Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

Report on Phase 1 of a Review by the Office of the Planning Regulator of certain Systems and Procedures used by An Bord Pleanála pursuant to section 31AS of the Planning and Development Act 2000, as amended

3rd October 2022

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Key Messages

An Bord Pleanála was established in 1977 under the Local Government (Planning & Development) Act 1976 and is responsible for the determination of planning appeals and certain applications for strategic infrastructure, compulsory acquisition of land by local authorities and other matters under Water Pollution Acts and the Building Control Acts.

An Bord Pleanála is an integral part of the overall planning process and its decisions have significant societal, economic and environmental consequences.

Its stated mission is "To play our part as an independent national body in an impartial, efficient and open manner, to ensure that physical development and major infrastructure projects in Ireland respect the principles of sustainable development, including the protection of the environment."

It is vital that this mission statement, which implies a high degree of public and institutional confidence in An Bord Pleanála's independence, impartiality, probity and professionalism, is maintained at all times. Where challenges arise these need to be confronted and immediately addressed.

Arising from matters which are set out later in this report, the Office of the Planning Regulator (OPR) determined it necessary to initiate a review, in two phases, of certain systems and procedures used by An Bord Pleanála pursuant to section 31AS of the Planning & Development Act 2000, as amended.

Our remit is set out in the Terms of Reference dated 24th August 2022, which are included as Appendix 1 of this report. Our brief in this first phase of the review was to urgently diagnose the causes of An Bord Pleanála's current difficulties and to prescribe both immediate and short-term steps to be taken to address these, and to signal wider matters to be examined in more detail under the second phase of the review.

However, from what we have seen so far, to ensure trust and confidence in An Bord Pleanála, the central messages of the first phase of this review are that:

- The work of An Bord Pleanála is critical to the functioning of the State in terms of supporting the overall planning process so that Ireland's developmental needs are met in a sustainable manner, having regard to societal, economic and environmental contexts. What is also critical is that An Bord Pleanála benefits from a high degree of public and institutional confidence in its independence, impartiality, probity and professionalism.

- Resourcing of An Bord Pleanála is a critical starting point, most immediately in relation to filling vacancies at board level, so that its core decision-making function is delivered upon. An Bord Pleanála must transition to a learning-based organisation, with strengthened management, oversight and technical capabilities in this regard, particularly in relation to the many interactions between planning and environmental law.

- Resourcing will not be sufficient of itself, however, as the organisation of An Bord Pleanála demands urgent reform in relation to strengthening its day-to-day management structures. This includes building a robust structure for ethics and compliance oversight to monitor conflicts arising in the decision-making function as well as appropriate legal services supports.

- To complement bolstered resources for the making of sound decisions from a legal and ethical perspective, An Bord Pleanála urgently needs to put in place clear and effective written systems and procedures to guide all staff, including the Chairperson and board members, in relation to its quasi-judicial decision-making process.

We make 11 recommendations in this report from our work in the first phase of this review.

Some should be implemented immediately or in the short-term, whilst others require further consideration during the second phase of this review process and beyond.

Moreover, the complexity of Ireland's planning legislation has been a focus of our work, which at present is the subject of review by the Office of the Attorney General, in conjunction with the Department of Housing, Local Government & Heritage. An Bord Pleanála, as well as planning authorities and other stakeholders in the planning process, have at times struggled with legislation that has evolved over time into a highly complex code. It is expected that an outcome from that review will be clearer legislation which will bring the potential for clearer planning policies and decisions and enhanced certainty for all those who engage with the planning process.

In our work, we have focused on quickly identifying systems and procedures which require the most immediate attention while also building on the many strengths of An Bord Pleanála's capability demonstrated in the past such as it being the largest repository of professional planning expertise in the country. The completion of this first phase of the review and publication of this report is not the end of that work.

While swift steps can and should be taken to address matters that have adversely affected the standing of An Bord Pleanála, we are confident that in acting on the recommendations in this report and in continuing the work through the second phase of the review process, and thereafter through

the OPR's ongoing oversight, An Bord Pleanála's systems and procedures can be optimised for the future.

In this regard, it is our view that implementation of the recommendations within this report, in addition to further recommendations that will arise from the second phase of this review, will be crucial to ensuring that An Bord Pleanála's decision-making is underpinned by robust and effective systems and procedures.

We are committed to working with An Bord Pleanála, the Minister for Housing, Local Government & Heritage, and the Department of Housing, Local Government & Heritage, in progressing the second phase of this review, and in implementing and building upon this report's recommendations, in order to deliver tangible improvements to the way in which An Bord Pleanála delivers its functions and ultimately to improve the overall effectiveness of, and ensure public confidence in, the Irish planning system.

Part 1: Introduction and Context

Preliminary

1. Consequent upon the provisions of section 31AS of the Planning & Development Act 2000, as amended ('the 2000 Act'), the Office of the Planning Regulator (OPR) has considered it necessary and appropriate to conduct a review of certain systems and procedures used by An Bord Pleanála in relation to the performance of its functions under the 2000 Act. The review process is being conducted in accordance with the terms of reference dated 24th August 2022.[1]

2. The overall review process, which is intended to conclude on 30th November 2022, is being conducted in two phases. Accordingly, this report has been prepared on foot of the first phase of the review process, which has sought, on an urgent basis, to analyse the issues of most immediate concern to An Bord Pleanála's functioning. Given our terms of reference, participative consultation with staff and board members of An Bord Pleanála was not undertaken in this first phase but is a feature of the second phase of the review process. The first phase of the review was conducted by the OPR's Director of Planning Reviews, and his team together with external experts, Mr Conleth Bradley SC, Mr Paul Cackette and Mr John McNairney, who were appointed as authorised persons under the relevant provisions of the 2000 Act for this purpose. The first phase is now concluded with the publication of this report. The second phase of the review is being separately conducted by the OPR's Director of Planning Reviews and his team together with Mr. Cackette and Mr. McNairney who remain as authorised persons during this phase.

3. The primary emphasis of the review process is with regard to practice at board level of An Bord Pleanála and focuses on the robustness and effectiveness of its decision-making and the organisation of work and governance arrangements, including in relation to planning casefile handling.

4. The legislation uses the terminology 'the Board' to refer to the statutory body An Bord Pleanála. This same terminology is also used colloquially in the planning sector to refer to the entire organisation. For the purpose of precision, and wider clarity, in this report the term '*the board'* is used to specifically describe the board of An Bord Pleanála.

5. This report offers 11 recommendations for implementation by An Bord Pleanála, the Minister for Housing, Local Government & Heritage ('the Minister') or for consideration in the context

[1] https://www.opr.ie/wp-content/uploads/2022/08/Terms-of-Reference-for-Review.pdf

of the wider process of legislative review and amendment. While some of the recommendations are for more general consideration over the coming period, a number of recommendations are considered urgent and should be addressed in the immediate term Some of the more immediate concerns relate to the appointment of board members, discontinuing the operation of two-person quorums of the board, Code of Conduct / conflict of interest matters, and crucial changes to the decision-making process. Other points of analysis are for further consideration and development, through the second phase of the review process, including suggested near and longer-term organisational reforms.

6. The recommendations included in this report have assigned timeframes for implementation. It would be expected that recommendations with an 'immediate' timeframe would be progressed upon finalisation of this report; 'short-term' recommendations would be implemented within 4-8 weeks of this report's publication; 'medium-term' recommendations would be implemented within a maximum of 6-9 months; and 'longer-term' recommendations would be implemented within one year of finalisation of this report, or in line with legislative review where legislative amendment may be required.

Background to An Bord Pleanála

7. Since its establishment over 40 years ago, An Bord Pleanála has benefited from a well-regarded reputation for its independence, impartiality and technical expertise in examining a range of cases from small householder applications to the most significant planning decisions of the State, including major infrastructure projects, urban regeneration and housing.

8. Although some planning control legislation had been in existence since 1934 (and 1939)[2], it was not until the Local Government (Planning & Development) Act 1963 that a comprehensive scheme of planning control was established in Ireland. Some years after its coming into being, however, aspects of the application of the planning code were found to be sub-optimal, and An Bord Pleanála was created to address these matters and has played a pivotal role in the Irish planning system since 1977.

9. The establishment[3] of An Bord Pleanála by the Oireachtas arose because of concerns expressed at that time in relation to the impartiality and consistency of decisions arising in the then system of appeals against planning decisions of local authorities. In the seminal decision of *The State (Pine Valley) v Dublin City Council*[4], Mr. Justice Henchy observed – albeit in the context of the somewhat unusual facts of that case – that it was "…*no wonder that Parliament, in its wisdom, by the Act of 1976 transferred to an independent appeal board*

[2] The Town and Regional Planning Acts 1934 and 1939.
[3] Section 3 of the Local Government (Planning & Development) Act 1976.
[4] [1984] I.R. 407.

the appellate power which had been vested by the Act of 1963 in an individual who might be influenced in his decisions by political pressures or other extraneous or unworthy considerations..." [5]

10. Accordingly, the transfer of these decisions to an independent and quasi-judicial organisation with its own internal planning experts was borne of a desire to strengthen public confidence in Ireland's planning process. An Bord Pleanála was established pursuant to section 3 of the Local Government (Planning & Development) Act 1976[6] and assumed office on 15 March 1977.[7]

An Bord Pleanála and Judicial Review

11. Respecting An Bord Pleanála's independence and expertise, landmark decisions of the Superior Courts set a very high bar for legal challenges to its decisions. Until relatively recently there was a very low level of challenge and a very high level of success in defending such challenges.

12. More recently, An Bord Pleanála has faced high levels of successful legal challenges to its decisions and associated costs – approximately €8m, or 45% of its budget, in 2021 – which has raised (a) concerns in relation to the manner in which the decisions have been made and (b) questions as to why such successful legal challenges have now arisen. These issues arise at a time when the State is more dependent than ever on the administration of an effective, efficient planning decision-making process in which the public can have a high degree of confidence.

13. Accordingly, in this review, we have sought to answer the central question as to what has so dramatically changed over the past five years to lead An Bord Pleanála to its current difficulties and, arising from our assessment, we have set out suggestions as to how these matters can be addressed.

14. Given the pivotal role played by An Bord Pleanála in Ireland's planning process, and the paramountcy the planning process plays in the State's collective actions to address pressing societal matters such as housing, economic issues, infrastructure needs as well as environmental requirements including climate action, the importance and urgency of taking

[5] [1984] I.R. 407, 425.
[6] Hereafter also referred to as "the 1976 Act."
[7] The 1976 Act initially required the chairperson of An Bord Pleanála to be a serving judge of the High Court or a person who formerly held judicial office. It can be observed, therefore, that initially the Oireachtas looked to the judicial arm of government to head up the body which was aimed at restoring public confidence in the planning appeals process. In fact, there were two judicial holders of the office of the then chairman: Mr. Justice Denis Pringle (a High Court judge) was the first holder of the office in 1976; Mr. Justice Eamonn Walsh (a High Court judge) was the second chairman of An Bord Pleanála. In 1983 an entirely new procedure for appointing the chairperson was established the Local Government (Planning & Development) Act 1983, which is reflected in a similar process today.

whatever actions are needed to ensure public and institutional confidence in An Bord Pleanála cannot be overstated.

Organisational Review in 2016

15. A review carried out in 2016 made 101 recommendations to the Minister to support An Bord Pleanála in its operations with a view to ensuring that it would be appropriately positioned and fit for purpose from an organisational perspective to achieve its legislative mandate. Those recommendations remain an important contextualising feature for this current review process.

16. Of the 101 recommendations contained in that report, the evidence before the Public Accounts Committee (PAC) in July 2022[8] was that approximately 56 had been implemented or partially implemented and incorporated as part of An Bord Pleanála's five year strategy; some were deemed not to be pragmatic or appropriate in the context of An Bord Pleanála's operations; and approximately 31 of the recommendations were deemed to be matters for legislative review.

17. In this regard, it is noted that a review of planning legislation is currently being overseen by the Office of the Attorney General. It is understood that a number of the recommendations of the 2016 review are being considered as part of this legislative review, which also provides an important context for this current review process.

Present Concerns

18. Presently, there are matters in the public domain which concern certain allegations in the context of specific individual cases that have been the subject of a review and report by senior counsel in July 2022. In accordance with the OPR's statutory remit pursuant to section 31AS of the 2000 Act, the focus of this review is on the systems and procedures used by An Bord Pleanála in relation to the performance of its functions under the 2000 Act and this review and report do not address any alleged specific individual instances which are in the public domain.

19. A summary of the concerns in relation to the systems and procedures used by An Bord Pleanála, some of which have already been the subject of public comment and were further raised at the PAC hearing in July 2022, include the following:

    - given the dependency of An Bord Pleanála on the availability of up to its full statutory complement of ten members (nine ordinary members plus the Chairperson) in making

[8] https://www.oireachtas.ie/en/debates/debate/committee_of_public_accounts/2022-07-14/4/

planning decisions, depending on the level of caseload on hand, the timing of vacancies, often arising in multiples, coupled to any delays in the filling of those vacancies through the complex statutory appointments procedure and the exigencies brought about by Covid-19, all have had an impact on the efficiencies and throughput of An Bord Pleanála's workload and the creation of a backlog;

- high levels of successful legal challenge to recent decisions of An Bord Pleanála leading to a sharp increase in the costs incurred in both defending decisions and paying the costs of parties successfully challenging such decisions;
- the assignment of casefiles to board members and the manner of presentation of cases to the board;
- the operation of two-person boards;
- patterns with regard to higher rates of departing from inspectors' recommendations in relation to certain categories of development (e.g. telecommunications);[9]
- communications with inspectors in order to seek amendments to their reports and recommendations in the course of the board deciding such cases;[10] and
- alleged breaches of An Bord Pleanála's Code of Conduct and a weak system of internal governance and oversight in relation to monitoring actual or perceptions of conflicts of interest .

20. Arising from these matters, the OPR considered that it was necessary and appropriate to initiate a review of An Bord Pleanála in respect of the systems and procedures used by An Bord Pleanála in relation to the performance of its functions under the 2000 Act.[11] This review does not include an assessment of the merits of any individual applications for planning consent or approval (whether for conventional planning, Strategic Infrastructure Development, Strategic Housing Development or otherwise) or any appeals which are currently before An Bord Pleanála. It addresses, rather, certain systems and procedures used by An Bord Pleanála in delivering its functions.

21. These matters of public concern are reviewed under the following headings:

    - The functions of An Bord Pleanála
    - The organisation of An Bord Pleanála
    - Ethical governance in An Bord Pleanála
    - The decision-making practices of An Bord Pleanála

[9] This matter is being addressed in Part 2 of this Review.
[10] This matter is being addressed in Part 2 of this Review.
[11] Section 31AS of the Planning & Development Act 2000 (as amended).

22. Within each of the aforementioned headings, we make recommendations as to how identified concerns can be addressed immediately within the current legal framework and / or as part of the second phase of this review process, or the future work programme of the OPR and we also indicate where further legislative amendment may be necessary.

23. With reference to the issue of potential future legislative amendment, as noted above, a Government sanctioned review of planning legislation is currently being carried out by the Office of the Attorney General. We are also aware that the remit of that review is distinct to that of this report, although there are certain overlaps. While in this report we are specifically concerned with improving the systems and procedures of An Bord Pleanála, the legislative review is considering planning legislation in the context of improving the planning system more broadly. Where legislative amendments are recommended within this report, we suggest that the logical process for such amendments to be considered further is by means of the Office of the Attorney General's legislative review, and such recommendations are made in this context.

Part 2: Functions of An Bord Pleanála

Introduction

24. An Bord Pleanála's range of functions [12] are perhaps best understood in chronological order, reflecting the periods during which its powers have increased. As referred to later, An Bord Pleanála has functions prescribed by other legislation in addition to those in the 2000 Act. As a general guide, the following chronologies are relevant:

    - 1977-to date
    - 2000-2006
    - 2006-2015
    - 2015-2022

1977-to date

25. Part 1 of this report addressed the context in which An Bord Pleanála was established in 1977. As observed earlier, the primary function of An Bord Pleanála was to decide ordinary planning appeals of decisions of planning authorities, which can comprise four types of appeal: (a) first party appeals against a planning authority's decision to refuse permission; (b) first party appeals against a planning authority's decision to propose conditions to be attached to the decision; (c) first party appeals against financial contribution conditions; and (d) third party appeals which are usually against the decisions of planning authorities to grant permission.[13]

26. Additional appellate functions of An Bord Pleanála include where appeals are sought against the following: the revocation or modification of a planning permission;[14] the acquisition of land for open space;[15] the removal or alteration of a structure or the discontinuance of a use;[16] a notice requiring measures to be taken relating to a structure or other land in an area of Special Planning Control;[17] the making of a planning scheme in a strategic development zone;[18] an appeal by a local authority against the refusal of consent by an owner/occupier to lay cables, wires and pipelines on his/her property;[19] the creation of a public right of way;[20] in relation to

[12] A comprehensive list of the functions of An Bord Pleanála is set out at www.pleanala.ie [Accessed 10 September 2022].
[13] An appeal can comprise first and third party appeals.
[14] Section 44(6) of the 2000 Act.
[15] Section 45(3) of the 2000 Act.
[16] Section 46(6) of the 2000 Act.
[17] Section 88(5) of the 2000 Act.
[18] Section 169(6) of the 2000 Act.
[19] Section 182(4) of the 2000 Act.
[20] Section 207(5) of the 2000 Act.

licensing an appliance, apparatus, structure, cable or other matter in or on a public road;[21] in relation to the imposition, restating, addition, or modification of conditions of certain quarries;[22] a request for an amendment to a planning scheme in a strategic development zone.[23]

27. Additional functions of An Bord Pleanála include the following: when an application is made by an adjoining owner for leave to appeal a decision of a planning authority on a planning application;[24] the amendment of any decision made by An Bord Pleanála to correct any clerical or technical error;[25] where there is a request by an applicant / intending applicant for planning permission for exemption from a requirement to prepare an Environmental Impact Assessment Report (EIAR)[26] in relation to a planning application;[27] where there is a request by a person to scope an EIAR where the person is required to submit one to An Bord Pleanála;[28] where there is an application by a planning authority for confirmation of a special amenity order.[29]

28. As mentioned, as result of various EU law measures, An Bord Pleanála, amongst other bodies, can be designated as a "competent authority." Taking the example of the Habitats and Birds Directive, Part XAB of the 2000 Act gives effect to Appropriate Assessment and provides at section 177R(1) and section 177S inter alia that:

    - the competent authority in the State for the purposes of Part XAB and Articles 6 and 7 of the Habitats Directive is, in relation to a draft planning scheme in respect of all or any part of a strategic development zone, the planning authority in whose area the strategic development zone is situate, or, on appeal An Bord Pleanála;
    - the competent authority in the State for the purposes of Part XAB and Articles 6 and 7 of the Habitats Directive is, in relation to proposed development that is strategic infrastructure development, An Bord Pleanála; and
    - the competent authority in the State for the purposes of Part XAB and Articles 6 and 7 of the Habitats Directive is, in relation to proposed development that may be carried out by a local authority under Part X or Part XAB of the 2000 Act, proposed development that may be carried out under Part XI or proposed local authority development on the foreshore, An Bord Pleanála.

[21] Section 254(6) of the 2000 Act.
[22] Section 261(9) of the 2000 Act.
[23] Section 170A of the 2000 Act.
[24] Section 37(6) of the 2000 Act.
[25] Section 146A of the 2000 Act.
[26] Hereafter also referred to as "EIAR."
[27] Section 172(3) of the 2000 Act.
[28] Section 173(3) of the 2000 Act.
[29] Section 203(2) of the 2000 Act.

29. Appeals to An Bord Pleanála also arise dealing with vacant sites,[30] building control,[31] water pollution licence,[32] and air pollution licence.[33]

Referrals

30. As is set out in more detail in Part 5 of this report, which addresses the decision-making functions of An Bord Pleanála (and in Appendix 2 'A Breakdown of determined Judicial Reviews involving An Bord Pleanála for the years 2012 to 2022'), an important function of An Bord Pleanála is to decide 'referrals' which comprise planning questions referred to An Bord Pleanála for formal adjudication usually (but not always) following initial consideration of the matter by a planning authority. This is different from a planning application and typical questions under section 5 of the 2000 Act, for example, would be what is or is not development or what is or is not exempted development within the meaning of the 2000 Act.

