Property Industry Ireland

Ibec

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PII Position on Residential Zoned Land Tax

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Contents

PII SECTORS

1. Executive Summary

The Residential Zoned Land Tax (RZLT) imposes a charge on land which has the potential to provide housing but on which construction has not yet started.

While the measure is welcome in its aims to bring down the cost of land and encourage the development of housing, there are specific challenges in how the tax would operate. Homebuilders are liable to pay the charge even in situations where they are trying their best to deliver housing and there is a delay primarily from state bodies.

Some real-world examples of this include:

Site 1 – Dublin 4: site granted Full Planning Permission by ABP, subsequently quashed by the High Court. Homebuilder seeking revised planning permission. Overall planning process to date is c. 4 years. Intention is to develop site immediately upon successful grant of planning. Over 700 units will be delivered. This is a tangible example of a site where the homebuilder is doing everything within its power to get planning and start construction. Site value in excess of €100m.

Site 2 – South Dublin: site has Full Planning Permission however there is an access issue. Homebuilder ready to start construction of c. 200 apartments, however access is being held up by Local Authority. This delay is totally outside the control of the homebuilder and uncertain as to when this issue will be satisfactorily resolved. Site value c. €15m.

Site 3 – South Dublin: site in planning for 600+ units. Development cannot commence until a Part 8 issue with regard to a local road is resolved by the Local Authority. Outside of the homebuilders' control and a significant impediment to site commencement. Site value c.€30m.

In each of the examples above, despite the best efforts and desire of the homebuilder to commence on site, they will be subject to the Residential Zoned Land Tax. In fact, we see that all homebuilders can expect to incur an RZLT cost where their development timeline follows industry norms.

Recommendations:

- Significant inflationary pressures and other challenges continue to adversely impact the viability of residential development in Ireland. In order to reflect the significant commercial challenges being faced by the industry in this regard, we propose:
  - The residential use value of the land (rather than open market value as currently applies) should be used to calculate the RZLT charge arising on a site.
  - A mechanism should be introduced which would allow site owners to apply for relief from RZLT on a case-by-case basis in circumstances where residential development is not commercially viable for reasons outside the site owner's control.

- Judicial Reviews – a homebuilder should not have to pay the tax if the planning decision related to the land or the inclusion on a RZLT map is subject to judicial review.
- Planning applications – where a planning application is under consideration the land should not be subject to the tax.
- The drawing up of the RZLT maps will require considerable human resourcing from Planning Authorities. Both the Local Authorities and ABP may need additional resources to prepare the RZLT maps while at the same time maintain existing services related to planning. To ensure the delivery of housing is not impeded, Local Authorities should be allocated additional resources to prepare the RZLT maps.
- A deferral or refund mechanism should be introduced into the RZLT rules which would mean that the tax is only paid when a relevant site is not subsequently developed for commercial or residential purposes within a reasonable period from the date of grant of planning permission.
- Proceeds from the RZLT should be ring-fenced for the sole purpose of providing infrastructure to facilitate the development of new homes on the site against which the tax is levied.
- In order to better align with stated policy objectives, the deferral available on commencement of residential development of a site should not be withdrawn where there is a bona fide change of ownership of the site prior to completion, particularly in circumstances where the acquirer intends to complete development of the site.

2. Introduction/Overview

Property Industry Ireland (PII) acknowledges the proposed Residential Zoned Land Tax (RZLT) as a measure to facilitate the increased delivery of housing and assist in the meeting of Housing for All targets and bring forward land to the market.

PII, however, would like to express its concern in relation to certain operational aspects of the Residential Zoned Land Tax (RZLT) in the Finance Act 2021.

The objective of disincentivising the hoarding of residential development land available for the development of housing is welcome. However, the effect of aspects of the tax will lead to challenges for some developments. In these cases, the tax will lead to an increase in the cost of new homes, a cost borne by the home buyer. It could also undermine the viability of developments leading to a delay in new homes being built and negatively impact the stated objective of the Government's Housing for All strategy. Furthermore, the tax falls in a wide range of land uses, many with little or no relationship with property development and housing delivery.

