Circular Letter: PPL 1/2010

20th August 2010

To all County and City Managers, Directors of Services for Planning, Town Clerks, and Chief Officer, An Bord Pleanála

Planning and Development (Amendment) Act 2010

A Chairde,

I am directed by Mr. Ciarán Cuffe, T.D., Minister of State with responsibility for Planning functions, to refer to the Planning and Development (Amendment) Act 2010 (No. 30 of 2010) which was signed by the President on 26 July, 2010.

There are 3 Parts in the Act, which contains 81 sections and these are set out in the guidance note at annex 1 to this circular letter. The purpose of the guidance note is to provide an overview of the changes; it does not purport to provide a legal interpretation of the Act.

Purpose of the Act
The main purpose of Act is to amend the Planning and Development Acts 2000 to 2009 with the principal aim of supporting economic renewal and promoting sustainable development by ensuring that the planning system supports targeted investment on infrastructure by the State and by further modernising land zoning.

Strengthening Local Democracy and Accountability
The Act is driven by the over-arching ambition to strengthen local democracy and accountability, a key objective in accordance with the ongoing process of local government reform being pursued in the context of the White Paper on Local Government, by maintaining the central role of local government in the planning process. The Act also aims to ensure a closer alignment between the National Spatial Strategy, Regional Planning Guidelines, development plans and local area plans.

Core Strategy
A key element in the Act is the introduction of a requirement for an evidence-based “core strategy” in development plans which will provide relevant information as to how the development plan and the housing strategy are consistent with regional planning guidelines and the National Spatial Strategy. The location, quantum, and phasing of proposed development must be shown, as well as growth scenarios, details of transport plans, retail development and policies regarding development in rural areas. More detailed guidance on this subject will issue shortly in the form of a circular letter from Planning Systems and Spatial Policy Section.

Obligations under the Birds and Habitats Directives
The Act clarifies in planning legislation the obligations of planning authorities and developers under the Birds and Habitats Directives. The existing policy guidance on appropriate assessment (December 2009) is being updated to reflect the new provisions in the Planning and Development (Amendment) Act 2010 and will be issued shortly by the National Parks and Wildlife Service (NPWS).
Pursuant to a decision of the European Court of Justice in 2008, the Act also abolishes retention permission for developments which required environmental impact assessment, a determination in relation to EIA or an appropriate assessment. It provides, however, for a substitute consent process, in exceptional circumstances only, to allow for retrospective planning permission for development requiring EIA or appropriate assessment under the Habitats Directives. This provision is particularly directed at situations where a permission for a development, which required EIA or appropriate assessment, has been found to be defective by a court, including the ECJ. Regulations will require to be made before the substitute consent provisions can be brought into effect. In this context, a special provision is enacted in relation to quarries whereby, for a limited period only, certain quarries with legal/EIA issues may apply for a substitute consent without proving exceptional circumstances.

Quarry Developments
The provisions whereby certain quarries with EIA issues will be allowed/required to apply for substitute consent, within a nine-month period of the commencement of the relevant section, are set out in the new section 261A. The provisions are somewhat intricate and involve a public consultation procedure and possible appeal of the ruling to the Board. Draft guidance notes were circulated separately by the Department on 19th August 2010. Another important amendment in relation to quarries is that the 7-year time limit for enforcement action has been removed in the case of quarries and peat extraction: in future, it will be possible to take action to prevent the continuation of unauthorised peat extraction or quarry development.

Providing for the extension of planning permissions in certain circumstances where substantial works have not been carried out
The 2010 Act provides for the extension of permission (for a period of up to 5 years) in circumstances where substantial works have not been carried out, but there were commercial, economic or technical considerations, beyond the control of the applicant, which substantially militated against either the commencement of development or the carrying out of substantial works. Grounds for refusal of the extension are included. The previous provision is also amended by removing the possibility of a second extension of permission. However, persons currently on an extension of permission, who may have an expectation that they would be able to avail of a second extension, may apply for such an extension. Guidance notes on the application of sections 28 and 29 are set out at annex 2 to this circular letter.

Other Provisions of the Act
The other provisions of the Act also aim to:
- Improve the throughput and performance of An Bord Pleanála;
- Empower a planning authority to refuse planning permission where the applicant has previously carried out a substantial unauthorised development or has been convicted of an offence under the Planning Acts;
- Increase the requirements on planning authorities in relation to taking enforcement proceedings in respect of unauthorised development;
- Provide for cost recovery of An Bord Pleanála’s costs across all categories of project under the 2006 Strategic Infrastructure Act;
- Update penalties for offences;
- Strengthen the legal effect of Ministerial guidelines;
- Give greater flexibility to effect a wider distribution of existing development levies monies;
- Apply the powers for the Minister to issue a direction, under section 31 of the Principal Act, to local area plans (LAPs);
- Introduce a new consultative procedure in the context of the issuing of Ministerial directions, taking due account of the recommendations of the Joint Oireachtas Committee on the Environment, Heritage and Local Government in their March 2009 Report on this issue;
Provide that a planning authority may take in charge an unfinished estate in circumstances other than those currently set out (i.e. that enforcement proceedings have not been taken in 7 years) and that an authority may take in charge part but not all of an estate; and

Provide that a default decision to grant planning permission only occurs 12 weeks after the expiration of the period for making a decision, and does not happen at all in the case of projects requiring EIA/appropriate assessment.

