An Taisce
The National Trust for Ireland

Joint Committee on Housing,
Local Government and Heritage
Leinster House
Dublin 2

Sent by email to: jchlgh@oireachtas.ie
FAO: Tom Malone, Clerk to the Committee

20th January 2022

Re. General Scheme of the Housing and Planning and Development Bill 2019

Dear Mr Malone,

Thank you for inviting comments from An Taisce on the General Scheme of the Housing and Planning and Development Bill 2019. We wish to make the following submission, which comprises the first nine pages of the following document. The remainder is the Briefing Document for the Bill prepared by the Oireachtas Library and Research Centre in December of 2019 attached as an appendix.

Yours sincerely,

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Planning and Environmental Policy Officer
An Taisce – The National Trust for Ireland

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An Taisce Submission on the General Scheme of the Housing and Planning and Development Bill 2019

Thank you for inviting a submission from An Taisce on the General Scheme of the Housing and Planning and Development Bill 2019. We very much welcome the opportunity to engage with the Committee on this Bill.

We consider that the Heads of Bill present a significant erosion of the public's right to access justice and participate in the Irish planning process. If passed, the Bill would drastically reduce the ability of ordinary citizens and environmental NGOs to take judicial review (JR) proceedings on planning decisions which they view to have potentially negative environmental consequences. Through several amendments, the Bill aims to significantly curtail which members of the public may take a legal challenge, and place arbitrary and restrictive thresholds on which organisations qualify as environmental NGOs. The amendments would also significantly increase the financial exposure for qualifying members of the public and environmental NGOs who wish to take a legal challenge. It is our considered opinion that the proposed Bill is wholly incompatible with the Aarhus Convention and the legal obligations of its implementing European Directives.

An Taisce therefore calls for the proposed legislation to be withdrawn for the reasons discussed below.

1. Public Participation in Consideration of the Bill

We note that the General Scheme before the Committee now is the same General Scheme that was released in December 2019, verbatim. This is despite the public consultation on the Heads of Bill, which concluded in January 2020. Given that the Heads remain identical to those proposed in 2019, there is no evidence that the results of the public consultation were taken into account, despite significant legal concerns having been raised during that consultation regarding the content of the Bill. To An Taisce's knowledge, the submissions are only available to the public upon request and no synthesis report of the points raised in these submissions is available.

2. Aarhus Convention

An Taisce considers that the proposed Bill would represent a significant breach of the Aarhus Convention, contravening citizens' right to legally challenge flawed planning decisions that do not comply with environmental law.

The United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (commonly known as the Aarhus Convention) was adopted in Denmark on 25th June 1998 and ratified by Ireland in June 2012. It delineates the right to public participation and access to justice in the planning process and stipulates that such participation should not be "prohibitively expensive". We highlight Article 9(3) in particular, which requires States to:

> "*ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.*"

Article 9(4) then specifies that this shall include: "*adequate and effective remedies, including injunctive relief as appropriate, and be fair*".

The Aarhus convention sets out rights for the public to a process which is fair, equitable, and timely. We consider that this Bill would unbalance the favour towards developers and the State, by limiting who is entitled to challenge decisions. These amendments cannot be considered to be "fair", given that the aim is to restrict who of the public is entitled to access justice. The proposed new cost rules would provide anything but equity for individuals and resource-limited eNGOs, when faced with the significant legal resources available to the State (the CSSO) subsidised by the taxpayer, and the resources available to large developers to employ strong legal representation. As such, An Taisce submits that the proposed amendments are clearly contrary to the requirements of the Aarhus Convention which Ireland ratified in 2012, the last of the Member States to do so.

We would highlight that many of the previous amendments to the Planning and Development Act 2000 (as amended) that the subject Bill intends to reverse or alter, notably those related to standing rights and cost rules, were introduced *specifically* to bring Ireland into compliance with Aarhus and the related Directives. Therefore, An Taisce considers the proposed Bill to be a highly retrograde step that in fact will bring Ireland further out of compliance with Aarhus and the EU Directives implementing it.

3. Restrictions on Locus Standi

3.1 NGO Standing Rights

The proposed legislation represents a significant curtailment of the current standing rights that environmental NGOs have in taking legal challenges against planning decisions. We submit that these restrictions are non-compliant with the Aarhus Convention, in addition to the Environmental Impact Assessment (EIA) Directive.

3.1.1 Three year minimum

This amendment would introduce a requirement for NGOs to have existed with a "distinct legal personality" (having articles of association, etc.) and have worked towards stated environmental objectives for a minimum for three years before being eligible for standing to take JR proceedings. As such, it would prevent recently established NGOs concerned with local environmental issues from bringing legal challenges. This is particularly problematic for local, citizen-led groups who may have only recently formed due to perceived controversial developments going through, or about to go through, the planning process.

Not only is this substantially eroding the right of the public to participate in planning, the briefing paper on this Bill, which was prepared by the Oireachtas Library and Research Centre in December of 2019[1] (attached as Appendix I) highlights uncertainty in the Heads of Bill on whether the organisation will have to have existed legally for three years, pursued environmental objectives for three years, or both.

3.1.2 100 member minimum

The proposal in the Heads of Bill that an NGO must have at least 100 members in order to take a JR appears to be completely arbitrary and lacks justification. It appears to be borrowed from the Swedish Environmental Code, where the exact same requirement exists. However, An Taisce would highlight that Sweden has more than double the population of Ireland, leading to disparity, as this requirement would be far easier to meet in Sweden than in Ireland. Notably, similar to the uncertainty with regard to time limits outlined above, the Heads of Bill fail to define what constitutes a "member."

Moreover, regardless of definition, such a restriction would exploit a capacity issue at most Irish NGOs and would rule out the majority of Irish environmental groups from bringing challenges, even when considering national environmental NGOs and foundations. It would also exclude many local, citizen-led environmental organisations from being able to act.

3.2 Sufficient Interest vs. Substantial Interest

As the law currently stands, a potential litigant must prove that they have a "sufficient" interest in the case in order to be granted leave to take a JR. The proposed Bill would amend this to "substantial" interest, a much stricter requirement, and a roll back on amendments to the Planning and Development Act, which were recently implemented to bring Irish legislation in line with European Directives and Aarhus. That is, in 2011, just 11 years ago, the legislation was amended for the very purpose of changing the requirement for a litigant to have substantial interest to sufficient interest for the purposes of achieving legal compliance with EU law. The Aarhus Convention and related laws have not changed in those 11 years, and as such this proposal is incoherent and entirely unjustified.

Under the proposed provisions, the would-be challenger would now have to prove that the development impacts them directly, and in a personal and peculiar way. This is in addition to the requirement that the challenger must have previously participated in the planning process for the subject case by making a submission(s). By significantly restricting the ability of individuals to take legal challenges in this way, the amendment would have the additional effect that the burden of taking legal cases will fall increasingly to already under-resourced NGOs.

[1] Given that the current Heads of Bill are identical to the version proposed in 2019, An Taisce considers that this briefing paper remains wholly relevant.

4. Changes to Cost Arrangements

The proposed new cost rules would expose individuals and groups to significantly higher legal costs if they lose in court, and create uncertainty on costs from the start. As such, it will become much harder for people and groups to hire a legal team without having to significantly finance it themselves. It would also make it much more difficult to hire lawyers on a "no foal no fee basis", as they are unlikely to be able to recoup their full fees even if they win. We would highlight that no foal no fee is one of the primary means through which NGOs and the public are able to access justice at present. Moreover, Ireland is currently the most expensive member state for taking an environmental challenge.

The new system outlined in the Heads of Bill would impose a cap on costs for adverse rulings of €5,000 for individuals and €10,000 for groups. We consider this to be prohibitively expensive, particularly for organisations that may need to take several cases in order to fulfil their objectives of protecting the environment from problematic planning decisions.

Additionally, a limit on awards of €40,000 in successful challenges makes it unsustainable for the small cohort of lawyers who are prepared to act for citizens and environmental NGOs. It also does not provide for a fair and equal process to review decisions when the State (supported by taxpayers) and large companies can afford to pay a team of lawyers to defend contested decisions.

We note that this proposal appears to be based on the UK cost-capping system. However, the UK has a robust legal aid system to help the public with legal costs. Ireland, on the other hand, does not provide legal aid to those challenging environmental or planning decisions. Even with this legal aid system, the UK system has still come under criticism for the high cost exposure to would-be challengers. As such, An Taisce submits that it is not a suitable template for the Irish State to follow.

Ensuring that access to justice is not prohibitively expensive is a key provision of the Aarhus Convention, and An Taisce submits that the proposed changes to the cost rules are not compliant with Aarhus obligations. The current cost rules set out in Section 50B of the Planning and Development Act 2000 (as amended) were introduced in 2010 in response to a CJEU ruling (Commission v Ireland, C-427/07) against Ireland for its failure to ensure that the not prohibitively expensive rule was applied to cases involving the EIA and Integrated Pollution Prevention and Control Directives. Here again, the proposed Bill is attempting to reverse legislation enacted only recently to bring Ireland into compliance with Aarhus and its implementing Directives, despite the fact that Aarhus requirements have not changed in the intervening years.

5. On Notice vs. Ex Parte

The proposed Bill would amend the legislation so that obtaining leave for a JR would be done "on notice" to the opposing party rather than via the current ex parte system. This means that the responding party would now be able to challenge the case at the leave stage - under the ex parte system, only the applicant seeking to take the challenge appears at the leave stage. This amendment would further block access to justice for the public, including by increasing the potential cost

exposure for those seeking to take a challenge. Additionally, while the proposed Bill purports to *reduce* delays in the planning system, allowing challenges to leave applications could in fact *increase* delays.

6. The Underlying Premise of the Bill

Ostensibly, the underlying premise of the proposed Bill is to address delays in the planning system caused by protracted court challenges to decisions made by An Bord Pleanála, particularly challenges that are "vexatious" in nature. The briefing paper prepared by the Oireachtas Library and Research Service on the Heads of Bill (Appendix I) highlights the case of the proposed Apple data centre in Athenry, a project from which Apple pulled out following a judicial review process initiated by two local residents.

