

**SUBMISSION TO INDEPENDENT REVIEW GROUP**

**ON ORGANISATIONAL REVIEW OF AN BORD PLEANÁLA**

**NOVEMBER 2015.**

**General Comments**

**Overarching recommendations:**

This review presents an opportunity to update and revise the legislative function, remit, appointment structure and operation of An Bord Pleanála, and to provide for a requirement for a range of complementary initiatives to ensure Ireland has an overall robust and fit for purpose framework for environmental decision making., which is in both the interests of the environment, the community and business. An Taisce would welcome an opportunity to discuss and further clarify its remarks if that would be of assistance to the panel.

The objective should be to make An Bord Pleanála fit for purpose in addressing the challenges facing Ireland in the areas of climate change, biodiversity loss and sustainable land use , resource consumption, energy and transport, all in the context of Ireland's legal and moral obligations in respect of same and also social and economic considerations.

As an overriding consideration the **maintenance and enhancement** of the function and role of the Board as an independent strategic planning and decision making national planning body and guardian of real sustainable development should be considered paramount. An Taisce is in general very supportive of the important and valuable role An Bord Pleanála can play in an Irish environmental decision-making context when operating at its best in accordance with EU Environmental Law in particular.

**As a preliminary and overriding recommendation - it is submitted that the legal remit and function of the Board be expanded and redefined:**

- **to fully incorporate and facilitate its delivery of the provisions on all three pillars of the Aarhus Convention<sup>1</sup>, namely access to justice, access to environmental information and public participation, and to fully facilitate the public and environmental NGO participation in the planning process and in its administrative functions;**
- **to properly execute its obligations when acting as an emanation of the State in making decisions and to ensure Ireland's compliance with EU law, even where national law is contrary or deficient, a requirement clarified by the Court of Justice of the EU, CJEU\*, and also to execute its responsibilities in remedying previous failures, as appropriate, on a case by case basis.**

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<sup>1</sup> CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998

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An Taisce – The National Trust for Ireland | Tailors' Hall, Back Lane, Dublin 8, Ireland | Company 12469 |

Registered Charity No. 20006358 | Charity CHY 4741 | +353 1 454 1786 | [info@antisce.org](mailto:info@antisce.org) |

[www.antisce.org](http://www.antisce.org)

Directors: J Harnett, J Leahy, M Mehigan, D Murphy, B Rickwood (UK), C Stanley Smith (UK), A Uí Bhroin, B McMullin, P Maguire, J Sweeney, G Conroy

- to require national and transboundary impact assessment in all decision making and ensure that on a case by case basis that all determinations are in compliance with :
  - Climate mitigation and adaptation ,
  - Legal obligations set out in the Birds Directive and Habitats Directive and Water and Marine Strategy Framework Directive in order to appropriately support achievement of: Favourable Conservation Status for listed Habitats and Species, provide for the Strict Protection of Species listed in the second pillar of the Habitats Directive through Annex IV and V, and good ecological status of water bodies; and to good Environmental Status (GES ) of the Marine area by 2020, and reversal of biodiversity loss,
  - the Environmental Impact Assessment Directive and all relevant EU Directives in which it plays a role as a competent authority
- National planning, land use and transport policy and where relevant and appropriate local planning authority Development Plans

Cross cutting requirement for Enforcement and Compliance with Board decisions

**Additionally, following on from the decision to provide that the Board perform a critical co-ordinating role in the context of multiple consents associated with Projects of Common Interests as required by the associated Directive – we submit that in the context of practical issues encountered within Ireland’s fragmented consent structure under the EIA and IED Directives and its failures to properly transpose “Development Consent” as provided for in Article 1(2)(c) of the EIA Directive – that there is also scope for the Board to provide a co-ordinating role particularly in EIA cases involving multiple consents, licences etc. This would assist Ireland in resolving issues in the closed case c-50/09 which are clearly still at issue. This is expanded on further below.**

*Effectiveness of the Board’s decisions:*

Underpinning a number of the “ *Terms of Reference* “ of the Review Group it would seem is the issue of effective delivery of the Boards decision making function. These include under 2 “*EU legislative context,*” under 4 “ *the increase in litigation in the area of the Boards work*” and 5 “ *the appropriateness of the current legislation governing the functions of the Board* “

Under all of these headings is the need to address enforcement and compliance with the Boards consents and conditions imposed, and in particular with all the mitigation measures required to be delivered consequent on the Environmental Impact Assessment and Appropriate Assessment the Board has conducted as the Competent Authority. This is essential if the Board is to be an effective and credible organ of environmental decision making and review body.

The delivery of the Boards remit as a consent body, and an appeal body is nullified if its decisions are not complied with. This applies to cases both where it is an appellate body, and in the case of certain EIA projects such as roads, Strategic Infrastructure Development and other categories where An Bord Pleanála is the direct decision making body of first instance making the EIA decision on the project – as opposed to a Local Authority.

When established in 1976 the Boards sole remit was considering appeals on local authority decisions, and enforcement was left to the Local Authority. Despite the transposition of the EIA

and Habitats Directives and the increasingly complex consents made directly by the Board for road and other projects a review of the competence of Local Planning Authorities in enforcement of decisions and condition has never been carried out. The enhanced enforcement provisions in Part V111 Planning and Development Act 2000 have not proved effective.