Commencement
S1 No. 405 of 2010, which commences a number of the provisions of the Planning and Development (Amendment) Act 2010 with effect from 19th August 2010, is also attached for your attention.

It is proposed to commence, under a separate order on the 28th of September 2010, sections 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 27, 30, 31, 32, 33, 34, 35, 39, 40, 41, 43, 44, 45, 47, 48, 49, 50, 51, 52 and section 57, insofar as it relates to Part XAB (sections 177R, 177S, 177U, 177V, 177W, 177X, 177Y, 177Z, 177AA, 177AB, 177AC, 177AD, 177AE and subsections 177T(1), 177T(2), 177T(3), 177T(4), 177T(5) and 177T(6) and paragraphs (b) and (c) of subsection 177T(7)), 59, 60, 61, 62, 63, 65, 67, 72, 76, 77 and 78.

A number of other sections and related consequential amendments will commence at a later date. These include sections 38, 74, 75, 79 & 80 and section 57, insofar as it relates to Part XA and Part XAB, subsection 177T(7)(a).

Planning and Development Regulations 2010
Finally, the Planning and Development Regulations 2001 have also been amended by way of S.I. No 406 of 2010 to provide for revised procedural arrangements for the making of an application for an extension of planning permission (per sections 28 and 29 of the 2010 Act).

Any views based on practical experience in the operation of the Act would be welcomed and should be directed to the Planning Policy and Legislation Section of the Department by email at: tony.collins@environ.ie

Should you have any further queries please do not hesitate to contact either Mr. Liam Smyth (053 911 7460 / liam.smyth@environ.ie) or Mr. Tony Collins (053 911 7461 / tony.collins@environ.ie)

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George Burke
Principal
Planning Policy and Legislation

Annexes
1. Planning and Development (Amendment) Act 2010 – Explanatory Memorandum
2. Section 28 and 29: Amendment of s42 and s42A Guidance Note
PLANNING AND DEVELOPMENT (AMENDMENT) ACT 2010

EXPLANATORY NOTE

[This Note is not part of the Act and does purport to be a legal interpretation]

General

The purpose of the Act is to amend the Planning and Development Acts 2000 to 2009 with the principal aim of supporting economic renewal and promoting sustainable development by ensuring that the planning system supports targeted investment on infrastructure by the State and by further modernising land zoning.

The Act is driven by the over-arching ambition to strengthen local democracy and accountability, a key objective in accordance with the ongoing process of local government reform being pursued in the context of the White Paper on Local Government, by maintaining the central role of local government in the planning process. The Act also aims to ensure a closer alignment between the National Spatial Strategy, Regional Planning Guidelines, development plans and local area plans. A key element in the Act is the introduction of a requirement for an evidence-based “core strategy” in development plans which will provide relevant information as to how the development plan and the housing strategy are consistent with regional planning guidelines and the National Spatial Strategy. The location, quantum, and phasing of proposed development must be shown as well as growth scenarios, details of transport plans, and retail development, and policies for development in rural areas.

The Act clarifies in planning legislation the obligations of planning authorities and developers under the Birds and Habitats Directives. The Act also, pursuant to a decision of the European Court of Justice in 2008, abolishes retention planning permission for developments which required environmental impact assessment. It provides, however, for a substitute consent process, in exceptional circumstances only, to allow for retrospective planning permission for development requiring EIA or appropriate assessment under the Habitats Directives. In this context a special provision is enacted in relation to quarries whereby, for a limited period only, certain quarries with legal/EIA issues may apply for a substitute consent without proving exceptional circumstances.

The other provisions of the Act also aim to –

(i) improve the throughput and performance of An Bord Pleanála - for example, by allowing the Board to reduce its statutory quorum from 3 to 2 members in respect of making decisions on specified classes of (routine) cases;

(ii) provide for the extension of planning permission in certain circumstances where substantial works have not been carried out;

(iii) empower a planning authority to refuse permission where the applicant has previously carried out a substantial unauthorised development or been convicted of an offence under the Planning Act;

(iv) increase the requirements on planning authorities in relation to taking enforcement proceedings in respect of unauthorised development;

(v) abolish the 7 year enforcement time limit in relation to quarries and peat extraction;

(vi) provide for cost recovery of An Bord Pleanála’s costs across all categories of project under the Strategic Infrastructure Act;

(vii) update penalties for offences;

(viii) strengthen the legal effect of Ministerial guidelines;

(ix) give greater flexibility to effect a wider distribution of existing development levy monies and;
apply the powers for the Minister to issue a direction, under section 31 of the Principal Act, to local area plans (LAPs).

