Speeding up Strategic Infrastructure Developments? New Measures Proposed

From 26 February 2018 onwards, the first of a number of proposed new measures aimed at combatting delays arising from Court challenges to Strategic Infrastructure Developments (or “SID”) will come into effect. These proposals are timely, with the National Planning Framework published on 16 February, alongside the Government’s capital spending plan for the next decade.

The announcement of the proposals also comes against the backdrop of several years of heavy activity in terms of judicial review challenges to planning decisions, with a total of 170 judicial review applications having been taken against An Bord Pleanála in the last five years. In terms of SID applications, the Board granted permission for seven private SID projects in 2016, and four of these were judicially reviewed. The proposed Apple Data Centre was the subject of a judicial review challenge, although its substation (which was SID) was not. Data centres are not currently classed as SID. However, the Planning and Development (Strategic Infrastructure) (Amendment) Bill 2017 was introduced on 26 October 2017 and proposes that data centres which are of “significant economic importance” to the local authority area they are located in will now be classed as SID.

The Government’s proposals fall under three headings:

» Reduced time limits to bring judicial review proceedings for SID;
» Criteria to assist the Courts in determining whether an applicant has ‘sufficient interest’ to bring a judicial review;
» New court rules to accelerate the legal process.

REDUCED TIME LIMITS

The Government confirmed that existing time limits for bringing judicial review applications in respect of certain planning decisions could be reduced from eight weeks to four weeks. This is significant in particular when contrasted with England and Wales, where the time limit for bringing a judicial review of a planning decision is six weeks from the date of the decision and Northern Ireland, where the time limit is three months. The proposed four week time period for SID would provide welcome certainty to developers wishing to break ground more quickly on a project, confident that the decision was free from judicial challenge. However there have already been indications from interest groups, including An Taisce, that the proposed reduction in time limits may in itself be challenged in the High Court.
**SUFFICIENT INTEREST**

Currently, any party seeking to judicially review a planning decision, must demonstrate that it has a ‘sufficient interest’ in order to be allowed to bring a challenge. The term ‘sufficient interest’ is not defined in the Planning Acts, and has been the subject of discussion in a number of judicial review cases, most recently before the Supreme Court in *Grace & Sweetman v. An Bord Pleanála*. The Supreme Court found that participation in the planning process undoubtedly confers an entitlement to pursue a legal challenge, but that a person may have standing without participating if they have ‘sufficient proximity’, having regard to:

(a) the nature of the development, and
(b) any amenity in the location of the development (e.g. if the land is protected on environmental grounds such as an SPA or SAC) which might potentially be impaired.

The Government has proposed that it will set out criteria in legislation to assist the Courts in determining whether a party has ‘sufficient interest’. It has been suggested that an individual will have to show that the proposed development directly impacts them in order to bring a Judicial Review challenge. It has also been proposed that there will be special rules for NGOs, who may now have to prove that they are not-for-profit, are active in the environmental sphere and have been set up for more than three years in order to have standing. This would be a change to the current position, where they only have to demonstrate that they have been pursuing the aim of environmental protection for the 12 month period preceding the application.

**NEW HIGH COURT PRACTICE DIRECTION**

In tandem with the Government’s announcement, the High Court published a new Practice Direction for judicial review challenges of SID decisions. High Court Practice Direction 74 comes into effect on 26 February 2018 and provides that:

» Mr Justice Barniville has been assigned to hear all SID judicial review leave applications, which should assist in providing consistency in decision making;

» all papers in support of the application are to be lodged the Monday before the leave application (which will be heard on a Thursday), which will allow Mr Justice Barniville an opportunity to fully consider the application in advance;

» if the leave application is successful, directions will be given by Mr Justice Barniville to ensure a “fair and expedient hearing of the matter”, which it is hoped will allow the case to progress to hearing more quickly, as has been the case for SID judicial reviews granted entry into the Commercial List.

**WHAT’S NEXT?**

The proposals are very much in their infancy, and certainly, as proposed, they are not without their potential difficulties and it is clear that they are already under careful scrutiny from interest groups. However, any proposals that assist with ensuring SID can progress through the Court system more smoothly and expeditiously, without hampering the right of wide access to justice, are to be welcomed.

In the meantime, we will continue to monitor the progress of these proposals and the workings of the new SID leave procedure.

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