Property Industry Ireland

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Proposals to reform the Judicial Review Process in Planning Matters

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Introduction

Property Industry Ireland (PII) welcomes Government's undertaking to review judicial review legislation and structures as they relate to planning and environmental matters. PII however wants to emphasise the urgency of a speedy review of the judicial review system for planning decisions. Planning permission, and Judicial Review, are only one element of the development process. There are other important steps that take place before and after planning permission is granted, however there are measures that can be taken to improve the efficiency of judicial review that would assist the speedy delivery of housing.

There are now often weekly decisions taken in Judicial Reviews of Strategic Housing Development (SHD) and Strategic Infrastructure Developments (SID) permissions granted by An Bord Pleanála (ABP). These are setting new precedents and combining to undermine the very basis upon which the planning system is based.

This is a critical issue that must be addressed. While the SHD system is being replaced with the introduction of the Large-Scale Residential Developments (LRD) process, there remains the not insignificant risk that planning applications under this process will also be subject to a high number of judicial reviews.

The need to deliver urgently new homes into the Irish housing system is well recognised. The very high level of judicial review challenges to planning permission for large-scale housing schemes is significantly delaying the delivery of these new homes or resulting in schemes unable to proceed and adding to the cost of homes – a cost that is usually borne by the first-time buyer.

Without an immediate review there is a danger that we will see judicial reviews start to impact further on commercial and infrastructure development as well.

PII recognises the right to appeal decisions. However, the system has become unwieldy and is impacting on the delivery of new homes. The aim of this paper is to examine ways in which the right to appeal can be facilitated within a more efficient system that minimises the delay to new home delivery and balances risk between all parties involved.

Judicial reviews can add at least €8,000 to €12,000 to the cost of each new home.

This report examines the impact of Judicial review including factors of cost and delay and sets out 15 recommendations for Government. These are:

1) Introduce proportionate costs risk for the applicant
2) Raise the entry bar for making a challenge
3) No permission should be quashed where correcting the error would not make any difference to the outcome
4) The applicant must be able to show some connection to the area
5) Interpretation of planning policy is a matter for planners
6) No permission should be quashed where the error complained about was not first raised in the planning process
7) Increase ABP's resources, including legal resources
8) Provide for peer review of an ABP Inspector's Reports to avoid inconsistencies within the report
9) Publish ABP Inspector Reports before decision to allow time for comment
10) Court deals with all issues at one sitting
11) No "double jeopardy"
12) Grounds published to all parties immediately
13) Publish consent quash orders
14 Use the Planning and Environment Court
15) Where a real issue is identified, the Government should be swift to respond

Analysis by the SCSI of their Real Cost of Delivery data for housing and apartments found that a delay of a year to a housing development caused by judicial reviews can add at least €8,000 to €12,000 to the cost of each new home.[1]

1. Reported in Irish Independent August 22, 2021

Case Study:

Impact of Judicial Reviews (JR) on SHD planning permissions

It is important to note that as of early February 2022, there are 37 Judicial Reviews of SHD decisions pending, relating to 11,715 homes.

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91 judicial review challenges during 2020

Over 100 judicial review challenges during 2021

In 2020, there was a seven-fold increase in the number of SHD judicial review challenges

judicial review challenge on more than 50% of all permissions granted

23% of total SHD decisions have been challenged in court

25 permissions successfully challenged

There has been an exponential growth in JR challenges to planning decisions.[2]

The number of challenges to decisions made by An Bord Pleanála (ABP) has increased during each of the last four years. There were at least 91 challenges during 2020 alone, which was then a record number. That record was broken last year, 2021. There were more than 100 challenges.

In relation to SHD decisions, the numbers are even more stark. In 2020, there was a seven-fold increase in the number of challenges, year-on-year (2019:5, 2020:34). In 2021 (up to October to allow for 2022 challenges of late 2021 decisions), there were 35 challenges – that is a judicial review challenge on more than 50% of all permissions granted (January to November). Judicial Review is primarily concerned with the decision-making process rather than with the substance of the decision. There is, however, a limited scope for review of the substance of a decision as well.[3]

Since the introduction of SHD, ABP has made a total of 395 SHD decisions in the four-year period from 9 January 2018 to 9 January 2022.