In describing the motivation behind the Bill at the time of its release in 2019, the Department of Housing, Planning and Local Government was reported in the Green News[2] to have stated in an email regarding the proposed Bill, "*In light of the level of proposed investment under the National Development Plan, it is considered that there is a need to safeguard the timely delivery of projects and value for public money while simultaneously maintaining the rights of citizens to challenge decisions that do not comply with EU environmental law*."

The briefing paper also stated that then Taoiseach Leo Varadkar reportedly commented at the October 2019 Construction Industry Federation annual conference that, "*It has been enormously frustrating for me, for Government, for many people in the room to see good developments go through the council or An Bord Pleanála quite quickly but get stuck in the courts, in unnecessary and in some cases vexatious disputes that are far too easy to take in this country.*"

An Taisce, however, based on decades of experience working with the planning system as a prescribed body, strongly challenges the Government's assertions that:

a) judicial reviews, particularly vexatious cases, are the primary source of delays in the planning system;
b) restricting access to justice will address said delays; and
c) the proposed amendments in the Bill will maintain the rights of citizens to challenge planning decisions that do not comply with environmental law.

There is no doubt that delays frequently occur in the planning system. However, it is our considered view that the arbitrary restrictions on access to justice as proposed in this Bill will in no way address these delays substantively and/or effectively.

We would highlight that judicial reviews, while crucial, are only one small part of the entire planning process (the proposed legislation applies to challenges taken against decisions by An Bord Pleanála).

[2] Green News, "Bill would make it 'impossible' to challenge poor planning decisions": https://greennews.ie/shock-bill-engos-access-justice/

Over 30,000 planning applications on average are lodged per year to Local Authorities[3], while An Bord Pleanála receives between 2,000 and 3,000 planning cases annually[4]. The table below shows the number of An Bord Pleanála decisions on planning cases and the number of JRs initiated annually since 2016[5]. We would highlight that the number of JRs is very small compared to the total number of decisions made.

Year	Number of cases decided by An Bord Pleanála	Number of judicial reviews instituted
2016	2,078	48
2017	2,143	47
2018	2,847	41
2019	2,971	55
2020	2,628	83

Source: An Bord Pleanála Annual Reports

We acknowledge that the number of JRs has risen over recent years, but would highlight that this is largely on foot of the introduction of SHD provisions, introduced with the intention of fast-tracking large housing developments, but thereby limiting public participation in the process. It should be noted that the current SHD system is ending in early 2022. The result of this attempted fast-tracking has been a higher number of JRs, the majority of which An Bord Pleanála lost, with over 90% of JRs taken on SHDs successful in their challenges to An Bord Pleanála's decisions[6]. An Bord Pleanála's 2020 annual report[7] itself acknowledges this:

> *"A large proportion of the increasing caseload of judicial reviews relating to An Bord Pleanála decisions concern complex matters of procedure and interpretation relating to the EU environmental directives and procedures to do with handling of Strategic Housing Development applications.*
>
> *It is accepted that recent judicial review outcomes have seen a greater number of such cases conceded or lost and this is an outcome of the increasing complexity of those European law issues and novel issues relating to the new strategic housing process."*

[3] Statistics from the Office of the Planning Regulator
[4] Based on statistics from the previous five years of An Bord Pleanála's Annual Reports. An Bord Pleanála planning cases include not only appeals against Council decisions but also strategic housing applications, strategic infrastructure applications, etc.
[5] Ibid
[6] Irish Times "Bigger cash risk proposed for challenges to planning decisions": https://www.irishtimes.com/news/crime-and-law/bigger-cash-risk-proposed-for-challenges-to-planning-decisions-1.4611268
[7] An Bord Pleanála 2020 Annual Report: https://www.pleanala.ie/getmedia/fc1c1237-99de-4636-a32f-005a7057d323/Annual_Report_2020_en.pdf?ext=.pdf

As such, we submit that this should be a cautionary tale for any future attempts to circumvent thorough public participation.

To address delays in the planning process effectively, we submit that rather than drastically restricting citizens' right to access justice, the Government should address the root of the problem. We submit that from our experience with the planning system, there is systemic inconsistent application of local, national and EU policy, particularly in relation to the environment, at the earliest stages of planning. Such inconsistencies frequently result in flawed decisions, which in turn may lead to appeals and perhaps even to JRs (albeit very rarely compared to the total number of planning decisions made, as evidenced by the data provided above). By tightening planning policy from the beginning of the process (at both local authority and An Bord Pleanála levels) and ensuring that national and European policy is adhered to, the number of cases necessitating legal challenges in order to protect the environment would drop significantly.

To accomplish this, we submit that planning authorities should be adequately resourced to ensure that they are able to make the most robust and legally compliant decisions possible. We would recommend 1) Ensuring that all planning authorities have the resources to maintain a full and expanded complement of specialists in a range of disciplines (ecology, transport, climate, etc.) to evaluate applications and the accompanying assessments; and 2) Ensuring that planning authority staff are regularly briefed on updates to national and EU law and policy, so that recent changes and new rulings can be incorporated in planning decisions.

The case of the Derrybrien windfarm, which made headlines around the time that the Bill was announced in December 2019, is highly illustrative of the problem with problematic decisions.[8] The developer did not carry out an EIA at the start of the planning process over 15 years ago, but the turbines were constructed regardless. A large landslide ensued causing extensive damage to local ecosystems, water quality and property. This initial flawed planning decision resulted not only in the disastrous landslide, but 15 years of legal back and forth with the European Commission, with no EIA ever produced. In November 2019 the European Court of Justice ruled on the case and issued Ireland with a €5 million fine with an additional €15,000 per day until the problem is resolved. At the time of writing, the lack of an EIA is still in the process of being remedied. Had environmental law and policy been adhered to from the start, this prolonged and extremely expensive process could have been avoided. By severely limiting the public's ability to take legal cases on environmental matters in planning, we run a very high risk of another Derrybrien occurring in the future.

Furthermore, An Taisce disputes the claim that vexatious cases are a primary cause of planning delays in the court system. The current judicial review process, by its nature, strongly deters such claims. Under Section 50 of the Planning and Development Act, the Courts assess the grounds of the case before granting leave to take a JR, and any vexatious claims would be dealt with comprehensively and dismissed at that point in the proceedings. The leave stage is used to identify and filter out, at an early stage, claims that may be without merit.

[8] Green News, "Derrybrien: Our dismal failure to uphold the law": https://greennews.ie/derrybrien-failure-uphold-law/

Further, in regard to time delays, Order 84 of the Rules of the Superior Courts[9] specifies that: "*An application for leave to apply for judicial review shall be made promptly and in any event within three months from the date when grounds for the application first arose*". As such, even if vexatious claims were brought before the courts, the case would likely be refused leave to proceed to JR within 3-4 months, which cannot be considered a lengthy delay. It must also be noted that generally when a party wishes to take a JR they will employ a legal team to prepare the grounds upon which their JR application will be based, and to represent them in court. To do so entails significant cost, with Ireland being the most expensive European legal jurisdiction, and this is not something that would be embarked upon lightly, or without sufficient grounds.

Moreover, questions arise as to whether the proposed legislation will undermine the intended effect and actually increase delays. For example, the proposed amendments may exacerbate delays as the proposals are likely to elicit a slew of legal challenges. This is discussed in greater detail in the State-authored briefing document (Appendix I).

7. Lack of Justification for Proposed Changes

Not only does the Bill fail to address the root causes of delays in the planning system, An Taisce also submits that the Government has entirely failed to justify the rationale behind the proposed amendments. Given that the proposals in this Bill would appear to be a haphazard conglomeration of pieces of planning law from various other countries, studies are necessary to evaluate the applicability of such proposals in the Irish system, or indeed the effectiveness of these measures in their country of origin. Indeed, the Explanatory Note accompanying Head 4(5) on standing rights states: "*These are fairly standard minimum requirements in most other jurisdictions*". However, the specific restrictions and measures proposed do not appear to have been considered in regard to their relevance, efficacy or workability in the Irish system. While they may work in other jurisdictions, it does not automatically follow that an exact replication will be suitable in an Irish context.

Similarly, no assessment has been conducted to evaluate the potential impacts of the legislation on public participation. No evidence has been presented to demonstrate that the increased restrictions would actually reduce planning delays and bring better value for public money as the Department suggested. Indeed, there may be evidence to the contrary (see the attached briefing document).

As such, An Taisce submits that the proposed amendments are entirely unsubstantiated and unjustified.

8. Conclusion

Ireland, along with the rest of the world, is currently facing a serious biodiversity and climate crisis. Many of our most sensitive species and habitats are in ongoing decline, we are struggling to control greenhouse gas emissions, and our air and waters are facing continuing degradation in quality.

[9] http://www.courts.ie/rules.nsf/8652fb610b0b37a980256db700399507/a53b0f76ffc6c5b780256d2b0046b3dc?OpenDocument

Ireland therefore cannot afford to further restrict access to justice on matters of environmental protection. The highest level of oversight and scrutiny is required.

Given that there is no evidence that the proposed Bill will have a substantive impact on reducing planning delays, it would appear to An Taisce that it is primarily an appeasement of developers and a facilitation of developer-led planning, at the expense of public participation and our legal obligations under the Aarhus Convention and its implementing Directives.

We therefore urge the Government in the strongest of terms to withdraw this Bill.

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Briefing Paper

General Scheme of the Housing and Planning and Development Bill



Hari Gupta, Senior Parliamentary Researcher, Law

04 December 2019

Abstract

The General Scheme of the Housing and Planning and Development Bill 2019 has been received with scepticism by environmental groups. The proposed legislation looks to fundamentally change access to judicial review proceedings for planning decisions in Irish courts. The General Scheme opens up a number of issues relating to access to justice which this paper looks to address.

