EVERSHEDS SUTHERLAND

Strategic planning

New measures to prevent delays to key building projects

February 2018

The Cabinet this week discussed and approved a number of key changes to the judicial review process in respect of strategic infrastructure planning decisions.

The proposed measures aim to allow the development of capital infrastructure more promptly and attract further investment in strategic infrastructure projects by reducing the time limit within which to bring a judicial review challenge and by increasing the threshold for interested parties to meet in order to be able to bring such a challenge.

The Strategic Infrastructure Act allows planning applications for certain types of major projects such as national roads, large hospitals and housing developments of more than 100 properties to go straight to An Bord Pleanála. This means there is not the usual two-stage process whereby the application is made to the local planning authority with a right of appeal to An Bord Pleanála. The validity of a decision taken by An Bord Pleanála may only be questioned by making an application for judicial review.

Proposed changes

The proposed legislation will reduce time limits for certain planning applications and reduce, from 8 weeks to 4 weeks, the period within which a party may bring a judicial review challenge to a strategic infrastructure project.

The government also intends to introduce stricter rules around the eligibility of individuals to seek judicial review in respect of strategic infrastructure planning decisions and to set out criteria in the proposed legislation to assist in determining whether an applicant has a sufficient interest in the planning application.

The new rules are also likely to restrict the type of organisations that can challenge a decision to grant planning permission for strategic infrastructure projects. It is envisaged that NGOs seeking to make such applications will have to demonstrate that they are 'not for profit' organisations that are active in the environmental field and have been in existence for more than three years. The requirement to have been in existence for more than three years will prevent shell companies being incorporated for the purposes of launching judicial review challenges.

The legislation is hoped to have the effect of reducing the number of judicial review applications in respect of planning decisions which have been on the increase in the past number of years. If the proposed legislation is adopted, it will be a positive development which, it is hoped, will lead to further multinational investment in major infrastructure projects.

Planning and Development (Strategic Infrastructure) (Amendment) Bill 2017

The Cabinet's approval of these measures follows the introduction of the Planning and Development (Strategic Infrastructure) (Amendment) Bill 2017 (the "**Bill**") on 26 October 2017. The purpose of the Bill is to amend the Planning and Development Act 2000 to allow data centres and other key IT infrastructure to be included in the criteria for access to the Strategic Development planning procedure.

The Bill was introduced following the judgments handed down by Mr Justice McDermott on 12 October 2017 rejecting two judicial review challenges[1] in respect of Apple's proposed data centre in Athenry. Apple's reluctance to commit to the development of the planned data storage centre in Athenry as well as concerns that further multinational investment in this sphere will be deterred, appear to have provided an impetus for the government to address the delay and uncertainty associated with the current planning and judicial review system.

Practice Direction HC74

The courts have also introduced measures to tackle delays with judicial review applications with the Courts Service issuing a new Practice Direction HC74. The direction states that from 26 February 2018 all applications for leave to apply for judicial review in respect of permissions or decisions concerning strategic infrastructure developments must be made to Mr. Justice Barniville.

Should leave be granted to the applicant to apply for judicial review, Judge Barniville will give all necessary ancillary directions with a view to ensuring a fair, just and expeditious hearing of the matter. The parties may be required to lodge written submissions in advance which would further reduce the delays associated with lengthy court hearings.

Notice party developers will not have an automatic right to be heard on the application for leave. It remains to be seen how Judge Barniville will develop his practice in relation to granting leave and stays, however, one would expect that more leave applications will be put on notice and fewer interim stays will be granted.

Having one judge who is experienced in this specialised area dealing with these judicial review applications should lead to greater efficiency and a more consistent screening process for granting leave.

The proposed four week period will require applicants seeking to challenge a decision to act promptly if they are to meet the deadline. The proposed legislative changes and new procedure are a positive development as they will streamline the judicial review process for strategic infrastructure projects and strike a fair balance between the interests of the parties engaged in these types of judicial review proceedings. The measures will be welcomed by developers and multinationals in the data centre industry, in particular, as they are likely to reduce the number of court challenges to certain building projects which, may otherwise, result in stalling construction.

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1 *Sinead Fitzpatrick and Allan Daly v An Bord Pleanála* 2016 No. 754 JR; *Brian McDonagh v An Bord Pleanála* 2016 No.758 JR

http://www.evershedssutherland.com/documents/global/ireland/Desktop/CMS%20upload/athenry-application-may-finally-bear-fruit-for-apple.pdf

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