Some 78 SHD decisions (23% of total) have been challenged in court, 74 of these are objector led challenges.

24,014 houses, apartments (including Build-to-Rent, co-living) or student bedspaces (for convenience, homes) have been delayed or frustrated by these challenges.

8,705 homes have been quashed by the High Court, with 25 permissions successfully challenged. 13 of those permission have been quashed by consent, without any contest in court. 12 have been quashed after a contest on the merits in court.

11,715 homes remain at risk, with 37 permissions under challenges that remain pending before the court.

Only 3,594 homes have survived a challenge. Specifically, 12 permissions have survived. 10 survived because the challenge was withdrawn and one because the challenge was late. Only two decisions have withstood a contest on the merits in court, and one of those is under appeal.

Given the level of risk in housing development and the cost of an SHD application, estimated to be on average at least €750,000 per application, the high probability of being subject to a judicial review and of any planning permission granted being quashed by the court is deterring planning applications and investment in home building – further impacting on the supply of homes.

It is also leading to investors in housing development in Ireland (many of whom are international and mobile) to question the risks involved in funding proposals through the planning system.

It is important to note that as of early February 2022, there are 37 Judicial Reviews of SHD decisions pending, relating to 11,715 homes. Experience to date would suggest a significant proportion of these homes are at risk of not being built. In addition, it is estimated that some 80 SHD applications are being finalised prior to the expiry date for SHD applications and may yet be judicially reviewed.

2. The statistics in this policy paper are based on research by Tom Phillips + Associates (THE JUDICIAL REVIEW OF SHD PERMISSIONS – SHOOTING FISH IN A BARREL) on the outcome of Strategic Housing Development (SHD) Decisions by An Bord Pleanála in the first four years of SHD.

3. https://www.citizensinformation.ie/en/government_in_ireland/national_government/standards_and_accountability/judicial_review_public_decisions.html.

Issues arising from the high number of Judicial Review (JR) Challenges

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There has been an exponential growth in JR challenges to planning decisions.

There is a strong correlation between the increasing numbers of JR challenges and the changes to rules relating to the protection from costs for those bringing challenges. The State elected to give effect to certain European and International rules with a generous regime that means those bringing legal challenge do not have to hesitate before commencing their challenge.

While some have apportioned blame to the SHD process for the number of JRs, the increased rate of successful challenge to SHD decisions has little to do with that legislation. Only one of the 28 quashed permissions was lost because of a unique feature of that code.

Instead, three principal themes have emerged:

1. Many successful challenges relate to requirements for assessment under European law that are poorly expressed in Irish law. The recently retired Chief Justice Clarke acknowledged this difficulty, pointing out the State has “not been very good at transposing European measures into our own law”, describing parts of planning and environmental law as “almost impenetrable”.

2. Many successful challenges relate to work done by ABP to give effect to National guidelines, where local planning policy conflicts with Government policy.

3. In several instances, there is no longer the same respect by the courts for the judgement of expert decision makers. The hearing in court is more like a planning oral hearing of merits than an administrative review of process. This conflicts with the intention of the legislature who determined that issues of planning be left in the hands of the authorities such as ABP, who can be expected to have the special skill, competence and experience to determine such matters. The great majority of challenges to ABP decisions to grant permission for housing, and infrastructure essential for that housing and general economic development, have been successful based on judicial assessments of planning/technical matters. These are now frustrating the delivery of housing in its myriad forms at a time when housing delivery is at the heart of government initiatives.

Proposals for Reform

Property Industry Ireland suggest the following solutions to make the JR process more equitable, efficient and reduce the impact on housing supply.

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↘ 1) Introduce proportionate costs risk for the applicant

Property Industry Ireland notes and welcomes the decision by the Court of Appeal in Heather Hill Management Co. CLG v An Bord Pleanála [2021] IECA 259. The Judgment makes clear that those who bring legal challenges can be made to pay the costs of their opponents, if they lose.