Contents

The Aarhus Convention and Parallel EU law....2
Domestic Background to the General Scheme....4
The Apple Case....4
Consequences of Apple's decision not to go ahead....4
Announcement of and Reaction to the General Scheme....5
Proposed Legislative Changes....7
Head 1: Short title, construction, collective citation and commencement....7
Head 2: Interpretation....7
Head 3: Specific points in time for initiating judicial review challenges and alleged deficiencies 7
Head 4: Bringing of judicial review proceedings including standing rights....7
Head 5: Consequential amendments to section 37 of the Act....8
Head 6: Special legal costs rules....8
Implications....10
Head 3: Application for judicial review....10
Head 4: Notice and Standing....11
Head 5: Consequential amendments....18
Head 6: Costs....19
Appendix 1: Judicial Review cases listed form 1 January 2018 to 1 December 2019....23
Appendix 2: Legal proceedings involving An Bord Pleanála....27

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Introduction

The General Scheme of the Housing and Planning and Development Bill 2019 (the 'General Scheme') proposes amendments to sections 37, 50, 50A and 50B of the *Planning and Development Act 2000*, as amended (the 'P&D Act'). These sections of the P&D Act relate to planning appeals to An Bord Pleanála (the 'Board') (section 37 of the P&D Act), judicial review of the Board's actions and determinations (sections 50 and 50A of the P&D Act) and the legal costs associated with judicial review procedures of this nature (section 50B of the P&D Act). Amendments to these sections have the potential to affect the ability of a person or group to challenge planning decisions, and therefore questions inevitably arise as to whether the General Scheme would affect the State's international obligations with regard to providing access to justice in environmental matters.

By way of numbers, a total of 75 judicial review claims have been listed in the High Court in the years 2018 and 2019, of which, only three have judgments. A list of these claims is provided in Appendix 1. Appendix 2 contains a graph showing a comparison of legal cases involving the Board in the period 2014 to 2018 inclusive and a graph showing the outcome of legal proceedings affecting the Board in 2018.

The Aarhus Convention and Parallel EU law

The United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (the 'Aarhus Convention') was adopted on 25 June 1998. Ireland ratified the Convention on 20 June 2012.[1]

The key provisions of the Aarhus Convention concerning legal costs and access to justice are contained in article 9, specifically, paragraphs (2) to (4).

Paragraph 2 of article 9 only pertains to activities specified in Annex 1 to the convention and other activities that may have a significant effect on the environment for which States are required to encourage public participation in the decision-making process.[2]

The paragraph provides that 'within the framework of its national legislation', a State is required to ensure that 'members of the public concerned … have access to a review procedure before a court of law and/or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision, act or omission'.

The term 'public concerned' includes people with a 'sufficient interest' and those whose rights have been impaired by the decision, act or omission. What constitutes a sufficient interest and impairment of a right are to be 'determined in accordance with the requirements of national law', consistent with 'the objective of giving the public concerned wide access to justice'. Any non-governmental organisation (NGO) that promotes environmental protection and meets any requirements under national law will be deemed to have a sufficient interest and to have rights capable of being impaired.

Article 9(3) provides an additional requirement on States to 'ensure that, where they meet the criteria, if any, laid down in its national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by private persons and public authorities which contravene provisions of its national law relating to the environment.'

Article 9(4) provides a further obligation on States Parties to 'provide adequate and effective remedies, including injunctive relief as appropriate, and be fair, equitable, timely and not prohibitively expensive.'

Although the access to justice provisions of article 9(2) of the Aarhus Convention are very similar in scope and effect to article 11 of the Environmental Impact Assessment Directive (the 'EIA

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[1] Prior to ratification of the Aarhus Convention the Department of Communications, Climate Action and Environment drafted a table outlining the implementation measures that had been put in place to ensure domestic compliance with the convention: see, Implementation Table in respect of Ireland's Implementation Measures.

[2] As provided for in article 6 of the convention. The activities listed in Annex I comprise large industrial installations in the energy, metal production/ processing, mineral, chemical, waste, wastewater, transport, and petroleum sectors. Such activities fall within scope of the Environmental Impact Assessment Directive requiring an Environmental Impact Assessment to be conducted as part of the planning process: Annex II to the Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment (codification) [2012] OJ L26/1 as amended by Directive 2014/52/EU of the European Parliament and of the Council of 16 April 2014 [2014] OJ L124/1.

Directive') as consolidated and amended, and to article 16 of the Integrated Pollution Prevention and Control Directive (the 'IPPC Directive'),[3] as codified, unlike those of the directives,[4] the provisions of the convention, in themselves, do not provide an autonomous European or International law requirement on States. The convention allows States to maintain their own particular standing rules, so long as they satisfy the wide access to justice requirement. In fact, as noted by Professor Pavlos Eleftheriadis of the Oxford Law Faculty an attempt in 2003 to make the provisions of the Aarhus Convention more prescriptive, by making them directly effective in State legal systems, never passed, largely because the proposal threatened the independent procedural autonomy of States.[5]

Guidance on the meaning of the access to justice provisions may be drawn from the Aarhus Convention Implementation Guide (the 'Guide') and from determinations of the Aarhus Convention Compliance Committee ('ACCC'). Neither the Guide nor decisions of the ACCC are legally binding on States.[6] It is also worth noting that in *Conway v Ireland* the Supreme Court has stated that while ACCC determinations do not provide a definitive legal interpretation of the law applicable in Ireland, they do facilitate compliance by States with the terms of the Convention and therefore it is appropriate for Irish courts to have regard to them.[7]

[3] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (Codified version) [2008] OJ L24/8.

[4] The CJEU held in the Trianel case that where domestic procedural law does not allow standing, an NGO may still derive a right to contest a decision in a national court directly from article 11 of the consolidated EIA Directive (formerly article 10a) and, by extension, article 16 of the consolidated IPPC Directive (formerly article 15a): *Bund für Umwelt und Naturschutz Deutschland, Landesverband Nordrhein-Westfalen eV v Bezirksregierung Arnsberg* (Case C-115/09) ECLI:EU:C:2011:289.

[5] Pavlos Eleftheriadis, 'Environmental Rights in the EC Legal Order' (2007) 26 *Yearbook of European Law* 297 at 307. See also Dáire McMullin, '"I'm Still Standing" – Ireland and the Wide Access to Justice Requirements in the Aarhus Convention', *Trinity College Law Review Online* (2017).

[6] However, as pointed out by Dr Áine Ryall, the consistent view of academic literature is that when decisions of the ACCC are adopted by the Meeting of the Parties 'the normative value' of its interpretations increases in accordance with Article 31(3) of the Vienna Convention on the Law of Treaties: Dr Áine Ryall, 'Access to Justice in Environmental Matters in Member States of the EU: the impact of the Aarhus Convention' *Jean Monnet Working Paper No 5/16* (2016) p. 7.

[7] [2017] IESC 13 at [4.13].

Domestic Background to the General Scheme

The Apple Case

On 24 April 2015, Apple Distribution International ("Apple") applied to the local authority for planning permission to build a data distribution centre facility together with an associated electricity substation and grid connection, close to Athenry, County Galway. The application was accompanied by an environmental impact statement (EIS) and an appropriate assessment screening report (AASR).[8]

In May 2015, two local residents made separate submissions to the local authority raising issues with the adequacy of the EIS. The application was approved by the local authority and that decision was appealed to the Board. On 11 August 2016, the Board granted planning permission to Apple for the development.[9]

The two residents (the 'applicants') sought judicial review of the Board's determination, in the High Court. The core issue of the review concerned the extent to which the Board had fulfilled its obligations to carry out an EIA, specifically, whether the Board was obliged to consider Apple's overall plan to construct eight different data centres in an EIA prior to granting permission for this individual data centre. On 12 October 2017, McDermott J upheld the Board's determination.[10] The applicants sought a certificate for leave to appeal to the Court of Appeal which was rejected by McDermott J.[11]

The applicants sought leave to appeal directly to the Supreme Court, and on 26 April 2018, the applicants were granted that leave to appeal.[12] On 10 May 2018, Apple announced that it would not go ahead with the plan to build the data centre, citing delays in the planning process as one reason for taking that decision.[13] On 11 April 2019, the Supreme Court dismissed the appeal.[14]

Consequences of Apple's decision not to go ahead

Prior to Apple's announcement that it would not proceed with its plans for a data centre, and in the leadup to the launch of the *National Development Plan 2018–2027*, the Government announced an intention to introduce legislation to make it more difficult to delay or block major infrastructure projects, large housing developments and data centres. The Government cited fears that challenges, like those faced by Apple, could slow infrastructure projects and dissuade multinational

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[8] *Fitzpatrick v An Bord Pleanála* [2017] IEHC 585.

[9] Ibid.

[10] Ibid.

[11] *Fitzpatrick v An Bord Pleanála* [2017] IEHC 644.

[12] *Fitzpatrick v An Bord Pleanála* [2018] IESCDET 61.

[13] C Taylor and P Hamilton, 'Apple scraps plan for €850 million data centre in Athenry', *The Irish Times*, 10 May 2018.

[14] *Fitzpatrick v An Bord Pleanala* [2019] IESC 23.

investment in the State.[15] A media report at the time noted that Cabinet discussed policy that would halve the period to launch judicial reviews of major planning decisions, from eight weeks to four weeks, and would tighten the rules governing eligibility to apply for a judicial review of a planning determination.[16]

In the same week as the Government's announcement, the President of the High Court issued Practice Direction HC74, requiring that from 26 February 2018, all applications for leave to apply for judicial review in respect of Strategic Infrastructure Development (SID) (development listed in Schedule 7 to the P&D Act, as amended) must be made to the Judge in charge of the Strategic Infrastructural Development Judicial Review List (currently Mr Justice Simons), who will sit at 10.30 am each Thursday during term to hear the applications. The Practice Direction provides that if leave is 'granted, the head of the Strategic Infrastructure Development Judicial Review List will give all necessary ancillary directions with a view to ensuring a fair just and expeditious hearing of the matter.' In June 2018, the Government also introduced Amendment no 44 to the Planning and Development (Amendment) Bill 2016 in the Seanad, adding Communications and Data Infrastructure with a combined gross floor space of 10,000 square metres to the list of SID.[17] Section 49 of the *Planning and Development (Amendment) Act 2018* has not yet been commenced.

