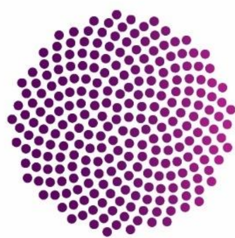

Property Industry Ireland

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PII Submission to Pre-Legislative Scrutiny of the General Scheme of the Land Value Sharing and Urban Development Zones Bill 2022

June 2023

Introduction

On 22 December 2021, Government published the General Scheme of the Land Value Sharing and Urban Development Zones Bill 2021 (the "original scheme"). On 13 April 2023, Government published a revised General Scheme (the "revised scheme").

The following submissions are made on the revised scheme, and references to the "Bill" are references to the Bill proposed within the revised scheme.

PII's primary concern is the effect the introduction of the proposed land value sharing ("LVS") contribution would have on the availability of land and the viability of home building and urban regeneration. Our members are convinced that the intervention will either increase the cost, or frustrate the delivery, of new homes. The direct and very substantial impact of the charge on viability will greatly exacerbate the shortfall in delivery of housing units compared with Government targets and national need. For Government to disincentivise new homes would be inconsistent with every other expressed Government policy.

There is already serious doubt about the legality of this intervention, particularly given the changes in the revised scheme and the limited transitional provisions. The Government should not enact this scheme as proposed. It should take appropriate time to consider the impact this charge will have on housing supply, including further engagement with industry and citizens prior to the introduction of LVS.

Without having had access to the full Indecon report PII is not able to comment on all the issues raised therein. It is regrettable that this report has not been published at the same time as the scheme, particularly given the obvious cumulative burden of overlapping other taxation and economic measures. The work of Indecon should be open to review and comment, so that Government can hear analysis of their work and make an informed decision on the scheme.

The following observations are made without prejudice to this primary concern.

The Explanatory Memorandum suggests the Bill gives effect to principles expressed in the Report of the Committee on the Price of Building land (1973) known as the "Kenny Report". The same has been suggested during pre-legislative scrutiny before the Joint Oireachtas Committee.

However, this ignores two fundamental points.

First, the majority view in the Kenny Report was *against* a levy or charge similar in kind to the proposed LVS contribution. Specifically, the report recommended against a levy on "betterment" because that would increase the price of serviced and potential building land, and thereby cause an increase in the price of all buildings on the land. The report recommended a compulsory purchase solution, where the price to be paid would be less than open market value.

Second, since the Kenny Report in 1973, the State has introduced several significant measures to capture from owners and/or developers the value of development land and/or a contribution from that cohort to the delivery of public infrastructure and facilities.

For homebuilding, these measures include capital gains tax (currently at 33%), value added tax (currently 13.5%), development contributions (estimated at an average of €100 per square metre), stamp duty at 7.5%, the social and affordable obligation under Part V of the Planning Acts (20% of the Equivalent Net Monetary value), connection fees to Uisce Éireann (formerly Irish Water) and other site activation measures, including the residential zoned land tax (at 3% of market value per annum) and the vacant site levy (at 7% of market value per annum). The Kenny Report never contemplated the impact of, or recommended, imposing all these measures, together with a land value sharing contribution. It is quite extraordinary that, in calculating the value captured by the State from decisions to zone land and invest in infrastructure, the existing means by which a very significant proportion of that value is already captured are ignored.

The proposed LVS contribution cannot be described as the preferred solution in the Kenny Report and, more fundamentally, could never be described as consistent with that report, where imposed in addition to, rather than in substitution for, those other existing measures.

The objective of the Kenny Report was to control the price of development land. It is notable that this is not an objective of the Bill. In fact, one of the objectives of the Bill is to capture for the State a proportion of the uplift in the price of development land. Whether a landowner, a developer, or the State benefits from an increase in the price or a proportion of that increase, the ultimate occupier and house purchaser carries the full cost of the increase. This is not consistent with one of the key objectives of Housing for All being supporting home ownership and increasing affordability.

The purposes of the Bill are described (at section 4) to include “to address the market failure leading to serious deficiencies in the housing market”. This appears intended to suggest the shortage in housing supply arises from some failure in the market, ignoring the role of the State in ensuring a planning process that is fit for purpose. This “purpose” should be deleted.

It is apparent from the Explanatory Memorandum that the Indecon Report commissioned to consider the impact of the proposed measure warns of a risk of disincentivising housing supply. In circumstances where there is a chronic shortage of housing in the State and significant viability challenges, it is difficult to understand the introduction of any measure which puts housing delivery at risk.