A new consultative procedure is also introduced in the context of the issuing of Ministerial directions, taking due account of the recommendations of the Joint Oireachtas Committee on the Environment, Heritage and Local Government in their March 2009 Report on this issue.

Provisions
There are 3 Parts in the Act, which contains 81 sections.

Part I – Preliminary and General (sections 1 and 2)

This Part contains standard legislative provisions.

Section 1 contains standard provisions relating to the title, collective citation, construction and commencement.

Section 2 is the standard interpretation section which defines relevant Acts and the Minister.

Part II – Amendment of Principal Act (sections 3 to 78)

Section 3 inserts a new section 1A into the Principal Act, which provides a table listing all Community Acts that are given effect through the Planning Acts.


Section 5 amends the current exemption in relation to forestry works by maintaining the exemptions for thinning, felling, re-planting, maintenance, etc. and for the construction of forest roads, but specifying that any road or development providing access to a public road is not exempted development and must be subject to the planning process. Section 4(1)(l) of the Principal Act is also amended to provide that land reclamation or reclamation of estuarine marsh or of callows referred to in the Land Reclamation Act 1949 would no longer be exempt. The provisions of 4(b) allow the Minister to make regulations to ensure that developments that are ordinarily exempted can be de-exempted, within specified areas if necessary, for the purpose of ensuring that any such development that could have a significant effect on a Natura 2000 site is screened for appropriate assessment.

Section 6 makes amendments to section 7 of the Principal Act which are consequential to the new Part XA (substitute consent procedure) and Part XAB (appropriate assessment of plans and proposed developments to ascertain whether, having regard to the Habitats Directive, there would be an adverse effect on a European site).

Section 7 provides for development plans to contain an evidence-based core strategy which shall provide relevant information to show that the development plan and the housing strategy are consistent with regional planning guidelines and the National Spatial Strategy 2002-2020. The core strategy shall take account of any policy of the Minister in relation to national and regional population targets and shall strengthen further the development plan as the fundamental link with national, regional, county/city and local policies. The core strategy shall also provide the policy framework for local area plans (LAPs), particularly in relation to zoning at LAP level. The
location, quantum and phasing of proposed development must be shown as well as growth scenarios, details of transport plans and retail development and policies for development in rural areas (in accordance with Ministerial guidelines). The key objective is to secure a strategic and phased approach to zoning which will facilitate infrastructure provision. Planning authorities must vary development plans not later than 1 year after the making of the relevant regional planning guidelines to provide for a core strategy within their existing development plans.

In support of the broader climate change agenda, development plans must now also contain mandatory objectives for the promotion of sustainable settlement and transportation strategies in urban and rural areas, including the promotion of measures to reduce energy demand, man-made greenhouse gas emissions and address the necessity for adaptation to climate change, having regard to location, layout and design of new development.

Section 8 provides for focusing the scope of submissions/observations on strategic issues in the preparation of the draft Development Plans. It also provides that the notification issued by a planning authority regarding the preparation of a draft development plan will indicate that children, or groups or associations representing the interests of children, are entitled to make submissions or observations.

Sections 9 and 10 provide, respectively in the case of making or varying a development plan, a requirement that the manager’s report addresses separately the issues raised by the Minister or the Regional Authority and makes appropriate recommendations on ensuring consistency between Regional Planning Guidelines and the relevant Development Plans. Only minor modifications are provided for after the amendments have been on public display and these cannot refer either to an increase in land zoned for any purpose or an addition to, or deletion from, the record of protected structures.

Section 11 makes a consequential, technical amendment to section 18 of the Principal Act on foot of section 12 of this Act, which inserted a new subsection 2B, obliging a planning authority to amend an LAP where it is no longer consistent with the objectives of the development plan.

Section 12 provides that the mandatory population threshold for preparing local area plans (LAPs) is raised from 2,000 to 5,000 persons. Notwithstanding, a local authority will also have to provide for a statutory plan for towns and villages of population between 1,500 and 5,000, but will have the flexibility to decide whether to provide for such statutory planning framework within the county development plan or a specific local area plan. Section 12 also provides that a local authority may defer the review of a local area plan for up to a further 5 years, increasing the lifetime up to a maximum life of 10 years, but only in specified circumstances. There is also provision made for the phasing of development within a LAP.

Section 13 provides for consistency of terminology used in the local area and development planning processes. In addition, prescribed bodies, including the Minister, must be notified of material amendments to draft local area plans. Only minor modifications are provided for after the amendments have been on public display and these cannot refer either to an increase in land zoned for any purpose or an addition to, or deletion from, the record of protected structures. It also provides that the notification issued by a planning authority regarding a proposal to make, amend or revoke a local area plan will state that children or groups or associations representing the interests of children are entitled to make submissions or observations.

