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Darragh O'Brien TD
Minister for Housing, Local Government and Heritage
Department of Housing, Local Government and Heritage
Custom House
Dublin 1
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2 February 2024

Re: Committee Stage Amendments to the Planning and Development Bill 2023

Dear Darragh,

I am writing in relation to the Planning and Development Bill 2023 (the "**Bill**") and the discussion at the meeting of Government on Tuesday, 30 January.

You will recall that on foot of a memorandum which you brought to Tuesday's meeting, the Government approved the amendments to the Bill which you propose to move at Committee Stage in Dáil Éireann, as well as the drafting of further amendments at Report Stage. You will recall that there was some discussion about two of the amendments in particular and it was agreed that I would write to you, copying the party leaders, setting out my view to their legal effect, in order to enable further consideration of them by Government.

In this letter, I propose to set out my advice in respect of the two amendments which were the subject of that discussion. These amendments are as follows:

- a proposed amendment to section 83 of the Bill relating to the refusal of planning permission on the basis that the relevant housing growth target has been met; and
- a proposed amendment to section 506 of the Bill which regulates interventions by Ministers of the Government, Ministers of State and special advisers in the planning process.

Section 83 and Housing Growth Targets

The first amendment proposes to insert a new sub-section (7) into section 83 of the Bill which would provide as follows:

> "*Neither a planning authority nor the Commission shall refuse permission for proposed development for reasons that the housing growth target included in the housing development strategy in respect of the settlement (within the meaning of Part 3) concerned has already been reached.*"

It is understood that this proposed amendment has been prompted by a refusal of planning permission for a strategic housing development of some 98 units in Greystones in County Wicklow in May 2023. In its decision, the planning authority refused the planning application on the basis that, notwithstanding that the site was zoned, the housing growth target for the area had already been achieved.

It is not clear that the development plan for County Wicklow necessitated the conclusion reached by the planning authority on that occasion. The settlement strategy contained in the development plan for County Wicklow records that Greystones is a level 3 self-sustaining growth town. The reference to "*growth*" might well suggest that there is room for further development during the lifetime of the plan. Further, the use of the term "*target*" in the development plan does not imply that it should be treated as an absolute limit or cap which cannot be exceeded. This is particularly the case in the context of an acute housing shortage, across the State and in Dublin in particular, which the Government is working to address and in circumstances where Greystones is well connected to Dublin by various transport links.

In that context, the proposed amendment to section 83 is designed to prevent a planning authority or An Coimisiún Pleanála (the "**Commission**") from following the example set in this case whereby permission could be refused for development that might alleviate the acute shortage of housing in the State solely on the basis that the housing growth target for a particular area has already been attained. It is important to observe that the text of the amendment would not preclude a planning authority or the Commission from relying on other reasons to refuse permission for development, such as insufficient capacity in local infrastructure and services such as roads, sewerage and water.

A counter-argument to the proposed amendment is that one of the principal objectives of the Bill is to ensure that there is a system led by plans which will govern the granting of planning permissions and that future development will be authorised in accordance with such plans, rather than being led by developers. This is the approach that has been adopted in Part 3 and Part 4 of the Bill. This proposed amendment, the argument goes, represents something of a departure from that principle by authorising planning authorities and the Commission to grant permission for housing development which exceeds the targets that are set out in the relevant plans. It might be argued that this is to some extent inconsistent with the approach adopted in other parts of the Bill.

However, whilst this is ultimately a political call, it may be that this qualification of the principle adopted elsewhere in the Bill is desirable in circumstances where there is an acute shortage of housing and a consequent pressing need to grant planning permission to facilitate development unless there are cogent planning reasons for refusing such permission. This might arise in circumstances where the relevant site has not been zoned or there are insufficient services or infrastructure in the area to support the development. It would appear that the refusal of planning permission merely because a plan, which may have been prepared

years earlier and in contemplation of more local concerns than the housing shortage that pertains at a national level, would not be sensible or consistent with Government policy.

