**THE HIGH COURT**

**[2015 No. 454 JR]**

**BETWEEN**

**CLEARY COMPOST AND SHREDDING LIMITED**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**JUDGMENT of Ms. Justice Baker delivered on the 10th day of July, 2017.**

1. The applicant seeks an order by way of judicial review quashing the decision of An Bord Pleanála dated 8th June, 2015 by which it dismissed an appeal pursuant to its powers contained in s. 138(1)(b)(i) of the Planning and Development Act, 2000 (as amended) ("the PDA"). Declarations are sought in regard to the approach of the Board to the appeal and to the planning history of the composting activity to which the application related. It is argued that the decision was not supported by evidence and is unreasonable, and was made without fairness of process and contrary to natural justice.

**Relevant factual background**

2. The applicant is a limited liability company and the owner of Larchill Farm at Larchill, Monasterevin in the County of Kildare comprising approximately 300 acres which historically was an arable farm on which was cultivated under rotation a wide range of crops including spring wheat, winter barley, winter wheat, oil seed rape, peas and previously, sugar beet. The applicant carries on at Larchill a waste management or a "composting facility" involving the processing and storage of horticultural and agricultural waste and organic materials, and the compost product is used to replenish the soil on Larchill. The operation in respect of which the applicant first engaged the planning process involved the bringing of organic materials onto part of the site for processing, storing and composting of these materials on site and spreading on the lands as required. The applicant also conducted a research and development project as part of its business.

**The planning history of the site**

3. The facility has the benefit of three planning permissions granted by Kildare County Council in 1995, 2000 and 2006 for the erection of a number of sheds for the storage of grain, hay, fodder and ancillary works, references 95/0234, 00/0094 and 06/2553. The composting activities were commenced after the last of these planning permissions was granted in 2006.

4. The level of activity has increased and certain structures were constructed to facilitate the increased storage and processing of the increased load.

5. On 28th January, 2015 the applicant appealed the refusal on 23rd December, 2014 by Kildare County Council to grant planning permission to extend the existing composting facility to accept and treat an additional annual quantity of 12,000 tonnes of waste in the facility together with ancillary works to facilitate the extension of that activity (09.244409).

6. The Board refused the appeal having come to a view that the planning history of the facility did not support the application for an extension as the activity did not have the benefit of planning permission nor was it exempt under the Act.

7. The decision of the Board issued on 8th June, 2015 stated in simple and stark terms:

> "Dismiss the said appeal under subsection (1)(b)(i) of section 138 of the Planning and Development, 2000, based on the reasons and considerations set out below."

8. The reasons and considerations comprise part of the basis of challenge in this judicial review, and the application also challenges the manner by which An Bord Pleanála came to the decision to dismiss the appeal under the statutory power contained in s. 138(1)(b)(i).

**Grounds of judicial review**

9. Leave was granted by Noonan J. on 27th July, 2015 to bring application for judicial review. The grounds will appear in the course of this judgment and in summary are :

> (a) The respondent misconstrued the nature of the existing use and activity, and its finding that the existing development was unauthorised was not supported by any evidence, was made without finding by a court competent to so determine, and where the planning authority had determined that the activity and works on the site were not development, or if they were development were exempt.
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> (b) The decision of the respondent was unreasonable or irrational.
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> (c) The respondent made its finding unilaterally, without notice and without affording the applicant opportunity to make submissions, and is contrary to fair procedures and natural justice.

**Reasons given by the Board**

10. The Board determined that it was "inappropriate for the Board to give any further consideration to the grant of planning permission". The reasons were stated as follows:

> "The subject application is for development comprising the extension of an existing composting facility. It has already been decided by An Bord Pleanála that:
>
> > (a) the existing composting facility is a waste management facility which does not have the benefit of planning permission or does not benefit from any exemptions from the requirement for planning permission under the Planning and Development Acts, 2000 – 2014 or regulations made thereunder, and

(b) the existing composting facility is a development which requires an environmental impact assessment and an appropriate assessment to be carried out."

11. The Board, having noted previous planning decisions, went on to state that it considered it inappropriate to give any further consideration to the application:

> "unless and until its planning status is regularised, as to do so would be contrary to orderly development and the proper planning and sustainable development of the area."

12. The Board gave a second reason arising from the fact that retention permission is precluded by European law as follows:

> "Furthermore, the option of seeking to extend the scope of the subject application to include the existing operations is not open to the Board, because s. 34(12) of the Planning and Development Act, 2000, as amended, precludes the Board from considering an application for retention of development where an environmental impact assessment or appropriate assessment is required."

13. This is a reflection of the determination of the CJEU in *Commission v. Ireland*, Case C-215/06, [2008] E.C.R. I-4911.

14. In conclusion, the Board considered that it should not further entertain the application:

> "The Board is satisfied that, in the particular circumstances, the appeal should not be further considered by it, having regard to the nature of the appeal."

15. In summary, the Board determined that, as the existing facility did not benefit from planning permission, nor was exempt from the requirement to obtain permission, and because an Environmental Impact Assessment ("EIA") or Appropriate Assessment ("AA") were required, it could not entertain the appeal.

16. The first argument of the applicant is that the Board erred in failing to have regard to three declarations made by Kildare County Council regarding the facility, and that its decision is as result irrational and wrong in law. I turn now to examine these.

**Three s. 5 declarations of Kildare County Council**

17. The applicant made three separate applications for declaration under s. 5 of the PDA in respect of the works or use of the land.

18. On the first referral, Kildare County Council made a declaration on 9th March, 2009 (Ref: ED/00300) that the proposed works were exempted development having regard to the "nature and limited extent and scale of the activity".

