DÁIL ÉIREANN

AN COMHCHOISTE UM THITHÍOCHT, RIALTAS ÁITIÚIL AGUS OIDHREACHT

JOINT COMMITTEE ON HOUSING, LOCAL GOVERNMENT AND HERITAGE

Dé Máirt, 5 Deireadh Fómhair 2021

Tuesday, 5 October 2021

Tháinig an Comhchoiste le chéile ag 3 p.m.

The Joint Committee met at 3 p.m.

Comhaltaí a bhí i láthair / Members present:

Teachtaí Dála / Deputies	Seanadóirí / Senators
Francis Noel Duffy,	Victor Boyhan,
Thomas Gould,	John Cummins,
Emer Higgins,	Mary Fitzpatrick,
Paul McAuliffe,	Rebecca Moynihan,
Cian O'Callaghan,	Mary Seery Kearney.
Richard O'Donoghue,	
Eoin Ó Broin.	

Teachta / Deputy Steven Matthews sa Chathaoir / in the Chair.

General Scheme of the Planning and Development (Amendment) (No. 2) Bill 2021

Chairman: We are now in public session. The purpose of the meeting is to carry out pre-legislative scrutiny of the general scheme of the Planning and Development (Amendment) (No. 2) Bill 2021. We are joined today by the following witnesses from the Department of Housing, Local Government and Heritage: Eamonn Kelly, principal officer; Mary Brady, assistant principal, and Aisling Holohan, administrative officer.

Members have been circulated with the briefing and the opening statement. I will ask Mr. Kelly to make his opening statement and we will then go to members for five minutes of questions and answers. Members attending remotely from within the Leinster House complex are protected by absolute privilege in respect of any presentation they might make to the committee. This means they have an absolute defence against any defamation action regarding anything they say at the meeting. However, they are expected not to abuse this privilege. It is my duty as Chairman to ensure this privilege is not abused. Therefore, if a member's statement is potentially defamatory regarding an identifiable person or entity, he or she will be directed to discontinue his or her remarks and it is imperative that the member complies with any such direction. I remind members of the constitutional requirement that members must be physically present within the confines of Leinster House in order to participate in a public meeting. Members are reminded of the long-standing parliamentary practice to the effect that they should not comment on, criticise or make charges against a person outside the House or an official either by name or in such a way as to make him or her identifiable. The opening statements submitted to the committee will be published on the committee website after this meeting. I invite Mr. Kelly to make his opening statement.

Mr. Eamonn Kelly: I thank the Chairman and the members of the committee for affording me the opportunity to brief you on the proposed Planning and Development (Amendment) (No. 2) Bill 2021. My name is Eamonn Kelly and I am a principal officer in the EU and international planning regulation section in the planning division of the Department of Housing, Local Government and Heritage. I am joined today by colleagues from my section - Mary Brady, assistant principal, and Aisling Holohan, administrative officer, who are also connecting remotely to this session.

The proposed amendments, as set out in the general scheme, concern the substitute consent regime at Part XA of the Planning and Development Act 2000. This part of the Act relates to the procedures for applications to regularise, where appropriate, existing development requiring retrospective environmental impact assessment, EIA, or appropriate assessment, AA.

The objective of the general scheme for the 2021 Bill is essentially to streamline the substitute consent procedure in the planning system. Streamlining of the substitute consent regime is required to increase the efficiency and utility of the process in order to safeguard confidence in the Irish planning system by eliminating a surplus step in the substitute consent process and moreover to ensure that the system is fully in compliance with EU environmental requirements and recent court judgments. In this context, it is proposed to provide for a single-stage application process under the remit of An Bord Pleanála. This would replace the current two-stage process, which requires leave from the board or a direction from a planning authority in order to apply for substitute consent and follows with the substantive substitute consent application. It is also proposed to amend section 37L of the Planning Act. This is a related amendment that currently allows simultaneous applications to be made for certain quarry developments for both future development and substitute consent to An Bord Pleanála at the same. The amend-

ments we are proposing will ensure that simultaneous applications will be open to all types of development, not just quarries. Finally, amendments are also proposed to section 34(12) of the Planning Act to require planning authorities and An Bord Pleanála to screen an application or an appeal for retention permission for EIA and AA as appropriate and to refuse to consider applications for retention of unauthorised development where either an EIA or AA was or is required for such development.

These amendments supplement the amendments introduced in December 2020 under the Planning and Development, and Residential Tenancies, Act 2020. The December 2020 amendments obliged An Bord Pleanála to consider whether exceptional circumstances exist at the substantive substitute consent application stage in order to justify a grant of substitute consent, which ensures that this consideration of exceptional circumstances is subject to full public participation at the substantive application stage. Prior to the December 2020 legislation, exceptional circumstances had only been considered at the initial application for leave stage, which stage does not provide for public participation.

I will provide the background to the substitute consent process generally. The European Union's EIA directive requires that projects likely to have significant environmental effects must undergo an EIA before development consent is given. In 2008, the Court of Justice of the European Union, CJEU, in case C-215/06 found that Ireland's planning provisions that facilitated retention permission applications for existing developments where such developments also required an EIA was contrary to EU law. Accordingly, section 34(12) of the Planning Act was amended in 2011 so that planning authorities cannot accept applications for retention of unauthorised development where, had an application been made before development had commenced, it would have required an EIA, an EIA screening determination or an AA. Rather, such applications would go into the substitute consent process instead.

The CJEU judgment at the same time did recognise that EU law does not preclude regularisation of unauthorised EIA developments in exceptional circumstances provided that this does not facilitate the circumvention or evasion of EU environmental obligations. In this context, the "substitute consent" facility under Part XA of the Planning Act was introduced and became effective in September 2011.

Substitute consent procedures under Part XA of the Act allow for the regularisation and the undertaking of retrospective EIA or AA of development that has already been carried out. Substitute consent applications are determined by An Bord Pleanála for existing developments that required an EIA, EIA screening or an AA but where such assessments were not carried out.

In deciding "exceptional circumstances", the board must consider a number of matters prescribed at section 177D(2) of the Planning Act, including whether regularisation of the development concerned would circumvent the EIA directive or the habitats directive and whether the applicant could reasonably have had a belief that the development was not unauthorised.

There is currently no entitlement to make an application for substitute consent directly to the board. Rather, and as mentioned earlier, substitute consent is generally a two-stage process requiring either a direction issued by a planning authority or grant of leave by the board to apply to the board for substitute consent. Once that leave is granted, it is followed by the making of a substantive application for substitute consent to the board as the second stage. Generally, the first stage is the leave stage while the second stage is the actual substantive application. Both are made to An Bord Pleanála.

I will now move to the 2020 amendments to substitute consent process, which arose from a Supreme Court judgment. The Supreme Court judgment of 1 July 2020 in the Ballysax/McQuaid judicial review cases found that certain provisions of the substitute consent system were inconsistent with the EIA directive in terms of the lack of an exceptionality criteria in the "defective permission" ground for leave under sections 177C(2)(a) and 177D(1)(a) of the Act. The lack of public participation at the leave stage generally was found to be inconsistent with the EIA directive. "Exceptionality circumstances" were considered at that time as part of leave application stage under sections 177D(1) and 177D(2), which did not provide for public participation and which was not revisited at the later application stage, which did provide for public participation. As a consequence of that, Part XA of the Act was amended by emergency legislation that was effective from 19 December 2020, namely, the Planning and Development (Amendment) and Residential Tenancies Act 2020, to immediately address the terms of the Supreme Court judgment. The amendments mean that the board must now be satisfied in the second stage substantive application for substitute consent that exceptional circumstances exist in order to justify a grant of substitute consent. Since the legislation was commenced in December 2020, the consideration of exceptional circumstances has been, therefore, subject to full public participation as it is considered at the substantive stage. In other words, the consideration of exceptionality takes place at the second stage, when members of the public have an opportunity to comment.

The 2020 Act amendments also contained transitional provisions that required an additional round of public consultation in cases where an application for substitute consent was pending before the Board at the time the 2020 Act was commenced. This transitional provision aimed to ensure that second stage applications for substitute consent that had already been submitted but not decided by the board were subject to the consideration of exceptional circumstances in order to give the developer the opportunity to provide any further information on exceptionality and, importantly, to facilitate the public and interested bodies making further submissions on exceptionality in the substitute consent application stage, including specifically on whether exceptional circumstances existed or not.

However, notwithstanding the 2020 amendments which addressed the terms of the July 2020 Supreme Court judgment, the substitute consent process itself now contains an initial stage, the application for leave stage, which is effectively surplus and does not provide for public participation. The amendments before the committee seek to streamline the substitute consent process in order to remove this surplus step, thereby making the process easier to understand for the public and participants alike.

