



**Better Lives,
Better Business**

An Ibec campaign

Better planning: reforms for sustainable development





Better Lives, Better Business

An Ibec campaign

A four-part Ibec campaign to make Ireland a better place to live and work.

- 01 Housing
- 02 Infrastructure
- 03 Planning
- 04 Sustainability

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Executive summary

People and talent are key drivers of economic success in a globalised world. Increasingly, it is the location of talent that attracts investment, rather than the other way around. Unfortunately, following a period of economic recession and underinvestment, Ireland has lost ground in international ‘liveability’ stakes. Business, society and government are united in seeking to resource the country’s future well-being and to create an environment where people can both work and enjoy a good quality of life. Providing solutions to these problems is at the heart of Ibec’s *Better Lives, Better Business* campaign. Ibec aims to influence the public debate and decision makers to ensure that our built environment and infrastructure improves people’s quality of life. For business, planning for sustainable communities, a clean environment and high-quality public amenities is critical.

This report shows why Ireland’s planning consent and appeals system needs reforming. In doing so it builds on the findings and recommendations of an earlier Ibec publication that focused on improving housing supply and affordability. Efforts by government and business to address the worsening shortage of housing and problems of inadequate infrastructure are being hindered by a planning regime that is unnecessarily costly, slow and cumbersome. An overhaul is urgently needed to help underpin Ireland’s economic prosperity.

A streamlined planning system will not on its own accelerate the construction of new homes sufficiently to meet pent-up demand. Nor will it automatically ensure the timely delivery of essential public amenities such as new or upgraded roads, water supplies, sewage treatment plants and electricity networks. A growing proportion of planning decisions are being challenged in the High Court, especially for large scale projects. Ibec’s *Better Housing* report proposed the automatic fast-tracking of all residential planning hearings in the Commercial Court and called for measures to reduce the incidence of baseless challenges. Ibec believes such measures should apply to planning-related judicial reviews in general, rather than simply residential ones.

Our approach

Although the scale of the challenges to be overcome are not to be underestimated, success in solving these problems offers significant opportunities for economic and societal rewards for decades to come. *Better Planning* sets out a series of practical recommendations for reform across Government Departments, Local Authorities and An Bord Pleanála. Ibec, on behalf of Irish business, is engaging in a substantial lobbying and communications campaign for better planning to ensure that our recommendations are understood, championed and implemented.

Actions needed

Ibec is calling for five complementary sets of action, detailed in the next section. In summary they are as follows.

01

Political leadership

The effective implementation of a transformed planning regime demands leadership that is not undermined by local politics, pressure groups or bureaucracy. The National Development Plan (NDP) must not be blown off course by such factors.

The Government also needs to ensure that the planning functions of Ireland's local authorities operate at a consistent level of service. Specialist resources must therefore be pooled within and across regions, and flexibly allocated where they are most needed.

02

Regulation and oversight

Local authorities must provide more details on their operational performance in respect of planning decisions.

The newly-established Office of Planning Regulator must be provided with full operational capacity as quickly as possible to ensure that the next round of regional, local authority and local area plans are consistent with the National Planning Framework. It must also have the resources and authority to promote effective professional development and support for local authority planners and representatives. In the longer term the Regulator should also be given oversight of marine planning.

03

Planning processes

Local authorities must actively cooperate with the nationwide harmonisation and digitalisation of planning procedures, thereby achieving greater consistency of service.

The procedure by which An Bord Pleanála deals with Strategic Infrastructure Development applications needs to be simplified and its decision timescales need to be more predictable. The framework for Strategic Housing Developments also needs refining.

