Major reforms proposed to the planning judicial review process in Ireland

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The planning landscape in Ireland has changed dramatically over the past twenty four years since the introduction of the Planning and Development Act 2000 ('the 2000 Act').

Significant challenges have arisen in recent years with the exponential rise of planning related judicial review challenges, at a time when there has never been a greater urgency to deliver housing and meet renewable energy targets. The planning authority, An Bord Pleanála (ABP), has also been identified as no longer being fit for purpose and in need of a radical overhaul with regards to its organisational and governance structures.

A Draft Planning and Development Bill 2022 ('the Draft Bill') was published in January 2023 following a 15 month review led by the Office of the Attorney General. The Draft Bill proposes a number of significant changes to the judicial review of planning permissions in Ireland.

The Draft Bill represents an overhaul of the 2000 Act, which has been amended significantly over its twenty two year lifespan and was once described by the Irish Supreme Court as "an untidy patchwork confusing almost to the point of being impenetrable". The Department of Housing said that the proposed legislation would bring 'greater clarity, certainty and consistency' to how planning decisions in Ireland were made.

The Planning and Development Bill 2023 was recently approved by Cabinet and will now be initiated before the Oireachtas, the Irish Parliament.

In anticipation of the Bill passing through the Irish Parliament, the Government has published a Guide to the 2023 Bill ('the Guide') which anticipates some key changes will made to the original Draft Bill published.

Re-structuring of An Bórd Pleanála

An Bord Pleanála is the first casualty, being replaced by An Coimisiún Pleanála. The Commission will have a three-pillar structure with a separation of powers between planning decision-making, governance, and corporate.

Reform of judicial review

Part 9 of the Draft Bill re-enacts the provisions of sections 50, 50A and 50B of the Act of 2000 with substantial modifications which will reform the area of planning judicial review.

The aim is to streamline the judicial review process while providing clarity on key issues such and standing, sufficient interest and costs protection for applicants.

Applications for leave

The need to first apply for leave in judicial review proceedings will no longer be required – this will reduce legal costs and Court time.

The amendment and addition of further grounds for judicial review beyond those originally filed will now only be permitted in limited circumstances.

Applicants, apart from environmental NGO's, will have to "exhaust any available appeal procedures or any other administrative remedy available in respect of the decision or act concerned" before bringing judicial review proceedings.

Applicants will also have had to have made a submission to the planning authority or the Commission before being able to bring judicial review proceedings.

Standing

A proposal in the original Draft Bill sought to curb the ability of residents' groups and environmental NGO's to take judicial review challenges, however, this drew significant criticism from political, environmental and public interest groups.

The Guide indicates a notable shift from the initial Draft Bill text on the limitations to curb residents groups and environmental NGO's applications.

The Guide proposes to allow unincorporated residents' associations to initiate judicial review proceedings, provided the residents association has a constitution, a vote is passed by a majority of at least two thirds to proceed with the judicial review, and the names and addresses of those in favour are filed with the Court.

Costs

The Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters ('the Aarhus Convention'), prescribes rights to information, involvement in decision-making, and access to justice concerning environmental issues.

The Irish Courts have acknowledged that a key aim of the Aarhus Convention is to ensure that judicial review applicants citing environmental grounds should not be faced with adverse costs orders that are prohibitively expensive.

Several legislative changes, such as the Environment (Miscellaneous Provisions) Act 2011, which amended section 50B of the Planning and Development Act (PDA), have implemented specific rules for cost protection. These rules are designed to safeguard applicants from being financially responsible for costs in the event that their application is unsuccessful.

However, the Supreme Court in Heather Hill Management Company CLG - as we described in an article published earlier this month - have clarified further that a Protective Costs Order (PCO) is available to applicants on all grounds in their proceedings even where only certain of those grounds may cite environmental law concerns and challenges.

The Draft Bill proposes to go further still where judicial review applicants have to cover their own costs. The Environmental Legal Costs Scheme ('ELCS') is a means-tested legal aid initiative for judicial review applicants and other Aarhus Convention (environmental) cases, where each party is responsible for covering their own costs.

Legal fees under the ELCS will adhere to a predetermined scale. In the event of a successful case, the applicant can recover costs in accordance with this scale. Conversely, if the applicant is unsuccessful, the ELCS may provide a contribution to their costs, proportionate to the applicant's means assessment.

Opportunity to correct errors

Under the Draft Bill the Commission will have an opportunity to correct an error of fact or law in a planning decision. The Commission would also have the opportunity to apply for a stay in respect of the judicial review proceedings while these corrections were made.

The Guide to the 2023 Bill as published in November indicates that this provision has been amended but the details of this amendment have not yet been published.

Urban Development Zones

The proposed legislation introduces Urban Development Zones (UDZs) to replace the previous Strategic Development Zones. This change will allow local authorities to identify areas with "significant potential for development," including housing, as potential candidates for UDZs, which

must then be approved by Government to attain the UDZ designation.

These areas will be a focus of State investment in key enabling infrastructure in order to ensure the potential for development can be realised expeditiously.

Development Plan Lifespan

The Draft Bill significantly intends to extend the life of Local Authority Development Plans from six to ten years. These plans will undergo a review after the initial five years.

The new plans are expected to adopt a more strategic nature, moving away from a population-size-driven need to focus on specific area-based plans tailored to address particular requirements. These include Urban Area Plans, Priority Area Plans, Joint Area Plans, and Strategic Development Zones/Urban Development Zones.

Conclusion

The Planning and Development Bill has been broadly welcomed as a much needed overhaul of the legislative planning framework in Ireland, at a time when there has never been a greater need for timely infrastructural and commercial development in the State.

The Draft Bill aims to provide greater clarity and certainty in terms of planning decisions and provide an efficient and consistent planning system which will support the delivery of much needed housing and infrastructure.

Next steps

The Bill commenced Second Stage in the Dáil in November 2023 and is proceeding through the Oireachtas. Make sure to keep a close eye on our website and channels for further updates.

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