QUESTIONNAIRE FOR THE 20TH COLLOQUIUM OF THE ACSSAJEU

RESPONSE OF IRELAND

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1) Administrative Consent Procedure

Please give a short outline of the administrative consent procedure applying to project planning in your national legal order (procedural steps, time-limits, competent authorities, involvement of lobby groups and technical experts).

The Irish planning system was originally introduced by the Local Government (Planning and Development) Act, 1963. Prior to this legislation there had been no rules governing development in Ireland. There has been a subsequent expansion of the statutory development control system, which has been consolidated in the Planning and Development Act, 2000[1]. Ireland is also in a unique position within Europe with regard to our independent third party planning appeals system run by An Bord Pleanála.

Development Control

All decisions to grant or refuse planning permission are at first instance a matter for the relevant planning authority[2] and for An Bord Pleanála on appeal. It is important to note at the outset all development, unless specifically exempted[3], needs planning permission. Furthermore in making planning decisions the relevant authority is restricted to considering the proper planning and development of the area in question, including the preservation and improvement of amenities, the development plan[4] and any valid written submissions or observations made on a proposed development.

The first step an applicant must take in seeking planning permission is to give public notice by way of a newspaper notice, two weeks prior to making an application and a site notice. Failure to comply with this requirement renders the application invalid.

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[1] Hereinafter referred to as PDA 2000.

[2] There are 88 local planning authorities, 29 county councils, 5 county borough corporations and 49 town councils in Ireland.

[3] The principal classes of exempted development can be found in s.4 of PDA 2000 and under the Planning and Development Regulations 2001.

[4] S. 178 PDA 2000.

Contents of Planning Application

Content requirements for planning applications are set out in Article 22 of the Planning and Development Regulations, 2001 (hereinafter "PDR 2001"). They include *inter alia*, the type of permission sought, the applicant's personal details, location of the proposed development, the legal interest of the applicant in the land or structure, and whether an integrated pollution control licence or waste licence is required. Further documents, particulars, plans, drawings and maps may also be required.

Procedure on receipt of Planning Application

On receipt of a planning application the appropriate planning authority shall stamp each document with the date of receipt and consider whether the application complies with the requirements set out above. Failure to comply with the above requirements renders the application invalid. The planning authority must then either acknowledge receipt of the application or inform the applicant in writing that it has been rejected due to a failure to comply with the requirements. In general, authorities must make a decision within eight weeks of receiving the application. Where permission is refused, or granted with conditions, the planning authority must give reasons for the decision. Planning permission expires normally after five years, however this period may be extended in certain cases.

An Bord Pleanála

The appeals system is run by An Bord Pleanála. A planning permission applicant and any other person who made a submission or observation on the application is entitled to appeal a planning decision to An Bord Pleanála within four weeks of the planning authorities decision. The person seeking leave to appeal must state his/her name and address and the grounds on which he/she is making an appeal. In the course of an appeal the original planning application is considered afresh and the Board considers all relevant issues independently. Accordingly, the Board is required to consider the proper planning and development of the planning authority's area and any submissions or observations received. It acts in a quasi-judicial role in accordance with the principles of natural justice.

Any party to an appeal may request an oral hearing. The person lodging the appeal must request an oral hearing within four weeks of the planning authority's decision, however, where a party to an appeal is provided with a copy of an appeal, they may make a request within four weeks of the date the copy was sent to them. It is also within the discretion of the Board to hold on oral hearing without a request from any party and will only convene such a hearing for a particularly complex case or where it deems issues of national or local importance are involved.

In general the Board will make a decision to either grant permission/outline permission, grant permission/outline permission with conditions, or, refuse permission/outline permission and all parties to the appeal will be notified. The decision of the Board is final and its validity may only be challenged by way of judicial review within eight weeks of its decision.

Involvement of Technical Experts

According to Article 28(1) of the PDR 2001 notice must be given to the prescribed bodies[5]. Such bodies are then given 5 weeks from the date of receipt of the application in which to make submissions or observations in relation to it. Failure to make submissions or observations allows the planning authority to proceed with processing the application without further notice to that body.

2) Public Involvement

a) Is there any public involvement and/or hearing of individually affected parties during the administrative consent procedure?

b) If yes, at which stage(s) of the procedure and in which form?

c) Do affected parties loose their right to challenge the planning decision before the courts if they do not make use of this form of public involvement?

