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Department of Agriculture Food and the Marine
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Draft Agriculture Appeals (Amendment) Bill 2020 – Submission to Public Consultation

The purpose of the proposed legislation is defined in the Program for Government as to ‘Implement the MacKinnon Report and review the forestry appeals process to ensure it is aligned with other comparable appeals processes.

While we would have legal and ethical concerns about the possibility of the general policy directives undermining the appeals board’s independence:

14E.—(1) The Minister may from time to time issue such general directives as to policy in relation to forestry appeals as the Minister considers necessary and the Forestry Appeals Committee shall, in performing its functions, have regard to any such directives

and for any restricting of standing for an appeal as a ‘relevant person’:

(iii) a person who has, in accordance with regulations for the time being made under section 6, 10, 17, 22 or 30 of the Act of 2014, made submissions or observations in writing to the Minister, or officer of the Minister in relation to an application referred to in subparagraph (i) or a decision of the Minister referred to in subparagraph (ii);

and particular concerns about introducing the concept of an ‘Environmental Body’ given that under the relevant EU Directive ‘the public concerned’ is defined as ‘non-governmental organisations promoting environmental protection and meeting any requirements under national law’ who ‘shall be deemed to have an interest’:

the additional requirements which an environmental body referred to in section 14A(4)(b)(vi) shall satisfy in order to make an appeal under paragraph (c), being (i) in relation to its membership

we address at this time only:

“14B (1) The Minister may charge such fees as he or she may prescribe for an appeal under section 14A(4) and different fees may be charged for different classes of such appeal.’

The Argument

The imposition of a participation fee which was once acceptable has been made legally unacceptable through three subsequent developments: The Aarhus Convention, EU Directive 2003/35/EC, and the Sustainable Development Goals {SDGs} as reflected in the European Green Deal.

It is now understood that full and unhindered participation is the only way that Governments can bring their citizen with them to support the increasing hard decision required as the impacts of climate change undermine our infrastructure and threaten human well being.

Origins of the concept of a participation fee

The Mackinnon Report, entitled 'Review of Approval Processes for Afforestation in Ireland', was commissioned by the previous Government and published in November 2019. It states that the opportunities that people have to comment and object to forestry proposals represents 'a barrier to efficient decision-making'.

The author argues that the case for the introduction of fees for third-party submissions is 'unarguable' as 'an appeals system which allows third parties, at no cost, to challenge decisions of the Department has created further delays with significant administrative costs'. The Report refers to the €20 fee introduced under the Planning Act 2000 to comment on planning application before local authorities.

Disgraced Taoiseach Bertie Ahern highlighted this view of a world without objectors when he stated in January 2005:

"I would like to have the power of the Mayor [of Shanghai] when he decides if he wants to do a highway, if he wants to by-pass an area he just goes straight up and over. I know that is not going to happen at home. I would just like that, when I am trying to put it on the ground, that we get through the consultation process as quick as possible."

While no records were kept of the number of objections received previously to the introduction of the planning fee in 2000, interviews carried out by this organisation of senior planners suggested a cut in objections of at least 50%.

We examined the submissions that were made to the Department of the Environment at the time. The County and City Management Association, 67 civil society groups and a wide range of individuals were virtually uniform in their objections: planning authorities gained much relevant information and the decision-making process was improved through public submissions.

Legal Turning Point

The Judgment of the Supreme Court on 31 July 2020 quashing the National Mitigation Plan after our challenge clarified that environmental bodies cannot rely on human and constitutional rights. NGOs cannot claim the rights to life and bodily integrity, for example - as these are 'personal rights which FIE itself [as a corporate body] does not enjoy'.

But the citizens have the right to claim these rights when addressing decisions by authorities that may adversely affect them and the State 'shall' assist their participation in decision making. This is because we now realise that genuine civic engagement and public participation is critical to an effective system of environmental governance.

How a fee is contrary to three new legal measures

Aarhus Convention

The Aarhus Convention originates in the 1992 Rio Declaration, specifically Principle 10 on the Environment:

'Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes.'

The fee to comment on planning applications was introduced before Ireland ratified the UNECE *Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, otherwise known as the Aarhus Convention, in June 2012.

