

**THE HIGH COURT  
JUDICIAL REVIEW**

[2022] IEHC 177  
[Record No. 2020/239 J.R.]

**BETWEEN:**

**BRENDAN STANLEY**

**APPLICANT**

**AND**

**AN BORD PLEANÁLA**

**RESPONDENT**

**AND**

**JOHN MCGURK AND DUBLIN CITY COUNCIL**

**NOTICE PARTIES**

**JUDGEMENT of Ms. Justice Siobhán Phelan delivered on the 28th day of March, 2022**

**INTRODUCTION**

1. The issues which arise in these proceedings concern a decision of An Bord Pleanála made on the 21st of January 2020 [hereinafter “the decision”] whereby it concluded, on an application for a declaration pursuant to s. 5 of the Planning and Development Act 2000 (the “2000 Act”), that a change of use was “*material*” and therefore constituted “*development*” within the meaning of s. 3 of the 2000 Act was adequately reasoned and/or sustainable as a reasonable decision.

**PROCEEDINGS**

2. The application for a declaration pursuant to s. 5 of the 2000 Act was presented by the applicant on the basis that the change of use of the premises at 132a Richmond Road, Dublin 3 (the “**premises**”) from furniture manufacturing and associated storage to commercial self-storage did not constitute a material change of use and was therefore not development for the purposes of the 2000 Act.

3. In arriving at its decision, the Board reviewed an earlier decision of the second notice party on the first instance s. 5 application whereby the second notice party also determined that development, which was not exempt development, was occurring by reason of a material change in use. The application for a s. 5 declaration was made in circumstances where there were extant enforcement proceedings pursuant to s. 157 of the 2000 Act adjourned before the District Court as against the applicant.

4. Proceedings were commenced by notice of motion dated the 6th July 2020 following an *ex parte* order granting leave to proceed by way of judicial review made by the High Court (Meenan J.) on the 22nd June 2020.

5. The primary relief sought in the proceedings is an order of *certiorari* quashing the decision of the respondent made on the 21st January 2020 whereby the respondent determined that the development the subject matter of a referral pursuant to s. 5 of the 2000 Act was development and was not exempted development (ABP 304098-19). The principal ground identified and pursued on behalf of the applicant in seeking this relief is that neither the Board nor the inspector identified a proper, reasoned basis for the conclusion that the change of use was “*material*”.

6. It is claimed by reference to the inspector’s report (para. 18 of the Statement of Grounds):

*"There is no basis whatsoever for this conclusion. No evidence exists or is relied upon in this regard. None of the matters upon which this conclusion was reached are apparent. The conclusion is unreasoned and unreasonable and flies in the face of reason and common sense."*

7. A similar plea is advanced in respect of the decision of the Board which adopts without further expansion the inspector's recommendation (para. 20 of the Statement of Grounds).

8. By Statement of Opposition filed in on the 11th November 2020, the respondent opposes the relief sought contending that the decision is correctly taken on the basis of relevant considerations, was properly grounded in evidence and adequately reasoned. It is asserted at para. 10 of the Statement of Opposition that the inspector concluded that the change of use was "*material*" due to the implications for traffic, servicing and car parking along a busy and relatively narrow road and the amenity of the neighbouring properties. It is contended that the decision of the respondent must be read in accordance with the inspector's report and the materials that were before the Board and the reasoning can be inferred from the Inspector's report and the planning file.

#### **FACTUAL BACKGROUND**

9. The applicant is the occupier of a premises at 132a Richmond Street, (hereinafter "the Premises"). The premises is used as a self-storage unit. Although the history of the planning file reveals a range of uses from a pre-63 use as a saw mill and associated store, to furniture maker, to car dealer, to furniture store to the current use as a self-storage unit, it was common case during the hearing that the relevant use for the purpose of determining whether there has been a "*material*" change in use is the difference between the use in 2015 and the current use. The premises are said to have been used for furniture manufacturing and associated storage in 2015.

10. On or about the 11th October 2018, the applicant received a warning letter from Dublin City Council pursuant to s. 152 of the 2000 Act which alleged that an unauthorised change of use had occurred 132a Richmond Rd, Fairview, Dublin 3. There is no evidence before me as to whether there was a response to this correspondence on behalf of the applicant or not.

11. A site inspection was carried out by a planning enforcement officer employed by the second notice party on the 16th January 2019. She prepared a report dated the 18th January 2019 in which issues in relation to the business activity carried on at the site were raised. It was recorded that issues with the structures on site were communicated and a further site visit was proposed to establish if the unauthorised structures were removed from the site.

12. In response to the correspondence from the second notice party and a site visit from the planning enforcement officer, the applicant made application for a declaration from the second notice party as relevant planning authority on the 11th February 2019. The application (Planning Register Ref. 0057/19) sought a confirmation to the effect that there was [n]o requirement for change of use as existing use as storage facility and previously as a furniture manufacturer and storage facility has not changed significantly. This application was accompanied by a letter from an architect on behalf of the applicant. The following documents were enclosed with the completed application form:

- i A drawing with floor plans and elevations;

- ii A site location map;
- iii Photos of the structure;
- iv Letter from the owner of the property explaining history and use;
- v Letter from second notice party re: use.