There is extensive provision for third party involvement through submissions and observations. Further third parties are entitled to inspect and purchase planning applications. It would appear lobby groups may also be included in this category of public involvement alongside individually affected parties.

Article 29 PDR 2001 provides that on payment of a prescribed fee any person or body may make a submission or observation in writing to the planning authority in relation to a planning application within five weeks of receipt of the application. It is important to remember that a general precondition to a third party appeal is that the appellant made submissions or observations in writing in relation to the planning application to the planning authority in accordance with the Regulations. There is however an exception to this general rule in the case of a person who has an interest in adjoining land in respect of which planning permission is to be granted, in circumstances where the development will differ materially from the development as set out in the application for planning permission by reason of conditions imposed, and the imposition of such conditions will materially affect the appellant's enjoyment of the land or reduce the value of the land.

Judicial Process

All decisions to grant or to refuse planning permission are firstly a matter for the relevant planning authority and for An Bord Pleanála in an appeal. A decision of An Bord Pleanála may only be challenged in the courts by way of judicial review in the High Court. This must be done within eight weeks of An Bord Pleanála's decision. However it is within the discretion of the High Court to extend this period if there is good and sufficient reason for doing so.

S. 50 of the Planning and Development Act 2000

Section 50 PDA 2000 provides for a special judicial review procedure for planning decisions and certain other decisions made by local authorities which may have implications for the environment. However there are a number of decisions which are only challengeable by conventional judicial review.

The special judicial review provisions found in s. 50 PDA 2000 are limited to:

(a) decisions of a planning authority on application for permission,

(b) decisions of the Board in relation to local authority development,

(c) decisions of the Board:

(i) on any appeal or referral, or

(ii) under PDA 2000, s. 175 in relation to the environmental impact assessment of a local authority development, or

(iii) under PDA 2000, Pt XV in relation to compulsory acquisition of land.

In fulfilling its judicial review function the High Court will not reopen the planning merits of the case and leave will only be granted to undertake the review process where the Court is satisfied that there are substantial grounds for claiming that the Board's decision is invalid or should be quashed.

The determination of the High Court on an application for leave or on an application for judicial review is final and no appeal lies to the Supreme Court except with the leave of the High Court which will only be granted where the High Court takes the view that the decision involves a point of law of exceptional importance and that an appeal is desirable in the public interest. However, this does not apply to a determination of the High Court in so far as it involves a question as to the validity of any law having regard to the provisions of the Constitution.

Interlocutory Injunction

If an objector decides to bring judicial review proceedings prior to the final decision of An Bord Pleanála, it may be necessary to apply for an interlocutory injunction in order to restrain any oral hearing before the Board. In *Broadnet Ireland Ltd. v. Office of the Director of Telecommunications Regulations* [2000] 3 I.R. 281, the High Court held the granting of leave to apply for judicial review could in itself have a chilling effect on the decision making process, notwithstanding the fact no formal order in the nature of a stay or interlocutory injunction was granted. It was confirmed by O'Sullivan J in *Martin v. An Bord Pleanála* [2002] 2 I.R. 655 that an application for an interlocutory injunction in the context of a planning appeal is subject to the same general principles as established in the seminal case *Campus Oil v. Minister for Industry and Energy* [1983] I.R. 82. These tests are namely; whether or not the applicant has demonstrated a serious issue to be tried, the adequacy of damages as a remedy and where does the balance of convenience lie.

4) Standing

a) **Do all of the above-listed plaintiffs have standing before your national courts?**

b) **If not, which are the reasons for their exclusion?**

Pursuant to s. 50 (4) of the PDA 2000 in order to apply for leave for judicial review an applicant must have a "substantial interest" in the matter. Further, s. 50 (4) (d) provides that a substantial interest is not limited to an interest in land or other financial interest. There is no definition of substantial interest; however it is possible to set out a limited list which may be found to satisfy the requirement of substantial interest;

(a) a person who is personally affected by the proposed development,

(b) a public interest litigant, motivated by bona fide concerns for the environment – *Lancefort Ltd. v. An Bord Pleanála* [1999] 2 I.R. 270,

(c) a limited liability company may also be deemed to have a substantial interest in an application in circumstances where the company is affected by the proposed development, or where the limited liability company is a public interest litigant motivated by a genuine concern for the environment.

