

An
Bord
Pleanála

Natasha Lee
Legal Services Regulatory Authority
P.O. Box 12906
Dublin 2.

15th June 2018

Dear Ms. Lee,

I refer to your email of 8th May 2018 to Dr. Mary Kelly, Chairperson of An Bord Pleanála in relation to the Legal Services Regulatory Authority's public consultation on education and training arrangements in the State for legal practitioners.

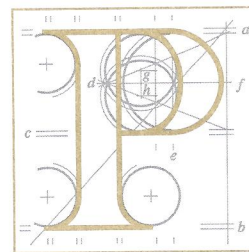
An Bord Pleanála's submission on the matter is enclosed for your information.

Yours sincerely,

Nóirín Finnegan
An Bord Pleanála

Encl.





Legal Education/Training

Context – An Bord Pleanála

An Bord Pleanála is a non-commercial State agency whose statutory responsibilities under the Planning and Development Acts 2000 – 2017 and associated legislation primarily relate to making decision on planning appeals arising from local planning authority decisions and direct planning applications for proposed strategic infrastructure development and proposed strategic housing development.

The Planning Acts provide that Board decisions can be subject to applications for judicial review to the High Court on the **legality** (as distinct from the **merits**) of those decisions. Having regard to the need for certainty around planning consents the Oireachtas had determined that such applications can only be made within reduced strict timelines rather than the normal six months – such applications must be made generally within 8 weeks of the relevant Board decision.

An Bord Pleanála has experienced a significant increase in the number of such applications being lodged against its decisions with the prevailing intake being in the range 40 – 50 in the last three years.

An Bord Pleanála is funded primarily through an Exchequer grant from central voted funds as administered by the Department of Housing, Planning and Local Government in tandem with a small amount of additional income from fees for appeals/applications etc. (circa 10-15% of overall funding).

The costs of defending its decisions against such challenges in the Superior Courts involves considerable expense which is ultimately in substance funded by the taxpayer via the Exchequer grant. The prevailing rate of such expenditure over the last three years is in the range **€3 - €4M**. This is made up of fees for both solicitors and Counsel engaged by An Bord Pleanála and also payments to cover 'other' side costs where the Court has awarded these against An Bord Pleanála.

Suggestions for Legal Education/Training Programmes

Having regard to the foregoing context An Bord Pleanála suggests the following high-level approaches be embedded in the Education/Training Programmes for Legal Professionals:

- A fundamental appreciation of the general **public interest** context in which the legal system operates so that legal professionals are fully aware that initiation of litigation should be based on the existence of a real perceived legal defect that it is appropriate to refer into the Courts system for assessment/adjudication.

In this regard it is suggested that legal professionals should be trained in a manner that ensures that they are disposed to advising clients or potential clients not to take legal challenges, which in the legal professional's opinion, have no real justification in law and have no chance of succeeding.

- In taking legal challenges legal professionals should be trained to concentrate on the net basis for the challenge and to be concise in exposing the exact nature/kernel of the challenge.

It is the experience of An Bord Pleanála that applications for judicial review of planning decisions of An Bord Pleanála (on the basis of an alleged 'legal' error in the decision or process of decision making) regularly consist of between **20 to 50** alleged legal defects in the one single planning decision of An Bord Pleanála. Accordingly, voluminous legal documentation covering all of these alleged defects is lodged with such applications. It is quite usual that, in the course of processing of such applications for judicial review, the bulk of these grounds for judicial review are either dropped by applicants or disregarded/dismissed by the Courts and most cases end up being determined on the basis of between **1 – 5** main issues.

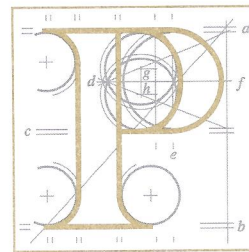
However, at the outset of such cases, responding and notice parties to such applications are required to lodge responding legal papers addressing **all** of the original lodged grounds. This requires detailed analysis and voluminous responding papers and inevitably elongates judicial review hearings. All of this consumes valuable and scarce resources both in terms of time (public servants instructing legal professionals (solicitors and barristers) to defend against such challenges) and expense as well as potentially wasting valuable Court time.