While the three-year lead-in in the legislation may seem generous, practical experience would suggest that this lead-in may not be sufficient in anything but a very best-case scenario. After site acquisition, it can be reasonably expected for development to commence after 3-4 years, although in some cases this could take considerably longer depending on the outcome of appeals and judicial review.

There is a real concern that these new rules will act as a disincentive for developers to take on projects, given the risk that planning permission for a development may be delayed or denied resulting in a significant annual cost to the landowner.

3. Issues of Concern

Presently, the Act allows for a deferral of RZLT where:

1. An appeal against a Local Authority/An Bord Pleanála (ABP) determination is ongoing at the return date with respect to a landowner submission requesting exclusion from the RZLT map or for a variation of the zoning applying to a particular site.
2. Development for which planning permission has already been granted cannot proceed due to a "relevant appeal" being made. A "relevant appeal" cannot be made by the landowner or the applicant for planning permission (or anyone connected with them). This is an unreasonable and unhelpful exclusion as first party appeals by a developer or applicant are an integral part of the planning system and are sometimes necessary for to address points of concern regarding viability or deliverability of a planning permission for a housing development.
   This includes:
   a. An appeal to ABP with respect to the grant of planning permission;
   b. An application for judicial review with respect to a decision by a Local Authority or ABP with respect to planning permission; or
   c. An appeal of a determination of a judicial review referred to above.
3. A commencement notice has been lodged with respect to residential development on a site.

Therefore, it seems to us that there is no deferral of RZLT in the following situations:

a) where planning permission is denied with respect to a proposed development (for example because the Local Authority/ABP determine that the development is too large or not in keeping with the surrounding area and a revised application is required before it can be developed, even in circumstances where the planning sought by the landowner is aligned to the zoning of the site);

b) where an application for planning permission has been made to a Local Authority/ABP and a decision on that application is awaited (which may be delayed due to resourcing issues). This is a particular concern at a time when the planning system continues to migrate from the centralised SHD process to the decentralised LRD process; or

c) where a Local Authority/ABP grant planning permission with conditions, and those conditions are appealed by the applicant on the basis they are onerous and impact the economic viability in respect of activating the planning grant. The conditions may in fact be the inhibitor of a development proceeding for viability or other reasons, such as a requirement to await on delivery of an element of supporting infrastructure.

In addition to the above, it would also appear to us that the benefit of a deferral which arises due to the judicial review of a decision to grant planning permission can be clawed back in full (with interest at 8% thereon) where that planning permission is ultimately quashed by the Court. This situation is commonplace with a high number of planning permissions for housing developments being quashed by the courts. This is a very significant inhibitor of housing development, and it usually arises notwithstanding the best endeavours of the site owner to obtain planning permission to develop the lands, involving very considerable financial expenditure. The development should not be further penalised by the imposition of this additional tax in these challenging circumstances. This may arise, for example, where planning permission is overturned following a judicial review finding that the Local Authority/ABP had erred in a procedural or administrative matter during the planning process.

It is entirely unreasonable for a landowner to be liable to the RZLT when they have expended large sums of money in seeking to bring forward the land for development and are simply unable to do so due to difficulties of the planning system in delivering implementable permissions. The application of the tax in these circumstances is inequitable. The situation is further exacerbated where a developer applies for the

quashing of a further permission, which is again granted and is subject to a further judicial review and the second permission is then quashed. This situation is likely to continue until there is significant reform of the legal process associated with planning applications and Judicial Reviews and this should be recognised and provide for in the legalisation. Property Industry Ireland has separately made recommendations on how the Judicial Review process can be improved.

