Dr Lorcan Sirr
Technological University Dublin
Bolton Street
Dublin 1

Ms. Anne-Marie Lynch
Clerk to the Committee
Joint Committee on Housing,
Local Government and Heritage
Leinster House
Dublin 2

Dear Ms. Lynch,

Re: Pre-Legislative Scrutiny of the draft
Planning and Development Bill 2022

Please find attached my submission as requested. The Bill is quite large at over 700 pages, so rather than cover every aspect that could potentially be changed, I have attempted to highlight the recurring theme of the removal of public participation from the planning system and made recommended changes based upon that aspect.

The extent to which the public is systemically being removed from participation is verging on that found in a totalitarian planning system, and not expected to be found in a first-world democracy.

Elements of the Bill also run contrary to the recommendations of all planning tribunals, but especially the Mahon Tribunal of Inquiry into Certain Planning Matters and Payments.

My recommendations seek to remedy these issues.

Yours,

_____
Dr Lorcan Sirr
Dublin, 23rd February 2023

EXECUTIVE SUMMARY

Amendments are recommended to the following sections:

- Sections 8, 9, 23, 24, 105, 248, 249, 250, 336 and the reinstatement of Development Contributions (s.48 and s.49 of the Planning and Development Act 2000).

INTRODUCTION

Public participation is a key component of the planning system. It is directly and indirectly a mechanism by which local and national concerns around planning issues can be voiced and, on occasion, actioned, as well as potential corruption thwarted.

International experience has shown that social, economic and environmental success in rural and urban environments can only be achieved through better and more frequent engagement with the public in the decision-making process, not by attempting to write them out of the process.

There is also the importance of promoting 'good governance' by opening the planning process to public involvement and debate.

Ireland is far from the vanguard of public participation in planning issues. In fact, Ireland is one of the European countries that has made the least amount of progress in citizen engagement in the last two decades. Ireland has moved from a state of "Access info only" (only basic information is accessible) to "Weak engagement", as shown in Figure 1, following. This Bill as proposed is not going to advance our status, but will move Ireland even more to the right on this table.

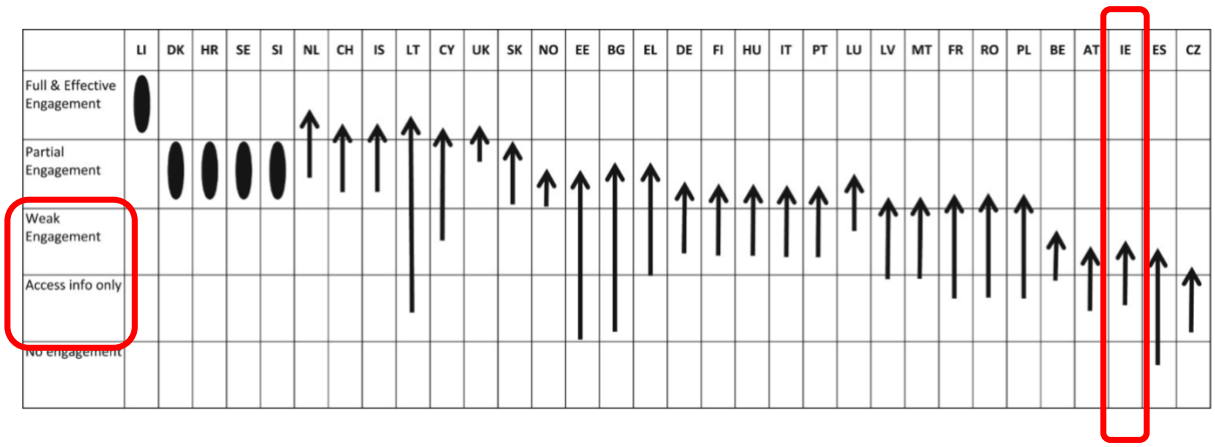

Figure 1. Trends for citizen engagement in spatial planning, 2000–16. Note: Arrows show change over time; ovals indicate little overall change; and figures are reproduced directly from the country responses.[1]

Despite this, in recent years there has been a concerted effort to further reduce the role of the public in the planning system. We have seen the influence sectoral interests have on policy-makers, whereby policy is effectively made behind closed doors by lobbyists, and policy-makers adopt their suggestions seemingly without question.

