Planning and Development Bill 2022 (Ireland): A solution in search of a problem

A joint submission to the Committee on Housing Local Government and Heritage by Community Law and Mediation (CLM) and Environmental Justice Network Ireland (EJNI)

27th February 2023

Authors: Alison Hough BL & Gavin Elliott BL

Community Law & Mediation

EJNI ENVIRONMENTAL JUSTICE NETWORK IRELAND

CONTENTS

Introduction

Framed as a response to the housing crisis, the Planning and Development Bill 2022 (P&D Bill 2022, 'the Bill') is designed to enact a radical overhaul of the planning system and related court processes in Ireland. Its central aim is to increase efficiency and the speed of the development consent process by centralising power and restricting access to justice in order to remove perceived impediments to housing development. Unfortunately, it is likely to backfire and lead to years of satellite litigation. Firstly, because it is based on a flawed premise, i.e. that there is a tsunami of judicial reviews holding up projects, when figures indicate that only around 1% of the circa 30k planning decisions made annually are ever judicially reviewed (and around 3.65% of An Bord Pléanála decisions). Secondly, because the Bill conflicts with International and EU legal principles and obligations surrounding access to justice, specifically through restricting access to public participation and access to judicial review in planning (i.e. reducing accountability), and through centralising powers in the planning system in undemocratic ways. It is worth noting that judicial review of planning decisions is already subject to a more restrictive regime than other administrative decisions (introduced via the Planning and development Act 2000) - this bill proposes to restrict access to justice even further (e.g. see Browne (2021) in Simons on Planning, para 12-01 to 12-13).

In the era of increasingly urgent climate and biodiversity crises, the importance of judicial review for environmental and climate accountability cannot be overstated. It is a vital mechanism for ensuring that development that is carried out aligns with our climate and environmental goals, as well as with State policies and plans. For example, the Edenderry Peat case (An Taisce v Bord Na Mona (2020) IESC 39) shows how planning judicial review can prevent extraordinary destruction of important habitats. More broadly, cases like Friends of the Irish Environment v Ireland (2020) IESC 49 ("Climate Case Ireland") demonstrate how judicial review can be used by the public to keep Government accountable on climate targets. It has never been more important that we stop permitting projects which will push us out of compliance with Paris Agreement/EU Climate Law Net Zero and 2030 targets. Pressure continues to build for Ireland to keep to its commitments under the EU climate framework, and there is increasing attention on backsliding on both EU and international commitments around access to environmental justice in Ireland and in other member states. Ireland's poor track record in meeting its climate obligations suggests that the role of pushing to ensure achievement of these targets will fall largely on the public and NGOs in between EU reporting periods.

There are many issues with the Bill at detail level (discussed below), but one of the most striking is the lack of consultation with the public on massive changes in our land use law. The public need to be given a proper say (i.e. via public consultation) on such significant changes to the democratic balance of our planning system, and proper recognition needs to be given to the right of communities to have a say in what happens to their local environment.

Summary of main issues

1. **Lack of detail in the Bill** – significant areas are left to be constructed by Ministerial order, making it impossible to truly assess the full impacts of the Bill.
2. **Lack of public consultation** in the preparation of the draft bill, failing to adhere to international law obligations under Article 8 of the Aarhus Convention.
3. **Lack of any rationale** provided for the Bill, no explanatory memorandum for these massive changes to our land use law, no clear identification of the problems the Bill is supposedly trying to address, and no evidence base for the necessity for the changes. This impairs the public's ability to engage with the Bill, and makes it difficult to assess the proportionality of the approaches adopted.
4. **Changes to the scheme of statutory planning judicial review** which will negatively impact on access to justice and Ireland's international and EU law obligations. In particular:
    a. **Restricting NGOs** that are not constituted as limited liability companies from participating, which conflicts with International (Aarhus Convention, Art 2(5) & 9(3)) and EU law obligations (Art 47 EU Charter/Art 11 EIA Directive) obligations to afford wide access to justice and to exercise any discretion to set down criteria on access to the courts in a manner that does not excessively restrict the number and types of organisations that can avail of the deemed locus standi provisions.
    b. **Changes to the costs rules** that would eliminate "no-foal, no-fee" litigation. The provision in s.250 of the Bill providing both sides would bear their own costs with no discretion to award costs to the successful party, creates a barrier for litigants not in keeping with States' access to justice obligations under EU/International law. Also, no-foal, no-fee provision acts as a filter on weak claims, with legal professionals selecting cases based on strength/likelihood of success (therefore likelihood that they will be awarded costs and get paid). It seems strange that a bill seeking to reduce unmeritorious claims would dismantle this.
    c. **Sufficient Interest Test definition** – addition of "materially affected" requirement: s.249(10)(c)(i) of the Bill attempts to change the definition of sufficient interest, introducing a requirement of being "materially affected" in order to have locus standi. This appears to be an attempt to raise the threshold for individuals standing to judicially review planning decisions and is unlikely to be compatible with Ireland's EU and International law obligations.
5. **Designation of certain projects as presumed IROPI** (imperative reasons of overriding public interest) derogation for the purposes of the Habitats Directive (s.190/s.191):
   The regime of the Habitats Directive prohibits development in a protected habitat where this would cause adverse impact on the integrity of the site. There is a derogation to permit projects even where they would adversely affect the integrity of a protected site – the IROPI exception. There must be no alternative to the project and an imperative reason of overriding public interest. This imperative reason must be assessed by the decision maker and balanced against the harm to the site in deciding whether to exercise the discretion to allow the harmful project. The Bill attempts to override the balancing assessment by introducing a presumption in s.190/s.191 that certain projects meet the IROPI requirement. This would likely breach the Habitats Directive.

Background

The Bill attempts to fulfil promises made in the Program for Government and appease construction and property industry lobby groups who have long complained that excessively bureaucratic processes, over-regulation, restrictive nature protections and "NIMBYs" or "objectors" stymie development in Ireland. In particular the narrative accepted by everyone from pundits, politicians to pedagogues, that **"objectors" and judicial review are preventing the country from advancing** on a variety of targets, from solving the housing crisis to tackling climate change, has been repeated so often that it has become axiomatic. It also has the appeal of "common sense" and as everyone knows someone who has fallen foul of the planning system in Ireland, chimes with people's anecdotal experience. An examination of available figures quickly shows that the evidence does not support this contention and thus a core rationale underlying the Bill (i.e. too much judicial review) does not bear up to scrutiny. Data available from the Courts Service, CSO, Department of Public Expenditure, the Planning Regulator and studies from abroad consistently show that, contrary to received wisdom, access rights do not prevent development, and there has not been a drastic increase in judicial reviews of planning decisions recently in Ireland since introduction of Aarhus rights. As discussed below, **overall judicial review rates both in Ireland and other countries have remained relatively steady since the 2012** ratification of the Aarhus Convention, which provides the international legal basis for rights such as access to judicial review of planning decisions, the right to participate in planning decisions and rights of access to information and is implemented via EU law such as the EIA Directive.