To this end, I understand that your Department has articulated the policy rationale for the proposed amendment along similar lines in response to a press query on the subject. This response reads as follows:

> *"With regard to the amendment proposed to Section 83, this is intended to support the plan-led approach whereby matters related to housing numbers, estimated capacity and zoning are determined at the plan-making stage, but with an appropriate and proportionate element of flexibility in line with statutory guidance. In turn, it is intended that the decision-making process does not further consider numbers and operates in a manner that does not restrict permissible housing development on zoned land. This is necessary as there may be circumstances where there may be extant but as yet uncommenced permissions for development, or where efficiencies in land use may have been achieved in accordance with compact growth policies, or where a local plan may further detail what may be permissible on zoned land further to a development plan."*

Ultimately, whether this amendment should be advanced is a question of policy for you, your Department and Government as a whole. It is nevertheless worth reiterating that the amendment is targeted to very specific circumstances and would not operate to override valid planning reasons for refusing development.

It is also appropriate for me to make two practical observations that might be considered in the event that a decision is made to proceed with this amendment.

First, while the amendment refers to a "*housing growth target*" which appears to adopt the language used in the development plan for County Wicklow referred to above, it may be that other development plans use different terminology for similar concepts. It might be appropriate to ensure that the text of the amendment is sufficiently broad such that it can encompass the different language that may be used in different development plans.

Second, while the proposed amendment is clearly targeted towards addressing the shortage in housing, it does not make express reference to this. This may well be because it is envisaged that the imperative to construct housing at speed and at scale will continue for some time into the future. However, even if these pressures have been alleviated, it is important to note that the amendment will nevertheless remain in force unless and until it is reviewed and amended. Some consideration could therefore be given to:

- reviewing the provision in due course and/or a statement from the Minister in Oireachtas to the effect that such a review should be undertaken; or

- amending the proposed text to reflect that it is intended to address the acute shortage of housing that pertains at present.

Section 506 and Interventions by Ministers

The other amendment proposed to substitute a revised version of section 506 of the Bill which would then provide as follows:

> ***"Prohibition on interference in performance of functions of planning authority, Commission or Maritime Area Regulatory Authority***
>
> *506. (1) A relevant person shall not influence or attempt to influence a planning authority or the Commission in the performance of any of its functions, in relation to a request under section 10 or an application for permission or an appeal under Part 4, except where he or she is –*
>
> *(a) the person who made the request,*
>
> *(b) the applicant for permission, or*
>
> *(c) a party to the appeal.*
>
> *(2) Subject to this Act, a relevant person shall not influence or attempt to influence a planning authority or the Commission in the performance of any of its functions under section 12, Chapter 3 of Part 8 or Part 13, 14 or 16.*
>
> *(3) A relevant person shall not influence or attempt to influence an enforcement authority, within the meaning of Part 11, in the performance of any of its functions under that Part.*
>
> *(4) Notwithstanding subsection (1), a Minister of the Government is entitled to make submissions to a planning authority or the Commission in relation to an application for permission or an appeal under Part 4 where it is necessary or expedient for the effective performance of his or her functions under this Act or any other enactment.*
>
> *(5) In this section "relevant person" means –*
>
> *(a) a Minister of the Government,*
>
> *(b) a person appointed under subsection (1) of section 1 of the Ministers and Secretaries (Amendment) (No. 2) Act 1977 to be a Minister of State, or*
>
> *(c) a special adviser to –*
>
> *(i) a Minister of the Government, or*
>
> *(ii) a person referred to in paragraph (b),*
>
> *appointed under section 11 of the Public Service Management Act 1997."*

It is important to note that this amendment builds on existing provisions in the Planning and Development Act 2000, as amended. Section 30 of the 2000 Act currently provides that the Minister for Housing, Local Government and Heritage shall not exercise any power or control in relation to any particular case with which a planning authority or An Bord Pleanála may be concerned.

The text of section 506 of the Bill as initiated sought to clarify elements of the provisions of section 30 of the 2000 Act by limiting its effect to specified functions under the Bill relating to consents and enforcement. It also expressly provided that the Minister for Housing, Local Government and Heritage is entitled to make submissions to a planning authority or the Commission in relation to an application for permission or appeal where it is necessary or expedient for the effective performance of his statutory functions.