31. The issues involved in the referral process have led to a series of important judicial decisions which highlight the tension between legal interpretation and planning judgment. These judgments, for example, address the question of whether the Superior Courts' inherent jurisdiction to grant declarations as to the planning status of lands is consistent with the section 5 procedure under the 2000 Act. Generally, and while this matter awaits a decision currently before the Supreme Court, the courts up to now have considered that the continued existence on the part of the High Court of a general jurisdiction to adjudicate upon the proper construction of a planning permission creates a danger of "*overlapping and unworkable jurisdictions*".[34]

32. For example, one judge has observed that the making of a declaration by the High Court might have the result that neither An Bord Pleanála nor the planning authority would thereafter be in a position to exercise its statutory jurisdiction under section 5 of the 2000 Act without finding itself in conflict with the earlier determination by the High Court.[35] As observed by this judge, the solution adopted by the Supreme Court to "this conundrum" was, in effect, to find that the existence of the section 5 reference procedure of the 2000 Act ousted the High Court's jurisdiction to grant (freestanding) declarations in respect of planning matters. The courts recognise, however, that the High Court continues to have original jurisdiction to determine planning issues when adjudicating upon enforcement proceedings under section

[30] Urban Regeneration and Housing Act 2015.
[31] Building Control Acts 1990-2007.
[32] Local Government (Water Pollution) Acts 1977-1990.
[33] Air Pollution Act 1987.
[34] Per Mr. Justice Henchy in *Tormey v Ireland* [1985] IR 289 at p.295, cited with approval e.g. by Chief Justice Ronan Keane in *Grianan An Aileach Interpretative Centre Co Ltd v Donegal Co Council* [2004] 2 IR 625 at p.638.
[35] Mr. Justice Simons in *Krikke v Barrannafaddock Sustainability Electricity Ltd* [2019] IEHC 825 at paragraph 68.

160 of the 2000 Act which sometimes requires the Circuit Court or the High Court to determine similar issues that arise in a section 5 reference.

33. The extent of the potential overlapping jurisdictions and legal issues which arise is apparent when consideration is given to the situations where referrals can arise, which include the following: referral of a declaration by a planning authority in relation to a question as to what is or is not development or exempted development;[36] referral where a planning authority fails to issue a declaration within four weeks of the due date of a question in relation to what is or is not development or exempted development;[37] referral by a planning authority of a question as to what is or is not development or exempted development;[38] referral by the Minister for Tourism, Culture, Arts, Gaeltacht, Sport & Media as to whether an activity requiring the consent of that Minister comprises development which is not exempted development;[39] referral of points of detail relating to a grant of permission in default of agreement between the planning authority and the developer;[40] referral of a dispute as to whether an application for permission is for the same development / description as one on appeal;[41] referral of points of detail relating to a grant of permission under section 37L;[42] referral for review by An Bord Pleanála by a person to whom a declaration under subsection 57(3) or a declaration reviewed under subsection 57(7) has been issued by a planning authority relating to a protected or proposed protected structure;[43] referral of dispute relating to social and affordable housing which may be subject to an agreement between the Planning Authority and an applicant / or other person with an interest in lands to which an application relates;[44] referral of a dispute or question as to whether a new structure substantially replaces a demolished or destroyed structure;[45] and where a screening determination for environmental impact assessment is made by a planning authority under section 176B of the 2000 Act any person to whom section 176B (4) or (5) relates may, within 3 weeks of the issuing of the determination and on payment of the appropriate fee, refer the determination for review by An Bord Pleanála.[46]

34. As addressed in Part 5 of this report, the conundrum created by potentially overlapping and unworkable jurisdictions in these referral case focuses attention on the role of the Superior Courts as the final arbiter of all matters which require legal interpretation.[47]

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[36] Section 5(3)(a) of the 2000 Act.
[37] Section 5(3)(b) of the 2000 Act.
[38] Section 5(4) of the 2000 Act.
[39] Section 5(8) of the 2000 Act.
[40] Section 34(5) of the 2000 Act.
[41] Section 37(5) of the 2000 Act.
[42] Section 37(N)(8) of the 2000 Act.
[43] Section 57(8) of the 2000 Act.
[44] Section 96(5) of the 2000 Act.
[45] Section 193(2) of the 2000 Act.
[46] See section 176C(1) of the 2000 Act, otherwise known as a “determination review."
[47] Echoing the observations of Mr. Justice Donal O’Donnell (now Chief Justice O’Donnell) in *Cullen & Ors v Wicklow County Manager* [2011] 1 I.R. 152.

2000-2006

35. With the enactment of the 2000 Act, An Bord Pleanála took over the role of various ministers in the confirmation of compulsory acquisition of land (Compulsory Purchase Orders, or CPOs) in respect of various local authority compulsory acquisition proposals[48] and An Bord Pleanála continued this role after the enactment of the Planning & Development (Strategic Infrastructure) Act 2006.

36. The legislative scheme for CPOs and related compensation ('the CPO code') is expressly incorporated into a suite of legislative schemes each of which requires decisions by An Bord Pleanála as part of its decision-making functions across a large range of matters.

37. The CPO code itself is extremely complex and traverses three centuries of legislation, including *inter alia* the Land Clauses Act 1845, the Housing Act 1966 and the Planning & Development Act 2000. A review of the CPO code is currently being examined by the Law Reform Commission. As is often the case, the difficulties or complexities in interpreting such legislation which confronts decision-makers such as officials, employees and members of An Bord Pleanála can be captured by a pithy and memorable judicial observation. Pending the welcome review being carried out by the Law Reform Commission and the related review of the planning code by the Office of the Attorney General, it is worth recalling the following observations of Chief Justice O'Higgins, which are as relevant today as they were 42 years ago, and which emphasise the legal complexities which officials have to confront:

> "…The various Local Government Acts, the Housing Acts and the Planning Acts form a code of interrelated statutes in the drafting of which clarity of language is remarkably absent. The seeker for the true meaning of particular statutory provisions is often sent from one statute to another and is frequently misled and confused by the use of different terms having the same meaning according to a particular adaptation used in one statute which may be absent in another. These statutes are drafted for an elite cognoscenti - those who in either central and local government are accustomed to the exercise of the powers prescribed and the language used. For others the ascertainment of what is laid down involves an arduous journey into the obscure…" [49]

[48] See generally the Third Schedule of the Housing Act 1966 (as amended); sections 14-16 of the Derelict Sites Act 1990; sections 8,9 and 10 of the Water Supplies Act 1942; section 8 of the Local Government (Sanitary Services) Act 1964; section 203 of the Public Health (Ireland) Act 1878; section 73 of the Planning & Development Act 2000; section 83 of the Planning & Development Act 2000;section 32 of the Gas Act 1976 and section 215A of the Planning & Development Act 2000 (as amended); section 17 of the Air Navigation and Transport (Amendment) Act 1998; section 16 of the Harbours Act 1996.

[49] *Portland Estates (Limerick) Ltd v Limerick Corporation* [1980] I.L.R.M. 77, page 80.

2006-2015

38. With the enactment of the Planning & Development (Strategic Infrastructure) Act 2006, An Bord Pleanála became the competent authority for applications seeking approval for development consents (prescribed as strategic infrastructure development) made directly to An Bord Pleanála.

39. These include the following: proposed development specified as Seventh Schedule Strategic Infrastructure Development (where An Bord Pleanála has determined that it falls within one of the categories in section 37A(2), i.e. strategic or national importance etc.);[50] proposed development by the State requiring an environmental impact assessment or appropriate assessment;[51] electricity transmission strategic infrastructure development;[52] strategic gas infrastructure development;[53] local authority strategic infrastructure development;[54] major road proposals;[55] procedures which are required to be followed when a national monument is discovered;[56] applications for a Railway Order;[57] alterations to approved strategic infrastructure developments;[58] the control of quarries and the substitute consent process;[59] and stage 1 (screening) and stage 2 Appropriate Assessment.[60]

2015-2022

40. The Planning & Development (Housing) & Residential Tenancies Act 2016 introduced new arrangements in relation to strategic housing developments (SHDs). The process originated as part of the Government's housing action plan Rebuilding Ireland. These arrangements, which were introduced for a limited time-period, were implemented to enable fast-track planning applications for housing developments of 100 or more units, or student accommodation / shared accommodation developments of 200 or more bed spaces. The process involved planning applications being made directly to An Bord Pleanála for determination, following intensive pre-application consultation with the relevant planning authority and An Bord Pleanála. Applications had to be decided within a mandatory 16-week time period, which also incorporated the public consultation phase. The implementation of this new process required a significant reorganisation within An Bord Pleanála to deliver the

[50] See the related and consequential provisions in section 37A-37J of the 2000 Act.
[51] See the related and consequential provisions in section 181A-181C of the 2000 Act and Article 123A and 254 of the Planning & Development Regulations 2001-2022.
[52] Section 182A of the 2000 Act.
[53] Section 182C of the 2000 Act.
[54] Section 175, 226 (proposed foreshore development) of the 2000 Act; Articles 117 and 120(3) of the Planning & Development Regulations 2001-2022.
[55] Sections 49-51A of the Roads Act1993 (as amended).
[56] Section 14B(3) and 14B(5) of the National Monuments Acts 1930-2004.
[57] Section 37 of the Transport (Railway Infrastructure) Act 2001 (as amended).
[58] Sections 146B, 146C and 146D of the 2000 Act.
[59] Sections 177B, 177C 177E, 261A, 37L and generally Part XA and XB of the 2000 Act.
[60] Part XAB and sections 177AE, 181A of the 2000 Act; Article 250 of the Planning & Development Regulations 2001-2022.

new function and achieve the mandatory period for decision. However the overall SHD process was undermined by the fact that many proposals approved by An Bord Pleanála were challenged through judicial review proceedings (see further discussion in part 5 under the heading 'Supports in relation to decision-making') with a significant proportion of those challenged ultimately being quashed.

41. The enactment of the Planning & Development (Large Scale Residential Developments) Act 2021 phases out planning applications for housing developments of more than 100 residential units previously made directly to An Bord Pleanála pursuant to the Planning & Development (Housing) and Residential Tenancies Act 2016 and Planning & Development (Strategic Housing Development) Regulations 2017[61] and returns the primary decision-making function to planning authorities, with a mechanism for appeal to An Bord Pleanála.

42. The Maritime Area Planning Act 2021, when it comes into force, also envisages a new function for An Bord Pleanála in the development of offshore energy and in the overall attempt to address the decarbonisation of the State's energy sources.

43. In summary, in the event of wind farm operator successfully applying to the Maritime Area Regulatory Authority for a Maritime Area Consent in a maritime area, if the proposed development is for more than five turbines or a total output of more than 5MW, a separate planning application must be made to An Bord Pleanála (in much the same way as strategic infrastructure development applications). For smaller developments, a planning application is submitted to the planning authority (in its capacity as the Coastal Planning Authority). In addition, applications for planning permission for all developments, including smaller developments, in the maritime area outside the "nearshore" (the area from the high water mark to three nautical miles from shore), or which straddle the functional area of more than one planning authority, will be made directly to An Bord Pleanála .

44. In the event that the validity of a Maritime Area Consent is challenged by way of an application for judicial review, An Bord Pleanála (or the planning authority) are still required to determine the planning application or the appeal and in the event that permission is granted, it will not come into effect unless and until the judicial review proceedings against the Maritime Area Consent is either dismissed or withdrawn.

45. As set out above, the functions of An Bord Pleanála are varied and numerous. These functions inevitably entail the making of a planning judgment and regularly entail a legal interpretation on complex legislative provisions.

[61] SHD applications.

Part 3: Organisation of An Bord Pleanála

Appointment of Board members

46. In accordance with section 104(1) of the 2000 Act, the board of An Bord Pleanála is intended to consist of a chairperson and nine ordinary members, with each usually being appointed for a term of five years. The chairperson is appointed by Government under section 105 of the 2000 Act, while a deputy chairperson must be appointed by the Minister from among the nine ordinary members (as per section 107 of the 2000 Act).

47. Based on current arrangements, under section 106 of the 2000 Act, while one member can be appointed directly by the Minister based on their experience, competence or qualifications as respects issues relating to the environment and sustainability, eight of the ordinary members are appointed on the basis of selection from nominations made by the following representative groups:

    - two from nominations made by organisations representing the planning, engineering and architecture professions;
    - two from nominations made by organisations representing the economic development, development, infrastructure and construction sectors;
    - two from nominations made by organisations representative of the interests of local government, agriculture or trade unions; and
    - two from nominations made by organisations representative of environmental interests, voluntary / charitable bodies, rural and local community development, Irish language promotion, the promotion of heritage, the arts and culture, people with disabilities or young people.

48. At the time of the PAC hearing in July 2022 there were two board member vacancies, the first position having been vacant since August 2021 and the second being the deputy chairperson position (following resignation earlier that month). Since then, two further vacancies have arisen with two board members' terms having expired during September 2022. Accordingly, of the intended nine ordinary members, there are now just five positions occupied. It is further noted that three of these five members will see their current term of appointment expire during 2023 (February, June and July).

49. Since the PAC hearing in July 2022, the Minister has confirmed the intention to change the current, panel-based, nomination process for appointing members of the board of An Bord Pleanála. This announcement included a declaration that no further appointments would be made based on the panel-based nomination process (in this regard it is noted that the

Minister's department had progressed the nominations process to fill the August 2021 vacancy when the process was terminated). It has been clarified that a new process is to be implemented which will see positions filled on the basis of open competition. In advance this new process being in place it is understood that one position can be filled under the abovementioned provisions that allow the Minister to directly appoint one board member on the basis of competence in relation to the environment / sustainability.

50. It is understood that the required legislative amendments for the new appointments process are being expedited, with a view to being in place before yearend. Nevertheless, implementing an open competition system for filling positions will require an appropriate period for advertising, the conduct of interview processes, allowing selected candidates to work notice-periods, etc. Accordingly, it is recognised that the filling of the existing board vacancies on a full-term basis will not be realised under a new appointments process until into the first quarter of 2023, or beyond.

51. Noting the above, the workload expected of An Bord Pleanála's board members must be acknowledged. In recent years An Bord Pleanála has disposed of approximately 2,800[62] cases each year, convening some 500 or more board meetings per year to deliver on this. This equates to over 11 planning cases being disposed of each standard working day (i.e. not factoring in annual leave, etc., for board members).

52. Regard must also be had to the other duties associated with board members' roles, including corporate, strategic organisational and management matters. Furthermore, it is also recognised that while desirable and necessary, ongoing training and development will place additional demands on board members' time. Finally, any realistic modelling of board members' time will need to factor in the expectation that a realistic number of working days may be lost to sick leave across the cohort in an average year.

53. In summary, delivering on approximately 2,800 cases annually in recent years represents a very significant level of decision-making output. Given that these outputs were achieved with a full complement of a board generally in place, it is clear that ongoing (and subsequently arising) board vacancies are going to have a significant impact on An Bord Pleanála's capacity to deliver planning decisions at anything like the pace at which cases will be received.

54. Furthermore, as elaborated upon below, it is clear that output in recent years was facilitated by the practice of decision-making frequently being carried out in board meeting composed of two-persons. On the assumption that this is a mechanism that will be no longer available

[62] This figure includes withdrawn and invalidated cases.

(based upon our positing of recommendation 3), there will be an inevitable knock-on consequence in relation to clearing workload. This is an important consideration given the rise in cases on hand, which had been generally in the region of 1,100 at year-end between 2017 and 2020[63] but rose to 1,637 by the end of 2021, and stood at 2,122 at the end of August 2022.[64]

55. Not only does this reduced capacity in terms of board member vacancies pose a risk in relation to delivering on a burgeoning workload, a diminished board would also impede An Bord Pleanála's ability to transition through this period of corporate instability and to successfully implement the required improvements suggested in this review.

56. Given the foregoing, the first recommendation arising from this review process is perhaps an obvious and practical one. Nonetheless it is fundamental to the achievement of the other recommendations made as part of this review. It is in our view essential that the Minister gives appropriate consideration, including legal advice, to the utilisation of powers, such as those available pursuant to sections 104 and 108 of the 2000 Act, to appoint a number of individuals as ordinary members of the board on a temporary basis. This is necessary so that An Bord Pleanála can sustain operational functions on an effective basis in the immediate term while transitioning to a new appointments model and also while rejuvenating its corporate configuration.

57. Given the four current vacancies, the workload on hand (including appeals, applications, referrals, etc.), the transitional issues and other operational realities facing An Bord Pleanála, it is suggested that the Minister would, taking account of the governing legal framework, utilise the powers available under the 2000 Act (in tandem with any other permanent appointments or extensions to existing members' terms that might be considered in the short-term) to ensure the board operates on the basis of having more than 10 board members available over the coming 12-month period.

58. The relevant provisions of sections 104 and 108 of the 2000 Act allow additional temporary board members to be appointed from among the offices of the Minister (established civil servants) or the employees of An Bord Pleanála. While it is a matter for the Minister and his department to determine from where such temporary appointments should emanate, it is suggested that a configuration consisting of a combination of officials from An Bord Pleanála and the Minister's department and offices under his aegis would achieve a desirable balance.

[63] As detailed in the Annual Reports of An Bord Pleanála, cases on-hand at year-end of previous years were as follows: 1,164 in 2020; 1,039 in 2019; 1,073 in 2018; and 1,189 in 2017.
[64] Figures provided by An Bord Pleanála as part of this review.

59. The legislation requires that such appointments shall not be for a term in excess of one year. Accordingly, making temporary appointments now as a priority will immediately ensure An Bord Pleanála's capacity at this crucial time and will allow the backlog of cases to be addressed. Furthermore, the appointment of temporary board members offers the reassurance of business continuity compared to a scenario whereby new board members would be appointed in 2023 to a depleted structure with an already formidable workload in front of them.

Future full-term appointments

60. Acknowledging the Minister's intention to remove the role of nominating bodies in the appointments system, and moving beyond the current transitional period to the new model for making board member appointments, it is vital that a more proactive system of forward-filling vacancies is put in place to ensure that, seamlessly, as board members vacate their positions, replacements are ready to take up duty. It is noted that, despite An Bord Pleanála issuing advance notification of impending vacancies, there have been instances in recent years where the appointment process has stalled with the effect that board member vacancies have persisted, affecting the board's ability to deliver on its functions.

61. While the precision of the legislative amendments in relation to the appointment process are matters for the Minister to progress through the Houses of the Oireachtas, it would be prudent that a panel of suitable candidates would be maintained on an ongoing basis from which the Minister could make full-term appointments at short notice. Furthermore, to strengthen the process, details of impending vacancies and timeframes for the appointment of individual replacements by the Minister should be formally incorporated into the annual Performance Delivery Agreements between An Bord Pleanála and its parent department.

62. In looking forward towards potential new arrangements for the appointing of board members, it is considered that the current circumstances present the opportunity to allow wider steps to be more proactively taken to ensure that the membership of the board is more reflective of the modern Ireland it serves. In this regard, in the consideration of all future recruitment processes and appointments, there should be an aspiration to achieve a greater level of gender balance and diversity on the board. Proactive steps should be taken in future appointments processes to make a statement of ambition to reflect the diversity of the citizens that An Bord Pleanála serves.

63. Finally, it is worth recognising that while it is likely that the Minister will be in a position to make a significant number of full-term board member appointments in the first half of 2023, there is merit in staggering these full-term appointments. As noted earlier, there will be five full-term board member vacancies by February 2023, and seven by July 2023. To have such

a significant proportion of the board's members appointed at the same time creates an obvious risk for business continuity. Furthermore, if a significant number of board members were appointed at the same time, for the same five-year term as each other, a further risk would be created for the organisation as vacancies would arise all together as board member's terms expire.

Composition of the Board

64. At last July's PAC meeting the Chairperson of An Bord Pleanála also stated that while the mandatory statutory quorum was three the usual attendance at board meetings was between three and four persons and when two quorums of three persons were available, two board meetings could run concurrently. From analysis of data provided by An Bord Pleanála as part of this review, over the years 2018-2021 approximately 26% of board meetings were composed of a two-person board; 70% of meetings were composed of a three-person board; and 4% of meetings were composed of a four or more-person board.