Major enforcement issues are arising in relation to the compliance with Board consents such as construction management, operating hours or seasonal restrictions to protect ecology. This is particularly problematic in cases where the Local Authority is both the developer and responsible for enforcement. Two cases which are the subject of complaint this year are the Kilkenny Access Scheme River Nore SAC bridge crossing project, and Dublin City Council Sutton sea wall. Similar problems are arising in quarries despite the elaborate Substitute Consent legislation introduced into the Planning and Development Acts consequent on case c-215/06, given the extent of development which had occurred in the quarry sector without proper Environmental Impact Assessment or indeed Appropriate Assessment. These provision are supposed to provide for regularisation of existing operations and regulate future operation. The reason why Ireland has such a problem with quarry regulation is consequent of the express failure by Local Authority to enforce the law effectively in the first instance. The new provisions provide for these problematic sites when granted a consent to have new conditions imposed by the Board also, which then revert to the Local Authority to enforce. This pattern is continuing on Section 261A determination by the Board in the last year. The role of Local Authorities in this sector is also arguably compromised given we understand they are the biggest purchaser of material from quarries.

This compliance issue appears to be generating increased legal action, not against the Board, but against Local Authorities and project developers both public and private. This applies particularly for EIA or AA consent schemes for SI, road and flood defence and quarry projects where the enforcement of mitigation measures is an essential legal obligation before , during and in the continued operation of the development, or at end of life.

**The level of non compliance and ineffective enforcement by local planning authorities with plans and conditions including non enforcement of EIA and AA mitigation measures, is undermining the legal competence and credibility of the Boards function. The anomaly by which the Board has no role in the enforcement of any of the decisions it makes, apart from limited conditions on arbitration of financial contributions or bonds, is no longer tenable.**

**We submit that:**

- **Competent and compliant enforcement of Board decisions is required both through enhanced legal function by local planning authorities, and direct involvement of An Bord Pleanála and the proposed Office of the Planning Regulator where compliance breaches are not resolved.**
- **Additional complementary measures would also be welcome to provide support to the judiciary to facilitate their effective consideration of enforcement actions, particularly when such actions are pursued in the lower courts, which face a vast array of issues and pressures.**
- **This review in seeking to promote the effectiveness of the Board's role - should provide for recommendations for a complementary review of the enforcement regime.**

### **More specific remarks based on the Terms of Reference of the Review Group**

The following considerations are set out following the 9 terms of reference of the Review Group

**1The anticipated increase in Construction Activity, including on Strategic Infrastructure and Strategic Development Zones SDZ's**

### *1.1 Increase in Construction activity*

The availability of land with planning permission for residential industrial or other development was not an impediment to development either before or since the financial crash. Indeed over zoning local authorities across the country and the facilitation of development in inappropriate locations leading to ghost estates partly contributed to the crash

#### **RECOMMENDATION**

**It is noted that during the boom period the Board did adopt a prioritisation for determining major residential applications. This practice should continue**

Additionally, while Ireland appears to be emerging from a very difficult period of depression, it is important that expectations of future levels of application are kept realistic, and not informed by the anomalous experience of the time referred to as the Celtic tiger - the legacy of which we are still suffering from. Figures of 6000 items for consideration by the Board during that period should not be taken as indicative of where we are heading, Rather 4000 items as experienced in 2003-2005 is more probable.

#### **RECOMMENDATION**

**It is important that the Board can maintain its flexibility to deal with volume fluctuations, through increases in Board Members and also inspectors, and that it can and does maintain standards of expertise throughout.**

**Additionally the practice of maintaining a quorum of 3 for Board Decisions at the very least should be maintained, and ideally improved upon through greater resourcing, and the associated provisions should ideally be changed to reflect that.**

Ultimately good decisions which are legally compliant are what we all seek, and provide for environmental and societal interests to be addressed and provide for important issue of certainty for business. The pressure to expedite complex decisions in unrealistic timeframes may in fact be counter-productive as it arguably may result in subsequent delays in judicial challenges against flawed decisions.. Such delays serve neither the environment nor business.

#### **RECOMMENDATION**

**It would seem sensible to avail of the opportunity provided in this review to consider an extension to the timeframe for decisions with a view to providing for more robust and better decisions in the first instance, which would provide for greater certainty for business.**

### *1.2 Strategic Development Zones, SDZ*

SDZ applications have not been advanced to the level projected at the time legislation was introduced in 2000, and there is no indication that this is going to change.

The principle of achieving the coordinated development of a large Greenfield or brownfield area is a desirable one. However The Board needs to address the situation by which SDZs application are not subject to the EIA process, as there are deemed to constitute outline plans or land use proposals, or are advanced in piecemeal fashion below EIA thresholds. However the effect of an SDZ designation is to provide for a grant a consent over an area of land for a quantum or scale of development significantly in excess of EIA thresholds, leaving individual consent application all of

which may be EIA sub threshold to be dealt with on a case by case basis by the local planning authority without further reference to the Board.

#### RECOMMENDATION

**We submit this is an area which requires further consideration on what legislative changes are required to provide for a legally compliant approach for the Board, particularly in light of European Case Law – particularly Wells, and also recent judgements in the Irish Supreme Court on Compulsory Purchase Order Challenges.**

#### RECOMMENDATION

**Specific Ministerial guidelines should be provided requiring the Board to attach effective enforceable condition to any SDZ consent, with regard to phasing, and delivery of community infrastructure, energy efficiency and achievement of sustainable transport targets. Our earlier comments in relation to providing for complementary review of the enforcement regime to accompany this review of the Board should be read also in this context.**

#### *1.3 Strategic Infrastructure Applications*

The Strategic Infrastructure, “SI” provision inserted through the 2006 amendment to the Planning and Development Act 2000, provided for direct preliminary communication between an applicant and An Bord Pleanala, under a legal process that excluded public consultation.

The effect of an application being validated as SI project means that it is determined to be of special “social and economic importance to the State”, and therefore gives it a status which it would not otherwise have in the planning process. Additionally this decision determines the decision making path the development will follow and that the Board is the Competent Authority, and therefore that no appeal can be made to the Board on the decision, and the only review possible is via application for Judicial Review to the High Court.