19. The second s. 5 declaration made on 30th December, 2010 (Ref: ED/00353) determined that the proposed works were exempted development having regard to the definition of agriculture contained in s. 2 of the PDA and to the exempting provisions relating to agriculture contained in section 4.

20. The third s. 5 declaration made on 7th June, 2011 (Ref: ED/00371) has the most relevance to the question in dispute. The questions posed were whether:

> "(1) continued use of the farmland for the processing, storage of compost to include the importation of green waste and spent mushroom compost and the processing and storage of the green waste only in an existing shed and the mushroom waste in the existing farmyard is or is not a material change of use and is or is not development.
>
> (2) the importation, processing, storage and composting of other organic materials in the existing farmyard as part of a research and development project and the importation, processing, storage and composting of food waste in an existing agricultural shed is or is not a material change of use which is a development and is or is not exempted development."

21. Kildare County Council determined that the use of the lands for the processing *etc*. of green waste was not a material change of use and was not development, and that the importation *etc*. of other organic materials, including "organic fines", was also not a material change of use and not development. Kildare County Council considered that the proposed activity, including that relating to organic fines, was "ancillary to an existing agricultural activity, and having regard to the previous decisions" (the plural was used), and made a determination that the activity was unchanged.

22. The effect of the three s. 5 declarations made by Kildare County Council was that the importation, processing, storage and composting of green waste including spent mushroom compost and other organic materials, including organic fines, was declared not to comprise development. It is clear that the third s. 5 declaration was made following a consideration of the first and second declarations made in 2009 and 2010 respectively, and that Kildare County Council took the view there had been no material change since those earlier declarations were made.

23. The applicant argues that because it has the benefit of the three declarations under s. 5 it was not necessary to apply for planning permission in respect of the works or activities on site. It is argued that the activity was agricultural in nature and, therefore, even if there was development, it was exempt from the planning requirements of the Act. In the circumstances it is contended that the Board erred in failing to have regard to these declarations.

24. The Board argues in response that it was entitled to, and did in fact make its determination on the appeal now under challenge in reliance on three later determinations, and that it did not fail to have regard to the three earlier declarations.

25. I turn now to examine the planning decisions of the Board.

**Three s. 5 declarations of An Bord Pleanála**

26. Subsequent to the making of the three declarations by Kildare County Council, a number of referrals were made by a third party to An Bord Pleanála under section 5. The Board departed from the decisions made by Kildare County Council in each determination made respectively on 5th September, 2013 (09.RL.3029 and 09.RL.3045) and on 30th July, 2014 (09.RL.3216). None of these decisions was challenged by the applicant who would now be out of time to do so. It is also of note that the applicant engaged fully with the Board in regard to the matters referred for determination.

**First and second declarations 5th September, 2013. Board ref: 09.RL.3029 and 09.RL. 3045**

27. The first referral to the Board, 09.RL.3029 for a declaration regarded the question determined by Kildare County Council in the 2011 reference. The question in simple terms was:

"Whether the processing of organic fines is an exempted development (domestic rubbish) in an existing farmyard."

28. Two referrals came to the Board at the same time, the other a referral by Kildare County Council following a request for a declaration by the same third party from the planning authority (09.RL.3045). The two referrals were dealt with together although two separate reports from an inspector were furnished which showed considerable overlaps and identical descriptions of the site, development and planning history. One report was adduced in evidence in the present application because of the overlap.

29. The inspectors characterised the waste being processed, stored and composted at the site to be green waste, including spent mushroom compost, food waste including animal by-products, organic fines as classified in the European Waste Catalogue and hazardous waste list, organic fines which are not capable of being composted and waste material, bio-stabilised material created as a by-product of a composting activity. A further question arose for consideration by the Board relating to the construction, excavation, demolition, extension, alteration or renewal of the composting windrows, retaining walls and waste water holding tanks on the lands.

30. It is clear from the reports of the inspectors that submissions were received on behalf of the applicant through its solicitors. Those submissions, *inter alia*, pointed to the fact that the activity was not commercial in the sense that the compost created by the process was not sold commercially to any other party but was used on the farmlands. Reference was made to the three declarations made by Kildare County Council, the last of which in 2011, ED/00371, had dealt *inter alia* with the organic fines and spent mushroom compost and the research and development component of the activity. It was contended that the question of whether the activity or works were development and not exempt was in effect *res judicata*, and that there had been no change in the circumstances since April, 2011, the operative date for the last of three s. 5 declarations made by Kildare County Council.

31. From the reports of the inspectors in evidence before me it is apparent that the three s. 5 declarations made by Kildare County Council were considered and explained, and that the inspector analysed the development of the overall activity on site with a view to ascertaining whether a material change had taken place between 2009, when the first declaration was made, and 2012. The report in 09.RL.3029 ran to 41 closely typed pages. Certain factors were regarded by the inspector as relevant to the determination, and he noted (at pp. 35ff) that over a period of two to three years, a number of changes had occurred in the activities being carried out, including a "tenfold increase in the amount of material handled", a change in the origin of the material in that the material received was not merely horticultural i.e. green waste, and the fact that some of the final composted organic fines could not, as a matter of law for reasons arising under the waste management legislation, be used as compost on the farmland but was transferred elsewhere for incineration. The inspector also expressed the view that the purpose of the activities being carried out had changed as the process produced a by-product which could not be spread on farmland.

32. The inspector also noted a likely "tenfold increase" in traffic and vehicular activity on the site, and the construction of new structures including a surface water holding tank and a wall.