04

Legislative reform

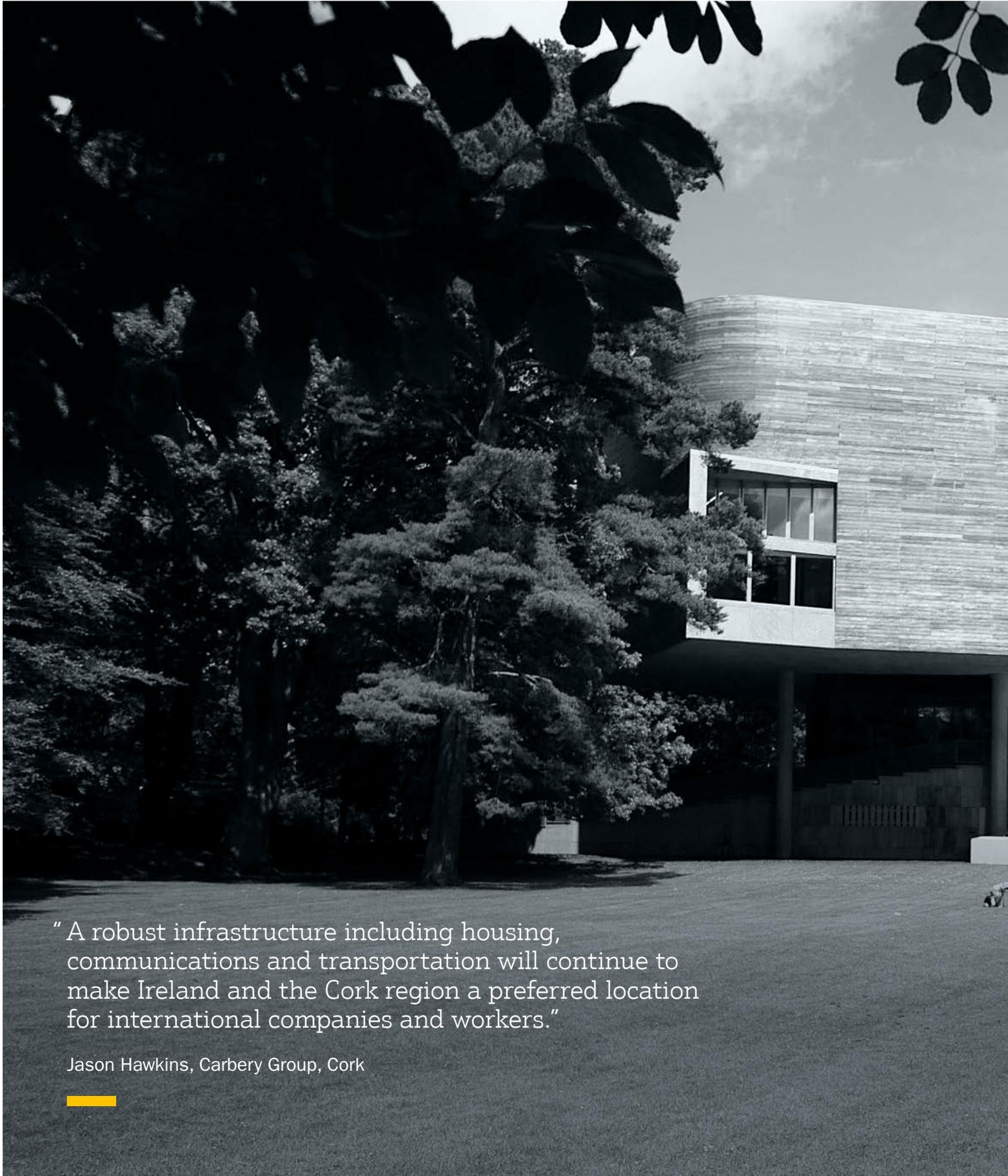
The laws governing Compulsory Purchase Orders (CPO), including the Planning Act 2000, should be revised to make the process less complex in cases where the CPO is challenged.

Long awaited legislation to streamline Ireland's archaic foreshore legislation must be progressed as a matter of urgency.

05

Legal challenges

Frivolous or vexatious challenges to An Bord Pleanála planning decisions need to be actively discouraged by the judiciary. Legitimate challenges must be processed more speedily, preferably by a dedicated panel of judges with relevant case experience.



“A robust infrastructure including housing, communications and transportation will continue to make Ireland and the Cork region a preferred location for international companies and workers.”

Jason Hawkins, Carbery Group, Cork



1. Recommendations

A more consistent quality of service is needed across local authorities. Greater digitalisation of the planning process will surely help but more proactive engagement from central government would also be beneficial.

The Minister for Housing, Planning and Local Government should:

1. Require local authorities within each of the three Planning Regions to pool their planning resources to help manage spikes in demand and to utilise specialist expertise efficiently.
2. Ensure that the Office of the Planning Regulator (OPR) is adequately staffed for assessing and ensuring coherence of spatial plans and their compliance with planning guidelines.
3. Provide the OPR with a budget to devise and promote continuing programmes of professional development and support for local authority planners and elected representatives.
4. Require local authority planners to undertake Continuing Professional Development as advised by the OPR.
5. Provide regional development support teams to assist in the preparation of Local Area Plans, urban regeneration initiatives and local authority led Strategic Development Zone (SDZ) schemes.
6. Seek feedback from the business sector on the Local Government Management Agency's pilot trial of the new e-planning system prior to its nationwide roll-out.
7. Collect and publish half-yearly statistics for each local authority on adherence to target timelines for local authority decisions and certification of compliance submissions.
8. Simplify legislation relating to CPOs, particularly for utilities.
9. Streamline the regime for projects requiring foreshore consent by promptly laying the Maritime Area and Foreshore (Amendment) Bill before the Oireachtas – in abridged form if necessary.

This will help to ensure that planning applications are dealt with more consistently and expeditiously. Nevertheless, complementary measures are needed to ensure that undue delays are avoided at the next hurdle, namely planning appeals.