65. It is acknowledged that during the period of restrictions arising from the Covid-19 pandemic, An Bord Pleanála remained fully operational and maintained output across this difficult phase. It is understood that at various points during this period the board was divided into two separate cohorts, or pods, that did not have any face-to-face interactions in order to limit the potential risk of any Covid related disruption affecting An Bord Pleanála's entire decision-making capability. A natural consequence of this was a further reliance on smaller compositions of the board to determine cases and it is also clear that in this post-pandemic phase it is appropriate to transition from such models.

66. While it is clear that the workload of the board requires that board members separate into smaller compositions and hold meetings concurrently, it is also evident that, as observed by Mr. Cormac Devlin TD at the PAC, relying on minimum quorums as standard practice is not satisfactory. A full-complement board should be able to operate on the basis of two meeting groups – each with an expected composition of five persons, but with limited scope for convening in smaller quorums for decision-making on lower threshold casefiles.

67. The matters raised at the PAC meeting in July have been of assistance in conducting this review, including the scrutiny of the use of two-person configurations of the board for decision-making. Based on data gathered, it is evident that the utilisation of two-person compositions has been a much relied upon mechanism for clearing workload in recent years with approximately 30% of cases (as distinct from the 26% of board meetings noted above) being determined in this fashion in recent years (approximately 773 cases in 2021, 663 cases in 2020, 561 cases in 2019 and 631 cases in 2018).

68. With the figures above in mind, it is interesting to note the volume of instances escalated from a two-person composition of the board to a three-person or four (plus) composition. For example, in 2018 eight cases were escalated to a three-person and 10 to a four or more-person composition (a total of 18 cases). For 2019, 12 cases were escalated to a three-person and 22 to a four or more person-composition (a total of 34 cases). During 2020, 14 cases were escalated to a three-person and three cases to a four or more-person composition (a total of 17 cases). In 2021, nine cases were escalated to a three-person and four cases were escalated to a four or more-person composition of the board (a total of 17 cases).

69. In total, therefore, the number of cases escalated to a larger board between 2018 and end-2021 was 82 (43 of which were from a two-person to a three-person composition). This is from a total of 2,628 cases that were decided by two-person compositions of the board, therefore representing 3% of cases that were considered by just two people in the first instance.

70. The various resolutions (22 January 2015, 14 December 2016, 1 August 2018, 26 July 2019), made by the board of An Bord Pleanála under section 108(1A) of the 2000 Act, are noted. These resolutions *inter alia* provided for a category of cases where a quorum of two persons could decide a case. This report recommends the ending of the practice of relying on a two-person quorum. It is noted that, following assurances from the Chairperson of An Bord Pleanála, the Minister made previous announcements regarding the cessation of two-person quorums for board meetings and it is further understood that the board of An Bord Pleanála will fully formalise this imminently. To ensure the practice is removed with finality, it is further recommended that consideration be given by the Minister to the permanent removal, by legislative amendment, of the provisions allowing for such resolutions in subsections 108(1A) to 108(1D) of the 2000 Act.

71. In addition, it is recommended that in decisions involving *inter alia* – (i) (remaining) Strategic Housing Development, (ii) Strategic Infrastructure Development (in line with the existing provisions of section 112A of the 2000 Act), (iii) the Large Scale Residential Development process, and (iv) any appeals concerning the making of or amendments to Strategic Development Zones, should require a minimum quorum of five board members when being decided upon. Further consideration should also be given to appropriate decision-making quorums for categories involving Environmental Impact Assessment and Appropriate Assessment or whether escalation procedures are required for instances where the board is considering making a decision that departs from the recommendation of an inspector.

72. All of the above is, though, wholly dependent on a sufficiency of board members as set out in recommendation 1 of this report.

Further structural issues to be considered

73. Further to the findings of this report, it must be acknowledged that the work of An Bord Pleanála is expanding, with an ever increasing caseload over recent years. In this regard, the number of cases received by An Bord Pleanála increased from 2,570 in 2017 to 3,251 in 2021. It is further noted that the introduction of the marine planning framework and legislation will see additional functions assigned to An Bord Pleanála in respect of marine development, with the consequence of a further increased caseload into the future. It is also recognised that to deliver decision-making in line with the recommendations of this report, with larger compositions of the board sitting to determine cases, will reduce An Bord Pleanála's ability to clear large volumes of caseload quickly. As such, it will be important that ongoing consideration is given to the overall number of board members required to deliver on the volume of caseload to be decided upon as An Bord Pleanála's remit and caseload evolves in the coming years. Further consideration will be given to these issues, including analysis on caseload, in the subsequent phase of this review process.

74. In addition to the longer term considerations regarding the configuration of the board, a central question arises in relation to the overall organisational structure of the organisation itself. In his evidence to the PAC meeting in July, the Chairperson observed that An Bord Pleanála is "…*a unique organisation in that we have a full-time executive board and the board is appointed by the Minister, so they are not even employees of the organisation. I share both the chairperson and the chief executive role and the functions of that*…"

75. The role of the board is complicated further by the divergent purposes it must fulfil – in the first instance being the decision-makers in an organisation established to process a significant planning caseload, and on the other hand being the senior tier in the organisation's corporate hierarchy. The volume of caseload that board members must process is somewhat at odds with the strategic roles that they are intended to fulfil as An Bord Pleanála's corporate leaders, setting the organisation's strategic objectives and being accountable for its governance systems.

76. In this regard, it could be suggested the pressures resting on a limited number of individuals to process significant volumes of caseload would create an obvious risk for any organisation in relation to overall strategic and corporate coherence and cohesion. An Bord Pleanála's structure eschews the typical model whereby an organisation's operations and its governance are separate responsibilities, where there is a separation between the executive and a board and a distinction between the responsibilities of a chairperson and a chief executive. While there are various possible models, including the bifurcation between the executive / management function on the one hand and the planning function on the other

hand, that can deliver the integration of all necessary roles into a coherent structure, it is felt that this matter is worthy of further consideration in the second phase of this review process and further beyond that.

77. Given the foregoing, the following recommendations are made in relation to the organisational structure of An Bord Pleanála:

<u>Recommendation 1:</u> [Immediate] The Minister for Housing, Local Government & Heritage should initiate a process in relation to the powers available, under sections 104 and 108 of the 2000 Act, to appoint a number of ordinary members to the board of An Bord Pleanála on a temporary basis of up to 12 months each. Sufficient temporary appointments should be made to facilitate the board to operate on the basis of having more than 10 members available at all times over the next year.

<u>Recommendation 2</u>: [Short-term] While noting the fact that underpinning legislation will be necessary, a proactive system of forward-filling of vacancies should be put in place as a matter of urgency to ensure that, as board members vacate their positions, replacements are ready to take up duty immediately. This would effectively comprise a process of putting persons on a panel. Specific confirmation of impending vacancies and the appointment of replacements should be incorporated into the annual Performance Delivery Agreements between An Bord Pleanála and its parent department.

<u>Recommendation 3</u>: [Immediate] The practice of utilising two-person quorums of the board to make decisions must be ended and should be formally effected by a resolution of the board of An Bord Pleanála. Furthermore, to ensure the practice is removed with finality, the Minister should give consideration to the permanent removal of the relevant provisions of subsections 108(1A) to 108(1D) of the 2000 Act by way of legislative amendment.

<u>Recommendation 4:</u> [Short-term] It should be directed that, where the board of An Bord Pleanála is at full complement, a minimum quorum of five board members would be required to make decisions on the following categories of planning cases: (i) Strategic Housing Development; (ii) Strategic Infrastructure Development; (iii) Large Scale Residential Development; and, (iv) any appeals concerning the making of or amendments to Strategic Development Zones.

Part 4: Ethics / Conflicts of Interest

Preliminary observations

78. The overall governing framework for conflicts of interest, under the 2000 Act, the Ethics in Public Office Act 1995 and the Standards in Public Office Act 2001, the Code of Practice for the Governance of State bodies and common law requirements (such as the rule against objective bias) places primary responsibility on the individual for their own compliance with these requirements. Personal responsibility is at the apex of An Bord Pleanála's Code of Conduct. The requirement for taking personal responsibility in the context of issues around conflicts of interest and compliance with ethical frameworks must remain front and centre. The following analysis and consequent recommendations for ensuring a robust compliance verification process to address perceived weaknesses in the existing frameworks and practices around ethics and conflicts of interest do not in any way lessen the absolute and paramount requirement for all individuals associated with An Bord Pleanála to assume and maintain personal responsibility for ensuring compliance with the range of ethical and conflict of interest requirements and to avoid any perception of objective bias from ever arising.

79. While the various specific allegations of conflicts of interest which have been aired in the public domain are not examined as part of this review, it is fair to say that the concerns raised have shone a spotlight on the systems and procedures which comprise An Bord Pleanála's ethics/conflicts of interest regime in a negative manner. Accordingly, and while it is acknowledged that structures were in place to coordinate the conflicts of interest requirements of the 2000 Act and provide advice in relation to the Code of Conduct, it is paramount that a new, demonstrably incontrovertible, ethical framework is implemented without delay.

80. The declaration/identification of actual or perceived conflicts of interest by the board members of An Bord Pleanála is addressed in two contexts under the 2000 Act:

    (a) the annual declaration of interests which are submitted by board members (section 147 of the 2000 Act); and

    (b) disclosures on a case-by-case basis where a matter is before the board for decision (section 148 of the 2000 Act).

81. It is significant that the 2000 Act provides that non-compliance with certain requirements of these provisions can, if proven, constitute an offence – this underlines the importance that the statutory and regulatory planning code attaches to conflicts of interest matters in maintaining confidence in the planning system.

82. While the specific matters that must be complied with in declarations and disclosures are set out in the above-mentioned provisions, it is important to note that sections 147 and 148 of the 2000 Act do not offer an exhaustive list of matters instancing conflicts of interest, rather they identify the types of conflicts for which it would be an offence not to comply with. Accordingly there are many further circumstances and scenarios, including relationships beyond those specifically referenced in the 2000 Act which must be considered by designated staff and board members, in particular, for their potential to be actual, or perceived, conflicts of interest.

Current position

83. An Bord Pleanála's Code of Conduct, dated June 2011, outlines the procedures currently in place in relation to sections 147 and 148 of the 2000 Act. It is noted that there is an existing commitment to update An Bord Pleanála's Code of Conduct before the end of the year. While the existing Code of Conduct makes general reference to the provisions for making annual declarations as set out in the 2000 Act, no detailed procedure is included to guide board members, and other prescribed staff, in the identification of interests they may hold. Further, no details are provided regarding appropriate or trained individuals within An Bord Pleanála to provide advice, should any clarification or assistance be required in preparing a declaration. Beyond the filing of these annual declarations, there does not appear to be an existing procedure for the review of the interests identified or their monitoring in relation to An Bord Pleanála's quasi-judicial decision-making function.

84. The disclosures that must be made (by board members, prescribed staff and fee-per-case inspectors, consultants or advisors hired by An Bord Pleanála) are also addressed in the Code of Conduct. It states: "*When a member is presenting a file at a board meeting, every other member present should disclose any possible conflict of interest*" and where the Chairperson of the meeting determines that a conflict has arisen "*the member in question shall not thereafter participate in or attend any meeting at which the case is discussed or determined*". It also clarifies "*Where a question arises as to whether or not there is a conflict of interest, (other than the situation as referred to at 13.3) the Chairperson of the board or in his absence the Deputy Chairperson shall determine the matter*".

85. The procedure as currently set out in relation to individual planning cases does not include a formal process whereby board members are notified of key details in advance of meetings to allow them make an assessment with regard to identifying any possible conflicts of interest (such as the names and addresses of the appellants or applicants or other parties involved with the case). Consequently, the proper identification of potential conflicts is reliant upon the

detailed reporting of these facts by the board member presenting the case, as well as the focussed attention of the board members in attendance.

86. Furthermore, while the Code of Conduct establishes that a board member must not deal with a case concerning their own "immediate neighbourhood", no definition is offered regarding the limits that might apply where a case has some proximity to a location at which a board member has some interest. This creates a basis for an inconsistent approach among board members in the identification of geographical areas that pose a potential conflict of interest to them. In some instances a board member may only consider a particular street as being their immediate neighbourhood, while in contrast another board member can view an entire county in which they resided as off-limits for decision-making.

87. It is also noted that under part 15.2 of the Code of Conduct it states that a board member: "*shall not deal with any case in any capacity on behalf of the board where she/he previously had any involvement at any time in the matter, either on a personal basis or on behalf of a previous employer or as a member of any other organisation or voluntary body*". This is an appropriate level of rigour that should be evaluated on an ongoing basis by board members in relation to cases that are before them.

Establishment of a Governance, Ethics & Compliance Unit

88. It is imperative that An Bord Pleanála adopts strengthened structures and mechanisms to ensure robust governance, oversight and compliance in relation to conflicts of interest, not only in the context of sections 147 and 148 of the 2000 Act, but also with regard to the Ethics in Public Office Act 1995 and Standards in Public Office Act 2001, the Code of Practice for the Governance of State Bodies and other contractual and legal obligations.

89. To succeed in delivering a much-strengthened corporate governance and oversight regime, it is recommended that An Bord Pleanála establish a new Governance, Ethics & Compliance Unit, which will be charged with developing and overseeing An Bord Pleanála's ethical framework. In addition, this unit will interface closely and regularly with the existing internal audit function and other corporate governance procedures as considered appropriate by the Chairperson. The unit should report on its work to An Bord Pleanála's Audit and Risk Committee on a regular basis.

90. It is also recommended that an appropriately experienced senior individual is appointed as An Bord Pleanála's Ethics Officer, who would report directly to the Director of Corporate Affairs and the Chairperson. The Ethics Officer will lead the new Governance, Ethics & Compliance Unit and will take responsibility for pursuing the achievement of excellence in corporate governance standards across the organisation.

91. The Governance, Ethics & Compliance Unit will subsume certain tasks that are currently the responsibility of the Board Secretary such as overseeing the submission of annual declarations by board members and staff. The Unit's role will include the review of these declarations, insofar as possible through the examination of details and discussions with individuals to assist in the identification and recording of any actual or perceived conflicts of interest that may exist. Annual declarations should also be monitored on an ongoing basis with key details cross-referenced from year to year and in relation to decision-making processes. The Unit would also have a role in relation to statements of interest and statement of a material interest prepared by designated individuals under section 17 and 18 of the Ethics in Public Office Act 1995 – in line with the Commission's document 'Supporting Ethics Compliance: Top Ten Best Practices for Public Bodies'.[65]

92. The Ethics Officer will drive the development and implementation of a new Code of Conduct for An Bord Pleanála which should be sufficiently detailed, and rigorously applied, to be a model of corporate governance (commensurate with An Bord Pleanála's quasi-judicial role) and in turn build public confidence. The updated code should include, as an appendix or otherwise, practical guidance and clarity around what types of potential conflicts of interest staff must declare as well as formalised definitions for the thresholds and standards that apply, and should also set out the procedures for raising any conflicts of interest matters. Some guiding principles that should inform the development of a new Code of Conduct are set out below.

93. There is scope for utilising technology to usefully assist in the identification and monitoring of actual or perceived conflicts of interest at board member and inspectorate level in the allocation of casefiles. Subsequent to the establishment of clear standards and thresholds through the new Code of Conduct (including formalised guidance), An Bord Pleanála should explore the possibility of programming details of such interests, including personal, geographical, occupational, etc., into its case management system which would assist in alerting actual or perceived interests for consideration and review at the case allocation stage. It would be necessary for this function to be directly supported by regular review of actual or perceived interests including mandatory updates by relevant staff at regular (e.g. quarterly) intervals, overseen by the Ethics Officer.

94. The Governance, Ethics & Compliance Unit would also ensure that appropriate training is provided to all staff. Training in relation to ethics matters should be mandatory as part of induction of all new staff to ensure obligations in relation to conflicts of interest are understood. Refresher training, including focussed modules for key individuals (e.g. in

[65] https://www.sipo.ie/acts-and-codes/guidelines/public-servants/Supporting-Ethics-Compliance-Top-Ten-Best-Practices-for-Public-Bodies.pdf

unconscious bias for decision-makers) should be offered to staff on an ongoing basis with an expectation that such training would be availed of at appropriately regular intervals. The unit would also offer an ongoing resource, available to all staff, to clarify or report conflicts of interest matters.

95. In delivering the above actions, guidance prepared by the Standards in Public Office Commission should be followed by An Bord Pleanála, including the abovementioned Top Ten Best Practices for Public Bodies but also other statutory guidelines for public servants which are available through the Commission's website[66]. It is worth noting that the Commission has a statutory function to provide advice on request to persons who have obligations under the Ethics legislation. Additionally, An Bord Pleanála should peer review its proposed standards and thresholds in this regard across analogous public bodies operating in Ireland and in other jurisdictions.

Guiding Principles for a Renewed Code of Conduct

96. As already noted, An Bord Pleanála is committed to updating its Code of Conduct. In addition to the structural and procedural reorganisations referenced above, this is an opportunity to embed refined practices to bring about strengthened corporate governance and oversight arrangements. Given the importance of the duties carried out by the board members and staff of An Bord Pleanála, it is crucial that appropriately detailed guidelines are in place to assist them in adequately identifying matters that represent, or could be seen to represent, conflicts of interest. Accordingly it is recommended that An Bord Pleanála develop a renewed Code of Conduct as a matter of priority and that the renewed Code of Conduct would incorporate sufficient unambiguous guidance to allow all individuals working within or for An Bord Pleanála to consider all matters that could influence their impartiality, or the perception of their independence, in respect of the duties they perform on behalf of the wider public.

97. Given recent matters of public concern, in relation to individual staff and board members, it is important that the Code of Conduct sets appropriately clear standards for all those it applies to. This is necessary so that public trust and confidence in An Bord Pleanála can first be restored and then upheld. Private or personal interests must not be allowed to interface with the decision-making process at any level and the Code of Conduct must be unambiguous in establishing that disclosure of interests is invariably appropriate. In this regard it is not only important to ensure that any impropriety is avoided but also that any possible perception that that personal interests could influence a planning case must be ruled out. The test to be applied should not just be what the individual staff or board member might consider an interest - but rather whether a member of the public might reasonably think that the interest

[66] https://www.sipo.ie/acts-and-codes/guidelines/public-servants/index.xml

concerned could be an influence on the individual in the performance of their functions, and if so then disclosure should follow. Ongoing public perception with regard to how it is intended to deal with these matters is essential for rebuilding public trust in An Bord Pleanála.

98. Recommended guiding principles are set out below to assist in the development of this renewed Code of Conduct:

(1) General considerations in relation to conflicts of interest

a) The Code of Conduct should set out all the wider ethics and '*Code of Practice for the Governance of State Bodies*' requirements which would apply to staff and board members of An Bord Pleanála.

b) The Code of Conduct should be clear in highlighting the importance of identifying and managing potential conflicts of interest by staff and board members in the processing of casefiles.

c) It should also clarify from whom guidance can be sought (e.g. Ethics Officer or appropriate members of senior management) and what steps should be taken where any matter of concern or consideration arises for any staff or board members in relation to their own interests, or with regard to others.

d) The Code of Conduct should underline the importance of independence and impartiality of staff and board members in delivering their work, having regard to any potential bias or prejudice that could, or be perceived to, affect the outcome of a matter before An Bord Pleanála.

(2) Personal and private interests

The Code of Conduct should make it clear that in conducting the business of An Bord Pleanála, all staff and board members should be untainted by any influence that could be seen as a source of potential bias or prejudice that could affect the outcome of a case. In this regard, the Code of Conduct should provide definitions and clarity regarding the requirements and considerations of the following:

a) Personal interests, including the membership of clubs or involvement with specific interest groups that might be seen as influencing an opinion in relation to any particular development or type of development.

b) Close relationships, outlining that staff and board members advise the Ethics Officer where a close relationship exists with any individual that has a central involvement in a case (including applicants, key professionals associated with cases, appellants, third parties, decision-makers, etc.).

c) Private investments or shareholdings held by staff and board members, or those close to them, in businesses / companies / enterprises that play a role in the property development sector.

d) The manner in which staff and board members interact with property industry officials, applicants, appellants, etc. in the discharge of their work.

