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Minister Burke,
Department of Housing, Local Government and Heritage,
Custom House,
Dublin,
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[Sent by email: peter.burke@oireachtas.ie]

9th June 2022

Re: Irish Planning Institute Submission on Planning Legislation Review

Dear Minister Burke,

The Irish Planning Institute welcomes the opportunity to provide its perspective, as the main professional Institute for planners in the State, in relation to the current Review of the Planning and Development Act, and to contribute to the work of the Planning Advisory Forum, of which it is a member.

1. PRINCIPLES

In any review of the existing Planning and Development Act, the Institute agrees with the Guiding Principles set out in the Terms of Reference for the Planning Advisory Forum, as amended. In particular, it should be borne in mind that the entire purpose of the planning system is to ensure the proper planning and sustainable development of our country *in the interests of the common good*. That is the most important principle in the Review.

The Institute agrees with the concept that the planning system should be plan-led, and that any reforms to the existing provisions of the Acts should be aligned to support this concept. This is particularly relevant since the establishment of the Office of the Planning Regulator (OPR), part of whose role is to bring consistency of approach to the plan-led system. This plan-led nature of the planning system was also outlined in the Government Planning Policy Statement of 2015, which explicitly stated the need for the planning system to be "plan-led and evidence based rather than developer-led".

It is important, in the review of the planning system, that the role of the public, not only in meaningful participation at the plan-making process, but also in the development management process, is respected and promoted. It is a long-established, and cherished, feature of the Irish planning system that there is full provision for third party rights, and in the Institute's view this must be retained and enhanced in the review.

In addition, the Institute considers that, over the two decades since the adoption of the Planning and Development Act, 2000, there has been a regrettable over-centralisation of the planning system, with

weakened powers and functions at a local level, and little power at the regional level. This has served to undermine public confidence in the operation of, and the impartiality of, the current planning system, particularly in relation to development management. The Institute therefore feels that the principle of subsidiarity should be at the core of the Review. In this context, the roles and functions of Regional Assemblies needs to be taken into account.

The Institute agrees with the view, as set out in the Terms of Reference, that there should be avoidance of unnecessary change, and accepts that there are many aspects of the planning process that are working well, and – subject to a re-ordering and simplification of the legislation itself to make it more comprehensible - these aspects should not be altered.

2. SPECIFIC ISSUES

The Institute has participated, to date, in meetings of the Planning Advisory Forum, and contributed to its deliberations. However, in the interests of clarity, it considers it appropriate to outline the key issues that it feels is necessary for the Review, only some of which were put forward for discussion at the Forum meetings.

Plans and Guidelines

It is the Institute's view that the current timelines for the preparation and adoption of County Development Plans are unrealistically tight, with insufficient time provided, in particular, for consideration of the (in many cases) thousands of submissions from landowners, statutory bodies and the general public, for the preparation of the Chief Executive's report, for the consideration of that report by the elected members, and for the translation of the draft Plan into the Irish Language. The Act should be amended to give at least three years (rather than two) for that process, with lengthened timelines for the various elements. In addition, the display period for the draft Plan should commence only once the translation has been completed and published on the local authority's website (and made available for purchase by those who may so wish).

Furthermore, the Institute would question the need for all County Development Plans to be adopted at the same time in every local authority area. This makes the job of statutory bodies, and organisations with a national remit, who may wish to give input on a significant number of Plans, and also the OPR, very difficult. Consideration should therefore be given to a staggering, over time, of the review dates of Development Plans.

In terms of the duration of County Development Plans, the Institute broadly welcomes the idea of a ten to twelve year duration, with statutory reviews at perhaps four or five year intervals (where Variations could be made). The Institute does not consider it necessary that these reviews should be aligned to census intervals, as Variations could be made, if necessary, at any time. A longer duration would allow for the preparation of the record of Protected Structures at a different time to the adoption of the County Development Plan.

In relation to development plans below the County level, such as Local Area Plans (LAP) or Municipal District Plans (MDP), the Institute recommends that these should remain with their current durations.

In the case of such LAP's and MDP's, and also Urban Development Zones, where specified areas for development or redevelopment are planned, the Institute considers that much more detail than is typically provided for with zoning, including 3D visualisations and detailed layouts, public realm

proposals and specific standards for height, design etc, and with active public participation, and subject to formal approval by the planning authority, is necessary. However, it is recognised that this is very resource intensive, so can only be achieved with additional resources at local authority level.