Dr Áine Ryall of the University College Cork School of Law has described the difficult balance affecting Irish planning law:[18]

'A significant theme in the current narrative around planning and environmental matters in Ireland is the ***sharp tension between timely decision-making, on the one hand, and "wide access to justice", on the other***. A careful balancing of interests is required here within the framework prescribed by international and EU law. ***Our current governance structures are struggling to draw this balance appropriately.*** In particular, concerns have been expressed in some quarters regarding the timeframes for decision-making in certain cases, including the long delays involved where a planning decision is challenged by way of judicial review.' (emphasis added)

Announcement of and Reaction to the General Scheme

On 2 October 2019, at the Construction Industry Federation annual conference, the Taoiseach announced the imminent publication of a new planning bill.[19] He premised his announcement by reportedly saying:[20]

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[15] See Pat Leahy, 'Proposed rules aim to limit court challenges to building projects', *The Irish Times*, 7 February 2018; Kevin O'Sullivan, 'Environmentalists say proposed Bill makes it harder to object to planning decisions', *The Irish Times*, 13 November 2019.

[16] Pat Leahy, 'Proposed rules aim to limit court challenges to building projects', *The Irish Times*, 7 February 2018.

[17] 'Planning and Development (Amendment) Bill 2016: Report Stage', Seanad Debates, 13 June 2018.

[18] Dr Áine Ryall, 'Challenges and Opportunities for Irish Planning and Environmental Law' (2018) 25(3) *Irish Planning and Environmental Law Journal* 104–111.

[19] Barry O'Halloran, 'Varadkar promises law to block "vexatious" planning challenges', *The Irish Times*, 2 October 2019.

[20] Shawn Pogatchnik, 'Old-fashioned builders are "holding Ireland back and adding costs", says Taoiseach', *The Irish Independent*, 3 October 2019.

'It has been enormously frustrating for me, for Government, for many people in the room to see good developments go through the council or An Bord Pleanála quite quickly but get stuck in the courts, in unnecessary and in some cases vexatious disputes that are far too easy to take in this country.'

The Minister for Housing, Planning and Local Government, Eoghan Murphy T.D., is reported to have stated:[21]

'In light of the level of proposed investment under the National Development Plan, it is considered that there is a need to safeguard the timely delivery of projects and value for public money while simultaneously maintaining the rights of citizens to challenge decisions that do not comply with EU environmental law'.

The Minister appears to imply that the General Scheme is a means of establishing the balance to which Dr Áine Ryall was referring; amending the provisions related to standing and costs with a view to restricting the capacity of individuals and groups to cause vexatious delay in the determination of planning and development applications while maintaining access to justice for individuals and established NGOs to challenge decisions that may fall foul of the domestic and EU environmental law. However, whether the provisions of the General Scheme achieve this balance has been questioned reportedly by environmental groups, citizens' groups and legal professionals, including the heads of the Free Legal Advice Centres and the Irish Council for Civil Liberties.[22] Environment Pillar (a coalition of environmental organisations) has argued: if the provisions of the General Scheme were to be enacted, it 'would make it near impossible to challenge planning decisions in the courts and to hold public authorities and the government to account.'[23]

[21] See Kevin O'Sullivan, 'Environmentalists say proposed Bill makes it harder to object to planning decisions', *The Irish Times*, 13 November 2019.

[22] Niall Sargent, 'New Bill a "retrograde" step in access to justice rights', *The Green News*, 23 November 2019.

[23] Kevin O'Sullivan, 'Environmentalists say proposed Bill makes it harder to object to planning decisions', *The Irish Times*, 13 November 2019. See also An Taisce, 'Proposed planning bill will shut out the public voice, says An Taisce', *Press Release*, 13 November 2019.

Proposed Legislative Changes

Head 1: Short title, construction, collective citation and commencement

This Head contains standard provisions about the name of the Bill and provides for the coming into operation of the Act.

Head 2: Interpretation

This is a standard provision setting out the definitions of terms specific to the Bill.

Head 3: Specific points in time for initiating judicial review challenges and alleged deficiencies

This Head proposes amendments to section 50 of the P&D Act.

The proposed amendments would require a potential applicant to wait until the Board has made a determination before the applicant can commence judicial review proceedings under the section.

The Head also proposes that, where an applicant wishes to seek judicial review of an alleged deficiency related to a clerical or typographical error, an unintentional error or omission or an error in transposition, the applicant is obliged to apply for rectification of the deficiency prior to applying for judicial review.

Head 4: Bringing of judicial review proceedings including standing rights

This Head proposes to make a number of amendments to section 50A of the P&D Act which will affect the standing rights of potential applicants for judicial review.

First, the General Scheme proposes to amend the manner in which judicial review leave hearings are dealt with and the notice requirements associated with the application process.

As it stands, sub-section 50A(2) of the P&D Act provides that an application for leave must be made by *ex parte* motion (without other parties present), in accordance with the procedure specified in rule 20(2) of Order 84 of the *Rules of the Superior Courts* ('RSC'). Then, the Court hearing the application may require the leave hearing to be held on an *inter partes* basis (with other parties present). If heard *inter partes*, then the notice provisions of the section come into play. The proposed amendment to sub-section 50A(2), would require that all applications for leave be made by motion on notice (grounded in the procedure set out in rule 20(2) of Order 84 RSC). This would have the effect of allowing the notice party or parties to choose to contest the application for leave.

Secondly, the Head proposes to require that leave can only be granted if the Court determines that the application has a reasonable prospect of success and that there are substantial grounds for challenging the act or decision in question. At present, paragraph 50A(3)(a) only requires the applicant to prove that there are substantial grounds for contending that the decision is invalid. The new provision would add an extra layer, requiring the applicant to prove that the judicial review has a reasonable prospect of success.

Thirdly, the Head proposes to change the current 'sufficient interest' requirement (that the leave applicant has sufficient interest in the matter) to a 'substantial interest' requirement and require an applicant to show that he or she would be directly affected by the proposed development in a personal or peculiar way. The relevant provisions also propose that, unless there has been a procedural breach in the decision-making process or the applicant can provide good and sufficient reasons for not becoming involved in the planning process at an earlier stage, the applicant must have made at least one submission or observation on the planning application before he or she will be granted standing.

Finally, the Head proposes to add further restrictions on the class of non-governmental organisation (NGO) that will automatically gain standing rights to challenge planning decisions related to development that may have significant effects on the environment. At present, with the exception of any prescribed requirements made under section 37(4)(e) of the P&D Act, an NGO will gain automatic standing if it can show that it has aims or objectives related to the promotion of environmental protection and that it has pursued those aims for a minimum of 12 months preceding the date of application. The proposed new prerequisites for automatic standing would require the NGO to have pursued their environmental aims for a minimum of three years preceding the date of application, to be composed of at least 100 affiliated members and to have pursued its environmental aims on a not-for-profit basis. The NGO would also need to prove that it has a legal personality based in a constitution or rules of association[24] and that its aims and objectives are relevant to the subject matter of the leave application.

Head 5: Consequential amendments to section 37 of the Act

This Head proposes to amend section 37 of the P&D Act to introduce restrictions on the class of non-governmental organisation (NGO) that will automatically gain standing rights to appeal to the Board. The proposed new restrictions are almost the same as those proposed in Head 4; the exception being that there would be no express requirement that the aims and objectives of the NGO are relevant to the subject matter of the appeal.

Head 6: Special legal costs rules

Head 6 proposes to introduce new costs rules for judicial review proceedings. Under the current legislation where the applicant fails the default cost order is that each party to the proceedings bears their own costs. Where the applicant succeeds or partially succeeds the respondent or notice party or both will be ordered to bear the costs of the applicant, or a proportion of costs where appropriate. The current legislation allows for Court discretion in formulating costs orders in matters of public importance or where in the special circumstances of the case it would be in the interest of justice to do so. The Court also retains a discretion in cases where the Court finds a party in contempt of Court, where the Court considers a claim or counter claim to be frivolous or

[24] The requirement that an NGO possess a legal personality appears to be directed at overturning the High Court decision (affirmed in the Supreme Court) in *Sandymount and Merrion Residents Association (SAMRA) v An Bord Pleanála* [2013] 2 IR 578, in which the court concluded that section 50A of the P&D Act provides an exemption (for bodies with aims grounded in environmental protection) to the common law rule that unincorporated bodies do not have standing to maintain legal proceedings.

vexatious, or where the Court determines that the conduct of a party warrants a particular costs order.

The proposed changes would make the default situation that the Court could not order an applicant or a defendant to pay costs greater than the amounts prescribed in the legislation. The cost caps would be €5,000 for individual applicants, €10,000 for other applicants and €40,000 for respondents; these amounts may be varied by the Minister by order or regulation having regard to inflation. The Court would maintain a discretionary power to vary the prescribed amounts or remove a prescribed limit in a particular case, but only if satisfied that the variance is necessary to inoculate the applicant against a prohibitively expensive costs order. A costs order would be prohibitively expensive to an applicant if payment of the costs would exceed the financial resources of the applicant (having regard to any actual or potential financial support), or if the amount of costs is objectively unreasonable having regard to: the situation of the parties; the challenge's prospects of success; the importance of the issue at stake to the applicant and the environment; the legal and procedural complexity of the case; and whether the claim is frivolous. The Head proposes to require hearings on costs to be conducted in private where it involves the disclosure of confidential and other personal financial information and publicity to the detriment of the disclosing party.

Implications

Head 3: Application for judicial review

In Ireland, the judicial review procedure allows an applicant to challenge the lawfulness and fairness of a decision-making process. An applicant seeking judicial review is required to first obtain leave from the High Court in order to proceed to a substantive hearing. As argued in Hogan and Morgan's *Administrative Law in Ireland*: 'The requirement as to leave is a most important feature of the judicial review procedure. It serves as a "filtering device" … and guards against unmeritorious claims that a particular decision is invalid.[25]

Section 50 of the P&D Act provides that the procedure outlined in Order 84 RSC (including the requirement to seek leave) applies to judicial review of planning decisions. The General Scheme would not affect this. However, the General Scheme proposes amendments that would require an applicant to wait until the Board has made its determination on a matter before applying for leave.