The Board of An Bord Pleanála should:

10. Further enhance its specialist expertise to deal with complex cases involving environmental impact, including noise, ecology and marine habitats.
11. Simplify the pre-application process that determines whether a project qualifies as Strategic Infrastructure Development (SID).
12. Ask the Minister for Housing, Planning and Local Government to amend the legislation to enable an 'opt out' for SID cases where the applicant's preference is for the initial application to go through a local authority.
13. Ask the Minister to amend legislation to allow a time-limited request for clarification on Strategic Housing Development cases where the alternative would be an avoidable refusal of consent.
14. Refine its Code of Conduct for oral hearings, with the objective of keeping them shorter and more focused on items of clarification rather than repetition of written submissions.
15. Achieve greater certainty of compliance with timelines for SID planning decisions, incentivised by a partial refund of the application fee for undue delays.
16. Provide more detailed reporting on the progress of all SID cases, with emphasis on any that feature more than one Request for Information by the case Inspector.
17. Use its discretionary powers, where appropriate, under sections 131 and 137 of the Planning Act to seek stakeholder feedback on Inspectors' Reports and/or on draft decisions.

1. Recommendations / continued

Given the long delays to critical infrastructure projects, and the apparent ease with which objectors can frustrate badly-needed projects, our courts processes will also need to be improved for planning cases.

The Minister for Justice and Equality should:

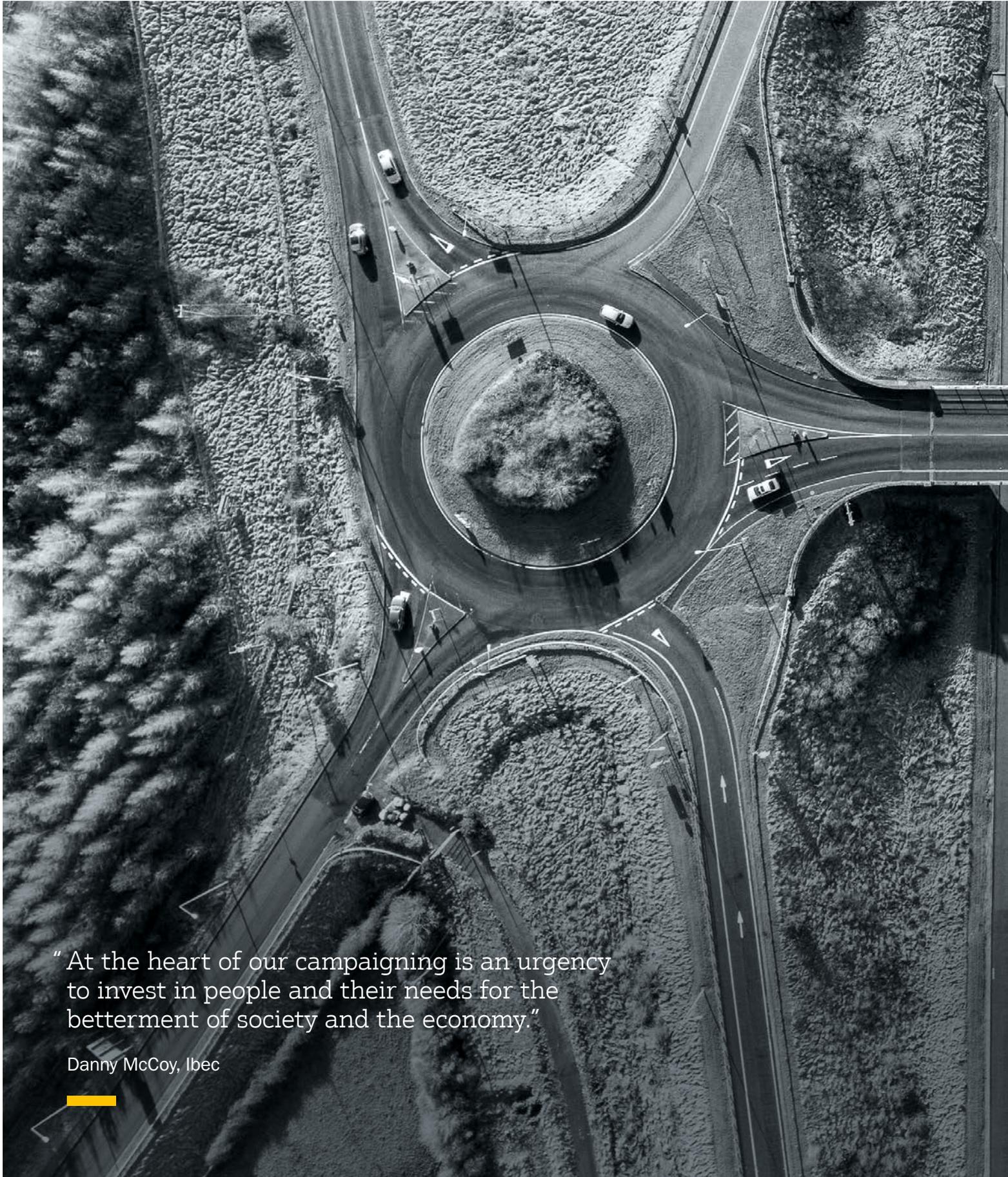
18. Create a dedicated Planning Division with the Commercial Court routinely dealing with all applications for judicial review relating to An Bord Pleanála decisions.
19. Ensure that this Division is adequately resourced, ideally with judges having relevant case experience, and with dedicated support staff for active case management.
20. Consider the practical application of the common good and planning merit when considering whether to grant leave to appeal.
21. Institute a mechanism for tracking and expediting planning cases through the courts system, with a view to minimising delays.
22. Require parties to engage meaningfully at pre-hearing to focus on legitimate grounds for challenge.
23. Impose sanctions on an applicant whose case is dismissed by a court because of reliance on spurious arguments or false assertions of fact.
24. Consider excluding altogether the jurisdiction of the Court of Appeal in planning cases.
25. Failing this, establish a fast-track route within the Court of Appeal for planning-related judicial review decisions where applicants are granted leave to appeal by the High Court.
26. Minimise the number and duration of adjournments in planning cases.