The procedure set out in the 2006 Act to allow communication between a developer and a quasi judicial decision making body namely An Board Pleanala – without any requirement for public participation - contravenes the obligation to provide for public participation at the earliest stage of decision making as provided for in the Aarhus Convention which Ireland ratified in 2012, specifically Article 6 (4) which requires of Ireland as a party to the convention that:

“Each Party shall provide for early public participation, when all options are open and effective public participation can take place”;

#### RECOMMENDATIONS

**Given the exposure of Ireland to intervention by the Aarhus compliance committee the 2006 SI legislation allowing internal communication between an applicant and the Board excluding public consultation needs to be reviewed.**

**Additionally, as a matter of urgency, the adequacy of notification and level of publication of determinations that a development constitutes Strategic Infrastructure also needs to be considered.**

**Any acceptance of status of the proposal as a Strategic Infrastructure Project should requires that the proposal demonstrate compliance with national climate mitigation and adaptation policy, and Ireland’s international obligations in respect of same, and that full cost benefit analysis and consideration of alternatives beyond the provisions set out in the EIA Directive, as well as a justification for why the development is considered to be strategic be provided by the Board**

### *Major Applications Generally*

Then imposition of mandatory time deadlines on the Board would not be desirable. With regard to SDZ , SI or other major applications a procedure could be adopted of appointing a lead inspector and assistant inspectors to address specific issues such as ecology or transport, while last the time ensuring the provision of an integrated assessment.

Enduring condition compliance , including major issues such as SDZ phasing is a key consideration

## **RECOMMENDATION**

**The delegation of major applications to individual inspectors should be reconsidered, with provision for an inspectorate team with particular expertise where relevant in individual area., and an outside technical consultant where issues of particular complexity may arise as occurred with the Galway Port hearing in 2015.**

**The practice of engaging specific technical expertise to assist the Inspector is appropriate and welcome, and the associated specification and selection process should be transparent.**

**Competent and compliant enforcement of Board decisions is required both through enhanced legal function by local planning authorities, and direct involvement of An Bord Plenala and the Planning Regulator where compliance breaches are not resolved.**

## **2The increasingly complex and changing national and EU legislative and policy context in which the Board operates.**

### *2.1 National legislation and policy*

It is submitted that the Board’s current provision for the proper consideration of national policy is not fit for purpose.

Examination of contents of a wide number of the “Reasons and Considerations” justifying Board decision shows that there is no systemic of process evaluating projects in accordance with national policy. When national policy is referred to there is no explicit demonstration as to how the relevant policy has been addressed in justifying the decision.

This is particularly significant in relation to Climate and Transport where the Board’s understanding of climate science *and mitigating climate emissions and other relevant considerations in relation to land use and transport planning might* benefit from independent assessment and associated specification of Continuous Professional Development to assist the Board in its function.

### 2.1.1. CLIMATE

Government is advancing legislation through the Oireachtas and has since 2013 committed Ireland to a “Low Carbon Roadmap” to 2050

Overarching Government planning policy through “DoECLG Planning Policy Guidelines 2015” set out a range of considerations on climate including:

“The planning process plays a very significant role in promoting patterns of development which help Ireland meet its international obligations by:

- tackling the sources of climate change by reducing Ireland’s carbon footprint;
- securing less energy and travel intensive development patterns;
- facilitating the generation of energy from low carbon sources; and
- adapting to the effects of climate change.”

The most significant application with climate impact determined in 2015 since this policy came into place was the October 2015 Board consents for the Facebook Data centre at Clonee Co Meath, 17.245347 with a parallel Strategic Infrastructure application for substation for grid connection, and 17.VA0018.

The decision was made without assessing and mitigating increased energy demand and hence climate impact created by the development. The inspectors report did not even seek to determine how much new energy demand the proposal would create, or how, or if at all, the energy demand and consequent direct climate impact of the development would be mitigated:

*“With regard to the EIS submitted with the application addressing this issue. I acknowledge that the EIS did not address the wider issues of renewable energy on a national level.”*

Despite this the Board in its Direction in a half page under the heading “ Environmental Impact Assessment “ used a standard cut and paste formulation in stating

*“ The Board considered that the Environmental Impact Statement identifies and describes the indirect effects of the proposed development on the environment...and concluded that the proposed development would not be likely to have significant effects on the environment. “*

There was this no evidence of any consideration of the direct impact of the development on increased national electricity demand and consequent direct and indirect increased climate emission impact , or any consideration to mitigate such impact by way of condition requiring dedicated renewable power.

The Boards disregard of climate impact exposes the Irish State generally as well as the Board directly to future individual and potential class actions on climate mitigation failure The implications of the Netherlands Urgenda judgement in 2015 against the Dutch Government on inadequate climate action are relevant, and further highlevel information on this can be found at the link below:

<http://www.theguardian.com/environment/2015/jun/24/dutch-government-ordered-cut-carbon-emissions-landmark-ruling>

The verdict is available through this link:

<http://www.urgenda.nl/documents/VerdictDistrictCourt-UrgendavStaat-24.06.2015.pdf>

### 2.1.2 NATIONAL TRANSPORT POLICY .

The Board had shown a systemic failure since 2009 in considering and ensuring decision making compliance with national sustainable travel policy. This policy was set out by the Department of Transport in 2009 in “Smarter Travel “ which contained clear targets to stabilise the total kilometres travelled by the national car fleet at 2009 levels, and reduce the overall national figure for car based workplace travel from 65 % to 45%, by 2020. It set out 49 specific actions including biennial reports on progress starting in 2010. The parallel National Cycling Framework Strategy adopted a target of 10% of all journeys being by bicycle by 2020.