The explanatory note to the Head states that this proposed amendment is aimed at creating a greater level of certainty around the timing of applications for judicial review. If this Head is enacted, a leave application could only be lodged within 8 weeks of the Board's determination.[26] A leave application could not be lodged directly after the decision of a local authority where the applicant has not invoked a right of appeal to the Board under section 37 of the P&D Act. In justification, the explanatory note cites article 11(2) of the EIA Directive which provides 'Member States shall determine at what stage the decisions, acts or omissions may be challenged'.

The Head also provides that an aggrieved party would be required to apply to the Board for rectification of prescribed errors, prior to applying for leave. Prescribed errors would include 'unintentional' errors or omissions in the order or determination.

Irish law differs from UK law in that it does not create a prerequisite for judicial review that an applicant must have exhausted all remedies prior to coming to the Court. However, Irish case law has lent support to the general proposition that where that applicant can follow an alternative legislative remedy, the reviewing Court should be slow to intervene unless the alternate remedy cannot provide adequate relief.[27] It follows that it is likely that Courts would respect these new rules, requiring aggrieved parties to get minor errors fixed unless their attempts at rectification fall on deaf ears.

The main issue that could arise is the question of whether or not an error is intentional. Often these questions can only be resolved by reference to the facts and a proper hearing. A question arises: ***what amounts to an 'unintentional' error? Would a failure to notify a person who had lodged***

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[25] Gerard Hogan and David Morgan, *Administrative Law in Ireland* (4th ed) (Round Hall: Dublin 2010), p. 838.

[26] *Planning and Development Act 2000* s. 50(7). This sub-section would not be affected by the General Scheme. Reports that the Bill would halve the period to launch judicial reviews of major planning decisions, from eight weeks to four weeks were inaccurate.

[27] *State (Abenglen Properties) v Corporation of Dublin* [1984] 1 I.R. 381; *Harding v Cork County Council* [2006] IEHC 295; *Sweetman v Clare County Council* [2018] IEHC 517.

a submission to the local authority amount to an 'unintentional' error in the order or determination?

In the case of *Sweetman v Clare County Council*[28] the applicant applied for judicial review pleading that the local authority had failed to carry out a proper EIA or AASR on the development that was the subject of the planning application. The applicant argued that the alleged failure to comply with EU law (the EIA Directive and the Habitats Directive) could not be resolved through an appeal to the Board and sought judicial review of the local authority's decision. The Court acknowledged that it retained a discretion to hear cases where an applicant had an alternate remedy (an appeal to the Board) but declined to do so on the facts, finding that that an appeal to the Board could have provided the applicant with an adequate remedy. ***Could a failure to carry out an EIA amount to an 'unintentional' error, where the original case officer had underestimated the extent of the development?***

Head 4: Notice and Standing

Keane J. in *Lancefort Ltd v An Bord Pleanála (No 2)*, while examining a question of whether the applicant should be granted standing to challenge a planning decision, stated:[29]

'The authorities reflect a tension between two principles which the courts have sought to uphold: insuring on the one hand, that the enactment of invalid legislation or the adoption of unlawful practices by public bodies do not escape scrutiny by the courts because of an absence of indisputably qualified objectors and, on the other hand, that the critically important remedies provided by the law in these areas are not abused.'

This comment once again refers to a perceived need to establish a balance between ensuring access to justice while limiting the extent to which the system may be used to support vexatious or frivolous purposes. This section will address this issue in relation to legal standing.

Notice Requirements

The proposed new requirements requiring a leave application to be made by motion on notice to affected parties effectively opens a leave application to challenge. The current default position is that the leave application is made *ex parte* and it is only during the hearing of the leave application that the Court may require the applicant to notify affected parties, making the hearing *inter partes*.[30] As stated in the explanatory note, the practical effect of this is that 'the defendant does not receive notice of the motion and therefore generally has no involvement in the leave application process'. The explanatory note points out that the Court rarely requires the leave hearing to be conducted on an *inter partes* basis 'with the majority of motions being granted leave to proceed to a full substantive hearing in the absence of any involvement by other concerned participants.'

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[28] [2018] IEHC 517.

[29] [1999] 2 I.R. 270 at 308–309.

[30] At present, the default position is that an applicant is required to notify respondents only after leave has been granted.

The proposed notice requirements would appear to have no direct effect on an applicant's access to justice, it would simply allow an affected party to challenge the leave application immediately. Where a potential respondent has concerns that an application is vexatious or frivolous, the respondent would be able to plead its case at the leave application stage of proceedings.

This does not mean that the proposed notice requirements would not have any detrimental effects on the judicial review procedure. For example, it is not inconceivable that the new procedure could result in far more challenges by respondents at the leave stage, adding to the workload of an already stretched court system and creating a backlog of work for the High Court especially given that only a limited number of judges are currently assigned to the judicial review list.[31] The counter-argument that has been put in the explanatory note to the Head is that the proposed new motion on notice approach could better enable 'the Judge to filter the grounds submitted and where they decide to grant a leave application, confine the judicial review to the key substantive issues … saving Court time and unnecessary expense for all participants.' Although this may save court time at the substantive stage, if this right to challenge is taken up by respondents, the proposals will add to the Court's workload at the leave stage and therefor the question that necessarily arises is: ***will the courts service be provided with the extra resources to help it to cope with any resulting increase in workload at the leave stage?***

Substantial Grounds Test

The current 'substantial grounds' test requires the Court not to grant leave unless satisfied that there are substantial grounds for *contending* that the decision or act concerned is invalid or ought to be quashed.

The proposed new standard would require the Court to be satisfied that there are:

1. substantial grounds for *challenging* the decision or act and contending that it is invalid or ought to be quashed; and
2. the application has a reasonable prospect of success.

The first part of the proposed test changes replaces the word 'contending' with the word 'challenging'. It is unclear whether this proposed change was intended, as the explanatory note to the Head incorrectly states that currently the relevant provision uses the word 'challenging'.

Assuming that the change is intentional, if enacted, a question arises as to what this change would entail. ***Would the change in terminology from 'substantial grounds for contending' to 'substantial grounds for challenging' require the Court to apply a more subjective test, looking into the specific intentions behind the applicant's challenge?*** If so, this would require the Court to delve a lot deeper into the pleadings than would normally be necessary at the leave stage, adding an extra level of scrutiny to the leave stage.

The Head proposes to add a new requirement to the substantial grounds test, that an application for judicial review must have a reasonable prospect of success before leave can be granted.

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[31] The *ex parte* non-jury/judicial review list is heard by Mr Justice Meenan on a Monday morning each week. The Strategic Infrastructural Development Judicial Review List is heard by Mr Justice Simons each Thursday morning. Some claims are also heard in the Commercial list, if they meet the requirements in terms of size: see the legal diaries on http://www.courts.ie/.

Currently, the law requires that before the Court can grant leave, it must be satisfied that, on the facts 'an arguable case in law can be made that the applicant is entitled to the relief which he seeks'.[32] The arguable case in law must be assessed in relation to the particular facts, but it can be completed in an objective manner, without scrutinising the overall merits of the applicant's claim.[33] The same could not be said for the proposed 'reasonable prospect of success' requirement as the Court would need to look into the specific merits of the case, not just the merits of the legal arguments, to determine if the case were reasonably likely to succeed. Potentially, this could add another subjective element to the substantive grounds test, further limiting the extent to which the leave stage could be heard expeditiously. Again, this leads to the question: ***will the courts service be provided with the extra resources to help it to cope with any resulting increase in workload at the leave stage?***

'Sufficient' v 'Substantial' Interest and further requirements

The current legislation provides that a Court may only grant leave if it is satisfied that the applicant has a sufficient interest in the matter. The General Scheme proposes to change this from a sufficient interest to a substantial interest and require the applicant to show that:

1. he or she would be directly affected by the proposed development in a personal or peculiar way (the 'directly-affected requirement'); and
2. he or she has made a submission or observation on the planning application, unless there was a procedural breach in the decision-making process or he or she can provide good reasons for not having made a submission earlier (the 'prior-participation requirement').

According to the explanatory note to the Head, the change from 'sufficient interest' to 'substantial interest' was an intentional strengthening of the wording.

Section 50A(4) of the P&D Act currently provides that a 'sufficient interest … is not limited to an interest in land or other financial interest'. It is presumed that this reference to sufficient interest would be changed to 'substantial interest', even though this has not been included in the General Scheme.

The standing requirement in section 50A of the P&D Act was changed from 'substantial interest' to 'sufficient interest' following the enactment of the *Environment (Miscellaneous Provisions) Act 2011*.[34] The reason for the change was not clarified in the Explanatory Memorandum to the Bill, but during debate on the Bill, the then Minister for the Environment, Community and Local Government, Phil Hogan T.D., stated:[35]

"This amendment means the planning code will have the same requirements as the Aarhus convention.

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[32] *G v Director of Public Prosecutions* [1994] 1 IR 374 at 377-378 per Finlay CJ.

[33] No view is expressed as to whether the applicant's arguments are strong or weak, or the eventual result of the case O.O. v Minister for Justice [2015] IESC 1 at [15], is a good authority for what amounts to an arguable case.

[34] *Environment (Miscellaneous Provisions) Act 2011* s. 20.

[35] Minister for the Environment, Community and Local Government, Phil Hogan T.D., 'Environment (Miscellaneous Provisions) Bill 2011: Instruction to Committee', *Dáil Éireann Debate*, Thursday, 21 July 2011.

It is a less onerous requirement for individuals who seek a judicial review of planning decisions if they are approved. We are not doing anything on sterilisation. It is just a matter for the planning authorities as is normal to implement the rural planning guidelines and no change is suggested."