33. The conclusion of the inspector was that there had been "significant intensification" of the activity and a "factual change" in the nature of the activity, such that the facility had become a "waste-related project" involving the processing of municipal waste, the by-product of which was required to be exported to a different storage site. The inspector regarded it as irrelevant whether the activity could be described as "commercial" but did note there was an "industry standard weighbridge and office at the entry point of the site" and that the applicant had indicated a future intention "to carry out a larger scale or commercial activity".

34. The inspector expressed the view that the activity did involve a change in use of land from agriculture to a waste related and a research and development process, that this change was material in planning terms and was, therefore, development.

35. It is significant that the inspector also expressed the view that the activity could not be categorised as exempted as it required an EIA and AA as the site was relatively close to the River Barrow and River Nore Special Area of Conservation ("Nore SAC").

36. The Board gave its decision on the 5th September, 2013 in 09.RL.3029 and 09.RL.3045 and concluded that the importation, storage, composting, spreading and/or disposal of organic fines and/or related research and development were development, and not exempted development. It also declared that the use of the agricultural sheds for the storage and processing of imported waste constituted a material change of use, and the provision of underground storage tanks and the construction of a reinforced concrete retaining wall could not be exempt.

37. In its direction of 22nd August, 2013 the Board had expressly noted that it did not share the opinion of Kildare County Council in ED00371 (the June, 2011 declaration) in respect of the continued use of the land for waste processing *etc*.

**Third Board reference 09.RL.3216, 30th July, 2014**

38. A further third party referral was made to the Board on 3rd April, 2014, 09.RL.3216, and a decision given on 30th July, 2014. It is clear from the inspector's report that this referral was dealing with a quite different factual context than that dealt with by Kildare County Council in June, 2011.

39. The Board's decision was that the activity on site did not come within the definition of agriculture set out in s. 2(1) of the Act as amended, and represented a change of use from the former use of agriculture to waste processing. Given the scale of the activity the Board considered that the change in use was material, was therefore development and not exempt. The Board was not satisfied that the activity was commercial in nature but this was not regarded as determinative. Of importance is the fact that the Board took the view that an EIA and AA were required.

**The application for permission for an extension of the facility**

40. On 10th July, 2013 the applicant made application for planning permission for an extension to the existing composting facility to add an additional enclosed area with a floor area of 6,671 sq. metres for the preparation and storage of horticultural and agricultural compost soil conditioners and the stabilisation of organic materials. The application proposed that the existing limit of 10,000 tonnes per annum of material would be increased by 12,000 tonnes, to a total of 22,000 tonnes per annum. An alteration and extension of the existing reception building on site was proposed as was an administration/staff building, seven enclosed concrete tunnels and an external plant in the form of bio-filtration system and maturation area. Modifications were required to the existing weighbridge, and new works to boundary fencing, drainage, waste water treatment system, parking and traffic controls and to the vehicular entrance.
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**Application for an exemption from s. 172(3) of the PDA**

41. As part of the application for permission to Kildare County Council, the applicant made a request to An Bord Pleanála for an exemption from the requirement to provide an EIS under s. 172(3) of the PDA: (Board Reference PL.09.EA 2004). An inspector's report was also obtained for this purpose. It is not necessary for me to analyse in any detail the content of this report save to note that at p. 7 the inspector, having referred to the decision of the Board in reference 09.RL.3029 that the activities on site were development and not exempted development, said:

> "… it is considered that there is unauthorised development currently on the site. It is therefore possible that the current application may be for an extension to/ expansion of an unauthorised development. The issue may also arise regarding retention permission and EIS/substitute consent process."

42. Later in his report (p. 11) the inspector noted that the planning status of the existing development "is not clear" and recommended that the Board not grant the exemptions sought.

43. The Board gave its decision on 6th March, 2014 and refused the exemption from the requirement to furnish an EIS.

44. Following the decision of An Bord Pleanála with regard to the EIS the applicant submitted an EIS on 31st October, 2014 but on 23rd December, 2014 Kildare County Council refused permission. It is the decision of An Bord Pleanála on the appeal from that decision that is challenged in the present application.

**Retention application**
45. One other planning application is relevant. The applicant applied to Kildare County Council for retention permission in respect of the underground storage tanks on 2nd May, 2014. Permission was granted subject to conditions on 26th June, 2014, and this was appealed by a third party to An Bord Pleanála which on 31st December, 2014 refused to grant retention permission, ref: PL.09.243638, having regard to the previous determination of the Board (references 09.RL.3029, 09.RL3045 and 09.RL3216) in respect of the activities on the site. The Board came to the conclusion that:

> "the proposed retention of the development would facilitate the consolidation and intensification of this use. In these circumstances, it is considered that it would be inappropriate for the Board to grant planning permission for the proposed retention of the development."

**Summary of planning decisions**
46. An Bord Pleanála therefore had considered the activity and works on a number of occasions, and gave three determinations under s. 5 of the PDA, a decision with regard to the exemption under s. 172(3), and had refused the application for retention permission on appeal on 31st December, 2014. Therefore, in the period between 2012 and the end of 2014 the Board engaged a number of extensive analyses of the facility, and issued five determinations or decisions which remain unchallenged, and are now not capable of being challenged. Each of these, and taken together, amount to the conclusion that the activity and works on site are development which do not have the benefit of planning permission, and are not exempt.

47. In each case the applicant had engaged fully with the evidence and made substantial submissions and replying submissions. In each the relevant planning history and the s. 5 declarations made by Kildare County Council were actively engaged.