The revised version of section 506 proposed to be inserted by the amendment at issue seeks to make two important changes. The first is that it seeks to extend the scope of the prohibition. In the proposed amendment, the prohibition applies to a "*relevant person*", which is defined as including Ministers of the Government, Ministers of State and special advisers appointed to a Minister of the Government or Minister of State under section 11 of the Public Service Management Act 1997. In simple terms, the amendment proposes to extend the scope of the provision from one Minister to 15 Ministers, 20 Ministers of State, and perhaps 60 special advisers. That is clearly a significant extension of the ambit of the provision.

The second is that the proposed amendment extends the range of functions covered by the prohibition to include:

- Section 10 (Exempted Development);
- Section 12 (Licencing of appliances and cables on public roads);
- Applications under Part 4 (Consents);
- Chapter 3 of Part 8 (Amenities, such as rights of way, tree preservation orders etc);
- Part 11 (Enforcement);
- Parts 13 (Disposal of Land);
- Parts 14 (CPO); and
- Parts 16 (Events and Funfairs).

Before considering the legal effect of the proposed amendment, it should be observed that Ministers of the Government, Ministers of State and special advisers are entitled under the existing law to make submissions to planning authorities and/or An Bord Pleanála.

I understand that the intention behind this amendment is to allow for the appropriate exercise of functions by ministerial office holders in the preparation and implementation of Government policy while also safeguarding the planning system from requests for intervention in individual planning matters.

There are a number of elements of the proposed amendment to section 506 that ought to be considered in order to assess its likely legal effect.

Section 506: *"influence or attempt to influence"*

In the first instance, it is necessary to consider the interpretation of the expression *"influence or attempt to influence"*. An issue arises as to whether the word *"influence"* connotes only *mala fides* influence (such as "*improper*" or "*undue*" influence) or whether it is broad enough to cover morally neutral influence such as, for example, a submission that would otherwise be lawful ("*influence* simpliciter").

It appears from the text of the proposed amendment that influence *simpliciter* is intended to be covered by the prohibition. The explanatory memorandum for the Bill states that *"this section provides that the Minister shall not exercise **any** power or control in relation to any particular case…"*.[1] This interpretation is informed by the use of the term "*influence*" in other provisions of the Bill,[2] as well as the absence of terms such as "*improper influence*" in the Bill which are used elsewhere in the corpus of Irish legislation.[3]

This can be contrasted with the prohibition on the Minister for Housing, Local Government and Heritage from exercising "*power or control*" over individual planning applications which is contained in section 30 of the 2000 Act. My Office has previously advised that this does not extend to a prohibition on the making of submissions by the Minister for Housing, Local Government and Heritage as it involves no more than putting forward information which was relevant to a planning authority's decision, which formed part of the public file, and which the authority was required to "*have regard to*" only and accordingly was not an exercise of "*power and control*". That arose in circumstances where the Minister sought to inform a planning authority of the potential impact of a development on the monitoring equipment of Met Éireann, which is a division of the Department of Housing, Local Government and Heritage.

The proposed amendment, in section 506(4), would now appear to provide that the Minister for Housing, Local Government and Heritage may only make submissions where it is necessary or expedient for the effective performance of his or her statutory functions. It appears to be the case that a submission made in any other circumstance would be the exercise of "*influence*" and therefore prohibited.

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[1] Emphasis added.

[2] For example, section 495(2) of the Bill provides that where a member of a planning authority has a pecuniary or beneficiary interest in, or that is material to, a matter arising pursuant to or as regards the performance by the planning authority of a function under the Bill, that member *"shall neither influence nor seek to influence a decision of the planning authority in relation to that matter."*

[3] See for example section 40 of the Environmental Protection Agency Act 1992, which prohibits a person communicating with the directors or employees of the Agency for the purpose of "*influencing improperly*" his consideration of any matters which falls to be considered or decided by the Agency (emphasis added).

It is also worth noting that it would also extend to any *attempt* to influence a decision, even if such an attempt is unsuccessful. However, it may well be difficult for an applicant seeking to challenge a decision on the basis that a Minister of the Government, Minister of State or special adviser has attempted to influence a decision to obtain an order of *certiorari* quashing that decision in circumstances where many submissions are made in respect of the development. It would be a substantial evidential burden for an applicant to discharge in judicial review proceedings that such an attempt was the sole or even a significant influence in the outcome of the decision.