13. An inspector on behalf of the second notice party prepared a report in respect of the s. 5 application. In his report, the second notice party's inspector described the site and its surroundings, addressed the zoning applicable to the site and set out in detail the relevant planning history including a description of the retention permission which was refused in 2012 for change of use to a car sales and associated works and recording that the reasons for refusal were:

- "1. *Having regard to the restricted nature of the site, the lack of any on-site parking and servicing facilities which would result in overspill onto the narrow and heavily trafficked Richmond Road it is considered that the development would give rise to traffic congestion, would lead to conflicting turning movements at this location and would, therefore, endanger public safety by reason of traffic hazard.*
- 2. *Having regard to the restricted nature of the site and the character of the motor sales showroom use proposed for retention which results in overspill onto Richmond Road, and the character of the surrounding area being mainly residential, permitting retention of the use as a motor sales show would result in serious injury to the residential amenities of property in the vicinity due to traffic congestion, parking problems and general impact on amenity and, therefore, would be contrary to the proper planning and sustainable development of the area."*

14. In material part, the second notice party's inspector stated:

*"The proposal seeking Declaration of Exempted Development comprises a change of use from a furniture manufacturer and associated storage of completed furniture (light industrial building as stated by agent) to a storage facility containing a large number of self-storage walk-in units of various sizes for short and long term rental.*

*It is considered that the proposal constitutes a material change of use and is therefore development in accordance with the provisions of section 3(1) of the Planning and Development Act, 2000 (as amended)."*

15. Following a decision on the 5th March 2019, the second notice party issued a notification of declaration on the 6th March 2019. The notification confirmed the second notice party's decision that the proposed development was not exempt from the requirement to obtain planning permission under s. 32 of the 2000 Act [Ref. 0057/19].

16. Several days later a further site inspection took place on the 8th March 2019 resulting in the production of an additional report by the planning enforcement officer dated 14th March 2019. An enforcement notice pursuant to s. 154 of the 2000 Act was served by the second

notice party on the 27th March 2019. In October 2019, the planning enforcement officer conducted a further site inspection which confirmed partial compliance with the enforcement notice. However, a report prepared by enforcement officer recommended that proceedings pursuant to s. 157 of the 2000 Act be instituted for the remaining non-compliance with the enforcement notice.

17. On foot of this recommendation a summons issued on the 18th November 2019 in respect of the alleged non-compliance with the enforcement notice dated 27th March 2019. These proceedings remain pending before the District Court and have been adjourned from time to time.

18. While the site inspection reports dating to March 2019 and October 2019 and the enforcement notice served in March 2019 were exhibited in the judicial review proceedings, the respondent did not have regard to this evidence in making the impugned decision as they were not contained on the second notice party's file forwarded on the referral and post-dated the referral. It is clear from the second notice party's enforcement file that of the three issues identified in the enforcement notice, only the first remains live, namely "*the use of the premises as a storage rental facility without the benefit of planning permission*". It is in respect of this issue that enforcement action is being pursued.

19. It was against a background of ongoing enforcement action that the decision of the second notice party finding that the change of use constituted development for which planning permission was required was referred to the Board on 29th March 2019 by letter of that date from an architect on behalf of the applicant. The referral was received by the Board on the 1st April 2019 and the second notice party transmitted its file on the s. 5 Declaration to the Board in accordance with the requirements of s. 128 of the 2000 Act. The referral was accompanied by some additional correspondence from previous users and further photos of the previous use and structure including photographs showing the street view during earlier uses. It was acknowledged in the referral letter that the changed internal layout of the premises may give rise to a requirement for retention permission, but it was contended that the change of use was not material.

20. The Board appointed an Inspector who carried out a site inspection on the 18th June 2019 and prepared a report dated the 13th January 2020. In addition to the inspection, the evidence available to the Inspector for the purpose of preparing the report included:

- a) *the initial request for a declaration pursuant to s.5 of the 2000 Act which was lodged on behalf of the applicant on or about 15th of February 2019 and included site layout maps;*
- b) *a copy of a warning letter from the Council dated the 11th of October 2018;*
- c) *the report prepared by the Council dated the 21st of February 2019;*
- d) *the Notification of Declaration by the Council dated the 6th of March 2019;*
- e) *the referral to the Board for review which was lodged with the Board by an architect on behalf of the applicant on the 1st of April 2019.*

21. As apparent from the Inspector's report, the Inspector also had regard to the planning history of the site. The planning history as referred to on the file included an application for retention permission for change of use of the premises which was refused by the Council in May 2012 [Ref.2332/12] and two earlier enforcement cases relating to the referral site dated to 2012 (change of use from a furniture showroom to a car sales business) and 2002 (change of use from a saw mill to a shop with air vents blocked – this case was closed as the use was considered to have been established for more than five years). Concerns were recorded in the inspector's report relating to the 2012 retention application as having been raised by the road traffic and planning division with regard to residential amenity. The concerns highlighted in the inspector's report included traffic congestion, parking issues and general disamenity due to overspill of 'for sale' vehicles on to the street along with the lack of on-site parking for customers.

22. The question that was referred by the applicant pursuant to s.5 of the 2000 Act was reformulated by the inspector and the question that was posed (and determined) was: "*whether the change of use from furniture manufacturing and associated storage to commercial self-storage is or is not development and is or is not exempted development*". No issue arises in relation to this reformulation which it is accepted correctly identifies the questions which the applicant sought to have determined by the respondent.

23. The Inspector's report shows that the Inspector proceeded by identifying the relevant legal provisions in s. 6.0 of his report. The Inspector referred to s.3(1) of the 2000 Act which states that 'development' means "*except where the context otherwise requires, the carrying out of works on, in, over or under land or the making of any material change in the use of any structures or over land*".

24. In concluding that the change of use was not exempted development, the Inspector considered Part 4 of Schedule 2 to the Planning and Development Regulations 2001-2020 (the "Regulations") and the 2000 Act and found there were no provisions in the 2000 Act and/or the Regulations whereby the change of use described in the question referred by the applicant is exempted. No issue is taken with this finding in these proceedings. In particular it is accepted on behalf of the applicant that the Inspector correctly characterised the former use as class 4 use (light industrial use) but the current use as class 5 (wholesale warehouse or repository), thereby representing a change of use as between classes of use and so not exempt.

