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Chairperson
Joint Committee on Housing Local Government and Heritage
Leinster House
Dublin 2
D02 XR20

15th[th] September 2021

Irish Institutional Property (IIP) submission on the Pre Legislative Scrutiny of the General Scheme of the Planning and Development (Amendment)(Large-Scale Residential Development) Bill 2021

Dear Chairperson,

Thank you for the opportunity to contribute our observations in relation to the pre legislative scrutiny of this important Bill. Irish Institutional Property (IIP) welcomes the review of the Strategic Housing Development (SHD) process and the Government's recognition that change is required in order to deliver a more effective and efficient planning system while striking the appropriate balance in reflecting the priorities of all relevant stakeholders. As the representative body for institutional investors with over €15bn committed to real estate projects here, and currently targeting delivery in excess of 50% of current housing output we would request that our observations on the proposed legislation receive due consideration.

Having reviewed the Heads of the Planning and Development Amendment (LSRD) Bill 2021 we wish to set out some issues that we believe need to be considered in this legislation.

Main issue of concern with the new LSRD legislation

> As part of phasing out of SHD, applicants will have the option of applying through SHD (subject to lodgement of a pre- app request with An Bord Pleanála (ABP) before 29th October) or S.34D up until 31st December 2021. Applicants should be allowed the option of applying through SHD or S.34D up until 31st December 2021, after which date it must be S.34D (LSRD).

- The proposed new timelines to phase out SHD even sooner do not work, because of the long lead time to prepare such applications and the short notice provided by the government of the change which effectively rules out this option for many large housing applications (in excess of 100 units)
- Based on a detailed review of SHD applications going through the system over a 12 month period, the average time from pre-app lodgement to pre-app decision from 1st July 2020 to 19th July 2021 is 17 weeks. This is based on a review of 146 pre-app cases.
- Approx. 57% of pre-apps were determined within 17 weeks (83 cases). Approx. 43% of pre-apps took more than 17 weeks to determine (63 cases). The longest pre-apps took 47 weeks, 34 weeks, and 31 weeks respectively. Only 4 pre-apps (approx. 3%) were determined within the non-statutory 9 week period.
- The period between 29th October and 25th February 2022 is coincidentally 17 weeks. This therefore provides no comfort to developers that statutory SHD application requirements will be met before the lodgement deadlines have passed and allows no time to fully review and take on board any comments raised from ABP at pre-app stage.
- An alternative would be to allow c. 16 -20 weeks from receipt of Opinion to lodge a planning application.

- The revised Planning and Development Regulations need to ensure that the approach is consistent across all planning authorities. There should be no scope for individual councils to deviate from this guidance in their dealing with prospective LSRD applications. The Dept will need to provide clarity / guidance notes in a short space of time to ensure consistency and stop "scope creep" by councils. The use of Further Information should only be used in limited circumstances where the planning authority cannot make a recommendation without such information.

- S.28 Guidelines and Development Plans – it is imperative that all elements of the S.28 Guidelines are fully incorporated into all Development Plans. Development Plans will need to be fully updated to comply with the S.28 guidelines and the Strategic Environmental Assessment (SEA) that was carried out on the guidelines must not cut across the SEA for the adopted Development Plans but must be complimentary. The Office of the Planning Regulator should be required to proactively monitor this as discussed further below. If this is not done in a timely and orderly manner, the result will be a policy lacuna and inevitable material contraventions of Development Plan policies/objectives. Unlike SHD, such potential material contraventions are not easily remedied under draft LSRD provisions.

- Section 28 Guidelines must be made non-mandatory for SHD applications until such time as the Development Plans, which have been subject to an updated Strategic Environmental Assessment (SEA) have incorporated the S.28 guidelines as noted in previous point (current SHD legislation). This would remove further Judicial Review (JR) risk and delays with cases currently subject to JR. The issue of S.28 Guidelines in the Bailey Gibson JR case has now been referred to the European Court of Justice (ECJ) and two additional SHD cases have been directly impacted by this referral and that list is expected to grow. The ECJ will likely take 1-2 years to make its determination so irrespective of its decision, this must be legislated for now to prevent further delays in housing delivery.

- The Further Information process must be included in the new LSRD, but it should be restricted in keeping with the fast track nature of LSRD. Issues identified during the process by the council / 3rd party submissions should be capable of being addressed during the process. Further Information allows applicants to address the following:
    - Errors, identified by any party, can be corrected
    - Spurious issues raised by objectors can be addressed and if they are addressed and ABP rules on them following an appeal, they should not be allowed as grounds for a JR at a later date.
    - Concerns of objectors can be mitigated during the application process.

