

**GENERAL SCHEME
OF
HOUSING AND PLANNING AND DEVELOPMENT BILL 2019**

ARRANGEMENT OF HEADS

PART 1

PRELIMINARY AND GENERAL

Head 1: Short title, construction, collective citation and commencement

Provide that:

- (1) This Bill may be cited as the Housing and Planning and Development Bill 2019.
- (2) This Bill and the Planning and Development Acts 2000 to 2018 may be cited together as the Planning and Development Acts 2000 to 2019 and shall be read together as one.
- (3) This Bill shall come into operation on such day or days as the Minister for Housing, Planning and Local Government may appoint by order or orders either generally or with reference to any particular purpose or provision and different days may be so appointed for different purposes and different provisions.

Explanatory note

This Head contains the standard provisions about short title and collective citation for a listing of acts included or previously included in the collective citation.

It also provides for the coming into operation of the provisions of the Act. It will allow different provisions and any consequential repeals to be brought into operation on different days.

Head 2: Interpretation

Provide that:

In this Bill -

“Act of 2000” means the Planning and Development Act 2000;

“consumer price index” means the All Items Consumer Price Index Number compiled by the Central Statistics Office and references to the consumer price index number relevant to any financial year are references to the consumer price index number at such date in that year as is determined by the Minister with the consent of the Minister for Finance;

“Minister” means Minister for Housing, Planning and Local Government;

Explanatory note

This is a standard provision to set out definitions and interpretations for terms used in this Bill.

PART 2

REFORM OF THE JUDICIAL REVIEW PROVISIONS OF THE ACT OF 2000

Head 3: Specific points in time for initiating judicial review challenges and alleged deficiencies

Provide that:

Section 50 of the Act of 2000 be amended to provide that judicial review challenges –

- (i) shall only be initiated after the making of a planning determination in relation to a proposed development by An Bord Pleanala, and
- (ii) may not be sought in respect of an alleged deficiency falling within any of the following categories –
 - (a) clerical or typographical errors in the order or determination which is sought to be quashed,
 - (b) unintentional errors or omissions in the order or determination,
 - (c) text, or an omission of text, which has the effect that the determination or order as issued does not on its face accurately express the determination or order as intended,

unless it can be shown that the applicant had previously applied for rectification of the deficiency concerned and had wrongly been refused that relief.

Explanatory note

There is presently no provision in the Planning and Development Act 2000, as amended (the 2000 Act), specifying the time(s) that planning cases can be challenged by way of judicial review. In this regard, there have been cases where judicial review challenges have been lodged before a development consent decision has been made by a planning authority or An Bord Pleanala i.e. when the planning application was still under consideration.

This Head introduces a new provision in section 50 of the 2000 Act under which the right to initiate a judicial review challenge will be restricted to decisions determined by An Bord Pleanala. This will ensure that if a person wishes to challenge a decision of a planning authority, s/he will be required to firstly appeal the decision to An Bord Pleanala. In effect, all possibilities of administrative appeal in relation to a planning case must be exhausted before a judicial review challenge can be initiated. In the case of planning applications submitted directly to An Bord Pleanala – in respect of strategic infrastructure and strategic housing developments – a judicial review challenge will not be able to be initiated until after the decision on the application has been made by the Board.

This is in line with the provisions of article 11.2 of the EIA Directive which gives effect in EU law to the requirements of the UN Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) and which provides that “Member States shall determine at what stage the decisions, acts or omissions may be challenged”.

This Head further proposes that section 50 of the Act be amended to provide a judicial review may not be sought in respect of certain alleged deficiencies in an order or determination which is sought to be quashed - i.e. clerical or typographical errors, unintentional errors or omissions etc – unless it can be shown that the applicant has previously applied for rectification of the deficiency and was wrongly refused that relief.

Head 4: Bringing of judicial review proceedings including standing rights

Provide that:

(1) Section 50A(2) of the Act of 2000 be amended as follows:

“(2) An application for section 50 leave shall be made by motion, on notice (grounded in the manner specified in the Order in respect of an *ex parte* motion for leave) –

- (a) If the application relates to a decision made or other act done by a planning authority or local authority in the performance or purported performance of a function under this Act, to the authority concerned and, in the case of a decision made or other act done by a planning authority on an application for permission, to the applicant of the permission where he or she is not the applicant for leave,
- (b) If the application relates to a decision made or other act done by the Board on an appeal or referral, to the Board and each party or other each party, as the case may be, to the appeal or referral,
- (c) If the application relates to a decision made or other act done by the Board on an application for permission or approval, to the Board and to the applicant for permission or approval where he or she is not the applicant for leave,
- (d) If the application relates to a decision made or other act done by the Board or a local authority in the performance or purported performance of a function referred to in section 50(2)(b) or (j), to the Board or the local authority concerned, and
- (e) to any other person specified for that purpose by order of the High Court.”.

