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Stop the Clock

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Stop the Clock!

On 18 April 2024, the Select Committee on Housing, Local Government and Heritage signed off on an amended version of the Planning and Development Bill 2023 (the Bill). The amended Bill is available online.

A new section 173 would "stop the clock" on every planning permission that will be subject to a judicial review under Part 9 of the Bill, once enacted. The Bill will make it easier and less expensive to commence a judicial review of a planning decision under Part 9.

A Part 9 JR would be commenced by lodging the necessary paperwork in the Central Office of the High Court, within the applicable time-limit, and the applicant would not be required to apply to the Court for "leave" to judicially review the planning decision.

Section 173 would suspend both the legal effect and the duration of a planning permission subject to a Part 9 JR. The suspension would remain in place until the proceedings are finally concluded, that is, after all potential appeal opportunities are fully exhausted.

On the plus side, therefore, section 173 will prevent permissions from 'withering' while judicial review proceedings are ongoing. The 'clock' will be stopped, and the developer will not lose the benefit of the permission merely through the passage of time.

Section 173 will also prevent the unfortunate consequences of a development proceeding on foot of a permission, only for that permission to be subsequently quashed by the Court, a situation which can be challenging to unpick. Section 173 would therefore serve an important function in preserving the *status quo* and avoiding the risk of unauthorised development or environmental harm.

On the downside, as a blanket provision without exceptions, and by removing the role of the Court in determining the balance of interests, section 173 could have unintended and adverse consequences.

In this article, Alice Whittaker, partner in the environment and climate group in Philip Lee, outlines how the new 'stop the clock' provision is intended to operate, why it is being introduced, the risk of unintended consequences, and possible alternative solutions to minimise risks of injustice and outcomes that are not in the public interest, or the interests of the environment.

The clock is ticking

Section 40 of the Planning and Development Act 2000, as amended (the Act) provides that a permission has a duration of five years, commencing on the date of the grant, or such other period as is specified in the terms of the permission. A permission can be granted for as little as two years, or as much as ten years. The 'clock' or duration starts to run immediately from the date of the grant until the permission expires.

Section 40 of the Act is not subject to the issuing of JR proceedings, or the orders of a Court. For this reason, when JR proceedings are commenced under the Act, the 'clock' continues to run even where the Court grants an order staying the permission. Such order only applies to the *effect* of the permission, not its duration.

Even where a stay is not granted, whilst a developer is entitled to proceed to carry out the development it does so at risk. As noted by the High Court in ***Coastal Concern Alliance*** [2024] IEHC 139, on 21 March 2024:

"A developer who chooses to carry out works pursuant to a development consent, which is subject to pending judicial review proceedings, does so at their own risk. Indeed, in Seery v. An Bord Pleanála [2001] IEHC 13, [2001] 2 I.L.R.M. 151, the High Court (Finnegan J.) went so far as to say that it would represent "commercial folly" to do so."

Funding would generally not be released for a project unless the period for judicial review has expired, without a judicial review being taken. Accordingly, in many cases there might as well be a 'stay' on the effect of the permission, as the developer cannot safely proceed with the development until the proceedings are finally concluded.

Planning cases can be slow, even with case-managed procedures in the new Planning and Environment List in the High Court (P&E List). In addition to Court capacity managing a burgeoning list of cases, a key feature in lengthy JR delays is the procedure whereby the Court can refer questions to the Court of Justice of the EU (CJEU) for a preliminary ruling on the interpretation of EU law.

In ***Coillte*** [2023] IEHC 640, the Court outlined why it considers it important that the entitlement of the Court to refer questions to the CJEU is supported and upheld, while in ***Eco Advocacy (no3)*** [2023] IEHC 644, the Court acknowledged that such references can slow things down. In that case, by the time the ruling came back from the CJEU, almost 60% of the permission had expired.

By the time questions were referred to the CJEU in ***Waltham Abbey,*** more than three years of a five year permission had already expired ([2023] IEHC 661).