25. The Inspector identified (at para.8.2.3 of the report) that the current use of the site as a self-storage facility arose as a result of a change of use from the previous use as a light industrial building. The Inspector noted that for development to have occurred the change of use must be "*material*" in planning terms.

26. Having, it is agreed, correctly identified the test, the inspector then concluded:

*"it is quite evident that such issues would be raised by this change of use, including the implications for traffic, servicing and car parking along busy and relatively narrow road and the amenity of neighbouring properties. Therefore, I am satisfied that the change of use is material, and, therefore that this material change of use is "development" within the meaning of section 3 of the act."*

27. While the Inspector then proceeded in his report to address whether that development was *exempted* development, no issue is taken with the approach adopted in this regard.

28. The decision of the respondent made on the 21st January 2020 adopts in its entirety the recommendation of the inspector. In material part, the decision recites:

*"the previous use of the site for light industrial purposes as a sawmill for furniture manufacturing and associated storage and change to the current use of the site for commercial self-storage, constitutes a change of use, which is considered to be a material change of use, and is, therefore, development within the meaning of section 3 of the Planning and Development Act, 2000, as amended".*

29. The respondent, in exercise of the powers conferred on it by s. 5(3)(a) of the 2000 Act, then records the decision that the change of use from furniture manufacture and storage facility to commercial self-storage facility at 132a Richmond Rad, Dublin is development and is not exempted development.

30. The respondent does not expand in any way on the basis for the decision taken beyond what is contained in the inspector's report. The only additional feature of the respondent's decision is the inclusion after the operative part of its decision of a heading "*matters considered*" that the respondent had regard to:

*"those matters which, by virtue of the Planning and Development Acts and Regulations thereunder, it was required to have regard. Such matters included any submissions and observations received by it in accordance with statutory provisions."*

31. From the file exhibited by the respondent, it is apparent that the respondent had before it documents relating to the retention application which was refused in 2012 including a report from the Road and Traffic Planning Division of the second notice party relating to the application for retention permission for change of use of premises to car sales from furniture sales and associated works. This report noted that:

*"During the site inspection for the proposal it was noted that the car sale's premises is in operation with cars for sale parked within the site and along the site boundary of the nearby NABCO site.*

*This division has serious concerns regarding the use of the site for car sales at this location. The site has direct frontage onto Richmond Road, a heavily trafficked road with no footpath along the site boundary. The constricted nature of the site means that cars and vehicles for sale/display are parked directly adjacent to the public road. There does not appear to be any parking provision for patrons visiting the facility and there is little availability of off-street parking in the vicinity of the site. Having regard to the restricted nature of the site, its proximity to the heavily trafficked Richmond Road, lack of an off street car parking and lack of on street public parking in the vicinity of the site, I consider that it is inevitable that there shall be traffic hazards on or adjacent to the site as a result of the proposal. In*

*addition to this site is located along the proposed Richmond Road widening scheme."*

32. Also, on the respondent's file as having been considered by the respondent is a report from the Planning and Development Department to the Deputy Planning Officer dated the 14th May, 2012. This report describes the site and states that to the north lie residential developments and the site faces onto residential housing and apartments on the opposite side of Richmond Road. The report records the issues raised by the Roads and Traffic Planning Division (in a report dated 3rd May, 2012) and records the recommendation made as follows:

*"Having regard to the restricted nature of the site, the lack of any on site parking and servicing facilities, which would result in overspill onto the narrow and heavily trafficked Richmond Road it is considered that the development would give rise to traffic congestion, would lead to conflicting turning movements at this location and would, therefore, endanger public safety by reason of traffic hazard."*

33. The report then adds that apart from the issues which Road and Traffic Planning Division had raised in relation to parking and traffic safety issues, the Planning Authority would also have serious concerns in relation to the use and its impact on the residential amenities of the area and expanded as follows:

*"the site is located on the edge of a predominantly residential section of Richmond Road and, while the zoning permits motor sales showroom, the intention of the zoning, particularly on Richmond Road, is to encourage a mix of uses compatible with the existing uses. In this instance existing adjacent uses are mainly residential and use of the subject site for motor sales, given the restricted site, results in the residential amenities of the area being affected by traffic congestion, parking issues and general disamenity due to overspill of for sale vehicles onto the street along with the lack of on-site parking for customers. The retention of this use as motor sales would have an adverse impact on the residential amenities of the nearby Z1 zoned residences and, in addition to the traffic hazard caused, would be unacceptable."*

34. Consequent upon this concern, an additional recommendation to that of the Roads and Traffic Planning Division was added as follows:

*"Having regard to the restricted nature of the site and the character of the motor sales showroom use proposed for retention which resulted in overspill onto Richmond Road and, the character of the surrounding area being mainly residential, permitting retention of the use as motor sales showroom would result in serious injury to the residential amenities of the property in the vicinity due to traffic congestion, parking problems and general impact on amenity and, therefore would be contrary to the proper planning and sustainable development of the area."*

35. Both recommendations were adopted by the second notice party in refusing retention permission on the application for the first notice party, the owner of the property.

36. In addition to photographs showing the current and previous uses of the land, streetscape and maps giving its location, the respondent also had copy advertising material describing the business as "self storage units for rent in Dublin" providing access 24 hours a day, a free inward and outward delivery service, and a transport and removal service seven days a week.

#### **STATUTORY PROVISIONS**

37. Section 3(1) of the 2000 Act defines "development" as meaning:

*"...the carrying out of any works, on, in, over or under land or the making of any material change in the use of any structures or other land."*

38. The decision which is challenged in these proceedings is a decision pursuant to s. 5(3)(a) of the 2000 Act. This provides that any person issued with a *declaration* by a planning authority under s. 5(2)(a) may, on payment to the Board of such fee as may be prescribed, refer a declaration for review by the Board within four weeks of the date of the issuing of the declaration.