The main provisions of the general scheme are as follows. The first two heads are standard heads that will be converted into sections in the Act and relate to the Short Title, citations and definitions in the Bill. Head 3 sets out amendments to section 34(12) of the Planning and Development Act 2000, which currently precludes planning authorities from accepting a retention application for existing unauthorised development in cases where, had a planning application been made before it commenced, an environmental impact assessment, EIA, or an EIA determination or an appropriate assessment, AA, would have been required in respect of that application. The proposed amendments at this provision will also apply this provision to the board. Effectively, on legal advice we are correcting an issue that was spotted in the legislation. The proposed amendments will also apply these provisions to the board in the case of any appeal and will require planning authorities and the board to also consider whether an EIA and an AA was or is required for the development and to delete section 34(12)(b) in order to allow for planning authorities and the board to carry out a screening for EIA to determine whether a retention

application can be accepted. In other words, the advice we received was that the provision in question contained an anomaly such that not only if the particular development required an EIA, but even if it required screening for an EIA, i might be obliged to go for substitute consent. We have clarified that. Rather than having an anomaly whereby it might go to substitute consent before any screening is carried out, we are now obliging the local authorities or An Bord Pleanála to carry out the screening to see whether an EIA or an AA is required.

Head 4 proposes to amend section 37L of the planning Act, which provides for simultaneous applications for future development for certain quarries at the same time as substitute consent applications. Currently, only certain quarries defined in the planning Act under section 261A can avail of simultaneous applications which are limited to future quarrying. It is proposed to extend the facility for simultaneous applications for future planning applications to any development being determined as part of a substitute consent application to An Bord Pleanála. Prospective planning applications will not be decided by the board until the related substitute consent application has been decided.

Heads 5 to 18 propose related amendments to Part XA of the Act to streamline substitute consent procedures. Most of these involve the deletion of references to the first stage. At present, there is no entitlement to make an application directly to the board for substitute consent. Substitute consent is a two-stage process requiring either a direction to apply to the board issued by a planning authority or a grant by the board for leave to apply for substitute consent, followed by the making of a substantive application for substitute consent to the board. Heads 5 to 18 instead provide for a single-stage application process for all development types, which will allow a person to apply directly for substitute consent under section 177E of the Act, thereby obviating the need for an initial first stage application for leave to apply for substitute consent or otherwise. In this context, it should be borne in mind that the initial first stage did not provide for public participation.

These amendments include the repeal of sections 177B, 177C and 177D of the planning Act to facilitate the single-stage process, under which a direction from a planning authority under Section 177B or leave from the board under Section 177D to apply for substitute consent is no longer required. All matters, including the question of exceptional circumstances, are considered as part of the single-stage substantive application process under section 177K. A defect in a planning permission, such as an error of law, will remain a valid consideration for the purposes of assessment of exceptional circumstances under section 177K, the criteria of which have been copied from the repealed section 177D.

It is proposed to amend section 177E to allow pre-application consultations with the board on proposed substitute consent applications and to enable any person who has carried out development to apply to the board for substitute consent in respect of development carried out where an EIA or an AA or both was or is required and where that person considers exceptional circumstances exist. Section 177E will also be amended to require that either or both a remedial EIA report or a remedial natura impact statement must accompany an application for substitute consent. That includes a natura impact statement or an environmental impact assessment report in respect of any permitted development not yet carried out.

Finally, it is proposed to amend section 177K to restate the exceptionality criteria at this section following the repeal of section 177D. As explained previously, the emergency 2020 amendments to the substitute consent process already require the board to be satisfied that exceptional circumstances exist in order to justify a grant of substitute consent. The exceptional criteria that the board must consider are being moved from section 177D into the substantive

application stage at section 177K(1J) accordingly. Other amendments as set out in the scheme are consequential to the repeal of sections 177B and 177C.

I again thank the Chairman and members for facilitating this briefing. I look forward to what I know will be an engaging discussion with the committee and I will endeavour to answer any further questions committee members may have.

Chairman: I thank Mr. Kelly for that detailed submission and opening statement.

Deputy Paul McAuliffe: I thank Mr. Kelly for his opening statement and all our guests for attending. This morning in private session the committee completed the pre-legislative scrutiny report on the large-scale residential developments Bill. That Bill seeks to rebalance what many believe to be an error in the strategic housing development, SHD, legislation, that is, the removal of the community voice and, second, the idea that An Bord Pleanála would be the first decision maker in the process. Given that background and position, I certainly welcome the additional public consultation. It is very important, particularly as it relates to exceptional circumstances. My fear is that as An Bord Pleanála is now the decision maker at first point, two concerns arise. When that happened under SHD legislation, there was not enough consultation or adherence to city development plans. The second concern relates to the cumulative impact of similar developments. Many local authorities are quite good at spotting a trend relating to several applications coming in and the cumulative impact that may have on an area. My fear is that An Bord Pleanála may not have the same local knowledge or the desire to spot and monitor the impact of those cumulative developments. My worry is that in the context of this process, which I accept is much less common, An Bord Pleanála would not have the local focus that local authorities have but it is the first decision maker in the process.

Mr. Eamonn Kelly: I thank Deputy McAuliffe for the question. The first point is that this is not a change or the introduction of something new. Applications for substitute consent have always gone to An Bord Pleanála. It is important because of what the Deputy mentioned in that they are very rare. Looking over the records there was a glut of maybe 30 or 40 substitute consent applications when the legislation was originally introduced back in 2012 and 2013 and they were mostly related to quarries. The vast majority of these relate to quarries. Many of those were time-bound. There are very few now and we are talking about four or five per year that might get through. They are spread all over the country. They are very technical and often subject to very detailed environmental considerations.

As it stands, we have a concentration of expertise in An Bord Pleanála in this respect. This is not the same as strategic infrastructure development or something that is going to happen much. Let us say these are problematic developments that might have historical issues of which the local authority would be aware. The local authority would be fully involved in the substitute consent process and given ten weeks to make submissions to An Bord Pleanála on that. An Bord Pleanála would be fully apprised of any concerns that a local authority might have.

We are considering leaving it with An Bord Pleanála because it is so rare and unusual and it would be a drain on the resources of local authorities. These concern environmentally sensitive matters. There are county councils from Leitrim to Roscommon to Galway involved with this. It is spread all over the country. We are not talking about a concentration of residential developments that might happen with strategic housing developments in cities, for example. As colleagues from my Department have acknowledged, amendments will be made to give points to local authorities for elements to be zoned.

In many of these cases there is no zoning. It may be in open and rural countryside for agricultural buildings, wind farms and quarries. I do not know if that answers the Deputy's question but it is a matter of efficiency.

Deputy Paul McAuliffe: It certainly does and I appreciate the answer. I have another quick question if I am not out of time. Will Mr. Kelly speak a little about the rationale in head 4 of extending the simultaneous applications for quarries and any development? Why is the Department advocating that approach?

Mr. Eamonn Kelly: Absolutely. It is basically about the same considerations. Effectively, as it currently stands, one must apply for substitute consent to regularise the environmental impact assessment issues that have gone before. It is relevant if the party wants to continue doing something else on the site. For example, if the unauthorised development on a quarry site is to be solved, a planning application would be required to go forward. A substitute consent is not the same as a planning application. There is a concentration of expertise in An Bord Pleanála that would assess it. We can assume the development has been regularised, as the point is moot otherwise. If the party wanted to continue with the same activity, a related activity or something else on the same site, it would have to go to the local authority. This relates to the loss of expertise that the board would have. This provision allows both processes to take place at the same time. It would be up to An Bord Pleanála but as it does in some cases, the board could apply the same inspectors to the same application. The board could hold oral hearings at the same time.

Effectively, this is an efficiency and it would allow members of the public to engage at a single point in time. This is instead of a party having to apply to the board first and then at some future point having to apply to the local authority, which would effectively have to do the process all over again, relying on the same baseline data. This is not a SHD issue but it relates to very technical environmental matters. If I could summarise with one word, it is about efficiencies.

Deputy Paul McAuliffe: I appreciate those answers.

Deputy Eoin Ó Broin: I thank the witnesses for the presentation. One of the problems with that presentation is the impression that this is a very light and technical matter. We use words like "efficiency" and "regularise" but it is really important to remember we are talking about unauthorised developments. In some cases we are talking about unauthorised developments that have had and continue to have very profound negative effects on communities, the local environment, water courses, biodiversity etc. Even the term "unauthorised development" is probably too light, as these are illegal developments. This is about what we do to try to address those illegal developments.

I am using this language because most ordinary people watching outside might think what we are discussing to this point is relatively remarkable or it is a technical exercise to get ourselves over some legal hitches. In fact, next week will mark the 18th anniversary of the Derrybrien mudslide, which is probably the most egregious example of where our planning system chronically failed an entire community and surrounding areas. It is a failure that not only caused considerable legal and legislative problems but has caused considerable fines for the Exchequer. It is really important people understand what we are talking about and we get this right. I am less concerned about whether something is a one-stage or a two-stage process because it is really about getting the process right so we do not have a repeat of the kind of mistakes we have had in the past.

I have a couple of general opening questions, and in the second, third and possibly fourth round I will hit the witness with the more technical and troublesome questions, if that is okay. Who was consulted by the Department and officials in the drafting of this general scheme? Has there been any consultation with third parties, interested parties or other experts?

I am interested in the witness saying there are only four or five substitute consents per year; the issue is not so much their number but their size. One Derrybrien in a year equates to a pretty bad set of circumstances so will the witness give a sense of the scale of some of the substitute consent cases and the kind of environmental impacts and challenges of those? Will he provide an update on the fines? When we discussed these matters last year, the workings of the EU fines for Derrybrien was approximately €20 million, so has that increased or has the process ceased? Are there other areas where the State and the taxpayer is being fined for these kinds of environmental planning failures?