Section 506 – Exceptions

Certain exceptions to the prohibition in the proposed amendment to section 506 of the Bill are intended to facilitate relevant persons in participating in the planning process in a *personal capacity*.

There are exceptions built into the proposed text of section 506(1)(a)-(c) for circumstances where (a) a relevant person themselves makes a request for a declaration pursuant to section 10 of the Bill, (b) where a relevant person makes an application for planning permission or (c) where a relevant person is a party to an appeal.

While the operation of the exceptions in section 506(1)(a)-(b) are reasonably straightforward and will allow relevant persons to make requests and planning applications like any other person, it is not clear to me that the exception in section 506(1)(c), where a relevant person is a party to an appeal can apply as broadly as it was intended.

Section 99(1) of the Bill provides that a person can appeal a decision of a planning authority to the Commission where (a) the person is the applicant for the permission, and (b) the person made submissions in writing in relation to the planning application. A relevant person can make an application for permission unencumbered by the proposed amendment to section 506 of the Bill and therefore would have standing to appeal to the Commission on that basis.

However, it seems unlikely that a relevant person could benefit from (b) and be permitted to bring an appeal simply by reason of the fact that they made submissions in respect of the planning application. This is because the proposed amendment to section 506 may operate to prohibit the relevant person from making the submission in the first place as this would be an attempt to influence a planning decision.

Therefore, it is not clear that a relevant person would be able to provide written submissions on another person's planning application and would therefore not be permitted to appeal a decision granting permission to another person.

While it could be argued that the the intention of these exceptions is to apply only to a relevant person acting in the course of their function as a Minister, Minister of State or special adviser, this in my view is not sufficiently clear from the text of the proposed amendment. Further, there are likely to be substantial difficulties in seeking to rely on such an argument to narrow the

scope of the prohibition envisaged by the proposed amendment to section 506. These are elaborated further below.

Section 506 – Relevant Person

It is necessary to consider whether the proposed amendment to section 506 distinguishes between the personal capacity of an office holder and their official capacity. It will be recalled that the prohibition in the proposed amendment to section 506 of the Bill applies to Ministers of the Government, Ministers of State and special advisers appointed to a Minister of the Government or Minister of State under section 11 of the Public Service Management Act 1997.

As a matter of law, a Minister of the Government is "*a statutorily-created corporation sole, distinct from the temporary, flesh-and-blood incumbent of the office*",[4] consistent with the Ministers and Secretaries Act 1924, as amended. This is a legal mechanism to facilitate the practical realities of government. Nevertheless, it has been held that the natural person who holds the office of a Minister of the Government persists *alongside* the corporation sole and remains capable of suing in a personal capacity and exercising their personal rights. This is particularly clear from the decision of the Court of Appeal in ***Shatter v Guerin***,[5] in which it was held that the applicant did have standing to seek judicial review in respect of an investigation conducted into matters including his conduct while serving as Minister for Justice and Equality, notwithstanding that the proceedings were brought after the applicant ceased to hold that office.

In particular, Ryan P noted that:

> "*I do not understand how it can be suggested that because he was a member of the Government that commissioned the report, he thereby abrogated any rights that he might have to fair procedures. I do not think that such a position makes legal or constitutional sense and I do not also believe that it accords with logic. It seems to me to be clear that Mr. Shatter had the capacity of Minister which meant that he was part of the Government and collectively responsible. He also had a function and a role as political head of the Department which he occupied as a corporation sole. But thirdly, he had a personal and individual identity as the person holding the office and it was in his personal and individual identity that he faced the criticisms that Mr. Guerin levelled at him in chapters 19 and 20 of his report. Therefore, it seems to me that Mr. Shatter had capacity under this rubric in which to make his claim for judicial review of the Guerin Report.*"[6]

Moreover, Finlay Geoghegan J noted that:

> "*Objection was made to the locus standi of the appellant as a private citizen or natural person to complain of alleged damage to his good name or reputation by reason of alleged criticism in the Report of the Minister in respect of acts done or not done while*

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[4] Gerard Hogan, David Gwynn Morgan and Paul Daly, *Administrative Law in Ireland* (5th edn, Round Hall 2019) para 3-39.