As a result, we would interpret the proposed legislation as meaning that no deferral of RZLT would be available in many cases where the landowner is actively trying to obtain the necessary planning and start on site, but through no fault of their own a viable planning permission has not yet been granted.

a. Matters relating to the planning process

The scenarios in which the RZLT would apply are a concern for the industry given the current experience regarding the Planning Permission process. While a lead-in period of up to 3 years may appear generous, it can be closer to 2 years in certain circumstances and practical experience would suggest that even a 3-year lead-in may not be sufficient in anything but a very best-case scenario. For example, the timelines for a typical-case scenario under the current planning process may be as follows:

- 1 year to prepare planning application, including undertaking consultations with the planning authority and all necessary supporting assessments, and undertaking a legal review of the documentation prior to submitting the application
- 12 to 18 months to receive planning permission (Local Authority and Board decision)
- 6-months compliance preparation and approval, prior to commencement
- 6-months detailed design for construction purposes and tendering

However, a number of other events can and often do result in delays:

- 1 out of 3 planning applications are currently refused, even following a positive pre-application process with Local Authorities
- Over 50% of grants for large scale housing schemes in 2021 were subject to Judicial Review challenge. There is recent evidence that this high risk which is now increasing further. It can take between 1-3 years before a judgement is made (see Appendix 1 in relation to SHD Judicial Reviews)
- Only one in three large scale housing planning applications decided in 2021 resulted in a planning permission that could be implemented, with the majority either refused permission or subject to a JR challenge
- In most Judicial Reviews, the planning permission is quashed, not for the design or quality of the scheme or other planning related issues but because of technical legal matters.

This means after site acquisition, it can be reasonably expected for development to commence after 3-4 years, although in some cases this could reach 7 years pending the outcome of planning appeals and the judicial review process. Thus, a measure intended to incentivise the delivery of housing would have the opposite effect of punishing landowners and homebuilders attempting to do everything in their power to bring homes to market.

There is a real concern at present that these new rules will act as a disincentive for developers (and financiers) to take on projects, given the high risk that planning permission for a development may be significantly delayed, quashed by the courts, or denied resulting in a significant annual cost in additional taxation to the landowner. This is directly contrary to the principles and objectives underlying the tax of increasing housing delivery.

It is also important to remember that the full cost of home delivery is ultimately borne by the buyer of that home.

Furthermore, the Finance Act (s653B) provides that Local Authorities shall determine if a site is a relevant site by whether, in relation to the site;

> *it is reasonable to consider may have access, or be connected, to public infrastructure and facilities, including roads and footpaths, public lighting, foul sewer drainage, surface water drainage and water supply, necessary for dwellings to be developed and with sufficient service capacity available for such development, (criteria 1) and*
>
> *it is reasonable to consider is not affected, in terms of its physical condition, by matters to a sufficient extent to preclude the provision of dwellings, including contamination or the presence of known archaeological or historic remains (criteria 2),*

Whilst couched in different language, effectively the criteria to be assessed are broadly in line with some of the criteria to be assessed pursuant to the planning approval process.

In making a determination for the purpose of RZLT a Local Authority may consult with Irish Water, Transport Infrastructure Ireland, An Taisce, EPA and other stakeholders (i.e. persons to whom Article 28 of the Planning and Development Regulations apply). However, the Local Authority has no obligation to consult with those parties and may determine that a site is a "relevant site" without ascertaining if those parties have any objection to its development.

However, if a landowner applies for planning permission, all of those parties, as well as the public, have a right to object, and the Local Authority and ABP must have regard to those objections in determining the planning application. Other departments within the same Local Authority may also make submissions in the context of planning applications.

It is therefore likely that the situation will arise that a Local Authority will make a determination that land is suitable for residential development on a given date and thus subject to the RZLT and, subsequently, in a planning decision, determine that it is not.

