



**Submission to review of the planning provisions regarding Strategic Housing
Developments**

July 2019

Green Party/Comhaontas Glas

1. Introduction and overall context

The Planning and Development (Housing) and Residential Tenancies Act 2016 introduced a new process to fast-track planning applications for large developments (100 or more housing units, or student accommodation of more than 200 bed spaces) straight to An Bord Pleanála, bypassing local authorities. This process was intended to run for three years – until the end of 2019 – with the option of extending that period by a further two years until the end of 2021.

This was introduced to address perceived delays in the granting of planning permission for housing developments, which it was said were contributing to delays in house starts. In the Dáil in advance of the passing of the legislation, Minister Murphy emphasised that the purpose was to provide “greater certainty for developers in terms of the timeframes within which proposals for such developments can be determined in the planning system, while also fully respecting the statutory requirements for consultation and having regard to observations submitted.”

[\[https://www.oireachtas.ie/en/debates/question/2019-04-11/213/\]](https://www.oireachtas.ie/en/debates/question/2019-04-11/213/)

We raised concerns during the Oireachtas debates on this issue about the bypassing of local authorities, and local communities, from the planning process – as well as worries that this fast-track planning process would result in a greater number of low-quality applications, which were more likely to be refused by An Bord Pleanála due to the lack of a vetting process through the local authority planning department. The statutory requirements for consultation have not been adequately respected and the planning process is being undermined.

If the fast-track process is to be renewed, there must be strong arguments that it is having a very positive impact on house building across the country. We do not believe this to be the case, and for the reasons outlined below, we recommend that the fast-track process not be renewed past the end of this year.

2. Implementation of the fast-track process

The implementation of the Strategic Housing Development process since it was commenced in June 2017 has seen a number of issues:

Continued delay in commencements

The delay in building commencements seems to be an ongoing issue which this process has not adequately addressed, despite being put forward by Government as a central reason why this process was needed.

Recent media reports have shown that of the 27 Strategic Housing Development applications which had been granted permission, only 10 of them had begun construction by February of this year. Further, in one of those 27 cases the land was subsequently put up for sale (and continues to be on the market).

There are justifiable concerns that this process is being used by some developers to get quick planning permission, which then increases land values – this would suggest that the new procedure is unnecessary and was more driven by the preferences of developers rather than a need to facilitate large scale housing development.

While the planning process has been truncated, with attendant limitations on the rights of the public and elected representatives, there is no corollary obligation on the developers to then proceed in a timely fashion with the development.

Strategic Housing Development housing is targeted at narrow population band

While this process may have encouraged large-scale development, in Dublin at least it has created a significant bias in the use of development for very high density housing which is targeted at a narrow band of the population – this is primarily the provision of small, high-end apartments which are not suitable for people with families.

Given the current crisis in family homelessness – where one in every three people of the more than 10,000 people homeless in Ireland today is a child – the provision of housing which is family inclusive is desperately needed. This includes an emphasis on providing three-bedroom units and local childcare facilities.

As is currently stands, the Strategic Housing Development process seems to have had the result of fast-tracking primarily non-family friendly housing, which is a very worrying policy in the context of the current housing and homelessness crisis.

With the alteration in development guidelines since the passing of the 2016 Act, the context of development has altered, and the recent large-scale “co-living” proposals in the news are evidence of this. There has also been speedy development of student accommodation without attendant development of public services in Dublin, where the homeless figure is approximately 4,000 people, including approximately 2,800 dependents. **[May figure - <https://www.thejournal.ie/homeless-5-4045810-May2018/>]** If this is coupled with an on-going preference for high density housing, through extension of this legislation, there will be damage done to the fabric of the city with a lop-sided development of short-term or transitory living spaces and no catering for families or other types of living.

Given the developer driven approach that is at the heart of the Strategic Housing Development process, the ability to provide social and affordable housing is undermined. With recent reports suggesting that house building is starting to stall as the finished houses are too expensive to sell, Strategic Housing Developments must be re-evaluated in terms of accessibility for people who have need of them.

Strategic Housing Developments in the Courts – recent caselaw

On 10 July 2019 Mr Justice Garrett Simons delivered a decision quashing a planning permission granted by An Bord Pleanála, made pursuant to the special statutory regime governing applications for “strategic housing development”, for more than 200 homes in Blackrock, Co Dublin. Southwood Park Residents Association challenged the board’s permission for the Cairn Homes development on 7.9 acres on the grounds of Chesterfield House, a protected structure, on Cross Avenue. The judgment addresses the circumstances, in which it is legitimate to treat a breach of the public participation requirements of the planning legislation as de minimis.

An Bord Pleanála purported to grant planning permission for a large-scale residential development. Under the “strategic housing development” planning regime the applicant for planning permission, i.e. the developer, must make a copy of the planning application available for inspection on a dedicated website. One of the documents submitted as part of the planning application had not been posted online. The omitted document contained information relating to the potential impact of the proposed development on various species of bat which are protected under EU law.

