



PLANNING AND DEVELOPMENT BILL A PRACTITIONER'S PERSPECTIVE

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The Impenetrable Maze

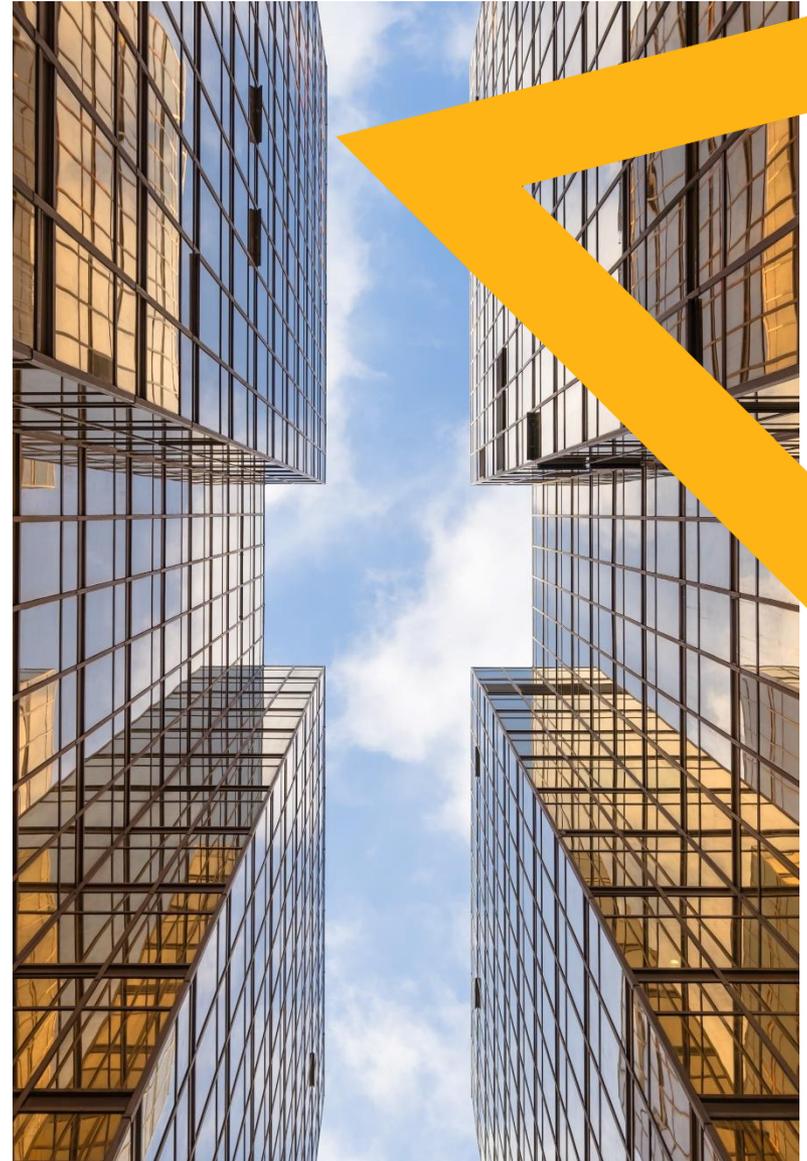
“Si monumentum requiris, circumspice (“if you seek (his) monument, look around”).

This was the famous epitaph of the greatest architect and master builder of his day, Sir Christopher Wren. Yet the modern architects and builders who look around in this State are as likely to be daunted by the sight of an almost impossibly complex system of planning laws and regulations as much as being enthralled by any great architecture or vaunted public buildings.”

*Mr Justice Hogan, **Pembroke Road Association/Waltham Abbey v ABP** [2022]
IESC 30*

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Planning and Development Bill

- 2019: General Scheme Housing, Planning & Dev Bill
- December 2022: Draft 728-page Bill
- February to April 2023: JOC Hearings and PLS Report
- October 2023: Cabinet approves Bill and Guide published
- November 2023: Bill to be published with explanatory memo?
- On adoption of Bill: Review and update of c. 100 S.I.s

➤ Objectives of the Bill

“We need faster planning decisions, more timely judicial reviews and fewer of them,” Taoiseach Leo Varadkar following approval of the Bill