Irish statistics on judicial review actions from the Courts Service are not usually disaggregated into environmental and non-environmental cases, but in general the category into which they would fall (High Court Judicial Reviews initiated) **has remained relatively steady at between 500-600 cases initiated per year since 2012**, with 558 cases initiated 2012, 588 in 2013, 558 in 2020 and 614 in 2021) despite a general media and political consensus that it has lead to an increase in vexatious litigation delaying projects. These figures represent a tiny proportion of the circa 40,000 planning applications made in 2021 and the 30,774 applications granted in 2021. In fact, the proportion of applications reviewed is dwarfed by the number of applications refused for invalidity annually (15% - 20% or 6,000 - 8,000 applications), so it is strange that the focus is on judicial review and not on capacity building/simplification of the application process. This is reflective of the experience in other countries also. For example studies from the UK and Germany show no or only modest increases in the amount of environmental litigation in the years following introduction of Aarhus rights via legislation in those Member States.

Judicial review has a key role to play in ensuring accountability in public body decision making. If the An Bord Pleanála crisis has shown us anything, it is the importance of this when poor quality decision making could have a hugely harmful effect on the environment. Many planning decisions carry significant implications for Ireland's ability to meet its climate obligations, and the possibility to review for compliance with climate legislation and policy is essential to ensure that targets are met. The reality is that there are procedures in place to weed out vexatious court claims i.e. the leave stage in judicial review, and that the high success rate demonstrates the merit of the claims that do make it through. Objections are not magic wands that can be waved to stop a development, but when they have an evidential basis they represent a valuable contribution to the process of preventing bad decision-making from ruining the amenity of our local areas, and our environment.

The real story of the housing crisis is unfortunately a much more complicated and nuanced affair, with research showing contributions from government policy encouraging the commodification of housing by foreign direct investment, including tax exempt vehicles like REITs affecting affordability, and factors like HAP and AirBnB distorting the rental market. That is not to say there are not delays in planning decision-making due to under-resourcing of and crisis within An Bord Pléanala, in addition to under-resourcing/delays/dysfunction in the Courts (e.g. Ireland had the lowest numbers of judges per head population in Europe COM(2022)234, pg.72, and the lowest spending as a portion of GPD at 0.01% of 46 countries studied in the Liberties Rule of Law Report 2022), and third lowest for spending

on the courts as a proportion of GDP). However, as demonstrated by figures from the Office of the Planning Regulator (OPR), and academic research, the impact of these factors on housing supply is insignificant when compared to issues like rising construction costs due to a convergence of international factors, the hoarding of land and un-commenced planning permissions.

Academic research has documented extensively the manner in which industry lobby groups have successfully weaponised the housing and other crises to argue for a deregulatory agenda in the planning system in Ireland and abroad, for example Lennon & Waldron (2019), Hearne (2017), when planning has very little to do with housing supply problems. Umfreville & Sirr (2020) demonstrate that the trajectory of reform directed at marketisation of housing has procured a deeply dysfunctional housing system, but one that remains highly profitable and attractive for institutional investors. This policy direction shows no signs of changing. The latest iteration of this argument that has taken hold across Europe is the argument that de-democratisation of the planning system is required to tackle the climate crisis, and the energy supply crisis caused by war in Ukraine. The reality is that tackling the climate crisis in an effective and just manner requires more, not less, democracy and access to justice, with judicial review in particular being instrumental in holding Governments to account for failure to meet climate targets (e.g. see discussion of Climate Case Ireland in Kelleher (2021)).

The construction and property industry lobbied heavily and successfully for fast track procedures for large scale housing, which was introduced in 2017 in the form of the Strategic Housing Development (SHD) legislation. This attempted to fast-track housing developments over 100 units (or 200 units of student accommodation) by bypassing local authorities and going straight to An Bord Pleanála. This was a disaster and resulted in the opposite of fast-tracking. This tendency for poorly thought out legislative interventions to have unintended consequences has been repeatedly highlighted by academics such as Ryall, as well as voices from the NGO community.

Figures from the Office of the Planning Regulator show that the years from 2017 where Strategic Housing Development (SHD) fast track procedures were in place resulted in a doubling of judicial review of An Bord Pleanála decisions, not a reduction. This was still a small number in the overall context of the numbers of judicial reviews, e.g. reviews of An Bord Pleanála decision judicial reviews increased by around 40 reviews to 95 in 2021 in 2021, up from a steady circa 50 per annum in the preceding four years. This is still a very small percentage (3.65%) of the circa 2,600 An Bord Pleanála decisions taken annually, and the circa 37,000 planning decisions and 40,000 applications taken annually in the planning system in total. It is important to note that this did not result from any change to access rights to the Court but instead reflected the need for this type of judicial review to be taken, as evidenced by the high success rate of SHD judicial reviews which was circa 75% in 2021. It is important to note that the SHD legislation which led to the increased rates of judicial review was an industry-led initiative designed to fast track large scale housing projects, but instead had the opposite effect, and clearly demonstrates why trying to bypass proper oversight and decision-making procedures is a bad idea.

From the above figures it is possible to conclude that 3.65% of all An Bord Pleanála decisions are judicially reviewed. Establishing an accurate percentage for total planning decisions subjected to JR is more difficult as the Courts only provide judicial review case numbers as an aggregate and not broken down by subject matter. We know from the Planning Regulator Report 95 of the 614 judicial reviews taken in 2021 were of An Bord Pleanála SHD Decisions, but we do not know what number of these JRs were of County Council planning decisions. If we took a generous approach, and said that half of all judicial reviews in 2021 were planning judicial reviews, this would be 314 judicial reviews of circa 30,000 decisions or circa 40,000 applications. This amounts to a headline figure **that 1% of all planning decisions, or 0.8% of all planning applications, are subjected to judicial review.** This is not an open floodgate that needs to be closed.

The success rate of these applications is also not known, as the applications taken in 2021 have not been resolved yet. But the success rate for SHD judicial reviews against An Bord Pleanála is running at around 75% suggesting that the majority of these applications are meritorious, rather than frivolous

and vexatious. The 2021 Courts Service figures show that there were 269 non-asylum related judicial reviews resolved by the Court in 2021. Of non-asylum judicial reviews resolved in court, reliefs sought were granted in 148 and relief was refused in 52 cases, with miscellaneous orders being granted in 69 cases and 101 struck out. This does not suggest a tide of unmeritorious claims are being allowed in before the High Court, probably due to the leave stage working well as a filter.

It is notable that despite being the product of a 15 month review process by the Attorney General's Office, as well as a review of unknown length and remit by the Department of Housing, remarkably **no statistical evidence, or evidence of any kind, is offered in justification of the far-reaching changes proposed in the Bill**, either in the Bill text or the Outline. It seems extraordinary that such an intensive process has not resulted in any contribution to further public understanding of the issues in the planning system or the basis of the changes proposed. The Bill lacks even a basic Explanatory Memorandum that bills are usually accompanied by.

Overall, increasing ease of access to justice, counterintuitively does not result in increased judicial reviews, but that truncated procedures restricting public participation and reducing oversight does result in bad decision making and increased judicial reviews.

