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Property Industry Ireland Planning Reform Policy Paper

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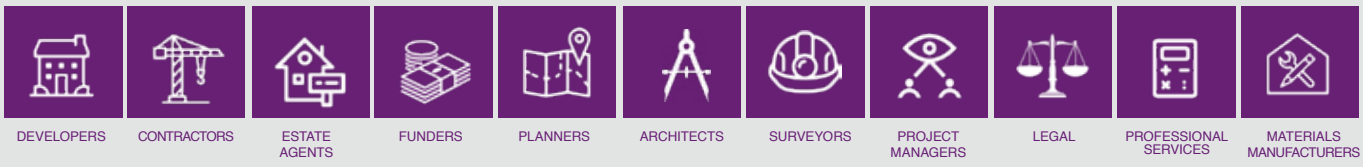

1. Introduction

Property Industry Ireland (PII) welcomes the review currently being undertaken by Government of the Irish Planning System. In 2012, PII published Planning a Better Future, a report on reform of the Irish Planning system. Successive Governments have taken action on many of the areas identified in the report. However, the built-environment ecosystem, of which the planning system is a key part, has undergone serious change. These changes include the establishment of the Office of the Planning Regulator, a new National Planning Framework, a continuing housing crisis, and an urgent need to address sustainability and energy security concerns.

Property Industry Ireland has therefore prepared this policy paper to provide a cross-sectoral industry contribution to the review currently being undertaken by the Attorney General.

We have separated our recommendations into three main sections addressing the key issues of current Planning Policy, Legislative Change Needed and the Operation of the Planning System.

2. List of Recommendations

1. A greater quantum of land should be zoned for residential use in each Development Plan. This should be at least 50-100% above the forecast need. While there are concerns about ensuring greater urban density and development within the existing settlement footprint, this level of flexibility is essential to allow sufficient housing to be delivered. Other instruments, such as targeted infrastructure (both transport and social) provision should be used to incentivise preferred sites.
2. All Development Plans should be varied as a matter of urgency to reflect the higher population identified in the Census 2022 preliminary findings. Plans currently under consideration should be required to incorporate additional population projections before being adopted.
3. Development plans to be of 10-year duration with a detailed interim review after 5 years.
4. The development process (including site identification, acquisition and planning requirements up to grant of planning) for large scale delivery of housing can extend over the course of two consecutive, 6-Year development plans and provision of zoning of land should be made to account for this.
5 In metropolitan areas there should be a single development plan for its geographic area.
6. A multi-criteria analysis (MCA) should be provided for each technical requirement and Development Management Standards to be provided for in a Development Plan.
7. A mandatory 12-month time limit should be introduced for Local Authorities to adopt any Local Area Plan or Masterplan referenced in a Development Plan.
8. Local Authorities to outsource the preparation of Local Area Plans and Masterplans where necessary to meet this mandatory time limit.
9. Local Area Plans and Masterplans prepared in accordance with the Development Plan to have the status of an Outline Planning Permission which can be appealed to An Bord Pleanála. In order to provide greater certainty for all parties, a future application for Planning Permission based on this Outline Permission, shall not be open to appeal in respect of matters already addressed in the Outline Permission.
10. Local Area Plans and Masterplans are consistent with the Development Plan. This may limit the additional requirements allowable under an LAP or Masterplan.
11. Greater emphasis should be given to the development plan-making process as the main citizen engagement in the planning process.
12. Landowners should be actively communicated with about proposed changes to the zoning of their land and meetings facilitated during the plan making process.
13. National Planning Guidelines and Development Plans should be treated as guidance documents rather than strict legal documents. This should be clearly set down in legislation to avoid unintended and unhelpful over literal legalistic interpretation by courts.
14. A clear hierarchy between the National Planning Framework, Ministerial Planning Guidance, Regional Spatial and Economic Strategies, and Local Development Plans should be established.
15. Government should prioritise clarifications to misinterpretations of Ministerial Planning Guidance.
16. The Department of Public Expenditure and Reform should maintain a dynamic priority list of strategic infrastructure projects including a projected commencement and completion date, which should be updated on an ongoing basis.
17. Conduct a review of current Strategic Development Zones to identify improvements.
18. All SDZ Planning Schemes to be subject to review, to include landowner and public consultation, every 5 years.