Development Plans should take into account and align with other sectoral initiatives and fiscal incentives, such as the Urban Regeneration Development Fund, the Rural Regeneration Development Fund, the Affordable Homes Fund and the Town Centre First Policy, all of which have a spatial focus and therefore require masterplans or Local Area Plans. In this context, it is important that these masterplans be statutorily adopted.

The Institute considers that the current provisions for the content of Strategic Development Zones are working well, and should not be amended. However, it would be helpful if the following areas are clarified and updated:-

- The duration of the Schemes;
- The duration of consents under the Schemes;
- The structure of the Schemes; and
- A more streamlined provision for material amendments.

In relation to Guidelines, the Institute is strongly of the view that Specific Planning Policy Requirements (SPPR's), under Section 28 (1C) of the Act should be repealed in relation to development management. It is the Institute's view that these SPPR's fundamentally alter the plan-led ethos, and have brought about, since their adoption, a developer-led process that is inimical to the "common good" principles that should underpin the planning system. In addition, the SPPR's offend against the principle of subsidiarity. Furthermore, the fact that planning authorities, at both local and national level (An Bord Pleanála) are obliged to apply these mandatory guidelines significantly undermines the public's confidence in the planning process, and the impartiality of these bodies. This applies in particular to situations in which planning applications have been routinely granted in material contravention of the relevant Development Plan, on the basis of compliance with SPPR's (as has been the case with a large number of SHD's in recent times). If the Development Plan is, as noted in a celebrated decision of the Supreme Court, an environmental contract between the local authority and the people, then retaining such mandatory requirements goes against the fundamental basis of a participatory planning process.

While mandatory guidelines may be necessary in order to support the role of the OPR in carrying out its functions of ensuring compliance of Development Plans with national policy, then they might be retained for that purpose alone. However, in a genuinely plan-led system, there is no justification whatsoever for the retention of SPPR's in relation to development management, and Section 28 of the Act should be modified accordingly.

Consents

The Institute considers that, in general, all planning consents should be made at the lowest practicable level, which is that of the planning authority (City or County Council). The institute supports the ending of the Strategic Housing Development (SHD) form of direct application to An Bord Pleanála.

While recognising that certain types of consents, such as local authority development and certain Strategic Infrastructure and, in the future, marine development, may need to be subject of direct application to An Bord Pleanála, the Institute feels that utilising the local authority in the first instance for consents not only enhances local participation by the public, thereby increasing public confidence in, and acceptance of, the system, but also allow for the valuable local knowledge, that only local authorities possess, to be incorporated into decision making. In addition, having an appeal on the

merits of a decision (rather than solely on the procedural elements) will limit the necessity for persons aggrieved with a consent to have to engage in costly judicial processes (as indeed the experience with SHD over the past number of years has amply shown).

There is a lacuna in the LRD legislation whereby there is no alternative provision to deal with changes to existing permissions under Section 146B. It would appear that, in such circumstances, a normal application for planning permission under Section 34, rather than an application under LRD, is appropriate.

The Institute would support, in principle, the concept of having formal statutory timelines/deadlines for consents. However, it would query what sanction should be imposed in relation to normal planning appeals. It would not be appropriate that, in an adversarial system such as an appeal, for a "deemed grant" or a "deemed refusal" to be the sanction for the failure of An Bord Pleanála to meet the deadline. Perhaps the concept of payment to all sides in an appeal by An Bord Pleanála, including the planning authority, on a graduated scale basis until the decision is reached, might be explored.

However, the fundamental problem with setting statutory timelines is the issue of resourcing. Considerable additional resources, particularly at Inspectorate level within An Bord Pleanála, will be required if statutory timelines, rather than the current "statutory objective period" were to be introduced in relation to appeals.

It might be considered that statutory timelines should, therefore, be applied only to direct applications to An Bord Pleanála, and that the current system, with appropriate additional resourcing, should continue in relation to normal appeals. To state the obvious – "if everything is a priority, then nothing is a priority."

The question of the length of the timelines should also be carefully considered. There is emerging evidence that the 16 week statutory timeline for SHD has led to poor, perhaps rushed, decision-making, and that this may have been reflected in a number of successful judicial reviews against certain SHD decisions of An Bord Pleanála. Therefore, more realistic timelines, of the order of 26 weeks, for all but very simple applications, might be appropriate. This would also help to provide certainty for applicants and appellants alike.