- We note that the timeline for dealing with LSRD Appeals to ABP is set at 16 weeks (normal appeals 18 week non statutory timeline), and that where it appears to the Board that it will not be possible to determine an appeal within the prescribed 16 weeks, the Board can notify the relevant planning authority or any persons who made submissions or observations in relation to the appeal of the reasons why it is not possible to determine the appeal within the specified timeframe and specify a new date by which the appeal shall be determined. It is imperative that a statutory timeline is brought in for the Board on the LSRD applications unless there are outstanding technical issues that need to be resolved before the Board can make its decision. Without a statutory timeline these LSRD applications will no doubt be subject to delays by reason of lack of manpower at Administrative, Inspectorate and Board level to deal with the applications as is currently the case with most standard appeals to ABP.

- Financial penalties, similar to SHD, must be introduced on Local Authorities and ABP where LSRD decisions or actions are not decided on time. Without incentives to meet deadlines, the fast-track nature of the scheme will be lost.

- Local Authorities and ABP must be adequately resourced to be capable of handling the ongoing large number of planning applications.

- Section 146B of the Planning and Development Act 2000- 20015, permits applicants to apply to ABP for amendments to an SHD permission. S.146B was brought in to allow developers of Strategic Infrastructure Applications (SID) to amend infrastructure schemes. This route to amend SHD applications does not work leading to long delays for decisions. Section 146B amendment applications under SHD are generally for minor alterations but can sit with ABP for in excess of 6 months. There are a substantial number of SHD permissions in the system and local authorities should immediately be given the option to determine amendments to SHDs where the number of units affected is less than 100. Section 146B applications are an unnecessary drain on ABP resources.

- Urgently amend the SHD legislation (SHD will be around for at least the next 12-18 months, with 150 to 200 or more ABP decisions to come – the current court overturn rate of >50% of ABP SHD permissions cannot be continued) as follows:

    - Remove the restriction set out in **S.9(6)(c)** which sets out a requirement for the applicant for permission to include a material contravention statement.
    - The power to grant permission where there is material contravention is set out in S.9(6)(a). S.9(6)(b) removes this power where the development materially contravenes the zoning objective]. S.9(6)(c) however places a further restriction on the power. Its omission would mean that the power under S.9(6)(a) would remain, without the restriction. S.9(6)(c), and the associated requirement for the applicant

for permission to include material contravention statement with the application, addressing the points that it is anticipated the Board would find in its decision that constitute material convention, have created great difficulties for the Board and have resulted in a significant number of permissions being quashed where the Court has held the requirements of S.9(6)(c) have not been correctly applied by the Board in a legal sense.

- This is made all the more difficult by a recent SHD judgement which states that it is ultimately a matter for the court to decide what is or is not a material contravention, rather than a matter for the planning judgment of the Board. The simple solution to these difficulties is to remove the restriction set out in S.9(6)(c). The restriction has no practical effect on the decision the Board might make- it can still Grant Permission in accordance with the criteria set out under S.37(2)(b) – the requirement under S.9(6)(b) has no material benefit to the decision making process.
- There is no similar restriction to 9(6)(b) in a standard S.34 application where the planning authority has issued a decision to grant or where the planning has refused permission but called up a material contravention in its decision. S.9(6)(c) is an unnecessary and particularly unhelpful feature of the SHD legislation.
- Allow ABP to invite a response from the applicant to submissions made (the absence of such a provision has been highlighted by the courts as a key vulnerability in a legal sense of the SHD process)
- Allow the Board to request amended drawings or additional information, including in relation to Appropriate Assessment (AA) or Environmental Impact Assessment Report (EIAR) screening similar to S.34 applications (this would eliminate quite a few JR points and also significantly reduce the current high refusal rate of SHDs and greatly reduce the need for highly wasteful, costly and time consuming re-applications with only limited changes).

Strategic Development Zones (SDZ)

- The LSRD Act should put an end to the confusion which exists, arising out of the drafting of the 2016 Act, as to whether an application for LSRD under the equivalent provision to S. 4(4) of the 2016 Act is required to be compliant with a planning scheme in force in an SDZ area. Our submission, which accords with the position taken by ABP, is that it does not need to be. This approach is consistent with the overwhelming need for new housing, particularly in urban areas where local planning schemes, many of which are inconsistent with government guidelines on height and density, are in force.

Development Plan Reviews and LSRD

- Local Planning Authorities (LPAs)s must be required to pause the Development Plan reviews immediately i.e., not discretionary.
    - With the transition from SHD to LSRD and the high risk of JRs across all major developments, the uncertainty and inconsistency across the LPAs is adding to the risks and delays for planning applications and is significantly impacting on developers' ability to deliver homes in this housing crisis.
    - The recent publication of the draft S.28 Development Plan Guidelines to assist Local Authorities in preparing city and county development plans should also require Councils to amend the current draft plans to align with same. This alone is justification for the pause.
    - Sunset provisions are required to bridge the gap between national policy objectives and conflicting local policy objectives until such time as Development Plans are

updated to avoid inevitable material contraventions that will arise in the interim. Such provisions should apply until the relevant Development Plan (or Local Area Plan where relevant) are fully aligned with National policy. This will take several years in some instances so the importance of addressing this issue in legislation now is paramount.

Your sincerely,

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Pat Farrell
CEO