19. Urgently amend the Planning and Development Acts to facilitate a more effective transition between SHD to LRD developments and provide for an efficient and effective process for amendment applications e.g. to permit amendments to SHD permissions and LRD permissions to be submitted under normal Section 34 planning application process.
20. Provide for a decision time limit of 4-weeks on minor amendments to SHD applications.
21. Amend article 37 (2) (b) of the Planning and Development Acts.
22. Courts should not be responsible for making policy decisions in relation to material contravention of Development or Local Area Plans.
23. Review Part 10 of Environmental Impact Assessment and review the thresholds for which an Environmental Impact Assessment Report is required.
24. Reinstate legislative provisions for Extension of Duration on grounds where the delay is due to economic, legal or other circumstances beyond the applications control.
25. Extend the 5-year duration period of a planning permission by the length of a Judicial Review challenge.
26. Reinstate Extension of Duration where an EIAR would be required for the extension, provided the information necessary to carry out the relevant amendments is submitted with the application for extension of duration.
27. Amend Article 22(2)(g) of the Planning and Development Regulations so that a letter of consent is not required where a public road has been taken in charge.
28. Where a real issue is identified, Government should be swift to respond with amendment to legislation or relevant guidelines to reinstate the original intent, e.g. where a court has placed an unintended and unhelpful interpretation on legislation or guidelines that runs contrary to the spirit and purpose of the provision, or renders the relevant provision highly problematic, to avoid a patchwork of jurisprudence.
29. Introduce proportionate costs risk for the person seeking the JR, for example introduce €5,000-10,000 Stamp Duty obligation on Statement of Grounds, introduce a minimum environmental threshold to be met before costs protection is granted, and ensure that applicant(s) organisations have a minimum financial standing to meet adverse cost orders.
30. Raise the entry bar for making a challenge, for example confine applicants to legal grounds which mirror observations made in the planning process, the type of grounds and the number of grounds permitted in a Statement of Grounds should be restricted and introduce obligation on applicants to have made prior observations in the planning process, and permission should be quashed where the issue complained about was not first raised in the planning process in a submission to the planning authority and/or ABP on the application.
31. The applicant must be able to show some connection to the area and a legitimate locus standi, for example by introducing minimum proximity to site rules for applicants.
32. No permission should be quashed where the issues challenged do not make any difference to the outcome of the planning decision.
33. Interpretation of planning policy is a matter for planners. The role of the judge is to decide as between opposing views in the light of the law. The role of planning authorities and An Bord Pleanála in exercising planning judgement should be strengthened in legislation.
34. Courts should deal with all issues raised in any one JR challenge in judgments issued, reducing the risk for a further JR challenge to any subsequent permission on issues not dealt with by the Court. There must be greater focus on getting to the position where a permission can be implemented, avoiding a series of JR challenges over several years in respect of any one development.
35. Grounds should be published to all parties prior to leave application.
36. Consent quash orders should be published.

37. Restructure the Planning and Environment Court.

38 If a planning application is remitted by the court to ABP for redetermination, the grounds of any further JR should be limited to those raised in the initial JR challenge (other than strictly in respect of any change in the decision compared with the quashed decision). Judicial Discretion to amend or invite applicants to amend any Statement of Grounds under Order 84 Rule 4 of the Rules of Superior Courts once Leave is applied for should be removed.

39. Introduce robust case management and coherent civil procedural rules with strict time limits to accelerate the period between leave being granted and the substantive hearing, reduce the 8-week period under s50(7) PDA 2000, as amended to 6 weeks.

40. Make costs appraisals and mediation a step in the legal process immediately following Leave being granted.

41. Remove the need for Notice Party developers from having to prove that they are in a position to commence development works when seeking an undertaking as to damages when applicants seek a 'stay' on development.

42. Significantly increase the membership of An Bord Pleanála as an urgent point.

43. Increase the executive and legal resources of An Bord Pleanála.

44. Introduce statutory timeline for all planning appeals of 16 weeks.

45. Streamline the Board inspectors' role and clarify between the legally required assessments and opinions of the inspector.

46. Increase the number of exempted developments to free up planning resources.

3. Planning Policy and Plan Making

National Planning Framework

The Project Ireland 2040 National Planning Framework (NPF) was published in February 2018. PII welcomes the aim of achieving sustainable development and meeting the needs of a growing population, both in terms of housing and infrastructure demand. However, only 4 years into the plan, it is clear from the preliminary Census 2022 results that population growth is exceeding projections, with significant implications for housing need assessment and housing land capacity in Development Plans and Local Area Plans.

The Census 2022 Preliminary Results show the population growing at a faster rate than provided for under Project Ireland 2040. Our population already stands at over 5.1 million people and the average increase of 60,000 people per year since the last census in 2016 is at a faster rate than the 50,000 per annum provided for in the NPF. This growth rate also exceeds the 'headroom' provided for in the NPF. This has serious implications for our housing need assessments and consequently how much land is zoned for residential development. An urgent review and update of the NPF population projections to reflect the census, along with a review of Regional Spatial and Economic Strategies (RSES), Development Plans and Local Area Plan (LAP) population and housing land capacity data is needed.

In addition, there is a fundamentally incorrect assumption in the roll out of the NPF through new Development Plans that the great majority of land zoned for residential use will be immediately developed on, with housing completed on it, within the 6-year life of a current Development Plan. However, because of various reasons including a lack of infrastructure, viability challenges including changes to the market and legislation, and the length of the planning process (including compliances with conditions and judicial reviews) this is not the case in practise. The entire approach to housing land supply in development plans is based on this seriously flawed assumption. This will further exacerbate the housing crisis over the next 6 years if it remains unaddressed.

