



Pre-Legislative Scrutiny of Planning and Development Bill 2022

Submission to Joint Oireachtas Committee

20 February 2023

1. Introduction

Ibec is Ireland's leading business representative organisation, with thousands of Irish businesses in membership across all regions and sectors of the economy, including non-profit organisations. Compared to other stakeholders, our breadth of scope offers an unusually broad perspective on the need for comprehensive planning reform. In summary we view it as a key enabler for improved quality of life for people living and working in Ireland.

2. The need for reform

The country is facing increasing capacity constraints that will need to be addressed if we are to underpin ambitions in making Ireland a better place to live and work. Efforts to address such policy areas are being hindered by an existing planning regime that is unnecessarily costly and cumbersome and fraught with delay. The draft Planning and Development Bill 2022 is the culmination of a lengthy policy review to which Ibec has contributed through its participation on the DHLGH Planning Advisory Forum.

We wholeheartedly support the Bill's stated objectives, namely:

- to provide greater clarity in the plan-making process, including the planning hierarchy and consistency with EU law;
- to make the planning application process easier to understand and use; and
- thereby, to provide applicants with greater certainty over timelines for decision making.

The current draft represents a significant and necessary step in the right direction, although it will need to be complemented by other policy measures to be fully effective. If implemented properly, with adequate additional expert staffing and financial resources both for the consenting bodies and the courts service, the Bill will serve the public interest by achieving a better balance between environmental sustainability and economic imperatives.

Balanced regional development under the revised National Development Plan requires an acceleration of investment in areas such as housing, transport infrastructure, energy infrastructure needed to support decarbonisation and security of supply, and modern water/wastewater services. Unfortunately, many urgently needed projects in the public and private sectors have experienced lengthy delays in recent times. This is due in part to a continuing scarcity of expert resources within local authorities and relevant state agencies such as An Bord Pleanála and the Environmental Protection Agency. However, we consider that it also reflects the confusing and fragmented nature of planning legislation, the need for enhanced public participation, and the unduly drawn-out nature of the appeals and judicial review processes.

3. Ensuring a coherent plan-led regime

The draft legislation has the potential to bring greater certainty to implementation of the National Planning Framework by consolidating and enhancing the patchwork of amendments to the original primary legislation that has proliferated over the past two decades. By doing so, it will remove one of the major obstacles to achieving regional targets for new housing in compact urban areas that are needed to serve Ireland's rapidly growing population.

With particular reference to Sections 10, 96, 108 and 122 of the Bill, Ibec supports the introduction of mandatory timelines for consent processes, especially for relatively non-complex infrastructure projects. However, we recognise that some applications, by virtue of their nature, may require extended periods. It is certainty of timelines, rather than the prospect of financial penalties, that should be the priority in the context of a housing crisis. The consents process must be embedded in a reformed plan-making regime in which enhanced public participation can be focused on the strategic plan-making stage, rather than on individual planning applications. This should not be viewed as a dilution of local democracy. Rather, it will bring greater consistency between regional and local planning.

The move to a 10-year planning horizon for local authority plans (Section 41) is welcome, as it will encourage a more strategic focus. Mid-term reviews (Section 56) will enable flexibility in the face of changing circumstances. Enhanced oversight by the OPR may be needed to ensure that local plans are consistent with regional objectives. It will also be vital to ensure that the plan-making process cascades efficiently from national objectives, through RSEs, into local authority plans. Alignment and interaction between these tiers will help to deliver an improved supply of commercial and residential property, more attractive areas to live, better availability of skills and higher density, underpinned by required infrastructure. At present, the planning processes of these three tiers are not temporally aligned, which creates a risk that decisions in the lower tiers may be based on out-of-date information. The current regional housing targets are a case in point, being based on obsolete census data.

4. Enhanced resourcing of state agencies and courts

An Bord Pleanála must have immediate access to necessary resources for it to carry out its responsibilities effectively. This is separate, but in addition, to the planned wider organisational changes (Section 396) to transform it into An Coimisiún Pleanála. These resources are essential and cannot wait. The backlog in cases awaiting decisions is simply far too great, and it is growing by the day. Confidence must be restored in the planning regime. This will require a reform of the governance and oversight regime for the Planning Commission.

In addition, the Environmental Protection Agency, and the Maritime Area Regulatory Authority, need to recruit and retain significant numbers of additional staff with relevant expertise.

The new Planning and Environment Division of the High Court will need to be staffed with appropriately trained judges and support staff. This will likely entail an increase in the total allowed number of sitting judges, which in turn will require new primary legislation.

5. Balancing public policy, public participation, and environmental protection

Strategic Environmental Assessments (Sections 55 and 57) play a valuable role in the development of programmes of sustainable investment in critical infrastructure, enabling early public engagement on the pros and cons of alternative approaches, and promoting evidence-based policy decision-making. However, there is a need to ensure appropriate use of SEAs across planning authorities to

ensure a more consistent contribution to effective plan making. It is important not to allow such assessments to get bogged down in unnecessary detail. The legislation should therefore be accompanied by suitable guidance from the Department, and/or the Office of the Planning Regulator. Given that any programme that is the subject of an SEA may involve a sequence of planning applications by multiple developers, it would also be beneficial to minimise or eliminate duplication of survey work that may be needed to support Environmental Impact Assessments at project level.