Section 14 provides explicitly for the link between Regional Planning Guidelines (RPGs) and the National Spatial Strategy (NSS), which post-dated the enactment of the 2000 Planning and Development Act. An explicit requirement is provided for RPGs to be prepared in order to
support the implementation of the NSS. RPGs shall be set within the policy framework of the
NSS, including its population targets that are updated from time to time.

Section 15 provides for the substitution of ‘amendments’ for ‘modifications’ in section 24 of the
Principal Act, in order to ensure that, following consideration of submissions or observations on
draft Regional Guidelines, the Regional Authority will, as may be necessary, be able to make
amendments to the draft regional planning guidelines.

Section 16 provides that a development plan or a local area plan must be consistent with the
Regional Planning Guidelines in force for the area to ensure coherence between the hierarchies of
forward plans and regional and national policy.

Sections 17, 18 and 19 provide that the Regional Authority has an explicit role in the pre-draft
and the draft development plan preparation, and the variation to a development plan stages
respectively to ensure consistency between it and the Regional Planning Guidelines in force,
including informing the Minister of its views. One of the key objectives in requiring
development plans to include a core strategy is to ensure greater consistency between the NSS
and RPGs on the one hand, and city and county development plans on the other. This is of
particular importance in coordinating development objectives across local authority boundaries
(for example, within an NSS Gateway) and also in relation to strategic infrastructure within a
region.

Section 20 provides that a planning authority must demonstrate, by way of a statement when
preparing and making a draft development plan, how it has implemented the policies and
objectives of the Minister contained in guidelines issued by him under section 28 of the Principal
Act. Equally, as the case may be, planning authorities must detail the reasons why such policies
and objectives were not implemented. This should help to ensure that there is a much reduced
need for the Minister to intervene in the development plan process and use his/her powers under
Section 31 of the Principal Act.

Section 21 extends the powers for the Minister to issue a direction, under section 31 of the
Principal Act, to local area plans (LAPs). Section 21 also prescribes a new consultative procedure
where the Minister can issue a proposed direction (i.e. a draft direction) and seek views from
local stakeholders (including those of the Council) on his/her proposal before he/she makes a
final decision whether or not to formally issue a direction. The Section also provides for a
discretionary provision for the Minister to appoint an independent inspector to review the
manager’s report prepared on foot of public consultations on the proposed direction.

Section 22 provides for a new section 31A of the Principal Act to consolidate Ministerial powers
of direction for Regional Planning Guidelines (RPGs), which are already provided in the DTA
Act 2008, and ensures consistency of approach to consultations that are now being provided for in
the new Section 31 on Ministerial powers on development planning.

Section 23 amends the provisions in relation to a default decision to grant permission, where a
planning authority fails to decide a planning application in time. A default decision to grant
permission will only be deemed to be given 12 weeks after the expiration of the time for deciding
the application, instead of the last day for deciding, as previously. Also, if a Planning
Authority fails to decide the planning application within the statutory period the planning
authority must pay to the applicant a sum of 3 times the application fee (subject to a maximum of
€10,000). Default decision to grant permission will not apply to applications for development
which require environmental impact assessment or appropriate assessment under the Habitats
Directive: instead, higher fines will arise in such a case.
Retention permission will no longer be permissible in circumstances where the projects should have been assessed in accordance with the EIA or Habitats Directives before development commenced. Developments which would not have required EIA or appropriate assessment will still be permitted to apply for retention permission.

Section 24 amends Section 35 of the Principal Act to allow a planning authority to refuse permission where the applicant has carried out a substantial unauthorised development (which could be a development with no permission whatsoever) or has been convicted of an offence under the Planning Acts, subject to certain conditions.

Section 25 amends section 37A of the Principal Act to afford the applicant the choice to make an application for a proposed strategic infrastructure development within a strategic development zone in accordance with section 37A [i.e. the strategic infrastructure consent process] or under section 34 of the Principal Act.

Section 26 provides for the extension of cost recovery to pre-application, scoping requests for Environmental Impact Assessment for strategic infrastructure development cases under the Seventh Schedule of the Principal Act in addition to cost recovery for cases that proceed to full application and determination by An Bord Pleanála.

Section 27 amends section 38 of the Principal Act to prescribe, for avoidance of doubt, that a planning authority is authorised to display planning application documentation on its website. A further amendment provides that contact telephone numbers and e-mail addresses provided by, or on behalf of, the applicant will not have to be published.

Sections 28 and 29 provide for the extension of permission (for a period of up to 5 years) in circumstances where substantial works have not been carried out, but there were commercial, economic or technical considerations, beyond the control of the applicant, which substantially militated against either the commencement of development or the carrying out of substantial works. Grounds for refusal of the extension are included. The previous provision is also amended by removing the possibility of a second extension of permission. However, persons currently on an extension of permission, who may have an expectation that they would be able to avail of a second extension, may apply for such an extension.