Furthermore, this approach takes no account of the current use and ownership of land and means that many sites must first be acquired by a homebuilder before planning permission can be sought. This however assumes that a current landowner is willing or able to sell and vacate the site. This is an assumption based on the availability of an alternative site. It also assumes an alternative site is available at a price that is affordable relative to the sale price for the current location. This is a big question with the potential introduction of Land Value Sharing, which in addition to Part V would account for a 50% charge on the increased value due to zoning.

The current guidance and practice of rephasing and recategorizing housing land is effectively downzoning much needed residential land and is very damaging to meeting housing needs. This has the consequence of significantly restricting the amount of land available, increasing land prices but, more seriously, is based on the flawed assumption that there is "mathematically" sufficient land supply to meet housing need. There will therefore be a significant and increasing gap between the availability of land suitable, in planning terms, for development and that which is needed for the supply of houses.

Recommendation:

1. A greater quantum of land should be zoned for residential use in each Development Plan. This should beat least 50-100% above the forecast need. While there are concerns about ensuring greater urban density and development within the existing settlement footprint, this level of flexibility is essential to allow sufficient housing to be delivered. Other instruments, such as targeted infrastructure (both transport and social) provision should be used to incentivise preferred sites.

2. All Development Plans should be varied as a matter of urgency to reflect the higher population identified in the Census 2022 preliminary findings. Plans currently under consideration should be required to incorporate additional population projections before being adopted.

Development Plans

Length of Development Plans

The current length of a development plan and the zoning decisions made is not reflective of the length of time it takes to acquire a site, progress through the planning process and complete construction which on average takes significantly longer than the 6 years Development Plans last (and often takes more than 12 years). This means that it is very challenging to provide housing on any new land zoned for residential use in the lifetime of the current plan. Development Plans should therefore be of a 10-year duration. A detailed review should be carried out after 5 years, with public consultation, with target dates made for housing land supply.

Recommendation:

3. The development process (including site identification, acquisition and planning requirements up to grant of planning) for large scale delivery of housing can extend over the course of two consecutive, 6-Year development plans and provision of zoning of land should be made to account for this.
4. Development plans to be of 10-year duration with a detailed interim review after 5 years.

Development Plans and Metropolitan Areas

A single approach to key Development Standards should be adopted across each of the five Metropolitan Areas including in areas where the metropolitan area overlaps multiple Local Authority boundaries. For example, there should be a single set of standards for the Greater Dublin Area which in turn should be fully consistent with government policy. The current practice of having different requirements of, for example, unit mix / open space, simply because you cross an administrative border makes no sense and results in a fragmented approach to the development of the cities.

Recommendation:

5. In metropolitan areas there should be a single development plan for its geographic area.

Development Plans and Viability

Policies are often adopted in Development Plans which have a significant impact on the design, layout and cost of homebuilding. Many of these are inserted by specialist technical sections of Local Authorities – Parks, Heritage, Sanitary Services, Ecology, Culture, Roads etc., - without a full analysis of the implications on new homebuilding by planning authorities. These policies have a direct bearing on the viability and affordability of housing to be delivered under the Development Plan.

A full assessment should therefore be provided whenever such a technical requirement is being considered. A multi-criteria analysis (MCA) would be appropriate for this purpose because it includes different types of data in the assessment and uses all the data available, undertaken by experts who assess all the information to see how a particular proposal performs according to several pre-set criteria. In the case of planning, these could include meeting objectives such as the supply of housing at affordable prices, increased densities, timing, planning delays and the impact on costs.

An MCA approach has recently been adopted by Department of Public Expenditure and Reform in the most recent Public Spending Code which recommends an MCA when putting together a Business Case for many types of proposals for public expenditure.

Recommendation:

6. A multi-criteria analysis (MCA) should be provided for each technical requirement and Development Management Standards to be provided for in a Development Plan.

Local Area Plans and Masterplans

There should be a general objective to facilitate development throughout the life of a Development Plan. Too often, there have been situations where new homes or regeneration projects have been stalled pending more detailed plans. Where a Development Plan calls for the development of further plans, e.g. Local Area Plan or a Masterplan, there should be a time limit of 12 months following the adoption of a Development Plan for the preparation by the Local Authority of such plans. Where Local Authorities fail to produce such plans in a timely manner, planning applications should be capable of being considered under the general Development Plan, without such a plan being in place.