Planning permission can be refused for many reasons, but they can generally be broken into:

- Design issues
- Infrastructural deficiencies, especially water and drainage (this is effectively criteria 1 above)
- Site issues (eg archaeology, environmental) (this is effectively criteria 2 above)

According to the RZLT provisions, notwithstanding the fact that the Local Authority (or ABP if appealed) has determined that the site meets criteria 1 and criteria 2, third parties can object to planning applications on the basis that the site does not meet those criteria. Worse, the Local Authority or ABP may itself determine in the context of a planning application that in effect, the site does not meet criteria 1 or criteria 2.

While the Finance Act (s653AD) makes provision for the "relevant site" to be removed from the register if it is determined that it does not meet Criteria 2, nothing in the Act entitles the landowner to have the site removed from the register of "relevant sites" where the planning authority or ABP has refused planning permission on the basis of the site not meeting criteria 1.

b. Matters relating to liability to tax

The Act allows for the liability to RZLT to cease in respect of a site or such part of a site which has the benefit of planning permission and in respect of which a commencement notice is served (and substantial activity is actually commenced) until:

a. Work permanently ceases without the development being complete;
b. Change in ownership; or
c. Expiry of planning permission where Certificates of Compliance on Completion have not issued in respect of all units.

It is not explained why the tax should arise simply because someone new takes over the development in case (b).There are many reasons why this may happen. At a practical level if one developer cannot get funding or may have other genuine reasons outside their control for not being able to continue and another party can take over, levying the tax is certainly likely to add to the ultimate cost of the homes. Due to the length of the Development Timeline this means that the tax will act as a disincentive to the delivery of homes. A grace period of 18 months should therefore be introduced for such scenarios.

Case (c) ignores the fact that houses are very often finished off after the planning permission has expired and this is perfectly within the law once they are substantially complete at the expiry date. However, the Certificate of Compliance on Completion cannot issue until the units are ready for hand over. While the current rules provide that an RZLT liability should not arise where 85% or more of work (measured by reference to floorspace) has been completed, a question must surely arise as to why the tax could be levied in any scenario where there remains the opportunity to finish out the houses under planning law. The only consequence of imposing the tax in such circumstances is that the cost will be passed on to purchasers. The objectives of the measure are no longer relevant – there is no reason for delaying completion of the development.

c. Resourcing

The drawing up of the RZLT maps will require considerable human resourcing across multiple disciplines from Planning Authorities, and this is acknowledged in the Department of Housing's guidelines on the RZLT mapping process for Local Authorities. As all maps are expected to be drawn up in the same time period, this could have the effect of taking staff away from existing roles in reviewing planning applications and participating in pre-planning meetings, leading to a delay in the grant of planning applications and delaying houses being built. ABP may also need to have additional resources to deal with appeals regarding the RZLT maps. There are currently very significant delays in decision making on planning applications and appeals, including housing developments, in An Bord Pleanála. While Department of Housing guidance to local authorities confirms that the Department will provide assistance to ensure adequate resources are available to undertake the mapping process, significant concerns remain that existing delays will be exacerbated.

For the purpose of making determinations on whether a site is a "relevant site" for RZLT, Local Authorities and ABP are under strict time restrictions. Questions must surely arise as to whether they are capable of making a proper assessment as to the application of the above criteria whilst adhering to such time restrictions applicable for the RZLT process. Local Authorities have repeatedly highlighted problems with applying similar time restrictions to planning decisions. As highlighted above, very similar criteria are required for some aspects of both planning applications and the RZLT.

d. Existing land owned by homebuilders

A key concern is that the tax would apply to land currently owned by a homebuilder. The aim of the tax is arguably twofold, to speed up the delivery of homes and to decrease the overall cost of land in the market.

However, the achievement of these aims is limited when it comes to land currently owned by homebuilders.

In relation to the first objective, we have already explained how the tax can be unfairly levied on homebuilders even in scenarios where they are doing their best to speedily deliver homes through the Irish planning process and court system.