In relation to pre-application consultations for Strategic Infrastructure Developments, provision should be made in the legislation to allow An Bord Pleanála to require the attendance of relevant external consultees and prescribed bodies (such as NPWS, the Heritage of the Department and Irish Water), in order that all necessary issues are fully explored in advance of the making of the applications in question.

Section 5 Referrals

While not mentioned in the consultation papers to date, the review will need to address the issue of Section 5 Referrals, following the *Narconon - v - An Bord Pleanála* case[1]. This case has identified the lack of public participation in relation to referrals. In addition, our members report that there can be serious inconsistencies as between different local authority's S.5 Declarations in relation to the same issue and circumstances. It has also shown the significance of a referral declaration, which currently cannot be challenged, except by judicial review within 8 weeks, in circumstances where the public is

[1] *Narconon Trust v An Bord Pleanála [2021] IECA 307 – see in particular paragraphs 2 and 6 of the judgement of Collins J.*

not aware of the request of, for example, a landowner (and hence has no opportunity to take such a challenge). The cost of such a challenge would, in any event, be prohibitively expensive.

The Institute considers that, to ensure consistency of approach, the provisions from the 1963 Act should be reinstituted, whereby only An Bord Pleanála should make the decision in respect of Section 5 referrals. This could be done by either limiting a referral to An Bord Pleanála, as was the case prior to 2000, or by providing that planning authorities would refer any referral requests made to them to the Board for decision. To allow for public participation, An Bord Pleanála should be required to advertise, and publish on its website (and make available for inspection) the details of any such referral request, including, if warranted, the planning authority's opinion on the matter, and a period of perhaps 4 or 5 weeks be provided for any member of the public to make an observation, before the final decision is made by An Bord Pleanála.

Enforcement

The Institute concurs with the review consultation paper that the existing three methods of enforcement – the stand-alone criminal offence in respect of the carrying out of unauthorised development, the Enforcement Notice and the Planning Injunction – will be retained. However, it is questionable whether the proposal in the consultation paper – that there should be a mandatory Warning Letter as a first step on foot of all complaints – is necessary. The Institute is of the view that a Warning Letter should only be served if the planning authority has first accepted that there is a *prima facie* case that warrants enforcement, ideally following an inspection.

In addition, the Institute would question whether there should be an obligation for a planning authority to issue an Enforcement Notice within a specified timespan. Generally, the person to whom the notice is addressed will welcome a delay, while it is in the interest of the planning authority to issue the notice promptly. It is not clear, from the consultation paper, whether there is research which shows that this is a major issue.

The consultation paper is silent on what is meant by "a more streamlined process" in respect of the Planning Injunction. It is the view of the Institute that the Planning Injunction is working well, and does not need to be changed. In particular, the provisions whereby anyone may seek such an Injunction, and may do so *ex parte*, is necessary to deal with urgent cases of unauthorised development, and should not be altered.

The Institute would support the suggestion in the consultation paper of a separate enforcement regime for activities that are subject to licensing, such as peat extraction and quarrying. However, our earlier principle in relation to subsidiarity would also apply here – if there is the expertise at local level, then there should be no need for regional level enforcement (and, still less, national enforcement). There may be some merit in having this type of enforcement of activities done on a regional basis, in order to avail of specialist expertise where it currently does not exist, but an alternative (which has been used in some waste management cases) is for a grouping of local authority staff, on a secondment basis, to carry out this work. This would have the advantage of skilling up the local authority staff, while avoiding potential interference or lobbying on behalf of miscreant operators at a local level.

Planning Bodies

The Institute supports the establishment, and current work of, the OPR and notes the view in the consultation paper that significant changes to its provisions are not contemplated, particularly with regard to the evaluation of local authority plans.

However, in the light of recent issues concerning alleged objective bias on the part of one member of An Bord Pleanála, the Institute notes that there appears to be a lacuna in the powers available to the OPR under the Act, in that, while it has powers to investigate complaints against planning authorities in the performance of their functions (Section 31AU), the OPR does not appear to have similar powers in relation to a complaint against An Bord Pleanála. It is suggested that this lacuna be closed, by adding the term" An Bord Pleanála" into the relevant subsections of Section 31AU of the Act.