2. Context

In competing for global investment, Ireland has differentiated itself through its success in attracting talent. Our talent comes in many forms including highly skilled migrants from within the EU and educated workers from outside the EU (two-thirds of whom have a third level qualification). Ireland's talent pool has also swelled with returning emigrants and a highly educated local workforce. To sustain Ireland's economic success and remain attractive to local and global mobile talent pools, the country must offer its workers a good place to live and work. Unfortunately, following a period of economic recession and underinvestment, we have lost ground in international 'liveability' stakes.

Ibec launched its *Better Lives Better Business* campaign in June 2018 with a landmark report on housing supply and affordability co-authored with Property Industry Ireland. Entitled *Better Housing*, its recommendations included zoning and fiscal measures to reduce the cost of development land, greater ambition for direct building by the State, and the promotion of a healthy rental market. It also recommended reforms that would re-establish confidence in the planning system, improve service quality by local authorities and accelerate the judicial appeals process. It further recommended that the National Oversight and Audit Commission should collect and publish relevant statistics on the performance of individual local authorities.

This follow-up report, *Better Planning*, builds on those ideas and considers their wider applicability. Its recommendations are intended to complement and enhance the Government's ongoing reform initiatives. Ibec strongly endorses the new National Planning Framework (NPF) and National Development Plan (NDP). Taken together, these represent a golden opportunity to achieve greater policy coherence and effective regional development.



“ At the heart of our campaigning is an urgency to invest in people and their needs for the betterment of society and the economy.”

Danny McCoy, Ibec





3. Why action is required

Having adequate, appropriate and affordable housing is not by itself enough to make our cities and towns more liveable. Despite increasing private affluence, there remain chronic deficits across key parts of our public infrastructure. Huge capital investment is needed to enhance our transport, communications, healthcare, clean energy, waste management, water supply and wastewater treatment services.

In principle, Ireland's consenting and appeals system can deliver the right investment in the right place and at the right time. In practice, however, it is not working as intended. Successive iterations of local authority plans, prepared in isolation, have exacerbated unsustainable development patterns. Many town and city plans lacked ambition, particularly regarding residential density and alignment with transport strategies.

In the absence of strong policy from central government, it has been left to developers and third-party objectors to argue the merits or otherwise of individual developments. The central role of An Bord Pleanála within the system is indicative of an over-emphasis on development management. Many people within the development management process believe the system is characterised by time delays, unnecessary bureaucracy, inconsistency, poor customer service and an anti-development bias.

The country's complicated and often adversarial planning and appeals processes pose a real threat to our international reputation as a good place to invest. A comprehensive overhaul of the regime will therefore help to underpin our economic prosperity as a peripheral but trade-intensive country.

The NPF, which is in favour of sustainable development, represents an important milestone in correcting past mistakes. Government policy needs to reinforce, champion and clearly re-state this principle.

The continuing move towards a plan-led system should enable more and more decisions of principle to be addressed in the plan-making process. This will free up resources in planning authorities, allowing the development management process to focus more effectively on detailed aspects of individual proposals. Notwithstanding the continuing shortage of qualified graduate planners, there should be potential to redeploy resources from development-management functions within local authorities for strategic planning to promote investment and economic development.

In addition to a major housing programme, the next decade will see Ireland undertake one of the most ambitious programmes of public capital investment in the history of the state. However, delivery of national priorities could be delayed due to the planning system being exploited by individuals or pressure groups. Negative publicity around high-profile planning cases can give the impression that Ireland is a difficult place to do business. The planning system must provide certainty to allow the country to win investment and to allow Irish business to grow.