Section 30 provides for a wider definition of “public infrastructure and facilities” to reflect newer infrastructural requirements, including in particular the provision of school sites. Having regard to the Sustainable Communities Agenda and other policy developments, such as the Developing Areas initiative, the definition of “public infrastructure and facilities” is re-defined to allow development contributions to be levied and used to fund such infrastructure as school sites, broadband provision, and flood relief works. The defined timeframe outlined in section 48(12)(c) of the Principal Act is also consequently amended to take account of the fact that under section 28, an applicant may, in certain circumstances, avail of an extension to his/her planning permission. This amendment also relates to the refund (with interest) of special development contributions charged under section 48(2)(c) of the Principal Act to planning applicants, where works on the public infrastructure and facilities which were to benefit the proposed development were not carried out within a defined timeframe.

Section 31 provides for the possibility of a supplementary development contribution scheme to help finance the provision of new schools that might benefit a particular community or area. The amendment also introduces a new subsection (1A) which defines public authority and for the
avoidance of doubt, subsection 49(1)(b) is amended to clearly allow for the payment of a contribution for a service or project to be provided in the future.

Section 32 inserts a new section 50A on judicial review procedure into the Principal Act and removes the requirement to notify all other parties at the outset but introduces a judicial discretion whereby the judge can proceed to hear the leave stage on an ex parte basis or decide to notify all the parties and hear the leave stage on an inter partes basis. The amendment also collapses a two-stage judicial review process into a single court sitting – the application for leave to apply for judicial review also becomes the actual judicial review hearing, if all parties agree or the Court so directs.

Section 33 inserts a new section 50B into the Principal Act and introduces a provision which will mean that, in relevant judicial review cases, parties will only be responsible for their own legal costs. They will not, therefore, generally be exposed to an award of costs against them irrespective of the outcome of the case, subject to certain discretions of the court, e.g. a frivolous case or contempt of court.

Section 34 amends section 57 of the Principal Act to clarify that exemptions given in the planning regulations do not apply to works to a protected structure or proposed protected structure.

Sections 35 and 36 provide a similar amendment in respect of works in an architectural conservation area or an area of special planning control.

Section 37 amends section 93 of the Principal Act by deleting the definition of “housing strategy”.

Section 38 amends section 96 to ensure that delivery options available under Part V fully reflect the wider restructuring of the social housing investment programme. In addition to the various options under Part V, including the transfer of land or of houses on a permanent basis, or in some cases, the payment to a planning authority of a financial contribution, authorities will be able to take houses on a temporary basis either under the Rent Assistance Scheme or the long-term leasing initiative.

Sections 39, 40, 41, 43 and 44 amend sections 104, 106, 108, 135, and 144 of the Principal Act to enhance the efficiency and performance of An Bord Pleanála. Section 39 empowers the Minister to urgently appoint additional members to the Board, on a short-term basis, without a Ministerial Order and empowers the Minister to reduce its membership, where appropriate. Section 40 empowers the Minister to appoint a person with satisfactory experience, competence or qualifications relevant to environmental/sustainability issues as an ordinary member to An Bord Pleanála. Section 41 amends section 108 of the Principal Act by providing the Board of An Bord Pleanála with the discretion to reduce the quorum for meetings from 3 to 2, on the recommendation of the Chairperson or Deputy Chairperson that such a reduction is necessary to ensure the efficient discharge of the business of the Board. Such a recommendation may not be made in cases where the higher quorum is necessary. If a meeting where a quorum is 2 is evenly divided on a vote, the matter shall be referred to a meeting where the quorum is 3. Section 43 amends section 135 of the Principal Act to optimize the agenda of issues which may be considered during oral hearings of all cases before the Board. Section 44 amends section 144 to expand the list of matters in respect of which the Board can determine and charge a fee.

These amendments combined aim to improve the throughput of An Bord Pleanála and secure a higher compliance rate.
Section 42 is a technical amendment.

Section 45 amends section 153 of the Principal Act to increase the enforcement requirements on a planning authority by providing that, where they have established that unauthorised development which is not trivial or minor is being carried out, and the person/developer concerned has not moved to remedy the situation, the planning authority must take further enforcement action unless there are compelling reasons for not doing so.

Section 46 provides for an increased maximum fine of €5,000 for a summary offence under the Planning Acts and for an increase to €1,500 for the maximum daily fine for a continued offence.

Sections 47 and 48 amend sections 157 and 160 of the Principal Act to remove the 7-year limit, going forward, for enforcement and the seeking of an order in respect of quarries and peat extraction because of the potential ongoing damaging nature of these activities.

Section 49 is a technical amendment on foot of the insertion into the Principal Act of subsection 34(12C) by section 23 of this Act.