In relation to An Bord Pleanála, the Institute would strongly argue against any change to the method of appointment of Ordinary Board Members. The existing panel system used for such appointments was brought into being in 1983, and has worked well. It is also important to recall the reasoning given by the Oireachtas for that procedure, including what had happened before then. The involvement of civic society, as represented by these four panels, is an important step in ensuring public acceptance of the Board's impartiality. The Institute acknowledges that some nominating bodies under the four panels may no longer be active, and therefore that the list of such bodies may require updating, but that can readily be done without altering the overall concept of panels, representing civic society, as the means by which nominations for appointment are made by the Minister.

To change this to a system of open competition operated by the Public Appointments Service, as suggested in the consultation paper, would lose that benefit, and indeed may give the public cause to consider that the Board Members are appointed to enforce national policy or the viewpoint of the supporting Department, rather than to represent the common sense of the public. As envisaged in 1983, the Board operates akin to a jury of the public, albeit one that is full time in nature, and therefore is very different to other state bodies, If, as was suggested at a recent Forum meeting, there is a need for a diverse range of expertise within An Bord Pleanála, then that can be achieved at Inspectorate level, and does not need to be provided at Board level. The analogy with a jury is also important in this context, in that barristers, solicitors and similar legal persons are debarred by law from serving on a jury.

The independent nature of An Bord Pleanála can, however, be strengthened by greater scrutiny of, and adherence to, the need for disclosures of interest and adherence to codes of conduct (sections 147 – 150 of the Act). The review may wish to await the recommendations of the current investigations by the Minister in that regard.

3. OTHER ISSUES

The Institute would wish to raise a couple of additional issues, that have not, to date, been covered in the consultation papers supplied to the Forum.

e- Planning

The Institute considers that there is a need, in the context of e-planning, to recognise that the production and standardisation of generic, and in most cases minimalist, planning application forms, will hinder, rather than strengthen, the need for an inclusive and efficient planning system. Many planning authorities have specific policy issues that need to be addressed in applications, including(for example) information in relation to housing need, that are not catered for in the standardised application form. Not having this information provided at application stage will likely lead to requests for further information, thereby delaying the processing of the applications, to the dis-benefit of applicants and the planning authority.

GDPR

The Institute considers that the issue of GDPR needs to be addressed in the review, particularly in relation to what can be made public and what cannot. Indeed, our members have indicated that GDPR has been used on occasions by applicants as an excuse not to make information, on which a planning decision is based, available, or to refuse to provide such information, on the basis that it might be publicly available in the event of an appeal. Some legislative provision, annulling GDPR in such cases, would seem to be warranted.

Similarly, it is important that exemptions from the operation of the Defamation Act, perhaps in the form of qualified privilege, be provided for planning authorities and An Bord Pleanála, in relation to potentially defamatory content that they, or it, may be required to publish in relation to planning applications and appeals on websites, or be made open to inspection at their offices. This would include content of observations or submissions made as part of the planning application process.

Judicial Review

The Institute is concerned that the current consultation at the Planning Advisory Forum is not dealing with the issue of judicial review, and requests an opportunity, once the Attorney General's consideration of this issue is complete, to make comments and provide input, before any legislative change is made.

Specialist Skills

There is an emerging need within planning authorities for specialised skillsets, beyond the existing planning, architectural and engineering disciplines that are available in those authorities, to deal with areas such as urban design, transport planning, ecology, environmental science and marine spatial planning. Ideally, these specialised skills should be provided at individual local authority level, but at the very least they should be provided on a shared basis by groupings of local authorities at a regional level.

Emergency Planning

While the current legislation allows for Ministerial intervention at the project level, in the case of emergency circumstances, there may be a need to take into account emergency and force majeure issues in forward planning, at the Development Plan level. This may require a shortening of the timelines for the adoption of Variations, or the allocation of additional land zoning, beyond what is provided for in Core Strategies, to deal with, for example, major immigration pressures.

Resources

The Institute recognises the need for a review of planning legislation in order to simplify and codify the existing provisions. As noted earlier, it supports the idea that unnecessary change should be avoided. Where change is warranted, then it is essential that the Minister and Department recognises the reality that additional resources will be required, particularly of professional planners in the local authorities and An Bord Pleanála. Change, without the commensurate increased resources, will not be able to achieve a better planning system for the public that we serve.

Accordingly, the Institute is of the view that a Resource Impact Assessment should be carried out in relation to any changes that are proposed as part of the Review, and that any changes – for example

in relation to mandatory deadlines for consents or enhanced plan-making - should not be implemented until the relevant increased resources are put in place.

Yours sincerely,

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