The Board made no apparent policy alteration to its established practice of approving road schemes without effective demand management. While we appreciate the Panel is not concerned with the review of specific decisions – the examples listed below are indicative of an issue which needs to be addressed.

In its consent for such the M50 lane addition it attached a condition No 5 that within three years of the completion of the project a study on “ Demand Management Measures ” be published, but providing no obligation that any such measures be implemented.

Despite the Smarter Travel targets being in place since 2009, in 2014 An Bord Pleanála gave consent for a National Roads Authority/Kildare County Council application to add two lanes to 15 km section of the M7 between the Newbridge and Naas interchanges. The decision while incorporating a monitoring condition failed to address and mitigate the impact of induced traffic from the wider catchment of the M7 and M9 from the surrounding counties and the downstream impact on the Red Cow interchange on to the M50. The Board attached a condition on future monitoring, but no demand management restriction.

Also since 2009 An Bord Pleanála made two significant decisions approving additional parking and car based motorway orientated retail development in the Greater Dublin Area at Kildare Village and Liffey Valley . The Board also extended the permission for 10,200 car spaces at Dublin Airport. This will encourage more car based travel from the catchment area in counties Kildare and Laois feeding into the M7, and undermine modal share with rail and bus.

### **RECOMMENDATION**

**It should be a mandatory obligation in all decisions made by the Bord that assessment of compliance with national policy and legislation be an explicit consideration, and be specifically demonstrated in all decision making orders**

## **2.2 EU Legislative context**

### **2.2.1 General legal obligations in determining consents under EIA and Habitats Directive**

Article 3 of the EIA Directive requires that a competent authority assesses the direct and indirect effects of a project on the named factors and the interactions between them

The Board has to date in a wide number of cases shown a systemic failure to address the direct and indirect upstream and downstream impact of a range projects on: cumulative climate and air pollution, biodiversity, energy demand and sourcing, traffic generation, land use change in its decision making.

The Board in general has to date determined projects on a case by case basis, using national policy and local development plan consideration, in narrow methodology without any coherent or integrated understanding of climate, sustainable resource consumption land use and transport , in its decision making. This is reflected in a range of road, car parking and retail development decisions, which fail to assess or mitigate impact on traffic generation, climate and air particle pollution and congestion and national “Smarter Travel 2009 policy.

The most recent significant case already referred to in relation climate polity was the October 2015 decision by the the Board granted permission to Facebook for a data centre 17.245347 and substation connection 17.VA0018 at Clonee Co Meath without assessing and mitigating increased energy demand and hence, climate impact created by the development , and a where the inspectors report admitted that these issues were not addressed :

Within the last 12 months An Bord Pleanála has faced two Judicial Review challenges which it lost on the issue in assessing the direct and indirect effects of EIA consent projects these are:

- O’Grianna v. An Bord Pleanála (December 2014)<sup>2</sup> relating to the issue of lack of consideration of grid connection for a Co Cork wind farm
- An Taisce v An Bord Pleanála (October 2015). Edenderry<sup>3</sup>

In this latter case The High Court judgment by Mr Justice Michael White upheld the case taken by An Taisce and quashed the permission granted by An Bord Pleanála to Bord Na Mona to extend the operating life of the peat and part biomass fueled power station at Edenderry Co Offaly to 2023. This was on the grounds that the environmental impact of the peat extraction to fuel the continued operation of the power station was not assessed.

Mr Justice Michael White held that there was "functional interdependence" between the power plant and the Bord na Mona bogs identified in the planning application, and went on to state:

"From any reasonable application of the objective facts of this project, there are possible indirect effects of the use of peat from these bogs on the environment,"

He added:.

"The difficulty is that [An Bord Pleanála] excluded completely the consideration of the indirect effects, when considering the planning application for the extension of life of the power plant,"

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<sup>2</sup> [2014] IEHC 632

<sup>3</sup> [2015] IEHC 633

The Court concluded that An Bord Pleanála "has interpreted the relevant legislation applying Article 3 of the Directive too narrowly".

Articles 6(3) of the Habitats Directive sets out specific assessment obligations to the effects of a development on a Natura 2000 site. In the judgement in *T Kelly*<sup>4</sup> v. An Bord Pleanála ( July 2014) the court rules against the Board on ecological assessment of wind energy projects.

These judgments together with this review highlight a need and an opportunity for a review of An Bord Pleanála's inspectors and the Board to support further development of their assessment function in order to better comply with their legal obligations, in particular:

- Under the EIA directive to address direct and indirect effects of a project, whether energy, industrial or in this case transport.
- Under the Habitats Directive to meet the obligation of Article 6

## **RECOMMENDATION.**

**Given the dynamic nature of legislative developments and case law developments – it is only fair and appropriate that the Board and its inspectors be adequately supported in a comprehensive and ongoing process of Continuous Professional Development, CPD and such should include ongoing reinforcement of basic provisions of the law, particularly that pertaining to environmental protection.**

**Additionally such training should include familiarity with basic best requirements for ecological assessment of a range of species and habitats so the Inspector and Board can determine the adequacy of Ecological studies undertaken in terms of seasonality, ranges covered in field assessment, techniques used. So for example - it is important that there is a basic understanding of the appropriate surveying requirements for a strictly protected species such as otter, given they can breed all year round, will develop natal holts up to 1km from a river, and a generally shy and need expert surveillance techniques, and that not only is the animal but its breeding and resting places are also strictly protected and need to be properly surveyed etc. There are a number of excellent accessible reference manuals which a CPD process could assist the Board and its inspector in using effectively.**

**A complementary initiative is required to provide an adequate and appropriate information system detailing favourable reference values, favourable conservation status, site specific conservation objectives and management plans to provide the essential inputs to the Board and its Inspectors in considering impacts to Natura 2000 sites and protected habitats and species outside the network. It is notable that the EU Commission has mounted infringement proceedings against Ireland on this failure which only serves to compromise the role and other competent authorities in their role.**

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<sup>4</sup> [2014] IEHC 400, unreported, Judge Finlay Geoghegan, 25<sup>th</sup> July 2014

## 2.2.2 CONDITION COMPLIANCE WITH BOARD CONSENTS MADE UNDER EU DIRECTIVES

In addition to the planning compliance obligation which would arise on any permission consent under Irish law, EIA and AA consents raise additional considerations.

