Joint Oireachtas Committee on Housing, Local Government & Heritage
Statement for the Irish Environmental Network, IEN on the
Draft Planning and Development Bill 2022
Pre-Legislative Scrutiny Hearing 28th February 2023, 3pm
Delivered by: Attracta Uí Bhroin, IEN's Environmental Law Officer & Phoebe Duvall, Planning & Environmental Policy Officer, An Taisce

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A Cathaoirleach, members of the Committee, we wish to open by expressing our sincere appreciation for the invitation to engage with you in this hearing, on this critically important Draft Bill, and your recognition of IEN as a key constituency of stakeholders with interest, experience and expertise on these matters.

I am Attracta Uí Bhroin, IEN's Environmental Law Officer. I represented the Environmental Pillar on the Planning Advisory Forum, a stakeholder group for the Attorney General's review of the Planning and Development Act[1], Ms Phoebe Duvall, Planning & Environmental Policy Officer, An Taisce who represented An Taisce on the forum, joins me today, with Dr Elaine Mc Goff, from the Environmental Pillar's Steering Committee, and Natural Environment Officer of An Taisce.

We are joined by Dr Fred Logue, managing partner, FP Logue Law LLP. We hope his further expertise and experience will be of use to the Committee in its considerations during this PLS process. We wish to acknowledge the public interest served by his constructive engagements to ensure this bill provides a legally compliant, sensible and robust legislative framework for planning and development in Ireland.

We naturally welcomed the concept of a review of the Planning and Development Act, 2000, and the publication of a draft bill which promised "clarity, consistency and certainty to how planning decisions are made"[2] and a planning system which was "more coherent and user-friendly for the public and planning practitioners"[3]. A key rationale for this overhaul is the need to support the urgent delivery of hundreds of thousands of homes, and critical infrastructure, including for energy and transport. Our concern is that in many respects we see conflict, dysfunction and delay resulting from this draft legislation, rather than the much needed coherence, efficiency and speed.

We welcome the bill's objectives around a plan-led approach as well as coherence and integration in land-use planning and policy hierarchies. These are in fact fundamental principles underpinning key EU Directives governing our approach to land-use planning and policies, in the Strategic Environmental Assessment (SEA) Directive, and its hierarchical relationship to project level assessments under, for example, the Environmental Impact Assessment (EIA) Directive.

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[1] https://www.gov.ie/en/publication/cedaf-planning-advisory-forum/
[2] https://www.gov.ie/en/press-release/3e4e1-improved-planning-regime-takes-step-closer-with-publication-of-draft-planning-and-development-bill-2022/
[3] Ibid.

But we are concerned at a further fundamental erosion of Local Government democracy and the further centralisation of power without adequate legislative safeguards on assessment, consultation and participation obligations, or on democratic oversight and controls. This is particularly the case in Part 3 of the bill on the overarching plan and policy framework and Part 4. This is then compounded by the erosion of environmental democracy and the rights of the public to information, participation and to hold public authorities to account before the Courts, through rights of access to justice.

As drafted the bill risks simply moving the battlefield upstream in the planning system from applications to higher level plans and policies, if it does not seek to fairly and lawfully resolve all these issues. As it stands, the bill fails to ensure compliance with environmental assessment and effective participation obligations in forward planning and in the realignment of plans as effects of central Government plans and policies cascade through the planning system. Additionally, the untrammelled power of the Minister proposed under s.22 to perpetuate current s.28 Guidelines is of serious concern.

Ultimately, to address the crises in housing, energy, climate, biodiversity loss, etc., we have to ensure lawfulness across the board – from individual planning decisions all the way through the hierarchy of plans – otherwise we will end up with multiple Derrybriens. Also, many of the plans and policies will be controversial, so it is all the more important to ensure they are compliant.

We additionally wish to highlight that even with the best will in the world, given the scale of changes presented in this bill and how it may be advanced, there will be errors in the legislation, leading to flawed decisions. That risk is compounded by the massive deficit of at least 541 resources in Planning in Local Authorities[4], and serious resourcing issues in An Bord Pleanala,[5] alongside all the changes it is experiencing, and concerns on its independence.