[1] Nadin, V, Stead, D, Dąbrowski, M & Fernandez-Maldonado, A-M (2021) 'Integrated, adaptive and participatory spatial planning: trends across Europe', in *Regional Studies*, 55:5,791-803

In the case of Strategic Housing Development (SHD) planning policy, its evolution was recorded by one lobbyist: "…we met him [the minister] four times over about six or seven weeks for, amazing actually, from eight o'clock at night until midnight…[…]…And we gave him our recommendations and they took it lock, stock and barrel and stuck it into the new housing bill."[2]

Mandatory ministerial guidelines are another example of attempts to bypass local democracy and public engagement.[3]

The Planning and Development Bill 2022, moves Ireland's planning system backwards towards a more totalitarian 'command-and-control' planning style instead of forwards toward best practice and better social, economic, environmental and planning outcomes.

It is therefore more than disappointing but, given repeated evidence of the regulatory capture of policy-makers, not surprising to find a recurring theme in the Planning and Development Bill 2022 of the further erosion of public involvement in the planning system in Ireland, despite international trends and indeed despite national court decisions and commentary (see Narconon ref., following).

The Bill as presented has more than faint traces of sectoral interest influence. Lessons seem not to have been learned from previous failed sectoral-interest led initiatives (e.g. the SHD process) and this Bill, rather than correcting the error, seems intent on digging the public exclusionary hole even deeper. Some of the proposals to limit public participation not only fly in the face of good planning practice but also in the face of civil society and good governance. Limiting the right to take a judicial review is a particularly egregious and classist inclusion in the Bill, but there are other aspects of the Bill which are just as retrograde and insidious.

Neither should the recommendations of the Mahon Tribunal be forgotten.[4] Public participation is a fundamental part of transparency, and corruption "flourishes in the shade". According to Judge Mahon, "Transparency requires that the decisions and actions of those in government are open to public scrutiny and that the public has a right of access to the information necessary to make that scrutiny effective." (p.2540). In addition, "More broadly, transparency is fundamental to a functioning democratic society which depends on both the consent of the people and their *participation in the democratic process* [my emphasis]. Both consent and effective participation turn on the public being able to scrutinise the actions of government and having the knowledge to do so effectively" (*ibid*.). An absence of public participation is an absence of transparency, and both factors facilitate everything from poor practice, to undue influence on policy, to outright corruption.

I have identified the sections in the Bill that need changing to retain what is left of public participation (and therefore transparency) in the planning system, and to avoid weak policy-making and influential sectoral interests to dominate the future shape of the built and rural environment as well as our democratic processes. All the recommendations below should be viewed in the light of the contribution they will make to increasing public engagement and transparency, and reducing the potential for abuse of power and corrupt behaviour.

---

[2] Lennon, M and Waldron, R (2019) 'De-democratising the Irish planning system', in *European Planning Studies*, 27:8, pp1607-1625

[3] S.28 of the Planning and Development Act 2000 gave ministers powers to issue guidelines to local authorities on planning matters. These guidelines were not mandatory. A new form of these section 28 guidelines (Specific Planning Policy Requirements) was introduced by the Planning and Development (Amendment) Act 2015 which made it mandatory for local authorities to apply 'guidelines' in their planning decisions. Section 28 ministerial guidelines do not need the approval of the Dáil to be issued.

[4] *The Final Report of the Tribunal of Inquiry into Certain Planning Matters and Payments,* 2012.

SPECIFIC RECOMMENDATIONS

All sections mentioned below refer to the 2022 Bill.

Section 8 – Declaration on development, exempted development, etc.

Issue 1:

Context. The proposed Bill seeks to permit only landowners, occupiers or people who want to carry out development with the consent of the landowner to seek a declaration of exempted development. This is a direct exclusion of the public, and is a most significant change from the position prior to this, going back all the way to the 1963 Act, when any person was entitled to seek such a declaration.