None of the parties were aware of this error until *after* the judicial review proceedings had been instituted. On learning of the error, the Applicant sought to amend its statement of grounds, and the Developer conceded the omission and submitted that the planning permission should be set aside on that narrow ground. It would not then be necessary for the court to consider the *other* grounds of judicial review.

However, An Bord Pleanála adopted what the court noted was a surprising approach to the proceedings. The Board conceded that there has been a breach of the requirements of the regulations, but contended that the breach was *de minimis* and does not affect the validity of the decision to grant planning permission.

The Court concluded that the breach of the requirements of the regulations was fatal to the validity of the planning permission. The Court noted:

“The regulations could not be clearer in their terms, and the failure to post the correct version of the document online represented a breach of those regulations. An Bord Pleanála’s reliance on case law in relation to de minimis breaches is misplaced. The breach in this case cannot be characterised as trivial, technical or insubstantial”

The Court found that the effect of the breach was twofold.

“First, it undermined public participation in the planning process in that members of the public, including the Applicant, did not have an opportunity to consider and make submissions on the survey results and mitigation measures relied upon by the Developer. Secondly, it distorted the interpretation of the planning permission itself. One of the conditions of the planning permission had required that the mitigation and monitoring measures which had been submitted as part of the planning application be carried out in full. A member of the public who examined the online version of the planning application would only have sight of an earlier version of the mitigation measures. This has the potential to undermine the right of access to the courts within the eight-week time period allowed under section 50 of the Planning and Development Act 2000 (“the PDA 2000”).

Mr. Justice Simons, when practicing as a Senior Counsel at the Bar of Ireland was acknowledged as the preeminent expert in planning law, and is the author of *Planning and Development Law* (Round Hall Press, 2007). This judgement demonstrates in the first instance, the surprising approach of Bord Pleanála, a state body, to a breach of the planning legislation. While An Bord Pleanála was seeking to have the breach regarded as so minimal that it should not affect the overall grant the Court found *“The breach in this case cannot be characterised as trivial, technical or insubstantial”*. Secondly the Court noted that such a

failure to strictly comply with the legislation was not a minimal breach that could not be overlooked as it deprived the public from having the opportunity to consider and make submissions on the results of the survey carried out. The application for planning permission had been made pursuant to the special statutory scheme established under the Residential Tenancies and Planning and Development (Housing) Act 2016 (*“the PD(H)A 2016”*). This Act allows for the making of an application directly to An Bord Pleanála in the case of “strategic housing development” as defined, with no initial application having been made to the local authority. There is no appeal from the Board’s decision, only the availability of Judicial Review, relating to the lawfulness of the decision and there is less opportunity for public involvement in the process. The judgement evidences the inherent risks in a planning process where there is no local authority involvement and limited involvement of members of the public, and the decisions are being fast tracked. The lack of publication of the bat survey was not picked up by either party prior to the initiation of proceedings – and may never have been picked up if the matter was not subject to judicial review on other grounds despite the deficiencies in the process being described by a planning expert and High Court Judge as not being trivial or technical or insubstantial.

In another recent decision of the High Court in *Heather Hill Management Company clg & anor -v- An Bord Pleanála & anor Simons J.*, overturned a decision of An Bord Pleanála granting permission for 197 units in Bearna Co. Galway, on the basis that (i) there was a material contravention of the Development plan, in that the Development contravened an objective of the Dev Plan regarding inappropriate development in flood risk zones, and (ii) that ‘mitigation measures’ proposed by the Developer in order to comply with the Habitats Directive requirements were not sufficient grounds for the Bord to conclude that it did not need to carry out a Stage 2 screening assessment as required by the Directive. The Court referred to the Bord’s failure to comply with the provisions of the legislation regarding material contravention of the Development Plan and its mistaken conclusion that the development was not a material contravention of the Plan.

This suggests a significant ambiguity in the legislation on the fundamental issue of contravention of the Development Plan, which is the cornerstone and reference point of every local planning decision. The decision illustrates the manner in which the Development Plan can be by-passed by developers and by an Bord Pleanála, which has serious consequences for the entire system of planning and development and the proper role of local planning authorities.

Provision of documentation

The fast-track process has proven to be one that shuts out local participatory democracy from the planning process. The expertise of planning departments is not adequately utilised (the local authority can only submit a report on the application to An Bord Pleanála), and local communities are bypassed by not being able to submit.

This is further hampered by the way in which information is distributed for Strategic Housing Development applications. As opposed to uploading documentation online on a given application as it is submitted to the local authority (as occurs in many local authorities), no

documentation is provided on the An Bord Pleanála website while an application is under consideration. This means that 100% of the documentation on any given application is provided by the developer themselves, in the form of a link to their own website for the given development provided within the An Bord Pleanála list of current applications. As a result of this, developers control the entirety of the documentation and information given out on a particular application.

