

Proposals for the Irish Planning System

Background

The recent High Court judicial review of the €850 million Apple data centre project proposed for Athenry, Co. Galway, has highlighted the significant planning risks and delays that large scale and strategic infrastructure developments are exposed to in Ireland. The Apple case has also highlighted the need to find a better way to ensure planning applications for important developments progress through the planning process in a more efficient manner, and that the process is more robust to allow the decisions of Planning Authorities including An Bord Pleanála, withstand judicial reviews and subsequent legal challenges which could derail or delay projects further.

Based on an intimate working knowledge of the Irish planning system and the planning process for large-scale developments, the following are a series of proposals that it is considered would deliver significant improvements in the efficiency and effectiveness of the Irish planning system, particularly for large-scale and strategic infrastructure developments.

1. Strategic Infrastructure Development (SID)

i. Decision Timeframes

Problem: The SID process has not proven to be the “fast track process” that was originally envisaged. Critical national strategic infrastructure is being significantly delayed when decisions on SID applications are not being made within the recommended target timeframes set by An Bord Pleanála, or decision dates are repeatedly deferred.

Solution: Extend the statutory timeframes for decision making that already apply to Planning Authorities and in Strategic Housing Developments (SHD), to SID applications being considered by An Bord Pleanála and all planning appeals that An Bord Pleanála is responsible for.

ii. SID Determination

Problem: It can regularly take 12+ months to determine whether a project constitutes SID, before an application for permission can be even submitted. There is a definitive list of SID projects, which is very clear, and should allow the SID-determination process to be completed in a very short period of time.

Solution: Create a form (web/electronic/paper) to be completed and submitted to An Bord Pleanála, which requires a prospective SID applicant to provide details of the project to allow An Bord Pleanála determine whether the proposed project satisfies the SID project criteria. Require An Bord Pleanála to issue the determination within two weeks of receipt of the completed form. This two-week timeframe is short, but is considered reasonable given the decision should be Yes/No based on the very clear SID project definitions.

iii. SID Pre-Application Consultation

Problem: Many SID applications have been refused for reasons that could and should have been identified for applicants much earlier in the process. Examples include refusals for reasons such as inappropriate site selection (e.g. first National Children’s Hospital application), a lack of policy to support the development (e.g. on a number of large-scale wind farm developments), or the expectation to follow new requirements or guidelines that had not been identified earlier (e.g. new best practice guidelines for surveying and

assessment). Applicants, Planning Authorities, An Bord Pleanála and third parties, all expend significant time and resources on such applications, which if unsuccessful, do nothing to help deliver strategic national infrastructure. Pre-application consultation with An Bord Pleanála is currently limited to discussions around determining whether the proposal is SID or not, and do not formally facilitate meaningful engagement on the detail of a project that can be relied upon in the later stages of the application process. This may include whether a project may be acceptable in principle, the standards to be followed or detail the Board will expect in the application that would follow.

Solution: Introduce a formal pre-application consultation process for SID projects, akin to that now in place for Strategic Housing Development (SHD) applications. Require An Bord Pleanála to engage with applicants, the local Planning Authority and other Statutory consultees, on a formal statutory basis, as per the SHD process. The pre-application consultation should conclude when the Board has formed an opinion that documents, details, consultation and discussions undertaken on the project, constitute a reasonable basis for an application. Such a process is proving very effective in the SHD process in bringing material issues to the fore in early-stage discussions, and providing applicants an opportunity to address those issues pre-application. SID projects would greatly benefit from a similarly structured opportunity in a formal pre-application consultation process for SID projects.