It is particularly important in the first instance that the Board attach clear conditions requiring compliance with mitigation measures in EIA and AA consents and that no ambiguities should be left to arise.

Additionally, the practice of leaving significant issues including ecological survey and mitigation measures to post-consent assessment and agreement has already resulted in a judgment against Ireland in case

c-183/05 following consents by the Board which left bat surveys to be carried out post consent at Lough Rynn and the Ennis By Pass. Bats are of course amongst a number of species which occur in Ireland which are listed in Annex IV of the Habitats Directive, and which are afforded the strictest level of protection of any species under that Directive.

The level of non compliance and ineffective enforcement by local planning authorities with plans and conditions including non-enforcement of EIA and AA mitigation measures, is undermining the legal competence of the Board's function as an effective decision making body. The anomaly by which the Board has no role in the enforcement of any of the decisions it makes, is no longer tenable.

## RECOMMENDATIONS

**Clarity is required in Board decisions and conditions and on EIA and AA mitigation measures.**

**Continuous Professional Development, CPD for the Board and its Inspectors and key administrative staff should include Training on historic judgements against Ireland also which reflect non-compliant practices such as c-183/05. As recommended earlier the CPD training should be regularly refreshed and provided on changes in EU Directives and national legislation and implications of relevant court judgments. This of course would be a core package which would provide benefit to a range of competent authorities in Ireland. Ideally it would provide an ecological dimension so the consequential effects of failures or deficiencies on habitats and species could be more readily and practically appreciated and not just considered in isolation with the law – providing more effective support to the Board and its inspectors and indeed key administrative staff in the roles in appreciating the effect of their decisions.**

**Surveys and agreements should not be left to post-consent agreement, particularly in respect of EIA decisions and decisions impacting on Annex IV species.**

**Competent and compliant enforcement of the EIA and AA mitigation measures in Board decisions is required both through enhanced legal function by local planning authorities, and direct involvement of An Bord Pleanála and the Planning Regulator where compliance breaches are not resolved.**

### 2.2.3 MULTIPLE CONSENT AND LICENSING SYSTEMS

Despite the amendment to the regulation governing EPA Waste and IPPC licensing following case c 50-09 there is a continued issue which arises for projects requiring multiple consents from other agencies in parallel or after Board applications and consents.

This is of particular concern given the scenario where the Board given its remit conducts an Article 3 EIA in accordance with Articles 4-11 of the Directive, and considers for example the landscape impact and aeronautical impacts of a stack height for an incinerator, and limits its height accordingly. Then the EPA subsequently determines that the stack height needs to be higher to deal with emissions. However it fails to consider the overall EIA requirements and factors given its limited remit. The issue then of the proper overall assessment necessary to inform the ultimate decision is therefore compromised as is compliance with Art 2(1) of the Directive.

The situation which measures when another licensing body requires measures such a buffer areas or other interventions which conflict with application particulars and consent including EIA and AA mitigation measures.

Further issues can arise when given the variety of consents, permits, licences needed – for complex developments – that the Development can be advanced before all of these are in place, in breach of Art 2(1) of the EIA Directive.

The EIA Directive is a framework directive, and it is acknowledged that Ireland is entitled to implement a fragmented consent structure with multiple competent authorities so long as such an implementation does not compromise the objectives of the Directive. An amendment to the original EIA Directive included the requirement in Article 2(1) that: (emphasis added)

“Article 2

1. Member States **shall** adopt **all** measures necessary to ensure that, before consent is given, projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size or location are made subject to **a requirement for development consent and an assessment with regard to their effects**. Those projects are defined in Article 4.”

A possible solution to Ireland’s challenges in dealing with its fragmented consent structure where in certain cases all aspects of the development are not subjected to EIA, and projects might be advanced before fully assessed is to consider the framework proposed in the Projects of Common Interest, PCI legislation as mentioned earlier which provides for an overall co-ordinating authority. The Board has been identified to fulfil this role as we understand for the PCI legislation. A similar role might be considered for the Board in relation to projects requiring EIA. A further requirement would be to ensure the requirement of a “development consent” is properly transposed and implemented in Irish law which the Directive defines in Article 1(2) (c) as:

‘development consent’ means the decision of the competent authority or authorities which entitles the developer to proceed with the project;

The effectiveness of the Board’s role in EIA is compromised in the absence of these further necessary changes and enhancements arguably.

## RECOMMENDATION.

**Provide for further consideration of the adequacy of Ireland’s response to the second complaint in the CJEU’s decision in case c-50/09, and more particularly given the requirements of Article 2(1) of the EIA Directive which in effects requires Ireland to take all measures necessary to ensure a project is assessed in its entirety before given consent to proceed. Include in that consideration of how the Board’s role might be extended to provide an overall co-ordinating role for EIA development in a manner similar to PCI’s.**

**Recommend proper transposition and implementation of “Development” Consent as being the consent which facilitates a project proceeding – and not just one of a range of multiple consents which require EIA from multiple authorities**

### **4. The increase in litigation required in the Boards work and measures required to address same.**

The most significant recent and continuing litigation against Boards board decision relates to EIA and AA consents. The Board needs to address this by improved procedures and decision making.

The major issues generating legal action against the Board are identified in the preliminary comments and section 3 of this submission.