In ***Reid*** [2024] IEHC 27, the Court viewed the developer's attempt to strike out proceedings at an early stage as a bit of a double-edged sword:

"The elaborate-sounding confection of legal points launched in this case as a basis for certiorari bears no resemblance – none whatsoever – to the applicant's notice of appeal to the board. A little esprit d'escalier is legally permissible (where EU law so allows, or where issues post-date the notice of appeal, for example), but the rest of it makes a mockery of the procedures for evaluating planning considerations under the 2000 Act. Where we now are with this case is that by virtue of a six page handwritten appeal, making unbuttoned complaints about a wide variety of actors, but failing to contain any meaningful relevant specifics, and by virtue of the consequent judicial review, the applicant has succeeded in delaying the finality of the permission for a period from 31st July, 2020 to today's date. The Planning & Environment List can't take much responsibility for that delay, because the parties did not seek the admission of the case to the list until quite late in the day, and when they did so, directions were swiftly given and within a couple of weeks a date was fixed for the leave application. The opposing parties' decision to contest leave, while of course forensically open to them and while not without some advantage, did nonetheless cause delay, because that had to be heard and determined by way of a written judgment with a further judgment required on leave to appeal that decision. Once that was delivered, further directions for case management were given promptly. Some time was extended by consent, and the parties then did not take up my offer of a hearing in Michaelmas 2023. I did however give the earliest available hearing date in Hilary 2024. That perhaps illustrates the wisdom of Thomas Sowell's aphorism that there are no solutions, only trade-offs. One can save costs by trying to cut back the pleaded case by interlocutory procedures, but that causes delay. If on the other hand, in other or future cases, parties want to prioritise speed, the court will be on stand-by to assist, within its allocated resources. Speed would generally be the court's inclination anyway, all other things being equal. But in an adversarial system, the court cannot act faster than the fastest party to the litigation."

However, as the High Court acknowledged in ***Eco Advocacy (no3)*** [2023] IEHC 644,

"a party should not be allowed to win the litigation by default by simply bringing the proceedings or delaying their resolution."

Section 173 therefore proposes to address this issue *prospectively,* to avoid a permission withering due to a Part 9 JR.

Section 170 of the Bill is an equivalent provision to section 40 of the Act, providing that the duration of a permission will run from the date of the grant, but subject to section 173 which would operate to suspend both the *duration* and the *effect* of a permission that is subject to a Part 9 JR, until those proceedings are finally concluded.

Section 173 therefore accepts the futility of decrying the increase in judicial reviews, as if it is a tide that can be held back. Judicial review is a feature of the Irish planning system that is not going away, and if anything is increasing in volume, complexity, and indeed novelty. Applicants, bolstered by Court judgments drawing attention to issues with the legislation and procedures in which public bodies are required to operate, and the adequacy of reasons in decision-making on complex projects, are actively pursuing access to the Courts.

Indeed, in ***Ballyboden Tidy Towns*** [2023] IEHC 722, the High Court took the opportunity to observe that:

"We are blessed with a population whose anxiety to participate in public affairs (doubtless motivated in greater or, often, lesser degree by their private interests – but there is nothing wrong with that) is not merely protected in domestic, EU and international law but is demonstrated in practice time and again in many and varied ways, including participation in planning processes via a legal regime which in effect and in considerable degree, crowdsources environmental protection."

Access to the Courts is safeguarded by the Irish Constitution, the Aarhus Convention, and EU law. In addition to the "crowdsourcing" of environmental protection, it is also an important part of our democracy that the decisions of public bodies are subject to judicial review.

Section 173 therefore accepts this current reality but would offer developers in the future protection from the withering of permissions, which is a feature of the system currently under the Act.

Risks and unintended consequences

As a blanket solution, section 173 would suspend every planning permission that is subject to a Part 9 JR. Section 173 would not give any priority to permissions for critical infrastructure, public facilities (schools, hospitals), renewable energy or grid infrastructure, transport, local authority developments, nor would it distinguish small scale domestic developments, rural or agricultural developments, temporary use or urgent/emergency developments. It would apply to any grant of permission under the Bill, including retention permission.

Section 173 would not distinguish between a Part 9 JR taken in the interests of environmental protection or for proper planning reasons, and a JR taken for the purposes of slowing down a rival development, or denying a developer the opportunity to avail of a time-limited window for the particular use or development. Section 173 would also not distinguish between a Part 9 JR in which there is an *arguable* but not particularly compelling ground of challenge, and a Part 9 JR in which there are several compelling grounds of challenge to the decision to grant.

Combined with the strong protection for access to the Courts, in particular in environmental matters, and the costs protection afforded to applicants who challenge planning decisions, section

173 risks creating an incentive to litigate, with limited protection for affected developments. A key difficulty with section 173 is the lack of any judicial oversight.