39. It is plain that the Board's single function under s. 5 is to determine whether in any given case there has or has not been development or, as the case may be, exempted development. Questions as to whether a particular use is unauthorised is not a function of the Board and the Board has no enforcement role at all (see further *Roadstone Provinces Ltd. v. An Bord Pleanála* [2008] IEHC 210).

40. Where a referral is made to the Board under s. 5, it is required to make a decision which is then entered onto the register. Section 5(6)(a) of the 2000 Act provides that the Board shall keep a record of any decision made by it on a referral and the *main reasons and considerations* on which its decision is based and shall make it available for purchase and inspection. Section 5(6)(a) provides for reasons in the following terms:

*"(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."*

41. This falls to be contrasted with the statutory duty to give reasons under s. 34(1) of the Act) which is provided for in the following terms:

*"(10) (a) Subject to paragraph (c) and without prejudice to section 172(1I) , a decision given under this section or **section 37** and the notification of the decision shall state the main reasons and considerations on which the decision is based, and where conditions are imposed in relation to the grant of any permission the decision shall state the main reasons for the imposition of any such conditions, provided that where a condition imposed is a condition described in subsection (4), a reference to the paragraph of subsection (4) in which the condition is described shall be sufficient to meet the requirements of this subsection.*

*( b) Where a decision by a planning authority under this section or by the Board under **section 37** to grant or to refuse permission is different, in relation to the granting or refusal of permission, from the recommendation in—*



(i) the reports on a planning application to the chief executive (or such other person delegated to make the decision) in the case of a planning authority, or

(ii) a report of a person assigned to report on an appeal on behalf of the Board,

a statement under paragraph (a) shall indicate the main reasons for not accepting the recommendation in the report or reports to grant or refuse permission.”

42. The requirements for making a referral to the Board are set out in s. 127 of the 2000 Act and are mandatory. Accordingly, the referral must state in full the grounds of appeal or referral and the reasons, considerations and arguments on which they are based.

43. Section 128(1) of the 2000 Act also provides that where a referral is made to the Board the planning authority concerned shall, within a period of two weeks beginning on the day on which a copy of the appeal or referral is sent to it by the Board, submit to the Board any information or documents in its possession which is or are relevant to that matter. Section 128(2) provides that, in determining an appeal or referral, the Board may take into account any fact, submission or observation mentioned, made or comprised in any document or other information submitted under section 128(1).

44. Thus, when determining a referral under s. 5 by a person to whom a declaration is issued by a planning authority, the respondent must consider whether the referral is valid and may take into account any fact, submission or observation in the planning file which must be transmitted by the planning authority. As the evidence demonstrates in this case, the file before the respondent (as exhibited by the respondent) did not include inspection reports completed following the decision on the referral to the second notice party.

#### **DISCUSSION AND DECISION**

45. The applicant does not dispute that there has been a change of use on site but contends that it is not “*material*” in planning terms.

46. The applicant accepts in these proceedings that the inspector proceeded to identify the correct legal test to determine whether there has been a material change of use in his report by reference to the decision of the Supreme Court in *Monaghan County Council v. Brogan* [1987] I.R. 333. In this decision the Supreme Court confirmed that the term “*material*” in this context means material in planning terms, that is whether the issues raised by the change of use would raise matters that would normally be considered by a planning authority if it were dealing with an application for planning permission, such as “*residential amenity, traffic safety or policy issues in relation to statutory plans*”. The applicant’s difficulty in these proceedings is not with the test identified as applying to an assessment of a “*material*” change but with the manner of its application in this case.

47. While satisfied that the inspector has identified the correct test, the applicant complains that the reasoning advanced for finding that there is a material change of use in this case is insufficient. He complains that the finding is in generic terms and no granular detail is given. He submits that he does not know what change in traffic implications, servicing, car parking or the amenity of neighbouring properties is considered to be “*evident*” arising as between the previous and current use and that there was no evidence before the Inspector or engaged with

by the Inspector to explain the basis for the decision arrived at. While the case made by the applicant is that the respondent's decision that there has been a material change of use is deficient in its reasoning, made without adequate evidential basis and therefore unreasonable, was clear during the hearing but it is the complaint as to lack of reasoning which lies at the heart of these proceedings.

48. The applicant argues that a high degree of procedural fairness inheres in the decision-making process of the respondent in the circumstances of this case. The applicant argues that his defence to the enforcement proceedings which are adjourned before the District Court is materially affected by the decision on the s. 5 declaration application as it is not open to him to make the case before the District Court that there has been no development at the site by reason of a material change of use as he is bound by the decision of the respondent unless it is quashed in these proceedings. He says that but for the impugned decision it would be open to him to argue before the District Court that there has been no material change having regard to the evidence before that Court. He further points to the impact of the impugned decision not only on his rights of defence but also on his property rights. He maintains that against these background circumstances he is entitled to know the reasons for the decision made on the s. 5 application and to be in a position to challenge, if necessary, the reasonableness of that decision having regard to the evidential and legal basis for same, especially as he will no longer be able to do so before the District Court in response to the enforcement proceedings. The respondent responds in this regard that the risk of his defence to the District Court proceedings being affected by the decision on the s. 5 application was a risk the applicant assumed when he made application for a declaration under section 5. Furthermore, the decision on the s. 5 declaration application is no barrier to an application for retention permission being sought.