I have a question around exceptional circumstances, as this is a concept with which many of us had real difficulty when we dealt with the legislation last year. As is often the case with such matters, it was rushed in that case. Will the witness explain in plain English what are exceptional circumstances? It seems from my limited knowledge of the area that exceptional circumstances are not necessarily that exceptional at all. For the second and third round of questions, I have very specific questions on the heads and will return on those if the time allows.

Mr. Eamonn Kelly: I thank the Deputy. Without a doubt, these measures relate to very serious and significant projects in the context of potential damage to the environment. It is worth noting we are not amending significant provisions that are already in the substitute consent process; these are amendments to an existing regime that is very unusual. It is not like a normal planning application. When An Bord Pleanála addresses the applications, in advance of even making its decision it has the power to instruct the developer to cease activities being carried out on the site. Through the process the board can refuse permission, and it can also request remediation. Perhaps one of the key phrases to grasp is that this is a process to regularise unauthorised development and it allows for remediation. It is very important that it allows public input into what are, in many cases, illegal or unauthorised developments, as the Deputy has said. It is important to note that. Perhaps I was remiss in not referring to what is already in the system. The provisions already exist and we are not changing them. It is very important for them to be implemented.

There was a question on-----

Chairman: We are almost out of time for the slot but there was a question on consultation in producing the scheme and the scale of outstanding substitute consent cases.

Mr. Eamonn Kelly: On the question of consultation, this process was initiated through a court case. The main consulting party was the Attorney General. Of course, we have also consulted with the commission, which was involved in the designation of this legislation initially back in 2010. Other than that, we have consulted various representatives from the Government and other Departments. They are the parties we have consulted thus far. I will add that we have had engagement, specifically, with representatives of the Green Party. The key point is that we are before the committee now to take any views members might have on it. We are always happy to hear any suggestions.

On fines, Derrybrien is still ongoing. At this stage, the State has paid a little more than €10 million. As far as I am aware, that case has to do with the regularisation of an ESB wind farm

in Derrybrien. That is currently working its way through the substitute consent process at the moment. No doubt, there will be more payments on that. Every six months, the State is liable to pay €2.745 million. There will definitely be more fines on that basis. To respond to Deputy Ring's question, we have paid €10 million thus far.

We have gone through some examples of substitute consent. Effectively, when the legislation was first enacted, the vast majority of the cases related to quarries. It is very varied at the moment. We have examples. Peat harvesting has come through as one in the past year and there has been a number of peat cases. Bord na Móna, for example, put through seven or eight applications, but it subsequently withdrew them because, as members are probably aware, it is changing its policy on cutting peat. There are other examples relating to grid connections. There are applications for an oyster processing facility, a waste facility, an agricultural structure, road widening, a holiday home, a sea wall, a manufacturing plant, a harbour development and a glass recycling facility, to give Deputy Ó Broin examples. These are cases that are not necessarily large scale. The appropriate assessment side of substitute consent, which is to do with protection of specific designated areas under the habitats directive and the birds directive, may bring cases in that are quite small but are still significant and need to be addressed. In all cases, we are not talking about something as big or as significant as Derrybrien, but it is one of the most well-known cases.

Chairman: I thank Mr. Kelly. We are out of time on that slot but we might come back to the question of exceptionality and what are exceptional circumstances in a subsequent round.

Deputy Emer Higgins: Much of what is involved in this legislation is very welcome. The fact that the leave stage is being removed, and the public is being included right from the start, is very welcome progress as is the fact that we are making the requirement for the environmental impact assessment much more explicit. That is something that ties in significantly with our climate action goals and also with proper planning, which is effectively what we are trying to achieve. Allowing applications to be made for future planning at the same time seems to make logistical sense. I would certainly welcome the officials' views on why that is the best route to go down but, looking at it from the outside, it seems to make the most logistical sense.

I have one of these, possibly, controversial situations in my constituency. One of the things that is a bit of a loophole that can often be exploited is if somebody is denied substitute consent and applies for a judicial review. During the time that court case is going through, it effectively ties the hands of local authorities when it comes to planning enforcement. I do not see anything in the Bill that would tackle that but I would certainly welcome the officials' thoughts on it.

Mr. Eamonn Kelly: The planning Act is clear on enforcement. The local authority has an obligation and a duty to investigate. If an enforcement case is ongoing, the difficulty is sometimes more to do with the courts. It is a practical reality that there is no prohibition on enforcement continuing if a substitute consent case is ongoing. As the Deputy alluded to, it is more the situation that if a judicial review is ongoing, and this may be very specific, a judge in an enforcement case might be hesitant to process or to proceed with enforcement if a separate judge is looking at the same case. That is more of a legal matter. The planning Act is clear. If there is unauthorised development, and it is still within the time period - which is seven years for most developments but there is no time bar on prosecution for quarries and peat development - that holds true. The Act is clear that enforcement must proceed if it has been commenced.

I do not know if that answers the question. It is not necessarily something this amendment can specifically address because it is the case, as I said, that there is certainly no prohibition on

enforcement being proceeded with under the planning Act, notwithstanding a substitute consent happening at the same time. The Deputy gave an example of a judicial review. Perhaps someone from the Attorney General's office or a barrister would be better placed to answer why or how that might be delayed in the courts. Hopefully, that somewhat answers the Deputy's queries.

Deputy Richard O'Donoghue: Mr. Kelly mentioned the issue of enforcement by local authorities. On certain projects, once an enforcement notice has been given, there is a statutory time within which you have to reply to it. If you reply to a statutory notice arising from an enforcement, once you open communications, it then goes to the local authority. In cases where an enforcement is sent out and somebody is late replying within ten days or whatever, and if the paperwork is correct, is there something that can stop enforcement proceedings continuing? We had a case in Limerick recently that went on for two and a half years over paperwork that was submitted on time, but was not registered on time. We found it took two and a half years, with a lot of legal expenses, to correct a case. After two and a half years, it was struck out due to the enforcement regulations that were in place at the time.

For anyone who is building outside the regulations, and enforcement proceedings have started and are ongoing, that is fine. However, if it is the case that enforcement proceedings are put in place that are not warranted, is there a way of getting through this process and not delaying projects for a year or two years over something that was overlooked, or something that came in and was not addressed at the time? Much of this is to do with staffing levels in local authorities. The staffing is not there to meet the demands of enforcement, which means a lot of enforcement is not carried through on time. It is causing issues, especially within the Limerick local authority where we have seen it. Local authorities need more staff and more people to deal with enforcement but they also need to be able to follow it through. In a case where paperwork is not in the right place on time, they also need to be able to stop the proceedings and to have an opt-out.

Mr. Eamonn Kelly: This particular amendment does not address enforcement but substitute consent. The enforcement process was reviewed a couple of years ago and there is an obligation on local authorities to investigate when complaints are made. There are steps they must carry out because enforcement is a very serious process and local authorities do not undertake it lightly.

On paperwork and delays, I cannot comment on any individual cases, but it is clear that enforcement could have significant impacts on the recipient of the enforcement case. Local authorities would take that very seriously in ensuring that all the paperwork is in order. I cannot comment on the length of time it takes to process court paperwork. Again, that would be a matter for the individual local authorities. All I can say is that enforcement is an important part of the planning system. The issue of resourcing for local authorities is possibly not a matter for this session. If the Deputy wants to raise the matter with us separately, we would be more than happy to talk it through. In terms of this specific presentation today, I do not know if I can get into any more detail on that.

Deputy Richard O'Donoghue: That is fine. I am okay with that.

Mr. Eamonn Kelly: I hope that addresses the Deputy's question.

Chairman: I will continue on the topic of the pre-legislative scrutiny report we completed today on the large-scale residential development Bill. That report highlights the need for ad-

equate resources at local authority level in the consent process, but also with forward planning and enforcement. Those are the three important parts of the planning system at local authority level. I thank Deputy O'Donoghue. The next speaking slot is for the Green Party, so I will take it.

Deputy Ó Broin asked about the consultation and who was involved in it. I would consider this to be part of the consultation process for elected representatives nationally, allowing them to have an input and make recommendations. We will be making recommendations in a report on foot of this session on the general scheme. It is important to consider that. There was a suggestion that we might waive pre-legislative scrutiny but I am happy for us to take it on and carry out this consultation process. It is helpful for us, too.

I read the heads of the Bill, the explanatory note and the opening statement very carefully because I am alert to deficiencies in environmental assessments within our planning system over the years and the catastrophic impact they can have on our environment, biodiversity, water quality, air quality and other natural resources. This Bill raised no immediate alarm bells with me. It raised a few slight alerts but I am conscious that in no way are we lowering the bar for getting substitute consent. We are pulling two clunky procedures together into a more efficient procedure. We are pulling the leave to apply stage and the substantial stage together. I have a concern about the notification to third parties or members of the public who may be concerned. They might have a shorter timeframe to become aware that a substitute consent case has been taken in order to participate in the process. If somebody is seeking leave to apply, a member of the public will become aware of it and that would be his or her tip-off that a substitute consent process is developing. He or she will then get the result and hear whether the project gets permission to proceed to the second stage and there is public participation in one of those phases, although I cannot remember which. We rectified the situation last December. In regulations and whatever else might come with this legislation, can we ensure that the notice to the public to participate in this process might be of a longer period? Is it five weeks presently?

Mr. Eamonn Kelly: It is.