The only other area in which an 'automatic suspension' applies is procurement law, where the issuing of proceedings to challenge the award of a public contract operates to suspend, in law, the award of the contract until the proceedings are finally determined or the suspension is lifted by the Court. In ***CHC Ireland DAC*** [2023] IEHC 457, the High Court observed:

'*The law applying to State bodies which put public contracts out to tender is the only area of law where a court injunction is effectively there 'for the asking'. This is because the mere filing of proceedings by a losing tenderer, in which it challenges the tender for a public contract, triggers an automatic injunction (known as an "automatic suspension"). This automatic suspension prevents the State agency from signing the public contract with the winning tenderer.*

The injunction/automatic suspension is there 'for the asking' in the sense that it arises regardless of the merits of a losing tenderer's challenge to the tender and without any judicial oversight whatsoever –the only condition to be satisfied is that proceedings are filed within a specified time frame of the decision to award the tender.

Not only is it an exceptionally powerful weapon in the hands of any individual or any business that has lost a tender, but it also arises irrespective of the importance or value of the public contract which is being injuncted, e.g the building of public housing, hospitals, schools, vital transport infrastructure or, as in this case, the delivery of the provision of life-saving search and rescue aviation services worth circa €800 million.

Furthermore, where the losing tenderer is also the incumbent provider of services to a State agency, this means that the incumbent has, 'for the asking', a means of automatically preventing the signing of a contract with its competitor, while the incumbent remains in place. As the incumbent, it will then be in prime position to financially benefit from the automatic suspension of the tender process, i.e. with the prospect of having its contract continued by the State agency, after its intended expiry date, for the months/years that it takes for its legal challenge to the tender process to be resolved.

... Another way to look at this situation is that the fact that an 'automatic suspension' of a tender process is there 'for the asking' for losing tenderers, particularly for those who are the incumbent provider of services to a State agency, could in some cases act almost as an incentive to litigate for the losing incumbent.'

The decision to lift the suspension was upheld by the Court of Appeal [2023] IECA 229, which noted that:

"...simply because the suspension arises automatically, the court cannot, in the absence of any evidence to the contrary, attribute any improper motives to an applicant in bringing proceedings. Certainly, the fact that an applicant benefits from the automatic imposition of the suspension of the power to award the contract cannot be weighed against an applicant and in favour of a moving party on an application to lift the automatic suspension."

Section 173 does not provide for a respondent or notice party in Part 9 JR proceedings to apply to the Court to have the automatic suspension of the permission lifted. Nor is such a procedure advocated for, given the difficulties and limitations highlighted by the Court in *CHC Ireland DAC*. Incorporating a right to apply to lift an automatic suspension might, given the need to develop and apply appropriate criteria and the number of planning JRs per annum, create an additional burden on the Courts that would be unwelcome and unhelpful.

At the same time, there is a need to ensure that section 173 is capable of operating fairly, flexibly, particularly with respect to the significant minority of planning cases that would merit a more tailored and proportionate approach. The Courts are best placed to determine whether a decision or permission should be 'stayed' or suspended for part or all of the judicial review proceedings. For example:

- in ***Okunade*** [2012] IESC 49, when considering a stay application the Supreme Court determined that "*the court should put in place a regime which minimises the overall risk of injustice.*" The Court set out several factors that can be considered when determining the overall risk of injustice.

- in ***Toole (no1)*** [2023] IEHC 263 the Court held that:

"32. Another issue relevant to balancing the weight of the factors to be considered under Okunade is the possibility of damaging (and a fortiori irreversible) effects on the environment generally and protected habitats in particular."

- in ***Eco Advocacy (no3)*** [2023] IEHC 644, the Court noted that:

"*.. if the grant of a stay would actually determine the proceedings overall, or deprive the action of benefit as seen by one party or another, <u>the court should think long and hard before doing so.</u>*" (emphasis added)

Section 173 removes the Court from the consideration of whether a permission should be suspended on the particular facts of the case, and if so, whether that suspension should continue for the entire duration of the proceedings or could be lifted sooner.

If section 173 had been in operation when the ***Hellfire Massy*** case was before the Courts, the permission granted to South Dublin County Council would have been suspended for at least twelve months longer than was necessary. In ***Hellfire Massy (No.1)*** [2021] IEHC 424, the High Court dismissed the challenge to the planning permission, and an appeal against this decision was refused by the Supreme Court on appeal ([2022] IESC 38)), which noted:

'*It is often, therefore, a counsel of prudence to avoid disposing of all issues in a case pending the determination of a reference under Article 267 even where the national court is reasonably confident that some issues are not likely to be affected by any reference. However, as against this, the timescale involved in a reference can be quite considerable.*

Delay can have unforeseen effects on the viability of a development, which in this case, is being pursued by a public authority in the interest of providing public amenity. It is normally in the public interest that challenges to the validity of permissions for such developments should be resolved promptly, if at all possible. Accordingly, if it was possible to isolate the challenge to the permission and determine it so that only the declaratory relief against State parties would [be] the subject of a reference and the consequent delay, then there were obvious and valid reasons to take that course.'

