

General Scheme Housing and Planning and Development Bill, 2019

Submission: Kildare County Council

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The General Scheme under consultation proposes changes to the criteria by which a judicial review can be taken on planning and environmental decisions. A judicial review examines both the procedural legality of decision and whether the decision itself is lawful. The area of judicial review relates to fundamental rights, and the right to participate in decisions affecting the environment.

It is our view that the Scheme outlined is problematic in terms of process and implications of proposals on costs and standing rules. This submission highlights these issues and requests a full regulatory impact assessment where the response can be justified as proportionate to the issue and where safeguards are in place. It further recommends establishing legal principles for how public consultations are conducted to inform decision-making processes.

The issues we note for your consideration are as follows:

1. Under Article 47 of the European Charter of Fundamental Rights any obstacle to accessing courts is seen to limit the right of effective remedy.

The proposal contains no analysis of the problem that would justify a limitation of the right of effective remedy. No problem statement is provided that details the number of Judicial Reviews (JR) or the implications of these JRs on the public interest in justification of a proposal that limits the right of effective remedy through the courts.

Without a detailed problem statement, it cannot be established that the solution is appropriate. Such a proposal requires a regulatory impact assessment. Article 52(1) of the European Charter of Fundamental Rights requires analysis of the necessity and proportionality of any measure that would result in restrictions to a fundamental right. With a clearly defined problem it is required to set out the least restrictive measure and establish safe-guards. This analysis has not been done which is required by both articles 47 and 52 (1).

*Article 52 (1). Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.*

2. Head 4 (5) limits standing rules arbitrarily and without justification. Currently, the conditions required for an individual to take a case are broad enough to accommodate the requirements of environmental legislation to protect fundamental rights and the rights to participate in decisions relating to the environment. However, the new condition requiring an individual to 'be directly affected by a proposed development in a way which is peculiar or personal' will have significant restrictive implications on an individual's rights in the case where they cannot demonstrate locality yet have a specific interest in the outcome of the decision. For example, individuals with ecological expertise and interest in protected sites in remote places will not, under the proposed changes, have the right to lodge a judicial review.

Similarly, the standing rights for NGOs are arbitrary without justification or evidence of proportionality. Not all organisations whose remit is environmental protection, are structured as membership organisations. Client Earth for example, is a 'charity that uses the power of the law to protect the planet and the people who live on it'. It is one of the largest organisations in the world is not a membership-based organisation. As a professional body of lawyers it would not have standing rights under this proposal.

3. Changes to the cost rules are contrary to the Aarhus Convention which states that costs of action should not be prohibitive. With costs awarded in successful cases capped at 40K (which is significantly less than the actual costs in typical judicial reviews) these proposals mean that applicants will have to raise significant funds to make up the difference. Other aspects of the proposed cost rules such as giving a court discretion to vary to costs caps bring in uncertainty in the financial risk for applicants, which will have the result of acting as a deterrent.

4. Head 4 (ii) states that the requirement for prior participation in the process can be waived where 'there has been a procedural breach in the decision-making process'. The decision-making process includes public consultation. Breaches may occur in the public consultation process in the absence of clear legal principles for demonstrating fair and lawful consultation. In order for individuals and organisations to be fully able to exercise their rights under this condition, there should be full clarity about their rights and the legal principles governing consultation.

The UK, for example, determines fair and lawful consultation according to the four principles, known as the 'Gunning Principles'.

These state that:

- (i) consultation must take place when the proposal is still at a formative stage;
- (ii) sufficient reasons must be put forward for the proposal to allow for intelligent consideration and response;
- (iii) adequate time must be given for consideration and response; and
- (iv) the product of consultation must be conscientiously taken into account.

Principle (ii) also demands that those consultation should be aware of the criteria that will be applied when their submissions are being considered and what factors will be considered decisive or of substantial importance at the decision-point or end of process.

These principles should also be established for consultation in Ireland, given the rate of change expected over the coming years, to strengthen the planning and policy-making process. Strong public consultation is a key success criterion to strong planning outcomes and essential to public acceptance of planning proposals. Where public consultation is done well, this could also potentially limit the number of Judicial Review requests. Fair and lawful consultation as defined by the principles will increase the likelihood that all stakeholders have been involved at an early stage; a considered proposal is put forward with rationale and information; all stakeholders have time to consider and respond; the output demonstrates careful consideration of the input and; the process has been transparent and meaningful.

## **Summary**

We urge the Minister to consider these points and revisit both the process for developing this bill and its proposals in terms of their implications outlined above. Where changes must be advanced we call for a full regulatory impact assessment to ensure that any measures required to address a clearly defined problem affecting the public good has a proportionate response with appropriate safe-guards in place. The problem statement should provide full justification with all necessary information required for the public to make a full and intelligent consideration of the issue as required under the second Gunning Principle of fair and lawful public consultation.

We further request that the consequences of the measures itself are considered in terms of their potential impact on environmental oversight in relation to poor planning or unlawful decisions. The current scheme provides protections, even at times laborious, to ensure the continued integrity of our planning system and upholding its democratic values.