iv. **Ancillary Elements of SID Projects**

Problem: Planning applications for SID projects commonly have to exclude non-SID elements that are deemed ancillary to the SID project. For example, a data centre's electricity grid connection was classed as SID, whereas the data centre itself was not. A SID port development had to exclude storage buildings from its SID application because they were not deemed integral to the SID project. This creates a somewhat bizarre situation where two (or more) planning applications end up being necessary for different parts of the same project, one SID application to An Bord Pleanála, and another to the local Planning Authority for the non-SID elements. Inevitably, both applications could end up being considered by An Bord Pleanála when the non-SID application gets appealed to the Board. A decision on the SID application can also be delayed to allow the appeal for the non-SID application "catch up" and allow An Bord Pleanála make decisions on the SID application and non-SID appeal at the same time. To account for potential cumulative impacts when preparing the project's Environmental Impact Assessment Report (EIAR), all elements of a project should have been assessed in their entirety, so it makes little practical sense to have to separate them into different planning applications.

Solution: An Bord Pleanála should have the discretion to allow SID project applicants include ancillary project elements as part of the SID planning application, to prevent the need for concurrent or subsequent applications to the local Planning Authority.

2. **Consistent Reporting in Support of Planning Decisions**

Problem: Individual Local Authority planners often make a recommendation to grant or refuse permission, which is subsequently overruled by a more senior Local Authority official. An Bord Pleanála (ABP) inspectors regularly recommend a grant or refusal, only for the Board to disregard their own inspector's recommendation and issue a different decision. Such differing views from within the same organisations cast doubt on and creates uncertainty around the final decision of the Planning Authority of ABP and has formed the basis for legal challenges. A decision of a Planning Authority or An Bord Pleanála should be a single, consistent decision. Any internal

deliberation required within the organisation to reach its final decision should take place within the organisation.

Solution: Planning reports and recommendations relating to an application/appeal should be aligned and consistent with the final decision of the relevant Planning Authority. This will require earlier engagement between development management and managerial personnel in Planning Authorities, but will make for a more consistent and coherent approach to development management.

3. Compliance with Legal Requirements to Limit Grounds for Judicial Reviews

i. Robust EIA and AA

Problem: The majority of judicial review challenges to grants of permission are being taken on the basis of the Environmental Impact Assessments (EIA) or Appropriate Assessments (AA) that were undertaken by the Planning Authority, and perceived inadequacies in how those assessments were carried out. Large scale infrastructure and SID projects have been delayed for years due to judicial reviews, even when heard by the Commercial Court. The current annual cost to An Bord Pleanála (ABP) alone of defending judicial reviews must also be significant, compared to earlier years. Much more significant is the reputational damage for Ireland, arising from the delay and uncertainty in the planning process. EIA and AA are complex subject areas, in which current best practice and thinking is continually evolving as a result of new legislation and judgements of the Irish and European courts. This gives rise to significant inconsistencies across different Local Authorities and ABP in how they undertake EIA and AA. It makes little sense to expect 32 separate planning authorities (31 Local Authorities and An Bord Pleanála), all to become and remain experts in the latest legislation, evolving thinking and court judgements in so far as they relate to EIA and AA. However, any one of their decisions is subject to challenge via judicial review on the basis of how they undertook their EIA or AA and the project is placed in jeopardy or unnecessarily delayed as a result.

Solution: Create a dedicated position within the Department of Housing, Planning and Local Government, to act as a single point resource for issuing best practice guidance, toolkits and best practice examples and legally robust language to be used in the preparation of EIAs and AAs by Planning Authorities including An Bord Pleanála. The relevant person(s) in the position would be responsible for advising and updating Planning Authority personnel in the application of the best practice for EIA and AA. They would also alert EIA and AA practitioners to how current practice needs to be adapted or updated to take account of the latest court judgements or legislative changes. This would result in a more consistent, legally robust and thorough fulfilment of the EIA and AA obligations of a Planning Authority, and would limit grounds and likelihood of success of judicial reviews on the basis of EIA and AA.

