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An Comhchoiste um Thithíocht, Pleanáil agus Rialtas Áitiúil

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Joint Committee on Housing, Planning & Local Government

Report on Scrutiny of the Vacant Housing Refurbishment Bill 2017 [PMB]

May 2019

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Introduction -

This is the report of the Joint Committee on Housing, Planning and Local Government's detailed scrutiny of the Vacant Housing Refurbishment Bill 2017 (the Bill).

The Bill was referred to the Select Committee on Housing, Planning and Local Government by order of the Dáil of 4th October 2017.

The Minister for Housing, Planning and Local Government was included in the circulation of a draft of this report, in accordance with Standing Order 141(2), as an *ex officio* Committee Member.

Procedural basis for scrutiny -

At its meeting of 18th October 2017, the Committee agreed to undertake scrutiny of the Vacant Housing Refurbishment Bill 2017. Private Members Bills referred to Select Committee are subject to the provisions of Standing Order 141(2) [Dáil], which provides that a Select Committee *“shall undertake detailed scrutiny of the provisions of such Bills ... and shall report thereon to the Dáil prior to Committee Stage consideration ...”* unless the Committee decides in relation to a particular Bill that detailed scrutiny is not necessary.

Paragraph (3) of Standing Order 141 permits scrutiny of the Bill in Joint Committee, viz. *“Nothing in this Standing Order shall preclude a Joint Committee from undertaking detailed scrutiny as set out in paragraph (2) and reporting thereon to both Houses prior to Committee Stage consideration of the Bill by the Select Committee”*.

Purpose of the Bill-

The purpose of the Bill is to “*establish a special planning authority, which will enable the expedited development of certain classes of residential developments including those requiring change of use from commercial or industrial to residential and residential refurbishment in upper floors and in older structures and to provide for related matters*”.

Figures from the 2016 Census show that 183,312 dwellings (excluding holiday homes) were classified as vacant households. This represents around 9% of the overall national housing stock.

To achieve its purpose the Bill proposes to amend the Building Control Act 1990 and the Planning and Development Act 2000 to enable the expedited development of certain classes of residential developments. Currently, a number of regulatory requirements, including planning permission, building control approval, disabled access and fire safety certificates, and provisions in relation to protected structures, can present significant regulatory hurdles to re-purposing a property.

In particular the Bill will provide for:-

- a “one-stop shop,” with the aim of expediting the building control application and approvals process;
- a work certificate which would replace both a fire safety certificate and a disability certificate;
- a pre-application consultation, which advises on whether an application meets requirements to be processed via the “one-stop-shop”;
- an independent “authorised person” that would inspect the safety of the development;
- three new classes of development which would be exempted from planning permission;
- revision to technical guidance documents (TGDs) to reflect the changes made by the Bill, if enacted.

Policy and legislative context-

The aim of the Bill is in line with action 5.21 under Pillar Five of Rebuilding Ireland to “*make it easier for vacant and under-used commercial property to be used for residential purposes*”.

Government initiatives to tackle vacant housing include:

- A **vacant site levy**, introduced by the Urban Regeneration and Housing Act 2015, which has been applied by planning authorities since 1 January 2019.
- The **Repair and Leasing Scheme** which allows owners of houses or apartments that have been vacant for at least one year, and require refurbishment to bring the property to the required standard for rental, to offset the cost of repairs against the agreed lease payment until the value of the works is repaid.
- The **Buy and Renew Scheme** which supports local authorities and Approved Housing Bodies to purchase and renew units that require refurbishment and make them available for social housing in areas of housing need.
- The **Housing Agency acquisitions fund** is €70 million and allows the agency to acquire units from banks and investment funds until 2020 for social housing use.
- The **Living City Initiative** is a tax incentive scheme that allows individuals to claim tax relief on refurbishing or converting residential or commercial property in the Special Regeneration Zones.

The Building Control Act 1990¹ provides for the making of Building Regulations, the making of Building Control Regulations, and powers of enforcement and inspection. Section 2 of the Bill, which relates to building standards, proposes amendments to the Building Control Act 1990 to provide for a one-stop shop local authority process, exemptions from fire safety certificates, disability access certificates and certificates of compliance on completion, exemptions from being recorded on the building register, an alternative building control system, and amendments to regulations regarding structure, fire, sound, ventilation, stairs, energy efficiency and accessibility. **The Building Control Act 2007**² provides for the strengthening of enforcement powers of local building control authorities, among other provisions. In addition to these Acts, the

¹ Building Control Act, 1990. <http://www.irishstatutebook.ie/eli/1990/act/3/enacted/en/html>

² Building Control Act, 1997. <http://www.irishstatutebook.ie/eli/2007/act/21/enacted/en/html>

Building Regulations 1997³ set standards for building works and the **Building Control Regulations 1997**⁴ puts procedures in place to control building works.

The Building Control (Amendment) Regulations 2014⁵ came into operation in March 2014 as a response to cases of building failures and non-compliance with Building Regulations. The Building Control (Amendment) Regulations 2014 (BCAR) apply to works which require a fire safety certificate, as well as new dwellings, extensions of a certain size and, in some cases, developments where there is a material change of use. As part of the regulations, a number of documents are required. The regulations introduced two certifiers – a design certifier and an assigned certifier – both of whom must be a registered architect, a chartered engineer or a registered building surveyor. The Bill represents a change from the system of assigned certifiers and proposes a system of ‘authorised persons’ who are independent of the building owner or their agent⁶.

Following a review of BCAR, the **Building Control (Amendment) (No.2) Regulations 2015**⁷ were published. The regulations allow owners of one-off houses or those carrying out a domestic extension to opt out of the new certification process introduced by BCAR.

