



September 2021

**Pre-legislative scrutiny of the
General Scheme of the Planning
and Development (Amendment)
(Large-Scale Residential
Development) Bill 2021.**

Pll submission to the Joint
Oireachtas Committee on Housing,
Local Government and Heritage

Introduction

Property Industry Ireland (PII) makes this submission on foot of an invitation to comment from the Joint Oireachtas Committee on Housing, Local Government and Heritage in relation to pre-legislative scrutiny of the General Scheme of the Planning and Development (Amendment) (Large-Scale Residential Development - LSRD) Bill 2021. The approach of putting in place specific provisions for planning applications for large scale residential development following the termination of the Strategic Housing Development (SHD) process is acknowledged.

It is our view that the principal goals for the LSRD proposal should be to:

- 1) Reduce the impact of Judicial Reviews (JR) on housing supply; and,
- 2) Reduce time delays to housing developments

PII has concerns that the proposal creates additional uncertainties over and above the 'normal' planning process, with significant potential unintended consequences. The ultimate outcome being a likely extended planning timeframe.

The overriding consideration must be to structure any proposed amendment legislation in a way that minimises the potential for future Judicial Review of large-scale housing developments under the new system. It is of equal importance that clarity is provided as to timescales for the transition process as soon as possible.

What has evolved at present is that the planning system is acting as major constraint on housing delivery because of (1) an increased refusal rates and (2) more significantly, the extremely high-level of Judicial Reviews and quashing of permissions under the SHD system.

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The pattern of Decision-making and Review for SHD Applications up to May 2021:

- The An Bord Pleanála (ABP) SHD Refusal rate Jan- May increased to 31%;
- Of the 45 SHD decisions issued by ABP, 69% were Granted Permission;
- 61% of these Grants are now subject to Judicial Review;
- To date over 90% of JRs determined resulted in ABP quashing the Permission; and
- Only 27% of decisions from Jan-May 2021 on SHD applications (12 out of 45 decisions), have resulted in Permissions that are implementable i.e., without a judicial review.

To put this in perspective, the refusal rate for the first 250 SHD decisions determined between January 2018 and January 2021 was 22%. This is effectively a crisis for the planning system and for housing delivery in Ireland and is a vitally important consideration in the context of any new arrangements.

1 Timescales and Key Dates

From a practical and technical perspective, the SHD process successfully provided a clear and time-shortened process for the delivery of high-quality permissions. It raised the bar in terms of the quality of pre-planning discussions between the LA, ABP and the applicant which has made the process efficient and clear for all involved.

While the LSRD proposal, incorporating procedural elements of the SHD process, holds the prospect of improving the quality of Applications, PII is concerned that several of the detailed measures may push planning permission timelines back by many months.

The General Scheme of the LSRD helpfully sets out key dates and timescales for the termination of the SHD process and the introduction of the new system.

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1.a

Transition from SHD to LSRD

We understand that it is now considered unlikely that the 29th of October 2021 date for termination of pre-application consultation requests under the SHD system can be met.

There must be a reasonable timescale between obtaining the required "Opinion" under SHD from ABP following the Pre-application Consultation and the deadline for submitting a Planning Application for the proposed development to which the Opinion relates.

It has been suggested that it takes at least 3 months from receiving the Opinion to lodgement of an application, having regard to the complexity of appropriately refining Applications. However, this timescale is now being extended further due to the perceived need, in most cases, for a detailed legal review prior to lodgement of the Application.

Therefore, it is submitted that a minimum of 6 months should be provided for, from date of receipt of the "Opinion" under the SHD

to the date of lodgement of the Application. For example, should the SHD date for pre-application requests remain at 29th of October, then it should be possible for any development, for which an Opinion has been received up to that date, to be lodged by end of April 2022. Where the Opinion comes out at a later date, then it should be 6 months from the date of the Opinion.

It is important to recognise that there are significant delays in holding pre-application meetings and receiving an Opinion from the Board, and it can take up to 6 months to receive the Opinion, from requesting the pre-application consultation of the Board. The dates as set out in the Scheme arrangement are therefore unlikely to be achievable in the great majority of cases, where the request for an Opinion is lodged between now and the end of October.

In summary, there is a need for an urgent re-statement of the relevant dates, having regard to a realistic appraisal of the timescale for enacting the necessary legislation and putting in place the necessary regulations and processes in local authorities and An Bord Pleanala.

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The current uncertainty over timescales represents a further significant challenge to preparing planning applications and developing housing. This is the indicative timeline based on PII's reading of the Heads of the General Scheme:

↘ Pre-planning work and informal discussions with the LA:	12 weeks [est.] and then request final consultation
↘ Final consultation meeting:	4 weeks later
↘ LA Opinion is issued:	4 weeks later
↘ Prepare and lodge final planning application:	6 weeks later [est.]
↘ LA timeframe to decision:	8 weeks and based on the draft legislation, can issue an FI
↘ Receive FI and issue response:	4 weeks
↘ Decision on FI:	4 weeks and if then appealed
↘ Prepare 1st Party Appeal or response to Appeal:	4 weeks
↘ ABP Appeal Decision:	16 weeks
TOTAL	62 weeks

PII argues that there is a need to reduce time and implement new statutory timeframes for decisions and properly resource the Board to be able to meet this timeframe for decisions.