(2) The “substantial grounds” test that must be satisfied under section 50A(3)(a) of the Act of 2000 in order for the Court to grant leave to apply for judicial review be amended to require that, in addition to being satisfied that there are substantial grounds for challenging the decision or act concerned and contending that it is invalid or ought to be quashed, the Court must also be satisfied that the application has a reasonable prospect of success.

(3) The “sufficient interest” test that must be satisfied under section 50A(3)(b)(i) of the Act in order for the Court to grant leave to apply for judicial review be amended to refer to the term “substantial interest”, and to require that an applicant shall -

- (a) be directly affected by a proposed development in a way which is peculiar or personal, and
- (b) have made submissions or observations in relation to the planning application to the proposed development to the planning authority or An Bord Pleanala, or relating to an appeal made to An Bord Pleanala.

(4) Such prior participation requirement in subsection (3)(b) may be waived where –

- (i) there were good and sufficient reasons for not making objections, submissions or observations, as the case may be, or

(ii) there has been a procedural breach in the decision-making process.

(5) The NGO “automatic standing rights” criteria, as provided for in section 50A(3)(b)(ii) of the Act, be amended as follows –

(a) the minimum time requirement applicable to NGOs in relation to their establishment and pursuit of environmental protection objectives be increased from 12 months to 3 years preceding the date of application for section 50 leave;

(b) insert new requirements that in order for an NGO to have automatic standing rights in this regard, it shall –

(i) have a minimum of [100] affiliated members;

(ii) have pursued its environmental protection objectives otherwise than for profit;

(iii) have a legal personality involving the possession of a constitution and/or rules of association; and

(iv) the area of environmental protection that their aims and objectives relate to shall be relevant to the subject matter of the leave application in question.

Explanatory note

Section 50A(2) of the Act of 2000 currently provides that the format of leave application for judicial review shall be made by “motion *ex parte*” - i.e. where the defendant does not receive notice of the motion and therefore generally has no involvement in the leave application process – with provision also made enabling the Court to convene a leave hearing with other participants if it considers this to be appropriate. Practical experience of these *ex parte* motion procedures indicates that the latter element of these provisions – i.e. giving the defendant or other parties the opportunity to participate in, and input to, the leave application hearing - is rarely used with the majority of motions being granted leave to proceed to a full substantive hearing in the absence of any involvement by other concerned participants.

Subsection (1) of this Head proposes to replace these “motion *ex parte*” arrangements by reverting to the pre-existing provisions (removed in 2010) and providing that judicial review leave applications shall instead be made by “motion on notice”, thereby enabling the notice party (such as a planning authority or An Bord Pleanála) to contest a leave application in cases where, having considered the grounds for judicial review, it considers that the application is frivolous, lacking in substance etc, thereby helping to avoid unnecessary judicial reviews and the associated time and legal expenses involved for all participants. The adoption of the “motion on notice” approach would provide the opportunity to the notice party (An Bord Pleanála, a planning authority or Government Department) to submit counter arguments to such grounds, thereby enabling the Judge to filter the grounds submitted and where they decide to grant a leave application, confine the judicial review to the key substantive issues, again saving Court time and unnecessary expense for all participants.

Section 50A(3)(a) and 50A(3)(b)(i) of the Act currently provide that the Court shall not grant leave to apply for judicial review unless it is satisfied that –

- (i) there are “substantial grounds” for challenging the decision or act concerned and contending that it is invalid or ought to be quashed, and
- (ii) the leave applicant has “sufficient interest” in the matter.

Subsections (2)-(4) of this Head propose to strengthen the standing rights requirements to bring judicial review proceedings in planning cases i.e. the “substantial grounds” and “sufficient interest” tests that must be satisfied.

With regard to the “sufficient interest” test, this Head proposes that the wording be strengthened to refer to the applicant being required to have a “substantial interest” in the case. It is further proposed to require that the applicant must be directly affected by a proposed development in a way which is peculiar or personal, while also re-introducing the requirement (removed in 2006) that the applicant must have previously participated in the planning process in relation to the case in question, subject to certain reasonable exclusions i.e. where there were good and sufficient reasons for such previous non-participation or where there has been a procedural breach in the decision-making process. This is aimed at minimising situations where persons can “at the last minute” lodge a judicial review application without having had any previous involvement in the planning case in question, either at local planning authority or An Bord Pleanála level, without good reason.