It is An Bord Pleanála's experience over recent years that applicant legal papers, as lodged by **legal professionals** engaged by them, are repetitious, voluminous and often contain a large number of spurious grounds of challenge.

This situation has been remarked upon by a number of High Court judges over recent years and that Court has in many cases directed applicants to reduce or condense their grounds into a more concise format for the purpose of efficient processing of the case.

It is hoped that legal professionals would be trained in a manner which emphasises the need for **brevity** and avoidance of generation of voluminous and often repetitious material which adds little to the kernel of the case and rather only delays processing of cases and increases costs of litigation for all parties (including applicants themselves).

It is the opinion of An Bord Pleanála that legal professionals whose training emphasises brevity and conciseness in originating legal challenges will serve both the interests of the **administration of justice** and the **wider public interest**.



Legal Representation at An Bord Pleanála Oral Hearings

The Planning and Development Act, 2000 as amended, includes statutory provisions relating to oral hearings of planning cases (see in particular the amended section 135 as inserted by section 23 of the Planning and Development (Strategic Infrastructure) Act, 2006). These provisions include a requirement that the person chairing the oral hearing (who is usually a planning inspector) shall conduct it “expeditiously and without undue formality”.

An Bord Pleanála’s experience in recent years is that parties involved in such hearings are engaging legal professionals to represent them at the hearing. In certain instances, it has been the case that such legal professionals can inadvertently (or possibly consciously) conduct their representation in a manner which, while clearly acceptable and appropriate in a Court of Law, does not align with the statutory provisions regarding oral hearings. This can result in frustration among participants and inevitably delays in moving such hearings along at an appropriate pace.

An Bord Pleanála suggests that training of legal professional should include clear directions/advice that behaviours and protocols appropriate in a Court of Law may not be appropriate for use in other fora where legal representation can be utilised. Legal professionals should be advised to be alert to the necessity to be familiar with and adapt their approach to align with the statutory provisions and protocols relating to such other fora.

Access to Justice

In making these observations I wish to stress that An Bord Pleanála **fully** accepts that access to justice is a fundamental right and that its planning decisions are subject to potential for judicial review as per the relevant provisions of the Planning and Development Acts 2000 – 2017.

Thank you for the opportunity for making these observations and I wish you well in your efforts.

Yours sincerely,

Dr. Mary Kelly,
Chairperson.



An Bord Pleanála Policy in relation to claims for observer costs under sections 37H, 182B and 182D of the Planning and Development Act, 2000 as amended and Section 47DD of the Transport (Railway Infrastructure) Act, 2001 as amended.

The following general principles have been adopted by the Board in respect of claims for costs made under the statutory provisions set out above subject to the proviso that the Board reserves the right to depart from the policy in the exercise of its absolute discretion where it considers that the particular circumstances warrant a different approach in any case.

Principles

1. Observers in the Irish planning process typically carry their own costs. It is not intended to depart from this general principle, although limited circumstances may arise where an award of costs to observers is made.
2. A substantive decision made by the Board on a planning case being in alignment with the position of an observer in that case will not necessarily result in an award of costs to that observer.
3. Any claim for costs will be considered on its merits. There may be circumstances where An Bord Pleanála considers it appropriate to award some costs to observers, for example, where the observer's claim relates to a particular submission made either in writing or at oral hearing (including a submission in relation to specialised technical or scientific matters) that the Board considered was of particular assistance to the Board in its understanding of the case and/or the making of its decision on the case.
4. Where the Board considers that in principle an award of costs is appropriate, it will then consider the level of the award. This may result in a full or part-award of the costs claimed, at the discretion of the Board, having considered the details of the claim and the circumstances of the case.
5. The Board may, at its own discretion, seek the views of the reporting inspector, before deciding on whether or not to award costs.
6. The Board will give reason(s) in relation to its decision to award or not award costs in relation to claims for costs under the above statutory provisions.

June, 2016.

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