Due to the country's dispersed pattern of settlement, it can be virtually impossible to locate large scale infrastructure away from all population centres. The relative ease with which lobby groups can engage with local and national politicians is a positive feature of our democratic system. However, in respect of large-scale housing and critical infrastructure, there is a consequent risk that local interests will override regional or national priorities. Moreover, as Apple's recent experience with the Athenry data centre highlights, even projects that command strong community support may be frustrated by planning appeals and court action.

There have recently been campaigns, some of which are still active, against critical infrastructure investments such as airport growth, road upgrades, including the M28 from Cork to Ringaskiddy, public transport projects, various electricity grid reinforcement projects, natural gas production or storage, municipal waste and hazardous waste management and wastewater treatment. Ervia's proposal to supplement the water supply to the Midland and Eastern Regions by abstraction from the River Shannon is also likely to face planning and legal challenges.

Such projects are generally aligned with Government policy. In the case of airports and utilities such as water, gas and electricity, they are also subject to detailed regulatory and economic scrutiny. They have the potential to confer significant societal benefits such as:

- Necessary international connectivity for trade and tourism
- Reduced congestion and shorter commute times on our roads
- Reduced air pollution, especially in urban areas
- Fewer greenhouse gas emissions
- Cheaper electricity and gas prices
- Assured adequacy of drinking water supply
- Elimination of landfilling
- Protection of sensitive marine habitats.

4. Legal reform

The Planning and Development (Amendment) Act 2018 provides a legal footing for the NPF, as well as establishing the Office of the Planning Regulator (OPR). The planning regulator will be empowered and obliged to recommend Ministerial intervention on any aspect of a regional or local development plan that it deems inconsistent with the NPF. Unfortunately, legislative delays have severely curtailed the OPR's oversight function during the preparation of the three Regional Spatial and Economic Strategies. In any case, Ibec believes that the remit of the OPR could usefully be expanded beyond its statutory duties, by including assessments of the proper functioning of planning systems across all local authorities.

Ibec notes that a considerable number of provisions in the 2018 Act remain to be commenced by Ministerial order, including one that requires planning authorities to respond promptly to applicants' proposals in respect of compliance conditions. This should be prioritised.

The Government must also take legislative steps necessary to reduce the level of baseless legal challenges. These could include more restrictive locus standi for lodging challenges or a higher threshold for seeking judicial review. To be robust against constitutional challenges, they should not entail a disproportionate restriction of citizens' rights. In this regard, Ibec understands that the Cabinet Committee's Senior Officials Group is currently considering the recommendations of a technical working group. If legislative changes are proposed, they should be prioritised in the Oireachtas.

The Planning Act governs the use of CPOs by local authorities, transport agencies and certain utilities. The twin legal hurdles of necessity and proportionality can often be an obstacle to the acquiring authority. A simplified CPO process could prove helpful for critical infrastructure projects such as the Eastern and Midlands Region Water Supply Project, which is vital for the long-term needs of businesses and households along the benefitting corridor. It would also potentially be helpful for the timely delivery of enhanced bus and cycle routes in our congested cities to which An Bord Pleanála may give consent.

The Law Reform Commission (LRC) published a major report in 2017, addressing nearly two dozen issues of contention in the existing CPO procedure. It seems likely that the LRC will recommend substantial amendments to the underpinning legislation. If so, the Government should act quickly.



Finally, it is worth considering whether the OPR should have a legislative mandate to promote better integration of land and maritime planning. Projects that involve foreshore development currently must go through two separate lengthy consent procedures each involving environmental impact assessment. This has the potential to hinder investment in our ports, in marine tourism, and aquaculture. Legislative reforms aimed at streamlining the foreshore planning consent process were proposed in 2013 but the Maritime and Foreshore (Amendment) Bill has yet to be published. Ibec understands that there are several unresolved conflicts involving different stakeholders.

“ Society is becoming more aware of the criticality of infrastructure investment - we are seeing the impact that underinvestment in housing, water and transport is having on people’s lives. A balanced, robust and streamlined planning process that takes into account the timeliness of the required investment is vital.”

Mike Quinn, Ervia





5. Local authority planning

The Irish economy continues to benefit from job-creating investments by firms across sectors as diverse as food & drink, biopharma and medical devices, property, tourism and hospitality, financial services and IT. Our member firms around the country have experienced variations in the quality of service from local authorities on planning matters. There are numerous differences in the paper work and in the procedures for checking for technical errors in applications. Ibec understands that this inconsistency results in an unnecessarily high proportion of applications being deemed invalid by some local authorities. Last year, for example, this was the case for more than one-quarter of applications lodged in Tipperary, Leitrim and Cork, and more than one in five applications lodged in Wexford, Laois and Carlow. Business also reports that certain local authorities struggle to provide meaningful advice at the pre-planning stage. This has the obvious potential to create problems at later stages.