Dr Áine Ryall noted that the pre-2011 legislation did not provide a definition of 'substantial interest' outside of qualifying that it was 'not limited to an interest in land or other financial interest'. As a result, even though the clear intention behind introducing a 'substantial interest' test was to reduce the number of challenges to planning decisions, it resulted in a 'wave of expensive and time-consuming satellite litigation' because the courts were required to determine the scope and meaning of the term. According to Ryall, the Supreme Court's particularly narrow interpretation of the term in *Harding v Cork County Council*[36] and the Government's decision to ratify the Aarhus Convention led to the switch to a 'sufficient interest' test.[37]

Article 9(2) of the Aarhus Convention requires that members of the public with 'sufficient interest' should be granted standing to challenge decisions pertaining to developments that would have a significant impact on the environment. The same term is used in article 11 of the EIA Directive and article 16 of the IPPC Directive. That said, there is no onus on Ireland to transcribe the specific term 'sufficient interest' into its domestic legislation, so long as the domestic law adheres the principles of equivalence and effectiveness.[38] This point has been emphasised in ACCC determinations, for example:[39]

'The fact that the exact wording of any provision of the Convention has not been transposed into national legislation is in itself not sufficient to conclude that the Party concerned fails to comply with the Convention.'

Irrespective of whether or not the proposed legislation is in compliance with its International and EU obligations, there is no doubt that this particular change could expose Ireland to litigation.

Dr Áine Ryall has argued 'any amendments to well-established standing rules can have the unintended consequence of triggering even more litigation to determine the meaning of any new rule. The net result is further uncertainty and delay.'[40]

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[36] [2008] IESC 27.

[37] Dr Áine Ryall, 'Challenges and Opportunities for Irish Planning and Environmental Law' (2018) 25(3) *Irish Planning and Environmental Law Journal* 104–111.

[38] The principle of equivalence requires that the procedures applied to the enforcement of EU law must not be less favourable than those governing similar domestic actions. The principle of effectiveness requires that the procedural rules do not make the protection of EU or Convention rights overly difficult: *Gemeinde Altrip v Land Rheinland-Pfalz* (Case C-72/12) ECLI:EU:C:2013:712 at [45].

[39] Aarhus Convention Compliance Committee, ACCC/C/2008/31 concerning compliance by Germany, 20 December 2013 at [75]. In the same determination the Committee stated 'when assessing compliance with article 9 of the Convention, the Committee does not only examine whether the Party concerned has literally transposed the wording of the Convention into national legislation but also considers practice, as shown through relevant case law. The mere hypothesis that courts could interpret the relevant national provisions contrary to the Convention's requirement is not sufficient to establish non-compliance by the Party concerned. If the relevant national provisions can be interpreted in compliance with the Convention's requirements, the Committee considers whether the evidence submitted to it demonstrates that the practice of the courts of the Party concerned indeed follows this approach', at [65].

[40] Dr Áine Ryall, 'Challenges and Opportunities for Irish Planning and Environmental Law' (2018) 25(3) *Irish Planning and Environmental Law Journal* 104–111.

Two questions arise:

1. ***Is the change of wording in the legislation from 'sufficient' to 'substantive' worth the potential costs and delays to the planning process that could result from challenges to this legislation in the European courts?***
2. ***Is this change necessary to give effect to the intention behind the change?***

The second question can be examined by reference to the proposed directly-affected and prior-participation requirements. The directly-affected requirement appears to derive from the test for standing used in EU courts. As noted by the ACCC in a 2011 determination, outside the 'wide access to justice' provisions of the EIA Directive and the IPPC Directive, the CJEU has been reluctant to grant standing to an individual or civil society organisation unless the subject matter of the decision directly affected them.[41] The 'directly-affected' test is referred to as the 'Plaumann' test in EU law, it requires applicants to show a direct injury to their rights before standing will be acknowledged.[42]

From an Aarhus Convention perspective, the ACCC has stated that '[t]he Convention does not prevent a Party from applying general criteria of a legal interest or of demonstrating a "direct or individual concern", provided the application of these criteria does not lead to effectively barring all or almost all members of the public from challenging acts and omissions related to domestic environmental laws.'[43] Despite this, the ACCC concluded that use of the Plaumann test by European Courts fails to comply with Article 9 paragraphs 3 and 4 of the Convention with regard to access to justice by members of the public.[44] The EU Commission has refused to accept this determination, arguing that the findings of the ACCC would 'open the judicial review mechanism – and ultimately access to the CJEU – to an enormous pool of potential litigants, to acts that do not have any legal effects and to areas going beyond the scope of environment.'[45] The Commission went on to state that the determination would 'challenge constitutional principles of EU law that are so fundamental that it is legally impossible for the EU to follow and comply with the findings.'[46]

Moving on to the prior-participation requirement. As explanatory note to the Head states, this requirement had been included in the P&D Act up until 2006. A question arises: ***why was the prior-participation requirement removed in 2006 and are those issues still relevant today?***

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[41] Aarhus Convention Compliance Committee ACCC/C/2008/32 (Part 1) concerning compliance by the European Union, 14 April 2011.

[42] *Plaumann & Co v Commission of the European Economic Community* ECLI:EU:C:1963:17.

[43] Aarhus Convention Compliance Committee ACCC/C/2008/32 (Part 1) concerning compliance by the European Union, 14 April 2011 at [80].

[44] Ibid at [94].

[45] European Commission, *Proposal for a Council Decision on the position to be adopted, on behalf of the European Union, at the sixth session of the Meeting of the Parties to the Aarhus Convention regarding compliance case ACCC/C/2008/32*, COM(2017) 366 final, p. 6.

[46] Ibid, p. 7.

NGO standing rights

This Head also proposes to amend the 'automatic' standing rights applicable to environmental NGOs in relation to judicial review proceedings. The proposed legislation adds a number of qualification requirements:

1. the NGO must have pursued environmental protection aims for at least 3 years;
2. the NGO must have a minimum of 100 affiliated members;
3. the NGO must work on a not-for-profit basis; and
4. the NGO must have a legal personality formalised by rules of association or a constitution.

A further restriction proposes to exclude NGOs from judicial review proceedings that do not relate to the NGO's environmental aims and objectives.

These proposed restrictions reportedly inspired Attracta Uí Bhroin, an environmental law officer with the Irish Environmental Network, to have said:[47]

'The Government is proposing a Frankenstein-like monster approach to killing off access to justice in Ireland, drawing from the worst practices elsewhere, and putting them all together in a bid to obstruct the rights of citizens and concerned NGOs to challenge bad and unlawful planning decisions.'

The explanatory note to the Head claims '[t]hese are fairly standard minimum requirements in *most* other jurisdictions.' (emphasis added) This claim appears to be erroneous.

Although several jurisdictions (including Belgium, Germany, Luxemburg and Sweden) have a 3-year legislative requirement, and other jurisdictions (including Slovakia and Sweden) have legislative requirements defining minimum numbers of members, it would be hard to argue that this is representative of 'most' jurisdictions. Furthermore, it appears that only one European jurisdiction, Sweden, has similar multi-layered legislative requirements to those proposed by the Head.[48]

Under the Swedish Environmental Code, NGOs will be granted standing if they have a purpose to promote nature conservation or environmental protection, if it has been active for at least three years in Sweden and has at least 100 members or else can show that it has 'support from the public'.

The 100-member minimum

In Sweden, the minimum number of active members requirement was reduced from 2,000 members to 100 members after the CJEU found that the 2,000-member requirement would too restrictive and therefore was not compliant with the wide access to justice requirement in article 11 of the EIA Directive.[49]

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[47] Quoted by Kevin O'Sullivan in 'Environmentalists say proposed Bill makes it harder to object to planning decisions', *The Irish Times*, 13 November 2019.

[48] Milieu Consulting on behalf of DG Environment, *Study on EU implementation of the Aarhus Convention in the area of access to justice in environmental matters*, Final Report, September 2019; European Commission, 'Access to justice in environmental matters', *European E-justice Portal*.

[49] *Djurgården-Lilla Värtans Miljöskyddsförening v Stockholms kommun genom dess marknämnd* (Case C-263/08) ECLI:EU:C:2009:631

The ACCC examined the revised Swedish NGO standing requirements and found that they satisfied the access to justice provisions of article 9 of the Aarhus Convention. The ACCC emphasised that in Sweden that associations with fewer 'than 100 members are entitled to standing so long as they can show they have the "support from the public"', where the onus falls to the NGO to prove that support.[50]

Bearing in mind that the population of Sweden is double that of Ireland, questions necessarily arise: ***where did the 100-member minimum requirement come from? If it came from the Swedish model, were the respective population sizes considered in determining the figure and was a 'support from the public' exemption considered?***

Three-year rule

Another controversial proposal in this Head is the introduction of a rule that and NGO must have a distinct legal personality, evidenced by a constitution or articles of association, and the NGO would have to have pursued its environmental protection aims for three years before it will gain standing. The proposed provisions list these criteria separately, but the explanatory note appears to merge these criteria, stating that the NGO would have had to have pursued their environmental protection aims for at least three years and would need to have been in 'possession of a constitution and/or rules of association for at least 3 years.' ***Was it intended that the three-year rule should apply to <u>both</u> the pursuit of environmental protection aims and the holding of a legal personality, or would it be possible for an NGO that has pursued environmental protection aims for 3 years to simply incorporate to gain standing?***

The proposed three-year rule has been criticised by the Irish Environmental Network which claims that 'it would exclude local, citizen-led groups which may have only recently formed in response to a concern about a local environmental issue.'[51]

David Browne BL has also questioned the impact that the three-year rule could have on community groups as well as groups of individuals which have a genuine environmental interest or a genuine interest or expertise in a particular amenity but which may fall foul of the three-year requirement. He submitted that 'the Oireachtas might risk imposing excessively strict standing requirements which are not consistent with the Aarhus Convention and EIA Directive and may not withstand challenge.'

A question that flows from this discussion is: ***will the legislation allow for judicial discretion with respect to the three-year rule to ensure compliance with the wide access to justice principle in the Aarhus Convention and EU directives?***

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[50] Aarhus Convention Compliance Committee ACCC/C/2008/32 (Part 1) concerning compliance by Sweden, 18 November 2011. The other European jurisdiction with an overt legislative minimum-member requirement, Slovakia (which has a population similar in size to Ireland), continues to restrict the standing of environmental NGOs with fewer than 250-members over 18 years of age (150 of which need to be permanently resident in the municipality where the permit was issued): European Commission, 'Access to justice in environmental matters - Slovakia', *European E-justice Portal*.