Improving the quality of decision making and providing that the Board is adequately supported with Continuous Professional Development is critical.

The Board in all decisions from a domestic extension to a major infrastructure project needs to ensure legal proofing in its decision making including when the Board makes a decision differing to that of its Inspectors report. In the case of decision contravening the inspectors recommendation there is particular onus on the Board in all consents to demonstrate the sequence of reasoning and grounds for making such a decision.

In the case of EIA consents the first part of European Court judgment Case c 50-09 refer to the obligation of a consent body in the EIA process.

In certain instances, issues arise consequent on information provided by the Developer at the last minute in the context of an oral hearing. In the context of EIA decisions – the directive is quite clear in Article 6(3)c, that information which comes to light after the publication and notification of the EIS to the public and which is relevant to the decision should be subject to proper consultation. The Directive provides *inter alia* in Article 6 for the following:

“3. Member States shall ensure that, within reasonable time- frames, the following is made available to the public concerned:

- (a) any information gathered pursuant to Article 5;
- (b) in accordance with national legislation, the main reports and advice issued to the competent authority or authorities at the time when the public concerned is informed in accordance with paragraph 2 of this Article;
- (c) in accordance with the provisions of Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental

information ( 1 ), information other than that referred to in paragraph 2 of this Article which is relevant for the decision in accordance with Article 8 of this Directive and which only becomes available after the time the public concerned was informed in accordance with paragraph 2 of this Article.”

It is submitted that in the first instance in the interests of EQUITY, there should be a strict embargo on Developers introducing new information in this way at this eleventh hour, and the Board should accept submissions on the inadequacies of information with a view to informing decisions on the requirement for Further Information before it embarks on the Oral Hearing or advances too far into the assessment process where no hearing is to be conducted. This would encourage an improvement in the quality of EIS documentation in the first instance which will assist the Board and the public and reduce the risk of down-stream litigation and associated impacts to all concerned – including delays to business. There may of course be instances where further information is identified as required later and this should be subject to consultation – but the above proposals would we believe reduce the risk of this and the associated litigation which is often consequential on the data, the inadequacy of the EIS or the equity and compliance of the decision making process, bearing in mind that the Article 3 assessment needs to be done in accordance with Articles 4-11 and thus includes Article 6 provisions noted above, and a lawful decision under Article 8 also requires compliance with Article 6 expressly as follows:

*“Article 8*

The results of consultations and the information gathered pursuant to Articles 5, 6 and 7 shall be taken into consideration in the development consent procedure.”

**Finally greater separation between those advising the Board in defending its decisions and those who then act for the Board in such defence might be considered.**

## **RECOMMENDATIONS**

**New procedures additional to those in place to pre-vet Board’s assessment determination for legal compliance under national and EU law. This would require proper documentation of the Board’s deliberations and assessments.**

**Prior assessment and consultation on the adequacy of documentation provided – particularly in respect of EIA cases should be conducted to inform requirements for Further Information. Adequate consultation time should be afforded to the public concerned on this information. Subsequent requirements for Further information which emerge later in the assessment process would then be ideally minimized – but should provide for adequate and EFFECTIVE consultation – which includes that at the very least the existence of the further information needs to be notified in an appropriate manner, adequate and realistic timeframes need to be provided for consideration and response.**

**Similar consideration should be given to elements of infrastructure and indirect and direct effects omitted from the original application – to avoid the complications which arose in the O’Grianna decision – where the whole application and EIA process was concluded – and then the court determined the project for a windfarm could not be considered in isolation of the grid connection.**

Some consideration for some greater separation between those advising the Board in defending its decisions and those who then act for the Board in such defence might be considered.

## **5. The appropriateness of the current legislation governing the functions of the Board, its corporate governance structures and the board appointment process.**

### ***5.1 Legislation governing functions.***

The Board was initially constituted under 1976 legislation to take over the function of the Minister for Local Government in determining appeals against local planning authority decisions.

Over the last two decades the Board has been given a increasing number of functions for CPO, roads and public EIA projects , Strategic Infrastructure, SDZs quarries and other categorise of development

This review presents an opportunity to update and revise the legislative function, remit, appointment structure and operation of An Bord Pleanála, to make it fit of purpose in dealing with the increased functions which it has been mandated with and addressing the integration of future development with the challenges facing Ireland in climate change, biodiversity loss and sustainable land use , resource consumption, energy and transport.

## **RECOMMENDATIONS**

**As per our overriding recommendation it is submitted that the legislative status and legal remit and function of the Board be expanded and redefined as follows:**

- **to fully incorporate and facilitate its delivery of the provisions on all three pillars of the Aarhus Convention<sup>5</sup> , namely access to justice, access to environmental information and public participation, and to fully facilitate the public and environmental NGO participation in the planning process and in its administrative functions;**
- **to properly execute its obligations when acting as an emanation of the State in making decisions and to ensure Ireland’s compliance with EU law, even where national law is contrary or deficient, a requirement clarified by the Court of Justice of the EU, CJEU\*, and also to execute its responsibilities in remedying previous failures, as appropriate, on a case by case basis.**
- **to require national and transboundary impact assessment in all decision making and ensure that on a case by case basis that all determinations are in compliance with :**
  - **Climate mitigation and adaptation ,**
  - **Legal obligations set out in the Birds Directive and Habitats Directive and Water and Marine Strategy Framework Directive in order to appropriately support achievement of: Favourable Conservation Status for listed Habitats and Species, provide for the Strict Protection of Species listed in the second pillar of the**

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<sup>5</sup> CONVENTION ON ACCESS TO INFORMATION, PUBLIC PARTICIPATION IN DECISION-MAKING AND ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS done at Aarhus, Denmark, on 25 June 1998

**Habitats Directive through Annex IV and V, and good ecological status of water bodies; and to good Environmental Status (GES ) of the Marine area by 2020, and reversal of biodiversity loss,**

- **the Environmental Impact Assessment Directive and all relevant EU Directives in which it plays a role as a competent authority**
- **National planning, land use and transport policy and where relevant and appropriate local planning authority Development Plans**

### ***5.2 Corporate Governance Structure***

The Current Corporate Governance needs to address matters going beyond the measures contained in the “Code of practice for the governance of State Bodies” including full transparency, accountability and performance review

The Board needs to ensure more effective procedures in the vetting of its assessment and of its decisions to ensure they are compliant.