Ibec has consistently advocated for public services to be digitalised where appropriate. The Local Government Management Agency (LGMA) will shortly be testing a new e-planning system for local authorities that is designed to be compatible with An Bord Pleanála's new Plean-IT system. Ibec hopes that the trial quickly proves successful so that it can be implemented countrywide, thereby ensuring a more consistent service for our member companies. We look forward to providing early feedback to the LGMA once the trial is under way.

Ibec welcomes the guidance issued by the Department of Housing, Planning and Local Government on building heights and apartments. However, we note that some authorities have previously sought to circumvent aspects of Government circulars and strategies, including residential density, student accommodation and land zoning. The OPR will therefore need to be vigilant.

Regarding residential development, members of Ibec have cited some instances of the Local Infrastructure Housing Activation Fund (LIHAF) being poorly targeted by a local authority. Delays in providing road access and essential services can leave housing developers hamstrung. However, LIHAF funding has now been subsumed into the competitive Urban Regeneration and Development Fund. This should ensure better targeting of local road and utility infrastructure but, once again, the OPR will need to be vigilant.

Strategic Development Zones (SDZs) are potentially a valuable tool to promote economic development. The Dublin Docklands and Waterford North Quays SDZs both have the potential to fast-track mixed residential and commercial investment. The proposed South Clare Economic SDZ, adjacent to the University of Limerick, likewise aims to facilitate a mixture of residential and commercial activity. However, to date, the full potential of this tool has not been exploited. The main problem experienced by developers relates to timescales. Although they were envisaged as means of fast-tracking major projects, most SDZ developments to date have proven slower than the 'traditional' planning route. Often, the time lags are the result of delays within the relevant local authorities, particularly in preparing and publishing a draft scheme. A secondary issue is that some of the SDZs currently in place are years out of date and no longer suited to current market requirements. Designations need to be future-proofed to give regional or national economic development agencies greater confidence in them. To address such concerns, there needs to be greater specialist expertise at local authority level.

In addition, there needs to be formal cooperation with other State bodies such as the National Transport Authority, Transport Infrastructure Ireland, IDA Ireland and the new Land Development Agency. Better transport integration is important for local area plans, particularly those affecting our ports and airports.

6. Faster processing of planning appeals

On foot of the Organisational Review of An Bord Pleanála completed in 2015, a Review Implementation Group was established in 2016. It is now reportedly overseeing an Implementation Plan, although this has not yet been published.

Ibec welcomes An Bord Pleanála's ongoing efforts to digitalise and streamline the application and appeals process, as outlined in its Strategic Plan to 2023. The streamlined processing of small, simple, relatively non-contentious cases (as Ibec previously recommended to the Review Implementation Group) is helping to free up resources for more complex cases. However, it seems likely that the growing workload will soon outstrip the Board's current capacity.

The total number of new cases it received grew by 9% in 2016 and a further 19% in 2017. Ibec expects the volume of applications, planning appeals and court actions to increase further as capital projects envisaged in the NDP ramp up. More significantly, when the Board is designated as the competent authority for foreshore licences and marine spatial planning, additional specialist skills will immediately be needed.

Service levels are already under pressure. Statistics published on the Board's website indicate that some consents are taking substantially longer than the 18-week statutory target. Several recent cases have been delayed by multiple requests for further information and lengthy oral hearings. This may be due to the complexity of individual projects, particularly where an Environmental Impact Assessment Report or an Appropriate Assessment is required. However, Ibec believes there is scope for procedural improvement.

For example, for every project that the Board designates as SID, there are typically another three enquiries for projects that are eventually not deemed to qualify. The pre-consultation phase for SID currently does not appear to be tracked, and is not time-bound, sometimes resulting in hidden delays. In some cases, for example minor capital works, the standard pre-application procedure seems unduly slow and costly. It would be worth looking for quicker, simpler ways of screening these out.

The designation of projects that contribute significantly to the objectives of the NPF or of a Regional Spatial and Economic Strategy ought to be straightforward and immediate. However, there have been isolated cases of applicants waiting several months for a designation. The reasons for these delays are not clear, but they ought not be attributable to temporary resource constraints. Given that they tend to be complex, always requiring an Environmental Impact Assessment and often an oral hearing, the process will generally be costlier for the Board than routine CPOs or planning appeals.

However, the minimum application fee of €100,000 is orders of magnitude higher than that for those services. The level and consistency of service being provided to SID applications does not appear to justify this.

Although SID projects are not numerous, they collectively have significant national or regional implications, and they deserve high priority treatment. Ibec understands that there were 10 new SID applications in 2017, compared to just four the previous year. Of the SID cases concluded in 2017, the average period between lodgement of the SID-designated application and the Board's decision was 26 weeks. This is close to the statutory target and on the surface appears to be a reversal of increasingly long delays over the previous few years. However, the data needs careful interpretation. Ibec's detailed analysis of the 2017 data reveals a wide variation between individual projects, with the duration ranging between four weeks and 49 weeks. For the first eight months of 2018, six SID cases were concluded, with the decision timescale ranging between 14 weeks and 56 weeks. Another case, which featured multiple requests for further information had taken 124 weeks.