Section 50 amends the wording of section 168 of the Principal Act by clarifying that, only where the draft scheme is prepared by a development agency other than the relevant local authority, shall it be submitted to the planning authority.

Section 51 amends section 169 of the Principal Act to ensure that any proposed amendments (by the Planning Authority) to a draft Strategic Development Zone Scheme are screened for strategic environmental assessment and appropriate assessment. However, the power of the Board to make significant modifications to a draft scheme is being curtailed, on the basis that any such modifications should be made through a public consultation followed by a decision by elected members. Where a variation in a draft planning scheme, if adopted, may have an impact on a European site, an appropriate assessment, pursuant to Article 6(3) of the Habitats Directive, is required for compliance with that Directive. This is a matter of transposition of the Habitats Directive.

Section 52 amends subsection 170(2) of the Principal Act to ensure that proposed developments must be consistent with the planning scheme and comply with EIA and appropriate assessment requirements.

Section 53 provides, for the avoidance of doubt, a definition in planning legislation of an Environmental Impact Assessment in line with the wording of the Directive.

Section 54 amends the existing provisions of Part X (Environmental Impact Assessment) of the Principal Act by the addition of a definition of EIA in accordance with the EIA Directive and specific requirements that environmental impact assessment must be carried out where appropriate prior to any grant of development consent.

Section 55 is a consequential amendment on foot of the definition of the EIA Directive.

Section 56 provides, firstly, for the avoidance of doubt, that the EU Directive to which section 176 of the Principal Act relates is the EIA Directive and, secondly, the amendment makes it obligatory that regulations be made in order to give effect to the Directive. Regulations under 176 require the approval of both Houses of the Oireachtas.
Section 57 provides for the insertion of Parts XA and XAB into the Principal Act. New Part XA provides for a substitute consent process to allow in exceptional circumstances for retrospective planning permission, for development which requires assessment under the EIA or Habitats Directives. Only An Bord Pleanála will be authorised to grant a “substitute consent” and this will only arise where a planning permission has been found defective by a court or where some exceptional circumstances exist such that An Bord Pleanála considers it reasonable to allow an opportunity for the regularisation of the development.

The new Part XAB clarifies in planning legislation the obligations of planning authorities and developers under the Birds and Habitats Directives. In essence, there is no new law here. Part XAB stems from the provisions of Ireland’s obligations under the 1992 Habitats Directive. This Part will replace the provisions of the 1997 European Communities (Natural Habitats) Regulations, which was the original transposing instrument, in as far as they relate to the planning and development system. The Part also addresses the gaps identified by the European Court of Justice in Ireland’s original transposition, relating to land-use plans.

Section 58 amends section 179 of the Principal Act to clarify the type of work to a protected structure in respect of which the Minister can make regulations requiring that they have to go through a public consultation process.

Section 59 amends section 180 of the Principal Act which provided that a housing/residential estate would be taken in charge by the planning authority, in certain circumstances, on foot of a request from a majority of the owners or occupiers. The Law Reform Commission Report on Multi-Unit Developments recommended that it should be owners of units only who would have the right to determine whether the estate is taken in charge. This amendment implements the Law Reform Commission’s recommendation. The amendment also provides that a planning authority may take in charge an unfinished estate at any time after the expiration of the planning permission, in situations where enforcement actions have failed.

Sections 60, 61, 62, 63, are consequential technical amendments to comply with the new appropriate assessment provisions introduced in Part XAB.

Section 64 and 66 amends section 182B and 182D of the Principal Act, respectively, to provide powers for An Bord Pleanála to recover costs (pre-application and determination) in respect of applications for electricity transmission lines and strategic gas infrastructure.

Section 65 amends section 182C of the Principal Act to provide that the Board must determine following consultations under section 182E, that a proposed development satisfies the criteria set out in 37A prior to acceptance of the application for approval as a strategic gas infrastructure development. This amendment also ensures that An Bord Pleanála will request the Commission for Energy Regulation (CER) to make observations in relation to all strategic gas infrastructure development and to considerably strengthen the consultation process by ensuring that the Board must have full regard to the technical safety advice and/or recommendations furnished by the CER for such projects. Where the Board makes a decision that materially differs from the assessment or determination of the CER, the Board will give reasons for so doing.

Section 67 amends section 191 of the Principal Act and is a consequential amendment to restrict or rule out compensation on foot of a zoning decision in an LAP which, under a new subsection 19(6), inserted into the Principal Act, provides that there is to be no presumption in law that any land zoned in a particular LAP is to remain so zoned in any subsequent local area plan.
Section 68 amends section 212 of the Principal Act to extend the scope of the powers of planning authorities to empower them to take action to secure the creation, management, restoration or preservation of any site of scientific or ecological interest.

Section 69 amends section 217 of the Principal Act in relation to the prescribed time period for approved Compulsory Purchase Orders but will not now be commenced and will be repealed in due course as the required provision now stands part of a separate Act.