Subsection (5) of this Head amends and supplements section 50A(3)(b)(ii) of the Act in relation to the NGO automatic standing rights to bring judicial review challenges as follows:

- (a) it extends the minimum time period that NGOs must have pursued their environmental protection aims or objectives from the current 12 months to 3 years;
- (b) it requires qualifying NGOs to have a minimum number of [100] affiliated members. No such minimum requirement exists at present;
- (c) such NGOs must pursue their environmental protection objectives otherwise than for profit. This is to ensure that judicial review challenges are not brought forward by bodies or organisations engaged in competitive or economic activity. This is standard practice in other jurisdictions;
- (d) they shall have a distinct legal personality involving the possession of a constitution and/or rules of association for at least [3] years. This is standard practice in other jurisdictions; and
- (e) the grounds of a leave application made by a NGO must relate to the environmental protection aims and objectives of the NGO in question.

These are fairly standard minimum requirements in most other jurisdictions.

Head 5: Consequential amendments to section 37 of the Act

Provide that:

Consequential to the amendments to section 50A(3)(b)(ii) of the Act in Head 4, make appropriate amendments to section 37 (4)(d) to (f) of the Act relating to the entitlement of NGOs to make appeals to An Bord Pleanala:

- (a) extend the minimum time period that NGOs must have pursued their environmental protection aims or objectives from the current 12 months to 3 years;
- (b) introduce new requirements that NGOs shall also –
 - (i) have a minimum number of [100] affiliated members,
 - (ii) pursue their environmental protection objectives otherwise than for profit, and
 - (iii) have a legal personality involving the possession of a constitution and/or rules or articles of association;

Explanatory note

Consequential to the amendments in Head 4 relating to the automatic standing rights of NGOs to bring judicial review proceedings in respect of planning cases requiring the submission of an environmental impact assessment report (EIAR), similar amendments are required to be made to the NGO criteria in section 37 of the Act of 2000 relating to the entitlement of NGOs to make appeals to An Bord Pleanala in respect of similar type planning cases.

Accordingly, in order to ensure consistency between the respective provisions relating to NGOs, this Head makes appropriate amendments to section 37(4)(d)-(f) of the Act to provide that NGOs entitled to make appeals to An Bord Pleanala in respect of planning cases requiring the submission of an EIAR shall comply with specific requirements in relation to having pursued their environmental objectives for a minimum time period, otherwise than for profit and minimum membership numbers; having a legal personality possessing a constitution and/ or articles of association; and requiring that the grounds of leave application made by a NGO must relate to the environmental protection aims and objectives of the NGO in question.

Head 6: Special legal costs rules

Provide that:

The special legal costs rules in section 50B(2)-(4) of the Act of 2000 (“each party to the proceedings, including the notice party, shall bear its own costs”) relating to judicial reviews of decisions, actions, omissions or failures to take action pursuant to laws giving effect to the Environmental Impact Assessment (EIA) Directive, the Strategic Environmental Assessment (SEA) Directive, the Integrated Pollution Control (IPC) Directive and the Habitats Directive be amended and replaced by new legal cost capping arrangements as follows:

- (1) Notwithstanding anything contained in Order 99 of the Rules of the Superior Courts (S.I. No 15 of 1986) and subject to the following subsections, in proceedings to which this section applies, an applicant or defendant in a challenge may not be ordered to pay costs exceeding the amounts in subsections (2) to (4), or as varied in accordance with subsections (5) to (9).
- (2) For an applicant, the amount is –
 - (a) [€5,000] where the applicant is claiming only as an individual and not as, or on behalf of, a business or other legal person;
 - (b) [€10,000] in all other cases.
- (3) For the defendant, the amount is [€40,000].
- (4) In proceedings with multiple claimants or multiple defendants, the amounts payable in subsections (2) or (3), subject to any direction of the Court under subsections (5) to (9), apply in relation to each such applicant or defendant individually and may not be exceeded, irrespective of the number of receiving parties.
- (5) The Court may vary the amounts under subsections (2) to (4) or may remove altogether the limits on the maximum costs liability of any party to the proceedings.
- (6) The Court may vary such an amount or remove such a limit only if satisfied that –
 - (a) to do so would not make the costs of the proceedings prohibitively expensive for the applicant, and
 - (b) in the case of a variation which would reduce an applicant’s maximum costs liability or increase that of a defendant, without the variation the costs of the proceedings would be prohibitively expensive for the applicant.
- (7) Proceedings are to be considered to be prohibitively expensive for the purpose of these provisions if their likely cost (including any Court fees which are payable by the applicant) either –
 - (a) exceed the financial resources of the applicant; or