(d) S. 50 (4) (c) requires the applicant to have taken part in the planning process prior to the application for leave to seek judicial review or in the alternative has satisfied the High Court that there are good and sufficient reasons for not making objections, submissions or observations. However prescribed bodies, a Member State of the European Union, or a State that is party to the Transboundary Convention are exempted from this requirement.

Standing of Plaintiff's

1. An inhabitant of the residential area who is afraid of the unbearable traffic noise and air pollution.
    - This applicant would have standing if they can successfully argue they are personally affected by the proposed development.

2. One of the municipalities which has divergent project plans for its territory.
    - If the municipality is deemed to be a prescribed body within the meaning of the relevant legislation then they will be able to establish locus standi.
3. The national environmental agency which is of the opinion that the motorway will seriously affect the environment.
    - The Environmental Protection Agency is a prescribed body for the purposes of planning legislation and could therefore establish locus standi.
4. A farmer who will lose part of his farmland.
    - The farmer would have a substantial interest as he has an interest in the land affected and could therefore establish locus standi.
5. A national association for the protection of the environment which is of the opinion that the motorway constitutes a serious threat to the environment in general and to the species listed by the "Habitats Directive" in particular.
    - It is likely the environmental association would be deemed to have locus standi if they can establish they are a public interest litigant with a bona fide concern for the environment.
6. An association for the protection of the environment of your neighbouring state which is afraid of transboundary pollution.
    - S. 174 of PDA 2000 refers to parties to the Transboundary Convention. There are currently 49 States which are party to the Convention however there does not appear to be any provision whereby an interested association may become party to the Convention.

5) Scope of claims:

Are the above listed plaintiffs only allowed to claim infringements of their individual rights (e.g. illegal expropriation of farmland, pollution of their private property) or may they claim infringements of public interests (e.g. adverse

effects on the environment) or the unlawfulness of the planning decision in general (e.g. because of procedural deficiencies) as well?

As was noted in answer 4, in order to establish locus standi the applicant must have substantial grounds and sufficient interest. However such an interest is not limited to an interest in land and could be extended to include infringements of the public interest. Moreover, the manner in which a decision was made can be reviewed in the judicial review process.

6) Scope of Judicial Review

Do your courts review the lawfulness of a planning decision in every procedural and substantive respect or is the scope of judicial review restricted (e.g. to procedural aspects or clear and serious infringements of national or Community Law)?

Section 50 of the Planning and Development Act 2000 provides for a special judicial review procedure. Where such a procedure is provided, a person cannot question the validity of the relevant order otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts 1986 (SI No. 15/1986).

The following are instances where judicial review of a planning authority's or An Bord Pleanála's decision may be obtained where either body has acted ultra vires its jurisdiction in that it:

(a) fails to act in accordance with the statutory powers conferred on it,
(b) fetters its discretion by committing itself to make a particular determination,
(c) takes into account irrelevant considerations,
(d) fails to take into account relevant considerations,
(e) acts in breach of natural and constitutional justice,
(f) acts mala fides,
(g) acts unreasonably[6].

[6] Gore-Grimes, Key Issues in Planning and Environmental Law, Butterworths, 2002, p. 282.

7) EU Environmental Law:

What decision will your court take, if

(a) the environmental impact assessment prescribed by Community Law has not or not duly been carried out in connection with the project in question?

An Environmental Impact Assessment was introduced as a legal requirement for certain types of development which effect the environment to a significant extent by the EC (EIA) Regulations, 1989 and the Local Government (Planning and Development Regulations), 1990, which was since repealed by the Local Government (Planning and Development) Regulations, 1994. These Regulations were intended to give effect to Directive 88/337/EEC, as amended by Council Directive 97/11/EC

In *Shannon Regional Fisheries Board v. An Bord Pleanála* [1994] 3 I.R. 449 it was established the requirement of Environmental Impact Assessment is a pre-condition under the 1989 Regulations and compliance with this is necessary to the exercise of the jurisdiction of the relevant planning authority and An Bord Pleanála under s. 26 of the Local Government (Planning and Development) Act, 1963. Part X of PDA 2000 now deals with Environmental Impact Assessment.

Directive 88/337/EEC was found to be capable of direct effect – *Berkeley v Secretary of State for the Environment* [2001] A.C. 603 – and as such if there is any defect in the implementation of the directive, this will be matter which both the Irish courts and the regulatory bodies, that is An Bord Pleanála and the planning authority, will have to take into account.