For the last two years, an objector has been free to go to court, safe in the knowledge they would only have to pay their own lawyers and may be fortunate enough to force ABP to pay his bill instead. That never made sense: why should anyone have a “shot to nothing” in court? Now, every applicant must weigh-up the importance and chance of success of their objection before starting a challenge or run the risk of having to cover the ABP, State and developers' costs. This should help curb the recent proliferation in challenges and narrow the focus of those challenges to only issues that matter.

Even with that judgment, the fact remains that the State has voluntarily elected to offer more generous protection to those bringing challenges than required under European law.

The proposed introduction of a proportionate cost cap would force objectors, and their lawyers, to think carefully about whether to challenge a decision on a serious matter of public policy.

This was among the recommendations in the General Scheme of the Housing and Planning and Development Bill. Property Industry Ireland requests the urgent completion of that scheme with urgent attention given to the operation of JR procedures as a high priority of that review.

↘ 2) Raise the entry bar for making a challenge

The General Scheme of the Housing and Planning and Development Bill also contemplated change from the current requirement for JR to commence with an application for leave ex parte. This requirement was introduced on 28 September 2010 and allows objectors to apply for leave to challenge a planning decision without the ABP, the State or developer being present to have their views heard. Based on searches of the Courts Service website, the number of applications for leave against ABP since then is almost 500. There was a record number of at least 91 during last year alone.

Our understanding is that leave has not been refused in any of these cases. We have identified only one reported judgment in a planning case where leave was refused at the ex parte stage: O’Neill v. Kerry County Council [2015] IEHC 827. It did not involve An Bord Pleanála.

It is possible that leave has been refused in cases without the need for a written judgment, but we have not been able to identify any such cases. It seems the practice is, in cases where there is some doubt, for leave to be granted, or for a direction to be made that the application for leave should be on notice i.e. provide affected parties the opportunity to be present and partake in the leave hearing.

There are cases where the ex parte grant of leave has been set aside or put simply, where the court concluded, after hearing from the affected parties, that leave should never have been granted ex parte: whether entirely, Malone v. Mayo County Council [2017] IEHC 300, or against some specific party, Alen-Buckley v. An Bord Pleanála [2017] IEHC 311

and North Westmeath Turbine Action Group v. An Bord Pleanála [2019] IEHC 924. There are several cases where leave has been refused after a contested hearing on notice. Most recently: O'Riordan v. An Bord Pleanála, unreported, Humphreys J, 19 December 2020. This has to be welcomed and encouraged.

The leave stage should serve a purpose. It should filter out cases or filter out grounds for review.

Property Industry Ireland believes that this process should be done more rigorously. Also, we believe that this stage of the process should not be used to correct, improve, sharpen and amend grounds for legal challenge, after the limitation period has expired. The regulations should make it clear that this should not be allowed given its strict timeline set out for taking challenges set out for various reasons.

↘ 3) No permission should be quashed where correcting the error would not make any difference to the outcome

Not every error made in the planning process would make a difference to the outcome. Where those errors mean a permission is quashed, the true outcome is only delay and increased cost for all persons involved, including the State, the developer and the final homebuyer. Ultimately, the same decision would be made by ABP had the error not occurred.

There are examples where the High Court will find an error made, but not quash the permission (Shillelagh Quarries v. An Bord Pleanála [2019] IEHC 479, Pembroke Road Association v. An Bord Pleanála [2021] IEHC 545), but those are rare.

The logic is sound:

"When considering judicial review applications, courts must evaluate whether any non-conformity with a rule relating to procedural matters is sufficiently serious to justify intervention.

Some breaches of a legal rule are of greater significance than others. The purpose for which a rule exists is relevant. Some rules may have no discernible purpose or may be inessential. Compliance with other rules is necessary in the interest of values which are identifiable and important. The significance of any breach of a rule may sometimes be measured against the interest of the person complaining of that breach. Has that person a real interest in upholding a value which the law attaches to compliance or does the rule only exist to protect an interest of others."