(3) Geographical-related interests

a) The Code of Conduct should make it clear that staff and board members should not input into the progression of any casefile for a proposed development that is in a general proximity to any place with which they have a personal connection.

b) While this will include property interests that are required to be declared on an annual basis under section 147 of the 2000 Act, e.g. holiday home, leased property, commercial holdings, investment property, land holding, etc., it also incorporates other places with which staff and board members have a personal connection, such as the immediate neighbourhood of their home or their place of upbringing. The Code of Conduct should identify a clear and defined geographical sphere to define what 'general proximity / immediate neighbourhood' implies in varying contexts, for example a variable km radius could be applied appropriately in either an urban or rural context.

c) Where properly declared, a system could be put in place to ensure that, in the first instance, staff and board members are not asked to be involved with casefiles in relation to proposals that are generally proximate to certain identified locations (whether detailed in annual declarations or confirmed by the individuals). Such a system could be effectively implemented through the upgrade of existing case management system software.

d) Inevitably, staff and board members will be presented with casefiles related to places with which they have some level of personal connection and it is important that the Code of Conduct makes it clear that, regardless of any system in place, it is incumbent on the individual to disclose such interests in accordance with section 148 of the 2000 Act.

(4) Occupational Interests

a) The Code of Conduct should clearly set out the parameters within which an occupational conflict of interest may arise, e.g. where staff or board members have previously worked in certain planning authorities, consultancies (planning or otherwise) or other organisations that are involved in a particular matter before An Bord Pleanála, and casefile allocations should be managed having regard to any potential conflicts identified within these parameters.

b) The Code of Conduct should clearly define the parameters in which staff and board members must generally declare their previous employment in such organisations, including requirements for declaring the employment dependent on the amount of time that has elapsed since being employed by such organisations.

(5) Engagement with the Planning Process

a) The Code of Conduct should include a clear policy for staff and board members regarding their interaction with the planning process, including their rights to express their views on development proposals / plans that may affect them whilst also meeting their duties in terms of professional integrity and any potential perception that their professional judgement or integrity could be compromised.

b) This should include an outline of obligations of staff or board members where they may wish to make observations on a planning application or draft development plan, and a process for notifying the Ethics Officer so that the matter can be noted appropriately.

c) An appropriate policy should be put in place to guide staff and board members as to the making of submissions by family members or close friends, including alerting the Ethics Officer.

Formalisation of disclosures of conflicts of interest in decision-making

99. Having regard to the statutory requirements of section 148 of the 2000 Act (which requires not only the disclosure of interests by board members but also, in instances where a conflict arises, that they take no part in discussion, consideration or voting on the matter and in no way seek to influence the decision) and noting the risk, identified above, posed by the fact that board members may not have the opportunity to assess key details associated with individual cases in advance of board meetings, it is essential that An Bord Pleanála maintains

an appropriately robust system whereby board members are informed in advance of the key details of the cases that they will be asked to decide upon.

100. It is noted that a new process was put in place during July of this year whereby board members are provided with a summary sheet that provides key details in relation to the cases to be presented to them, including address, names of applicant/appellant, observers, etc. Prior to the introduction of this process there were significant risks associated with the fact that a conflict might not be identified if all the possibly relevant details were not being made clear during the verbal presentation of a case by another board member (given that it was in this context that most board members may have had their first opportunity to assess whether a conflict might exist).

101. The legal implications that could arise, in relation to decisions made without conflicts being appropriately identified or addressed, could be significant and accordingly it is imperative that formal procedure safeguards against decisions being made in this context. While a simple process to begin addressing this weakness has recently been put in place, over the coming period this should be developed further into a formally adopted written procedure, designed to ensure that all potential conflicts of interest, as per the renewed Code of Conduct, are clearly identified for the attention of board members prior to board meetings. This formally adopted procedure should form an element of the overall methodical decision-making procedure, as set out in the subsequent section of this report (recommendation 7). The implementation and maintenance of such a procedure will play an important role in identifying and removing, both the possibility and perception of, any conflicts of interest in An Bord Pleanála's quasi-judicial decision-making processes.

102. It is also notable that this newly implemented process incorporates a means of recording matters raised by board members when disclosures are be made. As An Bord Pleanála's ethical framework is further developed it would be appropriate that these details would be provided to the Ethics Officer for monitoring purposes (including gaining insights that might assist operational capability with regard to scenarios in which potential conflicts of interest are arising, etc.).

103. The incorporation of greater checks and controls in the decision-making process, as elaborated upon in the subsequent section of this report, will ensure greater rigour as planning cases are being assigned to both inspectors and board members. This will allow relevant staff to be aware of all the particulars of such cases they are being assigned and will provide that processes are in place so that any potential conflicts are identified and avoided (by reallocation as necessary) and that appropriate records are kept.

<u>Recommendation 5</u>:

(a) **[Medium-term] An Bord Pleanála should establish a new Governance, Ethics & Compliance Unit, to develop and oversee its ethical framework. An appropriately experienced senior individual, who would report directly to the Director of Corporate Affairs and the Chairperson, should be appointed as Ethics Officer to lead the new Unit.**

(b) **[Short-term] In reviewing and updating its current Code of Conduct, An Bord Pleanála should provide sufficient unambiguous guidance (based on guiding principles identified in this report) to allow all individuals consider any matters that could influence their impartiality, or the perception of their independence, in respect of the duties they perform.**

<u>Recommendation 6</u>: [Short-term] Noting that a process has recently been put in place, An Bord Pleanála should continue to develop its procedures for ensuring that board members are informed in advance of the key details of cases and are thereby aware of all potential conflicts of interest in advance of decision-making. This more-rigorous procedure should be formalised into an adopted written procedure.

Part 5: Decision-making of An Bord Pleanála

A. The Decision-making Process

Introduction

104. It may seem trite and obvious to observe that it is the board of An Bord Pleanála that makes decisions and determinations. In Part 2 of this report, for example, we identified the myriad of functions which the board of An Bord Pleanála is required to deliver upon. The following analysis and consequent recommendations have a sole objective: to seek to improve both *the decision-making process* exercised, and *variety of decisions* made, by the board of An Bord Pleanála.

105. The decision-making functions of public bodies, as with many public services, universally face the challenges of reconciling (a) the desire by all that decisions are of high quality (b) that they are made relatively speedily and (c) that they do not involve excessive or unreasonable costs. This underlines the importance of having a clear decision-making path or template to follow.

106. Good decision-making in a planning context involves:

    a. applying a clear, principles-based written decision-making procedure;
    b. the provision of supports in relation to that decision-making; and
    c. planning-led judgment based on a clear hierarchy of policy.

107. A continuous theme in the analysis of good decision-making where An Bord Pleanála is concerned is the combination of (a) applying a correct legal approach to interpretation, and (b) the application of planning-led judgment.

Assignment of casefiles to board members

108. The July meeting of the PAC addressed difficulties associated with the process of assigning or allocating casefiles to board members and the general practice involving the presentation of cases by individual board members at the decision-making meeting of the board.

109. We understand that the practice heretofore of allocating or distributing files to board members was effected pursuant to section 110 of the 2000 Act, where the Chairperson directed that executive staff (primarily the corporate drafting section) randomly allocate casefiles to

members of the board, having regard to, *inter alia*, a general assessment of availability and capacity. Other than the Chairperson, we understand that no board member could request that a particular file be allocated to themselves.

110. This intended random allocation of files was to have regard to a completed list (used as a general guide) where board members expressed a request not to have files from certain areas or involving certain organisations/companies allocated to them. This mechanism sought to avoid the allocation of files which could cause a conflict of interest or a perception of real or objective bias (as set out in the relevant provision of the Code of Conduct). It was the responsibility of each board member to ensure compliance with this process, and the list was intended primarily for the guidance of executive staff involved in file allocation. Any board member who was inadvertently allocated a file which fell within the list was required to return it for reallocation. The operation of the random allocation principle was subject to altered arrangements in respect of Strategic Infrastructure Development (SID) and Strategic Housing Development (SHD) cases.

111. In respect of SID cases, these files were generally allocated to a member of the SID Division by the Chairperson of the board. In respect of SHD cases, these files were allocated to the Chairperson of the SHD Division or, in the absence of that person, as directed by the Chairperson of the board. There appears to have been a separate protocol covering allocation of these files.

112. As stated, the list was a general guide to file allocation and was to be reviewed and agreed with the Chairperson on a scheduled basis (at least annually in conjunction with the annual declarations process under section 147 of the 2000 Act). The list could be amended at any time by the Chairperson, following agreement with a board member in respect of his / her entries on the list. The above process was stated to be in addition to other processes and procedures in respect of identifying and managing potential conflicts of interest which were addressed under sections 147 and 148 of the 2000 Act and An Bord Pleanála's Code of Conduct.

113. Building on earlier recommendations, we are of the view that achieving a robust decision-making process requires the adoption and implementation of the following:

    a. the adoption of a clear, principles-based written decision-making procedure; and
    b. ending the existing practice of allocating casefiles to board members for presentation to board meetings and instead assigning responsibility for presenting casefiles to planning inspectors or other appropriately informed persons.

Written decision-making procedure

114. In relation to the first matter, An Bord Pleanála must develop and adopt as a matter of urgency a new step-by-step written decision-making procedure, which would be subject to the oversight of the OPR and made public on An Bord Pleanála's website. It must be acknowledged that 2,800 cases a year could not be dealt with in the absence of successful operating procedures, and it is also noted that certain elements of the overall process are already adequately documented. However the overall point is that, in a quasi-judicial decision-making context, it is important that all stages of the process are clearly documented and set out together to bring clarity, for staff and board members as well as the general public, with regard to how files are processed and how decisions are made.

115. While the existing dynamics of An Bord Pleanála's decision-making procedure will be explored further in the second phase of this review process, a number of recommended guiding principles are articulated below which should inform the adoption of a clear written decision-making procedure.

A. Initial Checking of Planning Cases

The procedure would outline the principal steps taken and checks applied to ensure that new planning cases have been subject to the necessary scrutiny and preparation to enable proceeding to the technical inspector-led assessment phase including:

I. Ensuring that all the necessary documentation has been received;

II. That all relevant parties to the matter have been circulated and have had the opportunity to comment; and

III. Any relevant background material has been assembled.

B. Assessment by inspector

The procedure would cover systems of allocation of casefiles to the relevant inspector including avoidance of any conflicts of interest; conduct of site inspections; assessment of any requests for oral hearings, including decisions on such requests by the board; and the overall approach to preparing written reports for consideration at board level. This would include:

I. Arrangements to ensure inspectors have access to such further technical input as may be required to assess a particular case in presenting a report, including a recommendation to the board;

II. The use of standard report templates, model planning conditions and reasons for refusal of permission in the preparation of reports in line with professional standards; and

III. Arrangements for inspectors to seek or receive appropriate professional planning guidance in the conduct and management of their work, while at the same time recognising and respecting the exercise of their professional judgement, so as to ensure high quality report preparation and, to the greatest extent possible, a consistent level of assessment for consideration at board level.

C. Allocation of casefiles by the Chairperson

The procedure would outline how, in consultation with the Deputy Chairperson, the Chairperson would arrange and distribute the work of the board, once casefiles have been appropriately processed and professionally assessed by the inspectorate, including the following.

I. The responsibilities of the Chairperson and Deputy Chairperson to arrange meeting schedules for board meetings, including lists of casefiles to be considered at each meeting (subject to the completion and submission of a report by the inspector in respect of casefiles) sufficient to discharge the caseload on hand in line with statutory obligations.

II. The composition, by the Chairperson and Deputy Chairperson, of meetings of the board, ensuring that cases at a certain threshold are dealt with by quorums of not less than five board members while other less complex cases may be decided by quorums of not less than three members.

III. The responsibility of the Chairperson and Deputy Chairperson to arrange varying compositions of board members to meet and discharge caseload with a view to ensuring an appropriate balance in decision-making. Arranging for interchangeability in the composition of board members will support informed, independent thinking, impartial decision-making and avoidance of group-think.

IV. The responsibility of the Chairperson and Deputy Chairperson in nominating any board member as the delegated chair for decision-making meetings at which neither of them are attending.

V. The obligations of all board members in their decision-making roles, particularly in relation to declarations of interest below.

VI. The adoption generally, as a matter of best practice, procedures for constituting board meetings with an odd number of members.

VII. Provisions in respect of a meeting with an even number of members and where the vote is tied allowing for the nominated chairperson to have a casting vote

VIII. Obligations on members not to abstain from voting in respect of the making of a final, determinative decision.

D. Duties of disclosure

The procedure would ensure that:

I. Board members have appropriately familiarised themselves with the key particulars of cases scheduled for decision at board meetings prior to such meetings in relation to (a) the location of the case, (b) the nature of the development and (c) the identity of the parties to the case, such that any conflict of interest or perception of same arising in the dealing with of the case by that member is identified and avoided.

II. The Ethics Officer (or the Chairperson and/or Deputy Chairperson where necessary) is alerted of any conflicts of interest a board member may have, and that these are dealt with and recorded appropriately.

III. Any board member replaced would not communicate with other members of the board on matters relevant to their consideration.

E. Decision-making

The procedure would address the following:

I. The role of the chairperson of any meeting in the conduct of the board meeting, ordinary members and the secretary to the board in recording the meeting and assisting the deliberations of the board by sourcing any further legal or administrative supports.

II. The role of the chairperson of any meeting of the board to examine and familiarise themselves with all of the documentation of the relevant case and the role of the other sitting board members to also be familiar with case particulars and the inspector's assessment before the meeting is held.

III. The role of the chairperson of any meeting of the board at the conclusion of its consideration of a case in summarising the principal considerations that the board should apply, prior to calling a vote.

IV. Where the board decides to depart from the recommendation of an inspector's report, including to grant / refuse permission or with regard to conditions or approval, procedures and templates for recording the full reasons of fact and policy for so concluding (under reference to the relevant section(s) of the inspector's report) in relation to such decisions in a Statement of Reasons.

V. Consideration of the Statement of Reasons referred to above at a meeting of the board after its consideration of the relevant case, including steps to be taken in the case of disagreement between members of the board in the composition of

the Statement, including consultation with the Chairperson and or Deputy Chairperson as appropriate.

VI. Provision for the Deputy Chairperson to prepare a weekly case discharge report so that the work of the board is monitored in relation to progress in achieving An Bord Pleanála's statutory objectives and in particular in relation to deferred cases (section 126(3) of the 2000 Act); discharge of priority cases pursuant to any Directions of the Minister in relation to prioritisation of discharge of case categories pursuant to section 126(5) of the 2000 Act; and numbers of board decisions determining cases either fully or partially, other than as the allocated inspector had recommended, by all relevant meetings of the board or division of the board.

F. Presentation at Board Meetings

The procedure should outline the approach for the presentation of the factual background of casefiles at board meetings, whether by the inspector that prepared the report or another delegated individual, including the following:

I. Provision, where an inspector considers necessary, for seeking a ruling from a board constituted for the purposes of considering and making that ruling on any preliminary matter which arises, prior to the preparation of a report and recommendation.

II. Templates to be used for case presentation.

III. That there would be no engagement between board members and the inspector(s) (including any technical advisers) in relation to casefiles outside of the designated board meeting arrangements.

IV. Minutes would be kept as part of the casefile documentation.

V. Provision for members of the board to seek further information during or after the presentation of an inspector's report, which details would be set out in a formal Board Direction indicating the information sought and the reasons for doing so and published on An Bord Pleanála's website under the casefile. In such cases, the procedure should provide that the inspector may, if considered necessary, seek responses from parties or other relevant persons in order to respond to the board's request.

G. Keeping of Records

The procedure would address the recording of the minutes of board meetings, including reasoned decisions (formerly known as directions) and their retention and quality-checking by the appropriate secretarial and compliance staff as part of wider strengthening of corporate and ethical provisions.

Replacing the existing practice of board members presenting casefiles

116. In relation to the second matter, this written decision-making procedure places a new emphasis on the role of inspectors. It is somewhat surprising, given the importance of the role they play, that duties of An Bord Pleanála's planning inspectors are not set out in any detail in the 2000 Act which, for example, refers to "a person being assigned" to make a written report on the matter to the board "which shall include a recommendation" and the board is required to consider the report and recommendation before determining the matter.[67]

117. The role that An Bord Pleanála's inspectors play is significant in the decision-making of the board and this is recognised in the recommendations of this report. Inspectors prepare detailed reports, including recommendations, designed to inform the decision-making of the board. These reports are based on the inspectors' consideration of the full details of the casefile, which may include visiting the relevant site, in tandem with comprehensive consideration of the objectives of the relevant development plan and a range of national policy considerations.

118. The board is, of course, the decision-maker and may come to different conclusions from an inspector within the remit of the decision-making process including in relation to matters of detail concerning, for example, conditions to be imposed or modifications (which are not material) in the event of the board deciding to grant a planning permission. On the binary question of a grant or refusal of an application, in the event that the board's decision departs from the recommendation in an inspector's report to grant or to refuse permission or approval, a statement in the board's decision is required to indicate the main reasons for not accepting the inspector's recommendation.[68]

119. As set out above, while the 2000 Act provides that board members may depart from the recommendations of an inspector's report on this fundamental question of whether to grant or refuse, given the fact of the comprehensive analysis conducted by inspectors, including having undertaken any oral hearing that may have been held, in framing recommendations and their knowledge of local factors, such departures (whether partial or otherwise), should be clearly reasoned and articulated. We note that Recommendation 61 of the 2016 Review recommended that the board "…*must make clear in its direction, by reference to paragraph numbers, those parts of the inspector's report with which it agrees and those parts where it*

[67] Sections 146(1) and 146(2) of the 2000 Act.
[68] Section 34 (10) and section 37 of the 2000 Act. While s.34(10) does not apply to all planning decisions (e.g. it did not apply to SHD decisions), the Courts have taken the view that an analogous obligation applies to such decisions: *Crekav Trading GP Ltd v An Bord Pleanála* [2020] IEHC 400, paragraph 156.

disagrees. Where the board disagrees, it should give its reasons for so doing supported, if necessary, by relevant evidence. The reasons should not be formulaic…"[69]

120. In addition to the adoption of a written decision-making procedure informed by the guiding principles which we have set out earlier, the other focus of this part of the review recommends the cessation of the general practice of a board member presenting a casefile at a board meeting. In our view this practice should be replaced by a process whereby the inspector that was allocated the casefile (or an appropriately delegated person) would present the relevant casefile details from the inspector's report, including recommendations, to the board meeting and that the board would then make its decision in plenary session, after the relevant inspector or delegated person had left the meeting.

121. Further in this regard, we consider that relying on individual board members <u>to present</u> casefiles at board meetings somewhat facilitated the development of certain practices that have been the focus of recent public concern, including issues associated with two-person quorums for board meetings, patterns of file allocation, unnoticed and disproportionate trends regarding departures from inspectors' recommendations for certain development types, the allegation that board members have sought changes to the recommendations of inspectors' reports as well as conflicts of interest not being adequately identified.

122. As above, to address this central issue, this report recommends that the existing practice of board members presenting casefiles at board meetings should be replaced by one where presentation of the factual background details of casefiles would be made by planning inspectors or other appropriately informed persons, which could include other suitable staff members or appointed technical advisers. Providing for appropriately delegated persons to make presentations on casefiles directly in plenary session to the board members would also facilitate an opportunity for the presenter to respond to questions and/or clarify any points of detail that may be unclear to any board member present.