Recommendation:

7. A mandatory 12-month time limit should be introduced for Local Authorities to adopt any Local Area Plan or Masterplan referenced in a Development Plan.
8. Local Authorities to outsource the preparation of Local Area Plans and Masterplans where necessary to meet this mandatory time limit.
9. Local Area Plans and Masterplans prepared in accordance with the Development Plan to have the status of an Outline Planning Permission which can be appealed to An Bord Pleanála. In order to provide greater certainty for all parties, a future application for Planning Permission based on this Outline Permission, shall not be open to appeal in respect of matters already addressed in the Outline Permission.
10. Local Area Plans and Masterplans are consistent with the Development Plan. This may limit the additional requirements allowable under an LAP or Masterplan.

Plan-Making

Effective plan-making is key, and it is important that every effort is made to consult broadly when preparing Development Plans. In principle, any objections should be taken account of at the plan-making stage of the planning process and not at application stage for individual planning permissions. This would have a positive effect on the entire development process, as it means that homebuilders and developers would be aware of any viability challenges to a site, and furthermore would ensure that the planning application process is more efficient and would require fewer application attempts before one is successful.

The consultation process for the preparation of a Development Plan is already comprehensive. Greater communication on the relevance and importance of contributions to the draft should be undertaken especially those by landowners and the development sector, whom the plan relies on to achieve many of its objectives, especially housing delivery.

In addition, property/landowners should be directly informed of proposed changes to the zoning of their lands (in a similar manner to additions to the list of Protected Structures) to ensure that they can engage fully with the plan-making process.

Recommendation:

11. Greater emphasis should be given to the development plan-making process as the main citizen engagement in the planning process.
12. Landowners should be actively communicated with about proposed changes to the zoning of their land and meetings facilitated during the plan making process.

Role of Development Plans

Provisions of Development Plans are being applied too literally and strictly, particularly when planning permissions are subject to Judicial Review. More flexibility is required in the application of the plans. The view that a Development Plan is a contract between the local authority and the public should be restated to reflect that it aims to balance the needs of existing and future residents, as well as those of existing and future businesses/employers in the area.

The expertise of the planning profession and decisions by professional public planners in carrying out their role should be respected. A Development Plan should therefore be treated as guidance and objectives, to be interpreted as appropriate to individual circumstances with planning judgment rather than prescriptive and the opinion of the planners respected. Over literal legal interpretation of Development Plan policies and objections undermines the necessary scope for professional judgment in the appropriate application of policies and objectives. This applies equally to government guidelines.

Recommendation:

13. National Planning Guidelines and Development Plans should be treated as guidance documents rather than strict legal documents. This should be clearly set down in legislation to avoid unintended and unhelpful over literal legalistic interpretation by courts.

Hierarchy of Legal Rules and role of Ministerial Guidelines

The role of the Development Plan should be clearly defined, with the hierarchy between the National Planning Framework, Regional Spatial and Economic Strategies, and local Development Plans clearly recognised. Where inconsistencies are identified – in planning applications, appeals to An Bord Pleanála (ABP) or in Judicial Review – primacy should be given to the NPF and RSES. Providing for the alternative, where a local Development Plan is superior, makes a mockery of the intention behind a National Planning Framework as adopted by the Oireachtas.

This should also be the case for Ministerial Planning Guidelines. Where a conflict appears between Ministerial guidance and Development Plans, the Ministerial planning guidance should take precedence.

This primacy should be explicitly stated in each Development Plan.

Furthermore, where a Judicial Review judgement highlights a lack of clarity in provisions in Ministerial guidance or legislation, or places an intended interpretation on guidelines or legislation, the Government should make it a priority to revise and clarify the detail of provisions in a timely manner to rectify the position.

Recommendation:

14. A clear hierarchy between the National Planning Framework, Ministerial Planning Guidance, Regional Spatial and Economic Strategies, and Local Development Plans should be established.
15. Government should prioritise clarifications to misinterpretations of Ministerial Planning Guidance.

Role of infrastructure in planning process

The availability and future provision of infrastructure, both transport and social, is key to facilitating plan-led development. Without clear timelines for state provided infrastructure projects, the value of local development planning is questionable. Government should issue a priority listing for infrastructure projects identifying a credible pipeline of nationally significant proposals. Other jurisdictions have provided for such lists, including Infrastructure Australia.

Recommendation:

16. The Department of Public Expenditure and Reform should maintain a dynamic priority list of strategic infrastructure projects including a projected commencement and completion date, which should be updated on an ongoing basis.

Strategic Development Zones

Strategic Development Zones (SDZ) have been a feature of the Irish Planning System since 2001. While development on several SDZs have progressed, impediments exist on progressing 6 out of the 11 approved SDZs.

Government should review these impediments and implement any learnings in the Land Value Sharing and Urban Development Zones Bill 2021 to ensure that SDZ and Urban Development Zones deliver on the objective of more co-ordinated and faster delivery of the built environment.