The **Planning and Development Act 2000** (as amended) forms the foundations for planning in Ireland. The Act covers a range of planning-related issues, and combines a wide range of different legislation. It sets out the process for applying for and obtaining planning permission and sets out Ireland’s planning appeals and enforcement processes. Section 3 of the Bill amends the Planning and Development Act 2000 (as amended) to insert three new classes of ‘Exempted Development’, subject to conditions and limitations to be determined by the Minister and including a section 5 declaration from the planning authority via a one-stop-shop application procedure. This Section also amends Section 5 (2) (a)1 of the Act to provide for an expedited Section 5 process within 2 weeks on

³ S.I. No. 497/1997 - Building Regulations, 1997.

<http://www.irishstatutebook.ie/eli/1997/si/497/made/en/print>

⁴ S.I. No. 496/1997 - Building Control Regulations, 1997.

<http://www.irishstatutebook.ie/eli/1997/si/496/made/en/print>

⁵ S.I. No. 9/2014 - Building Control (Amendment) Regulations 2014.

<http://www.irishstatutebook.ie/eli/2014/si/9/made/en/print>

⁶ Viz. subsection (6)(b)(vii) proposed to be inserted in section 4 of the Building Control Act 1990 by section 2 of the Bill.

⁷ S.I. No. 365/2015 - Building Control (Amendment) (No. 2) Regulations 2015.

<http://www.irishstatutebook.ie/eli/2015/si/365/made/en/print?q=Building+Control+Amendment+No.2+Regulations>

payment of a fee to be determined by the Minister.

Action 5.9 of the *Rebuilding Ireland Action Plan for Housing and Homelessness*⁸ commits to reviewing planning legislation to allow the change of use of commercial units in urban areas – including vacant areas above ground floor premises – so they can be reused as residential units without having to go through the planning process. Action 5.21 of the *Rebuilding Ireland Action Plan Status Report 2017*⁹ commits to:

"...support and facilitate the re-use and/or development of older / vacant buildings for residential use, such as unused commercial properties, under-utilised upper-floor accommodation over shops, as well as conversion/upgrading of vacant properties through a coordinated and streamlined planning, fire safety and building standards process."

To this end, a Working Group on the Reuse of Existing Buildings was established in October 2017 to develop guidance for property owners and developers on the practical application of relevant regulatory requirements to existing buildings with a view to better facilitating their reuse. In December 2018, this Working Group published the *Bringing Back Homes Manual for the Reuse of Existing Buildings*¹⁰ and *The Report of the Working Group on the Reuse of Existing Buildings*¹¹, which includes a recommendation to:

"...that a review of the Building Control Regulations 1997-2015 be undertaken to give further clarification with respect to the building control approvals required for material changes of use to dwellings."

⁸ Department of Housing, Planning and Local Government (2016), *Rebuilding Ireland Action Plan for Housing and Homelessness*. http://rebuildingireland.ie/Rebuilding%20Ireland_Action%20Plan.pdf

⁹ Department of Housing, Planning and Local Government (2017), *Rebuilding Ireland Action Plan Status Report 2017*. <http://rebuildingireland.ie/install/wp-content/uploads/2018/01/Rebuilding-Ireland-end-2017-Action-Status-Report-Final.xlsx>

¹⁰ Department of Housing, Planning and Local Government (2018), *Bringing Back Homes Manual for the Reuse of Existing Buildings*. https://www.housing.gov.ie/sites/default/files/publications/files/bringing_back_homes_-_manual_for_the_reuse_of_existing_buildings.pdf

¹¹ Department of Housing, Planning and Local Government (2018), *The Report of the Working Group on the Reuse of Existing Buildings*. https://www.housing.gov.ie/sites/default/files/publications/files/final_report_of_the_working_group_on_the_reuse_of_existing_buildings.pdf

This review resulted in the **Planning and Development (Amendment) (No.2) Regulations 2018**¹², which were published on 13 February 2018, after consideration of the Bill had commenced. The regulations provide for the change of use of commercial units in urban areas to be exempt from the requirement to obtain planning permission. A key difference with the provisions of this Bill is that, under the 2018 regulations, a section 5 declaration is not required prior to availing of the exemptions. The change of use and related works must take place between 8 February 2018 and 31 December 2021 and no more than 9 individual housing units can be provided in any building. A number of other restrictions and limitations apply. Development works to vacant commercial buildings which are being converted to residential use also need to comply with the requirements of the Building Regulations and the Building Control Regulations.

¹² S.I. No. 30/2018 - Planning and Development (Amendment) (No. 2) Regulations 2018.
<http://www.irishstatutebook.ie/eli/2018/si/30/made/en/print>

Pre-Committee Stage scrutiny -

The Joint Committee held four sessions to scrutinise the Bill – two sessions on 23rd November 2017 and sessions on 31st January 2018 and 28th March 2018.

In the first session, the sponsor of the Bill, Barry Cowen T.D., briefed the Committee on the main provisions of the Bill. The Committee resumed scrutiny of the Bill in a second session on the same day with Mr. Terry Sheridan, Ms. Sarah Neary, Mr. Niall Cussen and Mr. Brendan Buggy from the Department of Housing, Planning and Local Government.

Scrutiny of the Bill resumed on 31st January 2018 with Mr Alan Larkin and Mr. Noel Larkin from the Society of Chartered Surveyors Ireland, Mr. David Browne and Mr. Joe Kennedy from the Royal Institute of the Architects of Ireland, and Ms. Orla Hegarty, UCD.