**Engagement by the Board of section 138**
59. Section 138 of the Act, as amended and substituted by s. 24 of the Planning and Development (Strategic) Infrastructure Act 2006, vests in the Board the power to dismiss an appeal in certain circumstances without engaging in full with the facts as follows:

> "(1) The Board shall have an absolute discretion to dismiss an appeal or referral—
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> (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—
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> (i) is vexatious, frivolous or without substance or foundation, or
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> (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—
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> (i) the nature of the appeal (including any question which in the Board's opinion is raised by the appeal or referral), or
>
> (ii) any previous permission which in its opinion is relevant.
>
> (2) A decision made under this section shall state the main reasons and considerations on which the decision is based.
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> (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)."

60. The Board expressly invoked s. 138(1)(b)(i) in its decision of 8th June, 2015, and took the view that the nature of the appeal and previous decisions were such that the appeal should not be further considered by it.

61. The applicant argues that the decision by the Board to dismiss the appeal without further consideration and without considering the substance of the case amounts to an impermissible exercise of the statutory power. The applicant relies on the authorities starting with *The State (Lynch) v. Cooney* [1982] 1 I.R. 337 regarding the exercise of a statutory function by an administrative body. 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. In *Kiely v. Kerry County Council* [2015] IESC 97, [2016] 1 I.L.R.M. 221 McKechnie J. with whom Denham C.J. and O'Donnell J. agreed, identifies the judgment of Henchy J. in *The State (Lynch) v. Cooney* as the starting point and described the principles "in shorthand" as requiring "the opinion reached be *bona fide* held, factually sustainable, and not unreasonable". (para. 70)

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

63. The same approach is found in the earlier judgment of Hogan J. in *Cork Institute of Technology v. An Bord Pleanála* [2013] IEHC 3, [2013] 2 I.R. 13 where he identifies the requirement that the statutory decision maker has "first correctly defined the relevant terms … ."

64. *Cork Institute of Technology v. An Bord Pleanála* involved the question of whether the applicant third level institution was a "voluntary organisation" and Hogan J. considered that, while Article 157(1) of the Planning Regulations 2001 involved a degree of subjective appraisal by the decision maker, there was an obligation to "act bona fide and in a manner that is not unreasonable and factually sustainable". He relied on *State (Lynch) v. Cooney* and on *Kiberd & Anor. v. Hamilton* [1992] 2 I.R. 257. As Hogan J. noted, these principles have been emphatically restated in the judgment of Fennelly J. for the Supreme Court in *Mallak v. Minister for Justice Equality and Law Reform* [2012] IESC 59, [2012] 3 I.R. 297.

65. 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.

66. Further, because a decision to invoke the power undoubtedly will impact on the rights and obligations of the respective parties, the general principles that govern the review of administrative decision making are applicable.

67. No authority has been identified regarding the operation of s. 138, but I consider that as a matter of first principle, arising from the nature of the power, the statutory power is one that must be engaged only when the matter is clear, and for good reason, and only if the decision maker has correctly formulated the question before it.

**A summary dismissal?**
68. The applicant's primary challenge in the judicial review is that the decision to deal with the matter in what is termed a "summary" manner was not within the competence of the Board or was done without due process or for good reason.

69. To describe, as does the applicant, the statutory power of the Board as permitting it to "dismiss summarily" an application seems to me a wrong characterisation. A summary dismissal of an application involves the decision maker coming to the conclusion that an answer is clear cut, and requires neither detailed analysis nor substantial legal argument.

70. The approach of An Bord Pleanála in the present case was not "summary" if by this is meant that the Board did not fully consider the matter before it. The evidence shows that it had before it a considerable amount of material and a number of recent, clear, unassailable and relevant planning decisions. In its terms the decision rested upon prior decisions of An Bord Pleanála that planning permission did not exist for the existing facility it had characterised as a "waste management facility" and not one which could be treated as exempt, and also because the existing facility required an EIA and AA because of the nearby Nore SAC.

71. The Board was faced with a choice: treat the application as one in respect of which the answer was capable of being arrived at from the evidence before it, or invite further submissions and evidence and appoint an inspector. The Board took the view that it would not give any further consideration to the application for an extension as the planning status of the existing facility was already clear. It also considered that it was not competent to consider the application as one for retention having regard to the fact that an EIA and AA were required.

72. The decision of the Board was reasoned and based firmly in the recent, relevant, clear and detailed planning history regarding the site. It was not taken as a result of a "summary" approach to this evidence. Therefore, this argument fails.

**Relevant considerations?**
73. The applicant argues that the Board was not entitled to come to the decision under s.138(1)(b)(i) having regard to the planning history of the site and because of the extant and relevant s. 5 declarations made by Kildare County Council by which the works and activities on site were declared not to be development, or to be exempt.

74. As a matter of fact, the reports of the inspectors and the other documentation before the Board, including its own decisions made between 2013 and the end of 2014, all contained references to and details of declarations made by Kildare County Council. The Board therefore did have regard to the prior decisions made by Kildare County Council. Its own decisions made express reference to the Kildare County Council files, and the Board direction of 3rd June, 2015 expressly recited that it did have regard to the planning history and to those s. 5 declarations which were specifically identified.

75. The Board had made three declarations that development had occurred in respect of which planning permission did not exist. There was a separate but related finding that because an EIA and AA were required was a matter of law, an exemption could not exist. The decision of the Board was one which flowed logically from the previous s. 5 declarations. I do not go as far to say that the decision flowed inevitably or inexorably from the previous s. 5 declarations as the Board did have conflicting decisions before it which it was required to and did, in fact, reconcile. The reconciliation primarily occurred in the context of these applications for s. 5 declarations before it, and the application for exemption from the requirement to prepare an EIS.