It is important to remember what is at stake in preventing citizens/NGOs from challenging State decisions, which is often disparaged in public discourse. The challenging of bad State decisions is a fundamental mechanism for ensuring the Rule of Law in a democracy, and as such those who do so perform a service for society. There is an important public interest in this and it is why the right to do so is protected, constitutionally and under international law. This was articulated clearly by the Supreme Court in Mulcreevy v Minister for the Environment [2004] 1 ILRM 419 at 426: "… *it is not in the public interest that decisions by statutory bodies which are of at least questionable validity should wholly escape scrutiny*…".

It should also be noted that recent IRC-funded research (Hough (2022)) carried out by one of the authors of this submission highlighted the extensive gaps in the implementation of the Aarhus Convention in Ireland, and it is extremely disappointing to see attempts to further roll back the small progress that has been made on vindication of environmental democracy rights on the island of Ireland.

What follows here is not a detailed parsing of the entirety of the proposed legislation, but instead attempts to highlight some of the more obvious issues with a focus on Aarhus Convention rights like public participation and access to justice. However, there are a great many other issues with the Bill arising outside the scope of the submission. Due to time constraints, not all issues have been addressed in this submission and failure to address a particular issue should not be interpreted as agreement with its provisions. The extent of the issues with the Bill underlines the need for proper public consultation which has to date not been delivered.

The process of development of the Bill – lack of public consultation

The Bill has emerged from a 15-month review process conducted jointly (or in parallel, it is not clear which) by the Attorney General's office and the Department of Housing. It also builds on previous work done in the Review of the Civil Administration of Justice ("The Kelly Review").

There has been no valid public consultation on the Bill. A closed invitation only consultation with a stakeholder group was established on the specially created Planning Advisory Forum (PAF), a body which according to public documents is composed almost entirely of industry and government representatives, with only 4 civil society representatives out of 39 members. Additionally, large numbers of guest members appeared to be from industry/departments. From a reading of the very brief minutes, the PAF does not appear to have been intrinsically involved in either of the two reviews of planning law being undertaken, and instead were only informed in outline in September 2022 of the proposed changed to judicial review. Concerns were raised at that meeting but what they were or who made them is not recorded in the public minutes. This is supported by statements of members of the PAF in their evidence to the Oireachtas Committee (e.g. Gavin Lawlor IPI 23rd Feb 2023). There is no indication that there was any subsequent meeting prior to publication of the Bill in January, so as far as can be ascertained the full extent of PAF contribution to the Bill was a discussion at one meeting in broad brush strokes, detailed proposals not being available. Start and finish times of the meetings are not recorded in the minutes so it is impossible to know how long was spent discussing the possible changes.

It is notable that this Government appears to have almost completely abandoned the concept of public consultation on environmental legislation, which goes against the spirit and the letter of the Aarhus Convention, with many recent pieces of environment and planning legislation being not only put forward without due consultation, but through truncated or fast-tracked legislative process, also depriving the public of adequate opportunity to engage through their representatives.

While the Aarhus Convention excludes those acting in a legislative capacity from its definition of a public body for Art 6 and 7 purposes (public participation provisions for permitting, plans and programs), Art 8 deals specifically with legislation, and is very clear on the manner in which legislative proposals must be put out to consultation. The UN Aarhus Implementation Guide, (considered an authoritative source on interpretation) at p. 182 stipulates that legislative proposals under development by the executive must be subject to public participation, through the publication of draft legislation and provision of sufficient time for response, and providing for the taking into account of the results of the public consultation. **It is clear that the Government, acting in its executive capacity to prepare legislative proposals is not acting in a legislative capacity, and is still subject to public participation requirements.** When the proposal goes before the legislature then they are acting in a "legislative capacity". This is confirmed by ACCC/C/2014/120 Slovakia para 101. It is notable that Art 8 of the Convention instructs the parties to "strive to promote effective public participation at an appropriate stage, and while options are still open" during the preparation of legally binding rules and legislation that "may have a significant effect on the environment". It sets out mandatory requirements with regard to carrying out this public participation, including the publishing of draft legislation early in the process, and allowing sufficient time for responses. It requires that the final legislation be published alongside a document demonstrating the public participation process carried out and how the results have been taken into account. The Aarhus Convention Implementation Guide, p. 182, also indicates that the "appropriate stage" is during the preparation of the proposals by the executive, before they are handed over to the legislature (although there is a dearth of authority on this point). The Guide indicates that the provisions of Article 9(3) are available in relation to enforcing this requirement.

The decisions of the Aarhus Convention Compliance Committee touching on Art 8 such as ACCC/C/2010/53 UK makes it clear that the parties must comply with the objective and spirit of the Convention by facilitating public participation, and that the detailed requirements of early participation, publication of draft rules, timely procedures, and taken into account are mandatory and must be followed:

> "*The Convention prescribes the modalities of public participation in the preparation of legally binding normative instruments of general application in a general manner, pointing to some of the basic principles and minimum requirements on public participation enshrined by the Convention (i.e., effective public participation at an early stage, when all options are open; publication of a draft early enough; sufficient timeframes for the public to consult a draft and comment). Parties are then left with some discretion as to the specificities of how public participation should be organized.*"

How that discretion should be exercised is influenced in part by a proportionality approach, and the seriousness of the consequences of the act under contemplation. The more serious the implications, the more intensive the participation needs to be. The Maastricht Recommendations on Public Participation (developed by a UN Taskforce to the Convention and adopted by the Meeting of the Parties to the Convention) fleshes out these requirements on public consultation, and reflect the proportionality approach, on pg.14 where it states that where there are highly significant effects on the environment, the consultation must be more elaborate, and less so for lower impact proposals. They also deal with the issue of representative consultation, rather than direct consultation which can be used under Art 8 in certain circumstances. If representative consultation is the method chosen, then the guidelines outlines clear requirements for the adequacy of the representative body to fulfil the consultation requirements of the Convention. The guidelines state:

> "*If the public is given the opportunity to comment through representative consultative bodies, the persons representing the public in those bodies should be selected through a transparent, democratic and representative procedure ensuring that they are accountable to their constituencies and fully transparent about the constituency they represent. Persons with a direct financial interest in the possible outcome of the decision-making should not be permitted to play this role.*"

The composition of the PAF which was made up of 22 people from State and Government bodies, 13 from property industry professionals and property industry lobby groups, and 3 environmental NGOs is not sufficiently representative and contains too many people with a direct financial interest in the outcome.

The Maastricht Recommendations also encourage that the Government body sets out the evidence base for the proposed legislation and the reasons justifying the need to change the law. This is notably absent in the proposal, unlike the standard approach in law making to produce an Explanatory Note or Memorandum alongside the Bill. There was an Outline published in December, but it is not an explanation of the reasons for the various changes introduced in the Bill, but instead is a 23 page summary of the 738 page bill.

There is no Regulatory Impact Assessment (RIA) of the Bill. This is a standard governance instrument used to establish the nature of the problem sought to be addressed by the legislative intervention and the best options to address it. This approach is recommended by the OECD (OECD, 2020) as best practice in administrative governance, and used in almost every case by the EU. The lack of RIA's in recent planning proposals is notable, but particularly in this case where the Bill radically overhauls our land-use law in a fundamental root and branch reform.