The Joint Committee resumed scrutiny of the Bill once more on 28th March 2018. Present at this meeting were Dr. Richard Manton and Dr. John Bailey of Engineers Ireland; Mr. Peter Hynes, Mr. Richard Shakespeare, Mr. Pat Nestor and Mr. Séamus Murphy of the County and City Management Association; and Mr. Paraig Cantwell and Mr. John Commane of the Institute of Clerks of Works.

On 18th December 2018 the Office of the Parliamentary Legal Adviser provided legal advice and analysis to the Joint Committee on the Bill.

Implications and implementation of the Bill's proposals

In the first session, the sponsor of the Bill, Barry Cowen T.D., briefed the Committee on the main provisions of the Bill. Deputy Cowen informed the Committee of his rationale for the Bill: that, by addressing vacancy rates, the Bill will provide more units to deal with the current housing crisis. Deputy Cowen stated that the Bill *"essentially creates a one-stop shop for approving refurbishment projects in local authorities, which will remove many of the existing administrative hurdles to redeveloping vacant commercial and residential buildings."* The Committee broadly welcomed the Bill.

The Department of Housing, Planning and Local Government (the Department) and the stakeholders who met with the Committee expressed support for the aims of the Bill. The Society of Chartered Surveyors Ireland (SCSI) welcomed, in principle, the Bill *"as a step forward in reducing the timeframe required to seek necessary permits for redevelopment, especially of those vacant and underutilised properties in urban areas"*, and expressed support for the concept of a one-stop-shop. Engineers Ireland stated its support for the Bill and commended *"the move towards coordinated building permitting"*. Ms. Hegarty of the School of Architecture, Planning and Environmental Policy, University college Dublin, outlined potential benefits of the one-stop shop system for both property owners and local authorities, and expressed the view that the proposed system *"allows more collaboration, sharing and upskilling"* and, for tenants and residents, *"gives the transparency of a national system that works across all of the various safety inspections"*. The Royal Institute of the Architects of Ireland (RIAI) and the Institute of Clerks of Works and Building Inspectors in Ireland (ICWBII) also welcomed the general intention of the Bill.

However, several key issues were raised as concerns:

Safety concerns

The Department stated that, *"while we support the broad intention of the Bill, concerns are raised by the proposal to alter the performance requirements of building regulations in respect of fire safety, structural safety and ventilation, etc."* Particular concerns were raised about:-

- the Bill's provisions that a fire safety certificate would not be required¹³; and
- the fundamental change from the system of assigned certifiers under the Building Control (Amendment) Regulations 2014¹⁴.

The SCSi and RIAI echoed concerns that the Bill could jeopardise public safety by undermining the Building Control (Amendment) Regulations 2014. The RIAI stated that "*alignment of the Bill with SI 9 [of 2014] is critical to provide proper protection to the public*". Engineers Ireland raised the point that the Bill would introduce a third system of building regulation compliance documentation following SI 9 of 2014 and SI 365 of 2015, and could, as an unintended consequence, result in "*lesser emphasis on the importance of the fire safety certificate and disability access certification*".

The RIAI stated that, if the Bill's proposal for "authorised persons" to inspect developments were introduced, it would lead to three separate systems for building control:-

- The Vacant Housing Refurbishment Bill 2017, if enacted
- The Building Control (Amendment) Regulations 2014
- Building Control (Amendment) (No. 2) Regulations 2015

The RIAI argued that this would be "inefficient, confusing and unsafe for the public".

In relation to concerns that the Bill could lead to a lowering of standards, particularly in respect to fire safety, assurances were sought from the sponsor of the Bill that the provisions of the Bill would not compromise building standards or safety requirements for residential development. The lack of specific guidance documents relating to refurbishment as a barrier to projects was also raised with witnesses.

In contrast to the concerns raised by stakeholders, the sponsor has stated that the "*one-stop shop will issue a works permit which will replace a fire*

¹³ Viz. subsection (6)(b)(ii) proposed to be inserted in section 4 of the Building Control Act 1990 by section 2 of the Bill.

¹⁴ Viz. subsection (9) proposed to be inserted in section 5 of the Building Control Act 1990 by section 4 of the Bill.

safety certificate and a disability certificate, as well as verifying compliance with other parts of the building regulations” and that “under this Bill, safety standards and the necessity for full compliance with building regulations would remain unchanged”. Furthermore, Deputy Cowen has stated that the Bill’s proposed inspection system is “a far more rigorous, integrated system with independent oversight either from independent assessors or local authority officials and which is safer than the self-certification and blanket exemptions that currently exist”. The sponsor has also called on the Department “to draft and publish revised technical guidance documents to accompany each part of the building regulations for use by the one-stop shop”.

- The Committee recommends that the sponsor engages with the Department to ensure all concerns related to safety standards and the Bill be amended as necessary to ensure the stated aim that the Bill not bring about any reduction in safety standards.

Authorised persons

Section 4 of the Bill provides for a planning authority to assign ‘an authorised person’s application panel’ to administer the one-stop shop application procedure¹⁵. The panel would include ‘relevant professionals and authorised persons’¹⁶. However, the SCSI stated that the Bill does not clearly specify what is meant by ‘relevant professionals’ and questioned whether ‘authorised persons’ are intended to be local authority staff or private sector professionals. The Committee sought clarification on this matter.

The SCSI raised concerns about the capacity of local authorities to provide the one-stop shop service but also warned that, *“if non-local authority staff are required to undertake this activity, it is likely to place a higher risk of local authorities or indeed the State being held to account for future failures”*.