When the court is considering the failure to provide an EIS under Annex I, it would seem the better approach would be to view this as a question of law, and as such no deference should be given to the opinion of the planning authority or An Bord Pleanála. This can be contrasted with the discretion seemingly provided for the planning authority or An Bord Pleanála for Annex II projects.

With regard to the adequacy of an EIS, it seems likely the courts will demonstrate greater deference to the views of the regulatory bodies. The decision in *Kenny v. An*

Bord Pleanála (No. 1) [2001] 1 I.R. 565 seems to indicate that the court should not concern itself with the qualitative nature of an environmental impact statement.

(b) the project adversely affects a natural habitat which is eligible for designation as a special area of conservation in the sense of the EU – "Habitats Directive" but has not yet been transmitted to the Commission?

and

(c) the project adversely affects a natural habitat which has been transmitted to the Commission as being eligible for designation as a special area of conservation but which has not yet been placed on a Commission list?

The Habitats Directive was transposed into Irish Law in February, 1997 by means of the European Communities (Natural Habitats) Regulations, 1997 and has been subsequently amended by the European Communities (Natural Habitats) (Amendment) Regulations, 2005. It would appear Regulations 27 – 32 of the EC (Natural Habitats) Regulations, 1997 require that the site in question be adopted as a Site of Community Importance (SCI) prior to controls on the use of land being imposed.

Regulation 30 of the EC (Natural Habitats) Regulations, 1997 sets out the obligations of the Minister for the Environment in relation to road development by a road authority. Thus the position regarding the protection of natural habitats that are officially on a Commission list is clear – an environmental impact assessment must be undertaken and the Minister for the Environment must be satisfied there will be no negative impact on a European site as a result of a proposed development. However given the Article 6(4) exemptions in the Habitats Directive, even if the Minister is furnished with a negative assessment, the project may still go ahead as a result of imperative overriding reasons of a social or economic nature (Regulation 30 (6) (a)).

The position is somewhat less clear where a site is eligible for designation, but has not yet been transmitted to the Commission or has been transmitted, but has not yet been placed on a Commission List. However, given the decision in *Commission v. Ireland*(C – 67/99), where it was held in failing to transmit to the Commission, within the prescribed period, the list of sites mentioned in the first subparagraph of Article 4(1) of the directive, Ireland

had failed to fulfil its obligations under that directive, the Court may decide to deal with the nature protection area, as if it were in fact a Special Area of Conservation for the purposes of the planning process. Indeed in the context of the Wild Birds Directive, the ECJ ruled in the *Santona Case (Commission v. Spain* [1993] ECR I-4221) the construction of roads and other infra-structural development would produce "significant deterioration" and cause "considerable damage" within a specific habitat, which had not been classified though it ought to have been, was incompatible with Article 4 of the Wild Birds Directive.

(d) the project adversely affects a birds' sanctuary in the sense of the EU – "Birds Directive"?

The European Communities (Conservation of Wild Birds) Regulations 1985 (S. I. No. 291 of 1985), as amended, do not set down any statutory procedure for the designation of Special Protection Areas, however once sites are designated, each planning authority is sent details of SPAs within its functional area in order that it may take account of the designation when considering development proposals. However, the strict limitations put on Member State discretion with regard to "the appropriate steps to avoid pollution or deterioration of habitats or any disturbances affecting birds, in so far as these would be significant" has been replaced by those obligations contained in Articles 6(2) – (4) of the Habitats Directive which now apply to all Natura 2000 sites. Accordingly, it is likely the courts will give due deference to the opinion of the planning authority or An Bord Pleanála when considering any adverse affects on a designated area.

e) the project is likely to exceed the limit values of the EU "Ambient Air Directive" (esp. those for PM 10/particulate matter)?

Article 11 of Council Directive 1999/30/EC leaves the determination of penalties for infringement of the Directive to the discretion of the Member State. However the implementing measure, Statutory Instrument 271 of 2002 on Air Quality does not appear to set out penalties to be imposed in the event of exceeding prescribed levels of Particulate Matter, thus it is difficult to anticipate the approach of the courts. Regulation 17 (2) of S.I. 271/2002 states:

> "The Agency and the local authority, or local authorities as appropriate, shall promote the preservation of best ambient air quality compatible with sustainable development."

8) Consequences of procedural and substantive deficiencies of the planning decision:

a) Are there – in your national legal order – any procedural and/or substantive deficiencies which regularly render a planning decision completely void?