The failure to assess and consult breaches a number of domestic policies also, such as the Consultation Guidelines 2016 (assets.gov.ie) and the Open Government Partnership.

The regularity of failure to adhere to these policies and to provide opportunity for public participation in legislation affecting the environment raises the prospect of a breach by Ireland of Art 3(1) of the

Aarhus Convention also – failure to establish a clear, transparent and consistent framework for the implementation of Art 8.

The terms of Art 8 are softer than that of Art 6 & 7 – using phrases like "strive". This, combined with the exclusion of bodies acting in a "legislative capacity" from the definition of "public authority" under Art 2 of the Convention often leads to the misconception that the public participation obligations in Art 8 are not binding or enforceable. The Aarhus Convention Implementation Guide makes it clear that Art 8 obligations can be enforced by Art 9(3) and that the obligations are mandatory in respect of the requirements set out, of timely consultation, provision of draft legislation, taking into account results of consultation etc. It also makes it clear that the obligations in Art 8 to allow public participation applies to the executive when preparing legislative proposal, prior to them going before parliament in the legislative process.

This is supported by the recent findings in ACCC/C/2014/120 Slovakia, in 2021. In this decision also the ACCC explained that the softer language of Art 8 indicated greater leeway in deciding how to fulfil the obligations of public participation, but within the confines of the minimum requirements laid down in Art 8 (such as publication of draft rules and taking into account public comments).

A consideration of findings of the ACCC/C/2014/120 Slovakia and ACCC/C/2010/53 UK dealing with allegations of breach of Art 8 leads to the conclusion that the softer language in Art 8 of striving to use best efforts to ensure public participation does not indicate that the obligation is non-binding. Rather it would seem to indicate a shift in emphasis from a results-orientated in Art 6 & 7 to an efforts-orientated approach in Art 8. In other words Art 6 participation obligations are not fulfilled unless the public actually get to fully participate in the manner prescribed, while Art 8 is fulfilled when the Party can show they made best efforts to provide for wide participation, and if this was not achieved (e.g. for technical reasons) this does not automatically amount to a breach of Art 8.

It is clear there was no general consultation on this proposal and that it is one with a significant impact on the environment. The lack of public consultation in this instance is striking, for what amounts to a historic and significant reform of our land use laws. The process of consultation engaged in with the Planning Advisory Forum (PAF) was inadequate to meet the requirements of Article 8 as according to the minutes the PAF were provided with only an outline paper in relation to the judicial review reforms, and not the text of the Bill, in Sept 22. Article 8 requires publication of the draft rules for comment. From reading the minutes, it does not look like PAF members had an integral role in the development of the legislation. PAF is also not a sufficiently representative body, being composed of more than 50% government body members, and the majority of the remainder being from the property industry (and even more when guest members are counted at the various meetings). Less than 10% of the sitting committee was made up of environmental NGOs from the outset. Additionally, according to NGO sources, some provisions such as the highly significant costs rules were introduced at the last minute before publication of the draft and therefore were not part of the draft that was being consulted on with PAF. **Therefore, it cannot be said that there was any meaningful public consultation on the draft bill, and the Government has therefore failed to discharge its obligations under Art 8 of the Aarhus Convention.**

The Contents of the Bill

The bill is 738 pages long on pdf download. It entirely repeals and replaces the existing Planning and Development Act 2000 as amended. A text comparison between the draft bill and the latest Law Reform Commission Consolidation of the current Planning Act showed only around 50% similarity, which suggests that 50% of the 738 pages are new text. There are many unknowns and placeholders in the text which make it impossible to predict the full impact. Many timelines are left to be set later by regulations, as are lots of other details.

There are suggestions of some improvements in the draft bill – the idea of tighter timelines for decisions is in principle a way to address delays in the planning system, but this can have a negative effect if not combined with adequate resourcing and staff to meet these deadlines. The net result would be more bad decisions making/more judicial reviews required if inadequate resourcing combined with tight time frames leads to rushed decisions. This submission will focus on two key issues (there are others beyond the scope of this document as mentioned in the introduction): (1) a raft implications for the operation of judicial review and (2) a critical issue associated with potential non-compliance with the EU Habitats Directive.

1. Changes to Judicial Review

1.1 **Leave applications:** The bill proposes that Leave applications will be required to be "on notice" instead of "ex parte". This means a minimum notice of four days will have to be given to the other parties to the judicial review, who can then attend and contest the leave application. As the leave application is an examination only of the applicants standing and grounds, designed to vet the applicants to make sure they were not frivolous or vexatious litigants, it is unnecessary to have leave applications on notice. The notice requirement and the fact that they are contested means that they will take longer to be heard, and take more time in the courts list hearing both sides arguments and several return dates. The mandatory "on notice" leave application was abolished in 2010 by s.32 of the Planning and Development (Amendment) Act 2010, for precisely this reason (e.g. see Sweetman v An Bord Pleanála [2009] IEHC 174), replacing it with a system where this was to be the exception rather than the rule (but still available if the court deemed necessary). If the stated object of the Bill is to speed up judicial review, this is the opposite of achieving that objective. If on the other hand the objective is to ensure that the applicant runs out of time/energy/financial resources early on, this is a good addition.
Browne (2021) in Simons on Planning notes at para 12-14 to 12-16 the inter-partes leave application was abolished as it was "unsatisfactory" leading to leave stages that were almost as long as the actual case itself, turning into lengthy hearings with substantial arguments, often airing the core issues of the case in full in order to litigate the "substantial grounds" issue. The move from inter-partes back to ex-parte leave stage was recommended by the Law Reform Commission in their 2004 report on judicial review in order to deal with the delays and burden on the courts arising out of the contested leave stage. Therefore, it is difficult to understand why a bill dedicated to streamlining would seek to return to this abandoned position.

1.2 **Power of amendment:** Under s.249(5) the Planning Authority/decision maker can amend their decision at any time in the eight weeks after leave is sought, to remedy the defect complained of, or take any act they had failed to take. This provision is reminiscent of the morally dubious strategy on illegal nursing charges and disability payments (only act properly if and when you get sued). Presumably, the costs of the then moot lawsuit will then be borne by the applicant because of the unfortunate interaction of this provisions with the s.250 mandatory requirement that no order as to costs be made.
These provisions facilitate public body wrongdoing, by removing the opportunity for the Court to censure and oversee the Authority in the remedying of the wrongdoing by them. This could be interpreted as representing a tacit encouragement for planning authorities to breach the

supposedly strict new timelines, if the only consequences are that they get to make or remake the decision later at any time. This gives rise to problems when the right of action for the purpose of judicial review crystallises – does it "re-crystallise " with the remaking or late making of the decision? Is there a further eight-week period for seeking leave? What are the consequences for the applicant if there are other grounds not addressed by the remade decision, but they later lose on those grounds? Is there an obligation to give reasons for the decision to remake the decision? This change introduces only uncertainty and laxness into the planning system. It interacts negatively with the idea of strict timelines as well as the proposed costs rules, enshrines poor public administration in legislation and sends out the wrong message. This change could cultivate a culture of the decision maker having a 'second chance' of making the decision if challenged and risks inculcating a mindset which views the decision as provisional pending a challenge. Uncertainty as the finality of decisions is to the benefit of no-one involved in the process.