Access to Justice

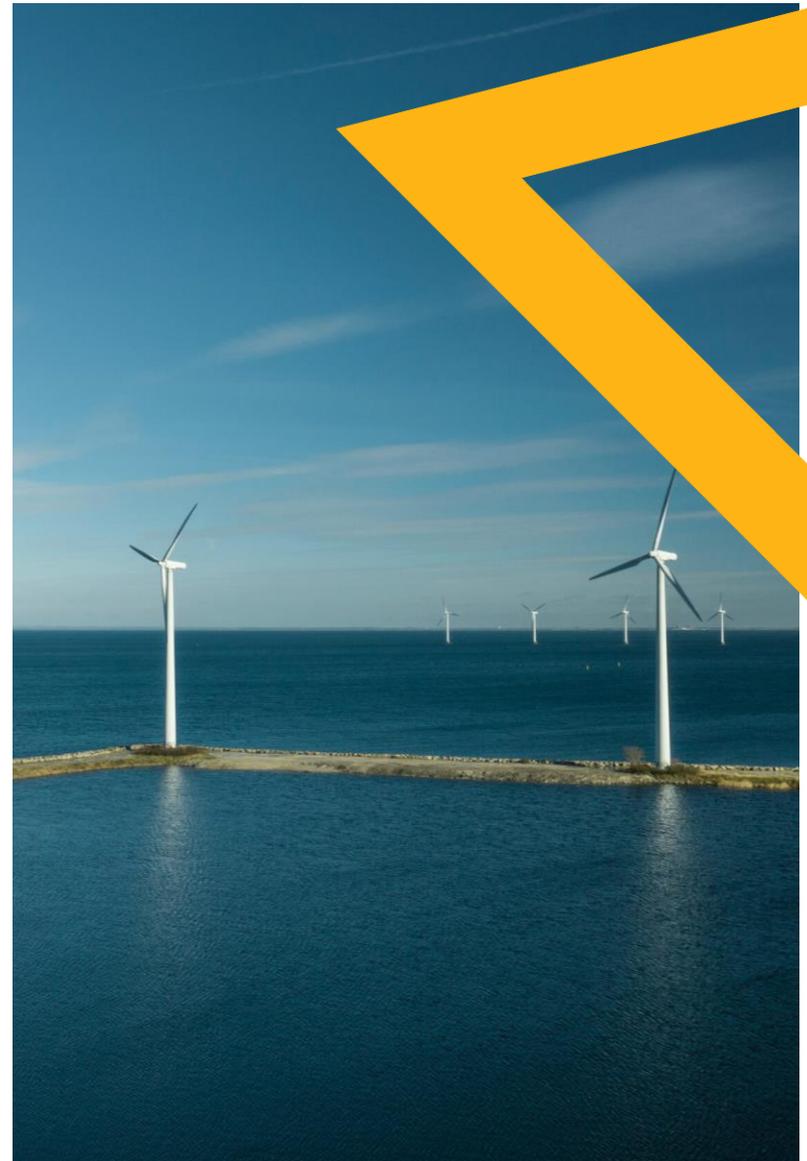
- Scope of provisions
- Procedures and Timelines
- Standing
- Costs Protection
- Correction of Errors
- Environmental and Planning Court

Caveats

- Final Bill not yet published
- Guide of general nature and may not reflect final position.

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Scope of Provisions

Draft Bill:

- **Core Rule:** A person shall not question the validity of any decision made or act done in the performance or purported performance of any function under this Act...or allege any failure to perform such a function other than by way of judicial review
- Scope of specific JR procedure is extended:
 - Range of bodies covered including: the Minister, OPR, the Government
 - Failure to perform functions
- **8 Week Time Limit:** Beginning on the date of the decision, the date of the doing of the act or the date of the failure to perform a function.
 - *Save the South Leinster Way & Ors v An Bord Pleanála* [2023] IEHC 577 (25 October 2023): 8 weeks is 8 weeks

Procedures – The Leave Application

- *Kelly v An Bord Pleanála* [2022] IEHC 238, Holland J.:

“46...In a legislative attempt at a short-cut, the 2000 Act required leave applications to be on notice – apparently in hope of weeding out early claims due to fail. In practice it was found to result in mini-, and sometimes not-so-mini-, trials at leave stage, duplicating in many cases what had to be done again at trial. Judicial commentary pointed to wasteful duplication of effort and inefficient use of court resources.... The short-cut was found to be the longer way home and in 2010 the PDA 2000 was amended to revert to the old ex parte leave application, which remains the rule”.