49. As well established and recently restated in the *Board of Management of St. Audeon's National School v. An Bord Pleanála* [2021] IEHC 453 (Simons J.), the threshold to be met by an applicant for judicial review who seeks to pursue a challenge on grounds of lack of reasons and unreasonableness is "extremely high and is almost never met in practice" (para. 32). This is because an applicant must demonstrate that the decision impugned is fundamentally at variance with reason and common sense. The court cannot interfere with the decision of an administrative decision-making authority merely on the grounds that (a) it is satisfied that on the facts as found it would have raised different inferences and conclusions, or (b) it is satisfied that the case against the decision made by the authority was much stronger than the case for it. (*O'Keeffe v. An Bord Pleanála* [1993] 1 I.R. 39 (at 71)).

50. As Simons J. points out in *Board of Management of St. Audeon's National School v. An Bord Pleanála*, the starting point in assessing any "reasonableness" challenge must be to identify what precisely the public authority has decided. In this case, the question decided was that there had been a "material" change of use as between the previous and current user of the site such that an application for planning permission is required. It is common case that "material" in the sense contemplated by s. 3 of the 2000 Act means "material for planning purposes": see, e.g., *Galway County Council v. Lackagh Rock* [1985] I.R. 120, Barron J., *Monaghan County Council v. Brogan* [1987] I.R. 333, 358, per Keane J. and *Roadstone Provinces* per Finlay Geoghegan J. It is further agreed that the Inspector properly identified the test in his

report. On the applicant's case, however, the test was not then properly applied to the evidence in assessing the differences between the previous and current use.

51. In *Galway County Council v. Lackagh Rock*, Barron J. concluded in the context of an application for a planning injunction (under s. 27 of the 1963 Act) that in determining whether or not a present use was materially different to a previous use, regard must be had to matters of planning concern arising on the previous use when compared with the present use. If these matters were materially different than the nature of the present use it must be equally materially different. In *Lackagh Rock* Barron J. stated (p. 127):

*"The applicant in effect submits that these differences, from their very nature, establish that the change of use is a material change of use. I do not accept this submission. The applicant points to no matter which affects the proper planning of the area. There is no evidence of the nature of effects of any complaint made by anyone. There is no suggestion that any burden is being imposed upon them in their character as the planning authority or that the proper planning of the locality is affected or that, if an application for permission were brought, they would need to consider any matters which would not have to be considered if the application were for the actual use of the appointed day."*

52. He concluded in that case (p.128):

*"since no evidence has been adduced to indicate that the applicant would have taken matters into consideration in determining an application for planning permission made now rather than on the appointed day, I accept the respondent's contention that there is no material change of use."*

53. There is a correlation between the reasons advanced and assessing the reasonableness of a decision. In assessing the reasonableness of the decision in this case, it is proper to consider the reasons stated for the decision and the reasons given should be sufficient for this purpose. As explained by the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31 one function of the obligation to give reasons is to allow the courts to exercise their supervisory jurisdiction. The principle is stated as follows by Clarke CJ at paragraph 6.15 of the judgment:

*"Therefore, it seems to me that it is possible to identify two separate but closely related requirements regarding the adequacy of any reasons given by a decision maker. First, any person affected by a decision is at least entitled to know in general terms why the decision was made. This requirement derives from the obligation to be fair to individuals affected by binding decisions and also contributes to transparency. Second, a person is entitled to have enough information to consider whether they can or should seek to avail of any appeal or to bring judicial review of a decision. Closely related to this latter requirement, it also appears from the case law that the reasons provided must be such as to allow a court hearing an appeal from or reviewing a decision to actually engage properly in such an appeal or review."*

54. The courts cannot easily exercise their supervisory jurisdiction in the absence of a statement of reasons. The "reasonableness" test obliges the court to consider, albeit to a limited

extent, the rationale or justification for the impugned decision. The courts will, however, show significant deference to the decision-maker's expertise in the exercise of a discretion which has been entrusted to them under legislation.

55. The respondent contends that what is required in the context of a decision under s. 5 following a referral is that the Board states the main reasons and considerations of its decision and makes that available in its record of decisions. It is contended that this does not have to be discursive and there is no obligation to state detailed reasons. The respondent relies on cases such as *O'Donoghue v An Bord Pleanála* [1991] I.L.R.M. 750 where Murphy J. said (at p. 757):-

*"It is clear that the reason furnished by the Board (or any other tribunal) must be sufficient first to enable the courts to review it and secondly to satisfy the persons having recourse to the tribunal that it has directed its mind adequately to the issue before it. It has never been suggested that an administrative body is bound to provide a discursive judgment as a result of its deliberations ..."*

56. The duty to give reasons in the s. 5 context has been considered on a number of occasions. In *Fairyhouse Club Ltd v An Bord Pleanála* (Unreported, High Court, Finnegan P., 18 July 2001) which was also a challenge to a decision on a s. 5 referral (albeit under the Local Government (Planning and Development) Act 1963), it was held by Finnegan J. that it may be sufficient if the reasoning is disclosed in the inspector's report, at least in circumstances where An Bord Pleanála's decision is consistent with the inspector's recommendation and adopts his or her reasoning. In that case, it was held that while at first sight the reasons stated in the decision did no more than state that a racing event constituted a material change of use, constituted development and was not exempted development, regard must be had to the procedures adopted by the Board. Finnegan J. noted that the applicant received and was afforded an opportunity to comment upon the submissions of the notice party. After the decision, the Inspector's report was made available from which the reasoning which he applied to the circumstances clearly appeared. The information made available to the applicant had been sufficient to enable it to formulate a claim for judicial review in considerable detail and to enable it to formulate an appeal pursuant to s. 5(2) of the 1963 Act.

57. Notwithstanding that the reasons given were terse, it was held that the applicant had not been prejudiced as they were in a position to pursue an appeal and a claim in judicial review.