76. The applicant bears the burden of proving that the Board failed to have regard to relevant considerations: McMahon J. in *Klohn v. An Bord Pleanála* [2008] IEHC 111, [2009] I I.R. 59, Charleton J. in *Weston Limited v. An Bord Pleanála* [2010] IEHC 255 and Finlay P. in *Comhaltas Ceoltóirí Éireann v. Dun Laoghaire* (Unreported, High Court, Finlay P., 14th December, 1977).

77. The applicant has not established evidence which leads me to the conclusion that the matters recited as having been considered by the Board were not in fact considered by it.

**The interplay between the various s. 5 declarations**
78. The s. 5 declarations made by Kildare County Council and the later ones made by An Bord Pleanála in each case are now not capable of being challenged. Insofar as a conflict arises, the applicant argues that the Board was not competent to make a determination which favoured one decision over another.

79. That analysis fails to have regard to the fact that An Bord Pleanála expressly determined the applications before it in the light of the evidence before it that the nature and extent of the activity had changed.

80. The corollary of the argument is that no one of the s. 5 declarations can be said to prevail.

81. I reject the argument that the Board predetermined its decision by relying on its previous s. 5 declarations. In *West Wood Club Limited v. An Bord Pleanála* [2010] IEHC 16 Hedigan J. considered that it was "inevitable" that the Board would have regard to previous s. 5 declarations and that it was correct for it to do so. That is not to say that the s. 5 declarations would pre-determine the result of the extension application, but rather the Board was entitled to take the view that there were extant, unchallenged and final determinations which found that the activity on site was development and not exempt development. Indeed, Hedigan J. took the view that:

> "It was proper that the respondent had regard to a relevant planning decision which it made only a relatively short time before … in the interests of consistency. That was a decision made following a formal process and which was entered in the planning register. Once entered it became part of the planning history of the site and was properly taken into consideration … ." (para. 34).

82. It was not only proper, but also in my view reasonable, for the Board to have regard to its previous decisions, and I am not satisfied that it could be said that the Board ignored the s. 5 declarations of Kildare County Council. It had departed from those for sound reasons based on the evidence before it, and therefore I consider that it had before it and did actually consider all relevant information, and properly did have regard to, and was influenced by, determinations that it had made in the previous processes which were recent. Hedigan J. in *West Wood Club Limited v. An Bord Pleanála* noted the fact that a previous s. 5 declaration was recent, as relevant.

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

84. The matter could be said to be a question of weight. The Board did not overturn, ignore or disagree with Kildare County Council because it made its determinations in the light of the then current activity on site in respect of which it had ample evidence, and substantial and extensive submissions by the applicant in regard to the authority and force of the previous decisions.

85. The inspector in his report in 09.RL.3216 set out a view that the activity on site had "increased substantially".

86. Further, the applicant is wrong as a matter of fact, as Kildare County Council in refusing permission for the extension had relied *inter alia* on the determinations of the Board. Both Kildare County Council and the Board took the same approach to the nature of the activity in 2014, that it was development which was not exempt.

87. It is also noteworthy that Kildare County Council sent a warning letter in June, 2012 and while enforcement proceedings have not been progressed thereafter, Kildare County Council seems to have taken the view that the activity in June, 2012 on the site was not authorised.

88. In submissions made to An Bord Pleanála on the first s. 5 application the applicant by its solicitors argues that the Board was bound by the decisions of Kildare County Council, especially by the decision made in June, 2011. The argument that the Kildare County Council declarations created a form of "*res judicata*" was rejected by the Board. I do not propose considering whether a true *res judicata* could be said to exist, as for the present purposes the significant factor is that the Board considered that argument and rejected it which, for the purpose of the present application, means as a matter of fact that the Board did fully engage with the 2011 decision, and the effect or force it might have or should be given, and that decision of the Board was not challenged.

89. Further, from the perspective of European law, and having regard to the fact that the Board has determined that the development did require an EIA and AA and refused an application by the applicant for an exemption from the requirement that an EIS be furnished, it is not possible as a matter of law for any planning authority to determine that the activity could be exempt.

90. It is not argued by the Board that the mere fact that the declarations made by it post-dated the three s. 5 declarations by Kildare County Council means as a matter of law that the Board decisions must prevail as being later in time. Such a simplistic approach to the existence of differing conclusions could not be correct without more analysis. That the activities had changed is borne out by the evidence before the Board, and the decision was made in that context.

91. The High Court has in a number of cases decided that it is within the competence of a planning authority not to make a determination that would "complement an unauthorised use": per Hedigan J. in *West Wood Club Ltd. v. An Bord Pleanála* [2010] IEHC 16 at para. 62, or involve the "facilitation of unauthorised development": per Hedigan J. in *Frank Harrington Limited v. An Bord Pleanála* [2010] IEHC 428 at para. 14. The applicant makes the argument that the Board was not entitled, having regard to the effect of the previous decisions under s. 5, to treat the existing works and activities as unauthorised. I will return later to the case law on s. 5, but for the present I consider that the Board was competent to decide on the evidence before it that, having regard to its own previous decisions, including decisions under s. 5, that development had taken place on the site, and that that development was not exempt, that in the absence of an extant planning permission it ought not to give further consideration to an extension application as what was sought was an extension of activities which did not have the benefit of planning permission, or which were not authorised.