Section 70 is a technical amendment to section 220 of the Principal Act to specifically refer to the Environmental Assessment Directive as opposed to the ‘Council Directive’.

Section 71 amends section 248 of the Principal Act by the deletion of the definition of “electronic form”, as the definition has been inserted by section 4 of the Act.

Section 72 provides for the holiday time period as it already applies to the development management process timeframes to also be applicable to the development planning process timeframes.

Section 73 amends section 253 of the Principal Act to remove any doubt that the powers of entry extend to the power to enter onto land where there might not be any building e.g. in the extractive industry, for the purposes of any of the enforcement provisions of the Planning Acts.

Section 74 amends section 261 of the Principal Act, which introduced a once-off system of registration for all quarries, except those for which planning permission was granted in the last 5 years. The amendment provides that, notwithstanding any other provision in the Principal Act, failure to comply with conditions imposed on a pre-1964 quarry will render the quarry unauthorised, so that a planning authority can take enforcement action. It is also being provided that failure to cease operations, having been refused permission pursuant to an application under s.261(7), or failure to abide by conditions attached to a granted permission under subsection (7), will render the development unauthorised. S.261(8) introduces compensation for conditions attached to a pre-1964 quarry.

Section 75 inserts a new section 261A into the Principal Act which provides for a substitute consent process for certain quarries. The planning authority will have to examine all quarries in its area in the 9 months following the commencement of this section, and

- make a determination as to whether environmental impact assessment/appropriate assessment were required under the relevant directives but not carried out, and
- make a decision as to the planning status of each quarry.

Where environmental impact assessment/appropriate assessment were required but not carried out and where the quarry is post-1964 with no permission, or failed to register, the planning authority will serve an enforcement notice requiring the quarry to close. Where the quarry commenced pre-1964 or obtained a permission it may apply for substitute consent. Public participation will be a part of the planning authority’s decision-making process and the planning authority’s decisions/determinations may be referred to an Bord Pleanála for review.

Section 76 amends section 262 of the Principal Act to bring regulations under section 96 of the Principal Act – the regulations for determining the additional discount to be given under a lease or RAS arrangement – under section 262(4) so that these regulations will be subject to Oireachtas scrutiny before they can be made.

Section 77 amends the first schedule of the Principal Act to provide for the inclusion in development plans of objectives for:
1) the carrying out of flood risk assessment as part of the control and regulation of development in areas at risk of flooding; and
2) to reserve land for allotments, and regulating, promoting, or controlling the provision of allotments for individual or community use.

The section also retains the local authority’s discretion to include an objective in its Development Plan in relation to preserving any public right of way but clarifies that such an objective relates to public rights of way other than those identified under a Development Plan objective for preservation under section 10(2)(o).

Section 78 amends the Seventh Schedule of the Principal Act to provide that a windfarm with more than 25 turbines or having a total output greater than 50 megawatts will now fall within the strategic infrastructure provisions of the Principal Act. Paragraph 2 of the Seventh Schedule is amended to expand upon the current definition of a ‘harbour or port installation’ to include harbour/port related facilities amongst the existing classes of projects for which the strategic consent procedure applies. An additional paragraph (4) is inserted into the Seventh Schedule setting out the classes of health infrastructure developments for which the strategic consent procedure applies.

Part III – Amendment of certain Acts (sections 79 to 81)

Sections 79 and 80 are consequential amendments to section 99F of the Environmental Protection Agency Act 1992, and Section 54 of the Waste Management Act 1996, required as a consequence of the provision of a new type of planning consent in the Act – the substitute consent provisions of Part XA.

Section 81 amends the Transport (Railway Infrastructure) Act 2001 to provide An Bord Pleanála with powers to recover costs (pre-application and determination) in respect of applications for railway orders.

An Roinn Comhshaoil, Oidhreachta agus Rialtais Áitiúil.
Liúnasa, 2010
Section 28 and Section 29: Amendment of section 42 and section 42A
Guidance Note

Section 28 of the Act replaces section 42 of the 2000 Act with a new provision. The principal change is to extend the grounds on the basis of which the duration of a planning permission may be extended.

Subsection (1)
Subsection (1) essentially repeats the provisions of the former subsection (1) which provided that a planning authority must extend the duration of a permission where an application is made to it in accordance with the relevant regulations within the duration of the permission, where the authority is satisfied that substantial works have been carried out within the duration of the permission and that the development will be completed within a reasonable time.

However, a new subparagraph [subparagraph (1)(a)(ii)] has been added to the effect that a planning authority shall also extend a permission where an application is made to it in accordance with the relevant regulations within the duration of the permission, where the authority is satisfied that there were commercial, economic or technical considerations, beyond the control of the applicant, which substantially militated against either the commencement of development or the carrying out of substantial works.