In addition, the proposed levy will act as barrier to the regeneration of lands in cities and towns in relation to land zoned for mixed use or, in time, zoned for commercial and industrial use. This additional viability challenge would put at risk stated public policy for greater use of land in existing settlement footprints and rehabilitation of brownfield sites.

PII does not accept that the scheme as proposed is necessary or appropriate at this time. Without prejudice to that position, and in the spirit of transparent co-operation, PII makes the following observations in relation to the specific provisions of the revised scheme:

1. **The Bill should not apply the LVS contribution to land that is already zoned.**

   The Explanatory Memorandum describes the LVS as a mechanism to share with the State the value uplift associated with the decision to zone land for development purposes. The stated objective is to facilitate an increase in the supply of housing, in particular by funding local authorities to deliver social and physical infrastructure to support development in an area.

   The revised scheme fails in these aims.

   The original scheme was (at Head 6) limited to newly zoned residential development land. The revised scheme is extended (at section 31BB) to all residential land, regardless of when that land was zoned.

   Where land is already zoned, the "value uplift" will, in many cases, already have been captured in a sale. In that event, the State has already secured 33% of the "uplift" by capital gains tax on the sale. Any attempt to impose an LVS contribution on lands sold after land was first zoned for residential would be unreasonable double charge. Part V of the Planning and Development Act which is another "land value capture tool" recognises the need to avoid double charge and retrospection. Part V allows local authorities to acquire 20% of the Equivalent Net Monetary Value but provided exemptions for those who had acquired land before the introduction of Part V. Part V was referred to the Supreme Court for consideration as to its compliance with the Constitution pursuant to Article 26 of the Constitution. When considering if the interference with property rights was arbitrary or unfair and therefore whether it was lawful, the Supreme Court [1] stated;

   Nor in the view of the court could the scheme be regarded as arbitrary, unfair or based on irrational considerations. It was reasonable to differentiate between those persons who bought their land after the Bill had been published and those who had bought before and to afford somewhat more generous treatment to the latter category. The court is further satisfied that it was not unfair or arbitrary to distinguish between those who acquired land by purchase before August, 1999, and those who acquired it by inheritance before that date. It is true that the latter category are not to be entitled to interest, but there is undoubtedly a distinction in principle between their position and that of those who purchased property: it was not unreasonable to treat the latter as being

[1] **In the matter of Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill**, 1999[S.C. No. 184 of 2000]

entitled to interest in respect of the purchase money paid by them, whether in the form of mortgage interest or otherwise, depending on the circumstances of the particular purchase.

In failing to distinguish between those who acquired zoned land before the Bill and those who acquire it after, the Bill fails to have regard to this important determination by the Supreme Court.

It is important that we learn from the more than 20 years' experience with Part V, specifically on this point and more generally, for the implementation of LVS.

Where purchasers have purchased land at a price that reflected the value uplift attributable to the decision to zone land. The assumed windfall has been paid to the original owner and is not available for the current owner to share with the State.

The sole effect of the Bill on those persons is to increase the cost of housebuilding and, as predicted by the Kenny Report, to increase the resulting price of homes. That is fundamentally inconsistent with the stated objective, and with other Government policies within Housing for All (2021).

The transitional provision (at section 1(4)) does not protect those exposed to unlawful double taxation nor does it respect the requirements of proportionality and avoidance of measures which are arbitrary and unfair. Worse, it simply forces planning applications to be made before given dates, solely to avoid the LVS contribution.

It is of critical importance that the Bill should not apply the LVS contribution to land that is already zoned.

There is a second key effect of extending the LVS to existing zoned lands. The requirement to pay this charge will undermine the viability of many housing schemes as result of the very substantial additional charge on the development of housing from LVS. Many housing development sites comprise greenfield or cleared brownfield sites which have very limited existing use value and therefore, the charge payable will be close to 30% of the existing market value of the site. This becomes payable when permission is obtained and implemented, i.e., when houses are being delivered. It is a very significant charge on the delivery of housing the point of construction.

The effect for families seeking housing is twofold. Firstly, it will greatly reduce housing supply, leading to greater 'house crowding', emigration of young people and homelessness. Secondly, it will lead to increased housing prices with purchasers in effect paying most of the charge where new housing does proceed. House price increases may well result from to the extreme shortage of housing which will arise directly from the application of LVS, resulting in increased prices for the limited number of schemes that do proceed. Both of these go directly against key government objectives.