However, in the current Bill, a "relevant person" means:

> (a) the owner of land, (b) a person who, in accordance with subsection (2) of section 81, is eligible to make an application for permission for maritime development under Chapter 3 or 4 of Part 4, (c) the occupier of land who – (i) carries out or proposes to carry out works on the land, or (ii) makes or proposes to make a change in use of the land, with the consent of the owner of the land, (d) a person (other than the person referred to in paragraph (c)) who – (i) carries out or proposes to carry out works on the land, or (ii) makes or proposes to make a change in use of the land, with the consent of the owner of the land, or (e) a prescribed person;…

This change is an entirely retrograde step, and one which makes a fundamental change to the current planning system. The Section 5 provision was not, and is not, as erroneously suggested by a Department of Housing witnesses to the Joint Oireachtas Committee on 7th February "to allow owners or people with a relevant interest to ask the planning authority that question and to get an answer in a reasonably quick timeframe", but rather, the Section 5 provision allowed any person to ask such a question. The Bill now seeks to exclude the public from that system.

Recommendation. It is recommended that this entire section be replaced by the relevant text of Section 5 (1) of the Planning and Development Act 2000, copied below, where there is specific reference to any person.

> "Section 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."

Issue 2:

Context. The courts in the 2021 Narconon vs An Bord Pleanála[5] case have identified the lack of effective public participation. In this case, Collins J in the Court of Appeal (now a member of the Supreme Court) referred to the fact that:

> "*there are serious deficiencies in the (current) Section 5 procedures*" and that they do "*not permit of any form of public participation where the request for the declaration is made by the person who has carried out the development*."

Instead of trying to mend this by allowing for public participation, this Bill seeks to remove it altogether, restricting it to landowners and developers.

When the Court of Appeal highlighted that lack of effective public participation in the process, it was surely not their intention to have policymakers remove it entirely. Indeed, noting that there was a potential, if any other person other than the landowner or developer was aware of the planning authority's declaration, for that person to take a judicial review of the declaration, the judge noted that:

> *an entitlement to bring judicial review proceedings, potentially involving significant time and expense, would appear to be a poor substitute for an entitlement to be heard before the planning authority or ABP.*

Therefore, to deal with this issue, there is a need not only to allow any person to seek a declaration from the Planning Authority, rather than solely landowners, occupiers and those proposing to carry out a development, but also to allow for public notice of a declaration that was sought by the latter applicants, so that members of the public, if they do not agree with the planning authority's decision, can take a referral of that decision to An Bord Pleanála, who would then make a final ruling on the matter.

Recommendation. It is recommended that Section 8 be amended to specify that a decision by a planning authority on a declaration by a planning authority should be advertised, by the authority, in a paper circulating in the area, and placed on its website, within a period of one week from the date of its declaration, and that provision be made in the legislation that any person may refer that declaration to An Bord Pleanála, within a period of four weeks from the publication of the public notice.

Alternatively, the proposed provisions of Section 8 could be replaced by the provisions of Section 5(1) of the 1963 Local Government (Planning and Development) Act, as amended, where referral (for declaration of exempted development) is only made to An Bord Pleanála; with a supplementary provision that when the Bord receives such a referral, it should be advertised by it in a national newspaper, and place on its website, so that any person can make an observation within four weeks of the publication, in respect of that referral.

[5] Narconon Trust v An Bord Pleanála [2021] IECA 307. Available here: https://www.courts.ie/acc/alfresco/cbcc0391-c44e-407f-a7f2-797382dbd48b/2021_IECA_307%20(Unapproved)%20Collins%20J.pdf/pdf#view=fitH

Section 9 – supplemental provision

Context. Section 9 seeks to limit public participation in enforcement by specifically excluding the declaration from being regarded as evidence other than by the enforcement authority, such as a planning authority: "Section 9 (2) – A relevant 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."

This means that should a third party want to take enforcement proceedings under the proposed Section 294, they cannot rely on the declaration by the planning authority.