In the United Kingdom, the relevant statute makes clear that judicial review must be refused where "it appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred" (see section 31(2A) of the Senior Courts Act 1981). As recently as 15 December 2021, the provision was relied upon in the UK High Court to refuse a challenge to permission for a taller building, where the decision-maker (Mayor of London) erred by failing to provide an objector with a technical note that had been prepared on behalf of the developer (see London Borough of Hillingdon v. Mayor of London [2021] EWHC 3387 (Admin)).

↘ 4) The applicant must be able to show some connection to the area

Ireland's planning system is highly transparent and open. It is easy for interested persons to engage in the planning process. The same should not follow for the court process. Even under European law, the State is free to insist that those bringing a challenge complaint, at a minimum, do so about the impairment of a specific right they hold. That would force those bringing a challenge to have some closer connection to the area, or issues in the case.

↘ 5) Interpretation of planning policy is a matter for planners

As explained, the hearing in court is now more like a planning oral hearing of merits than an administrative review of process. It seems forgotten that the legislature determined that issues of planning have been left in the hands of the authorities such as ABP, who can be expected to have the special skill, competence and experience to determine such matters. That is no less true now than when the then Chief Justice, Mr Justice Finlay, said so in O'Keeffe v An Bord Pleanála [1993] 1 IR 39. The trend has emboldened those bringing legal challenges to question the expertise of decision-makers more often, including the Minister for Housing &c.: Ui Mhuirnin v. Minister for Housing Planning and Local Government [2019] IEHC 824. The clear delegation of judgment in this matter to decision-makers, like ABP, should be reinforced in the statute.

This should be reinforced by legislative change, including making it clear in law that the decision as to what does and does not constitute a material contravention of a statutory plan should be a matter for the expert judgement of ABP and not a matter for a court to determine as such a decision requires expert planning judgement.

↘ 6) No permission should be quashed where the error complained about was not first raised in the planning process

No person should be encouraged to conceal their objections and deprive ABP of the opportunity to address their concern in the planning process. Anyone who brings a legal challenge should be properly compelled to exhaust their remedy in the planning process. This is a principle of long and wide application (see State (Abenglen Properties Ltd) v Dublin Corporation [1984] IR 381), which should be reinforced in legislation.

We have seen a number of ABP permissions quashed where the ground upheld could have been set out in the relevant party's submission to ABP but was not done so. This deprived the Board of the opportunity to address the point of concern in its decision-making process.

↘ 7) Increase ABP's resources, including legal resources

The mushrooming of considerations to which ABP must have regard suggests a fundamental challenge to the operations and efficiency of that organization. It is urgent that, in the short term, ABP be sufficiently resourced to have every aspect of its assessment procedures for strategic housing and infrastructure peer-reviewed from a legal risk perspective, at a minimum.

↘ 8) Provide for peer review of an ABP Inspector's Reports to avoid inconsistencies within the report

Some of the successful challenges rely on inconsistencies in the report of the Board's Inspector. It would make sense for additional resources to be made available to ABP to allow them complete peer-review of the work of any Inspector appointed to report and make a recommendation on SHD applications.

↘ 9) Publish ABP Inspector Reports before decision to allow time for comment

The developer and the public could complete that same peer review recommended above. The rate of challenge to the Environmental Protection Agency is much lower than for ABP. One reason for this is that the "draft decision" of the Agency is published to allow opportunity for objection. As such, issues with the draft are resolved before the final decision is made. The same could be achieved for the Board, if the report of its inspector was published for comment.

↘ 10) Court deals with all issues at one sitting

The now common practice is for a challenge to be parsed into two or more modules, with the perverse consequence that issues may remain latent in the legislation or a planning application process for extended periods of time. It does not make sense that the same proposed development should spawn multiple legal challenges, but without any of the parties ever learning what range of issues in fact require correction in a fresh application or in a change to the law. The current practice leads to a substantial waste of time and money for each of the developer, the public, the decision-maker and, ultimately, the court.