The impact is best illustrated by case studies of proposed housing schemes in different locations and site typologies. These case studies, to follow, provide an indication of the likely increase in cost per unit that will arise when the LVS is operational and the extent to which this charge will directly undermine the achievement of the government's housing targets.

2. **The Bill should be amended to commit the generated funds for the delivery of infrastructure.**

As noted, one of the stated objectives is to facilitate an increase in the supply of housing, in particular by funding local authorities to deliver social and physical infrastructure to support development in an area. The Explanatory Memorandum acknowledges that development is generally dependent on the provision of supporting infrastructure. Where the State provides that infrastructure, the memorandum explains that the value of land increases by reason of that investment. The memorandum explains that the LVS contribution gives to the State a proportion of the increase in land value that results from the investment, an objective in Housing for All.

The Bill does not ensure the delivery of that infrastructure at all, or in the area where the lands are located. As a result, the Bill does not commit any investment by the State, so does not generate any increase in land value that should be shared with the State.

The funds are not properly ring-fenced. The requirement for separate accounting (section 31BN(6)) has not proven effective before. Similar language is used at section 48(14) of the Planning Acts, but there is no confidence that the promised infrastructure will be delivered within the life of the relevant contribution scheme. Section 74 of the Waste Management Act 1996 (as amended) provides a more secure model for ring-fencing.

The local authority is not obliged to complete any of the necessary infrastructure. There is nothing in the revised scheme to ensure delivery. This is essential.

There is no refund to the developer, where the local authority fails to deliver the necessary infrastructure. Absent the promised infrastructure, there is no increase in land value to be shared. Section 48(12) of the Planning Acts provides a clear model for refund, and reciprocal incentive for the public authority to “use it, or lose it”. Absent the investment in infrastructure, there is nothing to be shared.

This was partly acknowledged by the Department during pre-legislative scrutiny before the Joint Oireachtas Committee and is likely to be an important consideration in any examination as to whether the measure is proportionate.

The Bill should be amended to commit the generated funds for the delivery of infrastructure.

3. **The Bill should exclude any value attributable to the grant of planning permission.**

The LVS contribution is calculated (at section 31BC) by reference to the zoning value of land, which is the difference between the existing use value (where only exempted development can by carried out) and the market value of zoned land.

The definition of market value in the revised scheme makes clear (at section 31BA) that the "assessment of market value shall not take into account any value associated with any extant planning permission in relation to the land in question".

This is a welcome change from the original scheme.

During pre-legislative scrutiny before the Joint Oireachtas Committee, it has been suggested that the market value of zoned land should include the value attributable to any planning permission obtained. That would ignore the stated objective of the Bill: to capture for the State a share of the increase in land value arising from a change in zoning and/or the State investment in supporting infrastructure. The Bill is not designed, so does not attempt, to capture for the State a share of the increase in land value arising from the grant of permission.

First, it appears from the Explanatory Memorandum that Indecon recommended as much, given the key objective to influence land prices and reduce speculation.

Second, if the LVS contribution applied also to the value arising from the grant of permission, this cost would surely be passed to subsequent purchasers of homes.

Third, the value arising from the grant of permission can only be achieved after substantial investment and risk on the part of private actors delivering the required homes. There is substantial cost to the design of a worthy scheme, and to the preparation of a planning application. The private actor must overcome the wide range of issues with the planning process that have prevented the delivery of homes, including failure to set housing targets to match the existing and future needs of the State's population, chronic under-resourcing of the public sector, unique challenges within the Board, an extraordinary backlog of cases awaiting decision by the Board, an

unprecedented rate of legal challenge and an unprecedented rate of success for those challenges. Even before unlocking development finance, there is substantial cost of finance during the too long period of time pending receipt of a developable outcome from the planning process. With respect, any increase in the value of land from the grant of permission is wholly attributable to the efforts of these private actors, often in spite of the State, rather than because of the State. There is nothing done by the State to justify any share in that value.

4. **The Bill should be amended to reduce the amount of the contribution during a transitional period and should be amended so the Minister can reduce the amount of the contribution to nil.**

The amount of the LVS contribution is 30 percent. There is no sensible rationale for this quantum, and no published analysis of how that comprises a proportionate interference with property rights.