This is a clear attack on the current rights of the public, to take enforcement action, where a planning authority is unwilling or unable to take such action. As noted by Baker, J in one of the many cases taken by the late Michael McCoy against Shillelagh Quarries in Brittas, Co Dublin[6]:

> *The law has long recognised the role of individual citizens in enforcing or seeking to enforce environmental protection and the unique role and interest of the citizen of the protection of the environment. This finds reflection in s.160 of the Planning and Development Act 2000, which permits a citizen who can show sufficient* locus standi *to bring enforcement proceedings under the planning code, it being recognised that the primary enforcement body, the relevant local authority is on occasion unable or unwilling to commence the enforcement.*

The proposed Bill seeks to make that role much more difficult, by preventing a member of the public from relying on that declaration when taking an injunction under Section 294 (the equivalent of the current s.160).

Recommendation: Delete Section 9 (2).

Section 23 – National Planning Statement

Context. The Bill currently reads:

> "The Minister may, at any time, with the approval of the Government, issue a statement (in this Act referred to as a "National Planning Statement") which shall comprise two parts as follows: (a) national policies and measures on planning matters to support proper planning and sustainable development (in this Act referred to as "National Planning Policies and Measures"), and (b) guidance as to the implementation of the policies and measures referred to in paragraph (a) (in this Act referred to as "National Planning Policy Guidance")."

Recommendation. It is recommended that this be amended to include: "Such statements shall be laid before the Oireachtas for a period of 21 days and shall come into force at the end of this period unless a motion has been passed by the Oireachtas to disapply such statement."

[6] McCoy & Anor v Shillelagh Quarries Ltd and Others [2014] IEHC 511, available at: https://www.courts.ie/acc/alfresco/f137d26d-a861-49cc-9338-3752fe846c9c/2014_IEHC_511_1.pdf/pdf#view=fitH

Section 24 – Issuance of a National Planning Statement

Context. The Bill currently reads: "Before issuing a National Planning Statement, the Minister may consult…"

Recommendation. It is recommended that this be amended to read: "Before issuing a National Planning Statement, the Minister shall consult…"

Section 105 (3) - Decision of Commission in relation to development in contravention of certain plans

Context. This is in effect a continuation of the current situation where in effect Specific Planning Policy Requirement (SPPRs) mandate that development that materially contravenes Development Plans have to be granted. This has been a recurring problem with SHD decisions, many of which have been overturned in the courts.

Recommendation. It is recommended that Section 105 (c) be deleted, leaving only the grounds in sub-paragraphs (a) and (b) to remain.

Section 248 – Interpretation (Part 9)

Context. The Bill is not clear whether Residents' Associations etc. can be applicants for Judicial Review.

According to the statement made to the Joint Oireachtas Committee on February 7th 2023 by one of the witnesses from the Department of Housing, Residents' Associations must now meet the criteria applied to Environmental NGOs in being a company, having at least 10 members, having been in existence for more than one year and have specific objectives in their articles of association, as well as having also passed a resolution to take a judicial review in each case.

These requirements are deliberately included to be too onerous for a group such as a Residents' Association. In reality, therefore, this limits the right to a judicial review to those with the means to do so and excludes anybody of limited means. This is an insidious, class-based inclusion in the Bill, and one for which it is difficult to find any rationale other than a deliberate attempt to restrict access to justice for those of limited means.

If the proposed Section 248 is not amended, it could mean that only individual persons, but not their representative bodies such as Residents' Associations, could take a judicial review. This is arguably discriminatory but also inequitable.

Recommendation. It is recommended that:

a) Section 248 (1) includes a definition of 'applicant' to read: "any natural person, any legal person and any unincorporated body comprised of at least two natural persons from the same locality"; and

b) Section 249 (10)(c)(i) is altered to read: "an applicant, other than as provided for in (c)(iii), shall include an unincorporated body consisting of at least two natural persons from the same locality that are directly or indirectly materially affected by the matter to which the application relates."

Section 249 (5)(a) – Judicial review of applications, appeals, referrals and other matters

Context. This section grants bodies, who are the subject of a judicial review, an opportunity to amend their decision and correct any error of law or fact.