ii. Planning Authorities' Administrative Functions

Problem: The Planning and Development Act and Regulations set very specific and prescriptive procedural requirements for the management and processing of planning applications and appeals. These include publishing lists of applications within a certain timeframe following lodgement, notifying third parties of decisions, and publishing notifications of decisions to grant planning permission for projects that are subject to EIA. Some Planning Authorities follow the legislative requirements diligently; others do not. In cases where the full procedural requirements of managing and processing a planning application are not followed in full, through no fault of the applicant, the application and

any grant of permission is compromised and open to judicial review. Such a judicial review may only arise 12-24 months after the initial application is submitted, despite the grounds relating to how the application was accepted and processed by the Planning Authority when first received. The inconsistent approach to the procedural requirements for the management and processing of planning applications, exposes planning applications to significant risk and delay via judicial review.

Solution: The Office of the Planning Regulator (OPR) should be given an oversight function on the administrative procedures used by Planning Authorities to meet their Statutory requirements, to ensure all requirements are diligently and consistently applied in a legally robust manner.

4. Strategic Housing Development (SHD)

Problem: The current threshold for strategic housing developments of 100 units or 200 student accommodation bed spaces, is a high threshold for developments outside the greater Dublin area. A housing development of 60, 70 or 80 units is a significant residential project in the likes of Cork, Galway or Limerick, but would currently be excluded from the SHD process. Residential developments of a scale less than 100 units will be much more common outside of the greater Dublin area rather than 100+ unit developments, given the size of development sites and less favourable policy for high-rise developments. Excluding residential projects outside the greater Dublin area of less than 100 units from the SHD process, will constrain and curtail the delivery of residential development needed to deliver the Government's Action Plan for Housing and Homelessness.

Solution: Lower the SHD threshold for residential development outside the greater Dublin area to 50 units. This would allow a lot more residential projects access to the streamlined SHD process, and result in the delivery of more housing units in a more timely manner.

5. Pre-Commencement Planning Compliance

Problem: There is currently no statutory or recommended timeframe for Planning Authorities to consider and review information that must be submitted to them for agreement, prior to the commencement of a development. Yet, the vast majority of planning permissions include conditions that require information to be submitted to the Planning Authority for agreement prior to the commencement of development. Such pre-commencement condition compliance submissions can often sit with Planning Authorities for months or even years, awaiting their review and agreement. New applications that must be decided within statutory timeframes are routinely prioritised ahead of pre-commencement condition compliance submissions, which get left in limbo. Developers regularly have planning permission, project finance, contractors and end users/tenants all in place, but have no control or sight of how long it will take the Planning Authority to confirm compliance with conditions.

Solution: Introduce statutory timeframes that require a Planning Authorities to review and issue decisions on pre-commencement condition compliance submissions within four weeks of receipt of the submission. If a submission is deemed to be incomplete or not to the satisfaction of a Planning Authority, it may request further information from the successful applicant within two weeks of receiving the initial submission.

6. Delivering Ireland's Strategic Infrastructure Needs

Problem: The strategic infrastructure that is required to meet Ireland's growing needs is not being driven by a dedicated Authority. Ireland has a relatively weak public infrastructure, as witnessed by our international rankings, and the fastest growing population in Europe. At the same time our average level of investment as a percentage of national income has been half that of our European competitors - many of whom have consistently spent between three and four percent of GDP on public investment each year. This is at a time when Ireland is facing into rapid demographic growth and overheating pressures in public infrastructure which are affecting Ireland's competitiveness.

Solution: Establish an independent National Infrastructure Authority (NIA) to identify and prioritise spend on infrastructure projects. Ambitious investment is needed to improve the capacity of the economy and overcome emerging infrastructure bottlenecks. The NIA should also be responsible for the calculation of Section 49 supplemental development contributions.

For the purposes of this note, any reference to "SID" or "SID projects" includes all applications that are submitted directly to An Bord Pleanála, whether they be under the provisions of the Planning and Development Act (as amended), or other legislation (e.g. Roads, Railway or Gas Acts).