In response to questions during pre-legislative scrutiny, representatives from the Department suggested as follows: “If we root it in Part V, as a kind of established principle, one option is to extend the logic of Part V, which is 10%, 15% or 20% depending on where and when. The question is how far to go with that. There is a certain logic to sharing, which is 50:50. That is where the term "land value sharing" comes in, as opposed to "land value capture", which is used elsewhere. The principle of no more than 30% was when we combine it with the 20% Part V, the 30 plus 20 leads to 50%, which is almost like a kind of shared basis on which to go forward in terms of development land in the future.” When asked whether it was “really just a simple case of 20 plus 30 makes 50, and that sounds okay”, the answer given was: “That was the start point and the initial logic of it.”

With respect, this explanation is wholly unsatisfactory and ignores the parallel other taxation measures, including capital gains tax (currently at 33%), value added tax (currently 13.5%), development contributions (estimated at an average of €100 per square metre), stamp duty at 7.5%, the social and affordable obligation under Part V of the Planning Acts (20% of the Equivalent Net Monetary Value), connection fees to Uisce Éireann (formerly Irish Water) and other site activation measures, including the residential zoned land tax (at 3% of market value per annum) and the vacant site levy (at 7% of market value per annum).

There is no published analysis of how the amount of the LVS comprises a proportionate interference, particularly during a transitional period.

The report of the Commission on Taxation which supported the principle of LVS was on the basis that it would replace and not be in addition to development levies.

It would be foolish to expect the market value of land to immediately reflect this radical intervention. The "market signalling" suggested during pre-legislative scrutiny before the Joint Oireachtas Committee is not effective, given the uncertainty about whether, when and how this measure might be introduced.

The Bill should be amended to reduce the amount of the contribution during a transitional period.

Also, with so radical an intervention, the Minister should be free to reduce the percentage. As drafted, the revised scheme (at section 31BD(2)) leaves the Minister free to reduce to 20 percent. That freedom is too limited. The Minister should be free to reduce the amount of the contribution to nil, given the anticipated risk that this intervention will increase the price of homes and impact viability, so that it might reduce development in the State.

The recent initiative to support housing supply by means of waiver of development contributions and Uisce Éireann connection charges for a period of 12 months as well as the apparent warnings in the Indecon Report regarding the potential impact on housing supply strongly support the principle of allowing the contribution to be reduced to nil where the Minister is of the view that this is necessary to support housing supply.

The Bill should be amended so the Minister can reduce the amount of the contribution to nil.

For completeness, we note that, during pre-legislative scrutiny before the Joint Oireachtas Committee, it was suggested that the rate should be as high as 50%. There is no evidence basis for that suggestion, and no consideration to the impact on viability where so great a fraction of the value is lost. Further, there was no evidence that any consideration was given to the other taxes and levies by virtue of which a significant proportion of value is already captured on the sale and development of zoned land. The suggestion ignores the need to fairly reward the risk assumed by private actors delivering the required homes.

5. **The Bill should respect existing uses and structures that are lawful, even if not exempted development.**

The definition of "existing use value" (at section 31BA) is artificially limited to exclude the value attributable to all works and material change of use of the land other than exempted development.

This ignores the well-established protection for development commenced before 1 October 1964 that has been particularly relevant for extractive industries, where proportionate continuation to completion is lawful. It would be remarkable if an application for permission to extend a quarry, or otherwise add value with new infrastructure, was to expose the operator to an LVS

contribution condition that is to be calculated on the basis that there is no value to the pre-1964 authorisation.

This also ignores the value of implemented planning permissions. If, for example, an application was made to add a floor to an existing apartment block, the permission would include an LVS contribution condition. The contribution would be calculated by reference to the market value of the land, which includes the apartment building on it. The existing use value would exclude that building, so 30% of the value of the apartment development would be exposed to LVS. That is nonsensical. The fact conversions and reconstructions are excluded (at section 31BE(8)) does not resolve this. The same logic applies with equal force to any application to retrofit an estate with more than four housing units.

The definition of existing use value in the Bill should respect existing uses and structures that are lawful, even if not exempted development.

6. **The Bill should not limit the right of appeal to the Valuation Tribunal.**

Where an owner disagrees with values assessed by the planning authority and entered on the land value sharing register (section 31BK), there is a right of appeal to the Valuation Tribunal (section 31BL).

However, that right of appeal is limited. An appeal may only be brought on the following grounds:

> "(i) that there has been serious and significant error of law or fact made by or on behalf of the planning authority, or,
>
> (ii) that there has been a series of minor errors of law or fact made by or on behalf of the planning authority, when taken together, amount to a serious or significant error."