- **Draft Bill:** leave on notice, automatic grant unless a party opposed it.
- **Guide:** Leave stage will be removed “*reducing time spent in Court and unnecessary additional legal costs to all parties*”.
- Criteria must still be met “*in order to proceed*”: sufficient interest and grounds, time-limit, exhaust administrative remedies

Procedures – Amendment of Grounds

- ***Sherwin v An Bord Pleanála*** [2023] IEHC 26, Humphreys J

“Consequently, it makes complete sense to have a very high bar for the initiation of the proceedings, thus requiring good and sufficient reason for proceedings to be brought out of time, with a less extreme test of explanation (along with arguability and lack of a remedial prejudice) as regards amendments that are brought to proceedings that have been properly instituted within time in the first place”.

- ***North Westmeath Turbine Action Group v. An Bord Pleanála*** [2022] IECA 126

“Order 84, Rule 23(2) does not require that every amendment application must be approached as if it involved a late application for leave. That is the appropriate approach where a substantially new case is sought to [be] made”

Draft Bill: (a) there is good and sufficient reason for doing so, and

(b) the circumstances that resulted in the failure to include the amendment within the said period were outside the control of the applicant and the applicant’s advisers (including legal advisers).

Procedures – Avenues of Appeal

Draft Bill:

249.(15) (a) The determination of the High Court of—

- (i) an application for leave for judicial review,
- (ii) any application for judicial review on foot of such leave, or
- (iii) any other application or motion whatsoever relating to *subparagraph (i) or (ii)*,

shall be final and **no appeal shall lie from the decision of the court to the Court of Appeal.**

(b) No appeal shall lie from the decision of the court to the **Supreme Court save on the basis of an application for leave to appeal** under Article 34.5.4° of the Constitution.

(16) Subsection (15) shall not apply to a determination...in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution

Standing – General Requirements

- Sufficient Interest
 - *Grace and Sweetman* [2017] IESC 10: Sufficient proximity to the proposed development or participation in the planning process (need not be cumulative)
- Issue specific standing
 - *Pigs in Distress Case C-826/18*: Not necessary to determine if Article 9(2) and (3) Aarhus Convention precludes only complaints directed against the same aspects of the contested decision as those which were the subject of observations by the applicants during that procedure from being open to challenge before the courts.
 - “Gaslighting” authorities: *Carrownagowan Concern Group v ABP* [2023] IEHC 579
- Latest version of the Bill? According to the Guide:

“...an individual must have made a submission to the relevant body whose decision is at issue in order to later make an application to take a judicial review on that application”.

Standing – ENGO and Residents Associations

The Guide:

- *“ENGOS will still enjoy special status within the legislation, aligned to Ireland’s commitments under the Aarhus Convention, subject to certain criteria”*
- Residents’ Associations - Unincorporated organisations will be able to take JR in matters that *“materially affect their neighbourhood”*, so long as:
 - they have a Constitution
 - they take a vote of their members on whether to proceed with a JR and 2/3 of those voting agree to proceed
 - the names and addresses of those in favour of the JR are filed with the application.

Environmental Legal Costs Scheme

- Section 50B PDA/EMPA 2011/The Interpretative Obligation *Heather Hill v An Bord Pleanála* [2022] IESC 43

The Guide:

- A **scale of fees** for all planning JRs and other Aarhus convention cases within the PDA.
- Each party shall bear its own costs.
- When seeking to initiate a JR, an applicant will also be able to apply to an Environmental Legal Costs Scheme, which will be means tested, for a legal aid contribution.
- If the applicant wins, it will be able to recover its costs (presumably against the relevant Respondent) in line with the scale of fees.
- If an eligible applicant does not win, it may receive a contribution from the Scheme. The level of contribution will be determined by a means assessment and, depending on the applicant's circumstances, could be up to 100% of the applicable scale fees.

Kemper v An Bord Pleanála [2022] IEHC 349, *FOIE v Legal Aid Board* [2023] IECA 63

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Correction of Errors

- **Section 146A PDA: Amendments of clerical or technical nature**
 - correcting any clerical error therein
 - where the doing of that thing may reasonably be regarded as having been contemplated by a particular provision of the permission or decision or the terms of the permission or decision taken as a whole but which was not expressly provided for in the permission or decision, or
 - otherwise facilitating the operation of the permission or decision

If it will not involve a material alteration of the terms of development.

- ***Ross v An Bord Pleanála* [2015] IEHC 256**: an applicant for permission ought first exhaust its remedies under Sections 146A
- ***Pembroke Road Association v An Bord Pleanála* [2022] IESC 30**: Example of a provision “*designed to mitigate the effects of the remedy of certiorari*”.