Moreover, the reduction in the average period quoted between 2016 and 2017 decisions may partly reflect the build-up of a significant backlog of unfinished cases resulting from the retirement of several Board members. As of September 2018, circa 300 active cases had been on hand for more than six months. Nearly 50 of these were over 12 months old.

The Board's decisions on Strategic Housing Development (SHD) cases to date have all been within the statutory timescale, reflecting the priority of housing needs. It may also reflect the fact that, unlike SID cases, financial penalties are provided in the planning legislation for tardy SHD case determinations. However, the 'one shot' provision, which aims to expedite decisions by requiring the Board to assess applications solely on the initial submission, can have unintended consequences. There have been isolated cases where a correctable technical flaw has led to outright rejection. Going back to square one with a completely new application can be both time-consuming and expensive. The Board should therefore request amendment of the legislation to allow a time-limited request for information or clarification.

There were substantially fewer windfarm planning appeals during 2016 and 2017 than in previous years. However, this trend may reverse soon. A new renewable energy support scheme is expected to stimulate a fresh wave of wind and solar generation projects, many of which may be community-based. With new wind planning guidelines due to be issued shortly, future appeals are likely to involve technically complex arguments over considerations such as visual flicker and noise levels.

Another significant component of the Board's workload is dealing with CPOs sought by local authorities and by state-owned utilities. There were 80 such cases in 2017. Although CPOs are listed on the Board's weekly reporting system alongside SID applications, most appear to be non-strategic in nature. However, when objections do arise, a public enquiry must be held, and the process can become complicated.

The automatic designation of commercial data centres as Strategic Infrastructure will further add to the Board's duties, given that the great majority of such projects have hitherto secured local authority planning consent, without being appealed. Ministerial commencement of this provision of the 2018 Act is arguably not an immediate priority for Irish businesses.

7. Streamlining judicial review

Ireland's planning system is grounded on Common Law principles, whereby judicial opinions are of primary importance, in contrast to the Civil Law systems commonly found across continental Europe where codified statutes predominate. Our legal system rightly promotes transparency and citizen involvement in line with the Aarhus Convention. However, the relative ease of virtually risk-free access to the High Court and the superior courts means that developers face an increasingly uphill task, particularly for projects that are subject to the EU's complex and constantly evolving environmental acquis. Over and over again, major infrastructure projects have been plunged into a 'bureaucratic black hole', frustrated by what sometimes appear to be deliberate delaying tactics. Ironically, it is often the applications that have undertaken extensive, diligent environmental studies that are subject to judicial reviews.

Ibec welcomes the recent direction by High Court President Peter Kelly that applications for judicial review of SID decisions must come before the Commercial Court and for consistency will be heard by the same judge. However, SID cases currently account for only a small fraction of the planning-related legal challenges coming before the High Court each year. For example, of the 27 judicial review notifications received by An Bord Pleanála in the first eight months of 2018, just two related to SID. They were the tip of an iceberg.

Given the presumption that time is of the essence, all planning-related judicial reviews should be fast-tracked through a dedicated courts division. This would ensure access to environmental justice for citizens while also ensuring timely outcomes for worthwhile projects. The aggregate effect of legal delays to non-strategic projects is costly and frustrating for businesses.

Judicial reviews are also imposing a huge resource burden on An Bord Pleanála, whose legal expenses have increased six-fold over the past years. This is largely driven by a steady increase in the number of court cases. By 2016 the number of new judicial review proceedings received had reached a level last seen in 2008. Table 1 compares the Board’s published data for 2016 and 2017. Although the number of new proceedings barely changed, there was a 60% increase in the number of High Court judgments, virtually all of which were in the Board’s favour.

Table 1: Disposal of judicial review proceedings involving An Bord Pleanála

	2016	2017
Total Judicial Review proceedings received	48	47
High Court Judgements issued, of which	13	21
<i>Judgements in favour of the Board</i>	9	19
<i>Judgements against the Board</i>	4	2
Cases discontinued/dismissed/withdrawn	8	19
Board consented to quashing the order	4	10

Source: An Bord Pleanála annual reports

It would be helpful to have more details on the growing number of cases for which proceedings were halted. In 20% of cases, the Board may have made a technical or procedural error. While it is better for an unlawful decision to be set aside early, to avoid wasted time and cost, some of these defects might have been avoided if a draft decision had been published for comment by the applicant and the public concerned. Publication of a draft decision is common in other regulatory codes. In a further 40% of cases, though, a question arises as to whether appellants had been pursuing dubious legal arguments. The Aarhus Convention rightly provides access to environmental justice, but it does not provide *carte blanche* for unfair legal tactics.