Engineers Ireland underlined that it is absolutely essential that the

¹⁵ Viz. subsection (9)(a)(i) proposed to be inserted in section 5 of the Building Control Act 1990 by section 4 of the Bill.

¹⁶ Viz. subsection (9)(b) proposed to be inserted in section 5 of the Building Control Act 1990 by section 4 of the Bill.

authorised persons are “*qualified and competent professionals, and that they are approved for specific activities*”. The ICWBII disagreed with “*concerns raised by other bodies about the competence of authorised persons*” and added that “*the authorised person regime has been in place since 1992 and is the basis for all local authority building control inspections*”. The ICWBII expressed the view that the authorised person regime would streamline the various processes.

- The Committee recommends that concerns about the composition of the panel and the roles of ‘relevant professionals and authorised persons’ be fully explored by the sponsor of the Bill, and the Bill be amended to provide clarity about same.

Local authority workload

The Bill sets a time limit of two weeks for the planning authority to decide on applications for development under the proposed one-stop-shop procedure.¹⁷

Several stakeholders expressed concern at the proposed timeframes for planning authorities to decide on planning applications. The County and City Management Association (CCMA) told the Committee that the two-week timeframe is “*not an adequate period in which to consider complex construction technology issues*”, and the SCSI stated that the timeframes envisaged by the Bill would be “*exceptionally difficult to implement without significant resourcing and a specific requirement for sufficiently detailed drawings and plans to assist the panel’s assessment of compliance with regulatory requirements*”. Engineers Ireland noted that no provision is being made for the local authority to seek an extension of time for the determination of the application and no provision is being made for the local authority to seek additional information from the applicant.

The SCSI, RIAI and Engineers Ireland all expressed concern that the faster turnaround times would place a greater workload on local authorities and told the Committee there would need to be additional resourcing for local authorities. The CCMA stated that the proposed “*transfer of liability for*

¹⁷ Viz. subsection (6)(a)(i) proposed to be inserted in section 4 of the Building Control Act 1990 by section 2 of the Bill.

ongoing inspections to local authorities is quite a significant change” and will have resource implications. Engineers Ireland challenged the assertion that the Bill would not entail a direct cost on local authorities or the Exchequer.

The sponsor of the Bill has expressed an openness to improving the Bill as drafted, and stated that he *“will take on board the recommendations made on definitions, clarifications and resources”*.

- The Committee recommends that the two-week deadline be reconsidered in light of the concerns raised and the relevant provisions in the Bill be redrafted if necessary.

Subdivision

The Bill proposes that the sub-division of any existing dwelling to provide two or more new dwellings would be exempt from planning permission¹⁸. There are no restrictions set out in the Bill as to the number of dwellings that may be created through subdivision.

The Department informed the Committee that the proposal in the Bill to make the subdivision of a dwelling into two or more dwellings exempt from planning permission *“conflicts with the Planning and Development Act 2000, which provides that such development is a material change of use and intensification of use”*. The SCSi and the RIAI expressed a concern that the Bill does not restrict the number of permissible units that could be created through subdivision. According to the SCSi, the Bill *“does not appear to contain any restriction in terms of building or project size, nor does it contain any limitation on the number of permissible units to be created by subdivision or refurbishment”* and implications of intensification of use may need to be considered. The RIAI further noted that the Bill as drafted would not prevent industrial or business units in industrial or business estates from being converted for residential use.

- The sponsor of the Bill has expressed willingness to take on board

¹⁸ Viz. subsection (o) proposed to be inserted in section 4 subsection (1) of the Planning and Development Act 2000 by section 3 of the Bill.

concerns about the number of units allowed through subdivision. The Committee recommends that the concerns raised in relation to subdivision be explored and further detail be added to the Bill that would address such concerns.

- The Committee supports the aim of the Bill to streamline the planning and building control approval process in order to bring more residential accommodation on stream through the refurbishment of vacant stock. The Committee recommends that the concerns raised be fully explored and the Bill revised as necessary to remove the risk of unintended consequences.

Possible alternatives to provisions of the Bill

Time limit

Stakeholders raised concerns about the significant potential for unintended consequences. The RIAI proposed that the Bill *“should be limited to two years in order to avoid perpetuating unintended consequences and should be aligned with other relevant regulations at the conclusion of that period after review”*.

Technical Guidance Documents

The RIAI suggested that, instead of creating new Technical Guidance Documents (TGDs), as envisaged by the Bill, Part M of the Building Regulations could be used. Part M relates to access for all and has two sections.

“The second section refers to existing buildings and makes the point that one cannot always provide the full requirements under the first and second section. It is a very practical way of adapting the technical guidance documents without having to have new ones. It is a simple provision that one would go as far as possible within practical measures, as long as this does not go below the bar of safety.”

Provisions of Planning and Development (Amendment) (No.2) Regulations 2018

The RIAI suggested that consideration be given to omitting planning matters from the Bill as these are already dealt with by the Planning and Development (Amendment) (No.2) Regulations 2018, which came into effect on 1 March 2018, after the Bill was introduced.

Continue inspections under Building Control (Amendment) Regulations 2014 (BCAR)

The RIAI recommended that that Bill could be amended to allow for more “BCAR-type” inspections by the “authorised persons” provided for in the Bill, but to be employed by the local authority rather than the builder or developer.

“Many of us are of the view that we would like assigned certifiers to continue operating under BCAR but not to be directly employed by the builder or developer, but essentially as authorised persons by the local authority, with the cost to be borne as it currently is.”

The Committee recommends that the sponsor of the Bill engage with the Department and stakeholders to explore the alternative provisions listed above and to amend the Bill if necessary.