Chairman: I think it would be worth considering. We are pulling the two stages together to add efficiencies. I do not think it would undermine that efficiency to give a longer public notice that the substitute consent process has begun. I just make that point.

We have talked about extending what was available to quarries, under section 261A of the Planning and Development Act 2000, for planning applications for any development. I understand that substitute consent would have to be achieved before the planning application aspect could be considered, and that is fine. Are those forward-facing planning applications for retention or could they be used for expansion? Where there is intensification of use, could they be used to seek to rectify that? Is that what we are talking about there?

Mr. Eamonn Kelly: The substitute consent piece is the retention piece and the forward-facing one is for the intensification if needs be. It was used and already existed for quarries. They would be the obvious example. Not to get into the history of it, but through the jigs and reels of the various pieces of legislation over the years, there were a number of quarries that, through no fault of the quarry developers, were overlooked for registration for an environmental impact assessment. Some 40 or 50 were brought through the process approximately ten years ago. A number of them sought to continue quarrying and that is why that particular provision is there. I do not know if that answers the Chairman's question.

Chairman: I have a follow-up question about the forward-facing planning application that would be judged after the substitute consent application and would also be done by An Bord Pleanála. Would those cases always have gone to An Bord Pleanála or would some previously have gone to the local authority? I am getting at the two-stage planning process whereby people have an opportunity to make submissions at two stages. Are we in any way getting rid of a single stage there?

Mr. Eamonn Kelly: The answer is "Yes". We are not talking about strategic infrastructure here. There have been cases of farmhouses or various developments that would be deemed small scale. We are talking about rare circumstances. Applications would be made to An Bord Pleanála. Again, it is to facilitate an assessment. The first thing to assess is what went before and the board would carry that out. The idea behind the proposal is that if substitute consent was then granted, the local authority would have an awful lot of catching up to do to reassess what the board has just carried out. We are allowing the facility to apply at the same time. Applicants would effectively skip the local authority stage and go to the board.

It is important to note that these are not standard planning applications. These would be applications on sites with significant environmental problems. I do not think we will have a situation whereby developers will be voluntarily looking to skip the two-stage process because, by definition, they are unauthorised, as I think Deputy Ó Broin has already pointed out. It would be rare for this situation to arise. It is not something that we foresee anybody will be taking advantage of. No one will be voluntarily applying for substitute consent for the sake of avoiding the two-stage process because, by definition, someone who has to apply for substitute consent is in trouble. I do not know if that answers the Chairman's question.

Chairman: It does; thank you.

Deputy Cian O'Callaghan: I thank our guests for their presentation and for coming in. My concern relates to the points the Chairman made. This legislation may be creating an easier path for retention and by doing so, could be undermining the EU directives that are there to protect the public interest and the environment. The legislation could be making the situation worse than it is. I accept that it does not apply to standard applications and that this is not a standard process. It should not be an easier or advantageous process. I have concerns not only with the removal of the leave application stage, but also with tying it in with the new application process. That could be advantageous. Our guests might explain further why they chose to do that.

Mr. Kelly said €10 million has been paid in fines. How much is owed?

Mr. Eamonn Kelly: Does the Deputy mean how much is remaining?

Deputy Cian O'Callaghan: Yes.

Mr. Eamonn Kelly: I cannot give the Deputy exact figures. It is €2.7 million-odd every six months. Ireland has paid €5 million in a lump sum and two instalments of €2.7 million. There is at least one more, and perhaps two more, to come. We are potentially talking about another €5 million, approximately.

Deputy Cian O'Callaghan: That would mean a total of approximately €15 million.

Mr. Eamonn Kelly: That is correct.

Deputy Cian O'Callaghan: Is the expectation that those fines will cease soon?

Mr. Eamonn Kelly: I need to be careful not to comment on an ongoing individual case.

Deputy Cian O'Callaghan: Sure.

Mr. Eamonn Kelly: That particular case is specifically focused on a particular development, not on the legislation. It is in respect of a wind farm. The ESB has applied for substitute consent to regularise it and as soon as that process is finished, we expect the fines to cease. The judgment of the European Court of Justice is clear. We continue paying the fines until the judgment has been expunged. That is our understanding.

Deputy Cian O'Callaghan: There is no proposal in the heads to extend the timeframes for the public participation elements despite the fact that substitute applications, by their very nature, are much more complex than an ordinary planning application. To assess them and make an informed submission, from a full participation point of view, would take a great deal of time. Will Mr. Kelly consider extending those timeframes and will he look at an additional period of at least three months for public participation, which I believe would be needed to be able to make a proper contribution as part of the process?

Mr. Eamonn Kelly: I will not pre-empt the report that the committee will put to us, but we are happy to consider it. By the way, those timelines are not in the Act. They are in the regulations, so it is open to us to extend them. As it currently stands, it is five weeks. It like any other planning application, but we might consider it in the context of the unusual nature and the extra layers of exceptionality that have to be considered. It is not something we would be opposed to, and we would certainly consider it.

Deputy Cian O'Callaghan: I appreciate that. Finally, the test for exceptional circumstances is a core issue here. Perhaps Mr. Kelly will explain the Department's thinking on it, particularly regarding how it accords with paragraph 57 of C-215/06 and the definition of the Act in terms of meeting the three conditions set out by the Court of Justice of the European Union. Effectively, there are three conditions - that it does not offer the persons concerned the opportunity to circumvent the Community rules, it does not give them the opportunity to dispense with applying them and that it should remain the exception. It would be useful to know the thinking of the Department on this.

Mr. Eamonn Kelly: I am happy to answer that. The Chairman, Deputy Matthews, had the same questions, or perhaps it was another Deputy. Effectively, the exceptionality circumstance and the criteria that have to be considered were devised between the Government and the European Commission, with the input of the Attorney General, about ten years ago. They have been through a number of court cases, including the significant challenge to the substitute consent process in the Supreme Court, and there were no specific challenges to the exceptionality criteria. They remain as is. To be brutally honest, we would be loath to change them. We have any amount of legal advice to say that it fully complies. I can go through them one by one, if the Deputy wishes, but they meet all those criteria. To be absolutely clear, we are not going to change them. We believe that they are robust, and they have been through a number of court cases. We believe they meet the requirements - it was originally the Derrybrien case - as agreed with the Commission. We do not want to change them because we think they comply. We are also comfortable, as they have been through a number of court cases, including through the Supreme Court, and there were no queries, issues or grounds raised against those criteria.

If the Deputy looks at section 177D(2), it provides that in considering whether exceptional circumstances exist the board shall, not may, have regard to the following matters: whether regularisation of the development concerned would circumvent the purpose and objective of the EI directive, which the Deputy mentioned, and "whether the applicant had or could reasonably have had a belief that the development was not unauthorised". That goes to the intentions of the developer and that can be examined by the board as to whether there is an intent to avoid, and whether the developers had knowledge in advance that they were doing something wrong. The third criterion is "whether the ability to carry out an assessment of the environmental impacts of the development for the purpose of an environmental impact assessment or an appropriate assessment and to provide for public participation in such an assessment has been substantially impaired". That is another thing to look at. The fourth criterion is "the actual or likely significant effects on the environment or adverse effects on the integrity of a European site resulting from the carrying out or continuation of the development". The fifth criterion is "the extent to which significant effects on the environment or adverse effects on the integrity of a European site can be remediated". The sixth is "whether the applicant has complied with previous planning permissions granted or has previously carried out an unauthorised development". If anything, that goes possibly even further than the EI directive because it very much relates to what actions the developer has carried out nearby or elsewhere. The last criterion is "such other matters as the Board considers relevant" in that particular case.

We have received an amount of legal advice on this. Given the fact that it has already been before the Supreme Court, we are as confident as we can be that it complies with the requirements of the Derrybrien judgment.

Chairman: We are in the third round now. Deputy Ó Broin asked to go first and I will go afterwards. Deputy Cian O'Callaghan also wishes to come back in. I ask anybody else who wishes to come in on the third round to indicate with the hand on the screen.

Deputy Eoin Ó Broin: If there is a fourth round, I will probably come back in on that round as well.

Chairman: Actually, you can make the third round the fourth round as well because I will give you ten minutes on this?

Deputy Eoin Ó Broin: First, with regard to the fines, my calculations are that, as of November of this year, they will be €16.1 million. We owed €10.5 million as of October last year and, as has been said, it is €2.7 million or €2.8 million every six months, so the total amount is €16.1 million. It would be good if that could be confirmed either at the meeting or afterwards because it is a considerable amount of money. Also, my understanding is, and I am not asking anybody to comment on an ongoing legal case but it is important that we have clarity, that the fines will stop not when substitute consent is granted but when full remediation of the environmental and community damage is dealt with. Perhaps it could be clarified if that is or is not the case. My understanding is that there are no other comparable fines affected by substitute consent, but the witnesses could inform the committee whether that is correct.

On the one-stage process, I strongly concur with both the Chairman and Deputy Cian O'Callaghan. Five weeks is nowhere near enough. On the one hand we are being told that this is like any other planning application, yet we were told earlier in the meeting that this is not like any other planning application. The reason it is going to the board for substitute consent is that, in the words of Mr. Kelly, it requires "detailed environmental considerations". If it is not like any other planning application because it needs such detailed environmental considerations, I

do not see how five weeks can be adequate in any set of circumstances. I appreciate that some of these are small developments but many, particularly the list that Mr. Kelly gave us earlier, are not small or insignificant. I hope the committee makes a very strong recommendation to extend that period. That is not to delay the process. The better the level of public participation at the earlier stage, the better planning outcome there would be.