This issue is unique to Strategic Housing Development applications, as when appeals on local authority grants or refusals of planning permission are made to An Bord Pleanála they include reference to the planning application which is being appealed. Following this planning application allows interested parties to view all of the documentation with the original local authority, and so in effect to trace the history of the planning application before it reaches An Bord Pleanála. Due to the fact that Strategic Housing Developments are not considered by the local authority, this is not possible in these cases.

This abdication of responsibility for information to the party who proposes the development is inconsistent with any form of objective scrutiny. The façade of an observation process is retained as a fig-leaf for a process that is almost entirely in the hands of the developer, who decides when time-lines start for permission, but are not obliged to ever build what they are permitted to. Coupled with a truncated time for review, the result is that the developer now blows the whistle, writes the rules and decides when to throw in the ball on the pitch of land development. Unable to see other submissions, the general public does not even know who they are playing against.

Local community engagement

Local residents, community groups, or local organisations don't have access to the submissions made by other persons or bodies when seeking to inform their own submissions. In some cases, this information is vital – for example, in relation to the Greenacres site on the Upper Kilmacud Road, Dublin 14, local residents were not able to view the submissions made by the Airfield Trust, which is located directly beside the site and whose views on the development many residents and local organisations would be interested to see, given the very specific and particular nature of the Airfield Trust and its proximity to the development.

Also, the general quantity of documentation provided (given that these are all, by their very nature, large development applications the number of attendant documents usually runs well into the hundreds of pages) combined with the very short timeframe for submissions (little more than a month from date of application) allows very little time for local residents and community groups to process and decipher what can be incredibly detailed and technical documents. And as the manner in which documentation is provided is by the developer rather than in the format of their local authority (which most community groups would be used to and would have experience dealing with), means that there is no standardised format for the filing of this information, and that developers can over-provide

technical information in a labyrinthine format in order to render the application harder to engage with.

In non- Strategic Housing Development planning applications, the local community has two options for assistance in engaging with the specifics of an application: 1) engaging with submissions from other parties (which, as outlined above, is not available in these scenarios); and 2) engaging with local representatives (who, as outlined below, have been given inadequate engagement on such applications). As neither of these avenues are as effective as they would be in other non-Strategic Housing Development applications, many local community groups are turning to employ planning consultants from their own pocket in order to engage with the volume of documentation provided by developers within such a short turn-around.

Engagement by local elected representatives

Similar to this issue outlined above, it is very difficult for Councillors to properly represent the views of their constituents if they are unable to access submissions made by local residents or community organisations if these submissions are not supplied. Again, this is an issue particular to Strategic Housing Developments as with all other planning applications the documentation is readily available from the local authority.

The process by which Councillors are able to give their views, and the views of their constituents, is not currently adequate in providing a real role for elected local democracy on these issues.

When Strategic Housing Developments are submitted, a presentation is made to Councillors about the application. The Councillors then make oral submissions to the local authority planners, which are then summarised and submitted along with the Chief Executive's Report to An Bord Pleanála on the application.

However, in a number of instances, these presentations and meetings for oral submission have been scheduled after the closing date for submissions on the application being discussed. This means that even if a Councillor gets clarity on a particular issue from the planning department, there is no point relaying that back to her constituents, as the deadline for submissions has already passed.

Whether this is constitutional remains to be seen, but by only being allowed onto the pitch after the final whistle, elected local representatives are deprived of necessary input into the development of the areas that they represent.

Furthermore, the presentations are made to Councillors at the first Area Committee meeting following the receipt of application for a Strategic Housing Development. This in effect can leave Councillors with only a few days to read and evaluate the documents, thus undermining their ability to thoroughly analyse the application.

This, combined with the issues around provision of documentation outlined above, make this entire process of engaging with local elected reps wholly inadequate. In order for such engagement to be meaningful and informed, at a minimum Councillors must have access to submissions made and an extra period must be allowed for Councillors to make written

submissions to An Bord Pleanála on foot of the meeting with planning officials, even if the submission period has ended.

3. Conclusion

The Green Party recommends that the Strategic Housing Development process not be extended past its current term to the end of 2019. Ostensibly, these changes were implemented to alleviate the housing crisis. But the Act has served to reduce the scrutiny of developments by limiting the process and reducing time and information in the public domain, and has not resulted in the increase of homes that was promised.

It has not been successful to the degree anticipated by Government in kick-starting the building of more houses, and where it has facilitated building the emphasis has been on housing units which are not designed for use by families, thus only appealing to a narrow band of the population.

Further, the lack of transparency in the process compared to local authority planning processes, and the difficulty of engagement felt by the local community and local elected representatives have caused great difficulty for both effective planning and community engagement – two things which should be at the heart of any and all development.

This is an issue better addressed by adequate resourcing of local planning authorities than renewal of this fast-tracking process.

In the event that the Government does decide to extend the Strategic Housing Development process until the end of 2021, serious changes need to be made to the process in terms of local and community engagement and obligations on developers, as outlined above.