1.3 **Date of Failure:** s.248 of the Act states that where the matter complained of is a failure to act, the relevant date for the running of time is the earliest date of failure to act. This poses many problematic scenarios, such as encouraging the immunity of public authority ongoing failure to act, which is bad public administration. The usual rule with ongoing failure to act is that it is continuous and happens afresh each day. This section possibly represents an inducement to concealment of failure to act. The earliest date of failure to act may not be knowledge that is available to the applicant, who might find evidence of earlier date of failure to act pulled out like a rabbit from a hat at any stage of proceedings to undermine the applicant's case as statute barred.

1.4 **Time limit changes for taking judicial review**: The current legislation provides that there are 8 weeks to take a judicial review of a planning decision. This is one of the strictest timeframes known to the law. It means that cause of action must be identified, lawyers must be located, hired and briefed, proceedings drafted and filed in the Central Office and a date obtained for the moving of the leave application, within 8 weeks of the decision complained of. Practice directions require the filing of substantial paperwork in advance of the hearing of the leave application. This is a tall order by any standards. The new provisions propose changing these arrangements to requiring that the motion for leave to judicially review the decision be issued out of Central Office within 8 weeks of the decision complained of. This would appear to soften the time limit requirement very slightly, but is clearly necessary in order to accommodate the requirement that the leave stage be on notice, as it could take weeks to months to get a slot for moving a contested leave application, while an ex-parte application can be disposed of with much greater expedition. This is in effect an acknowledgement that the inter-partes leave change will cause delay, as discussed above.

1.5 **Sufficient Interest Test – Additional "Materially Affected" requirement** – The Bill retains the current locus standi requirement for individuals to take judicial review, i.e. that they have "sufficient interest", but it makes significant changes to the definition of it. The current sufficient interest test means that the applicant must be affected in some way by the matters complained of. Cahill v Sutton [1980] IR 269 defined this as meaning "*(The relevant person) must show that the impact of the impugned law on his personal situation discloses an injury or prejudice which he has either suffered or is in imminent danger of suffering",* but also indicated that there was inherent flexibility depending on the matters at issue. Previous attempts to raise the standard to "substantial interest", a higher threshold, were reversed after it became apparent they would be unduly restrictive. The Bill appears to attempt to raise the bar for locus standi to a similar extent as the failed "substantial interest" test, but while keeping the headline wording the same. It does this by introducing at requirement of being materially affected. The wording of the section makes it clear this is intended to be an exclusionary requirement by the use of the terms "shall not be" and "unless". The full wording of s.250(10)(c)(i)"*an applicant shall not be regarded as having a sufficient interest for the purpose of this section unless that applicant is or may be directly or indirectly materially affected by the matters to which the application relates*".

There is no definition of 'material interest' in the Bill, and it will certainly require definition from the courts. It is unclear if the changes to the rules envisioned by the Bill substantially alter the current test as set out in Grace and Sweetman v APB [2017] IESC 10 and if the test has become stricter. That question will, almost certainly, be the subject of litigation and may perhaps produce a number of challenges.

More generally, on the issue of standing rules, the comments of the court in Grace and Sweetman provide a useful reminder about the potential impacts of overly strict rules on standing. The court observed that the subject matter of the case, the protection of the Hen Harrier, is almost necessarily one which does not affect any particular person in a direct way (the Hen Harrier being a bird that avoids human habitation) and developments that have an adverse effect on its habitat are therefore unlikely, in the normal course of events, to cause any personal prejudice or injury to the interests of individual objectors.

The introducing of greater restrictions on access to justice represents a breach of the principle of non-regression and also conflicts with the obligation to set any criteria in a manner consistent with the obligation of broad access to justice under Art 47 of the EU Charter and Art 9(3) of the Aarhus Convention, as explained by the CJEU in a range of case law up to Case C-873/19 Deutsche Umwelthilfe eV handed down in November 2022. This line of case law and the obligation of broad access to justice are discussed in detailed below in the section on NGO standing.

As mentioned, previous attempts to narrow the concept of interest for the purposes of locus standi in planning judicial review by raising the standard to "substantial interest" in 2006 were considered to fall foul of the Aarhus Convention and EU law requirements and were reversed in 2011 with s.20 of the Environmental (Miscellaneous Provisions) Act 2011 prior to ratification of the Aarhus Convention, as part of the review of laws done in order to prepare for ratification (Browne (2021 "Simons on Planning" para 12-604). The EU Commission expressed the view in Commission v Ireland C-427/07 that the higher standard of substantial interest represented a breach of the EIA Directive, but this point was ultimately moot because the events in the case occurred prior to 2006.

1.6 **Standing changes for NGOs**: A major departure for the new Bill is the restriction on NGO standing. Currently under s.50A(3), any environmental organisation pursuing environmental objectives for the past 12 months can avail of the provisions granting automatic standing to environmental NGOs which derive from the Aarhus Convention (Art 2(5)) and the EIA Directive implementation of these provisions. Currently Irish law appears to allow unincorporated association to meet the criteria in s.50A(3)(b)(ii) (based on the 2013 Supreme Court decision in Sandymount & Merrion Residents Association v An Bord Pleanála [2013] IESC 51) which is silent as to the legal character of the organisations required. The standing of unincorporated environmental organisations is the subject of a pending Art 267 reference to the CJEU in the Dublin 8 Residents case ([2022] IEHC 116) (Case C-613/22), which concerns the fulfillment the 12 month criteria.

Under the proposed changes unincorporated associations would no longer have standing. The draft Bill (Art 249(10)(c)(iii) in Part 9) only accords automatic standing to NGOs which are 10 member companies that have environmental objectives, registered in existence as a company for at least one year prior, pursued the environmental objectives for one year prior, and has passed resolution to take judicial review proceedings. It would appear to be intended to eliminate challenges by residents' groups, a contention supported by the Outline of the Bill published in December 2022 which stated that members of such groups could take challenges individually in their own name. It would also eliminate longstanding environmental organisations who are incorporated but do not meet the ten-member rule. There are several issues with the provisions as constructed and the rationale for them:

1.6.1 **They represent a substantial rollback of environmental NGO access to justice** and a narrowing of the category of NGO eligible to take judicial review. This is likely to breach the non-regression principle of international human rights law (access to environmental justice being a human right) and the Vienna Convention good faith obligations.

