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Housing and Planning and Development Bill 2019 Submissions
Planning Policy and Legislation Section
Department of Housing, Planning and Local Government
Custom House
Dublin
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Email to **planning@housing.gov.ie**

27 January 2020

Dear Sir/ Madam

Public Consultation on General Scheme of the Housing and Planning and Development Bill 2019

The Royal Town Planning Institute (RTPI) Ireland is a leading planning body for spatial, sustainable, integrative and inclusive planning. We work to promote the art and science of planning for the public benefit and doing so we:

- support policy development to improve approaches to planning for the benefit of the public;
- maintain the professional standards of our members;
- support our members to have the skills and knowledge they need to deliver planning effectively;
- maintain high standards of planning education;
- develop and promote new thinking, ideas and approaches which can improve planning;
- support our membership to work with others who have a role in developing places; and
- improve the understanding of planning and the planning system to policy makers, politicians, practitioners and the general public.

Thank you for the opportunity to comment on the review. Our comments are set out below.

General Comments

RTPI Ireland has concerns over proposals to restrict access to justice on environmental matters, especially in at time where there is a need to face up to tackling issues in a maintaining biodiversity and tackling the 'climate crisis'. We feel that the government needs to ensure that their proposals align with the spirit of the Aarhus Convention (Articles 9 (2) and (3)) to which Ireland is a signatory and has ratified and to the aims of EU Environmental Directives.

The Institute is also of the view that the proposals may conflict with Ireland's Constitution and the constitutional rights of Irish citizens to seek access to justice generally and go against the principle of non-regression of rights that have already been given.

A Court for Planning and Environmental Matters

Given the concerns mentioned above RTPI Ireland would suggest that a more appropriate solution is to establish a separate Planning and Environmental Division of the High Court which would have dedicated specialist judges to deal with technical and complicated matters of law on planning and environmental issues. We feel that this, working on the same lines as the Commercial Court, is long overdue. Judges need to develop expertise in the complex and specialised issues involved in planning and environmental law which is so often intertwined with European law. We believe that this would provide a speedier, informed and more transparent approach.

Unintended consequences of changing access to Judicial Review

It is worth remembering that s. 50 of the original 2000 Planning Act contained restrictive statutory requirements with regard to Judicial Review in planning matters:

- Application for leave to apply for Judicial Review had to be made on notice to the other party rather than on an ex parte basis
- Applicant had to have a "substantial interest" in the matter at issue not merely a "sufficient interest"
- Applicant had to have participated in the planning application process

These rules led to the initial Application for Leave to Apply for Judicial Review, which had to be on notice, becoming virtually a full airing of the substantive matters involved instead of merely a preliminary application dealt with quickly. The Law Reform Commission's 2003 Report on Judicial Review stated that the purpose of the leave stage is to filter out claims that are frivolous, vexatious or of no arguable substance. Judge Clarke, now the Chief Justice, said in the Arklow Holdings case (2006) "the reality is that leave applications have turned into substantial hearings themselves" and he referred to the duplication involved. By 2010, it was accepted that a lot of Court time and indeed litigants' time and money was being wasted and the law was changed in the 2020 Planning Act to allow the first application to be made ex parte. The court was given discretion to decide that it should be dealt with on notice to the appropriate persons where necessary and to decide to take both leave application and substantive hearing together in what is colloquially called a "telescoped" hearing. It is unclear whether the Bill is intended to limit access to Judicial Review or introduce measures to speed up Judicial Review? The unintended consequences of interfering with existing laws needs to be weighed up and whether this Bill will only lead to more uncertainty and challenge in the court.

Removal of locus standi from environmental NGOs

The 2006 Act allowed environmental NGOs who had not been involved in the planning application to take Judicial Review in certain circumstances. This change was introduced to comply with the Public Participation Directive. In 2011, the threshold for locus standi was reduced from "substantial" to "sufficient" interest to enable Ireland to ratify the Aarhus Convention. The Convention was ratified in June 2012. It appears that the proposals return to the pre-2006 position will conflict with EU law and Ireland's obligations under the Aarhus Convention.

RTPI Ireland is also concerned about raising the access to justice provisions so that you must be directly affected by the development and have participated at the planning stage. There are numerous reason why you may not have participated at planning stage – a adjoining neighbour may have had no grievance during the planning process however on making the decision the planning authority imposes a condition negatively affecting the adjoin neighbour.

Judicial Review and Local Authority Decisions

Introducing the limitation that Judicial Review can only be taken against the final decision of An Bord Pleanála conflicts with other provisions of the Planning Act. Statutory Judicial Review as provided for in s.50 applies to decisions by planning authorities across the range of planning functions and to interim decisions made by the An Bord Pleanála in the course of appeals and SID / SHD applications. Is a party to an application or appeal to stand by knowing that there is a failure to comply with the legislation and allow a matter to proceed to final conclusion before going to the High Court? There is case law to the effect that failure to apply to Court as soon as you become aware of a defect in procedures can be fatal – the Court has asked on more than one occasion why the applicant for Judicial Review did not make a timely application.

We do not accept the proposal to Judicial Review not being available in respect of "unintentional errors". These may still have substantial implications for developers and communities and it would be difficult to ascertain clearly what is unintentional and what is not. Also, how is rectification of a decision document to be secured in a manner that is transparent if not by Judicial Review?

We would be happy to discuss or clarify any aspect of our submission. Our Director, Craig McLaren can be contacted on 08925 15649 or contact@rtpiireland.com if you would like this be arranged.

Yours faithfully

Aidan Culhane

Aidan Culhane MRTPI
Chair