Our Courts are ultimately the great clearing house for all those flawed decisions. **It is therefore entirely dysfunctional and counter-intuitive to compromise access to the Courts with this bill. Now, more than ever, we will need to be sure Courts can be accessed quickly and efficiently, and add their important value to our planning system, as provided for under our Constitution, EU law and the Aarhus Convention.**

But alarmingly, in Part 9 in particular, with changes to Judicial Review, **the bill proposes a veritable cat's cradle of obstacles making it more difficult for the public to hold a whole range of public authorities to account before the Courts for the lawfulness of their decisions, via Judicial Review**. (Some of these obstacles are replicated for even making an appeal to An Bord Pleanala/An Coimisiún Pleanála). **Rather than speeding things up, this risks adding to delays, as the legality of these new restrictions will inevitably be challenged and argued first**. This adds to the complexity of any particular court case, and so too to its duration and costs. This is a phenomenon known as satellite litigation. The uncertainties arising from any such challenge will spread like a virus through the whole system. The resolution and

[4] https://www.oireachtas.ie/en/debates/debate/joint_committee_on_housing_local_government_and_heritage/2023-02-07/2/

[5] Ibid

determination of these matters may end up involving references to the Court of Justice to clarify questions on EU law, to assist the national court in deciding matters, a process which typically takes at least 18 months or more.

The individual changes raise serious legal concerns. But they also need to be viewed collectively in terms of how they work together to compromise wide access to justice and make access to the Courts excessively difficult. These changes raise serious issues of compliance with both EU law and Aarhus Convention obligations, and our Constitution.

The Programme for Government promised a "review and reform of Judicial Review". Where is this review rationalising the changes to Judicial Review? Where is the evidence required to justify the proportionality of a response which impinges on EU law rights to an effective judicial remedy, as required by the Court of Justice, as that is what is at stake here.

Judicial review, and those who pursue it, have become unjustifiably subject to a toxic narrative. However, as the Planning Regulator highlighted to this Committee, the recently published overview of planning for 2021 highlights that **just circa 3% of An Bord Pleanála's decisions were subject to JR when measured against decisions made, and that these were overwhelmingly justified.**

Let's be clear, you don't want unlawful decisions built upon. It is bad enough when the actual materials of buildings and homes are faulty, but when the very concept of the development itself, which is someone's home or critical infrastructure is unlawful, that is a nightmare, in legal and practical terms. Further issues arise when homes and infrastructure get built in places where they are unsustainable, due to flawed assessments and decisions.

So we are concerned at the risk of these provisions causing delays and compromising our collective need to ensure lawful, and sustainable outcomes from a range of planning decisions. **But we also make no apology for defending the right of access to the Courts to hold public authorities to account. It is a fundamental element of the architecture of the Rule of Law, in our democracy.**

We recommend: Part 9 should be deleted, and sections 50, 50A and 50B of the 2000 Act should be maintained with their outstanding issues of non-compliance corrected with a supplementary scheme to address legal aid obligations. **We would very much welcome an opportunity to expand on the concerns on Judicial Review later.**

We also wish to highlight fundamental concerns with the process for this legislation, including:

- The limited input we have had to the bill,
- The need for public consultation on this bill;
- The need for multiple impact analyses of and for this legislation, to support the legislature's decisions, and the understanding of the systems changes the bill will precipitate, and what is needed to implement them effectively.

Also of concern is how the Government unusually presented a draft bill for PLS meaning we all have lost the benefit of the explanatory rationale for each Head which would normally be provided in a General Scheme of a bill, with changes highlighted. We recommend the rationale for the changes proposed be set

out, and where required the detailed evidence base to support them be made publicly available well before this is advanced before the Oireachtas. Such omissions in the presentation of this draft bill are unacceptable, given it will govern practically every element of the physical world that the public experience, and the state of the environment on which they and future generations depend. These omissions therefore place a significant burden on legislators. This is quite apart from the fact there is no published outcome from the "fitness check" the Attorney General was charged to conduct.

Our final high-level recommendation is on ensuring adequate time is afforded to address this legislation, given the major issues being identified through this PLS, the many corrections and inconsistencies to be resolved, and the further complex areas still to come.

We would welcome an opportunity to elaborate on the above and further concerns, including in respect of s.8 declarations and reliance on them under s.9; appeals; material contravention; information, participation and consultation; fees; extension to duration of permissions; and environmental assessments.

Thank-you once again for this opportunity, we will endeavour to answer your questions to the best of our ability and/or to revert promptly with any details or clarifications sought.