Enforcement

- Resourcing
- Regional planning and environmental Courts
- Regional enforcement authorities
- Section 5 declarations



Regional Enforcement Authorities

Draft Bill

- S. 299(1): the Minister may by order designate a planning authority to be a “*regional enforcement authority*” with authority in a designated region over designated classes of development
 - “*if he or she is of the opinion that by reason of the likely size, nature, or effect on the surroundings, of development belonging to that class, it is appropriate that the functions under this Part of each planning authority whose enforcement area constitutes part of the designated region be performed, in relation to development of that class, by the planning authority referred to in paragraph (a).*”
- “*Under the new Bill, enforcement will be enhanced through provision of a new regional structure, on a shared service basis across local authorities, for the enforcement of activities, such as quarries.*”

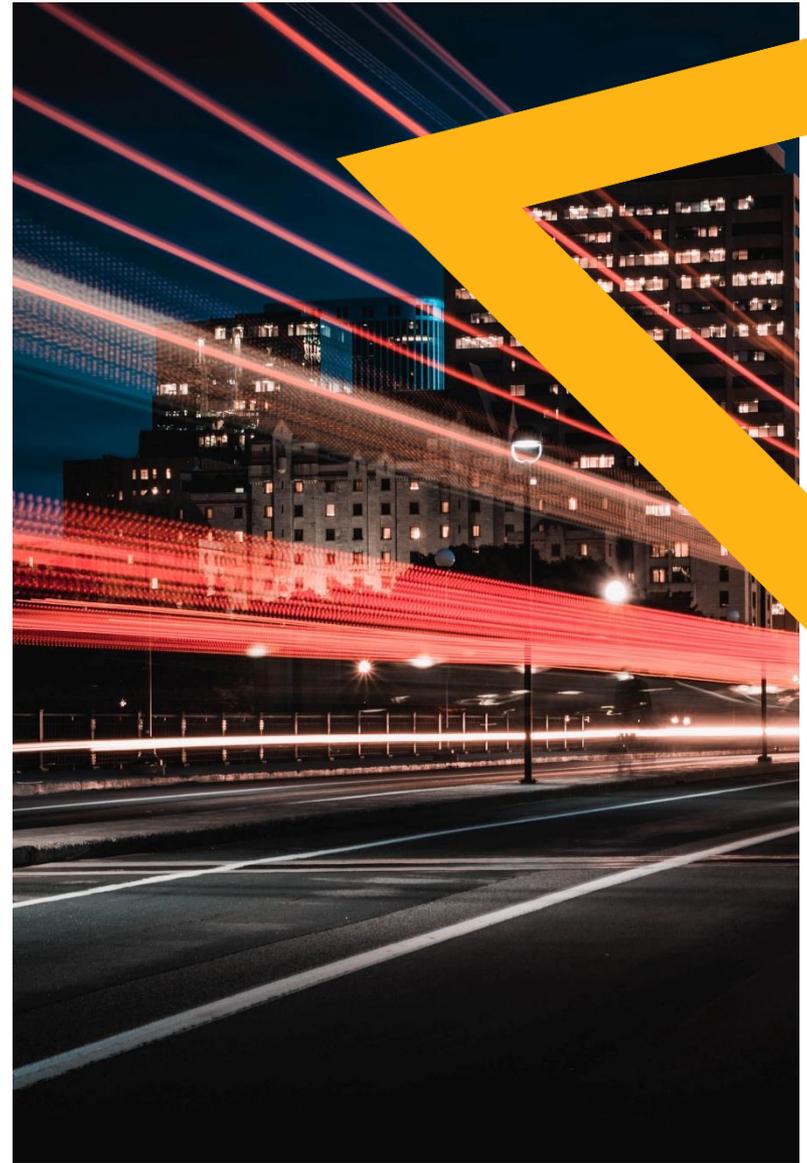
Section 5 Declarations

Draft Bill

- The persons who may seek such declarations are more limited: owner, occupier or other person with the owner's consent, a prescribed person
- It extends the nature of these types of declarations to include:
 - a declaration on any question relating to the meaning or scope of the permission or any condition to which the permission is subject
 - *Krikke v BSEL* [2022] IESC
- A declaration shall not be admissible in evidence in any proceedings brought by a person, other than an enforcement authority, relating to the change in use or works in respect of which the declaration was made.
 - *Narconon v An Bord Pleanála* [2021] IECA 307/*Sweetman v ABP* [2023] IEHC 89: previous declaration binding if no material change in planning fact or circumstances

What's Next?

- Publication
- Omissions and Submissions
- Regulations
- Transition
- Training
- More litigation and delays?



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