I refer to the exceptional circumstances. Again, this is quite technical. If one reads paragraph 57, which Deputy Cian O'Callaghan referred to, there are three explicit tests in it in terms of the consent not offering the "persons concerned the opportunity to circumvent the Community rules or to dispense with applying them, and that it should remain the exception". I do not see from anything that has been said how that is captured in section 177D. I am also particularly interested in section 177D(2)(g) "such other matters as the Board considers relevant". Perhaps Mr. Kelly could tell us what types of matters could be captured by that and whether that has also been subject to the advice of the Attorney General.

I will rattle out some questions with respect to some of the heads and if Mr. Kelly gets to answer them in this round or the following round, that would be great. In head 1, there is no reference to the commencement of the provisions. Is that normal or standard, and can he explain that? With regard to head 3, it seems strange that there is no specification of the screening determination and the criteria. That appears to be quite vague and ambiguous. Given that Mr. Kelly only mentions appropriate assessments and the EIA directive, could there be other aspects of EU law or assessment requirements and why are they not mentioned? Why is there not greater clarity about the basis upon which the screening determinations are being made? I have another concern about the same head. We obviously have a lack of Natura 2000 site designation. That has a direct relevance in terms of the screening determinations that fall under this head. How is the board to reconcile that with respect to the assessments?

I want to pick up on a point my two colleagues mentioned. I am very concerned that somebody who could have an application for substitute consent for an unauthorised, illegal and potentially environmentally damaging development could also now get access to a fast-track, forward-facing planning application. That makes no sense whatsoever. Substitute consent should be dealt with as substitute consent. If remediation is required through a remediation order, that should be provided. Only when all of that is resolved if somebody then wishes to expand the operation through a fresh application, the person should have to go through the normal course. I do not see why somebody who is clearly breaking the rules should be rewarded for that by giving the person access to a one-stage planning process, when many of those issues would be better dealt with by the local authorities in the first instance and then by way of appeal to the board. Can Mr. Kelly explain the rationale for giving people access to what is essentially a fast-track planning process for future planning applications, separate to the substitute consent consideration and talk us through a few concrete examples? That would be very helpful.

One of the real issues in head 5, and one which speaks to Deputy O'Callaghan's concerns, is that where there are potential or clear conflicts between EU law and requirements and domestic law and practice, it seems we may be taking the side of domestic law, which could get us into further difficulties down the line with further EU legal challenges. With regard to head 6, as is always the case with these things, enforcement is key. Looking at Derrybrien, which is the longest-standing and most egregious case in this process, I do not see many signs of remediation and enforcement to the required extent. If that is the case and of course, we are being fined as a consequence, is Mr. Kelly satisfied the enforcement provisions are strong enough? Did he consider strengthening those to ensure that where people have remediation orders against them or

other aspects, those actions would be enforced, as opposed to being left to linger with all of the negative consequences for communities, the environment, biodiversity and our natural habitat?

Mr. Eamonn Kelly: First of all, the time allowed for the public to consider is clearly one of the key elements of the planning process. We will absolutely consider a longer period than five weeks. It will not be in the Act. It will be in regulations, but we can feed that it into the Oireachtas if and when the legislation proceeds. We cannot comment on individual cases, such as Derrybrien, but the European Court of Justice case says the decision will be expunged when the development complies with the EIA directive. We can only know what that will be when the board has carried out its independent assessment and issued its determination. It would be premature to contemplate when the fines might be finished because we will not know until the board makes its decision.

Are there any other fines-----

Deputy Eoin Ó Broin: I am not asking Mr. Kelly to comment on an ongoing legal case. Given his level of knowledge and expertise, to be compliant with the directives in EU law would require being fully regularised and full remediation to be undertaken. That would not be an unreasonable assumption.

Mr. Eamonn Kelly: It would depend whether remediation was required. That is the simple answer. It depends on a case-by-case basis. I am aware of circumstances with quarries in which there were high levels of environmental compliance, but an EIA had not been carried out. When it was carried out retrospectively, the quarries were found to be in full compliance and there was nothing additional to be added to it. There is no assumption that remediation must automatically occur, but it is very strong. The powers are there for An Bord Pleanála to ask for it. This is not a normal planning application. During the process and before it has issued its determination, the board may intervene and issue an interim order to cease activities on the site. I do not know if that answers the Deputy's question.

I am not aware of other fines in the context of environmental issues. Derrybrien is very unusual. This was the second case on the same aspect. Normally, the issues would be sorted out by then. In fact, the key aspect of the first Derrybrien case, around 2006, was ensuring legislation was in place and hence the substitute consent process, which was developed with the Commission. The only remaining piece is that specific project in County Galway.

There was a question on why there was no commencement on head 1. That is dealt with by the drafters. Normally, if there is no commencement, it commences whenever it is enacted. We would work that out with the drafters. We are still engaging with the office of the parliamentary council. It is not in the scheme because it would normally be added at the Bill drafting stage.

Many of the screening criteria, as is the case in the planning system, are addressed in the regulations. The fact they are being provided for is the key point. The regulations get into the minutiae of how the screening works.

In terms of the lack of Natura 2000 designations, that would be a better question for my colleagues in the National Parks and Wildlife Service. I am not qualified in my role to discuss the matter.

One of the last points was on fast-tracking and remediation. I have touched upon it before. This is not a normal process or one in which anybody would want to voluntarily be because it means one effectively has an unauthorised development that could be refused. One may be

obliged to take it down or have significant costs to remediate. If one gets through the process, it shows one has complied with the EIA and habitats directives. It is not for the benefit of the developers, but the public and the planning authorities involved, that the expertise that has been developed to assess the substitute consent environmental issues is reused or used at the same time. There would be potential for a single oral hearing with the two applications, if the board so wished. That would benefit the public and make things clearer and cleaner for everybody involved in the system.

Given the work has been done by the board, it would be a waste or a duplication of effort if a local authority had to revisit much of that again and get its own independent expertise in. Many local authorities do not have or possibly do not need to keep full-time experts in specific, detailed areas of environmental science on their books. They often hire them in for individual cases. The fact the work would have been done by the board and it would have considered the difficult environmental issues in many cases would be of benefit to the public and everybody involved in the system. Yes, it would also be of benefit to the developer, but it is not for his or her benefit it is being put forward. It is to avoid duplication of work by the system, for which the taxpayer pays.

Chairman: Head 7 provides that one can enter into a pre-application consultation with the board. Let me see if I can find the section. Is it subsection 1(*a*) of section 177?

Mr. Eamonn Kelly: I do not know.

Chairman: I am trying to find it here. I have notes scribbled under here. It states in the explanatory statement that it is proposed to amend section 177(*e*) to allow for pre-application consultations with the board. Normally, one would have had to have been referred by the local authority to do that in the past or by leave to the board to seek that. Is that correct?

Mr. Eamonn Kelly: This does not change the substance of the provision. It is mainly re-stating it but deleting reference to the leave stage.

Chairman: Could it be weaved into the public notification that something is happening on this site, or with this development, that somebody can apply to An Bord Pleanála for pre-application consultation. Does that have to be notified? Is there a newspaper notification or anything such as that?

Mr. Eamonn Kelly: No. Sadly, there have been a number of court cases on this. Pre-application consultation does not normally involve the public. It is to allow the developer to understand what information needs to be put forward into the public participation phase. There have been a number of challenges which have been successfully defended against, in the strategic infrastructure development, SID, process. There were challenges made to the SID process, in which there are pre-application consultations and the public is not involved. The reason for this is at many stages, the developer has not fully developed the scheme and wants to find out what he or she needs to do to allow the local authority, or in this case, the board, to feed back to say he or she needs to look at certain elements in putting together and finalising his or her pack, in order to publish it for the public. The concept of pre-application is not for the public because the development has not necessarily been fully developed yet.

Chairman: I get that, and my suggestion was not that there would be public participation in the pre-application consultation.

Mr. Eamonn Kelly: Sorry.

Chairman: If someone was seeking a pre-application consultation with the board, would there be a notification of that that might inform the public that a substitute consent process was likely to commence at some stage? A notice would not need to be put in a newspaper saying that X intended to apply to An Bord Pleanála for pre-application consultation.

Mr. Eamonn Kelly: Certainly not. In SID cases, An Bord Pleanála has records and a note on its public website that pre-application has commenced, but it does not have the details of it. It is not something that we would envisage requiring a public notice, as the development may be in the very early stages and the developer may or may not have an application ready for submission. The key benefit of pre-application consultation is to find out what the developer needs to submit in the application in the first place.

Chairman: I am just suggesting it, as it might be helpful for the public to be aware that there is some sort of substitute development happening on a site that may have required substitute consent for years. It would be a pre-warning or pre-notification to people.

Mr. Eamonn Kelly: Understood.