123. While this approach would not alter the joint decision-making responsibility of the board it does reduce certain risks inherent in relying on individual board members to steer board meetings to a decision on a casefile. Each board member would still have access to the full casefile with the expectation that they inform themselves appropriately with its contents as

[69] Generally, we also note the provisions of section 29 of the Freedom of Information Act 2014 which provides that a head may refuse to grant an FOI request (a) if the record concerned contains matter relating to *<u>the deliberative processes</u>* of an FOI body (including opinions, advice, recommendations, and the results of consultations, considered by the body, the head of the body, or a member of the body or of the staff of the body for the purpose of those processes), and (b) the granting of the request would, in the opinion of the head, be contrary to the public interest, and, without prejudice to the generality of *paragraph (b)*, the head shall, in determining whether to grant or refuse to grant the request, consider whether the grant thereof would be contrary to the public interest by reason of the fact that the requester concerned would thereby become aware of a significant decision that the body proposes to make. (Emphasis and underlining added). See also article 8(iv) of the European Communities (Access to Information on the Environment) Regulations 2007-2014.

well as the inspector's report. Relying on board members to make presentations reduces their overall capacity by making them responsible for preparing technical presentations on casefiles; board members should be allowed to put greater focus on decision-making, including familiarising themselves with case to be decided upon. The new arrangements for presentation would still leave the nominated chairperson of any board meeting with responsibility for familiarising themselves with the relevant details of the casefile and each ordinary member too would have to familiarise themselves with relevant details, particularly the inspector's planning assessment report.

124. The recommended approach – involving the presentation of all of the casefile details to the board by an assigned inspector (or appropriately delegated person) – is already an established mechanism for decision-making within another agency charged with important statutory decision-making functions in the field of environmental protection and land-use, the Environmental Protection Agency (EPA). In a variety of decision-making contexts within the EPA's statutory functions, including decisions on applications for new environmental and emissions licences, significant amendments to existing EPA licences, decisions on requests for oral hearings and objections to 'proposed determinations' (in effect, recommended decisions), the Directors of the Board of the EPA (i.e. EPA Board 'members') meet to determine licence applications and other important decisions based on presentations and reports made to it by an assigned inspector and, in certain cases, by specialist technical staff. Under the EPA's decision-making mechanism, what is presented (by way of presentation and report) to the EPA Board for its consideration and determination represents the EPA Inspector's in-depth analysis of what has been applied for, with that analysis drawing on all of the application documents submitted, the supporting environmental assessments, public submissions, statutory consultee observations and the Inspector's site visits.

125. In the first instance, this approach has the advantage of representing a more direct interaction and communication between (i) An Bord Pleanála's experienced inspectorate (which conducts the in-depth evaluations and analysis of each development proposal) and (ii) the ultimate decision-maker (the board itself). These presentations will bring the inspectorate into a more immediate engagement and dialogue with board members which will facilitate the development of more effective working relationships within the organisation. Furthermore, this approach represents a clearer segregation of duties and responsibilities, one whereby the inspector is clearly responsible for making recommendations, and standing over them, and the board members are the decision-makers. Finally, this approach will require each board member to give equal consideration to the casefile details ultimately ensuring that each board decision is the outcome of a balanced level of involvement across the various board members.

126. It is recognised that in implementing this recommendation, consideration must be given to the logistics associated with presenting on over 2,000 casefiles each year, with reports emanating from over 60 individual inspectors. It will not always be practical to have the inspector that has prepared the report to present to the board meeting. While the merits of having the inspector that prepared the report for the board to make the presentation are obvious (having conducted comprehensive analysis of the full file to frame recommendations and, where relevant, having taken part in any oral hearing or site visits), and while this would be expected as standard in relation to more complex casefiles, there is appropriate scope for individuals other than the recommending inspector to make effective presentations to the board. The key point of the recommendation is that individual board members should no longer be responsible for presenting case files at board meetings. While this task would be appropriate to the responsibility of the inspector that has conducted the assessment and prepared the detailed report (certainly in the case of significant developments within certain categories), there is scope to have the task delegated to various individuals with the requisite knowledge of planning casefiles and An Bord Pleanála's overall decision-making procedure. Further consideration can be given to the operationalisation of this recommendation in the second phase of this review process. Finally, as observed earlier, it is the board of An Bord Pleanála which makes the decision or determination.

Recommendation 7: [Short-term] In accordance with section 111(5) of the 2000 Act, it is recommended that An Bord Pleanála adopt a written decision-making procedure informed by the guiding principles set out in Part 5 of this report.

Recommendation 8: [Short-term] An Bord Pleanála should cease the general practice of a board member being responsible for presenting a casefile at a board meeting. This practice should be replaced by a process whereby a casefile shall be allocated to an inspector or an appropriately delegated person, who will present the relevant casefile details of the inspector's report and associated recommendations to the board meeting.

B. Supports in relation to decision-making

The current position

127. At the hearing before the PAC on 14 July 2022, the Chairperson of An Bord Pleanála set out the following statistics in relation to applications for judicial review: in terms of success or failure, no judicial reviews were lost in 2012; eight were lost or conceded in 2013; six were lost or conceded in 2014; three were lost or conceded in 2015; eight were lost or conceded in 2016; 12 were lost or conceded in 2017; 12 were lost or conceded in 2018; 15 were lost or

conceded in 2019; in 2020, 83 applications for judicial review were received and 32 were lost or conceded; in 2021, 95 applications for judicial review were received and 40 were lost or conceded; and 45 applications for judicial review were received to end-June 2022.

128. The Comptroller and Auditor General in his report to the PAC meeting in July explained the financial consequence of these judicial review applications in recent years, stating that An Bord Pleanála's expenditure and legal fees in 2020 amounted to €8.3 million, a significant increase on the figure of €3.4 million incurred in 2019. Approximately half of the expenditure in 2020 was accounted for by An Bord Pleanála's legal fees in defending cases, with the other half representing payment of the costs of persons taking cases against the board following the settlement of cases.

Review of cases over a 10-year period

129. In order to further examine these matters in the context of the decision-making functions of An Bord Pleanála, a review of legal cases involving An Bord Pleanála over a 10-year period was carried out and the statistical details of this exercise are set out at Appendix 2.

130. Two important preliminary observations arise from our review of this case law which in a sense book-end and help explain the context for the low baseline figures given by the Chairperson at the PAC meeting in July for 2012 and the increasingly higher numbers in more recent times.

131. First, the low base line figures for judicial review applications in 2012 generally also reflects the 20 years prior to 2012 and places the higher figures in recent years in context. In explaining why this is so, it is perhaps difficult to appreciate, at this juncture, that a decision by a local authority-controlled cinema – shortly after World War II in a West Midlands town in England – to preclude children under 15 years of age, whether or not in the company of their parents, from attending on a Sunday[70], together with a decision some 44 years later to erect a 300 metre high mast as part of a longwave transmitting station in County Meath, could have such profound and lasting consequences for planning law (and administrative law generally) in Ireland. In the former scenario, this led to the decision known as *Wednesbury*[71] and the latter facts arose in a case, also known by its first name, *O'Keeffe*.[72] In summary, these cases established that the threshold to be met by an applicant for judicial review who seeks to pursue grounds such as unreasonableness or irrationality is "*extremely high and is almost never met in practice*" because "*an applicant must demonstrate that the decision impugned*

[70] By way of a condition imposed in a licence.
[71] *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
[72] *O'Keeffe v An Bord Pleanála* [1993] 1 I.R. 39.

is fundamentally at variance with reason and common sense.".[73] This is a factor (of course, by no means the only one) in understanding why legal challenges in the period from 1992-2012 were generally low and relatively unsuccessful and why the Chairperson was starting from a low base for 2012. While grounds based on irrationality and unreasonableness in accordance with the principles laid down in *O'Keeffe v An Bord Pleanála*[74] (attenuated by the principle of proportionality where fundamental rights are invoked)[75] remain applicable, the gradual increase in numbers after 2012 coincides with more complex EU law type grounds of challenge and issues surrounding the interpretation of law rather than grounds based on irrationality. This is an important context when seeking to also understand the higher numbers in more recent years.

132. Second, during the period of the Covid-19 restrictions, for example, the Commercial Planning & Strategic Infrastructure Development, Commercial Court and Judicial Review/Non-Jury divisions of the High Court (which together dealt with planning and environmental-related cases) were able to facilitate expedited hearings which not only avoided backlogs but resulted in an increase in the delivery of judgments from the time of the initial application to court, through the use of remote (and hybrid) hearings in virtual courts and efficient administration which has had a consequential effect on the statistics of decided cases and associated costs during that period. The important role played by An Bord Pleanála's administrative team and external lawyers in dealing with what has been a huge increase in complex litigation during this most challenging of times is readily acknowledged.

133. This has also coincided with the adoption of new practices including, for example, the issuing of Practice Direction HC107[76] by the President of the High Court and its application by the judges in charge of[77] and assigned to[78] the Commercial Planning & Strategic Infrastructure Development division of the High Court which has been transformative. Practice Direction HC107 addresses a number of matters including the management of the list, the filing of papers, the schedule of directions, the filing of written submissions, pleadings, the modularisation of hearings and the delivery of judgments.

134. Most telling has been the way this Practice Direction has addressed in great detail "the Statement of grounds and opposition" and importantly the use of templates, which are set

[73] *The Board of Management of St. Audoen's National School v An Bord Pleanála* [2021] IEHC 453 at paragraph 32 per Mr. Justice Simons.
[74] See, for example, the recent decision in *Waltham Abbey v An Bord Pleanála & Ors; Pembroke Road Association v An Bord Pleanála & Ors* [2022] IESC 30 per Mr. Justice Hogan at paragraph 11.
[75] *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 I.R. 701.

[76] Section 11(12) and 11(13) of the Civil Law and Criminal Law (Miscellaneous provisions) Act 2020. Issued on 17 June 2021 by Ms. Justice Mary Irvine, then President of the High Court.
[77] Mr. Justice Richard Humphreys.
[78] Mr. Justice David Holland.

out at Appendix 1 to HC107, to assist practitioners in their pleadings. HC107, for example, provides that the "core grounds" section should be divided into three sub-divisions as between (i) domestic law grounds (ii) EU law grounds and (iii) validity grounds (iv) the particularisation of grounds, and, (v) the pleading of factual grounds and other practical matters resulting in a clearer articulation of grounds of challenge. We note that very recently the President of the High Court has issued Practice Direction HC114[79] as an amendment to Practice Direction HC107 which enlarges the ambit of the work of the Commercial Planning & Strategic Infrastructure Development division of the High Court to include planning and environmental cases of a commercial character or with commercial aspects (which would have been previously initiated in the Commercial Court or the Non-Jury/Judicial Review List). Arising from Practice Direction HC107, the legal issues before the courts are pleaded with more precision and the courts are able to modularise the legal questions before it including ascertaining, for example, those questions which essentially raise issues of statutory interpretation, questions of law or questions which are jurisdictional and transcend the individual facts of the case.

135. In addition to these preliminary observations, there are, we believe, clear learnings from our review of decided legal cases involving An Bord Pleanála over a 10-year period (set out at Appendix 2) which place the statistics provided at the PAC hearings in a fuller context and which provide an evidence-based rationale for the specific recommendations in relation to providing supports for An Bord Pleanála's decision-making and more robust decisions which we set out later. These learnings are as follows:[80]

    a. the majority of the cases reviewed involved the 2000 Act which provides for a bespoke judicial review process in planning law (a similar statutory regime operates in immigration/asylum law). This legislation is structured in such a way that a decision of An Bord Pleanála often acts as the *trigger* or *the catalyst* for a challenge by way of judicial review. Two points arise here: first, judicial review orthodoxy mandates that the grounds of review (the legal basis of any challenge) are concerned with ***the manner*** in which the board has arrived at its decision rather than ***the merits*** of the decision itself. This can seem somewhat incongruous but it is the fine line by which ***legality*** (traditional judicial review) and ***a merits appeal*** (an appellate function) is distinguished; second the question arises as to ***what decision*** should be challenged and ***when*** should it be challenged. It

[79] Dated 29 September 2022, Mr. Justice David Barniville, President of the High Court.

[80] An assessment was carried out of judgments from the High Court, Court of Appeal and Supreme Court, in which An Bord Pleanála was a party and delivered over a ten year period between 1 January 2012 and 8 September 2022. In a case where there had been an appellate judgment, only the judgment of the final appellate court which determined the matter was reviewed resulting in approximately 147 judgments. Where relevant, the results of the lower court are footnoted in Appendix 2. Judgments which involved what might be described as interlocutory matters, for example, costs, cost protection, leave to appeal remittal, etc. were not included and in relation to applications for leave to apply for judicial review, only those judgments where there is a refusal of leave are included on the basis that this determined the case at that point.

should be noted that Practice Direction HC107 has addressed this thorny issue of ***when*** a challenge should be taken to a decision (and to ***what*** decision) and the related concepts of delay, ripeness and prematurity in the following practical way in paragraph 6(3) of Practice Direction HC107: "*Parties considering challenging any preliminary decision*[81] *prior to the final substantive decision should seek consent from the proposed respondents and notice parties to the effect that no point will be taken against the applicants if the challenge is postponed to the final decision and that an extension of time for that purpose will be consented to. If such consent is not forthcoming and an application is brought, the court may award costs of that challenge against any party who caused unnecessary costs to be incurred by declining to furnish such consent.*" Accordingly, (interim or preliminary) decisions made during the decision-making process and the final decision are potentially all open to challenge. We believe that any additional supports which improve the decision-making process, the manner by which An Bord Pleanála makes a series of interim or preliminary decisions along the spectrum of the decision-making process and the final decision are merited as they will result in a more robust process and final decision. Therefore, the focus of our recommendations has been on suggesting practical supports to improve the decision-making process which will underpin the final decision;

b. the sheer variety of legal frailties that have contributed to decisions of An Bord Pleanála being quashed over the 10-year period in question and having regard to the layers of decision-making which lie within the myriad of An Bord Pleanála's functions (which we have set out in Part 2 of this report) strongly supports the establishment of a properly resourced Legal Services Support Unit within An Bord Pleanála which can provide guidance in addressing the legal requirements involved in a multitude of functions;

c. it is clear that the number of legal challenges which are successful has increased exponentially in the last three years. Many of the legal challenges which concluded in 2020, 2021 and June 2022 related to Strategic Housing Development (SHD) applications: 2020 - 32 out of 83; 2021 - 47 out of 95 and 2022 (to end-Q2) - 18 out of 45. As mentioned in part 2 of this report, the Planning & Development (Large Scale Residential Developments) Act 2021 phases out SHD applications previously made directly to An Bord Pleanála pursuant to the Planning & Development (Housing) and Residential Tenancies Act 2016 and Planning & Development (Strategic Housing Development) Regulations 2017. We also note that specific difficulties in relation to material contravention of development plans/local area plans and the Specific Planning Policy Requirements (SPPRs) have been the cause of an increasing number of legal challenges. The legal and planning issues surrounding these matters and the question of material contravention and related issues concerning the interpretation and application of

[81] Emphasis and underlining added.

the hierarchy of policies and guidelines in the context of development plans and local area plans (sometimes with an added EU dimension) are becoming ***the*** central focus in much of the case law. These issues, in our view, require urgent attention (a) in the context of this review, both in phase 1 and phase 2 and (b) as part of the ongoing legislative review carried out by the Office of the Attorney General. In this review, we recommend that: (i) the proposed Legal Services Support Unit provide a comprehensive programme of training, use of templates for decision-making and advising An Bord Pleanála's board members and staff generally in their respective decision-making roles as to the correct approach to statutory and regulatory requirements in relation to the question of material contravention and the related issues surrounding this question; (ii) any necessary advice be furnished to An Bord Pleanála by the Legal Services Support Unit on the basis of the currently applicable legislative and regulatory provisions; (iii) as part of the legislative review a consolidated legislative restatement of the decision-making context for An Bord Pleanála decisions should be considered, founded on the premise that subject to the exceptions below, such decisions should be generally consistent with the operative development plan or local area plan. The scope for An Bord Pleanála to grant permission for a proposed development that would be in material contravention of the relevant development plan or local area plan should be limited, and the scenarios in which this would be permissible would include where it considers that there is a clear conflict between that provision and a written requirement of higher level plans or guidelines or Government policy, or where there are conflicting objectives in the development plan itself;

d. the case law examined confirms that the interpretation and application of EU law measures, particularly after 2012 when a number of updated environmental Directives came into effect, have had an important, albeit at times differential, impact on the board's decision-making having regard to its various functions which are set out in Part 2 of this report. For example, on the one hand, the case law generally recognises a distinction between compliance with the content of what was previously known as an Environmental Impact Statement (EIS),[82] as required by the Planning & Development Regulations 2001-2022, as being a matter for the court whereas, on the other hand, an assessment of the adequacy of the information in an EIS has generally been regarded as primarily a matter for the discretion of An Bord Pleanála. In one case[83] in 2013, for example, which is generally reflective of the approach adopted by the Courts, in the context of a question surrounding the adequacy of an EIS, it was stated by the judge in that case that this was clearly a matter for An Bord Pleanála as the decision-maker, observing that "…*the assessment of the adequacy of the EIS is a factual matter involving considerable*

[82] Hereafter referred to as an EIS. This is now referred to as an Environmental Impact Assessment Report or EIAR.
[83] *Craig v An Bord Pleanála* [2013] IEHC 402 see also *Klohn v An Bord Pleanála* [2009] 1 I.R. 59 at p. 64; *Kenny v An Bord Pleanála* [2001] I.R. 565 at p. 578

expertise in planning. It is classically a specialist matter upon which an expert body must decide. The test for this Court in examining such an assessment is thus the O'Keeffe one. Was there relevant evidence before the Board upon which it could rationally rely in order to come to its decision?..."

e. while the Courts initially and in general adopted a curial deference to the appellate functions of An Bord Pleanála, the increasing complexity surrounding the application and interpretation of EU law, particularly in recent years has changed that focus. Notwithstanding the judicial restraint to questions surrounding the adequacy of an EIS, the review of case law confirms that questions concerning the interpretation and application of legal measures concerning the Environmental Impact Assessment (EIA) process and the Appropriate Assessment (AA) process, including the screening requirements in relation to each, continue to be a basis of legal challenge. While AA/Habitats issues have featured less in recent cases, we have set out below, a reference to a judgment of the High Court which addressed the screening process in detail. We do so for three reasons: first, as part of a general support in the exercise of An Bord Pleanála's function as a Competent Authority under the Habitats and Birds Directives (under EU law), it could rely on a Legal Services Support Unit in providing general advice, legal updates and referring to the most recent decisions of the Superior Courts and CJEU, as a template or a guide to good decision-making; second, we acknowledge that while the percentage of AA/Habitats challenges may have fallen that is precisely the time – because of the stringent and complex legal test involved in AA screening – that the Board should be provided with as much support as possible to avoid successful challenges on AA grounds; third, in some of the cases examined, in addition to determining the issue (or *lis*) before it, the courts have gone further and provided a concise synthesis of the principles arising from complex EU law and national law, often addressing what are questions of law and have set out a principles-based standard for good decision-making which should be applied by all stakeholders;

f. the board's decision not to follow the recommendation of the inspector has played a role in a number of cases where decision of An Bord Pleanála was quashed. As part of recommendation 7 of this report, the new written decision-making procedure provides for a number of new provisions, including the presentation of casefiles by inspectors at a plenary hearing of An Bord Pleanála. It also provides that where An Bord Pleanála is minded not to follow (or not to follow without variation) the recommendation of the inspector, it is recommended that procedures and templates be adopted for recording the full reasons of fact and policy for so concluding (under reference to the relevant section(s) of the inspector's report) in a Statement of Reasons. While this previous concern may be now addressed by recommendation 7, the second phase of the review

will nevertheless inquire further into the interaction between the inspectorate and board members of An Bord Pleanála;

g. the quasi-judicial nature of An Bord Pleanála's decision-making requires it to make important calls on questions of legal interpretation. In a number of cases, An Bord Pleanála's failure to follow mandatory provisions has been the cause of a decision to quash from the Superior Courts. Accordingly, given the significant legal consequences which arise from the requirement on An Bord Pleanála, for example, to publish materials and maintain a website for this purpose, we suggest that this is an issue where An Bord Pleanála would benefit from advice and assistance from the Legal Services Support Unit;

h. in the case law examined over a 10-year period, questions of *statutory interpretation*, including net points in respect of *jurisdictional* issues, were included in the grounds upon which successful challenges have been brought. However, this examination of cases over a 10-year period refers to challenges brought ***after*** a decision has been made[84] which invoke the statutory judicial review process – as the vehicle for bringing the matter to the attention of the High Court– where the judicial scrutiny is on the manner of the decision-making process, i.e. the legality of the decision. However, immediately before this provision, section 50(1) of the 2000 Act provides for a form of consultative case stated.[85] It is important to distinguish this consultative case stated process in section 50(1) of the 2000 Act with, for example, (a) an appeal by way of case stated or indeed (b) a challenge to the validity of a decision by way of judicial review. In this regard, a helpful analogy was made in *Campus Oil Ltd v Minister for Industry and Energy (No.1)*[86] where the Supreme Court (Mr. Justice Walsh) compared the consultative case stated process with the preliminary ruling (reference) process to the CJEU, now under article 267 of the Treaty on the Functioning of the European Union. Put simply, both seek judicial assistance on a question of law which is not clear. The purpose and effect of a consultative case stated is to enable An Bord Pleanála obtain the advice and opinion of the High Court to assist it in reaching a correct legal decision.[87] Consultative cases stated therefore could involve a range of issues including, for example, questions of law concerning *the interpretation* of legislation and regulations and matters involving mixed question of *law and fact*. There are matters, of course, which are outside of its remit, including a challenge to the validity of any decision, legislation or regulations or a

[84] Section 50(2) of the 2000 Act provides that a person shall not question the validity of any decision made or other act done by the Board in the performance or purported performance of a function transferred under *Part XIV* of the 2000 Act and the Board in its capacity as the appeal body from decisions of the competent authority within the meaning of the Aircraft Noise (Dublin Airport) Regulation Act 2019 otherwise than by way of an application for judicial review under Order 84 of the Rules of the Superior Courts (S.I. No. 15 of 1986).