- (b) are objectively unreasonable having regard to –
 - (i) the situation of the parties;
 - (ii) whether the claimant has a reasonable prospect of success;
 - (iii) the importance of what is at stake for the applicant;
 - (iv) the importance of what is at stake for the environment;
 - (v) the complexity of the relevant law and procedure; and
 - (vi) whether the claim is frivolous.

- (8) When the Court considers the financial resources of the applicant for the purposes of these provisions, it must have regard to any financial support which any person has provided or is likely to provide to the applicant.

- (9) A hearing (or any part of it) in relation to costs under these provisions shall be in private if it involves confidential information (including information relating to personal financial matters) and publicity would damage that confidentiality.

- (10) The Minister may by order/ regulations vary the amounts specified in subsections (2) and (3) having regard to changes in the consumer price index between the financial year in which any such variations are being made and the financial year in which this Act is passed.

Explanatory note

Article 9(4) of the UN Convention on Access to Justice, Public Participation in Decision-Making and Access to Justice in Environmental Matters (the Aarhus Convention) requires that legal challenges of relevant acts, decisions or omissions shall be “not prohibitively expensive”. Article 11(4) of the EU EIA Directive gives effect to this requirement in the EU.

Ireland has transposed the “not prohibitively expensive” rule in relation to judicial reviews through section 50B(2) of the Act of 2000 by adopting the “each party shall bear their own costs” approach. This effectively means that where an applicant wins the legal challenge, s/he is entitled to his/her legal costs from the losing party (the defendant). However, where the applicant loses the challenge, s/he will not be fixed with the costs of the defendant, just their own costs. These arrangements can in practice result in applicants not being exposed to any risks or costs arising from the initiation of planning-related judicial reviews i.e. –i.e. where their legal representative agrees to operate on a no foal/no fee basis – thereby facilitating the taking of greater numbers of judicial reviews in the planning area in Ireland than might otherwise be the case, with consequential knock-on implications for project

delays, including in respect of projects of national or regional importance such as strategic infrastructures developments.

Against this background, this Head proposes to amend the existing special legal costs rules in section 50B(2) of the Act of 2000 by introducing new legal cost capping arrangements which, in the case where an applicant loses a legal challenge, will allow for the possibility for the defendant (i.e. a local authority or An Bord Pleanála) to recover at least some element of the legal costs incurred in defending the challenge from the applicant.

Under these cost capping arrangements, an applicant may not be ordered to pay costs exceeding - (a) [€5,000] where s/he is taking action as an individual and not as, or on behalf of, a business or other legal person; and (b) [€10,000] in all other cases. Furthermore, a defendant may not be ordered to pay more than [€40,000] towards the legal costs of the leave applicant. In effect, an unsuccessful applicant will have his/ her costs' exposure capped at [€5,000] while the costs recoverable by a successful applicant from a defendant will be capped at [€40,000].

These revised arrangements are designed to provide a reasonable and proportionate balance in relation to the awarding of costs in respect of both applicants and defendants, while – having regard to the relevant UN and EU requirements - also ensuring that they are not prohibitively expensive in individual cases, where for instance the applicant may have limited means. In the latter scenario and in the interests of providing the necessary reasonableness, proportionality and balance, the cost provisions are supplemented by providing that proceedings can be deemed by the Court to be prohibitively expensive in specified circumstances i.e. where the likely costs –

- exceed the financial resources of the applicant; or
- are objectively unreasonable having regard to a number of potential factors including the situation of the parties, whether the applicant has a reasonable prospect of success, the importance of what is at stake for the applicant or the environment, the complexity of the relevant law and procedures, and whether the claim is frivolous.

These supplementary provisions effectively give power to the Court to vary or remove the respective caps, as outlined above, on applicants' and defendants' costs having regard to individual circumstances.

In addition, any cost hearings under these provisions shall be held in private if they involve confidential information, including information relating to financial matters.

This Head also empowers the Minister to vary the cost capping thresholds outlined above having regard to changes in the consumer price index between the financial year in which any such variations are being made and the financial year in which this Act is passed.