**Failure to give reasons?**

92. The applicant claims also that Board failed to give adequate reasons. That reasons must be given for the decision is express in the Act, but there remains the argument that the Board failed to give reasons of sufficient detail to meet the threshold required as a matter of law. The authorities establish that the reasons given by an administrative body for a decision must be sufficiently clear and detailed to enable a person receiving the decision to understand the basis on which it was made, and to make an informed decision whether to appeal or seek review.

93. In *Grealish v. An Bord Pleanála* [2006] IEHC 310, [2007] 2 I.R. 536 O'Neill J., having reviewed the case law, including the authoritative decision of Kelly J. in *Mulholland & Anor. v. An Bord Pleanála & Ors.* (No. 2) [2005] IEHC 306, [2006] 1 I.R. 453, concluded that it was not necessary for a decision making authority "to give a discursive judgment". A similar view was taken by Birmingham J. in *Mulhaire v. An Bord Pleanála & Anor.* [2007] IEHC 478 where he identified the test as being whether a person receiving a decision is left "in any doubt as to why the decision went against him". (p. 13)

94. The Board gave coherent and adequate reasons for its decision. This ground is not made out.

**Opportunity to be heard?**
95. The applicant also argues that the approach of the Board was erroneous in that it did not afford the applicant any opportunity to address it prior to making a decision to refuse to further engage with the appeal. That a person whose interests are likely to be impacted by the decision has a right to be heard is now well established in law, and was firmly restated by the Supreme Court in *Dellway Investments Ltd.& Ors. v. National Asset Management Agency (NAMA) & Ors.* [2011] IESC 4, [2011] 4 I.R. 1 The authorities recognise a fundamental underlying requirement that fairness of process requires that a person not be excluded from addressing a decision maker when its determination is likely to impact on proprietary rights or interests.

96. In reply the Board argues that the statutory power contains no provision that requires or permits the Board to notify an applicant that it is considering making a determination under section 138.

97. In *West Wood Club Ltd. v. An Bord Pleanála* Hedigan J. considered a broadly similar argument, that an applicant should have been notified that the Board intended to take a s. 5 declaration into account, and invited, or at least permitted, observations on that intended approach. At para. 38 of his judgment Hedigan J. rejected that argument on the factual basis that "it was a decision well known to all and which the applicants needed no invitation to argue". He relied on a judgment, *Stack v. An Bord Pleanála* (Unreported, High Court, Ó Caoimh J., 7th March, 2003) as follows:

> "I am satisfied that the matter as represented in the earlier decision on what has been referred to as the historic file was not in reality a new matter that required the application of s.13(2) of the Act of 1992 or any specific notification to the applicants insofar as the same was taken into consideration by the Board. The earlier decision is a matter of public record and was so at the time and I am satisfied that it was a matter of which knowledge must at least be imputed to the applicants as the decision in question was made before the appeal in the instant case."

98. Hedigan J. was satisfied that the s. 5 declaration in question related to the same site and was legitimately taken into consideration by the Board when reaching its conclusion. He went on to say that the third party submissions "raised no new issues", and were "broadly the same as those which were raised against the original application to the notice party". (para. 40)

99. On the other end of the spectrum, in *McGoldrick v. An Bord Pleanála* [1997] 1 I.R. 497 the adverse conclusion drawn by the Board was held to have been wrongly based on a submission received from a residents group that was not furnished to the applicant.

100. The question, it seems to me, is whether there were material matters before the Board of which the applicant was not aware, or had not been given an opportunity to address, and which in the circumstances might have triggered an obligation on the Board to invite further submissions.

101. As a matter of fact the Board did have before it submissions from the applicant regarding the planning question before it. There were no new factual matters before the Board. Therefore, I consider that the Board could, as a matter of law, have dealt with the matter in the way it did without affording a fresh opportunity to the applicant to address it on its approach. The matter was an appeal by the applicant from a refusal by the local authority, so one must assume that the applicant had furnished to the Board all material it considered necessary and relevant to its consideration. The applicant had also made submissions on the s. 5 applications.

**The legal nature of a declaration under section 5**
102. The applicant argues that the Board has no jurisdiction to determine that a development is unauthorised, that this is a matter for a court. The applicant argues that the Board in essence asked the wrong question or identified the incorrect approach to the s. 5 declarations.

103. The relevant provisions of s. 5 of the PDA are:

> "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) The details of any declaration issued by a planning authority or of a decision by the Board on a referral under this section shall be entered in the register.
>
> (6) (a) The Board shall keep a record of any decision made by it on a referral under this section and the main reasons and considerations on which its decision is based and shall make it available for purchase and inspection.

104. The import of a determination under s. 5 of the PDA has been considered in a number of cases. In *Grianán an Aileach Interpretative Centre Company Limited v. Donegal County Council* [2004] IESC 43, [2004] 2 I.R. 625, Keane C.J. said:

> "It would seem to follow that the question as to whether planning permission is required in this case necessarily involves the determination of the question as to whether the proposed uses would constitute a 'development', i.e., a question which the planning authority and An Bord Pleanála are empowered to determine under s. 5 of the Act of 2000." (para. 26)

105. He later went on to say, adopting the reasoning in *McMahon & Ors. v. Dublin Corporation* [1996] 3 I.R. 509 and *Palmerlane Limited v. An Bord Pleanála* [1999] 2 I.L.R.M. 514, that:

> "a question as to whether the proposed uses constitute a 'development' which is not authorised by the planning permission is one which may be determined under the Act of 2000 either by the planning authority or An Bord Pleanála." (para. 28)

106. A declaration made under s.5 is not a determination that activity is authorised. It is a determination pursuant to the statutory power of a local authority or An Bord Pleanála that activity is development, and where appropriate that development is or is not exempt. It is part of the planning history of a site. The application under s. 5 is an application to clarify the planning status of an activity or works. This is because whether a development is "authorised" can and often does involve the question of whether it has planning permission, but can also engage the question whether it is exempt, or if there is a relevant pre-1964 user.