Legal Analysis -

Constitutional issues

Fair procedures in decision-making have been recognised by the Supreme Court as a constitutional right; where a person is affected by a decision, that person has a right to a fair hearing by an unbiased body. Exemptions that remove the rights of third parties who may be affected by a development to object to same, in effect, remove the right of those third parties to fair procedures. The right to fair procedures is not absolute, but any delimiting of rights must be satisfied by the common good. There are two countervailing common goods to be balanced – the urgent need for increased residential accommodation on one hand, and the need for safe, dignified housing, the protection of our cultural heritage and the fair procedures in decision-making on the other. Any delimiting of rights for the common good must be proportionate.

The one-stop-shop procedure set out in the Bill does not specify provisions for first-party or third-party appeals.¹⁹ At the meeting of the Joint Committee of the 28 March 2018, Engineers Ireland expressed the view that *“the failure to provide for first-party or third-party appeals of decisions could give rise to a constitutional challenge”*. The SCSi also noted that the Bill *“appears to impinge on established third party rights to comment on or object to any proposed redevelopment”* and the RIAI called for such rights to be included in the Bill.

- The Committee is of the view that the lack of provision in the Bill for third parties to object to developments may be open to constitutional challenge. The Committee recommends that concerns regarding the right to appeal be fully explored by the sponsor and the relevant sections of the Bill be revised to include a procedure for third-party appeal.

Constitutional issues may also arise if the Bill has the consequence of reducing living conditions, safety and standards, as reduction of same could adversely impact on the personal rights of autonomy, privacy and bodily integrity. It is arguable that, where the proposed Building Regulation exemptions may result in a reduction of living standards, they are contrary to the common good.

¹⁹ Viz. subsection (6)(a) proposed to be inserted in section 4 of the Building Control Act 1990 by section 2 of the Bill.

At the Joint Committee meeting of 23 November 2017, officials from the Department of Housing, Planning and Local Government highlighted the complex nature of developing existing buildings and expressed a concern that the changes to building regulations suggested in Schedule 1 could “*fundamentally change the level of safety*” in such developments. In its submission to the Committee, the Institution of Civil Engineers (ICE) notes that “*the Bill implies that there are no relaxations/dispensations of the Building Regulations, but the proposals contained in it represent significant lowering of standards*”. In its submission to the Committee, ICE argues that refurbishment projects need special consideration and questions the proportionality of the measures, stating;

“standards should not be lowered in the interests of expediency when alternatives available under BCAR such as 7-day Notices and Prior Notifications of Completion are available to lesser the impact of delays”.

- The Committee is not satisfied that any measures that would result in the lowering of safety standards are proportional to the common good and recommends that the Bill be amended to ensure the proposed changes to the building regulation system do not result in any reductions in safety and building standards. The Committee takes the view that ensuring no reduction in standards would remove the risk of constitutional issues stemming from adverse impacts on the personal rights of autonomy, privacy and bodily integrity.

European and International Law

The Committee understands that Article 8 of the European Convention of Human Rights (ECHR)²⁰ places a positive duty on the State to take reasonable and appropriate measures to secure the right of respect for a person’s home. Where this right is impacted on, Article 6 provides that the person is entitled to have the decision that affects enjoyment of the home dealt with in a fair and public hearing. In various cases before the European Court of Human Rights (ECtHR), it has been held that where the State fails to regulate private sector activities, which may then have an impact on the enjoyment of the home, liability may arise.

Article 11 of the International Covenant of Economic, Social and Cultural Rights

²⁰ European Convention of Human Rights https://www.echr.coe.int/Documents/Convention_ENG.pdf

(ICESCR)²¹ provides for the Right to an Adequate Standard of Living, which includes the right to adequate housing. Among the minimum criteria for housing to be adequate are habitability and accessibility. Thus, housing is not adequate:

- if it does not guarantee physical safety or provide adequate space, as well as protection against the cold, damp, heat, rain, wind, other threats to health and structural hazards; or,
- if the specific needs of disadvantaged and marginalised groups are not taken into account.

The Treaty monitoring Committee made observations in 2015 that indicate that Ireland is already non-compliant with the Covenant in relation to adequacy of housing. There is a risk that a reduction of standards of housing provision brought about by the Bill would bring Ireland further into non-compliance.

- The sponsor of the Bill has clearly stated that it is not the intention of the Bill to bring about a reduction in building standards. The Committee is of the view that further revision of the Bill to clarify the one-stop-shop proposals is warranted.

Potential ambiguities

During the Committee's consideration of the Bill, concerns were raised by stakeholders about potential ambiguities in the Bill as drafted.

The Committee is of the opinion that, in the Bill as drafted, it is unclear whether the relevant existing regulations are to be replaced or supplemented by those in Schedule 1. The Committee believes that this ambiguity may be remedied by redrafting Schedule 1 to give greater clarity.

Appearing before the Committee on 31 January 2018, the SCSI expressed concern that "*there is not sufficient distinction made between the planning process and building regulations and building control regulations*" and expressed the view that "*further consideration is needed to separate these two distinct processes*". The Committee is of the opinion that there is a fundamental ambiguity over whether the planning authority or the building authority is responsible for decision-making in the one-stop-shop, which raises

²¹ International Covenant on Economic, Social and Cultural Rights
<https://www.ohchr.org/en/professionalinterest/pages/cescr.aspx>

concerns about the operability of the Bill if enacted. The Committee notes that, in Section 2, it is stated that 'the authority' shall be responsible for compliance with Building Regulations but it is unclear which authority this refers to and both authorities are previously referred to in the section²². Subsection 9 of section 4 of the Bill provides that the planning authority is responsible for the staffing and operation of the one-stop-shop²³, including that the staff can 'ensure compliance' with the Building Regulations as amended under the Bill²⁴. However, Schedule 1 indicates that it is the building authority which is responsible for compliance.