[5] ***Shatter v Guerin*** [2016] IECA 318.

[6] ***Shatter v Guerin*** [2016] IECA 318, [96] (Ryan P) (emphasis added).

he was the holder of the office. That objection is not sustainable. The Minister, a corporation sole, is a legal person with perpetual succession and hence in that sense a distinct person from the appellant. Nevertheless the appellant personally is identified as the Minister for so long as he holds office. Hence it appears to me that criticism in respect of acts done or not done by the Minister while the appellant was the holder of the office can only be objectively viewed as criticism of him personally with the potential to damage his good name and reputation. Hence I am satisfied the appellant, albeit no longer Minister, has locus standi to pursue this claim."[7]

These aspects of the reasoning of the Court of Appeal were not disturbed on appeal to the Supreme Court.[8] However, there may be some difficulty in generalising the conclusions in ***Shatter*** to situations where constitutional rights are not directly in issue, as they were in that case.

In principle it seems that a distinction between the Minister as a corporation sole and as a private individual can be drawn at least in certain circumstances. This may well be the case in respect of the application of proposed amendment of section 506 to Ministers of the Government. However, it should be noted that this theoretical distinction may be difficult to delineate in practice and it is difficult to predict with any great clarity how the courts would approach this distinction in respect of statements or submissions made by a Minister of the Government.

There may be some cases where a Minister of the Government has a clearly personal interest in a proposed development, such as where development is to take place on land adjoining their place of residence. There will be other cases in which their personal and professional interests might be regarded as overlapping to an extent, for example, in the case of the development of a crèche or a school or an incinerator in their locality.

Moreover, while there may be some scope for distinguishing between the official capacity and personal capacity of Ministers of the Government, in part by reason of the fact that the Minister is a corporation sole, the same reasoning would not apply to the other categories of person defined as relevant persons in the proposed text of section 506 of the Bill. This is because neither a Minister of State nor a special adviser is a corporation sole.

Indeed, particularly in the case of a special adviser, it is difficult to see that the proposed amendment to section 506 could be limited to avoid its application to their activities in a personal capacity.

While the position is somewhat more ambiguous in respect of Ministers of State, who are public office holders rather than employees or civil servants, it is nevertheless difficult to see how the proposed amendment would distinguish between the personal and official capacities of Ministers of State.

Conclusions on Section 506

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[7] ***Shatter v Guerin*** [2016] IECA 318, [19] (Finlay Geoghegan J).

[8] See in particular ***Shatter v Guerin*** [2019] IESC 9, [2021] 2 IR 415, [18]-[24] (McKechnie J).

The expression *"influence or attempt to influence"* can reasonably be interpreted broadly to include good faith and bad faith attempts at influence and indirect attempts such as public statements. It also appears to be broader than the existing formula of "*power and control*" contained in section 30 of the 2000 Act.

While it is doubtful whether "*attempt to influence*" alone would form a sufficient basis for a grant of an order of *certiorari* in judicial review proceedings to quash the decision, it is nevertheless a binding legal prohibition on certain conduct on the part of relevant persons within the meaning of the proposed amendment of section 506.

A relevant person can continue to engage in a personal capacity with the planning system to the extent that they can make a request under section 10 of the Bill and apply for planning permission. A relevant person may also appeal a decision on their own application for planning permission under the proposed amendment to section 506. However, it is not clear that a relevant person can appeal a decision regarding planning permission granted to another person simply by reason of the fact that they have made submissions on that application, because the making of those submissions is likely to be prohibited in the first place.

It is very unclear that a workable distinction can be drawn between the personal capacity and official capacity of an office holder.

There is undoubtedly a need to ensure no *mala fides* control or influence should be exercised by those in a position to exercise same, and undoubtedly it is important that legislation reflects that. In circumstances where submissions are on the file and transparent, and are made in circumstances where ordinary citizens would also be in a position to make submissions, it may be questioned from a policy perspective as to whether it is a sustainable position to deprive these office holders of the same privilege, particularly where other elected representatives have no such inhibition imposed upon them.