A key amendment is required to introduce a requirement for a Planning Scheme to be reviewed every 5 years, to ensure they can respond to changing circumstances, and as new National Planning Policy guidelines. There are a number of SDZ Planning Schemes that are almost a decade old (e.g. Cherrywood SDZ - 2014, North Lotts and Grand Canal Dock SDZ - 2014) and are inconsistent with key objectives of National Planning Framework and Government Guidelines used as the Urban Development and Building Height Guidelines. This acts as a significant constraint on the sustainable development of these key development areas.

Recommendation:

17. Conduct a review of current Strategic Development Zones to identify improvements.
18. All SDZ Planning Schemes to be subject to review, to include landowner and public consultation, every 5 years.

4. Legislative Change

Issues with transition from SHD to LRD

A number of members are facing challenges due to the transition arrangements from Strategic housing development (SHD) to Large Scale Residential Developments (LRD). Issues have been faced where planning has been granted under the SHD process, but where changes must be made later. Even minor changes mean that the scheme would be subject to the LRD statutory planning application fee of €30,000, resubmitting all drawings and reports already submitted as part of the SHD process, setting up a dedicated website for a number of planning applications and the preparation of reports and consent documentation beyond the scope of the required changes. All of this has the effect of increasing the cost of housing for purchasers and delaying the delivery of housing, while unnecessarily utilising additional resources of planning authorities.

There should also be provision for applications for minor amendment to all planning permissions, including SHD and LRD permissions to be decided by the planning authority in 4 weeks and that third party appeals will not be permitted in such applications for minor amendments. Such applications have very limited, if any, implication for third parties and are often required while the construction process is ongoing. Standard planning applications are not a suitable mechanism to gain approval for minor amendments, (e.g. the position of basement plant, the arrangement of internal room partitions, glazing details etc). This would address a long standing and widely recognised lacuna in Irish planning law.

Recommendation:

19. Urgently amend the Planning and Development Acts to facilitate a more effective transition between SHD to LRD developments and provide for an efficient and effective process for amendment applications e.g.to permit amendments to SHD permissions and LRD permissions to be submitted under normal Section 34 planning application process.
20. Provide for a decision time limit of 4-weeks on minor amendments to SHD applications.

An Bord Pleanála overruling Development Plan

The scope under which An Bord Pleanála may overrule an existing Development Plan is too narrow.

Recommendation:

21. **Amend article 37 (2) (b) of the Planning and Development Acts as follows:**

    (2) (a) Subject to paragraph (b), the Board may in determining an appeal under this section decide to grant a permission even if the proposed development contravenes materially the development plan relating to the area of the planning authority to whose decision the appeal relates.

    (b) Where a planning authority has decided to refuse permission on the grounds that a proposed development materially contravenes the development plan, the Board may only grant permission in accordance with paragraph (a) where it considers that—

    (i) the proposed development is of strategic or national importance, **in this context the provision of residential accommodation should be considered to be of national importance until the deficit of such accommodation is cleared, or**

    (ii) there are conflicting objectives in the development plan or the objectives are not clearly

stated, insofar as the proposed development is concerned, or

(iii) permission for the proposed development should be granted having regard to regional planning guidelines for the area, guidelines under section 28 , policy directives under section 29 , the statutory obligations of any local authority in the area, and any relevant policy of the Government, the Minister or any Minister of the Government, or

(iv) permission for the proposed development should be granted having regard to the pattern of development, and permissions granted, in the area since the making of the development plan.

(v) permission for the proposed development should be granted having regard to the substantial compliance of the proposed development with National Planning Policy.

Material Contravention

To address a number of court judgments it is important that legislation makes it clear that the decision a as to what is or is not a material contravention of a Development Plan or Local Area Plan is matter for the professional planning judgment of the Planning Authority in the first instance and of An Bord Pleanála on appeals or in respect of applications made directly to the Board. Deciding on what is or is not a material contravention requires expertise and experience of planning practice. This cannot be left to be decided in a court as courts firstly do not have the necessary experience or expertise in planning matters and secondly, applicants require a high degree of clarity on this matter prior to making a planning application - it is entirely unsatisfactory that the answer to what is or is not a material contravention of a Development Plan or Local Area plan to be only answered by means of judicial review challenge to a court, as is the current case law. That is a very time consuming, unwieldly and expensive way to find the correct interpretation of a policy or objective in a plan. Judicial Review would still be permitted in line with the 'O'Keefe' principles, as with any planning judgment in a decision.

Recommendation:

22. Courts should not be responsible for making policy decisions in relation to material contravention of Development or Local Area Plans.

Environmental Impact Assessment

A Review of Part 10 of the Environmental Impact Assessment is required in light of a significant number of Judicial Review challenges and interpretation of parts of this section. Issues arise in respect of the question of screening of potential projects, as to whether there is a requirement for an Environmental Impact Assessment Report (EIAR).

Under Irish legislation, there are thresholds set down under Part 10 and an EIAR is mandatory for any development above certain sizes. The majority of developments are under the threshold as legislation is currently drafted.

