

Response to public consultation on Draft Development Plan Guidelines for Local Authorities

8th October 2021

I welcome the draft Guidelines which for the most part create a clear and helpful set of guidelines. However, there are four areas which I'm concerned about.

1. The need to highlight legal obligations affecting the Development Plan process for a number of vital policy areas, including water quality and climate change;
2. The exclusion (which I believe is legally erroneous) from the remit of the Development Plan and Local Area Plans of a number of important policy areas;
3. The need for stronger guidance on the role of the Strategic Environmental Assessment in shaping the development of the Plan, and the importance of quantitative assessments of impacts where they are possible;
4. Guidance on the non-mandatory objectives.

1. Legal Obligations

The Guidelines should highlight the most important legal obligations bearing on the Development Plan process, including those which are found outside the planning code itself. The Guidelines set out the requirements as regards Appropriate Assessment under the Natura 2000 governance system. They should similarly advise on the obligations of local authorities under Article 15 of the Climate Action and Low Carbon Development Act 2015, as amended, and under the Water Framework Directive. I note (p.98) that full planning guidelines on WFD implementation are in preparation, which is welcome. In the interim, it would be important to specifically draw local authorities' attention to the Weser judgement and its implications.

2. Exclusion of policy areas

The following elements of the draft guidelines are deeply concerning:

"Differentiation between the Development Plan and other Statutory Codes

"The statutory elements and remit of the development plan are set out clearly in the Planning & Development Act. In preparing the development plan, planning authorities must exercise caution not to inappropriately stray into the operation of other statutory codes and regulatory regimes that relate to the development sector, but are outside the remit of a county or city development plan. This is applicable to policy or objectives for non-planning functions governed by other legislation and regulations.

"In particular, there is a legal distinction between planning and the operation of Building Regulations under the Building Control Acts, such that development plans are not empowered to introduce new or bespoke localised standards for the construction of buildings that are governed by the Building Regulations at a national level." (page 17)

and

"There are a number of key factors that should be considered in the selection and drafting of objectives in a development plan...

"• The objective should not address matters that are the subject of other legislative provisions. Objectives dealing with specific issues that are governed by other legislative codes, including for example, the Building Regulations or the Building Control Acts, should not be included as objectives in development plans. This includes objectives that refer, for example, to specific building standards or methods, such as NZEB, Passive House or Low Carbon Cement." (page 66)

The guidelines do not set out any legal basis for this legal guidance and I am unable to find anyone who can do so. It is also contrary to established practice which has not been the subject of legal challenge.

The general guidance on p.17 risks undermining a whole range of policy areas wherein the planning system has and continues to play an important role but other regulatory regimes also apply, including water quality, air quality, biodiversity, noise management, etc. The fact that the "other statutory codes and regulatory regimes" aren't listed, with only one example being given surely puts these guidelines in the undesired position of increasing rather than reducing uncertainty.

Coming to the specific area which these sections seem to be designed to address, the guidance is contradicted by the text of the Planning and Development Act, 2000, as amended. S.10(2) of the Act sets out that the development plan shall include objectives for a list of purposes including

"(n) the promotion of sustainable settlement and transportation strategies in urban and rural areas including the promotion of measures to—
(i) reduce energy demand in response to the likelihood of increases in energy and other costs due to long-term decline in non-renewable resources,
(ii) reduce anthropogenic greenhouse gas emissions, and
(iii) address the necessity of adaptation to climate change;
in particular, having regard to location, layout and design of new development;"

The Act also sets out, in the First Schedule, purposes for which objectives may be included, including, in Part II,

"3. Promoting design in structures for the purposes of flexible and sustainable use, including conservation of energy and resources."

There is no legislative provision which sets out that "development plans are not empowered to introduce new or bespoke localised standards for the construction of buildings that are governed by the Building Regulations at a national level."

I attach a report on work done by local authorities in Ireland in requiring higher building standards, which in fact accelerated the improvements in building standards at a national level, including reference to the legal basis for those local requirements implemented through the planning code.

With subsequent developments in national and EU legislation, there is undoubtedly less of a case for engaging with thermal energy use through the planning code than there was at the time of the writing of the attached report. However, there are operational energy issues not addressed by our current building regulations, the risk of overheating being a primary example. For a range of reasons including occupant health, cost-effectiveness, and embodied and operational energy use (e.g. of retrofitted air conditioning), it would be both legitimate and beneficial for local authorities to ensuring that overheating is addressed in the context of developments where it might otherwise occur.

The progress made in relation to operational energy demand has not also been made at national and EU level in relation to resource consumption, material use and reuse, embodied carbon/energy and potentially other areas including water management. Progress on these at a national level is slow. A similar process of policy development at a smaller scale that was seen with energy consumption standards could be very useful in identifying the best regulatory and measurement approaches, demonstrating feasibility, etc.

Even if DHLGH is not convinced that the planning system can help in this area, the fact is that local authorities have powers in this regard and the guidelines should not mislead.

However, the planning system has a vital role to play in facing the environmental emergency which we have recognised at global, national and local levels. I strongly urge the Department, given the scale of the environmental crisis we face, to encourage local authorities to use their powers to promote and drive the innovation and change needed for the rapid transition towards sustainability, protection of biodiversity and climate neutrality.

3. Strategic Environmental Assessment

The draft guidelines advise that

"After the development plan is adopted then an 'SEA Statement' is published which includes a description of how the SEA has informed the adopted version."

and that

“The SEA process is one that parallels and informs the development plan preparation process and is an important tool in policy formulation. In this regard it is important that environmental considerations are integrated into the development plan preparation process from the early stages.”

However, the guidelines themselves don't offer any advice into how the SEA process should be run in order to effectively inform the development plan process. Such guidance would be useful, as in practice there is a risk of treating the SEA as a red tape exercise which simply adds time to the process without adding value. The discussion in sections 3.3 and 3.4 of the Guidelines should contain this advice on how the SEA informs the plan. The discussion in 5.3 should relate the SMART Objectives in the plan back to the SEA process.

In this context the guidelines could consider the degree to which the practice often followed of handing the entire SEA process over to outside consultants, while the development plan preparation is done in-house reduces the impact the SEA can have on the development plan. An alternative would be for the SEA process to be led in-house with relevant specific expertise called in as appropriate.

Another key issue in this area is the need to make quantitative assessments of environmental impact where possible. Local authorities should be advised to make the SEA process as informative as possible and to avail of the existing transport modelling capacity of the NTA to carry out quantitative assessments of the environmental impact of the transport which will result from the infrastructure and spatial planning decisions in or flowing from the Development Plan.

4. Guidance on non-mandatory objectives

It would be very helpful to have guidance on the purposes for which objectives may be included, found in the First Schedule to the Planning and Development Act.

Cllr. David Healy

Green Party / Comhaontas Glas

Beann Éadair / Mullach Íde

Howth / Malahide

087 6178852

www.davidhealy.com

david.healy@cllrs.fingal.ie