In relation to considerations of a commercial or economic nature, whether these are advanced in relation to large developments or smaller developments (including single houses) it is not considered necessary for planning authority to seek evidence as to the personal financial or commercial situation of the applicant. The planning authority may base its decision on matters such as relevant national and local conditions affecting the property and development market or availability of credit, having regard to e.g.

- Data published by official agencies or independent research bodies such as the ESRI relating to economic growth, employment rates, availability of credit etc. at national level, and/or
- Local property market data, such as the existence of a high level of vacant or unsold property comparable to the type of development for which the permission was granted.

Where considerations of a technical nature are advanced, the applicant should be required to provide sufficient evidence to the planning authority as to the nature and extent of such technical considerations. Such considerations will be specific to the type of development for which the permission was granted. Perhaps the most common example in recent years of developments delayed by technical considerations has been wind farms, where either scarcity of steel turbines, or delays in obtaining grid connections, significantly limited the ability of developers to complete permitted developments within the lifetime of the permission.

It will be noted that extension on the grounds of economic, technical or commercial considerations is subject to a number of conditions. The planning authority must ascertain whether objectives in the development plan or regional planning guidelines have changed since the permission was granted, and if they have, it must be certain that the development for which the extension is sought is still consistent with the proper planning and sustainable development of the area, having regard to such changes. Similarly the authority needs to consider whether, having regard to statutory guidelines issued by the Minister (for instance, the 2009 Flood Risk Management Guidelines) the development would not now be considered to be inconsistent with proper planning and sustainable development of the area. Finally, the authority needs to ensure
that, when the planning application was being considered originally, an environmental impact assessment, and/or an assessment as to possible adverse effects on the integrity on a European site were carried out, if such were required.

Subsection (2)
Subsection (2) is a new provision which permits a planning authority to attach new conditions or to vary or add to conditions previously attached in relation to the giving of security/bonds.

Subsection (3)
Subsection (3) corresponds to the former subsection (2) and deals with the time limit for dealing with the application for extension by the planning authority. A significant change has been made here in that the provision regarding a default decision to extend a permission has been removed. This has been replaced by a provision making it an objective of the planning authority to make its decision within the relevant 8-week period.

Subsection (4)
Subsection (4) is a new provision providing that a permission will only be extended once by a planning authority (see subsection (7), however).

Subsection (5)
Subsection (5) repeats the provisions of the former subsection (4) and provides for the entry of details onto the planning register.

Subsection (6) repeats the provisions of the former subsection (5).

Subsection (7)
Subsection (7) provides that, in the case where a planning authority has previously extended a permission prior to the coming into operation of the new section and an application to further extend the period is made within the period of the extension, the planning authority may further extend the period subject to the requirements of the subsection (same as previous requirements re further extensions). While the possibility of second extensions of permissions is removed going forward, it is considered reasonable to allow persons currently on an extension, who might have had a reasonable expectation of a further extension, the opportunity to apply for such further extension.

Regulations
The Planning and Development Regulations 2010 came into operation the same day as the amended S.42 was commenced. These amend the existing provisions to provide that, where an application is made on the basis of commercial, technical or economic circumstances, information regarding those circumstances must be submitted as part of the application and, obviously, information regarding substantial works completed will not be required in such a case. The Regulations also cover applications made by NAMA under S.42A. The Regulations apply to all applications under S.42 or S.42A made after the commencement of these sections.

Applications under section 42 on hands at the time of commencement.
While the Act is not specific as to how applications under S.42 on hands at the date of commencement of the new provision should be dealt with, the Department’s policy is that the benefit of the new provisions should be extended to as many people as possible as quickly as possible and therefore the Department recommends that the new provisions should be applied to applications on hands, as follows.
Where the planning authority is considering an application and considers that the application would fall to be refused if substantial works having been carried out was the only criterion, it is suggested that the planning authority contact the applicant immediately and inform him or her that the new provision has come into operation and that it is open to him/her to make a case for extension on the basis of the new provision in S.42(1)(a)(ii)(I). Such a case should be made in writing as soon as possible and the planning authority may then consider whether the permission should be extended under the provisions of the new S.42(1).

An implication of the new provisions applying immediately to all applications, including those made under the old provisions, would be that the provisions in relation to the mandatory 8 week deadline in the old provisions would cease to apply on the enactment of the new provisions. However, in order to err on the side of caution, it is recommended that applications received before the commencement of the new provisions, be decided within the mandatory 8 weeks.

**Section 42A**

A new section 42A was inserted into the Planning Act by the NAMA Act 2010. This was based on an earlier version of the new S.42, and it has now been amended by section 29 of the Planning and Development (Amendment) Act 2010 to bring it into line with the final S.42. The essential difference between it and S.42 is that it contains an additional provision at subsection (7) providing that in relation to permissions expiring between 1 January 2009 and 31 December 2011, NAMA may apply to extend the duration of a permission at any time within 2 years of the expiry of the permission.