1.6.2 **They represent a substantial narrowing of the number of organisations that are eligible to avail of the automatic standing provisions for eNGOs.** This is likely to be a breach of international and EU law. Specifically, it is likely to be a breach of the obligation to ensure any criteria-based restrictions on NGOs are subject to ensuring wide access to justice, as required by the Aarhus Convention and the findings of the Aarhus Convention Compliance Committee (ACCC). The ACCC is a quasi-judicial body charged with monitoring compliance with the Convention. Its findings are presented to the Meeting of the Parties (MoP) to the Convention where they become binding on the Parties to whom they are addressed once adopted by the MoP as well as an authoritative source of interpretation of the Convention. The ACCC also produces the Aarhus Convention Implementation Guide, which, while not offering a legally binding interpretation of the Convention has achieved a status in discussion of the Convention greater than might be assumed at first glance. In Conway v Ireland [2017] IESC 13 the Supreme Court made use of the Implementation Guide as a tool to interpret the Convention. The Court also commented that in interpreting the Convention "it was appropriate to have regard to the decisions of the compliance committee."
Paragraph 18 of the preamble of the Convention states that "*effective judicial mechanisms should be accessible to the public, including organizations, so that its legitimate interests are protected and the law is enforced*". Of particular relevant is the ACCC decision of ACCC/C/2008/31 Germany, where the Committee stated at Para 71 in relation to any criteria for NGO standing: "*This means that any requirements introduced by a Party should be clearly defined, should not cause excessive burden on environmental NGOs and should not be applied in a manner that significantly restricts access to justice for such NGOs*". It is clear that the introduction of this proposed provision would significantly restrict access to justice for such NGOs.
In ACCC/C/2006/18 (a Danish case) and ACCC/C/2005/11 (a Belgian case) the ACCC held that any standing rules cannot be such that they "*effectively bar all or almost all environmental organizations or other members of the public from challenging act or omissions that contravene national law relating to the environment*".
The ACCC findings to date confirm that there are important constraints on a contracting party's freedom to set standing requirements in the context of access to the review procedures mandated under art.9 of the Convention, including the setting of criteria to regulate access to the courts in the case of NGOs. Any standing provisions will be scrutinised closely by the Irish Courts and ACCC to determine their impact on effective access to justice in practice.
Additionally, the expression of Aarhus principles in this regard in the EIA Directive, Art 11, has been the subject of rulings by the CJEU, which has reinforced the Aarhus Conventions stipulation regarding wide access to justice. The issue of numbers restrictions for NGOs was dealt with by the CJEU in Case C-263/08, "Djurgården" and in that case the membership number restriction was found to be incompatible with the concept of broad access to justice. Paragraph 45 of this judgement states that while the EIA Directive leaves to the Member State the task of determining the conditions for NGOs to be eligible to take appeals/reviews, the rules as set down must be consistent with "broad access to justice" and with the requirement that projects covered by the Directive be subject to judicial review. In particular, they stated at paragraph 47 that: "…the number of members required cannot be fixed by national law at such a level that it runs counter to the objectives of Directive 85/337 and in particular the objective of facilitating judicial review of projects which fall within its

scope." This approach that Member State's flexibility regarding criteria is limited by the requirement to ensure broad access to justice was reiterated by the CJEU in many cases since such as "Trianel" Case C-115/09. In LZ No.2, Case C-243/15 at para 72 the CJEU explained that Art 47 of the EU Charter on Fundamental Rights (right to effective judicial protection) when read in conjunction with Art 9(2) and 2(5) of the Aarhus Convention meant that Member States while they had some discretion in regard to access to justice, had to exercise that in light of the requirement of broad access to justice. Case C-873/19 Deutsche Umwelthilfe eV, handed down by the Grand Chamber of the CJEU on the 22nd Nov 22, reiterated earlier rulings of the court to the effect that Art 9(3) when read in conjunction with the right to an effective remedy in Art 47 of the Charter, limits Member States discretion in laying down criteria in national law for what environmental organisations have the right to challenge decision.

> "*Although they imply that Member States retain discretion as to the implementation of that provision, the words 'criteria, if any, laid down in its national law' in Article 9(3) of the Aarhus Convention cannot allow those States to impose criteria so strict that it would be effectively impossible for environmental associations to challenge the acts or omissions that are the subject of that provision (judgment of 20 December 2017, Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation, C-664/15, EU:C:2017:987, paragraph 48*)."

1.6.3 **Local Residents will be disadvantaged by being forced to litigate individually rather than as part of an organisation**: This "union busting" provision interacts negatively with recent CJEU interpretations of the distinction between NGO and individual access to justice, such that an individual could lack standing to take a judicial review where they had not participated in the prior process, but an NGO would not. This disparity is an example of the ways in which the loss to local residents of the "deemed" sufficient interest of the environmental NGO by way of the corporate requirements of this bill do in fact result in reduced access to justice, and crucially, fewer local voices at the table in planning, which is a negative outcome. This interpretation is visible in the recent case of Stiching Vaarkens in Nood (Pigs in Distress) Case C–826/18.

1.6.4 **There are potential logistical problems** with the arrangement that a company pass a resolution before having he standing to take judicial review. This is not a normal requirement under company law. The Companies Act 2014 as amended require the calling of an Extraordinary General Meeting (if the Annual General Meeting didn't happen to fall at a convenient time) which usually requires 21 day's notice for a Special Resolution or 7 days notice for an Ordinary Resolution under the Companies Act 2014 (s.181), with potential postal notification requirements, and the need to print up the draft resolution, potentially adding days onto these procedures. In the context of the already restrictive 8-week period for taking a judicial review, this has the potential to cause difficulty. No rationale is offered for bringing in these additional procedural barriers which create additional administrative burdens for environmental NGOs over and above that required for a commercial registered company. Simliarly, there is no clear rationale for the requirement that companies have ten members in order to have locus standi. This is not a company law requirement, and is not required in any other area of law. It is unclear what difference it makes how many members an incorporated entity has given they have separate legal identify from the members. It is suspected it is an arbitrary number. There are currently a number of environmental NGOs engaged in extensive environmental litigation who are incorporated companies but would not meet this criteria.

1.6.5 **The net effect of requiring individual residents to start actions in their own name is to encourage a multiplicity of separate litigations on the same case, rather than to**

reduce the number of judicial reviews. This has obvious negative implications for the already overburdened courts system (for discussions of the existing problems with Ireland's justice system please see the Liberties Rule of Law Report 2022, and the OECD Report on the Irish Courts system, Modernising Staffing and Court Management Practices in Ireland 2023 both of which highlighted serious issues).