107. The statutory function of the planning authority or the Board under s. 5 is not an enforcement role. Finlay Geoghegan J. in

*Roadstone Provinces Limited v. An Bord Pleanála* [2008] IEHC 210, at para. 21 of her judgment said the following:

> "The respondent has no jurisdiction on a reference under s.5 (4) of the Act to determine what is or is not 'unauthorised development'. It may only determine what is or is not 'development'. Hence, a planning authority, such as the notice party, cannot refer a question under s.5 (4) as to whether the works or proposed works or use constitutes unauthorised works or use and hence unauthorised development. Determination of what is or is not 'unauthorised development' will most likely be determined by the courts where a dispute arises on an application under s. 160 of the Act."

108. This dicta of Finlay Geoghegan J. is regularly quoted as authority for the proposition that the jurisdiction under s. 5(4) of the Act is one which is confined to determining whether works or use is development.

109. Finlay Geoghegan J. was considering the import of a s. 5 declaration where what was challenged was the decision of the respondent that the expansion southward of a quarry was development and not exempted development. The decision was quashed by *certiorari* as there was pre-1964 use and no determination had been made whether there was an identified factual difference between that use and current use. The judgment does not go so far as to say that the consequence of a s. 5 declaration can never be understood to mean that a development is not one authorised by planning permission. The judgment of Finlay Geoghegan J. is authority for the proposition that development which does not have the benefit of a planning permission is not always in legal terms a development which is "unauthorised", and the jurisdictional limit of s. 5 is to determine whether there is development, after which there arises the second question whether permission is required or exists.

110. Hogan J. giving the judgment of the Court of Appeal in *Killross Properties Ltd. v. Electricity Supply Board* [2016] IECA 207 explained the conceptual difficulty as follows:

> "The essential difficulty which is presented here is that the concepts of development, exempted development and unauthorised use are all, to some extent, inter-related. It is true that, as Finlay Geoghegan J. held in *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210, the Board has no jurisdiction on a s. 5 reference to determine whether or not there was unauthorised development. Yet if the Board (or, as the case may be, a planning authority) rules that a particular development is not exempted development, the logical corollary of that decision is that planning permission is required. In practice, there is often only a very slender line between ruling that a development is not exempted development since this will generally – perhaps, even, invariably – imply that the development is unauthorised on the one hand and a finding that a particular development is unauthorised on the other. Conversely, where (as here) the Board (or the planning authority) rules that the development is exempt, this necessarily implies that the development is lawful from a planning perspective since, by definition, it has been determined that no planning permission is required." (para. 20)

111. A development is not unauthorised merely on account of the fact that an activity or works are found to be development. The development may, as in the case of a quarry, the context in which *Roadstone Provinces Limited v. An Bord Pleanála* was decided, be exempt from the requirement to obtain planning permission if it is a continuation of pre-1964 user. In such cases the development is not unauthorised although it is development. A development may also be found to have occurred but to be exempt.

112. However, it must be the case that, absent an argument that there is relevant pre-1964 use, if works or activity are declared in the s. 5 process to amount to development and if a determination is made that it is not exempt, then the inevitable conclusion is that the development does not have the benefit of planning permission, is not authorised in planning terms, and is "unauthorised".

113. I can find no error in the approach of the Board to the s. 5 declarations which in factual terms meant that the activity was not authorised and not exempt. This follows also from the fact that a s. 5 declaration is by Statute part of the planning history of the site.

**Statutory character of s.5 as part of history: s. 5(5)**

114. A declaration under s. 5 may constitute evidence or a finding on which a subsequent decision maker may make a determination that works or activity are not authorised, i.e. that works or activity do not have the benefit of planning permission.

115. That a declaration under s. 5 is part of the planning history of a site and constitutes evidence on which a determination may be made that works or use is unauthorised is apparent from the approach of Hedigan J. in *West Wood Club Limited v. An Bord Pleanála* where the Board had under s. 5 declared that the use of the premises was development which was not exempted development. The Board expressly took the view that the use was "unauthorised for use as a licensed premised". Hedigan J. regarded the s. 5 declaration as "part of the planning history of the site, as mandated by s. 5(5) of the Act of 2000" (para. 34). He held that the respondent was correct to have regard to it when determining the appeal before it and that it was "inevitable" that the s. 5 declaration would be taken into account and that it was "proper" that the Board had regard to it as a relevant decision made in the relatively recent past.

116. The Board in the present case determined that the activity and works on site were unauthorised in the sense in which that term is generally used, i.e. that there existed no planning permission, no exemption, no pre-1964 status or argument or contention that such status fell for consideration. There is no flaw in that approach.

117. Further, the decision under challenge in the present case is not a declaration made under s. 5 but rather a substantive planning appeal, and there is no jurisdictional limit on the power of the Board to make a determination in that context that works or activity are unauthorised. The planning history is part of the nexus of fact that could lead to that conclusion. The s. 5 declarations are evidence of a finding by the Board and by Kildare County Council regarding the planning status of the works and activity, and there being no argument or evidence of pre-1964 use which might have precluded such a consideration or determination, and there being separately a finding that an exemption did not exist, the Board was entitled to conclude that the activity was unauthorised in planning terms. No other possible means by which it could be authorised was argued before the Board in any of the applications before it or in the appeal now under challenge.