The Convention entitles the public to be informed about plans that may impact on the environment:

'Each Party shall provide for early public participation, when all options are open and effective public participation can take place'.

and

The public concerned shall be given early and effective opportunities to participate in the environmental decision-making procedures referred to in Article 2(2) and shall, for that purpose, be entitled to express comments and opinions when all options are open to the competent authority or authorities before the decision on the request for development consent is taken.

The Convention further requires that

'Arrangements are to be made by public authorities to enable the public affected and environmental non-governmental organisations to comment on, for example, proposals for projects affecting the environment, or plans and programmes relating to the environment, these comments to be taken into due account in decision-making, and information to be provided on the final decisions and the reasons for it.'

A fee to participate in decision making is not compatible with the obligations of this Convention.

SDGs and the European Green Deal

The 2030 Agenda (SDGs), initially adopted by the United Nations in September 2015, is now a central policy framework intended to guide EU policy and decision-making. It is a sustainable development agenda which is integrated and indivisible.

The 2030 Agenda requires the EU to achieve much greater integration of, and balance between, its macro-economic, environmental and social policy-making.

The Agriculture Appeals (Amendment) Bill 2020 falls within this EU 2030 Agenda which is based on the SDGs which requires 'broad and informed public engagement'.

There is a clear role for public involvement in monitoring the implementation of SDG 15, for example, which specifically requires sustainable forestry.

Protect, Restore and Promote Sustainable Use of Terrestrial Ecosystems, Sustainably Manage Forests, Combat Desertification, and Halt and Reverse Land Degradation and Halt Biodiversity Loss

and target 16.7 which imposes on Governments a duty to

'ensure responsive, inclusive, participatory and representative decision-making at all levels'.

These SDGs were specifically designed to strengthen civil society and to allow it to fulfil a crucial role in decision making that this legislation will undermine.

EU Directive

The relevant EU Directive [Directive 2003/35/EC] states in its preamble

'Effective public participation in the taking of decisions enables the public to express, and the decision-maker to take account of, opinions and concerns which may be relevant to those decisions, thereby increasing the accountability and transparency of the decision-making process and contributing to public awareness of environmental issues and support for the decisions taken.'

'Participation, including participation by associations, organisations and groups, in particular non-governmental organisations promoting environmental protection, should accordingly be fostered, including inter alia by promoting environmental education of the public.'

How is the barrier of a fee compatible with the requirement to that participation 'should accordingly be fostered'?

The Directive refers to the Aarhus Convention, highlighting the central thrust of modern legislation

'Among the objectives of the Århus Convention is the desire to guarantee rights of public participation in decision-making in environmental matters in order to contribute to the protection of the right to live in an environment which is adequate for personal health and well-being.'

stating, somewhat ironically in the subject case:

for the future, public participation requirements in line with the Århus Convention will be incorporated into the relevant legislation from the outset.

Conclusion

As we stated above,

'It is now understood that full and unhindered participation is the only way that Governments can bring its citizen with them to support the increasing hard decision required as the impacts of climate change undermine our infrastructure and threaten human well-being'.

Ahern's dream of a Chinese dictatorship has dominated Irish economic thinking. The public's right to comment must be restricted in every way possible as 'an appeals system which allows third parties, at no cost, to challenge decisions of the Department' is the cause of 'delays with significant administrative costs'.

McKenna sees unconditioned public participation as one of the 'major barriers to the achievement of the Irish Government's target for forestry planting.' In bold, he declares

'The case for placing third party rights of appeal on forestry on a similar financial basis to planning is unarguable. Fees should be introduced as a matter of urgency for making a submission on an application and lodging an appeal. These should be in line with the comparable planning fees.'

The introduction of fees is only 'unarguable' if you, like Bertie Ahern, wish for a world where Government believe the people are to be scorned and disenfranchised and the rulers live in an untouchable privileged bubble of their own.

Democracy is being undermined by the increasing restrictions on public participation in Irish civil society. Bridges have not been built between communities seeking their rights and our local and national authorities. In fact, the opposite has happened: walls are being incrementally erected by administrators to keep out citizens unless they comply with multiplying and onerous conditions.

As the pressures on the environment increase in the coming years and sacrifices are required to address the consequences of climate change, it is increasingly important to resist legislation like this which will compound the growing alienation between citizens and their rulers.

Participation must be encouraged as alienation can only have the utmost dire consequences in ultimately creating civil unrest and a breakdown in democracy. Bertie may have his way in the end.

Yours, etc.,

Tony Lowes