Chairman: If there is a site that requires an EIA but does not have one and now it requires substitute consent, the EIA, had it been produced at the time of application, would have set a baseline for the environment, that is, what the environment was like, the receiving waters, the soil quality or whatever may be the case. It would have suggested mitigation measures to offset any harmful action that might arise from development. Where someone is looking for substitute consent retrospectively, irreparable damage may have been done to the site by that stage or the mitigation measures that would have originally been required prior to development may no longer be sufficient. How can it be ensured that a retrospective writing of these development applications and mitigation measures takes the environment as it would have been prior to development as opposed to how it stood during the substitute consent process? The damage is done. How is that rectified so that it returns to how it was prior to the development? Does Mr. Kelly understand?

Mr. Eamonn Kelly: I do. I am sorry. A call came through on my computer, so I missed the end of the Chairman's question as I cancelled of the call. The Chairman is effectively asking me how the deciding authority makes its decision on the basis of damage that has happened. It is something that An Bord Pleanála must address in the application. The EIA must, in terms of its baseline, set out what was there previously. Under the EIA directive, a part of both remedial and normal EIAs is the consideration of cumulative impacts of a development on the existing environment. To answer the Chairman's question, it is inherent in the EIA process that, if there is damage, the authority must try to envisage what the site was like previously. For that reason, remediation is at the heart of the substitute consent process. Where a substitute consent application is either granted or refused, the planning authority or An Bord Pleanála may impose remediation conditions. It is a difficult process to undertake, but unlike EIAs where the development has not happened yet, there is proof in front of us where substitute consent applications are concerned. There is something that can be monitored, touched, assessed and measured in terms of the damage caused. It is cold comfort for the environment that has been damaged or impacted, but this approach makes it easier for the authority to assess the damage because the damage is right there in front of it. I do not know if that answers the Chairman's question but, in a nutshell, it is something that the planning authority or An Bord Pleanála must struggle with and it is provided for in the context of remediation being at the heart of the substitute consent process.

Chairman: I thank Mr. Kelly. I call Deputy O'Callaghan.

Deputy Cian O'Callaghan: If section 177B is repealed, how will a local authority or any other body direct a party to apply for substitute consent? I have a few other questions, but Mr. Kelly might take that one now.

Mr. Eamonn Kelly: To our mind, this provision has only been used once, that is, in the Derrybrien case. Enforcement is the answer and the need for the local authority to ask someone to enter the substitute consent process is superfluous. This comes down to enforcement powers, with the onus placed squarely on the developer. The onus is not, and should not be, on the local authority to get developers to enter the substitute consent process. The local authority's responsibility is to carry out its enforcement duties and the developer, if he or she wishes to regularise, may enter the process. Does that answer the Deputy's question?

Deputy Cian O'Callaghan: It does. Ultimately, the developer does not have to enter the process, in which case enforcement proceedings will come to a conclusion and the developer might-----

Mr. Eamonn Kelly: In a nutshell, the local authority not doing this is not a protection.

Deputy Cian O'Callaghan: If the developer does not apply for regularisation, he or she may have to take down what was put up.

Mr. Eamonn Kelly: Yes.

Deputy Cian O'Callaghan: Is there a reason for he timeframes for public participation being set out in the regulations instead of in this legislation?

Mr. Eamonn Kelly: There are only one or two timelines in the entire Planning and Development Act. Most of the time, they are set out in the regulations. It is the custom and practice in drafting. Once we consider the matter, we can give a commitment. That is not an issue in and of itself.

Deputy Cian O'Callaghan: It is an important part and including it in the legislation would be much better.

Head 4 proposes changes to a key section, namely, section 37L. Whereas the other heads are specific in their wording, no wording is indicated in this case. Is there a reason for that?

Mr. Eamonn Kelly: I apologise. Could the Deputy repeat that?

Deputy Cian O'Callaghan: I am referring to head 4 and the changes to section 37L. There is no wording.

Mr. Eamonn Kelly: I will find it now so that I have it in front of me. Is the Deputy asking about specific and detailed provisions?

Deputy Cian O'Callaghan: Yes.

Mr. Eamonn Kelly: My apologies. There was a break in my Wi-Fi during the Deputy's question.

This is a matter for the Office of the Parliamentary Counsel. The scheme that the committee has before it is quite well developed. In all the numerous amendments from head 7 onwards,

we could have simply said, "Wherever the first stage is mentioned, please delete", and it would then have been for the drafter to provide for that. We do not yet have that level of detail from the Office of the Parliamentary Council, so we put that in ourselves. Effectively, head 4 is the core, the intent of what we mean to do. In terms of more specific details, that is not for us to do. It is for the Office of the Attorney General's drafter to produce. The key point, though, is that what is stated in the head is what we want. There is currently a section 37L that applies only to certain types of quarry. For the sake of efficiency and to make the process more understandable to the public, we want to allow it to apply to all developments, not just quarries. It is a drafting issue that we will not address but that the Attorney General will.

Deputy Cian O'Callaghan: I will return to the issue of exceptional circumstances, which Deputy Ó Broin and the Chairman mentioned. Regarding the three key tests, the provisions should not give a person concerned the opportunity to circumvent or dispense with the community rules. Doing so should remain the exception. It is not clear to me from this that all three of those are specifically set out separately in the proposed legislation. Obviously we will need to see the final Bill but I want to see us capturing the exceptional reason that an unlawful development should be allowed to be regularised. What is the rationale for compounding the three considerations? Should they not be separated out so the board must specifically consider each one separately, rather than putting the three in together?

Mr. Eamonn Kelly: Again, that text was developed following a European Court of Justice decision and was developed over a number of years by our Department, the Attorney Generals and the Commission. As I said, we have got an awful lot of legal advice. One of the questions we put to our legal advisers was on whether there was a necessity to change it. It was very clear to us after the Supreme Court case that it is robust, reflects the requirements and meets the obligations imposed on us following the original Derrybrien judgment. To answer the Deputy's question, we have very strong legal advice to confirm it complies with the requirements of the original Derrybrien judgment and it has stood up to numerous tests in the courts, including last year in the Supreme Court, which went through the whole substitute consent process in great detail. As to why, it is a matter, again, of drafting. It is something we have inherited but also something we are confident and happy still works. Again, we would be loath to change something that is-----

(Interruptions).

Chairman: I think we have lost Mr. Kelly temporarily. We got the gist of the message, which was that this has stood up to European scrutiny and is robust.

Mr. Eamonn Kelly: I am back.

Chairman: Does Deputy O'Callaghan want to keep going? He has a couple more minutes.

Deputy Cian O'Callaghan: We lost Mr. Kelly there. I think he was just finishing up that point.

Mr. Eamonn Kelly: Yes. I apologise, I lost the connection there. In a nutshell, as to the way the legislation was drafted, the response is that notwithstanding anybody's opinions we have got much legal advice and it has also been through the courts a number of times. Thus we are very protective of the process we currently have. We know it works and want to ensure it continues to work, in terms of exceptionality. Hopefully that answers the Deputy's question.

For that reason we do not intend to change it, again on very strong legal advice.

Deputy Cian O'Callaghan: I thank Mr. Kelly. On head 4 and the point I was making about section 37L, in the scheme there are other parts where the text is more specific. There is less detail here with respect to proposed wording. For such a core section, it stands out to me as not having the same level of detail where the proposed wording is concerned, except that it is going to be worked on and we will see it in the Bill. That is just an observation.

Chairman: I thank the Deputy. We are in the third round now, so members may indicate if they wish to speak. I call Deputy Ó Broin.

Deputy Eoin Ó Broin: I have two comments and then a few more questions. Returning to an important point the Chairman made, it is much more difficult to evaluate the level of environmental damage that has been done by an unauthorised development when there is not an original baseline. Thus while one might have evidence, one does not have evidence about how much damage has been done from the period when the unauthorised development happened. I would be interested to hear how that can be adequately addressed in the assessments, as well as the requirements to remediate. Also, I am not so sure everybody would agree the wording of section 1770 has stood up to the level of legal scrutiny but I will not press the point as Mr. Kelly has answered it clearly.

I wish to return to head 4, section 37L. The officials may correct me if I am wrong about the following. Let us say I am, for example, the owner of a quarry. I have been fully compliant with planning law, namely, I applied for planning permission, did an appropriate EIA and am working away. If I then want to expand my activities, I apply to the local authority for planning permission. Somebody can then appeal it to the board. The person who has done everything right and has been fully legally compliant must go through a two-stage process when he or she wants to expand his or her operations. At the same time, the Department is proposing here that where somebody who has an unauthorised development - in other words, somebody who has broken the rules and now must regularise that and demonstrate whether there have been any negative environmental consequences - also wants to expand his or her business, he or she gets a fast-track one-stage planning application. It does not have to do with the substitute consent, which is dealt with, as Mr. Kelly said, by the technical expertise of the board. However, for any expansion of the business, if I was the person who had done everything right and complied fully, I would be saying that does not make any sense. I have yet to hear a compelling argument as to why, separate from the substitute consent application going through the board, which I understand, in parallel to regularising any environmental damage caused by the unauthorised development if such is required, that applicant should get access to a fast-track planning process for something that is entirely separate in terms of a new planning application. Perhaps the officials can enlighten me as to why we would reward the unauthorised development to the detriment of those who have obeyed the rules. I just do not understand it.

Will they also outline how all of this would affect any of the substitute consent applications currently in the pipleline? I presume it does not affect them as they operate under the rules that were in place when they entered into the process. Was any consideration given to transitional arrangements to try to address that?