[85] Section 50(1) of the 2000 Act provides that "*Where a question of law arises on any matter with which the board is concerned, the board may refer the question to the High Court for decision*.

[86] [1983] I.R. 82 at page 86.

[87] By analogy see the observations of Chief Justice Finlay in *Dublin Corporation v Ashley* [1986] I.R. 781,785 in the context of a case stated from the Circuit Court to the Supreme Court.

constitutional challenge. The format of the case stated should comprise a single document describing the factual context, the legal submissions of the parties and the questions of law arising. As mentioned, a consultative case stated process and a judicial review are quite different legal processes and it is important to emphasise that one is not a replacement, or indeed a substitute, for the other. The review of cases in Appendix 2 does suggest, however, that many of the cases reviewed involved questions of law notwithstanding that the vehicle for the courts' decisions on such questions and articulation of legal principle was by means of a judicial review challenge. The provision for a consultative case stated has been provided for (in different formats) since the enactment of the Local Government (Planning & Development) Act 1963 but, notwithstanding this, in contrast to the cases examined in Appendix 2, such references to decisions by way of consultative case stated are few and far between. In *Shannon Regional Fisheries Board v An Bord Pleanála*[88], however, the High Court pointed to the opportunities and advantages which would have accrued to An Bord Pleanála in the circumstances of that case if it had obtained the advice of the High Court – observing that it could have sought the opinion of the High Court as to whether an environmental impact statement (as it then was) was mandatory in that case. Given the range of legal issues which arose in the case law examined in Appendix 2 including, for example, questions of law concerning *the interpretation of legislation and regulations* and questions touching upon *jurisdiction* and notwithstanding the provisions of Order 84B of the Rules of the Superior Courts, 1986 (as amended), we recommend that consideration be given as part of the broader review of planning legislation by the Office of the Attorney General to the making of specific Rules of Court which expressly provide for an expedited consultative case-stated/referral to be made to the Commercial Planning & SID (Strategic Infrastructure Development) Division of the High Court for its decision on question or questions of law which arise on any matter with which An Bord Pleanála is concerned;

i. a cohort of case law, for example, which raises issues which may have been more appropriately explored by the consultative case stated procedure in section 50(1) of the 2000 Act, involve the detailed *referrals process* under the 2000 Act and which we have outlined in Part 2 of this report. These provisions and associated case law address, inter alia, the question of whether the Superior Courts' inherent jurisdiction to grant declarations is consistent with the various referral provisions under the 2000 Act (as set out in Part 2 of this report) and in general the question of "overlapping and unworkable jurisdictions."

[88] [1994] 3 I.R. 449.

136. That planning legislation has become a labyrinth, increasingly difficult to understand and navigate, is accepted by most professionals who work in the area. Based on our analysis of the case law, this has contributed to why some of the decisions of An Bord Pleanála have been quashed by the Courts, as outlined in Appendix 2. By way of example, the analysis of judgments in Appendix 2 makes clear that some decisions of An Bord Pleanála have been quashed due to a failure to follow little-known provisions in legislation or regulations: see for example *Waltham Abbey v An Bord Pleanála*[89] where the High Court quashed an SHD planning permission due to a failure to follow Article 299B(1)(b)(ii)(II)(C) of the Planning & Development Regulations 2001 to 2022[90] (albeit that this decision was overturned on appeal). Further in *Atlantic Diamond v An Bord Pleanála*[91] one of the grounds for quashing was a failure by the developer to comply with Article 297(1) of the Planning & Development Regulations 2001 to 2022. As such, we understand, as part of the review of planning legislation being carried out by the Office of the Attorney General, that consideration will be given to creating more streamlined and legible planning legislation, with more user-friendly consent and environmental assessment processes in particular, which in our view should help support improved decision-making by planning bodies, including An Bord Pleanála, and help to avoid legal error in such decision-making.

The provision of support

137. Having regard to the review of cases involving An Bord Pleanála over a period of 10 years and the issues canvassed in these cases, we recommend that the following actions be taken by An Bord Pleanála to improve its decision-making process and ultimately decisions which the board is required to make:

    a. the establishment and appropriate staffing of a Legal Services Support Unit to give the supports and legal advice to the members of An Bord Pleanála, its employees and inspectors in their respective decision-making roles;

    b. the provision of supports offered by the Legal Services Support Unit would include comprehensive training, upskilling, the provision of regular digests of case-law, the establishment and updating of templates for decision-making for board members and staff of An Bord Pleanála duly adapted to each of their respective decision-making roles;

    c. consideration be given as part of the broader review of planning legislation by the Office of the Attorney General to the making of new Rules of Court which would

[89] [2021] IEHC 312
[90] Hereinafter "PDRs"
[91] [2021] IEHC 322

make available, if required, an expedited process for referring questions of law by way of a consultative case stated procedure to the High Court for determination.

138. The Oireachtas has made very similar provision for a statutory judicial review process in a number of areas including most notably planning and in immigration and refugee cases.[92] Over the years, various amendments made to these statutory judicial review processes have addressed issues such as whether the leave application should be on notice or made *ex parte*, the standing or sufficiency of interest of applicants, whether there was participation in the processes under challenge, time/delay provisions, extensions of time, the establishment of substantial grounds, and the finality of decisions together with restrictions on appeal.

139. The objective of these various initiatives – the attainment of an *expedited process* for dealing with legal challenges and *certainty* as to the final decision – has not always been realised.

140. In the context of the immigration and asylum code, for example, what has been statistically proven to be more effective in recent years has been a programme of training in which all decision-makers participate and the use of comprehensive templates aimed at good decision-making. The International Protection Appeals Tribunal Annual Report for 2021 at pp 16-18 under the heading "Judicial Review Monitoring", for example, describes how this has been achieved in a process where similar statutory judicial provisions that apply in planning also apply to immigration and asylum judicial review cases:

> *"…The Tribunal closely follows the developments in the Superior Courts in respect of judicial reviews of its decisions. Whether the Court upholds or quashes a decision of the Tribunal, the Tribunal seeks to implement in its guidance to and training of its Members the jurisprudence of the Superior Courts. The particular ways in which the Tribunal does this include:*
>
> 1. *Clear summaries of the key insights from the jurisprudence, presented systematically in Quarterly Reviews for the benefit of Tribunal Members.*
> 2. *Implementation in Chairperson's Guidelines pursuant to s. 63(2) in respect of developments of the law of international protection.*
> 3. *Revision and updating of the guidance and training materials used for the professional development of Tribunal Members.*
> 4. *Revision and updating of the decision-making templates used by Tribunal Members.*
> 5. *Determining and shaping the training provided to Members internally.*
> 6. *Determining the external training relevant to Members.*

[92] Section 5 of the Illegal Immigrants (Trafficking) Act, 2000.

7. *Hosting workshops, discussion groups and 'lunch and learn' sessions on matters arising from the case law.*
8. *Updates on particular net issues from case law and opinions of counsel.*
9. *Revision and updating of the quality audit materials used for analysing members decisions with a view to identifying matters for continued improvement.*

During 2020 the Tribunal consolidated and ordered all information available to it in respect of litigation against the Tribunal since came into being on the 31st of December 2016. This knowledge management project continued throughout 2021 and enables the Tribunal to systematically monitor relevant litigation in the Superior Courts for the purpose of further enhancing the quality and efficiency of its decision-making…"

141. Consequently, in the immigration and asylum code this comprehensive programme of training and use of templates for decision-making has resulted in improved decision-making and we are of the view that a similar process can be introduced for board members of An Bord Pleanála, its employees, staff and inspectors.

142. Our recommendations are evidence-based including from a review of cases over a 10-year period. We pointed out earlier that in a number of the judgments, in addition to determining the issue of controversy before it, the decisions of the Superior Courts have gone further and provided a concise synthesis of the principles arising from complex EU law and national law and have thereby addressed what are often questions of law and have provided a *principles-based standard for good decision-making*. Further, the objective of our recommendations is to improve the decision-making of An Bord Pleanála and hence its consequent decisions. They comprise in effect a suite of planning and legal supports which, in our view, help achieve that goal and are apparent through the following examples and supported by the establishment of a Legal Services Support Unit:

(i) Notification and publication requirements

(ii) Material contravention and related issues

(iii) Reasons

(iv) Screening for Appropriate Assessment

Notification and Publication Requirements

143. An important practical issue which has significant legal consequences and applies to the administration of An Bord Pleanála is the requirement to publish materials and maintain a website for this purpose. These matters were the subject of a recent judgment of the High

Court.[93] The judgment comprehensively addressed a number of issues but the central matter concerned a complaint about a lack of publication in two respects: (a) a failure to publish materials on the website of An Bord Pleanála in the course of the application procedure; and (b) a failure to publish a notice of the decision at the end of the procedure. This concerned: (a) information that arose before transposition of an amending EIA directive; and (b) information that arose on or after that transposition.

144. The High Court granted declarations to the extent that An Bord Pleanála breached certain statutory requirements by: (a) failing to make available on its website a submission received on 24 June 2019 and four *errata* documents furnished at the oral hearing from 8-18 October 2019 and 12-22 November 2019 insofar as they affected the EIA report; and (b) insofar as information was statutorily required to be placed on its website rather than in the newspaper notice in circumstances where the newspaper notice did not adequately identify the precise link at which such necessary information was to be found.

145. The judgment of Mr. Justice Humphreys also offers important guidance on questions of statutory interpretation concerning when transposition of an amending EIA Directive occurs after an application has been made but before a decision is reached.

146. From a practical perspective and confirming our recommendations in relation to the input of a legal analysis (from, for example, a Legal Services Support Unit) as part of a wider regime of training and use of templates for good decision-making, the Court observed in relation to the link to the website of An Bord Pleanála that a member of the public would not without undue difficulty be able to reliably and readily find the details of the decision in this case from the information in the public notice and accordingly while the use of a weblink was in principle permissible, the fact that no specific link was provided and no clear information given as to how to properly search for the information on the general link, had the effect that inadequate information was given for the purposes of the statutory requirement.

147. Practical and technical matters such as this have significant legal consequences and would, we suggest, benefit from a continuous review as part of wider suite of training and continuous professional development together with continuous due diligence from the perspective of administration.

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[93] In *Clifford v An Bord Pleanála (No. 1)* [2021] IEHC 459 (Unreported, High Court, 12th July, 2021), Mr. Justice Humphreys refused an order quashing An Bord Pleanála's decision and left over certain declaratory reliefs for module II which he addressed in this judgment *Clifford v An Bord Pleanála (No. 3)* [2022] IEHC 474.

Material Contravention of the Development Plan and Related Issues

148. The material contravention process and related matters raise fundamental issues concerning: (a) the correct legal approach to interpretation and (b) planning-led judgment based on a clear hierarchy of policy.

149. As already mentioned, the hierarchy, precedence and competing nature of planning policy documents (together with the application of EU law), such as development plans, local area plans and ministerial guidelines on, for example, height restrictions, is increasingly becoming the subject of applications for judicial review where questions as to statutory interpretation arise.

150. The following legislative provisions are, for example, now regularly relied upon.

151. Section 37(2)(b) of the 2000 Act provides that where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, An Bord Pleanála can only grant permission in such circumstances where it considers that—

- the proposed development is of strategic or national importance, or
- there are conflicting objectives in the development plan or the objectives are not clearly stated, insofar as the proposed development is concerned, or
- permission for the proposed development should be granted having regard to the regional spatial and economic strategy for the area, guidelines under section 28, policy directives under section 29, the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or
- permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.

152. Where An Bord Pleanála grants a permission in such circumstances it is required, in addition to the requirement to give reasons in section 34(10) of the 2000 Act, to indicate in its decision the main reasons and considerations for contravening materially the development plan.

153. In contrast, section 9(3)(a) of the Planning & Development (Housing) & Residential Tenancies Act 2016[94] which is concerned specifically with SHD provides that when making its decision on a SHD proposal, An Bord Pleanála shall apply, where relevant, specific planning policy

[94] Hereinafter referred to as the "2016 Act."

requirements of ministerial guidelines issued under section 28 of the 2000 Act. The legislation also provides that where such specific planning policy requirements of guidelines differ from the provisions of the development plan of a planning authority, then those requirements shall, to the extent that they so differ, apply instead of the provisions of the development plan. As confirmed by decisions of the Superior Courts, this is not so much a material contravention rather than the effective disapplication of provisions contained in the development plan.

154. Under of the 2016 Act (save where a proposal contravenes materially the development plan or local area plan relating to the area concerned in relation to the zoning of the land) An Bord Pleanála may decide to grant a permission for a proposed SHD even where the proposed development, or a part of it, contravenes materially the development plan or local area plan relating to the area concerned. The legislation then provides that where the proposed SHD would materially contravene the development plan or local area plan (other than in relation to the zoning of the land), An Bord Pleanála may only grant permission where it considers that, if section 37(2)(b) of the 2000 Act were to apply, it would grant permission for the proposed development.

155. These provisions are increasingly the subject of comprehensive judicial analysis.

156. In this example, it is envisaged that the Legal Services Support Unit will have already engaged in a comprehensive programme of training, use of templates designed to promote good decision-making; and generally advising the board members and staff of An Bord Pleanála as to the requirements of "the material contravention provisions" in their respective decision-making roles. That may be sufficient to dispose of any question. Alternatively, it may be the case that advices may be sought after consideration of the inspector's report and recommendations and before a decision is made by the board in the context of a question or questions concerning a material contravention of a Development Plan. In the majority of cases, legal advices will be able to be furnished based on the comprehensive bank of case law, precedent and those material contravention cases which the Legal Services Support Unit will have compiled and that then may be sufficient to dispose of any question. Ultimately, if applicable, further consideration can be given by the board, based on advice, as to whether it is appropriate to seek the assistance of the High Court on a question of law and invoke the referral or consultative case process before it makes a decision.

Reasons

157. It is clear that grounds in relation to the giving of adequate reasons continue to be a source for questioning the validity of decisions made by An Bord Pleanála and there remains a challenge in seeking to find the correct balance between providing adequate analysis, evidence and justification in, for example, an inspector's assessment and the board's

decision to show that it has fully engaged and assessed all relevant matters and can give a reasoned decision which is both comprehensive and concise.

158. In this case it is suggested that the Legal Services Support Unit could provide, training, and if necessary, advice for decision-making based on the comprehensive decision in *Connelly v An Bord Pleanála*[95] (a case which also addressed stage 2 appropriate assessment under the Habitats Directive), *Balz v An Bord Pleanála*[96] and the recent judgment in *Killegland Estates Limited v Meath County Council & Others.*[97]

159. Accordingly, by way of example, the practical advice from this analysis is that whether as (a) part of a process or (b) contained in a final decision, where there is a legislative obligation to provide reasons and a court is required to determine the *lawfulness* of a decision by reference to this statutory requirement, there is much to commend an approach which suggests that the reasons which are furnished should satisfy the following criteria: (i) be proper, adequate and intelligible; (ii) address the substantive points raised; and (iii) be briefly but comprehensively stated.[98]

160. Further guidance on these matters and the articulation of concise principles canvassed in a very practical way were set out as follows in *Killegland*:

(i) the extent of reasons depends on the context;

(ii) there is no obligation to address points on a submission-by-submission basis - reasons can be grouped under themes or headings;

(iii) it is not up to an applicant to dictate how a decision is to be organised - the selection of headings or order of material is, within reason, a matter for the decision-maker;

(iv) there is no obligation to engage in a discursive, narrative analysis - the obligation is to give a reasoned decision;

(v) there is no obligation to set out the reasons in a single document if they can be found in some other identified document; and

(vi) reasons must be judged from the standpoint of an intelligent person who has participated in the relevant proceedings and is apprised of the broad issues involved and should not be read in isolation.

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[95] [2018] IESC 31; [2018] 2 I.L.R.M. 453.
[96] [2019] IESC 90; [2020] 1 ILRM 637.
[97] [2022] IEHC 393 per Mr. Justice Humphreys.
[98] In *Westminster City Council v Great Portland Estates plc* [1985] AC 661, 673 Lord Scarman endorsed the approach in *In re Poyser and Mills' Arbitration* [1964] 2 Q.B. 467, 478 per Megaw J. that "*Parliament provided that reasons shall be given, and in my view that must be read as meaning that proper, adequate reasons must be given. The reasons that are set out must be reasons which will not only be intelligible, but which deal with the substantial points that have been raised*" and the rider added by Glidewell J. in *Edwin H. Bradley and Sons Ltd. v Secretary of State for the Environment* (1982) 264 E.G. 926, that reasons can be "*briefly stated*."

161. The Court added that "*I should perhaps add to the point about the context that there is no legal requirement to state reasons for what is obvious. If the rationale is clear from the circumstances even if it is not expressly articulated, then a legal obligation to so articulate the reasons would be "pointless formalism" (not a desirable approach to law in any context)...*[99]

Screening for Appropriate Assessment

162. Earlier we acknowledged that while AA/Habitats issues have featured less in recent years in the challenges to the decisions of An Bord Pleanála, due to the complex and binary legal test involved in AA screening, An Bord Pleanála should be provided with as much support as possible to avoid successful challenges on AA grounds.

163. Article 6(3) of the Habitats Directive provides for a two-stage process when it comes the consideration by a competent authority such as An Bord Pleanála for consideration and evaluation of the implications of a proposed 'plan or project' for an area protected under the Habitats Directive. The first stage involves a screening for appropriate assessment: a 'stage 1 screening.' The second stage is the 'stage 2 appropriate assessment' and arises where, having 'screened' the application/development proposal, the competent authority determines that an appropriate assessment is required, in which case it must then carry out that appropriate assessment.

164. The two stages have been considered by the Superior Courts in Ireland in numerous cases. The following cases set out the key questions and tests to be applied by the competent authority at each stage:

- *Kelly (Ted) v. An Bord Pleanála* [2014] IEHC 400 (High Court, Ms Justice Finlay-Geoghehan);
- *Connelly v. An Bord Pleanála* [2018] IESC 31 (Supreme Court, Chief Justice Clarke); and
- *Kelly (Eoin) v-An Bord Pleanála* [2019] IEHC 84 (High Court, Mr. Justice Barniville[100]).

165. The 2014 decision of Ms. Justice Finlay-Geoghegan J. in *Kelly (Ted) v An Bord Pleanála* was based on a detailed review of the provisions of the Habitats Directive and of the caselaw of the Court of Justice of the European Union (CJEU) and of the implementing provisions in

[99] Per Mr. Justice Humphreys citing *Okunade v Minister for Justice and Equality* [2018] IESC 56, [2018] 11 JIC 1401 (Unreported, Supreme Court, 14th November, 2018) per Mr. Justice O'Donnell (Chief Justice Clarke and Ms. Justice O'Malley concurring), at paragraph 21).