[51] Attracta Uí Bhroin, Irish Environmental Network, referenced by Kevin O'Sullivan in 'Environmentalists say proposed Bill makes it harder to object to planning decisions', *The Irish Times*, 13 November 2019.

Standing generally

Dáire McMullin has pointed out that one applicant (Mr Peter Sweetman) has taken out several hundred cases against various developments across the State. He stresses:[52]

'These disputes have not only cost the state an exorbitant amount in legal fees but have also served to halt developments that are beneficial to the environment; an example being Mr Sweetman's objection to several wind farm developments. This begs the question, ***what sort of environmental advocacy do we want to support?***'

In contrast, Dr Ryall argues that '[a]ny move to restrict access to justice is a matter of enormous public importance. It engages the rule of law and the constitutional right of access to the courts.'[53] Dr Ryall poses three important questions in relation to the proposed changes to standing rights:[54]

1. ***What is the evidence base to justify these particular restrictions on access to judicial review?***
2. ***Is there empirical evidence to demonstrate that the proposals are workable in practice?***
3. ***What is the anticipated impact on timeframes for judicial decision-making?***

Head 5: Consequential amendments

The Head proposes to amend the 'automatic' standing rights applicable to environmental NGOs in relation to appeal proceedings. The amendments proposed are almost identical to those applicable to NGOs in Head 4, with the exception that in Head 5 there is no restriction on NGOs from making an appeal to the Board where the subject matter of the appeal does not relate to the NGO's environmental aims and objectives. The explanatory note to the Head does not appear to recognise this difference between the proposed provisions, as it refers to the requirement. ***Was it intended that NGOs should be restricted from making an appeal to the Board where the subject matter of the appeal does not relate to the NGO's environmental aims and objectives?***

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[52] Dáire McMullin, '"I'm Still Standing" – Ireland and the Wide Access to Justice Requirements in the Aarhus Convention', *Trinity College Law Review Online* (2017).

[53] Dr Áine Ryall, 'Challenges and Opportunities for Irish Planning and Environmental Law' (2018) 25(3) *Irish Planning and Environmental Law Journal* 104–111.

[54] Ibid.

Head 6: Costs

Article 9(4) of the Aarhus Convention provides that environmental remedies should be 'fair, equitable, timely and *not prohibitively expensive*' (emphasis added). Moreover, the CJEU has found that the not-prohibitively-expensive (NPE) rule applies to all cases of environmental justice, not just large-scale developments covered by article 9(2) of the Aarhus Convention.[55]

The current domestic legislation sets the default position to one where the parties cover their own costs. There is some flexibility, allowing for a specific costs order in certain cases (such as where litigation is deemed to have been vexatious or frivolous). However, as Justice Humphreys stated in the *North East Pylon Pressure Campaign Ltd v An Bord Pleanála (No 5)*:[56]

'Even a single further hearing as to what … costs should be would outweigh what would be the ultimately qualified not-prohibitively-expensive costs in most cases. Thus the court should lean in favour of making no order as to costs where the not-prohibitively-expensive rule applies to minimise the costs burden overall.'

Nevertheless, where the applicant succeeds or partially succeeds, the respondent or notice party or both will generally be ordered to bear the costs of the applicant, or a proportion of costs where appropriate. As noted in a recent article by Niall Sargent in The Green News, 'this can make it possible [for potential applicants] to engage with lawyers on a no foal, no fee basis.'[57] Legal representatives are willing to take on a case on the promise of only getting paid if the claim is successful.

The explanatory note to the Head, argues that the current situation can result in applicants not being exposed to any risks or costs and, in practice, this is:[58]

'… facilitating the taking of greater numbers of judicial reviews in the planning area in Ireland … with consequential knock-on implications for project delays, including in respect of projects of national or regional importance'.

An Taisce has challenged this point, arguing:[59]

' … many of the legal challenges are well founded on environmental grounds, with the courts overturning many decisions to date in cases brought by the public and environmental NGOs because the decisions were flawed. If the government really intends to reduce planning delays

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[55] *Lesoochranárske zoskupenie VLK v Ministerstvo životného prostredia Slovenskej republiky* (Case C-240/09) (The 'Slovak Brown Bear' case) ECLI:EU:C:2011:125; *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* (Case C-470/16) ECLI:EU:C:2018:185 at [47], [49]. National Courts are expected to disapply national rules that conflict with this requirement: *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd* (Case C-664/15) ECLI:EU:C:2017:987.

[56] [2018] IEHC 622.

[57] Niall Sargent, 'New Bill a "retrograde" step in access to justice rights', *The Green News*, 23 November 2019.

[58] Explanatory note to Head 6 of the General Scheme of the Housing and Planning and Development Bill 2019.

[59] An Taisce, 'Proposed planning bill will shut out the public voice, says An Taisce', *Press Release*, 13 November 2019.

then they should review the planning system which allows for these bad planning decisions to be made in the first place, which then necessitate legal challenges to be taken.'

The General Scheme proposes to change the current legislation and introduce costs caps. In 2013 the UK introduced a similar cost-capping scheme through their Civil Procedure Rules (UK) ('CPR (UK)').[60] The UK rules cap costs at £5,000 for individual applicants, £10,000 for other applicants and £35,000 for respondents. These caps align closely with the proposed caps in the General Scheme of €5,000, €10,000 and €40,000 respectively.

The UK Scheme was amended by the Civil Procedure (Amendment) Rules 2017 (UK) to allow courts to vary or remove the caps if satisfied that the variation would be needed to comply with the NPE rule.[61] The General Scheme proposes to include a similar discretion to vary the cost caps if needed to make them comply with the NPE rule.

As highlighted by Suzanne Kingston BL,[62] the CJEU has found that a national court, when determining compliance with the NPE rule:[63]

'… cannot act solely on the basis of that claimant's financial situation but must also carry out an objective analysis of the amount of the costs. It may also take into account the situation of the parties concerned, whether the claimant has a reasonable prospect of success, the importance of what is at stake for the claimant and for the protection of the environment, the complexity of the relevant law and procedure, the potentially frivolous nature of the claim at its various stages, and the existence of a national legal aid scheme or a costs protection regime.'

This hybrid subjective (the actual financial means of the applicant) and objective (the circumstances of the case) test has been incorporated almost verbatim into the General Scheme. The addition of an express provision that would allow the Court to hear a case in private if it involves private information counteracts a potential argument that claimants may be deterred from bringing claims if there is a risk that their personal financial information (or that of their funding source) may be discussed in open court.[64]

The €40,000 cost cap on respondents

Gillian Lobo, a British lawyer with the non-profit environmental law charity ClientEarth, has suggested that in the absence of a *pro bono* or reduced fee retainer, the cost cap of £35,000 on respondents in the UK has resulted in a situation where successful applicants are unable to recover sufficient amount to pay their legal representatives. She warned that this is not sustainable

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[60] *Civil Procedure Rules* (UK) r. 45, s. VII.

[61] CPR (UK) r. 45.44(5)–(7). Applicants are required to submit to the Court a schedule of financial resources identifying significant assets, liabilities, income and expenditure to help the Court determine whether a costs order would be compliant with the NPE rule: CPR (UK) r. 45.42(1)(b).

[62] Suzanne Kingston BL, 'Legal Costs in Environmental Proceedings – EU and Aarhus Developments' (2019) 2 *Irish Planning and Environmental Law Journal* 66–73.

[63] *R. (on the application of Edwards and Pallikaropoulos) v Environment Agency* (C-260/11) ECLI:EU:C:2013:221 at [46]. This has been affirmed in *North East Pylon Pressure Campaign Ltd v An Bord Pleanála* (Case C-470/16) ECLI:EU:C:2018:185 at [61].

[64] See *Royal Society for the Protection of Birds v Secretary of State for Justice* [2017] EWHC 2309 (Admin) at [57]; Client Earth, 'Comments on the Party concerned's first report' ACCC/C/2008/33, 31 October 2018.

in the long term.[65] A cap on respondents' costs could also affect the capacity of a potential applicant to get legal representation on a no fee, no foal basis.[66]

Advocate General Kokott has examined the validity of providing legislative cost caps to respondents in environmental cases involving article 11 of the consolidated EIA Directive (formerly article 10a) and article 16 of the consolidated IPPC Directive (formerly article 15a).[67] She stated:[68]

'In actions brought against public bodies, no true equality exists from the outset as those bodies generally have much greater resources at their disposal than [potential applicants] … To that extent, therefore, a one-way protective costs order is simply an initial step towards establishing equality of arms.

Furthermore, actions of that kind ultimately involve an interest common to both parties, namely, ensuring that the law is upheld. A public body which is unsuccessful in proceedings before a court because its decision under challenge proves to be unlawful does not deserve protection in relation to litigation costs comparable to that afforded to an applicant. It was, of course, the public body's own unlawful act that prompted the action to be brought.

Finally, under the Aarhus Convention particular emphasis is placed on the public interest in upholding the law …'

The Advocate General did accept that costs caps on respondents may be justified in certain circumstances. Protective cost caps could limit the extent to which applicants' lawyers can inflate costs claims. However, she concluded that these caps should not be rooted in legislation, but only used on a case-by-case basis. Otherwise, they could incentivise a more adversarial response to a claim, allowing a respondent to tactically widen the subject-matter in dispute, artificially draw out the hearing and increase the applicant's legal costs.[69] Although the Head allows the Court to vary the respondent costs cap, it may only do so if a failure to do so would make the proceedings prohibitively expensive for the applicant.

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[65] Gillian Lobo, quoted in Niall Sargent, 'New Bill a "retrograde" step in access to justice rights', *The Green News*, 23 November 2019.

[66] Niall Sargent, 'Bill would make it 'impossible' to challenge poor planning decisions', *The Green News*, 12 November 2019. See also, An Taisce, 'Proposed planning bill will shut out the public voice, says An Taisce', *Press Release*, 13 November 2019, in which the organisation stated:

> 'The prohibitive cost of mounting a legal case is a key challenge in bringing environmental cases in Ireland that is widely recognised in the legal sphere. This has been an issue in a judgement of the EU Court of Justice in the 2018 North East Pylon case and also in comments in the EU Commission's Environmental Implementation Review Report from 2019 and the 2019 Environmental Governance Assessment for Ireland.
>
> The new cost rules proposed would expose people and groups to much higher costs if they lose in the courts, and also significant uncertainty on costs. It will also make it much more difficult to hire lawyers without having to finance this significantly themselves.'