Thus, the planning authority, which has no expertise in the Building Regulations, will be responsible for staffing a unit which will have to have expertise in the Building Regulations. There is no guidance as to which authority will manage the running of the one-stop-shop and there is a fundamental ambiguity over which authority is responsible for decision-making and compliance. In its submission to the Committee, the ICE notes that "*the Bill appears to be conflating the Planning Regulations and the Building Control/Building regulations and the roles of both as presented in the Bill are inextricably intertwined*". The ICE notes that, in the definitions section of the Bill, 'declaration' is referred to as 'a declaration by a planning authority under section 4 of the Act of 1990 for dispensation from, or a relaxation of, a requirement of Building Regulations'²⁵, whereas a planning authority under section 5 of the 1990 Act applies to Planning and Development Regulation. The ICE states that "*there should be clear differentiation in the process between Planning and Building Regulations*" as the granting of dispensations or relaxations from Building Regulations are "*quite distinct and different processes from Planning Regulations*".

In addition, there are several ambiguities in the Bill about the procedure for granting a Works Permit. Section 2 of the Bill²⁶ refers to a checklist but none is provided; there is no definition provided for 'works permit' or 'appropriate for habitation'; it is unclear if site visits are discretionary or mandatory²⁷. The lack of

²² Viz. subsection (6)(c)(v) proposed to be inserted in section 4 of the Building Control Act 1990 by section 2 of the Bill.

²³ Viz. subsection (9)(a)(i) proposed to be inserted in section 5 of the Building Control Act 1990 by section 4 of the Bill.

²⁴ Viz. subsection (9)(b) proposed to be inserted in section 5 of the Building Control Act 1990 by section 4 of the Bill.

²⁵ Viz. section 1 of the Bill.

²⁶ Viz. subsection (6)(a)(vi)(II) proposed to be inserted in section 4 of the Building Control Act 1990 by section 2 of the Bill.

²⁷ Viz. subsection (6)(b)(iii) proposed to be inserted in section 4 of the Building Control Act 1990 by

clarity about the process to award a Works Permit may leave it vulnerable to challenge by way of judicial review.

In Section 4 of the Bill it is unclear what is envisaged about the composition and competencies of 'relevant professionals' of the 'panel' and who the authorised persons of this panel will be – whether they will be Local Authority staff or private sector professionals²⁸. In a submission to the Committee, ICE warns that if the former is the case, *"there must be serious concerns about the capacity of the Local Authority to provide such a service given the current Local Authority cohort of staffing situation in the Building Control area"*, and if the latter is the case, *"it is likely to place a higher risk of Local Authorities, or indeed, the State, being held 'vicariously liable' for future failures"*.

The sponsor of the Bill speaking before the Committee in November 2017 commented in favour of the certifier being a Local Authority employee but has not ruled out the possibility of private sector professionals undertaking this role;

"[...] we have provided in the Bill, initially at least, for assigned certifiers or persons to be of relevant expertise but independent of the builder or landlord or both, and for an employee initially of the local authority to make an independent authoritative assessment of compliance with the regulations and technical guidelines we hope would ensue on foot of it. I am open to that assigned person or certifier being within the local authority and having similar relevant qualifications and capabilities to those from the private sector."

The RIAI and SCSi highlighted several terms in the Bill that lacked definitions; The Committee notes that no definition is provided in the Bill for 'appropriate for habitation', 'development', 'one-stop shop', 'relevant professionals', 'vacant building', 'vacant housing' or 'work permit'. The RIAI raised concerns about the lack of definition as to what existing buildings the Bill applies to; The Committee notes that lack of clarity as to whether they should be treated as dwellings, apartments or flats could have repercussions in relation to compliance

section 2 of the Bill.

²⁸ Viz. subsection (9)(b) proposed to be inserted in section 5 of the Building Control Act 1990 by section 4 of the Bill.

with other relevant legislation, such as the Fire Services Act 1981.

- The Committee recommends that the Bill be redrafted to remove these ambiguities and clarify the distinct roles of the planning authority and the building authority. Further clarification is also needed as to the composition of the 'panel of authorised persons'. The Committee calls for definitions to be added for 'appropriate for habitation', 'development', 'one-stop shop', 'relevant professionals', 'vacant building', 'vacant housing' and 'work permit' as referred to in the Bill.

Unintended legal consequences

The Bill proposes to replace the statutory requirement for a fire safety certificate, a disability access certificate and compliance with other parts of the building regulations with a works permit²⁹. The effect of this would be to introduce a third system of building regulation compliance documentation, following SI 9 of 2014, (BCAR), and SI 365 of 2015. Several stakeholders raised concerns that this proposed system could lead to unintended legal consequences.

The Committee has concerns that the work permit system proposed in the Bill could lead to the development of buildings that are substandard in terms of fire safety, sound insulation, thermal insulation, ventilation and/or accessibility for the disabled. Engineers Ireland warned the Committee on 3 March 2018 that the proposed works permit system could have unintended consequences and raised particular concerns related to fire safety;

"Since its introduction, BCAR has promoted a greater awareness of the need for proper design and inspection of fire protection measures. An unintended consequence of the proposed Bill might be to relegate this awareness to a works permit scenario, with a consequent lesser emphasis on the importance of the fire safety certificate and disability access certificate documentation."