1.7 **Costs Provisions:** S.250(i) of the Bill contains a serious amendment to the current costs regime. The current costs regime is contained in s.50B of the current P&D Act 2000, and provides that each party bears their own costs, but that a successful party may recover their costs, particularly where the respondent was culpable. There are also punitive provisions for frivolous and vexatious claims. This regime, while far from perfect, at least preserves "no-foal, no-fee" litigation, enabling the public to avail of legal assistance where they have a good case with a high prospect of success and therefore costs recovery. While "no-foal, no fee" litigation does not afford equal access to justice for everyone, for example those who do not know the small number of specialist practitioners who practice in the area, it does ensure that a good balance is struck, with legal professionals incentivised only to take claims with substantial arguable points and a high prospect of success. Weak or frivolous cases are filtered out in advance of court by the risk of non-recovery. This scheme was introduced in 2011, and only recently have some of the nuances of how the scheme functions been resolved e.g. in cases like Heather Hill [2022] IESC 43 where it was determined that the protective costs provisions covered all aspects of a claim where some of the grounds fell within the ambit of the legislation and other grounds did not. The bill proposes in s.250 to alter this nuanced regime that took years to develop to one where there is simply no cost recovery and each side bear their own costs as mandatory, with the only exception being the possibility that costs will be awarded against an applicant where they are found to have acted frivolously or vexatiously. The problem with eliminating "no foal, no fee" litigation in its entirety is that this will result in denial of access to justice by reason of a cost barrier. Own costs in High Court Judicial Reviews can be substantial, and vary considerably depending on the length and complexity of the claim from circa €50,000 to multiples of this, with own costs of €250,000 or greater being not unheard of. This raises several issues:

1.7.1 Non-retrogression principle: This introduction of a greater cost barrier represents a breach of the non-retrogression principle (mentioned above).

1.7.2 The Aarhus Convention: The introduction of additional cost barriers possibly represents a breach of the Aarhus Convention Art 9(4) "not prohibitively expensive" (NPE) requirement, and the analogous requirement under EU law e.g. in Art 11 of the EIA Directive. This requirement has been the subject of extensive CJEU decisions as well as findings from the Aarhus Convention Compliance Committee.

1.7.3 "NPE" and the EIA Directive: "NPE" and the EIA Directive: The NEPP case C470/16 reiterated the established principle under EU law that proceedings under the EIA Directive not be prohibitively expensive and this includes that own costs not be prohibitively expensive, (as also stated in Edwards and Pallikaropoulos, C-260/11, paragraphs 27 and 28). Under current rules for litigants able to avail of no-foal, no-fee assistance, own costs can be recouped if successful, and under the new provisions this is expressly disallowed. This means even if successful the applicant will have to pay their lawyers' fees for taking a judicial review in the High Court. As pointed out, this could amount to tens of thousands of euros which would certainly be prohibitive for an applicant on an average industrial wage in Ireland. This represents a breach of the NPE requirement.

1.8 **Restrictions on Rights of Appeal to the Court of Appeal/Supreme Court:** The Bill attempts to eliminate appeals from the High Court the Court of Appeal and leave open only appeal to the Supreme Court on point of law of public importance. No rationale is given for entirely excluding the jurisdiction of the Court of Appeal. This could conflict with Art 34.4.2 which prohibits curtailing the jurisdiction of the Court of Appeal in matters to do with the validity of a

law. It also is difficult to see why appeals in planning matters should be confined only to leapfrog appeals to the Supreme Court, increasing the burden on the Supreme Court and representing a restriction on the right of access to justice in general.
Under the current regime, right of appeal in planning matters is already extremely curtailed. To appeal a judicial review or leave decision in a planning matter, leave of the High Court must be sought (s.50A(7) P&D 2000) and that the High Court must be satisfied that the appeal raises a point of law of public importance and that there is a public interest in the having the appeal heard. The effect of the Bill would be to further restrict the appeal to only appeal to the Supreme Court, and only on point of law of public importance.
The Bill states at s.249(15) (a) that determination of a leave stage application or judicial review is final and no appeal shall lie to the Court of Appeal and (b): "*No appeal shall lie from the decision of the court to the Supreme Court save on the basis of an application for leave to appeal under Article 34.5.4° of the Constitution.*"

Art 34.5.4 of the Constitution states:
"*Notwithstanding section 4.1° hereof, the Supreme Court shall, subject to such regulations as may be prescribed by law, have appellate jurisdiction from a decision of the High Court if the Supreme Court is satisfied that there are exceptional circumstances warranting a direct appeal to it, and a precondition for the Supreme Court being so satisfied is the presence of either or both of the following factors:*
i the decision involves a matter of general public importance;
ii the interests of justice."

It is difficult to see what the benefits of this alteration are.

1.9 **Costs Scheme**: A vague provision at s.250 of the draft Bill asserts that a scheme to deal with costs of taking litigation will be introduced by the Minister for the Environment, Climate and Communications, or a body authorised to do so on his behalf. It is impossible to assess such a provision given the lack of detail, or determine how it would work with the prohibition on costs recovery. This scheme is designed to replace the current system of costs protections. The details of this scheme have yet to be made public, and it is notable that even at the 'draft bill' stage there is no detail available on how this scheme will work. It is also unclear how this section will relate to the preceding section in relation to each side bearing their own costs. The existing system of civil legal aid suffers from numerous persistent issues which limit access to justice for under resourced litigants. The current review of the civil legal scheme is welcome and it is suggested that the establishment of the administrative scheme for costs should be done with the learnings of that review in mind, and in particular the submissions of NGOs and legal professionals working in the sector. It is imperative that the scheme is fit for purpose, both in order to meet EU law obligations that taking proceedings be "*not prohibitively expensive*", but also to ensure that the decisions that are taken in respect of the environment are correct and can be challenged if not. The costs involved in gaining access to justice are a crucial factor in exercising those rights in practice. The Aarhus Convention includes the obligation for parties to ensure that national procedures should provide adequate and effective remedies, including injunctive relief as appropriate, and be "fair, equitable, timely and not prohibitively expensive", and to consider the establishment of appropriate assistance mechanisms to remove or reduce financial and other barriers to access to environmental justice. In North East Pylon Pressure Campaign and Sheehy [2018] IEHC 622, the Court of Justice ruled that the requirement that costs not be prohibitively expensive applied to environmental litigation in general. The CJEU, in Edwards v Environmental Agency (C 260/11), set out detailed guidance on the concept of "prohibitively expensive". These factors are subject to the overarching aim "to ensure wide access to justice and to contribute to the improvement of environmental protection". However, the EU Commission's Environmental Implementation Review Report 2022, recommended that Ireland:

"*Make significant improvements to ensure that high costs and the lack of clarity about those costs in advance of any legal action do not hinder the effective access to justice in environmental matters. It is recommended that Ireland draw up an action plan to address problems with prohibitively expensive judicial procedures in the environmental field.*"
It also noted that the costs of "*environmental court procedures represent a very significant obstacle to accessing justice, even for a high-income individual or organisation.*"

The administrative costs regime must be shaped in such a way as to guarantee that rights conferred by the EU can be effectively exercised.