118. For that reason, it seems to me that the argument of the applicant that the Board was fundamentally incorrect in its approach to the planning history and especially to the extant declarations made under s. 5 must fail. I reject the argument of the applicant that the Board fell into error in coming to the view that the works and activity were unauthorised.

**Were the facts before the Board unclear or contradictory?**

119. The applicant argues that the Board had before it contradictory evidence and that it was not therefore competent to proceed to conclusions without further considering and weighing those facts. The respondent argues that it was well aware of the determinations made under s. 5, and the import of these, and had extensive reports from its inspectors, had already engaged in the application for an

exemption from an EIS, and had refused the request for an oral hearing having determined that there was sufficient information available in writing. The Board considered that it had sufficient information and that the history of the site was amply dealt with in previous reports and findings, so that it did not need a further report from an inspector under section 146(1).

120. I turn now to consider whether it could be said that there was materially contradictory evidence before the Board which mandated that it approach the evidence with caution, if necessary by permitting or requiring that it be further interrogated.

121. Having regard to the fact that the application before me is an application for judicial review, it is not necessary for me to analyse the differences in the factual matrices between the facility as it operated at the time the s. 5 declarations were made by Kildare County Council and those that prevailed at the time of the Board's decision. However, some factors are of note, including the fact that the decisions of the Board were supported by four separate reports of its inspectors, and there is no evidence before me that any such analysis was before the local authority. More importantly from the point of view of the decisions of the Board is the fact that it had taken a view arising from the fact that the site was materially close to the Nore SAC relating to the requirement for an EIA and AA, and once it had been determined that these assessments were required, the development could not be said to be exempt.

122. The Board had evidence, in the form of s. 5 declarations made by it in the context of the contemporary activity on site, which were unchallenged and unassailable. Its approach to the difference between the declarations made by the local authority was to require detailed analysis and submissions by an inspector, other authorities such as water authorities, and the determinations made by the Board under s. 5 were made following a full consideration of all the facts. It cannot be said that the Board did not have evidence or reasons on which it could take a reasoned and legally correct approach to the factual differences. The Board did not disregard the s. 5 declarations made by Kildare County Council, but it came to its own view in a robust and procedurally fair manner as to the planning status of the activities and works, and thereby resolved the conflict of fact.

**Conclusion and summary**
123. Recent decisions of the High Court have confirmed that the approach of the Supreme Court in *O'Keeffe v. An Bord Pleanála & Ors.* [1993] 1 I.R. 39 remains the correct approach in an application for judicial review of a decision of the Board. Notably, in *Ratheniska Timahoe and Spink (RTS) Substation Action Goup & Anor. v. An Bord Pleanála* [2015] IEHC 18, Haughton J. said that the test in *O'Keeffe v. An Bord Pleanála & Ors*. was "appropriate, and continues to bind the High Court at least in its review of decisions of the Board". (para. 76)

124. In *Dunnes Stores v. An Bord Pleanála* [2016] IEHC 226, Hedigan J. identified a similar approach on review, namely whether any basis had been shown which would support the intervention of the court:

> "Once there is any reasonable basis upon which the planning authority or the Board can make a decision in favour of or against a planning application or appeal, or can attach a condition thereto, the Court has no jurisdiction to interfere (see *Weston Limited v. An Bord Pleanála & Anor.* [2010] IEHC 255)." (para. 8.2)

125. He went on to conclude on that point:

> "No basis has been laid that could support the proposition that the Board's decision in this regard was so irrational as to require the court to intervene." (para. 8.5)

126. McDermott J. came to a similar decision in *Sweetman & The Swans and The Snails Ltd. v. An Bord Pleanála & Anor.* [2016] IEHC 277, where he said that:

> "If the Board made the decision on the basis of material or evidence before it, which was reasonably capable of supporting its view, the decision must stand and is not to be regarded as unreasonable or irrational." (para. 93)

127. I find that that the Board was entitled to come to a conclusion that the changed activities constituted development which was not exempt, and that it had sufficient evidence before it to support the decision.

128. I do not consider, therefore, that the Board came to its decision without considering the facts, without giving reasons and without weighing those facts.

129. The Board did not exercise its jurisdiction to dismiss the appeal by treating it as vexatious or frivolous which it is entitled to do under s. 138(1)(a)(i) or that the appeal comprised a ransom demand in s. 138(1)(a)(ii). The decision was made on a different statutory basis having regard to the nature of the appeal and the previous permission which in its opinion was relevant. Four different inspectors had given extensive reports on the facility, three of which had been prepared in the twelve months before the Board came to its determination. It cannot be said that the Board acted irrationally or unreasonably in not requisitioning a further report from an inspector, and there is no evidence before me that would suggest that different factual or planning matters had arisen in the months leading up to its decision. Further, the applicant had the reports and did in fact address the conclusions in its application to Kildare County Council for permission. There is no stateable argument in those circumstances that the Board relied solely on the declarations given by it under s. 5, and a full consideration of the factual nexus giving rise to the application and a full analysis of the existing facility was before the Board. It is also to be observed that the appeal to the Board, which resulted in the subject matter of the present application for review was made on 28th January, 2015, only weeks after the decision by the Board on 31st December, 2014 to refuse permission for the retention of the underground tanks.

130. The decision arrived at by the Board was one that flowed from previous decisions but logically and lawfully did so, and there is no irrationality in that approach. The Board could not lawfully ignore its previous recent determinations and refused to grant planning permission as to do so would permit an impermissible graft upon a facility which it had previously determined required planning permission and environmental assessment. The decision of the Board was not preordained but was, in a sense, inevitable.

131. I dismiss the application for review for the reasons stated.