Ibec’s analysis of recently published legal judgments on planning cases has highlighted a tendency for some appellants to ‘throw in the kitchen sink’ when it comes to possible grounds for appeal to a superior court. In one recent high-profile case¹, no less than 19 points of law supposedly of exceptional public importance were cited, all of which were rejected.

1. High Court judgements by Mr Justice Max Barrett delivered on 22nd August 2017 and 11th January 2018 in respect of a challenge brought against An Bord Pleanála by the North East Pylon Pressure Campaign.

8. Quicker superior court decisions

Ibec understands that High Court President Peter Kelly is finalising recommendations of a working group on improved access to justice. This should include speedier resolution of planning-related cases.

There is currently a waiting list of up to two years for hearings in the Court of Appeal, which inherited a backlog of over 1,600 cases when it was established in 2014. If the High Court grants leave to appeal a Board consent, the consequent delay is hugely damaging for the business, utility or authority seeking to invest. Perversely, judicial review cases may be resolved more quickly if leave to appeal is refused by the High Court. Applicants may then invoke their constitutional right to apply directly to the Supreme Court. The current role of the Court of Appeal appears to be somewhat superfluous, particularly where the threshold for entry to the Court of Appeal is higher than for entry to the Supreme Court. If the waiting list cannot be eliminated, it needs to be bypassed.

The legal tactics that fatally delayed Apple's proposed data centre in Athenry case were by no means an isolated instance. Where opposition campaigns are mounted against infrastructure projects, remedies may be pursued all the way up to the Supreme Court even if the legal arguments have little or no prospect of success. Ibec is aware of several cases that have dragged on unnecessarily. Overleaf are two examples.

Case study 1

Indaver's EPA-licensed waste-to-energy plant in County Meath, which makes a valuable contribution to meeting Ireland's landfill reduction target, was in legal limbo for approximately six years. The following provides a summary of the legal tactics used against it.

Table 2: Planning and legal appeals timeline for Indaver Carranstown

January 2001	planning application lodged with Meath County Council
July 2001	planning consent granted
August 2001	consent decision is appealed to An Bord Pleanála
February 2002	objectors seek injunction to stop An Bord Pleanála's oral hearing
October 2002	the Board's oral hearing takes place
March 2003	the Board upholds Meath County Council's planning consent
April 2003	objectors seek a judicial review of the Board's decision
November 2004	the High Court finds in favour of the Board
November 2004	objectors appeal to the Supreme Court
April 2005	a Supreme Court hearing takes place
May 2007	the Supreme Court finally upholds the High Court decision

8. Quicker superior court decisions / continued



Case study 2

EirGrid's North South Interconnector project, which is urgently needed to underpin the all-island electricity market, has been delayed by a series of vexatious court challenges since the Board granted planning consent in 2016. Table 3 lists some of the many legal arguments that were raised. A political and legal campaign against the project continues.

Table 3: Legal arguments raised against the North South Interconnector

The grounds for seeking judicial review of the December 2016 planning consent included:	whether the Board was the competent authority to deal with EU designated Projects of Common Interest
	whether that role introduced bias
	whether EirGrid required landowner consent to make the application
	whether EirGrid had the statutory power to make the application for this powerline
	whether adequate cost-benefit analyses should have been conducted on all possible routes for the Interconnector
	whether alternative technology options were properly considered
	whether the potential market impact of Brexit had been considered
	whether the points for access to land for work had been properly disclosed and assessed
	whether various alleged public health impacts were considered
	whether the environmental impact on Whooper Swans has been assessed

The High Court judgement, delivered in August 2017, respectfully refused all the reliefs being sought. Applicants subsequently sought, but were refused, leave to appeal. The judge included a general observation about would-be applicants “consuming the time and resources of their opponents in attending unnecessarily protracted applications that were at all times clearly doomed to fail”. An appeal to the Supreme Court is pending.

9. Conclusions

Ireland has many advantages as an attractive place to live and work, but these are under threat from various social and environmental pressures, particularly relating to housing and associated infrastructure. Addressing these deficits is amongst the Government's highest priorities. This report has shown that inconsistencies and bottlenecks in our planning and appeals regime constitute serious obstacles to fixing the problems. A streamlined planning and consents regime is a vital component of the reforms needed to deliver future investment in housing and critical infrastructure.

The recommendations in this report, implemented as a coherent package, should result in major performance improvements. However, they are not the whole solution. There are other obstacles, such as public procurement, that merit urgent attention. Ibec will be addressing these separately under the Infrastructure theme of the *Better Lives Better Business* campaign.

Acknowledgement

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About Ibec

Ibec is Ireland's largest lobby group, representing Irish business both domestically and internationally. Our members span all sectors of the economy, collectively employing over 70% of the private sector workforce. Our policy work seeks to improve business conditions and thereby promote sustainable economic growth.

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Notes



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