58. Thus, Finnegan J. held that even in circumstances where the reasons provided in support of a determination were terse, the decision maker would not have acted unlawfully unless the applicant had been prejudiced in some way. It is clear from the judgment in the *Fairyhouse* case, however, that the applicant was not prejudiced because the actual reasoning was set out in the inspector's report with sufficient clarity and could be relied upon to inform the respondent's decision. This is quite unlike the situation here where it is complained that the inspector's report is no more informative than the respondent's decision.

59. Counsel on behalf of the respondent made the point in submissions to me that there is no equivalent in s. 5 of the 2000 Act to the obligation in s. 34(10) to state the main reasons and considerations where the respondent disagrees with the Inspector. Therefore, it was submitted on behalf of the respondent that the case-law on s. 34(10) of the 2000 Act cannot necessarily

be 'read across' when one is considering the duty to give reasons under s. 5 of the 2000 Act. The implication of the argument made was that the duty to provide reasons under s. 5 required a lesser standard of reasoning than a decision to refuse permission to which s. 34(10) applies.

60. While it is accepted that there is a difference in context between a decision on a s. 5 referral (which is confirmatory of the planning position) as compared to a decision under s. 34 to refuse planning permission, it is not clear to me how the difference in wording as between the two sections is material in this case where there is no departure by the respondent from the recommendations of the inspector and hence the necessity to explain a departure simply does not arise. There is no bright line in relation to the level of reasoning required under the 2000 Act in a given decision-making context and in a decision under both s. 5 and s. 34, there is a duty to identify the main reasons and considerations.

61. In my view, both sections set out that there is a duty to record the main reasons and considerations and to that extent the duty on the decision maker is similar.

62. It is established on the case law that whether this duty has been discharged or not should be considered in the specific context of the decision-making process in question and having regard to the materials that were before the decision-maker. Here we are dealing with a decision the effect of which is to require an application for planning permission, not to refuse permission. In this regard, I accept, as pointed out in *Satke v. An Bord Pleanála* [2009] IEHC 230 (Hanna J.), that (at para. 36):

*"This is not a process of planning permission or no. Though no doubt momentous enough in its own way, the effect of the decision is much more limited. The applicant must now seek to rectify his planning permission..."*

63. To borrow from the expression of Hanna J. in *Satke*, the decision in this case is "momentous enough" in that the applicant's defence to pending enforcement proceedings before the District Court is materially affected by the decision, albeit that he may yet seek to regularise his position by applying for retention permission in respect of the new use. Thus, while in *Satke* the Court rejected a complaint that there were inadequate reasons relying in part on the nature of the s. 5 process and the capacity of the applicant to regularize its position by applying for planning permission,

64. I accept that the decision on the s. 5 application is one with real consequences for the applicant and that the respondent must accordingly provide adequate reasoning for its decision if it is to be sustainable at law. Noting the similarity with the s. 34 decision making process addressed above, I am satisfied that in either case (be it in a decision under s. 5 or s. 34) the duty is to provide the main reasons with sufficient particularity to permit the identification of the legal test applied by the respondent and the identification of why the test was considered to be satisfied or not.

65. The applicant seeks to distinguish *Satke* on a number of grounds. It is contended that in *Satke* the development was clearly described and identified in the inspector's report and the effects of the development were also identified. In that case the respondent, while disagreeing with the inspector, made positive determinations that the development interfered with the character of the landscape and that the local road network was a designated scenic route. It is

contended that the applicant in *Satke* was therefore in no doubt as to why the respondent determined that the development was not exempt development.

66. The applicant also pointed to the fact that there has been considerable evolution in the law on the duty to give reasons in the planning context since the decision in *Satke* pointing out that the main guidance regarding reasons, especially in the planning context, is now recognised as the decision of the Supreme Court in *Connelly v. An Bord Pleanála* [2018] IESC 31, [2018] 2 I.L.R.M. 453.

67. More recently again, in *Balscadden Road SAA Residents Association Limited v. An Bord Pleanála and Ors* [2020] IEHC 586, Humphreys J. considered a range of caselaw in relation to the question of reasons, including *RPS Consulting Engineers Ltd. v. Kildare County Council* [2016] IEHC 113, [2017] 3 I.R. 61; *Sliabh Luachra Against Ballydesmond Windfarm Committee v. An Bord Pleanála* [2019] IEHC 888 (Unreported, High Court, McDonald J., 20th December, 2019); *Friends of the Irish Environment CLG v. Government of Ireland* [2020] IEHC 225 (Unreported, High Court, Barr J., 24th April, 2020); *O'Neill v. An Bord Pleanála* [2020] IEHC 356 (Unreported, High Court, McDonald J., 22nd July, 2020); *Crekav Trading G.P. Ltd. v. An Bord Pleanála* [2020] IEHC 400 (Unreported, High Court, Barniville J., 31st July, 2020); and *Leefield Limited v. An Bord Pleanála* [2012] IEHC 539 (Unreported, High Court, Birmingham J., 4th December, 2012), before drawing a number of conclusions as follows (para. 39):

- "(i) the extent of reasons depends on the context;*
- (ii) what is required is the giving of broad reasons regarding the main issues;*
- (iii) there is no obligation to address points on a submission-by-submission basis - reasons can be grouped under themes or headings;*
- (iv) it is not up to an applicant to dictate how a decision is to be organised - the selection of headings or order of material is, within reason, a matter for the decision-maker;*
- (v) there is no obligation to engage in a discursive, narrative analysis - the obligation is to give a reasoned decision;*
- (vi) there is no obligation to set out the reasons in a single document if they can be found in some other identified document; and*
- (vii) reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is appraised of the broad issues involved, and should not be read in isolation."*

68. This brings us to the test to be applied on this s. 5referral. Having regard to the decision in *Lackagh Rock* and what it is agreed is the correct test, it appears to me that the proper application of the test to determine whether a change in use is "*material*" necessarily requires an identification in the decision-making process of the following:

- (i) the actual change in use;*

- (ii) *what effects, impacts or consequences in planning terms arise from the said change and,*
- (iii) *the scale of those impacts and if they give rise to concerns.*

69. In other words, while it is well established that there is no requirement for a discursive judgment on the part of the respondent, it must be clearly established on the record of the decision-making process (which includes the inspector's report and the materials on the file) what the change is, how it gives rise to an impact and what that impact is. In my view, it is necessary to see these three elements addressed to consider whether the respondent has applied the legal test properly because this is what is required for the applicant to be advised as to whether the decision is legally sound.

