



Ms. Nicola Kelly
Secretary
Judicial Planning Working Group
Department of Justice
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By email: judicialplanning@justice.ie

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Re: Request for submissions to the Judicial Planning Working Group

Dear Ms. Kelly,

I am writing in response to your letter of 30 June 2021.

I welcome the invitation to make a submission to the Judicial Planning Working Group as a stakeholder organisation in the Justice sector and to contribute to the Working Group's consideration of the number of and type of judges required to ensure the efficient administration of justice over the next five years.

1. Introduction and context

It is noted that the Terms of Reference of the Working Group includes an objective at point 7 to review forthcoming and proposed policy and legislative reforms that may impact on the requirement for judge numbers including:

"h. PfG commitment to establish a new Planning and Environmental Law Court".

In particular, the Programme for Government commits to establish "a new Planning and Environmental Law Court managed by specialist judges and on the same basis as the existing Commercial Court model". In this regard, the Programme for Government also states, at page 85, that it "is evident that in areas such as planning law there is a need for greater specialism to enable the more efficient management of cases. The costs associated with the Irish legal system, as well as the time involved in cases, are more expensive and take longer than in peer countries and we will address this."

[The Secretary General is a Designated Public Official under the Regulation of Lobbying Act, 2015](#)



In this context, this Department has also observed a marked increase in recent years in both the number and complexity of judicial review challenges to planning decisions, principally concerning the implementation of EU environmental law in the planning system.

2. Increase in planning and environmental judicial review cases

Generally, in planning judicial review cases, the substance of the decision by a decision maker, such as a planning authority or An Bord Pleanála ('the Board'), to grant consent for a proposed project is challenged in the first instance, whereby the applicant seeks to quash that decision.

Where a judicial review case also includes a challenge to the legislation upon which that decision was made, the relevant Minister and/or Ireland and the Attorney General may also be joined as State Respondents to the proceedings, wherein such legal grounds commonly concern the alleged non-implementation of EU environmental Directives in respect of that legislation. In rarer cases, judicial review cases may be taken solely against the action of the Minister, and which does not involve a review of a particular development consent.

The Chief State Solicitor's Office (CSSO) has confirmed that the numbers of Planning/Environmental judicial review cases initiated in the period 2017 to 2020, as part of which a Minister and/or Ireland and the Attorney General are State Respondents, are as follows—

2017: 20 new cases
2018: 38 new cases
2019: 43 new cases
2020: 57 new cases

It should be noted that the above CSSO figures do not include judicial reviews initiated against a decision-making authority, such as the Board or a planning authority, where a Minister or Ireland and the Attorney General have not been joined in the proceedings. For example, An Bord Pleanála in its *Annual Report and Accounts 2019* notes an increase in judicial review proceedings taken against the Board with respect to the period 2017 to 2019, some of which cases may have included a Minister or Ireland and the Attorney General as the second or third respondent:

2017: 47 new cases
2018: 41 new cases
2019: 55 new cases
[2020: 81 new cases¹]

¹ While the Board's Annual Report and Accounts for 2020 is not yet available, according to the Courts Service of Ireland's online records of High Court cases, 81 new judicial review cases were initiated against the Board in 2020 (as well as 1 Plenary case and 1 Miscellaneous Common Law Application case), while 53 judicial review cases have been initiated against the Board to date in 2021.



3. Projected population increase and related growth in infrastructure, housing and commercial development

The majority of recent judicial review planning cases referenced in section 2 above relates to challenges to strategic infrastructure development projects, which include strategic housing development projects. The growth in the number of judicial review planning cases is also noted in the context of the general increase in the number of large scale planning projects, particularly strategic housing development projects, which reflects the growth in the economy and population since the downturn, as supported by the objectives of the National Planning Framework (NPF).

In terms of future population growth, the NPF envisages that our country's population will have increased by approximately one million people by 2040, with all the additional infrastructure, housing and commercial development that will be required to accommodate this growth.

Noting that implications of population growth has been referenced at point 2 in the Working Group's Terms of Reference, it is worth clarifying that the NPF projection of one million additional people in Ireland by 2040 is based on a mid-range growth estimate by the Economic and Social Research Institute, as commissioned by the Government, using 2016 census data. While we await Census 2022, current estimates for July 2021 place the nation's population at just under 5 million people, which is an increase of approximately 235,000 people in the five years since 2016. The clear implications of this growth rate are a sustained need for more infrastructure, housing and commercial development, at rates of growth that far outstrip most other EU countries and are more in line with developed sustained-growth countries such as Australia or New Zealand, as opposed to our neighbours in the UK for example. Therefore, with reference to point 5 in the Working Group's Terms of Reference, it may be of interest to the Working Group to examine how planning and environmental law judicial reviews matters and land disputes generally are addressed in the Common Law jurisdictions of Australia and New Zealand.

In parallel with sustained population growth over the coming decades, it should also be recognised that Government policies encouraging more sustainable and climate resilient forms of development – with higher density developments in urban areas, as well as proposals which, confidentially, are included in the forthcoming plan for housing – Housing for All, in relation to active land management through the planning system, and the oversight of statutory plans and the planning system by the Office of the Planning Regulator, may increase the levels of challenge, resulting in an increase in the number of planning and environmental judicial review cases (as is already apparent from the relatively significant number of judicial review cases that have been taken against decisions to grant strategic housing developments). It is also the case that Project Ireland 2040 envisages increased investment by the State in strategic infrastructure projects of significant scale (which would include a number of “mega” infrastructure projects) in the coming years, and there is the need to ensure that there is greater certainty around timelines for the delivery of these projects, even if subject to judicial review.