It certainly does not seem appropriate that, for instance, if a next-door neighbour was seeking to construct a large extension that would overlook a rear garden, that a Minister of the Government, Minister of State or special adviser would have any lesser right to object to such a development in their private capacity than an ordinary citizen.

Similarly, it would surprise some that a Minister of the Government or Minister of State could not make observations in relation to a controversial development located in their constituency where other elected representatives in the same constituency would have no such inhibition.

In the circumstances, it would seem to me desirable to provide greater clarity in the proposed amendment to section 506 as to who can and cannot make submissions and in what capacity.

In addition, I observe that there is no express sanction or consequence contained in the Bill for a breach of Section 506, which begs the question as to its utility. There could, as identified above, be an indirect consequence insofar as a breach of section 506 might be relied upon in judicial review proceedings seeking to quash a planning decision, but it is far from clear in

what circumstances that could arise. Further, it may be possible for a court to make a declaration that a relevant person has acted in breach of the prohibition in section 506.

Having consulted with the Parliamentary Counsel leading the drafting of the Bill, it seems to me that an amended text of section 506 along the following lines may resolve many of the difficulties which I have outlined above:

"Prohibition on interference in performance of functions of planning authority, Commission or Maritime Area Regulatory Authority

506. (1) Subject to subsection (4), a relevant person shall not influence or attempt to influence a planning authority or the Commission in the performance of any of its functions, in relation to a request under section 10 or an application for permission or an appeal under Part 4, except where he or she is –

(a) the person who made the request,

(b) the applicant for permission, or

(c) a party to the appeal.

(2) Subject to this Act, a relevant person shall not influence or attempt to influence a planning authority or the Commission in the performance of any of its functions under section 12, Chapter 3 of Part 8 or Part 13, 14 or 16.

(3) A relevant person shall not influence or attempt to influence an enforcement authority, within the meaning of Part 11, in the performance of any of its functions under that Part.

(4) A relevant person is entitled to make submissions to a planning authority or the Commission –

(a) pursuant to an invitation under Part 4 or 6, and

(b) under and in accordance with that Part,

in relation to an application for permission or an appeal under Part 4.

(5) In this section "relevant person" means –

(a) a Minister of the Government,

(b) a person appointed under subsection (1) of section 1 of the Ministers and Secretaries (Amendment) (No. 2) Act 1977 to be a Minister of State, or

(c) a special adviser to –

(i) *a Minister of the Government, or*

(ii) *a person referred to in paragraph (b),*

appointed under section 11 of the Public Service Management Act 1997."

As can be seen from the changes highlighted in bold and underlined text above, this would make the prohibition in section 506(1) subject to a revised subsection (4). Section 506(4) would clarify that a relevant person is entitled to make submissions to a planning authority or the Commission in the same way as any other person as part of the planning process.

This is a broader exception to the prohibition than is provided by the current draft of the amendment as the exception applies not only to Ministers of the Government, but also to other relevant persons. It also does not require that any submissions made must be necessary or expedient for the effective performance of statutory functions. However, any attempt by a relevant person to exercise influence over the planning process other than by making submissions in this way would still be prohibited.

As in the current draft of the amendment, the prohibition would not apply where the relevant person is the person making a request under section 10, the applicant for planning permission or a party to an appeal.

While it is a matter for you as to whether such an amendment should be pursued, it seems to me that this wording might achieve the policy objective that underlies the proposed amendment to section 506.

I trust that the above assists in clarifying the legal effect of these amendments.

If a political decision is taken not to proceed with the current version of the proposed amendment to Section 506 at Committee Stage, the amendment could be withdrawn and any alternative version could be proposed at Report Stage, subject to a further Government decision. Alternatively, the issue could be revisited when the legislation is before the Seanad.

As agreed, I am copying this correspondence to the Taoiseach, the Tánaiste and Minister Ryan.

I am available to advise further as required.

Yours sincerely,

ROSSA FANNING
ATTORNEY GENERAL