2. **Section 190/191 Habitats Directive Issue: Presumed IROPI (Imperative Reasons of Overriding Importance):** The EU Habitats Directive 92/43/EEC is designed to protect our most valuable and vulnerable habitats, that of at-risk species. The Directive requires a higher level of environmental protection than normal. Development is not permitted in a habitat unless it can be shown that no adverse impacts will occur to the habitat. There is a derogation that can be activated in certain circumstances, under the current s.177W – s.177Y of the P&D Act 2000 as amended, to carry out plans or projects even though they pose a risk to the integrity of the site. The grounds for such derogations from the usual precautionary approach in the Habitats Directive are "imperative reasons of overriding public importance" or IROPI (Art 6(4) of the Directive). There are two alternative IROPI derogation scenarios envisaged – one for sites that are habitats of priority one species (Annex I), and another for all other habitats. In the case of priority one habitats, IROPI can only be used where for reasons of human health, public safety, or overall benefit to the environment. In all other habitats IROPI derogation to damage the habitat can be activated when imperative reasons exist, that are documented, there is no alternative to the development, and compensatory measures will be put in place. The proposed new bill provides at s.190(5A)/s.191(6A) (identical provision) that for certain categories of projects imperative reasons would be presumed to exist:

   "(5A) Where a relevant project or any part thereof consists of –
   (a) the construction or operation of plants producing energy from renewable sources,
   (b) the storage of energy produced by such plants, or
   (c) the connection of such plants to electricity, gas or heat grids, the competent authority shall presume that imperative reasons of overriding public interest exist for the carrying out of the project."

   There seems to be some insurmountable logical and legal problems with a category and presumption-based approach to the IROPI derogation, and also some potential conflicts with the underlying EU law, the Habitats Directive. The derogation already lowers the usually high standard of protection for habitats under the directive, and the operation of a presumption in favour of granting permission lowers the bar even further, **weakening protections for sensitive sites**. The derogation itself is already a significant departure from the precautionary principle-based approach. The addition of categorical presumptions undermines the protective elements of the section, and a categorical presumption approach is inconsistent with the assessment process that is supposed to happen in deciding to whether to permit harm to a protected habitat. This also **affects the balance of proportionality** in the section. IROPI derogations attempt to strike a good and proportionate balance between competing interests, limitations on the protection of important habitats versus important objectives of society. However, the presumption that all renewables or solar, and all connectors are IROPI means that the competent authority is potentially relieved in these cases from carrying out this balancing assessment of whether there are in fact imperative reasons, which does not seem compatible with the Habitats Directive requirements. It would seem to remove the balancing exercise from the derogation mechanism, so that a proportionality approach is no longer being adopted to the. Yes, energy security and switching to renewables is important in the fight against climate change, but research shows protecting biodiversity is also a hugely significant contributor to climate action and is equally important to renewable energy.

This is supported by the CJEU interpretations of Art 6(4) such as those in Nomarchiaki (C-43/10) where the court said that

> "*The assessment of any imperative reasons of overriding public interest and that of the existence of less harmful alternatives require a weighing up against the damage caused to the site by the plan or project under consideration. In addition, in order to determine the nature of any compensatory measures, the damage to the site must be precisely identified.*"

The operation of a legal presumption means a shifting of the burden of proof. In practical terms for the decision maker, this means if confronted with an application for large scale grid connection project for a gas plant (one of the categories listed in the legislation) in a protected habitat of an endangered species that will damage or destroy that habitat, the decision maker is effectively obliged to find that imperative reasons exist for granting the permit without any evidence before it that such reasons do exist. This is in violation of the obligation in Art 6(4) for the competent authority to satisfy themselves there are good reasons for permitting damaging projects in this manner.

To paraphrase Humphreys J in Protect East Meath Ltd v Meath Co Co (II) No. 2 [2023] IEHC 69, para 67, the public interest in renewable energy and energy security is not a public interest at all costs, it is in the public interest insofar as it constitutes proper planning and sustainable development. Not every wind farm built is a win for the environment or our carbon emissions.

The inclusion of these provisions shows that lessons have not been learned from the long-running Derrybrien Windfarm infringement proceedings against Ireland (C-215/06, Commission v Ireland, and Case C-261/18 Commission v Ireland) which started in with the construction of a windfarm without an EIA where one was required, causing landslides, and damage to property and irreparable harm to a protected habitat, culminating many years of litigation and circa €17 million in fines paid by the State, for an ultimately unusable asset. Not only that, the upland blanket bog it was built on was severely damaged and degraded by the project. Recent evidence shows that when the integrity of a wetland site is affected in this way it becomes a net emitter of carbon, nullifying any climate benefits from green energy produced, if any had even been produced. This is a window into a deregulated future for renewable projects.

In fairness to the drafters of this section, at the time of drafting they probably had an eye to the EU Commission proposal under RePower EU, COM(2022) 222 which contained similarly worded sections. This crisis-time proposal, put forward when Europe looked to be facing into a winter of power cuts due to the Ukraine-Russia war, was proposed as a temporary emergency measure, and contained in it some similar wording around IROPI derogations.

This proposal has not been passed and the most up to date position of the EU Council, 2022(0160)COD shows that section was removed entirely, reasserting strong habitats protections in the scheme to accelerate renewable developments. This was probably removed because it was fundamentally inconsistent with the Habitats Directive as outlined above.

Conclusion

The crisis in An Bord Pleanála has highlighted how **weak the governance structures of our planning system are**, and a raft of recent international reports has highlighted that Ireland's courts system and access to justice are undermined by resourcing issues. Democracy itself is under threat across Europe, and citizen oversight of government power through the courts is a fundamental element of a functioning democracy and a safeguard on the rule of law. We are at a critical juncture in the future of the planet in terms of climate and biodiversity issues, and it has never been more important that Ireland takes bold steps in the direction of strengthening democracy, environmental/climate action, addressing housing and human rights challenges. The current planning law regime is a terribly fragmented patchwork of legislation and secondary rules, in dire need of consolidation, streamlining and reconciling both for both internal consistency and external consistency with EU and international law obligations. However, this Bill addresses none of the above. The approaches in this legislation appear to be more driven by lobbyist influence and popular narrative than by evidence, and the result is that the Bill is a poor fit in terms of addressing any of these large societal problems.

The changes proposed in the area of judicial review and habitats protections are particularly problematic and out of step with Irelands international and EU law obligations. Enacting this legislation as it currently stands would result in a chaotic period of litigation for 5 – 10 years to resolve and eliminate the problems in it. The interest-based nature of our locus standi requirements would mean that random infrastructural and housing permissions will get caught in the cross-fire, as the challenges to the underlying legislation based on EU and International law issues will need to be framed around a challenge to a specific permit. The net result of this law will therefore be more legal challenges, and not less, and an eventual undoing of all of these problematic proposals, at great cost to the Exchequer in terms of wasted legal costs and EU Commission fines.

This comprehensive review of Ireland's planning law has the potential to radically improve and overhaul our planning and land use system as well as related court process. But in order to achieve this ambition a broad range of perspectives and creative solutions need to be taken on board. This Bill needs to be opened up to public consultation in early course, in order to give the opportunity for the public to have their say, and to improve the Bill's effectiveness in reaching its aims.

We hope this submission, in highlighting some of the more problematic aspects of the Bill, has served to assist the committee in their extremely important work, and helps to shed light on why the Bill needs to be subject to substantial consultation and revision in order to make it fit for purpose.

Recommendations:

1. That the entire Bill be put out to a general public consultation.
2. That the Bill be the subject of multidisciplinary review by experts from relevant fields like environmental science, ecology, planning, architecture, law and NGO experts.
3. That the Bill be substantially revised in the areas highlighted above, in particular in the provisions dealing with costs and standing, and in the area of the Habitats Directive.