The Boards transparency of operation is entirely inadequate.

### **RECOMMENDATION**

**An appropriate annual performance review procedure for Bord members and inspectors should be put in place, including consideration of exposure of the Board to adverse legal decisions.**

**Minutes of Board meetings should be made available and electronically, both on general issues and where individual decision are made ( subject to restrictions relating to litigation)**

### ***5.3 Board Appointment Process***

The need to preserve the independence of the Board from any hint of political interference is of paramount importance. The credibility of the general public or civil society at large and key stakeholders is provided for in the current panel system allows recommendations be made on Board appointments, and provides for a level of informed public participation on such an important selection process.

In any subsequent determination on the recommendations made by the various panels by the Minister, there should be a requirement for transparency in the decision which needs to provide for an appropriate mix of expertise and qualifications to meet the challenge of strategic decision making for the future.

The increased complexity of functions which have been vested with the Board require an effective, transparent appointment structure which provides for independence and involvement of civil society and expert groups as is provided for in the existing panel structure to ensure an appropriately qualified range of Board members. The Board needs an appropriate mix of expertise and qualifications to meet the challenge of strategic decision making for the future.

It is considered that the 5 year appointment term for Board members is appropriate.

Board members have an enormous responsibility to the future for their part in the decision making process, while at the same time being ( at least to date ) immune for personal liability.

## **RECOMMENDATIONS**

**The existing panel structure should be maintained and enhanced given it provides for civil society participation, expert group input, and for the maintenance of both the appearance and facility to ensure the Board is independent from political interference.**

**The two major positive features of the board appointment structure namely competitive interview for the position of Chair and involvement of external nominating bodies for Board members should be maintained and augmented, in particular be requiring that all Board appointment be subject to interview as part of the recommendation process.**

**The final selection of Board members needs to be based on proven competence and mix of expertise and the decision should be rationalised, documented and transparent.**

**Given a new Planning Regulator is to be established, the Regulator could be given a coordinating role the interviewing process.**

### **6. Increase in functions including foreshore and cross border projects.**

Transfer of responsibility of Foreshore functions will require new expertise at Board inspector and member level, particularly with regard to the Marine Strategy framework which requires achieve good Environmental Status (GES ) of the Marine area by 2020. Cross border energy projects require a greater technical understanding of energy transmission and interaction with other electricity of gas transmission systems, than would apply to projects within Ireland

## **RECOMMENDATION**

**The highest level of appropriate training for existing Board members and new inspectors expertise is required for new functions given to the Board.**

### **7. The systems, procedures and administrative practices employed in the Board, including decision making processes in determining planning appeal and determinations.**

The Board in all decisions from a domestic extension to a major infrastructure project needs to demonstrate a clear and transparent decision making process, to show how it has arrived at a decision, and what considerations have informed that decision. This particularly arises when the Board makes a decision differing to that of its Inspectors report. The current practice of using “cut and paste” generic reasons and consideration in different types of categories of decision is no longer tenable

In the case of EIA consents the first part of European Court judgment Case c 50-09 refer to the assessment obligation of a consent body in the EIA process. The purpose of providing a documented and adequately reasoned decision is to provide confidence and transparency to the public concerned and the developer on the decision made and to provide a sound and robust basis to inform any decision to take a challenge. Deficits in the decision and generic lists of considerations clearly fail to achieve those purposes, or to do justice to the Board’s

deliberations. Accordingly the Board needs to be resourced and supported to provide for well documented decisions, and to maintain proper and complete records for appropriate periods for its decisions. The practice of shredding of documents has created problems in a number of cases and while it may be appropriate at a point in time – it should not be done prematurely in the context of the judicial review windows and other decisions yet to be taken on the project and certain critical enforcement windows. Obviously the use of electronic record systems would greatly enhance and address some of these issues and this is developed further below.

## **RECOMMENDATIONS**

**New procedures additional to those in place are required needs to demonstrate a clear and transparent decision making process in all determinations.**

**The Board needs to be resourced and supported to provide for well documented decisions and to feel confident in providing them.**

**Records need to be maintained for appropriate periods to provide for proper audit of decisions and necessary transparency and legal obligations on information and access requirements.**

### **8 Optimal Organisational Structure, information technology and information access.**

It is noted that the DCELG has general policy to promote e-Government. In September 2015 a consultation was initiated on switching referral to Prescribed Bodies to email circulation.

It is submitted the public interest would be greatly served by the migration of the Board's record systems and full files to an electronic system. It would also facilitate compliance with proactive dissemination of information obligations under the Access to Environmental Information, AIE Directive\* and the Aarhus Convention in addition to lessening the requirement for Access to Environmental Information requests and the associated administrative burden and the adverse impact on the legal rights of the public to such information.

Complementary proposals we have made on facilitating submission of electronic documents for applications and indeed submissions or observation, with provision for maintenance of a paper file for audit and for those with certain specific access requirements – should be considered throughout the system – from Local Authority through to the Board, the EPA and indeed Ministerial decisions. This is essential to provide for equity in the transparency and accessibility of the information – given so much of it is based in Dublin in the Board's offices – and yet may pertain to decisions at the other end of the country of concern to local residents.