In its submission to the Committee, the ICE raises the possibility of Local Authorities or the State being "*exposed to a risk of litigation actions in the future by specifying lower standards and procedures as demonstrated in Schedule 1, than those present in BCAR*". At the Committee's meeting of 28 March 2018, the

²⁹ Viz. subsection (9)(b)(ii) proposed to be inserted in section 5 of the Building Control Act 1990 by section 4 of the Bill.

CCMA expressed concern that, *“having approved, inspected and signed off on the works, the local authority cannot expect to be immune from responsibility and liability if there is a failure in the building that results in harm to occupants, firefighters or others.”*

As stated above, Section 4 of the Bill provides for a planning authority to assign ‘an authorised person’s application panel’ to administer the one-stop shop application procedure³⁰. The panel would include ‘relevant professionals and authorised persons’³¹ but it is not specified whether such persons would be Local Authority staff or private sector professionals.

Furthermore, properties developed under the Bill may not meet structural and fire safety standards under other legislation, such as rental legislation. In such a scenario, properties developed under the provisions of the Bill may not be able to enter the housing supply. The County and City Management Association (CCMA) expressed the opinion that the provisions of the Bill *“may not confer advantages in terms of delivering projects and will introduce significant risk for developers in the event that their applications ultimately fail on the completion of projects”*.

The Department informed the Committee on 23 November 2017 that the proposal under Section 3 of the Bill, which would exempt the subdividing of a dwelling into two or more dwellings from planning permission³², conflicts with the *Planning and Development Act 2000*. Speaking before the Committee on 28 March 2018, the CCMA warned that the proposed one-stop-shop system may introduce significant risk for developers in the event that their applications ultimately fail on the completion of projects;

“If there are difficulties with compliance issues and these are not resolved upon repeat inspection, a development will be deemed to be unsuccessful and the developer must revert to the established planning and building control procedures. This would appear to place the developer in an almost impossible situation. Having entered the one stop-shop process in good faith, a developer could be left with a completed building which cannot be occupied.”

³⁰ Viz. subsection (9)(a)(i) proposed to be inserted in section 5 of the Building Control Act 1990 by section 4 of the Bill.

³¹ Viz. subsection (9)(b) proposed to be inserted in section 5 of the Building Control Act 1990 by section 4 of the Bill.

³² Viz. subsection (o) proposed to be inserted in section 4 of the Planning and Development Act 2000 by section 3 of the Bill.

Section 2 of the Bill indicates that individuals such as building owners, designers and builders will continue to be bound by the requirements of the existing Building Regulations³³. The Committee is of the view that this could prove a deterrent to development under the new process as individuals could still be liable under other legislation. The provision requiring all drawings, specifications and other details to be submitted at the pre-planning stage³⁴ could be perceived as more onerous than the existing requirements in the planning process, as this requirement is not there in existing legislation. The Committee is concerned that, if enforced, this requirement may also act as a disincentive to potential applicants.

- The Committee takes the view that the proposed one-stop-shop system of building regulation be further clarified to ensure that no lowering of standards is permitted and compliance with other legislation is guaranteed under the system.

³³ Viz. subsection (6)(c) proposed to be inserted in section 4 of the Building Control Act 1990 by section 2 of the Bill.

³⁴ Viz. subsection (6)(a) proposed to be inserted in section 4 of the Building Control Act 1990 by section 2 of the Bill.

Observations of the Joint Committee -

The Committee in its scrutiny of the Bill and pursuant to Standing Orders, agreed to report to the Houses of the Oireachtas that it has undertaken and completed detailed scrutiny of the Bill. The Committee has made the following observations and conclusions:-

- the Committee notes the broad support expressed for the principle of the Bill and notes also that the Bill passed Second Stage reading;
- that consideration be given to legislative and policy developments since the publication of the Bill in 2017 and the Bill be updated if necessary.

The Committee recommends:-

- that the sponsor and the Department engage to ensure that concerns identified during scrutiny regarding possible reductions in building standards, are fully explored, and the Bill is amended as necessary to ensure no reduction in safety standards and avoid any potential unintended legal consequences as a result;
- that the sponsor and the Department engage to bring further clarification to the composition of the 'panel' of 'relevant professionals and authorised persons' and that the Bill be amended to provide greater detail on same;
- that the two-week timeframe for Local Authorities to make a decision on a planning application be reconsidered in light of the concerns raised by stakeholders and the Committee, and the related provisions be amended as necessary;
- that the issue of subdivision in the provisions of the Bill be reexamined in light of concerns raised by stakeholders and the Committee, and the related provisions be amended if necessary;
- that the Bill be amended to provide for first-party and third-party appeal in the proposed one-stop shop procedure;
- that any drafting issues identified in the Bill, particularly around the potential Constitutional issues, the definition of terms and potential legal ambiguities, be resolved.

Conclusion -

The Committee concluded that that the Bill proceed to Third Stage consideration and that the proposer of the Bill take account of the observations of the Committee in framing their respective amendments to the Bill, in particular in relation to the need to address certain drafting issues arising in the Bill.



Maria Bailey T.D.

Chair

9 May 2019

Appendix 1 – Committee Membership

Joint Committee on Housing, Planning and Local Government

Committee Membership:

Chairperson: Maria Bailey (Fine Gael)

Deputies¹

Pat Casey (Fianna Fáil) (Vice Chair)³

Mick D. Barry (Solidarity-PBP)

Mattie McGrath (Rural Independent Group)

Darragh O'Brien (Fianna Fáil)

Eoin Ó Broin (Sinn Féin)

Fergus O'Dowd (Fine Gael)

Senators²

Victor Boyhan (Independent)

Martin Conway (Fine Gael)

Jennifer Murnane O'Connor (Fianna Fáil)

Grace O'Sullivan (Green Party)

Notes:

1. Deputies nominated by the Dáil Committee of Selection and appointed by Order of the Dáil of 16 June 2016.
2. Senators nominated by the Seanad Committee of Selection and appointed by Order of the Seanad on 21 July 2016.
3. Elected Vice Chair on 24 May 2017.