↘ 11) No "double jeopardy"

Where a permission is quashed and a fresh decision is made, ABP and the developer should not face arguments that could and should have been made first time around. Again, it would be wrong to encourage persons to conceal their objections and deprive ABP of the opportunity to address their concern in the planning process. There are good examples of this rule in practice (see O'Grianna (No. 2) v. An Bord Pleanála [2017] IEHC 7, where arguments that could have been made in an earlier challenge were not allowed in the challenge to a permission granted after remittal). This should be reinforced in statute.

↘ 12) Grounds published to all parties immediately

Property Industry Ireland welcomes the practice of the Commercial Planning and SID List, in Practice Direction HC107, which requires disclosure of the application for leave to all parties, as a courtesy, before the application is made. The same practice should be adopted for all planning challenges.

A troubling feature of the ex parte procedure is that it can be several months before ABP, or the developer is alerted to the challenge. In a planning challenge of interest internationally, an ex parte application for leave was made on 14 August 2020 against the permission for the €150m Glanbia cheese factory proposed for County Kilkenny – a joint venture with a major Dutch food company. It took more than four months for the leave application to conclude on 23 November 2020 and the respondents to be formally informed of the challenge. Even then, notwithstanding a request for urgency by the developer, the matter was adjourned to February 2021. The developer was forced to accelerate the matter through the Commercial Planning and SID List of the High Court.

↘ 13) Publish consent quash orders

In 2020, ABP conceded more cases, without any contest, than ever before. Some 13 of the 24 successful challenges to SHD permission were conceded, without any contest. While the planning community can at least learn from the published judgments, where decisions of ABP were quashed, the same is not true for the substantial and increasing number of cases that are conceded, without any contest. There must be value to sharing that knowledge, in order to avoid repeated hazard.

↘ 14) Use the Planning and Environment Court

PII welcomes the proposal to establish a new Planning and Environmental Court. While the Commercial Planning and SID List of the High Court had, at least, been able to provide early outcomes for challenges of this kind, even that court process is suffering from the volume of new cases. It used to be possible to ensure a contest was heard within three months. Now, the process is a lot slower. The urgent need for additional resource to support the heavy workload of the list should have been resolved by the allocation of an additional judge to this area. However, that additional resource has recently been reallocated, without any clarity about when he can be expected to return.

It follows that any challenge to a permission granted in the Dún Laoghaire – Rathdown County Council area is abandoned to a "limbo".

For example, the challenge to the permission for 298 homes in Monkstown was listed for hearing at the end of November 2021, but was adjourned, without warning or explanation for when it might be heard instead. This specialist area of expertise requires multiple dedicated judicial resources to clear the substantial backlog of 37 permissions under challenges that remain pending before the court, the increased rate of new challenges and the wider range of challenges in the ordinary JR list.

The need for a dedicated Environment and Planning Law Court has never been greater.

↘ 15) Where a real issue is identified, government policy should be swift to respond

It is frustrating that the courts might identify an issue with planning law or practice, but there is a delay in policy seeking to rectify that issue. Some legal challenges have highlighted weaknesses in this legislation, which have potential widespread implications for all similar applications. These should be addressed as a matter of urgency, given the government's objectives to increase housing supply, as set out in the 'Housing for All' and to have a domino effect of judgements, or a range of other permissions in the pipeline, or recently decided in the case of technicalities relating to the wording of the p lanning legislation and regulations.

By way of example, in a judgment delivered 25 November 2020, the High Court gave a meaning to article 298(1)(f) of the Planning and Development Regulations 2001 (as amended) that has material consequences for every pending and future application for strategic housing development ("SHD") and very many recent SHD permissions: Balscadden Road SAA Residents Association Limited v. An Bord Pleanála [2020] IEHC 586.

The relevance of the judgment is not limited to SHD.

The same words are used in article 23(1)(f) of the Planning and Development Regulations, which applies to all ordinary planning applications. The law should be changed to ensure that the planning authority (and ABP) has a residual discretion to treat an application as valid, where some missing dimension is not considered material.

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