[100] Now the President of the High Court.

Ireland.[101] The approach and analysis of the High Court was also approved by the Supreme Court in *Connelly* (2018).

166. Helpfully the principles which apply to the stage 1 screening for appropriate assessment were comprehensively set out by Mr. Justice Barniville (as he then was) in *Kelly (Eoin) v An Bord Pleanála* (2019) which, of the three decisions referenced above, is the decision in which the earlier stage, that is the stage 1 screening for appropriate assessment, was most in issue. As with other judgments referred to in this review, in addition to determining the issue before it, the court in this case went further and provided a concise synthesis of the principles arising from complex EU law and national law and provided a principles-based standard for good decision-making.

167. Accordingly, the following are the established principles which could form the basis for training, the provision of a template for good decision-making and ultimately the advice which may be given by the Legal Services Support Unit in the event of an issue arising in relation to a question concerning screening for appropriate assessment:

    a. Measures which are not permitted to be taken into account at the screening stage are those measures which are intended to avoid or reduce the harmful effects of the particular plan or project envisaged on the relevant European sites. (While there is no reference in Article 6(3) of the Habitats Directive to the concept of a 'mitigation measure', such measures are sometimes generally referred to as 'mitigation measures');

    b. The threshold test is that an appropriate assessment will be required if the proposed development is *'likely to have a significant effect'* on a European Site either individually or in combination with other plans or projects;

    c. The triggering of the requirement to proceed to the stage 2 appropriate assessment is <u>not</u> dependent on a determination that the proposed development will *definitely* have significant effects on a European Site. Such a requirement (for the stage 2 appropriate assessment) will arise if significant effects are a *'mere probability'* (in this regard, Barniville J. noted that the CJEU decision in *Waddenzee*[102] referred to *'a probability or a risk'*);

    d. In light of the precautionary principle, such a *'risk'* exists if '*it <u>cannot be excluded</u> on the basis of objective information'* that the development '*will have significant effects'* on a European Site (underscoring added);

    e. In Ireland, section 177U(4) of the 2000 Act employs the expression *'cannot be excluded'.* Under section 177U(4), an appropriate assessment will be required if, on the basis of objective information, a *'significant effect',* on a European Site *'cannot be excluded'*;

[101] Contained in Part XAB of the Planning & Development Act 2000.
[102] *Waddenzee* (Case C-127/02) [2004] ECR I-07405

f. Under section 177U(5) of the 2000 Act an appropriate assessment will not be required if, on the basis of objective information, a *'significant effect'* on a European Site, *'can be excluded'*;

g. In the case of *'doubt as to the absence of significant effects'* an appropriate assessment must be carried out. The requirement to conduct appropriate assessment will arise where, at screening stage, it is ascertained that the particular development is *'capable of having any effect'* (albeit this must be any *'significant effect')* on the European site;

h. The *'possibility'* of there being a *'significant effect'* on the European Site will give rise to a requirement to carry out an appropriate assessment for the purposes of Article 6(3). There is no need to *'establish'* such an effect and it is merely necessary to determine that there *'may be'* such an effect;

i. In order to meet the threshold of likelihood of significant effect, the word *'likely'* in Article 6(3) Habitats Directive and section 177U(1) of the 2000 Act should be read as being *less than the balance of probabilities.* The test does not require any *'hard and fast evidence that such a significant effect is likely'.* It merely has to be shown there is a *'possibility'* that this significant effect is likely;

j. The assessment of whether there is a risk of *'significant effect'* on the European Site must be made in light, *inter alia,* of the *'characteristics and specific environmental conditions of the site concerned'* by the relevant plan or project;

k. Plans or projects or applications for developments which have *'no appreciable effect'* on the protected site are excluded from the requirement to proceed to appropriate assessment. If all applications for permission for proposed developments capable of having *'any effect whatsoever*' on the protected site were to be caught by Article 6(3) (or section177U) *'activities on or near the site would risk being impossible by reason of legislative overkill.'* [103]; and

l. While the threshold at the screening stage of Article 6(3) and section 177U is *'very low*,[104] nonetheless it is a threshold which must be met before it is necessary to proceed to the stage 2 appropriate assessment.

Legal Services Support Unit

168. The central recommendation in this part of our assessment is centred on the furnishing of supports including training, upskilling, and the use of templates to improve the decision-making and the ultimate decision. A vital aspect in the delivery of these measures of support requires the establishment of a Legal Services Support Unit. We have set out above our

[103] Per Barniville J. at para 68 of *Kelly (Eoin) v An Bord Pleanála* [2019] IEHC 84, referencing the Opinion of Advocate General Sharpston in *Sweetman & Others v An Bord Pleanála* (Case C-258/11) ECLI: EU:C:2012:743

[104] Per Barniville J. at para 68 of *Kelly (Eoin) v An Bord Pleanála [*2019] IEHC 84, referencing (1) the Opinion of Advocate General Sharpston *Sweetman & Others v An Bord Pleanála* (Case C-258/11) ECLI: EU:C:2012:743 (para 49) and (2) the decision of Finlay-Geoghegan J. in *Kelly (Ted) v An Bord Pleanála* [2014] para 30.

understanding of how this would work, giving practical examples in the context of contemporary issues and centred on evidence-based findings. In addition, we make the following observations.

169. There are a number examples within the public sector of in-house law departments which could provide a comparative model for the establishment of a Legal Services Support Unit. Local authorities, for example, have law departments staffed with Law Agents, Assistant Law Agents, in-house lawyers, senior legal clerks and other administrative staff who build up an expertise and experience on every aspect of local authority law, practice and procedure and advise the Chief Executive, Directors of Services and management, who in turn are statutorily obliged to advise the elected members (councillors) in the exercise of their reserved functions. Similarly, in the semi-State sector such as, for example, in the provision of public transport and among other regulatory bodies, it is common that appropriately sized Law Departments staffed by in-house lawyers and administrative personnel provide supports and advice on all aspects of the decision-making functions involved in that particular public body. Additionally, in recent years, our national parliament has provided for the development of the Office of Parliamentary Legal Advisers from an initial staff comprised of one or two lawyers to an expert in-house legal department comprising approximately 25 professional lawyers in addition to legal researchers and administrative staff.

170. In his evidence to the July 2022 PAC meeting, the Chairperson of An Bord Pleanála confirmed that "…*a recommendation in the 2016 report was that we should bring in and hire in-house counsel. We tried that and got sanctioned by the Department to advertise for in-house counsel. We did not get anybody who was willing to come in at the salary level we were applying for*…"

171. We recommend, therefore, that An Bord Pleanála be supported by a properly resourced Legal Services Support Unit comprised of a sufficient number of senior lawyers.

172. The rate of success in legal challenges to the An Bord Pleanála's decisions, together with the variety of procedural deficits that have affected those decisions (evident from Appendix 2 - see in particular the 'factors involved in loss….' column of the table), emphasises the necessity to redress those prevailing negative trends - an imperative that we consider to be even more pressing where the range of duties and functions currently operated by An Bord Pleanála will continue to have a vital role to play in socio-economic planning and development in Ireland and in achieving sustainable land use and in mediating and balancing the competing factors and interests that are expressed through planning and environmental contentions.

173. In that regard, there is a matrix of factors that points strongly towards a continuing centrality for the work and roles currently exercised by An Bord Pleanála. These factors include:

    a. the heightened awareness of and concern for the environment - both the natural environment and the built environment - with the planning system likely to continue to operate as the main vehicle through which environmental assessment of all significant developments and projects is channelled;

    b. the extent to which, increasingly, planning decisions are regarded as 'environmental matters' and as representing 'environmental decision-making' in respect of which citizens' participation rights - under instruments like the EU's 'Public Participation Directive' and the Aarhus Convention (on Access to Justice in Environmental Matters) are increasingly emphasised and asserted;

    c. the important place that an efficiently-functioning planning appeals board will be expected to occupy in dealing with the many critical and strategic projects that will form part of Ireland's effort to transition its economy and infrastructure towards carbon neutrality by 2050; and

    d. the ongoing, and likely increasing, influence into the future of the Habitats Directive and the Birds Directive (both already well-established jurisprudentially) and in terms of a wide acceptance on the part of all stakeholders in the planning process, and having regard to the extent of Ireland's landmass and offshore areas that has Special Area of Conservation and/or Special Protection Area status. Existing and emerging caselaw related to the Habitats Directive Regime will continue to be highly influential to decision-making.

174. As a corollary of how the 'Table of Cases' at Appendix 2 analyses An Bord Pleanála's recent record in losing legal challenges and identifies the types of procedural deficit accounting for those losses, the table also represents an important starting point and an ongoing resource for key learnings (as set out earlier) and it also signals a number of areas for priority focus as part of the response. The core priority must be how, most rapidly and most effectively, to *integrate* those lessons and learnings into the work of An Bord Pleanála at all levels. In the context of redressing and reversing a negative pattern of decision-making that operates within an overall *legal* framework, where An Bord Pleanála's processes and procedures are frequently mandated by or guided by *legal* rules or by a *legal* context, there is, in our view, an important role for the Legal Services Support Unit in the provision of training and professional development for An Bord Pleanála, in particular in effecting a *programmatic* integration of training into An Bord Pleanála's procedures and mechanisms for enhancing overall legal and procedural compliance with legal standards related to its decision-making. As a body exercising functions fundamentally based on *planning* expertise, An Bord Pleanála (and the wider planning system of which it is part) has, of course, always operated within a *legal* framework – to begin with, the 1963 Act, as revised by the 2000

Act. However, the era when the 1963 Act and even the expanded 2000 Act (together with those Acts' implementing Regulations) represented the boundaries and frontiers of planning law and much or all of the *content* of planning control, is now in the distant past.

175. The legal framework for the planning system and for the range of functions exercised by An Bord Pleanála has expanded exponentially in recent years to encompass and include (in addition to the principal 2000 Act) a huge corpus of Irish caselaw specific to the planning regime, a significant range of primary legislation *outside of* the planning legislation, much secondary planning legislation, a series of statutory and non-statutory guidelines, regulatory codes, relevant national and CJEU caselaw, EU environmental legislation and EU environmental law principles, as well as a number of international regimes and Treaties covering areas such as heritage, transboundary environmental impact, major accidents and climate change. There is also a large body of caselaw, legal principles, administrative law and general public law that has derived from operation of many other areas of regulatory control in Ireland. In addition, whereas previously the development plan contained much or all of what An Bord Pleanála needed to concern itself with in dealing with planning appeals or with its other planning jurisdictions, the ways in which planning policy is made, the diverse sources of planning policy and what *comprises* planning policy has greatly fragmented and multiplied in recent years.

176. While that proliferation of sources for rule-making and for planning policy has challenged *all* stakeholders in the planning process, it is vital that An Bord Pleanála, as the decision-maker at the apex of the system, does not lag behind in its awareness and understanding of the implications of those changes or in its response to them or in its incorporation (into its systems and procedures) of all those elements that are important, directly or indirectly, to its ultimate decision-making function. Accordingly, the core focus of a programme of a Legal Services Support Unit training and professional development within An Bord Pleanála (again, as something that should be designed to *reinforce* planning decision-making) would be on facilitating (throughout An Bord Pleanála and its Inspectorate) access to, awareness of and consistency of application (to the different stages of the decision-making process) of all of those aspects of the planning law regime that are relevant to how planning decisions evolve and develop within An Bord Pleanála and to how they are informed and finalised, recorded, published and communicated - in a way that is legally robust. Within this core focus, priority areas would include, but would not be restricted to:

    a. identifying where legal or procedural points are articulated by stakeholders or where, otherwise, they feature in planning matters that come before An Bord Pleanála (they are not always readily evident);

    b. identifying where there are opportunities, within An Bord Pleanála's power and timescales, to redress any existing deficiencies in supporting materials or in earlier processes in order to preserve the integrity of the board's ultimate decision;

c. appreciating the increasing legal significance attached to *qualitative* analyses of important technical reports submitted to the board;

d. understanding that where there are recognised and established 'legal tests', such as in the area of justification for the 'screening out' of Appropriate Assessment under the Habitats Directive, that these legal tests are understood and observed within An Bord Pleanála in a consistent, substantive, evidence-based and non-formulaic way by An Bord Pleanála's inspector's and board members;

e. ensuring (from within the typically very extensive range of factors relevant to any planning-related decision) that no 'relevant consideration', in administrative law terms, is omitted;

f. ensuring (and reflecting appropriately in reports and final decisions) a robust, evidence-based evaluation and reasoning;

g. demonstrating a full understanding of the legal parameters relating to any departure from an inspector's recommendation;

h. ensuring that, promptly, every relevant national and CJEU decision, not just in the fields of environmental and environmental impact assessment law but in administrative law and public law generally, are incorporated into An Bord Pleanála's approach, systems and procedures for planning decision-making; and

i. incorporating into An Bord Pleanála's practices and into its executive and administrative systems, all of the new and emerging requirements for stakeholder communication from An Bord Pleanála and from applicants for development consent. For example, through observing the requirements for developers' project websites, departmental EIA portals and An Bord Pleanála's own website - where even 'minor' non-compliances in terms of language or omission of documents and information can taint the board decision.

177. Accordingly, having regard to the judgments examined in Appendix 2, there is merit in providing an *a priori* legal check (as set out above) to ensure, as far as is possible, that the decision-making process is robust from a planning judgment perspective and is legally correct. The recommendations address the process prior to the decision being made by: (a) providing for a process of comprehensive training, upskilling and use of templates for good decision-making based on best practice planning judgment and legal precedent by a Legal Services Support Unit; (b) if necessary, legal advice can be furnished by the Legal Services Support Unit to An Bord Pleanála, its inspectors and employees at the various points along the spectrum of decision-making; and (c) the provision of new Rules of Court will allow An Bord Pleanála, after having invoked steps (a) and (b) above, to consider, if necessary, whether it should obtain a determination from the Superior Courts if it considers that a question(s) of law arises on any matter with which it is concerned prior to making a decision.

<u>Recommendation 9</u>: [Medium-term / longer-term] An Bord Pleanála should establish a Legal Services Support Unit comprised of senior lawyers, research and administrative staff to provide such specialist legal support, training and templates for good decision-making based on best practice and legal precedent and ultimately, in the case of the Legal Services Support Unit, to provide legal advice at all points in the decision-making process.

<u>Recommendation 10</u>: [Medium-term] As part of the review of planning legislation by the Office of the Attorney General, consideration should be given to the making of Rules of Court to give effect to an expedited consultative case stated / referral process in the event that An Bord Pleanála decides to refer a question of law to the Superior Courts in accordance with section 50(1) of the 2000 Act.

C. Planning-led judgment based on a clear hierarchy of policy

<u>The Development Plan and Decision-making Context for An Bord Pleanála</u>

178. Earlier we observed that the material contravention process and related matters raised fundamental issues concerning (a) the correct legal approach to interpretation and (b) planning-led judgment based on a clear hierarchy of policy. We now wish to examine further the second of those two issues i.e. from a planning perspective and planning context.

179. Our analysis of legal challenges (in Appendix 2) indicated that in some cases the grounds pleaded raised issues of interpretation around objectives of the relevant local authority development plan where An Bord Pleanála placed more weight on strategic – mainly national or Ministerial - planning policies and guidelines than the provisions of development plans. The effect of the material contravention process as set out, for example, in section 37(2)(b) of the 2000 Act can result in a decision which is contrary to the provisions of a development plan which in turn has been adopted by the elected members. Where An Bord Pleanála grants a permission in these circumstances, it is required to indicate in its decision the main reasons and considerations for contravening materially the development plan.

<u>Changing National Planning Policy Context for Plans and Decisions</u>

180. Reflecting wider Government policies in relation to spatial planning, housing, transport and climate action focused around more sustainable urban development patterns, the Minister in

2018 published the 'Urban Development and Building Heights, Guidelines for Planning Authorities' ('the 2018 guidelines').

181. The 2018 guidelines called for reviews of local authority development plans and any blanket restrictions of building heights that had become prevalent in some areas, notably Dublin City. However, the 2018 guidelines also, in the interim and pending reviews of such plans in the light of more contemporary national planning policy, enabled approval of projects on wider material planning considerations even if the building height provisions of the development plan provided otherwise, under a statutory mechanism known as the Specific Planning Policy Requirement (SPPR).

182. As referred to earlier, section 9(6)(a) of the 2016 Act also provided that An Bord Pleanála could grant permission in respect of Strategic Housing Development (SHD) applications where the proposed development, or part of it, contravened materially the development plan or local area plan relating to the area concerned, except contravention of the zoning objective.

183. Implementation of the 2018 guidelines by An Bord Pleanála, especially in relation to SHD applications and before local authority development plans had the opportunity to catch up as it were, with national policies such as the National Planning Framework and the 2018 guidelines, has been both highly contentious politically and the subject of extensive litigation in the Courts.

184. Moreover, the Courts have leant towards a restrictive view of such decisions, inclining towards upholding development plan objectives by setting aside An Bord Pleanála SHD decisions where An Bord Pleanála has failed to provide sufficient reasons to justify the material contravention, or has failed to properly invoke the statutory power to grant planning permission in material contravention of the development plan. For example, in *Clonres CLG v An Bord Pleanála* [105] the High Court (Humphreys J.) quashed the decision of An Bord Pleanála to approve the SHD application for reasons including a failure to give adequate reasons why s. 37(2)(b)(i) of the 2000 Act - which permits a material contravention where the development is of "strategic or national importance"- applied as a basis for material contravention. The Court found that the SHD development was not strategic in the sense referred to in the legislation and noted that An Bord Pleanála's inspector considered that the proposal was not a development of strategic or national importance, and that in disagreeing with its inspector, An Bord Pleanála needed to set out more explicit reasons.

185. Also, in this case, An Bord Pleanála had relied on SPPR 1 of the 2018 guidelines as part of its basis for permitting a material contravention of the development plan. However, the Court

[105] [2021] IEHC 303

found that SPPR 1 was about development plans and not a basis for material contravention and that it was erroneous in law to rely on it as the basis for deciding to permit a material contravention.

186. In *O'Neill v An Bord Pleanála*[106] the court found that An Bord Pleanála had failed to set out the main reasons and considerations to justify a departure from the terms of the Dublin City Development Plan 2016-2022 (height and density) pursuant to section 9 (3)(a) of the 2016 Act and engaged in an inconsistent analysis of criterion relevant to the 2018 guidelines.

187. What can be taken from the above is that both the Legislature and the Courts recognise that making planning decisions that contravene a plan which a democratically elected Council makes and that the public shapes, requires the careful application of due process and a correct interpretation of the law. However, there are both practical and legal considerations to bear in mind in relation to the above and the trends in the case law.

Interpretation by An Bord Pleanála of Development Plans

188. First, the nature of contemporary development plans is such that they often run to hundreds of pages and many supporting documents, which may in turn contain hundreds of development objectives, policies and standards, thus raising the associated question around what may or may not be an objective of the plan, or a fundamental as opposed to a more minor departure from the development plan. In both professional planning assessments and in crafting board decisions, great care is needed in understanding the complexity of such documents and how to weigh up and balance their various contents and so that where significant departures are in contemplation, these are fully understood and acknowledged and documented in the process and statutory decisions and orders. As the review of case law set out in Appendix 2 confirms, to do otherwise will inexorably result in a legal challenge.

189. All planning decisions invariably involve the consideration of, and different weightings being applied to, a variety of factors as the legislation and professional planning practice and judgement requires. As the matters analysed earlier emphasised – the importance of informed and robust legal interpretation – it is critically important that An Bord Pleanála is seen to make the correct planning and legal calls.

190. It is therefore striking that in the 2000 Act, whereas section 34(2) sets out a very clear decision-making context for local authorities in deciding on planning applications, being restricted to considering proper planning and sustainable development, the provisions of the development plan, planning guidelines published by the Minister and so on, the statutory

[106] [2020] IEHC 356

basis for An Bord Pleanála in making its decisions is quite diffuse. Section 143 of the 2000 Act requires that An Bord Pleanála is to have regard to certain policies and objectives in performing its functions and section 37(2) of the 2000 Act allows it discretion in taking on board – or not as the case may be – the provisions of the development plan.