Appendix 2 – Terms of Reference of Committee

COMMITTEE ON HOUSING, PLANNING AND LOCAL GOVERNMENT

TERMS OF REFERENCE

a. Functions of the Committee – derived from Standing Orders [DSO 84A; SSO 70A]

- (1) The Select Committee shall consider and report to the Dáil on—
 - (a) such aspects of the expenditure, administration and policy of a Government Department or Departments and associated public bodies as the Committee may select, and
 - (b) European Union matters within the remit of the relevant Department or Departments.
- (2) The Select Committee appointed pursuant to this Standing Order may be joined with a Select Committee appointed by Seanad Éireann for the purposes of the functions set out in this Standing Order, other than at paragraph (3), and to report thereon to both Houses of the Oireachtas.
- (3) Without prejudice to the generality of paragraph (1), the Select Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments, such—
 - (a) Bills,
 - (b) proposals contained in any motion, including any motion within the meaning of Standing Order 187,

(c) Estimates for Public Services, and

(d) other matters

as shall be referred to the Select Committee by the Dáil, and

(e) Annual Output Statements including performance, efficiency and effectiveness in the use of public monies, and

(f) such Value for Money and Policy Reviews as the Select Committee may select.

(4) The Joint Committee may consider the following matters in respect of the relevant Department or Departments and associated public bodies:

(a) matters of policy and governance for which the Minister is officially responsible,

(b) public affairs administered by the Department,

(c) policy issues arising from Value for Money and Policy Reviews conducted or commissioned by the Department,

(d) Government policy and governance in respect of bodies under the aegis of the Department,

(e) policy and governance issues concerning bodies which are partly or wholly funded by the State or which are established or appointed by a member of the Government or the Oireachtas,

(f) the general scheme or draft heads of any Bill,

(g) any post-enactment report laid before either House or both Houses by a member of the Government or Minister of

State on any Bill enacted by the Houses of the Oireachtas,

(h) statutory instruments, including those laid or laid in draft before either House or both Houses and those made under the European Communities Acts 1972 to 2009,

(i) strategy statements laid before either or both Houses of the Oireachtas pursuant to the Public Service Management Act 1997,

(j) annual reports or annual reports and accounts, required by law, and laid before either or both Houses of the Oireachtas, of the Department or bodies referred to in subparagraphs (d) and (e) and the overall performance and operational results, statements of strategy and corporate plans of such bodies, and

(k) such other matters as may be referred to it by the Dáil from time to time.

(5) Without prejudice to the generality of paragraph (1), the Joint Committee appointed pursuant to this Standing Order shall consider, in respect of the relevant Department or Departments—

(a) EU draft legislative acts standing referred to the Select Committee under Standing Order 114, including the compliance of such acts with the principle of subsidiarity,

(b) other proposals for EU legislation and related policy issues, including programmes and guidelines prepared by the European Commission as a basis of possible legislative action,

(c) non-legislative documents published by any EU institution in relation to EU policy matters, and

(d) matters listed for consideration on the agenda for meetings of the relevant EU Council of Ministers and the outcome of such meetings.

(6) The Chairman of the Joint Committee appointed pursuant to this Standing Order, who shall be a member of Dáil Éireann, shall also be the Chairman of the Select Committee.

(7) The following may attend meetings of the Select or Joint Committee appointed pursuant to this Standing Order, for the purposes of the functions set out in paragraph (5) and may take part in proceedings without having a right to vote or to move motions and amendments:

(a) Members of the European Parliament elected from constituencies in Ireland, including Northern Ireland,

(b) Members of the Irish delegation to the Parliamentary Assembly of the Council of Europe, and

(c) at the invitation of the Committee, other Members of the European Parliament.

b. Scope and Context of Activities of Committees (as derived from Standing Orders) [DSO 84; SSO 70]

- (1) The Joint Committee may only consider such matters, engage in such activities, exercise such powers and discharge such functions as are specifically authorised under its orders of reference and under Standing Orders.
- (2) Such matters, activities, powers and functions shall be relevant to, and shall arise only in the context of, the preparation of a report to the Dáil and/or Seanad.
- (3) The Joint Committee shall not consider any matter which is being considered, or of which notice has been given of a proposal to consider, by the Committee of Public Accounts pursuant to Standing Order 186 and/or the Comptroller and Auditor General (Amendment) Act 1993.
- (4) The Joint Committee shall refrain from inquiring into in public session or publishing confidential information regarding any matter if so requested, for stated reasons given in writing, by—
 - (a) a member of the Government or a Minister of State, or
 - (b) the principal office-holder of a body under the aegis of a Department or which is partly or wholly funded by the State or established or appointed by a member of the Government or by the Oireachtas:

Provided that the Chairman may appeal any such request made to the Ceann Comhairle / Cathaoirleach whose decision shall be final.

- (5) It shall be an instruction to all Select Committees to which Bills are referred that they shall ensure that not more than two Select Committees shall meet to consider a Bill on any given day, unless the Dáil, after due notice given by the Chairman of the Select Committee, waives this instruction on motion made by the Taoiseach pursuant to Dáil Standing Order 28. The Chairmen of Select Committees shall have responsibility for compliance with this instruction.