LAW SOCIETY OF IRELAND

Draft Planning and Development Bill 2022

Joint Committee on Housing, Local Government and Heritage

Opening Statement - 2 March 2023

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INTRODUCTION

Thank you for the invitation to discuss the draft Planning and Development Bill 2022 with you this morning. We appreciate the opportunity to engage with the Committee on this fundamentally important legislative initiative.

Myself and my colleagues represent the Law Society's recently established Environmental & Planning Law Committee which is very much focused on the draft Bill.

As the representative body for the solicitors' profession in Ireland, the reforms to the Judicial Review of planning decisions proposed in the draft Bill are of significant interest to the Society in the context of their implications for access to, and the administration of, justice.

There are two primary areas where access to justice questions arise – standing in judicial review and costs – and I'd like to take this opportunity to address these for the benefit of the Committee.

Both areas have given rise to significant **"satellite litigation"** in recent years, where questions around the compatibility of rules relating to both with EU Law and the Aarhus Convention have arisen in the course of challenges to planning decisions. Those questions inevitably have to be explored before the core judicial review challenge can be resolved, which has been the cause of significant delay for many judicial review cases in recent years. The courts have now resolved many open questions about the compatibility of the existing rules with the Convention and EU Law. The Law Society would be concerned that any changes are carefully scrutinised for compatibility with the Convention and EU Law in order to avoid new delays in judicial review proceedings as settled questions of law are reopened.

1. STANDING

The current requirement is that an applicant seeking leave to apply for judicial review must have a "sufficient interest" in the matter to which the application relates.

The draft Bill appears to suggest that the Court would assess the question of sufficient interest on a ground-by-ground basis and an applicant would have to illustrate that they have sufficient interest in a specific ground for judicial review because - either:

i. They are, or may be, directly or indirectly, materially affected by the matters to which the application relates; or

ii. The ground relates to matters raised by the applicant in submissions before the decision-maker, provided that the applicant has legal capacity to bring proceedings; or

iii. In certain environmental cases, the applicant is a company which meets specific criteria (including that it has been in existence for at least one year prior to the application for judicial review, has 10 members and its constitution includes objects related to the promotion of environmental protection relevant to the matters to which the proceedings relate which it has pursued for the previous year).

The fact that the rules around standing are less restrictive than those proposed in the draft General Scheme of the Planning Bill 2019 is to be welcomed. However, questions remain around their interpretation and compatibility with the Convention and the requirements of EU Law. Rules on standing which are too narrow could deprive people of their right to seek legal review of planning decisions and delay the resolution of proceedings if those standing requirements are challenged.

2. COSTS

The Aarhus Convention and implementing EU Directives require that costs in certain environmental cases must not be prohibitively expensive.

The scope of costs protection afforded by, and the adequacy of, implementing legislation has been the subject of significant litigation during the last decade with some measure of certainty and clarity having only been recently achieved.

Against that background, and given the significance of this issue in the context of access to justice, it is a cause of concern that proposed costs reforms remain a Draft Head at this stage.

While the draft Bill proposes an administrative scheme for costs, it is not clear whether it is intended that this would be the sole funding option for litigation in environmental cases. It will be important to ensure that further consultation is undertaken once details of that scheme, and the legislative proposals, are made available in order to ensure compatibility with the Convention and EU law.

Our committee is also examining various of the draft Bill's other proposals in this context including:

1. That bodies may make amended decisions correcting “any error of law or fact” in its decision, how that would operate in practice and its implications for the judicial review process.

2. That leave applications would be made on notice (rather than *ex parte* as at present).

3. That the Bill would prescribe time limits for the judicial review process and the implications of the time limits proposed (where such matters are normally dealt with in the Rules of the Superior Courts and Practice Directions).

4. That no appeal would lie from a decision of the High Court to the Court of Appeal.

OTHER ASPECTS OF THE BILL

Whilst access to justice is of course a very significant part of the Bill, it is important not to lose sight of other proposed reforms and our committee has followed your hearings on the draft Bill with interest.

We are also reviewing other aspects of the Bill with a focus on areas which have given rise to legal uncertainty and litigation and assessing how these have been addressed. They include:

1. Section 5 declarations and exempted development;

2. The alteration and extension of planning permissions;

3. Retrospective consents;

4. The material contravention of Development Plans;

5. Environmental assessments; and

6. Statutory mandatory timelines for development consent processes

It would also be helpful as anticipated that an Explanatory Memorandum be prepared explaining the changes being proposed in the draft Bill.

CONCLUSION

Again, thank you for including us in your pre-legislative scrutiny of the draft Bill - we will be glad to take any questions Members may have.