70. It is contended on behalf of the applicant that none of these steps have been taken in the present case. It is contended that the respondent's decision is entirely uninformative and provides no information at all as to what it found or why. In particular, it is not clear what traffic or amenity interests are affected as there is no reference to any increase in traffic. Furthermore, the reference to servicing is not explained or understood. There is no reference to any parking problems having arisen with the new use and no reference or any additional impact on the amenities of neighbouring properties. Accordingly, far from the concerns being "*quite evident*", the applicant says it is not clear what issues arise from the changes in use and what impacts have been identified as flowing from it and/or how these are material in planning terms. It is said that the report and the decision completely silent on these matters.

71. Counsel on behalf of the respondent contends, contrary to the applicant, that the type of analysis required by s. 5(1) of the 2000 Act has been done in this case. It is submitted that the jurisdiction conferred by that provision is that the planning authority (or on a referral, the respondent) must describe what, in any particular case, is or is not development or is or is not exempted development. The respondent relies on the materials on the respondent's file and in particular the information on file relating to the planning history of the site from which it is contended, it is clear what the reasons for the decision were. It is pointed out that the Inspector considered (at para. 8.3.4) that the current use of the premises falls within the definition of repository (within the meaning of Class 5 in Part 4 of Schedule 2 to the Regulations) and was a change of use from the previous use as a light industrial building (within the meaning of Class 4 in Part 4 of Schedule 2 to the Regulations). It is contended that in reaching the conclusions in the report regarding a material change of use, the Inspector had regard to all the information on file including the first inspection report of the planning authority, the planning history of the site (including three enforcement notices). Counsel for the respondent brought the Court through the material before the respondent and placed particular reliance on the reasons advanced for the refusal of the previous retention application in respect of use as a car sales room.

72. I am satisfied from reading the decision together with the inspector's report that there has been proper identification of the actual change of use. I further agree that planning concerns which might have effects or consequences in planning terms arising from the change have been identified e.g. implications for traffic, servicing and car parking along a busy and relatively narrow road and the amenity of neighbouring properties. Accordingly, I reject the

case made on behalf of the applicant that there has been a failure to identify the change of use or to identify potential effects in planning terms.

73. However, as to the nature and scale of the potential impacts, the applicant is correct that the inspector's report having identified issues of planning concern merely asserts without further elaboration:

*"it is quite evident that such issues would be raised by this change of use".*

74. The kernel of the argument repeated on behalf of the applicant in his pleadings and submissions is that it is not "*quite evident*" and it is not clear at all what difference there is between the implications for traffic, servicing and car parking along busy and relatively narrow road and the amenity of neighbouring properties as between the previous use and the new use and therefore the decision is inadequately reasoned.

75. Whilst it would of course be preferable to see these matters addressed clearly in the record of the respondent's decision, the fact that this analysis does not appear on the face of the record is not determinative where the reasons for the decision are otherwise discernible. It is correct to say as the respondent does, per *Connelly v. An Bord Pleanála*, that reasons may be found elsewhere in the documentation, provided that it is sufficiently clear to a reasonable observer carrying out a reasonable enquiry that the matters contended actually formed part of the reasoning.

76. Applying the test in *Connelly* and the principles identified by Humphreys J. in *Balscadden Road SAA Residents Association Limited v. An Bord Pleanála and Ors*, I must consider if the material before the respondent demonstrates that it considered the impact or effect of the change of user on the identified matters of planning concern and, if it did, identifies in broad terms why it decided that there was a material change in use having regard to those matters which were identified namely the implications for traffic, servicing and car parking and the amenity of neighbouring properties.

77. The question I must now determine is whether, on the material before the respondent and available to the applicant, it is sufficiently clear why the respondent decided that there had been a material change of use for the purpose of refusing to grant a declaration that there had been no change of use. This involves the Court in deciding whether there is enough in the material to allow the applicant to understand why it was concluded that the change of use was material having regard to "*the implications for traffic, servicing and car parking along busy and relatively narrow road and the amenity of neighbouring properties*" and to form a view as to whether there was a sufficient evidential basis for the decision reached or whether it is amenable to challenge as unreasonable for lack of an adequate evidential basis (bearing in mind the high threshold which applies in any challenge of an expert body on rationality grounds).

78. The material before the respondent shows that substantive and evidence-based concerns were raised in 2012 as to the implications for traffic, servicing and car parking along busy and relatively narrow road and the amenity of neighbouring properties when an application for retention permission for a change in use to permit car sales from the site was refused. What was meant by these concerns was explained in the Roads and Traffic Planning Division Report which forms part of the planning file. The reference to "*servicing*" in that report was clearly



linked to the lack of onsite parking or off-site parking in the vicinity of the site. One might extrapolate from this that the inspector and the respondent in its turn took the view that it was "evident" that these concerns would also be raised by the change in use to a commercial self-storage unit. In the further planning report prepared in respect of this earlier retention application, the impact on residential amenity in a predominantly residential area of the car sales use were also considered.