It took a further twelve months after the dismissal of the challenge to the permission for the balance of the issues in the proceedings to be finally concluded by the High Court ([2023] IEHC 591). There are a number of other examples of JR hearings proceeding on a modularised basis, where the challenge to the permission is dismissed before the wider EU law / legislative / policy issues are considered and determined. Section 173 is not adaptable to these situations.

Section 173 therefore takes away what is currently within the jurisdiction of the High Court (the power to grant a stay suspending the effect of a permission) and replaces it with an entirely new, mandatory and automatic suspension of permissions on a blanket basis, with no sensitivity to the

particular facts of a particular case. If the following slightly contrived analogy can be forgiven, it is not dissimilar to the effect of the new section 50A(9A) of the Act, which was enacted in 2022. That new provision was considered in detail by the Supreme Court decision in ***Crofton*** [2024] IESC 12. The new section 50A(9A) directs a Court, at the request of the developer, to send a planning application back to the decision-maker after the permission has been quashed, provided it would not be unlawful for the Court to do so. The Supreme Court described the new section in the following terms:

"an entirely new statutory scheme in an area that was otherwise covered by the Rules, inherent jurisdiction and case law. The context of the legislative provision is therefore that it is bringing about a change in the pre-existing legal position. Moreover, the only discernible purpose for enacting the legislation is to bring about change to planning cases from the existing position that applies to all judicial reviews."

Section 173 looks set to do something similar: to bring about a mandatory change to how the Courts deal with planning cases, removing a discretionary power, and forfeiting any fact-specific analysis and balancing of interests.

A possible alternative

The possibility of incorporating a power to lift an automatic suspension is considered problematic for the reasons already discussed. There is an alternative possibility, which involves amending section 173 of the Bill to expressly provide that, when a Court grants an order 'staying' a permission, that order shall stay both the effect and the duration of the permission. A developer is less likely to oppose a 'stay' if it would not cause the permission to wither.

In fact, section 173 could provide that an order staying a permission may be made on the application of any party to the proceedings (not just the applicant), which would allow the developer to 'opt in' for a stay, to 'stop the clock' on the permission while the Part 9 JR proceedings are being determined.

Section 173 could qualify section 170 of the Bill to say that the duration of a permission is subject to an order of the Court staying the permission, so that the duration and effect of the permission would be suspended from the date of the said order until the date on which the order is set aside, or the proceedings are dismissed or withdrawn, whichever occurs first.

For the reasons already discussed, it is important to retain with the Court the power not only to grant a stay (including a stay with the consent of or on the application of the developer), but also to set aside or vary the stay as it sees fit, having regard to the particular circumstances of the case.

Section 173 envisages that the planning authority or the MARA would have responsibility for issuing notices of the commencement of Part 9 JR proceedings and their final conclusion, and recording these dates in the planning register. The period between the two dates would be the 'relevant period' that would be discounted for the purposes of calculating the new date of expiration of the permission. There is no reason that this process cannot be replicated, but using the dates on which the relevant orders are made by the Court for the purposes of defining the 'relevant period' and recording all necessary details in the planning register in the same way.

In conclusion

A presumption has been emerging in planning cases recently that a stay should be granted 'for the asking' where a JR raises issues of compliance with EU environmental law. There may even be a presumption in favour of granting a stay in other planning cases, where maintaining the *status quo* by restraining the development until the questions over the lawfulness of the permission are finally resolved is viewed as the safest option.

It does not follow, however, that a blanket suspension of all permissions is the answer, and that the role of the Court should be forfeited in the interests of uniformity or avoiding complexity. Planning cases are fact-specific and multi-faceted, often involving challenges to the lawfulness of the planning decision, Government policies that informed the decision, and challenges to the law itself. Regrettably, a "one size fits all" solution is rarely the right approach to a broad spectrum of development types, including changes of use, that would be subject to potential Part 9 JRs.

Per the Supreme Court's decision in ***Okunade,*** the Bill should aim to put in place a regime which minimises the overall risk of injustice, and in this author's view, that involves empowering the Court to exercise its powers to grants stays (with the addition of a power to grant a stay at the request of the developer), to suspend both the effect of a permission, and to 'stop the clock' running on the permission while the Court does its work.

For further information, please get in touch with awhittaker@philiplee.ie or anyone else in the Philip Lee climate and environment group.