevant to the referral.

138. Secondly, it paid no attention to the existence of different land use definitions in the first notice party’s statutory development plan.

139. The Board Direction of 31 January 2020 recites at (b)

“the change of use of the premises to use as an embassy would be a factual change of use”

And at (c)

“Having regard to case law, and to the nature of users carried out in an embassy, it is considered that an embassy does not constitute an office...”

140. Finally, the Board Order, having recited the previous decisions and judgment in Quinlan stated at (b) as follows “the change of use of the premises to use as an embassy would be a factual change of use, and this change of use raises material issues relevant to the proper planning and sustainable development of the area.”

141. At Recital (c) the Board repeats this error where it states “*having regard to case law and to the nature of uses carried out in an embassy, it is considered that an embassy does not constitute an office, and therefore does not come within the scope of Class 3 of Part 4 of the second schedule to the Regulations.*”

142. The respondent submits that the precedents guided the Inspector in her determination that embassy office use does not constitute office use within the meaning of Class 3 of Part 4 of Schedule 2 to the Regulations. It says that this determination was a question of planning judgment which the Board was lawfully entitled to exercise. This submission would generally have some force, were it not for the finding of the board at Recital (c), relating as it does to use as an embassy, which is clearly not a rational basis for the decision that embassy office is not within Class 3.

Failure to consider relevant case law

143. The Board met to consider the referral six days after the delivery of the judgment in *Narconon* and issued its decision two weeks after the delivery of that judgment. There is no evidence that it considered the *Narconon* judgment, despite reciting that it had regard to ‘relevant case law’.

144. The *Narconon* judgment had no relevance to the substantive planning question concerning change of use from an office to embassy office. The applicant submits that its relevance is that the Board ought to have considered whether the referral before it constituted an impermissible collateral challenge to the First Declaration. The effect of *Narconon* is that an authority or the respondent considering a repeat referral should consider whether it constitutes an impermissible collateral challenge. To that extent the failure to consider *Narconon* was an error. Nonetheless, I have already concluded that the judgment in *Narconon* does not mean that on the facts of this case the request and subsequent referral by

Finance Ireland constituted an impermissible collateral challenge to the First Declaration. Therefore, I am not persuaded that the Board order should be quashed on this ground.

Article 10 of the 2001 Regulations

145. In para. 8.1.3, the Inspector states that she considers that there is adequate precedent to allow the Board to conclude that the use of the fifth floor as Embassy Offices “*raises matters different from those which would arise under use as an office and is materially different and therefore constitutes development*”.

146. The applicant submits that the question of materiality is relevant only to the determination as to whether the change of use constitutes development, which is not contested in the case. It submits that once the finding was made that the change of use constituted development, the concept of materiality has no further application and therefore was not relevant to the analysis required for the purposes of the Article 10 exemption.

147. The references to “matters different from those which would arise under use as an office and is materially different” cause confusion. I am not persuaded that merely because materiality is a factor in the first question of determining whether a change of use is development and because materiality is not referenced in Article 10 of the Regulation, questions of materiality can never be relevant to establishing if there has been or is proposed a change of use which would bring an activity outside a permitted user class referred to in Part 4 of Schedule 2. I accept the respondent’s submission that it was within its competence to make a planning judgment finding that an intended user was outside the meaning of “office” for the purpose of Class 3 of Part 4. The difficulty in this case is that identified earlier in this judgment, namely that the respondent performed the analysis having erroneously considered issues relevant to the activity of an embassy, which were not relevant.

Conclusions

148. I have concluded the following: -

- (1) The applicant had locus standi to bring these proceedings notwithstanding its failure to make submissions to the respondent on the Finance Ireland referral.
- (2) The request made by Finance Ireland to the first notice party for a declaration pursuant to s. 5(1) of the Act was not an impermissible collateral challenge to the s.5 First Declaration made on 23rd July, 2019;
- (3) The referral to the respondent pursuant to s. 5(3) of the Act made on 17th September, 2019 was a valid exercise of the rights of Finance Ireland under s.5 to request a review of the Second Declaration made on 21st August, 2019, which itself had arisen from a valid and permissible original request by Finance Ireland;
- (4) The respondent acted within its power and authority in considering and deciding the referral made by Finance Ireland;
- (5) The respondent erred in taking into account irrelevant considerations, namely precedent decisions which concerned the distinction between embassy use and office use in circumstances where the referral concerned a change of use from office to embassy office.
- (6) The respondent acted irrationally and unreasonably in its determination that having regard to the nature of uses carried out in an embassy, which use was not the subject of the referral, the intended change of use to an embassy office did not constitute exempted development. In making this determination the respondent failed to have regard to the existence of different definitions of land use contained in the first notice party's Development Plan 2016 – 2022.
- (7) The respondent failed to consider the exercise of its discretion pursuant to s. 138 of the Act, having regard to the planning history of the subject property

and, in particular, the existence of three declarations made by the authority pursuant to s. 5(1);

- (8) The respondent erred in law in its failure to take into account the case law of this Court and, in particular, the judgment in *Narconon*.

149. The errors of law identified in paragraphs (7) and (8) above do not of themselves warrant an order quashing the decision of the respondent, having regard to my conclusions at (2), (3), and (4). In light of my conclusions at (5) and (6) I shall make a declaration that in making the decision on 6th February 2020 under ref ABP – 305471-19 pursuant to s.5(3) of the Act, the respondent erred in law, took into account irrelevant considerations and acted irrationally and unreasonably. I shall make an order quashing the decision of the respondent. I shall hear the parties as to the final form of the order and consequential matters.