Judicial review cases taken against planning decisions, particularly of An Bord Pleanála, can frequently result in significant delays to the commencement of a development, and increased costs. Therefore, the establishment of a new Planning and Environmental Law Court, with greater specialism to enable the more efficient management of cases, is of vital importance to my Department and to wider Government, as delays to judicial review outcomes for such projects caused, among other things, by an increase in the complexity and number of cases, may have a cumulative negative impact on the strategic development of the country over the coming years if such delays are not addressed with additional resourcing at a Judicial level.

In other words, access to a dedicated, efficient and speedier Planning and Environmental Court will form the cornerstone of a more effective planning system that will be needed to deliver significant sustainable growth in Ireland over the coming decades.

4. Previous judicial initiatives – the High Court’s Planning and ‘SID’ List

The Department has previously welcomed the establishment in 2018 of the High Court’s Commercial Planning and Strategic Infrastructure Development (SID) list, which addresses judicial review cases relating to strategic infrastructure development (including strategic housing development) and planning cases admitted to the Commercial List. This specialised case listing procedure was established to provide a more expeditious route through the courts for SID cases, which are, by their nature, of strategic importance. This list has increased efficiencies in the processing of such cases in some areas, notably, where by a modularised approach is adopted early on, where domestic law grounds against the substantive decision of An Bord Pleanála or a planning authority are heard first, while the case against the State respondents in respect of EU law grounds (such as non-transposition of EU law) is subsequently heard where the Applicant’s case in respect of the domestic grounds has failed.

The Department has also welcomed the proposal by the Minister for Justice, as agreed by Cabinet in April this year, for an interim increase in the number of High Court Judges by five, one of which judicial positions is to be allocated as a second judge on the High Court’s Commercial Planning and SID List, in order to clear the backlog of cases created during the pandemic. The need for two judges to administer the Planning and SID list may be a useful indication as to the eventual number of judges that will be needed to manage the substantive cases in the new Planning and Environmental Law Court, noting that the vast majority, if not all, of the Planning and SID list cases would be expected to move to the remit of the new Planning and Environmental Law Court.



5. Compliance with EU law obligations under the Aarhus Convention

Of note, most planning and environmental judicial review cases are subject to special costs protection rules in Section 50B of the Planning and Development Act 2000, as amended. Section 50B applies to legal costs in proceedings in respect of a decision made, action taken or failure to take action pursuant to legislation presently giving effect to the following EU environmental Directives — the Environmental Impact Assessment (EIA,) Directive, the Strategic Environmental Assessment (SEA) Directive, the Industrial Emissions Directive (formerly the Integrated Pollution Prevention and Control Directive), and the Habitats Directive.

Section 50B provides that, subject to stated exceptions, each party to judicial review proceedings relating to the environment shall bear its own costs. The costs of proceedings, or a portion of such costs, as are appropriate, may also be awarded to the applicant to the extent that the applicant succeeds in obtaining relief and any of those costs shall be borne by the respondent or notice party, or both of them, to the extent that the actions or omissions of the respondent or notice party, or both of them, contributed to the applicant obtaining relief. These provisions implement requirements in the UNECE Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, as well as related requirements in relevant EU environmental Directives.

The Programme for Government also contains a commitment to *“Review and reform the judicial review process, so that such reforms come into effect upon the establishment of the Environmental and Planning Law Court, while always adhering to our EU law obligations under the Aarhus Convention.”* In this regard, my Department is presently progressing a General Scheme of a Housing and Planning and Development Bill, which includes proposed amendments to planning judicial review procedures, which scheme was published in December 2019. The scheme is due to undergo pre-legislative scrutiny with the Joint Oireachtas Committee on Housing, Local Government and Heritage in Autumn 2021.

6. Recommendation of DHLGH to the Judicial Planning Working Group

Planning and environmental judicial review cases involve an increasingly complex and evolving area of EU environmental law (including judgments from the Court of Justice of the EU), particularly in relation to the implementation of the Environmental Impact Assessment Directive, the Habitats and Birds Directives and the Strategic Environmental Assessment Directive. In addition to this, yearly case numbers highlighted above indicate a significant increase in such judicial review cases being taken, particularly against strategic infrastructure development projects, including strategic housing development projects.

It is therefore imperative that the establishment of the Planning and Environmental Court, as provided for in the Programme for Government to be managed by specialist judges, is allocated the necessary resourcing at a Judicial level to ensure the timely and efficient disposal of the growing number of planning and environmental related judicial review cases as highlighted above.



While the new Planning and Environmental Law Court will build upon some of the efficiencies introduced by the Commercial Planning and SID list in the High Court, which list is to be administered by two judges on an interim basis, a new Division of the High Court will require the adequate resourcing of and support for a number of specialised dedicated Judges, with professional and specialist experience particularly in the area of planning and environmental litigation. It would also be of benefit if such specialist experience included familiarity with the broad area of project consent processes implementing environmental law, other than the planning system, that may arise in respect of infrastructure projects, for example foreshore licensing or the EPA's waste water discharge authorisation system.

7. Conclusion

I trust that this submission to the Working Group will be of use, in particular with respect to the Programme for Government's commitment to "*Establish a new Planning and Environmental Law Court managed by specialist judges and on the same basis as the existing Commercial Court model*".

I look forward to further updates on the work of the Judicial Planning Working Group, including the circulation of its report and findings, which I understand are due to be completed in the first half of next year. My colleagues in the Department and I remain available to assist the Group in any way possible.

Yours sincerely,

Graham Doyle
Secretary General