191. Accordingly, it is suggested that the legislative review being carried out by the Office of the Attorney General might consider a legislative amendment setting out a clear decision-making context for An Bord Pleanála and in doing the following matters may be considered:

    a. a key part of the planning judgment exercised by An Bord Pleanála is the assessment of the fit between a particular proposed development and the development plan and the fit of both with the wider legislative and policy context pertaining to planning and how, collectively, all such considerations lead to the conclusion as to whether or not the development proposed is or is not in accordance with the proper planning and sustainable development of the area;

    b. while taking a lead from higher level plans, strategies and guidelines[107] within the Irish planning system, the county or city development plan is: *"the principal planning strategy document for the development of a local authority area over the statutory time period of the plan. The development plan gives spatial expression to the physical, economic, social and environmental needs of the community in order to support and regulate new development, enhance valued assets and amenities and protect the environment"*.[108] In the Carrowmore Passage Grave case involving the development by the local authority of a landfill near the Neolithic grave site, the Supreme Court (McCarthy J.) described the primacy of the development plan in forming "…*an environmental contract*[109] *between the planning authority, the council and the community, embodying a promise by the council that it will regulate private development in a manner consistent with the objective stated in the [Development] plan, and further that the council itself shall not effect a development which contravenes the plan materially*";[110]

    c. the development plan is, therefore, a key policy context for decision-making by both planning authorities and An Bord Pleanála, and similar provisions apply in other administrations;

    d. in Scotland, section 25 of the Town & Country Planning (Scotland) Act 1997 provides that generally, unless material considerations indicate otherwise, planning decisions must be made in accordance with the local authority development plan. English planning law also requires that applications for planning permission be determined in accordance with the development plan, unless material considerations indicate otherwise;

[107] Such as the National Planning Framework (NPF) Regional Spatial and Economic Strategy (RSES) and guidelines published by the Minister for Housing Local Government and Heritage under Section 28 of the Planning Act.
[108] Development Plan Guidelines, Department of Housing, Local Government and Heritage, 2022.
[109] Emphasis added.
[110] *Attorney General (McGarry & others) v Sligo County Council* [1991] 1 I.R. 99.

e. as in the UK, the decision on a particular planning application can and must also take into account other material planning considerations, which could include important national planning policies of the Government that may have been introduced after the finalisation of a given development plan to address, for example, important new planning matters like flood protection, biodiversity or addressing the causes of, or implications of climate change;

f. local authority development plans and local area plans are generally obliged to reflect and appropriately apply, taking into account local conditions, the import of strategic planning policies at national and regional level, subject to the oversight of the OPR and ultimately the potential exercise of the power of Direction (under section 31 of the 2000 Act) by the Minister on the recommendation of the OPR. We note, for example, that at the date of preparing this report, almost half of the country's development plans have been assessed by the OPR with the remaining half to be completed by 2023, and around half of the assessed plans have been subject to recommendations of the OPR to the Minister to remedy significant departures of strategic policies or other defects in terms of internal coherence, etc.;

g. we anticipate therefore, given the enhanced level of strategic scrutiny of local authority development plans by the OPR and the Minister at plan drafting stage, the level and / or materiality of departures from strategic planning policies in the making of local development plan policies should abate, albeit that development plans will need to be kept up to date to reflect newer strategic policies that will inevitably come along after a given plan is adopted;

h. it also has to be recognised that within this strengthened oversight, reflecting the principle of subsidiarity, development plans are made by councillors of local authorities, democratically elected by the local communities. Working within a clear national and regional policy context, councillors should know what is happening on the ground and through their representation they reflect the hopes and aspirations of the community in (and of) the environment in which they live whilst also having regard to national and regional policy and legislative requirements;

i. it might therefore be assumed that development plans should be broadly consistent with strategic planning policies. However some caveats apply to this in relation to: (a) the issue of time lag between an important new national planning policy emerging and its reflection at development plan level, as opposed to a decision on a particular planning matter before An Bord Pleanála having to be made before a development plan is revised; (b) the fact that the oversight of the OPR is at a strategic level, may not delve into the minutia of a development plan, certainly as it relates to particular places or areas; and (c) the OPR's oversight has also been somewhat restricted given reliance on Ministerial guidelines issued under section 28 of the 2000 Act which has, in recent times, been challenged in the Courts;

j. therefore, while decisions of the Superior Courts have tended to indicate the primacy of the development plan or local area plan at the apex of Irish planning, which should inform every level of decision-making, broader legislative amendments in relation to local authority development plan-making processes and obligations aimed at a tightly integrated planning policy hierarchy would ensure that, to the greatest extent possible, there is broad cohesion between the various layers of the planning policy hierarchy and avoiding situations where An Bord Pleanála has to contemplate and assess competing or, worse, conflicting policies.

192. Taking account of the above, we consider that a consolidated legislative restatement of the decision-making context for An Bord Pleanála decisions should start from the premise that such decisions be generally consistent with the operative development plan or local area plan.[111] The scope for An Bord Pleanála to grant permission for a proposed development that would be in material contravention of the relevant development plan or local area plan should be limited, and the scenarios in which this would be permissible would include where it considers that there is a clear conflict between that provision and a written requirement of higher level plans, guidelines or Government policy, or where there are conflicting objectives within the development plan itself.

193. Accordingly, we consider that the following recommendation be considered:

<u>Recommendation 11:</u> [Medium-term / longer-term] Within the context of the review of planning legislation by the Office of the Attorney General, a consolidated legislative restatement of the decision-making context for An Bord Pleanála decisions should be considered, founded on the premise that subject to the exceptions below, such decisions should be generally consistent with the operative development plan or local area plan. The scope for An Bord Pleanála to grant permission for a proposed development that would be in material contravention of the relevant development plan or local area plan should be limited, and the scenarios in which this would be permissible would include where it considers that there is a clear conflict between that provision and a written requirement of higher-level plans or guidelines or Government policy, or where there are conflicting objectives in the development plan itself.

[111] The OPR would have to confirm that these were in broad conformity with relevant strategic national and regional policies, and where the Minister has or has not exercised their statutory powers of Direction to make good any deficiencies in that regard on the recommendation of the OPR, save where stated material planning considerations apply.

Summary of Findings and Recommendations

In conducting the first phase of the review process and in preparing this report, the OPR has sought to address matters of public concern, including concerns around the systems and procedures used by An Bord Pleanála in the delivery of its functions under the Act.

The conduct of this first phase was structured around four headings including the functions, organisation ethics and governance, and decision-making practices. Key areas of focus included:

- The availability of board members in making planning decisions including the filling of vacancies;
- The assignment of casefiles to board members and the manner of presentation of cases to the board;
- The operation of quorums of the board including reliance on two-person quorums;
- Systems of internal governance and oversight in relation to the management of actual or perceived conflicts of interest; and
- High levels of successful legal challenge to recent decisions of An Bord Pleanála and substantial legal costs arising.

Resulting from our analysis, we make 11 recommendations with a view to immediately addressing certain concerns within the current legal framework. We also identify improvements which may require further legislative amendment.

Key findings

Part 1 of this review makes a number of key findings for which actions and / or resolutions are set out in recommendations. A number of key findings are summarised below.

Our analysis highlights the urgency of ensuring that a sufficient number of Board members are available to effectively deliver An Bord Pleanála's decision-making function, including the use of the legislative mechanism for the Minister to appoint additional board members and to fill vacancies on a temporary basis in addition to implementing a proactive approach to the filling of upcoming vacancies.

Another crucial consideration has been the procedure for quorums of board meetings. In this regard we find that the reliance on two-person quorums is not appropriate for board decision-making going forward and the use of a five-person minimum for certain case types should be implemented.

Further, we support the Minister's commitment to reviewing the manner in which board members are nominated as currently provided for under the legislation.

The governance and management of conflicts and declarations of interest has been closely examined as part of this review and a number of measures are recommended including: the establishment of a new unit and the appointment of an Ethics Officer to manage and oversee this area; a review of An Bord Pleanála's Code of Conduct having regard to a set of guiding principles set out in this report; and improvements to An Bord Pleanála's case management and decision-making processes in identifying and managing actual or perceived conflicts of interest.

Finally, recommendations are made on foot of our findings in relation to An Bord Pleanála's decision-making process, including the preparation and adoption of a decision-making procedure based on a number of guiding principles set out in this report; changes to the way in which cases are presented at board meetings; the establishment of an in-house legal unit to support the decision-making of the board; and a number of additional legal considerations.

Continuation of Review

It is important to note that, whilst this report has been finalised and recommendations have issued, there remains a number of issues to which we must give further and more detailed consideration. Considerations under the second phase of the review process will include, but are not limited to, the following:

- The interface between the board members and planning inspectorate of An Bord Pleanála;
- Departing from inspector's recommendations in board decisions; and
- Further consideration of An Bord Pleanála decision-making processes and procedures including associated guiding principles.

These issues require more time for consideration under the second phase, rather than being addressed in this first phase, as they must be informed by detailed analysis of data on An Bord Pleanála decision-making activity in recent years, and by engagement with staff and board members of An Bord Pleanála, to fully understand the issues at hand and to make recommendations which are implementable.

As committed to under the Terms of Reference of this review, the second phase will be delivered over the coming months, to conclude with the publication of a second report, including recommendations, by end-November 2022.

List of Recommendations

Under the first phase of this review, we issue the following 11 recommendations:

Recommendation 1: [Immediate] The Minister for Housing, Local Government & Heritage should initiate a process in relation to the powers available, under sections 104 and 108 of the 2000 Act, to appoint a number of ordinary members to the board of An Bord Pleanála on a temporary basis of up to 12 months each. Sufficient temporary appointments should be made to facilitate the board to operate on the basis of having more than 10 members available at all times over the next year.

Recommendation 2: [Short-term] While noting the fact that underpinning legislation will be necessary, a proactive system of forward-filling of vacancies should be put in place as a matter of urgency to ensure that, as board members vacate their positions, replacements are ready to take up duty immediately. This would effectively comprise a process of putting persons on a panel. Specific confirmation of impending vacancies and the appointment of replacements should be incorporated into the annual Performance Delivery Agreements between An Bord Pleanála and its parent department.

Recommendation 3: [Immediate] The practice of utilising two-person quorums of the board to make decisions must be ended and should be formally effected by a resolution of the board of An Bord Pleanála. Furthermore, to ensure the practice is removed with finality, the Minister should give consideration to the permanent removal of the relevant provisions of subsections 108(1A) to 108(1D) of the 2000 Act by way of legislative amendment.

Recommendation 4: [Short-term] It should be directed that, where the board of An Bord Pleanála is at full-complement, a minimum quorum of five board members would be required to make decisions on the following categories of planning cases: (i) Strategic Housing Development; (ii) Strategic Infrastructure Development; (iii) Large Scale Residential Development; and, (iv) any appeals concerning the making of or amendments to Strategic Development Zones.

Recommendation 5:

(a) [Medium-term] An Bord Pleanála should establish a new Governance, Ethics & Compliance Unit, to develop and oversee its ethical framework. An appropriately experienced senior individual, who would report directly to the Director of Corporate Affairs and the Chairperson, should be appointed as Ethics Officer to lead the new Unit.

(b) [Short-term] In reviewing and updating its current Code of Conduct, An Bord Pleanála should provide sufficient unambiguous guidance (based on guiding principles identified in this report) to allow all individuals consider any matters that could influence their impartiality, or the perception of their independence, in respect of the duties they perform.

Recommendation 6: [Short-term] Noting that a process has recently been put in place, An Bord Pleanála should continue to develop its procedures for ensuring that board members are informed in advance of the key details of cases and are thereby aware of all potential conflicts of interest in advance of decision-making. This more-rigorous procedure should be formalised into an adopted written procedure.

Recommendation 7: [Short-term] In accordance with section 111(5) of the 2000 Act, it is recommended that An Bord Pleanála adopt a written decision-making procedure informed by the guiding principles set out in Part 5 of this report.

Recommendation 8: [Short-term] An Bord Pleanála should cease the general practice of a board member being responsible for presenting a casefile at a board meeting. This practice should be replaced by a process whereby a casefile shall be allocated to an inspector or an appropriately delegated person, who will present the relevant casefile details of the inspector's report and associated recommendations to the board meeting.

Recommendation 9: [Medium-term / longer-term] An Bord Pleanála should establish a Legal Services Support Unit comprised of senior lawyers, research and administrative staff to provide such specialist legal support, training and templates for good decision-making based on best practice and legal precedent and ultimately, in the case of the Legal Services Support Unit, to provide legal advice at all points in the decision-making process.

Recommendation 10: [Medium-term] As part of the review of planning legislation by the Office of the Attorney General, consideration should be given to the making of Rules of Court to give effect to an expedited consultative case stated / referral process in the event that An Bord Pleanála decides to refer a question of law to the Superior Courts in accordance with section 50(1) of the 2000 Act.

Recommendation 11: [Medium-term / longer-term] Within the context of the review of planning legislation by the Office of the Attorney General, a consolidated legislative restatement of the decision-making context for An Bord Pleanála decisions should be considered, founded on the premise that subject to the exceptions below, such decisions should be generally consistent with the operative development plan or local area plan. The scope for An Bord Pleanála to grant permission for a proposed development that would be in material contravention of the relevant development plan or local area plan should be limited, and the scenarios in which this would be permissible would include where it considers that there is a clear conflict between that provision and a written requirement of higher-level plans or guidelines or Government policy, or where there are conflicting objectives in the development plan itself.

Appendix 1: Terms of Reference

Terms of Reference for the Review by the Office of the Planning Regulator of certain systems and procedures used by An Bord Pleanála

Consequent upon the provisions of section 31AS of the Planning & Development Act 2000, as amended ('the 2000 Act'), the Office of the Planning Regulator ('OPR') considers that it is necessary and appropriate to conduct a review of certain systems and procedures used by An Bord Pleanála in relation to the performance of its functions under the 2000 Act as follows:

1. The review will examine the robustness and effectiveness of decision-making practices, organisation of work, governance arrangements, including in relation to planning case-file handling, within the Board of An Bord Pleanála ('the Board') in the discharge of its statutory functions in compliance with the 2000 Act including:

    (i) the decision-making practices of the Board having regard to its functions pursuant to the 2000 Act from a governance, procedural and legal perspective including *inter alia*:

        (a) the process of issuing reports with recommendations and subsequent directions and decisions;

        (b) procedures for governance, identification, recording and monitoring of potential conflicts of interest in the course of the Board's decision-making;

    (ii) the organisation of the work of An Bord Pleanála, including *inter alia*:

        (a) the allocation and assignment of case-files:

            – the processes for allocation of case-files to individual Board members for the purposes of presentation for decision at Board meetings, including measures to ensure balance of representation across members in decision-making and consistency in decision-making. This part of the review may include an examination of recommended procedures in relation to whether allocations should be made on the basis of a randomised rotation or otherwise;

            – the management of the process of assignment of case-files to inspectors for the purposes of preparing and conveyancing of planning reports and assessments for consideration by Board members in their decision-making functions, including appropriate procedures for raising queries or addressing errata by either or both management or the Board that may arise in relation to such reports or any amendments of reports in this context;

        (b) the performance of the divisional work of the Board:

            – the performance of the Board's functions in divisions and quorums, pursuant to section 112 of the 2000 Act, and arrangements for

convening meetings with varying quorums of Board members, including the appropriate procedure for the chairing such meetings;

(iii) any other systems in place to appraise the effectiveness of performance at Board level, compliance with codes of conduct and measures to uphold public confidence in the Board's transparency, impartiality and fairness;

(iv) any further matters which the OPR considers relevant in the context of strengthening procedures in relation to codes of practice, avoidance of any perception of conflicts of interests, systems to uphold public confidence and the efficient discharge of An Bord Pleanála's statutory planning functions.

2. The review shall be in two parts. The review shall be carried out by the OPR as follows:

   (a) **Part 1** will, under Director of Planning Reviews of the OPR Gary Ryan, be led by Conleth Bradley SC with Paul Cackette former head of the Scottish Government's Legal Directorate and Chief Reporter of the Directorate of Planning & Environmental Appeals and John McNairney former Chief Planner to the Scottish Government;

   (b) Paul Cackette, John McNairney, Gary Ryan and Conleth Bradley SC shall be appointed as authorised persons by the OPR pursuant to section 31AS(2) and section 31AW of the 2000 Act;

   (c) **Part 1** of the review shall be completed on or before **the 3rd October 2022**;

   (d) **Part 2** of the review will, under Director of Planning Reviews of the OPR Gary Ryan, be undertaken by Paul Cackette former head of the Scottish Government's Legal Directorate and Chief Reporter of the Directorate of Planning and Environmental Appeals and John McNairney former Chief Planner to the Scottish Government. The review under Part 2 shall include the further and ongoing regulatory supervision by the OPR of An Bord Pleanála pursuant to the provisions of section 31AS of the 2000 Act in reviewing generally the systems and procedures used at organisational level within An Bord Pleanála and also the future work programme of the OPR;

   (e) **Part 2** of the review shall be completed by the **30th November 2022**.

3. In the carrying out of **Part 1** of the review and in making recommendations on the matters set out at paragraphs 1(i), 1(ii), 1(iii) and 1(iv) consideration will also be had in particular to the following:

   (a) the need to progress measures aimed at restoring public confidence in An Bord Pleanála without delay;

   (b) the further and ongoing regulatory supervision by the OPR of An Bord Pleanála in reviewing generally the systems and procedures used at organisational level within An Bord Pleanála and the future work programme of the OPR pursuant to the provisions of section 31AS of the 2000 Act which comprise **Part 2** of the review and whether any (or some) of the matters at paragraphs 1(i), 1(ii), 1(iii) and 1(iv) should be reported on under **Part 2** of the review;

(c) the report in relation to Part 1 will contain a summary of the reasons why it has been decided that paragraphs 3(b) apply to any (or some) of the matters set out in paragraphs 1(i), 1(ii), 1(iii) and 1(iv) and are addressed in **Part 2** of the review.

4. Having regard to (a) the statutory powers of the OPR and authorised persons to access information, records or documents relating to the performance by An Bord Pleanála of its functions (b) the requirement of An Bord Pleanála to co-operate and comply with any request by or on behalf of the OPR in relation to all or any of the matters which are the subject of the review or examination, and (c) the time frames for this review and reports, the Chairperson of An Bord Pleanála will immediately appoint such person or persons at senior management level to arrange for the communication of information, records or documents as requested within the time frame set out by the OPR, the Director of Planning Reviews or authorised persons.

5. Further and in accordance with section 31AW of the 2000 Act, the authorised persons may also engage directly with An Bord Pleanála employees and Board members, or through any other channels or any other individual deemed appropriate as determined by the Director of Planning Reviews of the OPR.

6. The OPR shall send a draft of the report of **Part 1** of the review, together with any recommendations it makes, to the Minister for Housing, Local Government & Heritage and to An Bord Pleanála by the **19th September 2022**. Having regard to the urgency associated with the finalisation of these matters, the Minister for Housing, Local Government & Heritage and An Bord Pleanála may make submissions or observations to the OPR on the draft report by the **26th September, 2022**. The OPR shall review any submissions or observations received before finalising the report and any proposed recommendations therein, and shall by, or before the **3rd October 2022** (a) send a copy of the report to the Minister for Housing, Local Government & Heritage and to An Bord Pleanála (b) publish, or cause to be published, the report on the website of the OPR and (c) may send a copy of the report to such other persons as it considers appropriate in the circumstances.

7. The OPR shall send a draft of the report of **Part 2** of the review, together with any recommendations it makes to the Minister for Housing, Local Government & Heritage and to An Bord Pleanála by the **14th November 2022**. Having regard to the urgency associated with the finalisation of these matters, the Minister for Housing, Local Government & Heritage and An Bord Pleanála may make submissions or observations to the OPR on the draft report by the **21st November, 2022**. The OPR shall review any submissions or observations received before finalising the report and any proposed recommendations therein, and shall by, or before the **30th November 2022** (a) send a copy of the report to the Minister for Housing, Local Government & Heritage and to An Bord Pleanála (b) publish, or cause to be published, the report on the website of the OPR and (c) may send a copy of the report to such other persons as it considers appropriate in the circumstances.