6. Compulsory Purchase Orders

Ibec notes the enhanced provisions (Section 360) for local authorities to draft Compulsory Purchase Orders, subject to the decision of the Commission. The provision for 'other legislation' in Section 362(1)(d) must take adequate account of the needs of a wide range of network utilities such as CIE, EirGrid, Gas Networks Ireland, ESB Networks, and Uisce Éireann.

7. Judicial Review

The Bill's proposals for streamlining the Judicial Review regime (Section 249) are particularly welcome, given that several major projects in the National Development Plan have suffered extremely long delays due to legal challenges. Some of these long predate the recent spate of challenges to strategic housing developments.

We fully support the provision for the Planning Commission to be able to seek a stay on legal proceedings while it seeks to correct any acknowledged errors in fact or law. Relevant legal costs reasonably incurred by objectors up to that point should be recoverable via the Administrative Regime envisaged in Section 250. Ibec welcomes the provision that costs orders will not be made against either party to Judicial Review proceedings, provided they act in good faith. However, substantially more detail is required on the Administrative Scheme. Its presumed purpose is to facilitate access to justice, but Ibec is concerned that it could have perverse unintended consequences unless it contains safeguards to discourage frivolous or vexatious challenges.

On a related topic, Ibec believes that it should be possible for applicants to request a correction where technical aspects of planning conditions appear to have unintended adverse consequences. This could complement an existing (but so far unused) mechanism with potential to expedite robust decision making by ABP in more complex cases where the likelihood of unintended errors is heightened. Some other Irish regulatory agencies, notably the CRU, routinely issue draft decisions on foot of public consultations, thereby offering applicants and other stakeholders the opportunity to raise concerns about factual or procedural errors without the need to incur legal costs, and without causing undue delay to the final binding decision. Ibec has long advocated for ABP to exercise its discretion under sections 131 and 137 of the existing Planning Act to seek stakeholder feedback on 'draft' decisions. This optionality should be retained in when the Bill is enacted. Arguably, the selective use of such an additional step could reduce the frequency of valid judicial review challenges.

The requirement for a more clearly defined locus standi for planning objections is reasonable. Standing must be open to scrutiny and challenge. It should not be an unchecked light-touch entitlement. Transparency must be a guiding principle in demonstrating and assessing standing. An organisation must have a legal personality involving the possession of a constitution and/or rules of association. This should be publicly and readily available.

Environmental NGOs in particular must be able to demonstrate sufficient and legitimate standing specific environmental matters, including a track-record in the specific area of environmental law or policy they seek to engage in. The stated requirement that an eNGO demonstrates 12 months of relevant activity is important and not unduly onerous.

It is appropriate that the 'date of application' applies to the date for the planning application, not the date of an application to the High Court. This is necessary to guard against *ad hoc* local groups being established solely for the purpose of objecting to specific developments under the questionable claim of being an eNGO.

There appears to be no provision in the draft Bill concerning reviews and, if necessary, revocation of standing due to change in structures, membership, or indeed level of activity. For example, an organisation may have been in existence for several years but have no recent demonstrable activity specific to the area of environmental protection.

The provisions for demonstrating a material interest in a judicial challenge are reasonable. It would be helpful if, in addition, a constitutionally robust requirement could be introduced, confining grounds for judicial review to observations of technical error previously made in the planning process. Where a planning application is remitted by the court to ABP for redetermination, the grounds of any further JR should be limited to those raised in the initial challenge (other than strictly in respect of any change in the decision compared with the quashed decision). Judicial Discretion to amend or invite applicants to amend any Statement of Grounds under Order 84 Rule 4 of the Rules of Superior Courts once Leave is applied for should be removed.

8. Next Steps

Further detail must be provided ahead of the Bill being introduced to the Oireachtas on the specific parts of the Bill that will require implementation via secondary legislation. Businesses require certainty. A pathway, and a detailed timetable, for implementing regulations and government guidance must be published. Stakeholder consultation must be encouraged, and Regulatory Impact Assessments published where required. The Joint Oireachtas Committee should seek the views of stakeholders, including from business, in the development of, monitoring and reviewing the performance of secondary legislation. It will be vital to clarify the status of existing provisions, notably including the scope of exempted development.

About Ibec

Ibec is Ireland's largest lobby group and business representative. We campaign for real changes to the policies that matter most to business. Policy is shaped by our diverse membership, who are home grown, multinational, big and small and employ 70% of the private sector workforce in Ireland. With thirty-eight trade associations covering a range of industry sectors, six offices around Ireland as well as an office in Brussels. With over 240 employees, Ibec communicates the Irish business voice to key stakeholders at home and abroad. Ibec also provides a wide range of professional services and management training to members on all aspects of human resource management, occupational health and safety, employee relations and employment law.