There is a particular issue where larger scale developments are below the relevant threshold. Currently there is considerable scope for how the scope of the legislation is interpreted, which leads to uncertainty and significantly increases risk in terms of Judicial Review in this respect.

Under EU Directive, there is a requirement for each Member State to set out requirements to clearly define situations where types of projects require an EIAR. This can be done either by means of setting thresholds for certain types of development as we have done in Ireland, or by means of assessing material for assessment of the potential for environmental impacts, as we have done in Ireland for all sub-threshold developments. However, the Irish legislation goes well beyond the requirements of the

Directive by both setting thresholds and then screening requirements for sub-threshold developments.

The EU EIA Directive states:

> "10) Member States may set thresholds or criteria for the purpose of determining which of such projects should be subject to assessment on the basis of the significance of their environmental effects. **Member States should not be required to examine projects below those thresholds or outside those criteria on a case-by-case basis."**

Therefore, as Ireland has adopted a threshold approach (e.g. a threshold of 500 units for a housing scheme) the Directive states that there should not be a requirement to examine projects below that threshold for EIA. Ireland does the opposite at present by requiring an additional screening for all projects assessment below the threshold (no matter how small in scale). This greatly, and entirely unnecessarily, complicates the EIA screening process and would appear to be contrary to the spirit and requirements of the EU Directive.

The appropriate way to deal with projects below the threshold would be to require an assessment of the particular issue where the sensitivity arises and for that assessment to be submitted with the application and considered by the planning authority/ An Bord Pleanála (e.g. a bat impact assessment of the project). This would avoid, for example, a situation where there is a potential for a below threshold development, which may give rise to a significant impact on a particular ecological feature, requiring a full and detailed EIAR and environmental assessment of other largely unrelated factors such as air quality, soil, water, etc. – again wasteful of resources, unnecessarily adding to complexity and timescales of the planning process.

The difficulty in this area would be resolved simply by setting thresholds for development at or above which an EIAR will be required, where an EIAR is not required below this threshold, and entirely omitting requirements for screening for sub-threshold developments. This would provide much greater clarity and certainty for applicants and planning authorities.

Secondly there is a need to review the thresholds themselves. These were set at least 20 years ago and therefore a review is overdue. A comparison can be done with other Member States in this regard. In particular, consideration should be given to the threshold for housing developments and consideration given to other thresholds of 500 units for review upwards of say, 1000 units.

Recommendation:

23. Review Part 10 of Environmental Impact Assessment and review the thresholds for which an Environmental Impact Assessment Report is required.

Extension of Duration

The revised Extension of Duration provisions in S.42 of the Act, which came into effect in September 2021 have presented considerable difficulties in respect of implementation of any planning permissions, including permissions for housing developments, as a result of the removal of the option of Extension of Durations for economic circumstances beyond the control of the applicant and the significant restrictions on Extension of Durations where Environmental Impact Assessments might be required to be completed.

This is an area requiring very urgent review so as to avoid unnecessary non-implementation of planning permissions for housing and other developments and also to reduce unnecessary additional workload on planning authorities and An Bord Pleanála, through repeat applications which are necessary as a result of these restrictions.

These difficulties also arise in respect of large-scale housing schemes which are under Judicial Review (this applies to a very significant number of such schemes). Presently it is taking more than a year, often 2 years or more, for a judgement to issue in the first instance. Very often that judgement is to quash the permission. However, in the few cases where the permission is upheld, the permission may be of little value to the applicant, because of the time elapsed during the Judicial Review process. For example, on the standard five-year permission, if challenged by JR and the JR process takes two or three years then there is only two or three years left to obtain pre-commencement compliances approval, prepare detailed design drawings, appoint contractors and significantly advance construction of the development to achieve 'substantial works' status, which in many cases is too short a time period. A simple change to legislation to provide for an extension of the 5-year duration period for the length of the Judicial Review challenge, i.e. for the five year period to commence following the determination of the Judicial Review when the permission is upheld. This will also avoid providing an incentive to objectors to undermine developments simply by virtue of taking Judicial Review and causing a delay in running down the clock on the permission.

Of course, it is open to the applicant to re-apply for a permission, following the determination of a Judicial Review. However, that further application in many cases may well involve a higher planning risk due to changes in local policies in new development plans and may also be subject to Judicial Reviews, so that does not provide the answer.

The significant investment risk in proceeding and relying on a potential future Extension of Duration, based on substantial works, which may or may not be granted. Therefore, there is a requirement for legislation to be amended to address this concern.

Secondly, the economic ground provision, involving circumstances beyond the applicant's control, should be re-introduced as a matter of urgency. We understand that there was a view that its removal might help activate housing applications. However, there would be very few instances where it has had that effect and in many more cases, it has precisely the opposite effect, where residential permissions would have been commenced in the later years of the permission if the legislation had not been changed, i.e. if the permission could have been extended and there was sufficient time available to complete the scheme. In these cases, as a result of this recent legislative changes, the applicant now needs to go back through the planning process again, facing the significant risk of JR, which is in turn a significant deterrent to investors on such schemes which have or had a permission.