There does not appear to be any procedural or substantive deficiencies in the Irish planning system, resulting in planning decisions being rendered completely void. Indeed as was noted Ireland is the only member state with an independent appeals system as operated by An Bord Pleanála. However it may be possible for an applicant to argue that a particular objective of the local development plan is invalid and as a

result reliance on that objective vitiated a subsequent decision to grant planning permission.

b) For which kinds of rulings does your national legal order provide in this case (e.g. cassation of the planning decision or declaratory ruling establishing its nullity)?

1. **Certiorari and Prohibition**

Certiorari is a remedy available to all citizens on application to the High Court. Such an application can be made "when any body or tribunal (be it a court or otherwise), having legal authority to affect their rights and having a duty to act judicially in accordance with the law and the Constitution, acts in excess of the legal authority or contrary to its duty[7]."

The purpose of certiorari is to supervise the exercise of jurisdiction by statutory bodies and tribunals in order to ensure they do not usurp their power or act in excess of the jurisdiction granted to them and as such the purpose of certiorari is not to correct errors or review decisions made, nor is its function to render the High Court a court of appeal with regard to the decision complained of. Accordingly the application of certiorari is discretionary and may not always be useful in the context of planning decisions.

An order for certiorari quashes the decision and it is thus annulled.

Prohibition is sought to restrain a public body from doing something which would be in excess of its jurisdiction. There appears to be no real difference between certiorari and prohibition, save that prohibition can be invoked at an earlier stage.

1. **Mandamus**

The purpose of mandamus is to secure the performance of a public duty. The duty in question may be a statutory one, as is the case in making a grant of planning permission. If an order is made, it directs the performance of the duty in question,

[7] Per O' Higgins CJ in State (Abenglen Properties Ltd) v Dublin Corporation [1984] IR 381, 392

however it does not direct the manner in which it should be performed, nor does it compel a body that is charged with deciding a matter, to decide it in a particular way.

3. Declaration and Injunction

A declaration answers a question as to the legality of a state of affairs or as to the rights of the parties. Relief in the form of a declaration does not quash a decision however it may declare a decision void. It does not forbid or compel any act, nor does it offer any form of compensation to a successful applicant.

An injunction may be granted by the High Court where the court is satisfied it is just or convenient to do so. An injunction is usually granted in terms which prohibit the performance of an act, however in an appropriate case a mandatory injunction may be granted that directs the performance of a certain act.

b) For which kind of rulings does your national legal order provide if the planning decision has only minor deficiencies/is not completely void (e.g. modification of the planning decision by imposing additional requirements such as noise barriers, speed limits or reforestation)?

Section 50 (4) (g) of the Planning and Development Act 2000 provides;

> "Where an application is made for judicial review under this section in respect of part only of a decision referred to in *subsection (2)*, the High Court may, if it thinks fit, declare to be invalid or quash the part concerned or any provision thereof without declaring to be invalid or quashing the remainder of the decision or part of a decision, and if the Court does so, it may make any consequential amendments to the remainder of the decision or part of a decision that it considers appropriate."

From the foregoing provision it appears minor modifications to the planning permission are at the discretion of the High Court.

c) Which rulings are likely to be given in the cases of the above listed plaintiffs?

Given the very high standard required to succeed at the leave stage of judicial review in Ireland and the watering down of the protection of Natura 2000 sites as a result of the Article 6(4) exemptions, it is difficult to anticipate if any of the above named applicants would succeed in overturning a decision to allow the building of the motorway. This is particularly so given the deference afforded by the courts to the planning authorities, as discussed below.

9) Remedy of deficiencies:

May procedural or substantive deficiencies of the planning decision be remedied during the judicial process? If yes, on which conditions?

It is important to remember judicial review is limited to a review of a decision made by a planning authority on an application for permission or a decision of An Bord Pleanála on any appeal or reference[8].

In the seminal decision, *O'Keeffe v. An Bord Pleanála* [1993] IR 39, Finlay CJ pointed out that planning authorities and An Bord Pleanála are expected to have special skills, competence and experience with regard to planning issues. As a result courts are reluctant to interfere with such decisions and will do so solely in circumstances where it is manifestly unreasonable and that no reasonable planning authority could come to the same decision. Thus the courts may quash a decision or deem it to be invalid, but do not see their function as one of substituting the planning authorities decision.

[8] Gore-Grimes p. 281, para 88.15