1.b Amendment Applications under SHD

It is widely recognised that there is a need to put in place new statutory provisions for amendment applications to SHD permissions and generally.

It is established that the 2016 Act did not specifically provide for amendment applications and a process under the Strategic Infrastructure Development under Section 146B of the Act has been used instead. However, this has significant limitations and may well be open to legal challenge.

Furthermore, there is no timescale for decisions under Section 146B applications and the timescales can often take over 4 months for a decision, which can result in significant delays to housing developments.

There is a need for an efficient and speedy process for determining Planning Applications for Amendments to SHD schemes and/or the provision of a scheme that would apply post-SHD for SHD Permissions.

It is suggested that amendment applications would be best dealt with through the Planning Authority.

1.c Amendment Applications Generally

There should be a clear definition of what amendments are considered Material and which are "Non-material".

For Non-material amendments, there should be a fast-track process where a 4-week decision from the local authority, with no rights of 3rd Party Appeal.

For significant Amendments, which are considered material, there should be an equivalent for Section 34 applications, with public consultation provisions and clarity as to how issues such as Appropriate Assessment and Environmental Impact Assessment screening are addressed.

It is noted in this regard that there is currently no specific provision in the Planning and Development Act 2000 (as amended) for amendment applications. An opportunity, therefore, should be taken to regularise the position overall in respect of the planning process in respect of amendment applications and ensure that a system is put in place, which is clear and efficient.

It is widely understood that most complex planning applications do require some degree of amendment, either prior to or during the construction process. It is vitally important that the planning system facilitates this efficiently and effectively.

2 LSRD Pre Application Consultation Opinion

"It is important that any new provisions introduced, as a variation of the Section 34 process to facilitate large scale residential developments, are not vulnerable to significant delays and uncertainties that may be caused by a legal challenge to any such new provisions"

The establishment of the proposed new pre-application formal Opinion process by local authorities may bring benefits in some cases where local authorities do not or cannot allocate necessary resources to this pre-application process at present. There are some local authorities where the pre-application process is functioning well, and it may be considered an unnecessary additional step in the process, utilising additional timescale, resources, and time, prior to lodgement of an application. Nonetheless, if such a provision is introduced, it is considered essential that it is drafted in a way that minimises the extent of legal challenge.

PII is aware that there are a number of Judicial Review cases remain outstanding and not yet determined by the Courts, where An Bord Pleanála's pre-application Opinion process is subject to legal challenge. It is important that any new provisions introduced, as a variation of the Section 34 process to facilitate large scale residential developments, are not vulnerable to significant delays and uncertainties that may be caused by a legal challenge to any such new provisions.

3 Further Information Requests

"It is important, for the integrity of the application decision making process, that the applicant for permission has the opportunity to respond to submissions by 3rd Parties and prescribed bodies"

It is noted that it is proposed that Further Information would be requested in limited circumstances only. While this is positive, the Minister can prescribe what can be further information and there is no detail as to this yet. Detail is key here.

The provision for local authorities to request Further Information, albeit in limited circumstances, is welcomed as it is considered an essential part of the process. If the process of Public Consultation and consultation with statutory bodies and other organisations is to have any meaning, then it must be possible for the local authority and the Applicant to respond where appropriate, to issues raised in such submissions. This can involve issues which require Further Information to be submitted to the planning authority.

Again, these provisions should allow for the Applicant to respond to submissions made on the Application. This would greatly assist the Planning Authority and on Appeal, An Bord Pleanála, having available to them the response to the submissions in making their decision.

It is recognised by the Courts that the absence of any opportunity for the developer to respond to 3rd Party submissions is a significant legal weakness in the current SHD process and has been a key issue in several Judicial Reviews, which led to the quashing of permissions.

It is important, for the integrity of the application decision making process, that the applicant for permission has the opportunity to respond to submissions by 3rd Parties and prescribed bodies, as well as addressing any Further Information requirements of the planning authority.

It is also considered important that any provisions restricting the scope and nature of Further Information in respect of LRSD applications, are considered very carefully from a legal perspective given the potential for legal challenge over the interpretation of such provision.

Again, there may be risk of opening a further stream of Judicial Review challenges, including the introduction of such provisions.

Resourcing within planning authorities will be important so that they can adequately meet their statutory timeframes (4 weeks to meet, 4 weeks to provide Opinion and 8 weeks to decide once lodged with RFI in only limited circumstances).

PII is of the strong view that the best approach is simply to revert to standard S.34 application process, with the one important change of introducing a mandatory decision period by An Bord Pleanála on appeals. A 16-week decision period seems too long given the rigorous process that the planning has been through at LA level. This should be shortened to prioritise these applications.