There is no good reason for this limitation. The LVS contribution is a taking of property, a direct interference with the rights of an owner of land. The planning authority should not be excused from the burden of careful diligence; they should be discouraged from errors of law or fact. Where an error of law or fact would change the valuation, and thereby the amount of the LVS contribution to be paid, it must be presumed serious and significant, given the interference with property rights. That being so, the limitation to the right of appeal is meaningless and introduces only confusion and a likelihood of legal challenge.

7. **Impact on ability to transact land.**

Having regard to the proposal that LVS is a charge on land and to the fact that certificates of discharge from the charge will be required so that zoned land and houses constructed on that land can be sold. It is suggested that, before the LVS is introduced, there would be urgent engagement with the Law Society to ensure that procedures are put in place for the issuing of certificates of discharge from LVS. This engagement needs to consider the timing of the determination of the value. In this regard, the ability of the local authority to assess that value after the date of the planning permission appears unnecessary, as well presenting difficulty in terms of developers being able to sell houses.

8. **Differentiation between private developers and others, leading to Market distortions.**

The proposal to impose LVS on private developers but not on AHBs, Local Authorities, the LDA and other public sector developers puts private developers at a very significant disadvantage in terms of delivery of affordable housing.

Firstly, the creation of such a distinction is likely to give rise to further uncertainty and risk to private sector developers who are already struggling with viability and the challenge of delivering affordable housing. It is impossible for private developers to compete if their costs are rendered higher by means of LVS.

Secondly, consideration is required as to whether this distinction will give rise to market distortion and possibly be considered a form of State Aid. The measure as proposed in the Bill would place public sector developers and those contracting with them, whether in the construction of units or in lending to them, at an advantage over those contacting with the private sector and those lending to that sector.

9. **Provide exemption for amendments to existing planning permissions.**

The proposed Section 31BE states as follows;

(1) (a) Subject to subsections (8) and section 31BM, a planning authority shall, when granting an application for a permission under section 34, which consists of either or both of:

(i) a residential development of more than 4 housing units, or

(ii) a commercial development of 500 or more square metres gross floor space,

include a condition or conditions requiring, prior to the commencement of development pursuant to the planning permission unless otherwise agreed, the payment of a contribution (in this Part referred to as a 'rezoning land value sharing contribution')

As is apparent, there is no exemption from LVS, even if there is an existing planning permission and the new permission is required for any reason, whether to respond to a demand for a different house type, to address viability, to increase the density or otherwise.

Although subsection (9) allows a credit for any LVS already paid in respect of the land which is the subject of the planning application, no such LVS would have been due on lands where permission was granted prior to December 2024. However, if those permissions are to be altered even if the alteration is to address housing delivery obstacles with the existing permission, no exemption is available. This runs completely contrary to the stated objective to address the compelling and immediate need for an increase in the supply of housing, and in particular affordable and social housing.

10. **The Indecon report should be published.**

Government should take appropriate time to consider the impact this charge will have on housing supply, including further engagement with industry and citizens prior to the introduction of LVS.

Without having had access to the full Indecon report PII are not able to comment on all the issues raised therein. It is regrettable that this report has not been published at the same time as the scheme, particularly given the obvious cumulative burden of overlapping other taxation and economic measures. The work of Indecon should be open to review and comment, so that Government can hear analysis of their work and make an informed decision on the scheme.

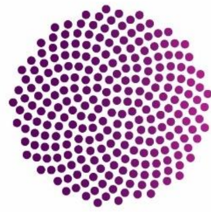
About Property Industry Ireland

Property Industry Ireland (PII) is the trade association within Ibec which represents the property and construction sector, including contractors, developers and builders; property professional service providers including, architects, surveyors, engineers and planners; as well as banks, financial institutions, asset and property managers.

Our vision:
A sustainable Irish Property Industry which is creative, responsive, competitive and well integrated in meeting the socio-economic needs of all the stakeholders in the built environment

Our mission:
To be the trusted partner and provider of "evidence based" information, policies and strategies for the property industry at National level, to the Oireachtas, Government, Local Authorities and Agencies, and for the benefit of the people of Ireland.

Our objectives are to:
1. Be the Leadership Forum in the Industry for the discussion on National Property Issues
2. Develop, propose and support a National Property Strategy, policies and solutions to issues for the benefit of the nation as a whole
3. Be a research led organisation, which collates and commissions relevant and innovative research on Ireland's construction sector in order to promote & sustain a competitive economy
4. Be the go-to organisation for Government and the Oireachtas on all aspects of property
5. Work with all stakeholders in the industry to restore it to a sustainable position in the economy
6. Increase membership through demonstrating the achievements and outcomes in relation to national strategy and policy



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