79. In coming to the conclusion that I have with regard to the materials before the respondent, I do not lose sight of the fact that these concerns were identified in the previous application for retention by reference to the evidence of vehicles for sale being parked on the road-side and forecourt with no space for customer parking. Accordingly, the concerns identified related to the nature of the specific change in use envisaged at that time and are not automatically transferrable to the current use. I accept that the identification of an evidential basis for concerns on a previous retention application does not necessarily obviate the requirement for the respondent to demonstrate through the decision making record and the material on its file that it has addressed its mind on this s. 5 referral to the issues which it was obliged to consider namely, the impact or effect the change of use was considered to have on *"traffic, servicing and car parking along busy and relatively narrow road and the amenity of neighbouring properties."* While I have not lost sight of the fact that the previous use for car sales cannot simply be equated with the new use of self-storage, nor should I blind myself to the similarities where it is obvious that these same or similar concerns are likely to arise with the use under consideration. After all, it would not be an appropriate exercise of my discretion were I to intervene where there is a common sense or logical basis for the decision adopted by the respondent which should be clear from the record of the decision as a whole and the planning history of the site.

80. In this case, I recognise that the concerns which arise from a car-sales use are not on all fours as those which arise from a commercial self-storage use when compared with the previous use of furniture manufacturer and store. It goes without saying that I accept, for example, that the fact that a retention application for car sales was refused does not mean that an application for retention of the current use would be refused. I also accept that where the respondent concludes that there is a materially different impact or effect on matters of planning concern such as traffic, servicing and car parking and the amenity of neighbouring properties as between the previous use and the new use, there must be some evidential basis identifiable from the record of the decision making process to show how the respondent so concluded with regard to the particular change of use under consideration. It cannot simply rely on the fact that these concerns arose previously with regard to a different use.

81. Reading the respondent's decision together with the inspector's report and the materials that were before the respondent, it seems to me that I can be satisfied that not only did the respondent identify the correct legal test, but it also applied it. The inspector's report properly records that the new use is a different class of use to the previous use. This is of some materiality as it changes the class designation of the use under Part 4 of Schedule 2 to the Planning and Development Regulations from light industrial to wholesale or as a repository. The inspector's report further identifies the planning history (including the refusal of the 2012 retention application). The specific planning concerns identified by the inspector mirror almost

verbatim those which led to the previous retention application being refused. The fact that the inspector adopts the same language as used to describe the concerns on the previous retention application makes it clear that the respondent considered that similar concerns arose on this new application because of the number of people driving to and from the site. The nature of the previous concerns are clear. They arose in relation to the servicing of the site for parking, traffic issues associated with access to and from the site by clients and the impact on the residential amenity of the area.

82. While neither the inspector nor the respondent expand on these concerns identified in respect of a separate use by specific reference to the new use in question, the material on file is enough in my opinion to provide an evidential basis for concluding that the same concerns arise and are sufficiently material in respect of the new use as to require separate consideration for planning purposes. The material on file clearly describes the new use as a business which entails access to a considerable number of storage units, provided to a similar number of customers on a twenty-four hour basis together with a facility to take deliveries and dispatch goods for delivery and a removal service (according to its own advertisement). The photographs depict the number of different storage units available. Insofar as the respondent is told and accepts that the premises had previously been used for furniture making and to store furniture, it is not suggested that furniture was stored by a business other than the furniture making business engaged in light industrial use on the site or that these third parties had access to furniture storage facilities for a range of time-spans and would be entitled to receive and dispatch furniture stored by them at the site.

83. Granted the particulars of the previous use available from the application are limited but no evidence was placed before the respondent to suggest that this previous use involved 24-hour access to the site by multiple customers. In the absence of this type of evidence and it being entirely logical to presume that numerous third parties did not enjoy free access to deliver and remove items from the store when it was used for furniture making and storage, I accept that it was evident to the inspector and the respondent that issues material to matters of planning concern arise from the new use in terms of impact on traffic, parking and residential amenity by virtue of the number of persons with rights of access to the site. In my view, the reasons for the decision could and should have been better stated but are sufficiently clear to a reasonable observer carrying out a reasonable enquiry and with access to the planning file. In my view the decision does not fail for lack of reasons.

84. Given what is known about the new use and what is not said about the previous use, I am satisfied that it was also reasonable for the inspector and the respondent in turn to consider that the new use gave rise to matters of planning concern similar to those which arose when retention was sought for the previous car sales use. These previous concerns were not limited to the parking of the cars for sale in the vicinity of the site (which obviously does not arise here) but extended to the lack of parking facilities on site or off site for customers and the impact on traffic of increased access and egress to and from that site and the residential nature of the area. There is a logical, common-sense basis for concluding that similar concerns arise here. It was not unreasonable for the respondent to conclude that the change of use was sufficiently material as to require an application for planning permission. Whilst ultimately the concerns identified by the respondent may not preclude the grant of planning permission on the site, the

issues with the site and the new use identifiable from the materials before the respondent are such as to warrant scrutiny, including public participation, through the making of an application for planning permission.

85. For the reasons set out above, I must decline the relief sought quashing the decision of the respondent of the 21st January, 2020 whereby the respondent determined pursuant to s. 5 of the Act that the development the subject matter of a referral pursuant to s. 5 of the 2000 Act was development and was not exempted development.

86. In circumstances where the applicant has not been successful in these proceedings, I propose to make an order for the respondent's costs as against the applicant to be adjudicated in default of agreement. While the first notice party was represented in court, he did not participate in the hearing. I would propose to make no order with regard to the costs of the first notice party. In the event that the parties contend for a different order or other consequential order(s), I direct that written submissions addressed to the question of the appropriate orders should be exchanged and filed with the Court within fourteen days of the date of delivery of this judgment. Absent receipt of such submissions orders will be drawn in the terms proposed.