This provision seems to be reasonable, in the interests of efficiency and to save court time, provided that the amendment or correction does not make a material change to the development that is the subject of the original decision. However, since the making of such an amendment or correction is an admission by the respondent body of the validity of the points made by the applicant in that regard, and since the alternative would be a full court case, and then a potential remittal of the decision, or its quashing, it is appropriate, and fair, that the body concerned should pay the costs of the applicant and (where appropriate) the notice parties.

Recommendation. It is recommended that an additional provision should be made here that where the body (e.g. An Bord Pleanála) makes an amended decision, the costs of the other parties (applicant and notice parties) incurred up to that point shall be paid by the respondent to those parties. In default of agreement to those costs, they shall be taxed.

Section 250 (1) – Costs in relation to certain proceedings

Context. The provisions in relation to costs applying to judicial reviews of planning decisions, as proposed in this section, are highly problematic, and will mean, in reality, that those who seek judicial review would have to fund their own costs, irrespective of the outcome. This would make it prohibitively expensive for most applicants, and particularly those of limited means. Currently applicants, if they succeed, may be awarded their costs. The proposed "administrative scheme" referred to in Section 250 (2) has not been outlined or detailed, and therefore it is not in any way clear that such a scheme would make up for this deficiency.

No convincing rationale has been put forward by the Department of Housing as to why such a significant, and unfair, change is being proposed in this instance.

Recommendation. The existing provisions of Section 50B of the Planning and Development Act 2000, as amended, and particularly Section 50B (2A), should be substituted for the proposed Section 250 (1).

Section 336 (4) – Documents of the Commission

Context. The Bill currently reads: "… the documents and information referred to in subsection (3) (other than planning complaints and all notices to or correspondence with a person who made a planning complaint and such other documents as may be prescribed) shall be made available for inspection by the owner or occupier of the land or maritime site to which the documents or information relate, or a person acting on behalf of or with the authority of such owner or occupier, at the offices of the Commission, during office hours and copies of such documents shall be made available to *such persons* on payment to the Commission of a fee not exceeding the reasonable cost of making the copy." [my italics]

It is not clear why this provision is being made in the Bill, other than seek to prevent members of the public from viewing the documents that had been submitted to the Commission, upon which the Commission's decision was made. Often, concerned residents may need to see the documents to

check whether the development under construction is in accordance with the Commission's decision. To exclude members of the public entirely, as the Bill proposes, is a clear indication that the role of the public is not being respected.

Recommendation. It is recommended that "such persons" be amended to be made available to "any person."

Removal of Development Contributions:

Context. Currently, under Section 48 of the 2000 Act, there is specific provision whereby Development Contribution Schemes are adopted by members of each local authority, and which are then covered by conditions in planning permissions. These monies provide financial resources towards the provision of local infrastructure, which infrastructure facilitates development in the area of the planning authority. Examples would be small scale sewerage and water supply schemes, parks and playgrounds, cyclepaths and footpaths etc. Such monies are independent of central government. Similar provisions are made in s.49 of the Planning and Development Act 2000 for public infrastructure such as LUAS extensions, and for special financial contributions for specific public infrastructure which benefits a particular proposed development.

It would appear that these provisions have been removed from this Bill without notice to any on the Joint Oireachtas Committee, and their proposed removal is a significant attack on local government and the role and independence of the elected members of planning authorities.

That this is a deliberate omission, rather than an inadvertent mistake on the part of the drafters of the Bill, can be seen by comparing the text of the proposed Section 83 (4)(b), which states as follows:

> (b) conditions requiring the payment of a contribution in respect of public infrastructure and facilities benefiting development in the functional area of any planning authority in which the development concerned is (in whole or in part) situated or proposed to be situated.

with the corresponding provision from the 2000 Act (s.37G (7) (b)):

> (b) a condition requiring the payment of a contribution or contributions of the same kind as the appropriate planning authority could require to be paid under section 48 or 49 (or both) were that authority to grant the permission (and the scheme or schemes referred to in section 48 or 49, as appropriate, made by that authority shall apply to the determination of such contribution or contributions)…

Recommendation. It is recommended that the entire text of Sections 48 and 49 of the Planning and Development Act 2000, as amended, be reinstated in the Bill.

Dr Lorcan Sirr
Technological University Dublin
23rd February, 2023

ENDS