I asked two questions in the last round which the officials were not able to answer. On the screening determinations and the detail in the regulations, will the officials provide the committee with a written note on that in advance of the full Bill? On the Natura 2000 designations, while I appreciate I can go to the NPWS, I am sure there is somebody in the Department who

has expertise on that. Maybe they can provide us with a written note on that as well. The officials might reply to the first few questions and if I have time, I have a few more after that.

Mr. Eamonn Kelly: That is no problem. First of all, section 37L is not a fast-track process. Most of the substitute consent cases have taken well over a year on average. It is only allowed for those in exceptional circumstances. I do not mean to pick the Deputy up on it but the actual example he used of the quarry is in at the moment. They are the one development that actually does have that facility as it currently stands. The point of it is that it is for those developments which have got through the process and have effectively shown they are compliant. Again, it may be through no fault of their own. It is not for their benefit but for the benefit of the public, so they can see what future development is happening at the same time, potentially in one oral hearing, although again that is up to the board. It is also to allow the assessment of what went before to be built on what goes into the future. I can understand the point the Deputy is making. It is almost as if to impose, say, a delay on those who have an authorised development but it is important to note inherent in the system is that they could be refused. They have a far greater risk in terms of going into the substitute consent because they have actually voluntarily done an unauthorised development and they now have the risk of having to remediate it all at a massive cost whereas the person who goes through the normal process has not yet built the development and has not on the inherent risk that goes with that. The fact is this is so rare. There are between 27,000 and 29,000 planning applications every year and four or five substitute consent applications. It really is an exceptional circumstance in the normal sphere of things. It is up to all the experts, namely, the independent planning system of An Bord Pleanála, to assess what went before and not to have to duplicate that again. What we are talking about is putting an extra burden on the system. If substitute consent is granted - again, in many cases it is not - and an applicant has to carry out any remedial development he or she has cleared the requirements as far as the EIA is concerned. If applications go back to the local authority and are appealed to the board again, members of the public might not be aware and they might get confused as to what is going on. We just see this as a general benefit. We have used the word "streamlining". I do not think it is fast-tracking because it is actually-----

Deputy Eoin Ó Broin: May I ask for clarification? If, in the case of a substitute consent application, conditions are applied, including a requirement to remediate, and if there is a parallel application made directly to the board for a planning application to expand the operations, would it be possible to apply a condition specifying that the grant of permission to expand operations cannot be activated until that remediation is carried out in full? The concern is that somebody could break the rules and carry out unauthorised development, causing significant environmental and community damage. This person could get substitute consent, even if it includes conditions in respect of remediation, but would also get to expand his or her business. As a result of the enforcement of those conditions being so weak, this person could delay the remediation while ploughing ahead with the expansion of the business. Surely that would be terribly unfair and unjust from the perspectives of both planning and natural justice.

Mr. Eamonn Kelly: It would indeed. We talked about this earlier. There is no automatic assumption that there necessarily will be remediation but, if there was to be, it would be open to An Bord Pleanála to impose a condition that does exactly what the Deputy just suggested. I do not know if that answers the question. It is entirely open to the board to place such a condition on such a developer. Such developers will have had to come into the system to try to regularise their unauthorised development. They will potentially have had to take on significant costs to remediate what they have done, if remediation conditions are applied. It is not something that any developer should do voluntarily. I know I keep repeating myself but nobody wants to enter

a substitute consent process voluntarily because there is a risk that the consent will be refused, meaning that whatever has been built must be removed and that the site must be remediated and returned to the state it was in before anything was built. It is a significant risk that such developers bring upon themselves.

Deputy Eoin Ó Broin: I will ask one final question. What is the rate of refusal? Mr. Kelly talked about historic numbers of 30 or 40 and then talked about three or four a year. How commonly is substitute consent refused? If he does not have the figures, perhaps he could provide them to the committee at a later stage.

Mr. Eamonn Kelly: Absolutely. We are still waiting on figures from An Bord Pleanála. From what I can see looking back at the period of 2012 and 2013, when the legislation first came through, there were an awful lot of grants. These primarily related to quarries. More recent cases often do not meet the exceptionality condition in the first place. We are aware of a few. I will come back with more detailed figures from An Bord Pleanála. Again, we are building a single-step process, under which an application would fail if An Bord Pleanála did not consider it exceptional. The board would then refuse it on that basis. Historically, I am aware of cases that did not get past the stage of considering their exceptionality. In these cases, the developers do not get as far as lodging a full application for substitute consent in the first place. I do not know if that is an answer.

Chairman: I thank Deputy Ó Broin. I will intervene to say that, now that our meetings are three hours long, it had been my intention to take a small break at the halfway mark to give people a break, if needed. Do members know how much longer they intend to continue? Does everybody wish to contribute? If so, I may propose a short break now.

Deputy Eoin Ó Broin: I have four more questions but I am not so sure we need a break. It might be better-----

Chairman: I would take a break at some point in the three hours. If we only intend to continue for a short time, I could push that out and we could continue.

Deputy Eoin Ó Broin: I do not believe we will use the three hours. I do not know about the other Deputies but-----

Chairman: Deputy Ó Broin only has a couple more questions.

Deputy Eoin Ó Broin: I have four more.

Chairman: Does anybody else wish to come in? No. Okay, we will take those four questions.

Deputy Eoin Ó Broin: I will go back to some of the questions I had asked earlier that the witnesses did not get an opportunity to answer. I asked a specific question about section 177D(2)(*g*) which contains the phrase "such other matters as the Board considers relevant". Will Mr. Kelly give us an indication of what such matters these are likely to be? Was legal advice sought on the appropriateness of that provision?

While I know that, again, this is in the existing legislation, we will tease out another concern of mine since the departmental officials are here. The Planning and Development Act 2000 uses the term "shall have regard to" as opposed to, for example, "must comply with". Does that mean that the board can take a pick and mix attitude to the seven or eight conditions listed

in section 177D(2)? Do they all have to be adhered to? Will Mr. Kelly talk us through that a little more?

Will the witnesses explain the rationale behind head 11? I am a little bit unclear on that from reading the text. Under section 177K, the board will be obliged to conduct an appropriate assessment or EIA Given that one of the reasons that substitute consent applications are being made is that an EIA or appropriate assessment was not carried out in the first place, how often is the board required to carry such assessments out at this stage?

I will come back to the issue of enforcement. We all know of cases in our constituencies in which local authorities have worked hard to try to enforce the regularisation of developments that have been found to be in breach of the conditions of their planning permission. It is incredibly difficult. Given that the board has far lower levels of staff and far greater numbers of cases on hand, albeit very specific cases in this instance, did the Department examine whether the levels of enforcement of existing remediation conditions are adequate or how long it takes to enforce those conditions? I know I keep going back to the case of Derrybrien but it is one of the most extreme examples. I can think of quarries in my own constituency and other unauthorised developments. In these cases, enforcement is the most difficult phase, even more so than getting a decision. The negative impacts of unauthorised development can carry on for long periods, even when enforcement orders or remediation conditions have been applied. Is this an area that needs to be strengthened?

Mr. Eamonn Kelly: I will start with section 177D(2)(g) regarding the criteria for determining exceptionality, specifically "such other matters as the Board considers relevant". This is effectively a matter for the board. This provision allows the board to consider any matters it considers germane, in addition to the other criteria, each of which must also be considered.

The Deputy asked whether we received legal advice on this. The legal advice was first sought ten or 11 years ago when this legislation was first drafted. We have since gone back over it to seek the legal advice of the current Attorney General. That criterion is additional and does not weaken the other criteria that are to be assessed. It is to be used by the board on a case-by-case basis. I will not speculate on what additional issues might be considered but the key point is that the criteria that come before this one all comply with the EIA directive and the Derrybrien decision. To answer the Deputy's question, we have numerous pieces of legal advice, including recent advice on this drafting as part of the Supreme Court case last year and advice from years ago from files. The Attorneys General were very much involved in drafting the specific wording. The Deputy also asked whether the board can pick and mix criteria. The answer is "No." The board shall consider all of those criteria.

Enforcement is still a function of the local authority. An Bord Pleanála has powers within the substitute consent process because it assesses the application. It can, at that time, issue instructions to the developer to cease activities but, ultimately, the enforcement function remains with the local authority. The question of resourcing may be a question for another day, but it has been assessed by colleagues who have come before the committee. It is always something that needs to be looked at. If it is the case that there are additional resourcing issues, that will be addressed by my colleagues rather than by me as part of the management of this Bill. I appreciate that the issue is inherent. We have looked at it and at how enforcement interacts with this. Again, we are happy. We have received advice and our enforcement process, from the investigative powers of the local authorities right up to injunctions under section 160, is available for local authorities to use. We always encourage the local authorities to use their powers but how to carry out the enforcement process is still, ultimately, an independent decision for each

local authority, once it complies with the process. I do not know if that answers the Deputy's questions but, in summary, we have consulted heavily with Attorneys General on this legislation. If anything, it came from recent court cases. Its genesis, therefore, has effectively come from legal considerations.

Chairman: I thank Mr. Kelly. I call Senator Cummins. I will then ask one brief question.