4 Specific Observations

In addition to our general comments above, comments in relation to specific aspects of the General Scheme are set out below:

Head 6 (4): Final Consultation Meeting attendees:

PII would like to see clarity as to who should be at the meeting from the LA side. In our view the meeting should be attended by:

- ✎ All applicable LA departments and prescribed bodies must be present at the meeting physically or virtually and the meeting must be minuted.
- ✎ It should be insisted on, that at LA level, pre-applications are fully assessed prior to the application being lodged with the LA. That way if it goes to appeal to ABP, all of the information that ABP will require will be there to see.
- ✎ Perhaps there should be a dedicated SEO at LA level who oversees that the LSRD process is implemented correctly from both sides.

Furthermore, as ABP are not present at the meeting, and there remains a disconnect between ABP applying national and regional policy and the LA applying local policy, the Opinion from the LA may not be aligned with what ABP would decide on appeal. This is one of the key challenges that separately remains and should be addressed.

Head 6 (5): Issuing documents to prescribed bodies:

When the documents should be sent is not clear. The documents should be sent to prescribed bodies on receipt by the LA so that the prescribed bodies have a number of weeks to review it before the final consultation meeting.

Head 6 (9): States the LA shall in appropriate cases provide advice on how to address any issues:

The LA should have to provide advice on how to resolve issues rather than it being an option. Otherwise, any solution put forward by the applicant to resolve the issue can be claimed by the LA to not be what they required / desired.

The final consultation meeting must be productive and be proactive in trying to resolve all planning issues to promote appropriate development. An overall objective of the Bill should be to facilitate a more collaborative planning process to find solutions rather than find reasons to refuse. Furthermore, as the final consultation meeting is a 'requirement', it would be a waste of time if advice is not provided.

Head 6 (12): The final consultation meeting nor the Opinion can be relied on in formal planning process or legal proceedings:

While this is already written into the Act for Section 247 meetings, given that this final consultation meeting is required and not optional in this case and adds up to 14 weeks to the timeline, the applicant should be able to rely on in the Opinion and meeting in some shape or form if possible.

Head 11: Fees payable to planning authority:

We cannot understand why there should be additional cost for procedures that are so similar to those existing. This will add more cost to an already expensive process. In principle, it would make more sense for the legislation to prohibit any increase in cost, merely because the definition for LSRD is satisfied.

Head 13: The transitional provisions:

The proposed clarity about the specific deadlines for transition is welcome. However, this must be given urgent priority. The announced prospect of LSRD and the suggested deadlines in the General Scheme have already influenced many to refrain from making applications (or even from acquiring lands), pending final clarity, and some, few, to accelerate to ensure that their application is still addressed as SHD. None of this is welcome for those preparing or deciding on applications. Worse still, all of this will adversely affect the delivery of housing, with a fractured pipeline of consents for the future.

5 Comparison Matrix

COMPARISON OF “CONVENTIONAL”, STRATEGIC HOUSING DEVELOPMENT (SHD) AND LARGE SCALE RESIDENTIAL DEVELOPMENT (LSRD) SCHEMES

We have prepared a matrix that compares “conventional” Section 34 applications, SHD and LRSD. Based on this analysis we would have some concern that there are some best practise from the SHD process that will not transfer over to the new LSRD process.

	S. 34 “Conventional”	SHD	LSRD
Size of Scheme	No limit	100+ houses/apartments 200+ student bedspaces.	100+ houses/apartments 200+ co-living student bedspaces.
Open to JR?	Yes	Yes	Yes
Request for Further Information	Yes. c. 55% of Applications.	No	Yes
Fee	Max €38,000	Max €80,000	TBD
Third Party Observation Fee	€20 (but €220 for appeal)	€20	€20
Appeal Fee to ABP?	€220	N/A	TBD
Oral hearing	Yes	Very rare	Yes
Appeal to ABP?	Yes	N/A	N/A
Time limits	LA: 8 weeks (+ additional if RFI issues) ABP – objective (not obligation) of 18 weeks Planning Authority.	ABP: 16 weeks post lodgement.	ABP: 16 weeks, but really open ended – totally at the Board’s discretion.
Lodged with?	Planning Authority (Ultimately appealable to ABP.)	An Bord Pleanála	Planning Authority (Ultimately appealable to ABP.)
Site zoning	Residential as either Permitted in Principal or open for consideration.	Residential as either Permitted in Principal or open for consideration.	Residential as either Permitted in Principal or open for consideration.
Commercial Element/“other uses” limit?	No limit	15%	30%
Public Participation	Yes	Yes	Yes
Mandatory s.247 with LA?	Yes for 10+ No. units.	Yes	Yes. Also “final consultation meeting” required
Application in an SDZ?	Yes. No Appeal, but the proposal must be 100% compliant with the relevant Planning Scheme.	Arguable – legal case pending.	No
Presentation by Local Authority planners to Area Committee Councillors?	No	Yes	TBD?
Dedicated Bespoke Website	No	Yes	TBD



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PII Sectors