## **RECOMMENDATIONS**

**To comply with obligations of public authorities on proactive dissemination of information under the Aarhus Convention and the AIE Directive – the board's files and records should be electronically available.**

**Operating procedures should be introduced to allow submissions including appeals with appropriate fees to be paid on line as well by hard copy submission by hand or post.**

## **9. The implication of proposed changes in the planning system, both legislative and structural, including the establishment of the Office of the Planning Regulator**

The establishment of the Office of the Planning Regulator will require horizontal integration with the required redefined legal remit and operation function of the Board and the planning system generally. Some additional specific considerations include:

### CLIMATE LEGISLATION

The objectives set out in Climate legislation will require integration with the Board's decision making process both strategically and on a case by case basis

### WATER FRAMEWORK LEGISLATION

The recent judgement in case c-461/13 will require consideration in order to ensure that impacts of individual projects on the attainment of water quality objectives for water bodies as required under this directive are properly considered in accordance with the requirements of this directive as has been recently clarified by the CJEU in this case and in line with best practice elsewhere in Europe.

### AARHUS LEGISLATION

A full review of the Board's decision making process is required to ensure that :

1 Public participation is provided in all decision making including decision made at preliminary stage, including in relation to all stages of the EIA including screening decisions, and on whether the development constitutes Strategic Infrastructure,, Appropriate Assessment and screening for Appropriate Assessment, Substitute Consent and other relevant stages of an application.

2 Access to submissions made by all parties to the decision making process is available as part of the public participation process and during the determination process generally.

3 Under the Aarhus Convention Article 9(4) and Article 10A as inserted into the EIA Directive in 2003, there is a requirement to ensure review of EIA decisions do not involve prohibitive costs for the public concerned or eNGO's.

This has resulted in a new legislative requirements aimed at judicial reviews. However it is the Board's review in appeal on EIA cases needs to also meet these requirements. We submit there are issues when a developer withdraws an application and a community has incurred costs – and the Board has no discretion under the current legislation to award costs to the community. There is also an issue in the rare instances where the Board awards costs – that they are un-recoverable as the developer applicant is a shelf company, this creates issues for both the public and the Board and there should be screening and requirements in place to avoid this issue. It is acknowledged that the party which benefits from a planning consent – in as much as it increases their land value and its return should be reflected in any structure on how costs are awarded. Additionally – while the public may have contributed significantly to the end outcome and level of mitigation and conditions imposed on a project which may be ultimately then consented to – it seems it is not the Board's practice to award costs to the public when the decision is against them. In short this seems unfair and fails to recognise the public interest provided in their efforts. It is notable that S50B(4) of the

Planning Acts allows for the judge to award costs where the public interest has been served and or where it is in the interests to do so.

The Boards with only one exception has granted expenses under Section 145 Planning and Development Act 2000. to an appellant, and limited to the appeal fee only despite other expenses arising. This was in relation to a repeat retention application in Co Galway. The Board has systemically failed to give reasons in response to requests for expenses recovery to third parties and prescribed bodies as set out in Section 145 Planning and Development Act 2000. The Board has refused as significant number of Section 145 request by An Taisce , even those in cases where the local planning authority was found by the Board found to have made a decision prejudicial to public health or public safety.

The ability of an organisation like An Taisce to continue such a public and environmental service is thus compromised

Arguably if the Board were to use Section 145 more regularly it would also serve to improve the quality of local authority decisions and discourage repeat applications not addressing initial grounds of refusals

## RECOMMENDATIONS

**The basis on which the Board handles costs in appeals and in particular in EIA cases should be reviewed. In respect of procedures on EIA cases there is a specific requirement to ensure it is in line with the Directive's Article 10A as inserted by 2003/35/EC and Article 9(4) of the Aarhus Convention, on costs but also including the requirements for fairness and equity in review procedures.**

**The involvement of Environmental NGOs organisations to make submissions to the Board should be enhanced.**

### **The Office of the Planning Regulator**

The Office of the Planning Regulator should be given a role in the support of a slightly revised Board appointment structure, which maintains the panel system at its heart to preserve the credibility of Board independence and expertise as outlined earlier above.

The level of non-compliance and ineffective enforcement by local planning authorities with plans and conditions including non enforcement of EIA and AA mitigation measures, is undermining the legal competence and credibility of the Boards function. The anomaly by which the Board has no role in the enforcement of any of the decisions it makes, apart from limited conditions on arbitration of financial contributions or bonds, is no longer tenable. Competent and compliant enforcement of Board decisions is required both through enhanced legal function by local planning authorities, and direct involvement of An Bord Pleanála and the Office of the Planning Regulator **where compliance breaches are not resolved.**

## **Other additional Comments:**

While there has been a welcome improvement overall in Ireland the focus on Appropriate Assessment obligations arising out of Article 6(3) in the Habitats Directive – it sometimes appears that this necessary focus on impacts on the Natura 2000 network serves to crowd out assessment on impacts on flora and fauna within the development site, and indeed in the wider countryside surrounding the development and downstream from it. There are strict protections such as Flora Protection Order species and Annex IV species as well as our general obligations to biodiversity which are compromised consequently.

## **RECOMMENDATIONS**

**Continuous professional development should include training on ensuring wider and more general obligations and protections for nature not limited to the Appropriate Assessment Article 6(3-4) of the Habitats Directive, and an awareness in particular of the ongoing deficits in Ireland's response to the marine environment and Bird protections in c-418/04.**

## **Conclusion:**

We thank the panel for its consideration of our remarks which have been offered constructively, but as always under severe resources constraints within An Taisce. We would be happy to provide for clarification as necessary. We look forward to the recommendations arising from this review and highlight the need to put in place an effective plan and structure to ensure they are delivered upon.