In terms of EIAR screening and the requirements under S.42, there is a need for reconsideration and greater clarity in the legislation. Rather than refusing Extension of Durations where an EIAR requirement arises, as the current S.42 requires, a solution would be simply for an applicant for Extension of Duration to address potential environmental impacts as part of the application documentation and to provide the necessary information so that an EIA of the Extension of Duration application can be undertaken by the planning authority, who can then proceed to grant the Extension of Duration, having fulfilled EU Directive requirements re EIA.

Recommendation:

24. Reinstate legislative provisions for Extension of Duration on grounds where the delay is due to economic, legal or other circumstances beyond the applications control.
25. Extend the 5-year duration period of a planning permission by the length of a Judicial Review challenge.
26. Reinstate Extension of Duration where an EIAR or this would be required for the extension, provided the information necessary to carry out the relevant amendments is submitted with the application for extension of duration.

Planning Application Regulations

The planning regulation provisions as they relate to Planning Applications, location and site layout plans should be revised. There is an obligation to include all land in which works are proposed within the red line of the application, and where the applicant is not the owner of the land a Letter of Consent from the landowner is required.

This is creating very significant difficulties and delays for planning applications in relation to works to public roads. For most developments, it is necessary to undertake some works to the public road to tie in the access point or to provide utility connections to water and drainage within the road.

A particular difficulty has arisen in instances where local authorities have stated that they are not the owner of the public road. While the road may have been taken in charge by the local authority, the owner of the road is often unknown. Therefore, it is not possible to obtain the Letter of Consent. Local authorities in these circumstances are issuing letters to include the works but also stating they are not the owner.

Judicial Review cases have been taken on the basis that the application is invalid because there was not a Letter of Consent from the owner of the road. This has also led to very considerable delays in submitting applications while letters of consent are awaited from the planning authority. We are aware of one situation where it has taken over 5 months for a Letter of Consent to issue from a planning authority. Local authorities are increasingly reluctant to issue such letters.

Issues also arise in relation to utility connections. This can involve long lines of utility infrastructure along public roads where the land under the road is in multiple ownerships. Outside of urban areas, roads are often owned by the landowner on either side, where it can be an impossible task to obtain all required letters of consent in respect of works for utility connections.

A solution to this would be to state in Article 22(2)(g) of the Planning and Development Regulations that "where application site includes part of a public road that is in charge of the planning authority, and/or utility connections are required within the public road, a Letter of Consent will not be required in respect of any such land or any such works".

Recommendation:

27. Amend Article 22(2)(g) of the Planning and Development Regulations so that a letter of consent is not required where a public road has been taken in charge.

5. Operation of the Planning System

Judicial Review

In February 2022 PII published the report Proposals to reform the Judicial Review Process in Planning Matters. In our paper, we emphasised the urgency of a speedy review of the judicial review (JR) system for planning decisions and made recommendations on measures that can be taken to improve the efficiency of judicial review that would assist the speedy delivery of housing.

New JR Challenges to permissions granted for Strategic Housing Development (SHD) and Strategic Infrastructure Developments (SID) are now being taken on a frequent basis. Judgements in JRs are setting new precedents and combining to undermine the very basis upon which the planning system is based. This has undermined the efficiency and effectiveness of the Irish Planning System, especially for Large Scale Housing and infrastructure projects (including renewable energy)

Over 50% of all large-scale housing planning permission issued were subject to a JR challenge in 2021 and over 90% of cases where judgement has issued to date have resulted in the planning permission being quashed by the court. This has led to a very significant reduction in the number of housing units with a permission which is capable of implementation. The knock-on effect will be clearly seen in reduced housing completion numbers over the next few years.

JR has the potential for significant financial and funding implications due to increased risk and significantly increased timescales to obtain an implementable permission etc. this reduces investor confidence and in turn results in further reduced future housing delivery.

We expect that each of these issues, while prevalent for SHDs, will also be an issue for the new Large Scale Residential Developments (LRD) process.

While we recognise the right to appeal decisions, the system has become unwieldy and is impacting on the delivery of new homes, and the legitimate right of access to justice is being abused to frustrate housing delivery.