Senator John Cummins: I thank the Chair and I will be brief. I welcome this proposed Bill. It is important that we address the concerns identified in this process across the EU and in court judgments. I will take up this issue from where Deputy Ó Broin left off. My point goes beyond this Bill, but it is related to the enforcement elements of the legislation. People in all constituencies are frustrated when a development is found to be in breach of the planning process, councils pursue the avenues open to them yet they are hamstrung in what they can do ultimately. Resourcing is one element at the heart of this issue. I would like the witnesses to take this aspect up with their colleagues. I refer, in the context of this proposed legislation, to the need to beef up the enforcement element within local authorities. While additional resources are going to be provided to planning sections in local authorities to speed up applications, we must also be mindful of cases where wrongdoing occurs. This is more of a point than a question and I ask that it be brought back to the relevant areas of the Department because it is a point often raised with me by constituents.

Mr. Eamonn Kelly: I thank the Senator. I am more than happy to relay his comment to my colleagues in the planning and local government divisions. We all acknowledge that without proper enforcement the planning system will crumble. My colleagues are in frequent contact with our colleagues in the local authorities. I will certainly raise this point with them. It has come up before and I understand that it is being addressed not as part of this undertaking but as part of other work being done by the Department in the context of the wider funding issues in respect of local authorities. Therefore, I understand that this issue is being considered and I do not disagree at all with the Senator.

Senator John Cummins: I thank the witnesses.

Chairman: I thank Mr. Kelly. I ask him to send the committee some detail regarding what it is that is expected would or should be contained in a remedial environmental impact assessment, EIA, or a remedial Natura impact statement, NIS. It is not something that I have come across before. I am familiar enough with what goes into an EIA or an environmental impact assessment report, EIAR, but not a remedial one.

Mr. Eamonn Kelly: No problem.

Chairman: We would appreciate some detail in that regard and we will circulate the information to the committee.

Deputy Eoin Ó Broin: I would like to make an information request as well.

Chairman: Fire away, Deputy.

Deputy Eoin Ó Broin: My request is concerned with allowing us to fully understand this proposed legislation. Regarding head 4, it was mentioned several times that it has withstood the scrutiny of a series of court decisions. I am interested in that aspect and I ask Mr. Kelly to send the committee a note with more explicit information in that regard. I refer in particular to situations where any of those court judgments, whether in the Supreme Court or elsewhere,

contained explicit consideration of these specific sections and how they meet the requirements of the relevant European Court of Justice, ECJ, decisions to which I, Deputy Cian O'Callaghan and the Chair referred. That would be helpful.

Mr. Eamonn Kelly: That is no problem.

Chairman: I thank the members. I thank Mr. Kelly, Ms Brady and Ms Holohan for their attendance. It has been helpful to us in our scrutiny of the heads of this proposed Bill. We will proceed to draft a pre-legislative scrutiny report, approve it and furnish it to the Department and the Minister as soon as we can.

Deputy Eoin Ó Broin: I am sorry, but I have a question. I presumed that we would have had the opportunity to have a second pre-legislative scrutiny hearing with external bodies. I just automatically assumed that we would have had at least one other session.

Chairman: That was not agreed by the committee. I understood that we would just have this one session.

Deputy Eoin Ó Broin: Given the significance of this matter and the issues arising, and the fair degree of consensus in this regard, I think it would be helpful if we could at least discuss this issue at our meeting on Tuesday. I believe that one more session will be required given the scale of the issues involved.

Chairman: I understand that there is some urgency with this legislation. Is that correct?

Mr. Eamonn Kelly: Absolutely. There is some urgency in ensuring that we have a robust planning system in place generally and removing some of these steps in that regard. In the context of foreign direct investment, FDI, we have received queries in respect of ensuring that this is a backstop that is rare and that should not happen. We need something like this proposed legislation in place and it would be appreciated if we could get this progressed quickly.

Deputy Eoin Ó Broin: Could I make a compromise suggestion?

Chairman: Go ahead.

Deputy Eoin Ó Broin: I do not wish to delay this proposed legislation in any way, but only a small number of us have been here for this meeting. In that context, we discussed previously the possibility of having a meeting of the committee on a Friday in exceptional circumstances. I do not think it would be right for us to do this pre-legislative scrutiny report without at least having had one session with external witnesses. We could do that Friday week, for example, and that would not delay the process in any way.

Chairman: As the Deputy knows, and this issue was discussed this morning in our private session, the timetable for committees is chock-a-block. We managed to fit this meeting in because there was a cancellation in the schedule and it was agreed to do this on that basis. I am not prepared to take a risk in this regard. We also have the Maritime Area Planning Bill 2021, Private Members' Bills, including those being pushed by Deputy Ó Broin, and other matters to consider as well. I do not want to delay that business.

Deputy Eoin Ó Broin: Sure.

Chairman: It is up to the committee members who wish to do so to turn up. Those of us who turned up went through this proposed legislation in detail. I call Senator Cummins.

Senator John Cummins: To be of assistance, I agree with what the Chair has said. I am also mindful that members are not here because the Dáil and Seanad are sitting. We agreed a work programme in our private session. Every member of the committee agreed to that programme. If we are going to chop and change that, then we may have to look at dropping what has already been agreed. I was of the same opinion as the Chair. We had agreed a programme and also agreed that we would take on this proposed Bill and examine it urgently. I am satisfied that we have done that.

Chairman: I thank Senator Cummins. I call Deputy Cian O'Callaghan.

Deputy Cian O'Callaghan: I am happy to see our examination of this proposed Bill done quickly and efficiently, but I would not feel that we had done proper and full pre-legislative scrutiny of it if we have only heard from the Department and not from others. It was useful to hear from the representatives of the Department today, but I would like to hear from a wider range of people. Given the history of this matter, including the fines, the mistakes made with the planning process before and everything else in this context, it is exceptionally important for us to get this proposed legislation right. It would, therefore, be useful to hear additional voices and perspectives.

Chairman: I do not doubt that we need to get this proposed legislation right. However, having another session with other witnesses does not mean that we would necessarily get it any more right. The contributions we have had today have been substantial. Deputy Ó Broin suggested having a meeting on Friday. Another week would then be required for the pre-legislative scrutiny report to be compiled. We also generally receive written submissions as part of that process and that element also delays the compilation of reports. We will then be in the midst of our examination of the Marine Area Planning Bill 2021.

What Deputy Ó Broin is suggesting, therefore, will not put the pre-legislative scrutiny of this proposed legislation back by a week but by weeks and possibly by a month or six weeks. My role as Chair is to ensure that we get through legislation as quickly as possible. I said at the outset that we would have this meeting and then we would proceed with the pre-legislative scrutiny process. If members wish, they could contact outside organisations to seek written submissions on this matter. The information in those submissions would not be for inclusion in this pre-legislative scrutiny report, but for possible use during the amendment stage, if they wish.

Deputy Eoin Ó Broin: We can discuss this as a committee, but my understanding is that while we have agreed a general programme, we only have meetings definitively tied down for Tuesday and Thursday of next week. We are hoping to start Committee Stage of the Maritime Area Planning Bill 2021 on the following Tuesday, but that has not yet been confirmed. My understanding is that we have no committee meeting this Thursday. This is a matter for the committee to decide and we do not have full attendance today. Deputy Cian O'Callaghan and I will raise this matter during private session on Tuesday. As a general rule, we always have at least two sessions of pre-legislative scrutiny, PLS, so we hear the views of both the Department and external bodies. The only time I remember we have not done that was when a Bill was so simple, clean or quick it was not required. We are not going to decide this now but I urge the Chair, between now and Tuesday, to consider if we can try to facilitate a second session. The value of these public sessions is that the public gets to see them and it adds to public scrutiny. This is very technical, complex stuff. It has very significant implications for people across communities throughout the State, including those in the Chair's constituency and mine. A second PLS session is not unreasonable, but let us debate it and decide at private session on Tuesday.

Chairman: It is not unprecedented that we have one PLS session. The Tailte Éireann Bill, for example, took one PLS session, as did others.

Deputy Eoin Ó Broin: That was a relatively uncontentious Bill and we have not been fined almost €20 million as a consequence of related matters. This Bill is of a different order.

Chairman: I am not making comparisons between the Bills, but it is not unprecedented for us to have one PLS session with the Department. We have done that before and we are likely to do it again. It is my intention from today's session, with the questions and answers and the help we got from the Department, that we proceed to compile the PLS report, which can be drafted and put before us as soon as possible. We can seek suggestions from outside groups and Deputies can include those as part of the recommendations within the report, if they wish. It should be remembered, and the Deputy knows this well from the PLS reports we have done that, realistically, this process takes some time. It takes approximately two weeks, even from one session, to produce a PLS report. We know that from the large-scale residential development, LSRD, Bill. We only had two sessions on that, yet it took four weeks to produce a report.

I do not want to delay this any longer. My view is that we ask the secretariat to compile the PLS report and bring it to us. Members may contact outside organisations for suggestions and recommendations for that report, or bring them on Committee Stage or other Stages of the legislation. Is that okay?

Deputy Eoin Ó Broin: I do not agree with that. I will make a counter-proposal, during private session next week, that we hold a second PLS session and the committee can then decide, by way of a vote if necessary.

Chairman: Okay. That is grand. I have thanked all the Department officials, so we can let them go.

The joint committee adjourned at 4.52 p.m. until 3 p.m. on Tuesday, 12 October 2021.