[67] *Commission v United Kingdom of Great Britain and Northern Ireland* (Case C-530/11) ECLI:EU:C:2013:554.

[68] Ibid at [73] – [77].

[69] Ibid at [78] – [80].

The question arises: ***in the context of a €40,000 cap on a respondent's legal costs, what would stop a respondent from widening unnecessarily the subject-matter of a dispute, so as to increase the applicant's legal costs and, thereby, to undermine the applicant's capacity or readiness to pursue the claim?***

Multiple claimants and respondents

The General Scheme provides that the individual costs caps apply to each applicant or respondent individually. This would mean that where a case is taken by a group of (unincorporated) individuals (for example residents in an apartment block) each individual would be the subject of a costs order of up to €5,000. The same would be true for respondents; if more than one public body chose to respond to the claim, each of the respondents would be liable for up to €40,000 in costs where the applicant's case is successful. ***Given that the same claim made by multiple claimants are heard together on the judicial review list, is it fair to charge costs to each applicant or each respondent separately?***

Appendix 1: Judicial Review cases listed form 1 January 2018 to 1 December 2019

List No	Case Name	Outcome	Citation
2019 7 JR	*Dublin City Council v An Bord Pleanála*		
2018 17 JR	*Donnelly v An Bord Pleanála*		
2019 16 JR	*Narconon Trust v An Bord Pleanála*		
2018 21 JR	*Jcdecaux Ireland Limited v Limerick City And County Council*		
2019 25 JR	*Sweetman v An Bord Pleanála*		
2019 32 JR	*Mccarthy v An Bord Pleanála*		
2019 33 JR	*Sweetman v An Bord Pleanála*		
2019 40 JR	*Gleann Fia Homes Ltd v An Bord Pleanála*	Board decision quashed	[2019] IEHC 618
2019 49 JR	*Reidy v An Bord Pleanála*		
2018 56 JR	*Cosgrave Property Group v An Bord Pleanála*		
2019 72 JR	*Cosgrove v An Bord Pleanála*		
2019 97 JR	*Porter v An Bord Pleanála*		
2019 98 JR	*Sweetman v An Bord Pleanála*		
2018 123 JR	*Duffy v An Bord Pleanála*		
2019 139 JR	*Tarpey v An Bord Pleanála*		
2019 141 JR	*Michael F Quirke & Sons v An Bord Pleanála*		
2019 147 JR	*Sc Sym Fotovoltaic Energy Srl v An Bord Pleanála*		
2019 177 JR	*Clarion Quay Management CO'Ltd By Guarantee v An Bord Pleanála*		
2018 187 JR	*Cox v An Bord Pleanála*		
2019 211 JR	*Geraghty v An Bord Pleanála*		

2019 223 JR	*Kavanagh v An Bord Pleanála*		
2018 225 JR	*Sweetman v An Bord Pleanála*		
2019 253 JR	*Sweetman v Cork County Council*		
2018 265 JR	*Kelly v An Bord Pleanála*		
2019 269 JR	*Dalton v An Bord Pleanála*		
2019 297 JR	*North Westmeath Turbine Action Group v An Bord Pleanála*		
2019 305 JR	*Sweetman v An Bord Pleanála*		
2019 315 JR	*Dunlea v An Bord Pleanála*		
2019 318 JR	*Barna Wind Action Group v An Bord Pleanála*		
2019 327 JR	*Roache v An Bord Pleanála*		
2019 345 JR	*Wallis v An Bord Pleanála*		
2018 363 JR	*Damer v An Bord Pleanála*	Matter remitted to board	[2019] IEHC 505
2019 384 JR	*Dunboy Construction And Property Developers Ltd v An Bord Pleanála*		
2019 441 JR	*Cummins v An Bord Pleanála*		
2018 481 JR	*O'Brien v An Bord Pleanála*		
2018 484 JR	*Lucey v An Bord Pleanála*		
2018 532 JR	*Jcdecaux Ireland Ltd v An Bord Pleanála*		
2018 534 JR	*Tathony Holdings Limited v An Bord Pleanála*		
2019 556 JR	*Annemount Management Company Company Ltd v An Bord Pleanála*		
2019 557 JR	*Davin Plant Hire Limited v An Bord Pleanála*		
2018 560 JR	*Edmondson v An Bord Pleanála*		
2019 559 JR	*McCarthy v An Bord Pleanála*		
2019 566 JR	*O'Sullivan v An Bord Pleanála*		

2019 573 JR	*Glann Mor Cuan Teoranta Ag Tradail Mar Ionad v An Bord Pleanála*		
2018 579 JR	*Bindford Limited v Dublin City Council*		
2019 600 JR	*Bullock Harbour Preservation Association v An Bord Pleanála*		
2019 614 JR	*Annemount Management Company Company Ltd By Guarn v An Bord Pleanála*		
2018 620 JR	*Cooper v An Bord Pleanála*		
2018 630 JR	*Derrysallagh Windfarm Ltd v An Bord Pleanála*		
2018 661 JR	*Pkb Partnership v An Bord Pleanála*		
2018 663 JR	*Fwnh Ltd v An Bord Pleanála*		
2018 666 JR	*Poundland Ltd v An Bord Pleanála*		
2019 674 JR	*Krikke v An Bord Pleanála*		
2019 707 JR	*Sweetman v An Bord Pleanála*		
2019 709 JR	*Redmond v An Bord Pleanála*		
2018 740 JR	*Sweetman v An Bord Pleanála*		
2018 748 JR	*Midland Indistrial Maintenance Limited v An Bord Pleanála*		
2018 753 JR	*Dowling v An Bord Pleanála*		
2019 768 JR	*Brophy v An Bord Pleanála*		
2019 794 JR	*EcO'Advocacy Clg v Westmeath County Council*		
2019 799 JR	*O'Connor v An Bord Pleanála*		
2019 810 JR	*Owens v An Bord Pleanála*		
2019 825 JR	*Dempsey v An Bord Pleanála*		
2018 836 JR	*Sherry v Louth County Council*		
2018 847 JR	*Morris v An Bord Pleanála*		
2018 849 JR	*Dennehy v An Bord Pleanála*		
2018 852 JR	*Highgate Properties Limited v An Bord Pleanála*		

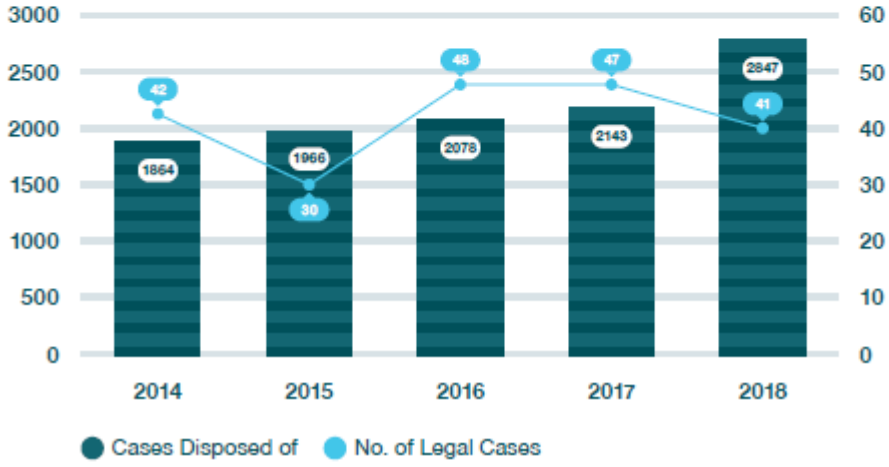
2018 929 JR	*Behan v An Bord Pleanála*		
2018 947 JR	*Balscadden Road Saa Residents Association Ltd v An Bord Pleanála*		
2018 979 JR	*Heaney v An Bord Pleanála*		
2018 1029 JR	*Conway v An Bord Pleanála*	No standing	[2019] IEHC 525
2018 1063 JR	*Baile Eamoinn Teoranta v An Bord Pleanála*		
2018 1072 JR	*Moore v An Bord Pleanála*		
2018 1076 JR	*Sweetman v An Bord Pleanála*		
2018 1083 JR	*Walsh v An Bord Pleanála*		

Appendix 2: Legal proceedings involving An Bord Pleanála

Legal Proceedings

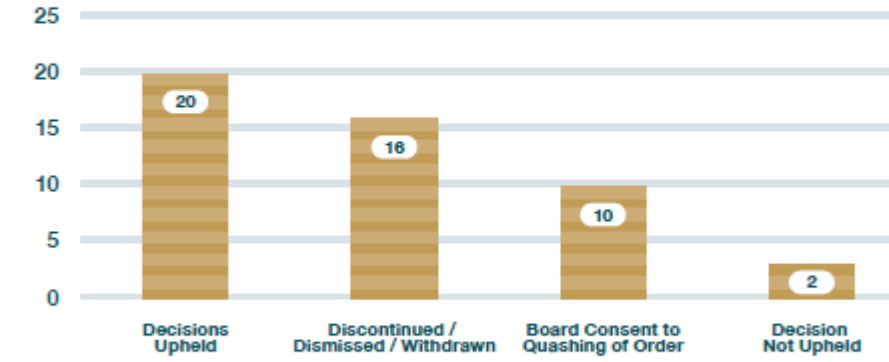
In 2018, judicial review proceedings in relation to Board decisions and procedures were instituted in 41 cases (Figure 9).

Figure 9: Legal Cases and Cases Disposed of Comparison 2014 - 2018



There were 22 substantive judgements in cases taken with 20 decisions of the Board upheld. Proceedings against An Bord Pleanála were discontinued, dismissed or withdrawn in 16 cases.

Figure 10: Outcome of Legal Proceedings 2018



During the year, the Board consented to the quashing of 10 of its orders where a procedural defect was identified.

Source: An Board Pleanála, *Annual Report and Accounts 2018*, p. 30.



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