Recommendation:

28. Where a real issue is identified, Government should be swift to respond with amendment to legislation or relevant guidelines to reinstate the original intent, e.g. where a court has placed an unintended and unhelpful interpretation on legislation or guidelines that runs contrary to the spirt and purpose of the provision, or renders the relevant provision highly problematic, to avoid a patchwork of jurisprudence.
29. Introduce proportionate costs risk for the person seeking the JR, for example introduce €5,000-10,000 Stamp Duty obligation on Statement of Grounds, introduce a minimum environmental threshold to be met before costs protection is granted, and ensure that applicant(s) organisations have a minimum financial standing to meet adverse cost orders.
30. Raise the entry bar for making a challenge, for example confine applicants to legal grounds which mirror observations made in the planning process, the type of grounds and the number of grounds permitted in a Statement of Grounds should be restricted and introduce obligation on applicants to have made prior observations in the planning process, and permission should be quashed where the issue complained about was not first raised in the planning process in a submission to the planning authority and/or ABP on the application.
31. The applicant must be able to show some connection to the area and a legitimate locus standi, for example by introducing minimum proximity to site rules for applicants.
32. No permission should be quashed where the issues challenged do not make any difference to the outcome of the planning decision.

33. Interpretation of planning policy is a matter for planners. The role of the judge is to decide as between opposing views in the light of the law. The role of planning authorities and An Bord Pleanála in exercising planning judgement should be strengthened in legislation.
34. Courts should deal with all issues raised in any one JR challenge in judgments issued, reducing the risk for a further JR challenge to any subsequent permission on issues not dealt with by the Court. There must be greater focus on getting to the position where a permission can be implemented, avoiding a series of JR challenges over several years in respect of any one development.
35. Grounds should be published to all parties prior to leave application.
36. Consent quash orders should be published.
37. Restructure the Planning and Environment Court.
38. If a planning application is remitted by the court to ABP for redetermination, the grounds of any further JR should be limited to those raised in the initial JR challenge (other than strictly in respect of any change in the decision compared with the quashed decision). Judicial Discretion to amend or invite applicants to amend any Statement of Grounds under Order 84 Rule 4 of the Rules of Superior Courts once Leave is applied for should be removed.
39. Introduce robust case management and coherent civil procedural rules with strict time limits to accelerate the period between leave being granted and the substantive hearing, reduce the 8-week period under s50(7) PDA 2000, as amended to 6 weeks.
40. Make costs appraisals and mediation a step in the legal process immediately following Leave being granted.
41. Remove the need for Notice Party developers to prove that they are in a position to commence development works when seeking an undertaking as to damages when applicants seek a 'stay' on development.

An Bord Pleanála

The membership of the board should be increased as a matter of urgency so that it is capable of tackling the very serious and growing backlog in decisions. We are now even seeing very long delays in decision making on the priority large scale housing applications, with many SHD decisions now taking 6 months or more. We understand that over 90 SHD applications are awaiting decision by the board, with often only 1, 2 or 3 decisions made in any one week. Delays in standard appeals are now extending to well over a year in many cases.

This is even more important with the anticipated increase in SID decisions that are expected to be required in the coming years to enable Ireland's energy and low carbon transition, together with a significant number of appeals under the new LRD System. A larger board will also mean that there is capacity to deal with the ongoing workload whenever vacancies arise and prior to replacement by the Minister.

In this regard PII welcomes the proposed reform to the system for appointment of Board members. However, the immediate critical need to approve additional Board members cannot await new legislation.

In addition, greater legal resources should be provided to the board to conduct its business.

While it is important that the proper rigour is taken in appeals to planning application decisions, there is an urgency to ensure that new homes and infrastructure can be delivered quickly. Statutory timelines of 16 weeks for all planning appeals should therefore be introduced. This could be facilitated by simplifying the work of the inspector by requiring them to review the report/decision of the Local Authority only instead of having to prepare a new report.

Recommendation:

42. Significantly increase the membership of An Bord Pleanála as an urgent point.
43. Increase the executive and legal resources of An Bord Pleanála.
44. Introduce statutory timeline for all planning appeals of 16 weeks.

Control of Development - Inspectors' reports

Reports from inspectors have been relied upon to overturn decisions by the board in Judicial Review proceedings. The purpose of these reports should be to inform the board in their decision-making, but due to increasing legislative requirements, have become overly onerous on inspectors to complete, causing significant additional delays in decision making. Much of this additional input required of both applicants for permission and the Board Inspector arises from court judgments and is therefore required simply to proof against future JRs rather than being required for the planning decision making process of the Board. A more streamlined reporting system by inspectors, ensuring that all legal requirements are met, should instead be introduced.

Additionally, planning history consideration should be limited to current/immediate past development plan. Many reports contain history going back 4/5 plans which is irrelevant to the matters at hand and wasteful of resources.

Recommendation:

45. Streamline the Board inspectors' role and clarify between the legally required assessments and opinions of the inspector.

Exempted Development

There is serious pressure on Local Authority planning departments in terms of resources and how they are used. The planning application process should be reserved for material matters and other matters should be exempted to ensure resources are allocated appropriately. There should therefore be an increase in types of development that are exempt from planning permission to free-up the system for developments of significance. This could be done by allowing planning Inspectors in Local Authorities to deal with extensions and minor developments.

Recommendation:

46. Increase the number of exempted developments to free up planning resources.

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