In relation to the second objective, the tax will only devalue land currently owned by the homebuilder. This means that for sites where a homebuilder has already identified viability of construction as a barrier to delivery, if the tax operates the way it intends to lower the price of land, the land is now worth less than when it was before the introduction of the tax.

In scenarios where the homebuilding is not yet viable, the tax becomes punitive – the landowner must sell the land at a seriously impaired price or continue to pay the RZLT until such time as homebuilding is viable as they cannot build and sell homes at a loss. In this case continuing to pay the RZLT will further put pressure on viability. Again, it is important to remember that the full cost of home delivery (including taxes) is ultimately borne by the buyer of that home.

4.Worked Examples

Site 1 – Dublin 4:

site granted Full Planning Permission by ABP, subsequently quashed by the High Court. Homebuilder seeking revised planning permission. Overall planning process to date is c. 4 years. Intention is to develop site immediately upon successful grant of planning. Over 700 units will be delivered. This is a tangible example of a site where the homebuilder is doing everything within its power to get planning and start construction. Site value in excess of €100m.

Site 2 – South Dublin:

site has Full Planning Permission however there is an access issue. Homebuilder ready to start construction of c. 200 apartments, however access is being held up by Local Authority. This delay is totally outside the control of the homebuilder and uncertain as to when this issue will be satisfactorily resolved. Site value c. €15m.

Site 3 – South Dublin:

site in planning for 600+ units. Development cannot commence until a Part 8 issue with regard to a local road is resolved by the Local Authority. Outside of the homebuilders' control and a significant impediment to site commencement. Site value c. €30m.

In each of the examples above, despite the best efforts and desire of the homebuilder to commence on site, they may still be subject to the Residential Zoned Land Tax.

Furthermore, we can see that developers should in principle expect to incur significant RZLT costs even where development timelines follow industry norms. Applying the expected development timelines to a scenario where land is acquired by a developer one year after first satisfying the criteria, as many as three RZLT charges could arise prior to the commencement of development, amounting to 9% of the market value of the land.

It should be noted that the above scenario assumes that no Judicial Review is lodged against the grant of planning permission; the overall RZLT cost could increase significantly where a judicial review successfully overturns planning permission, even where no fault lies with the developer in this regard..

5. Recommendations and expected outcomes

a. Viability of residential development

Rapid cost inflation continues to adversely impact the viability of residential development in Ireland. This issue is particularly marked in the area of high-density housing developments.

A review of the latest data regarding the progress of SHD developments highlights the challenge faced by the industry. In Dublin, c. 39% of SHDs for which planning permission has been granted have yet to commence for reasons other than an ongoing judicial review. Outside of the capital this trend is even more pronounced, where the figure rises to 48%. A very significant majority of the delay in bringing forward development in these cases will be concerns regarding the viability of residential development.

Concerns regarding commercial viability extend beyond SHDs, similarly impacting land outside urban centres where the density of development required in a local area plan is such that viable residential development is precluded.

In this context, it is essential that any Government intervention in the Irish housing market reflects the significant commercial challenges being faced by developers at this time. As presently drafted, RZLT fails to reflect this commercial reality, applying a recurring 3% charge on sites where development may not be able to commence for reasons outside of the site owner's control and failing to provide a mechanism for site owners to seek relief where residential development is not possible due to commercial restraints. The effect of RZLT applying in such circumstances is that the additional cost arising simply makes the project even more unviable.

In this regard, we propose the following:

Valuation of Land

The legislation imposes an annual 3% charge based on the market value of the land. As the definition of "market value" in this context is taken from capital gains tax legislation, this means that RZLT will be charged on the highest value use of the land, even where this exceeds the residential use value of the land.

The above runs contrary to the apparent policy intention of the tax, which aligns the charge to tax with the potential for residential development on the land. In addition, these rules unfairly penalise site owners and developers where residential development of the land is not commercially viable, but other forms of development may be.

In this regard, we propose that the residential use value of the land should be used for the purposes of calculating RZLT in all circumstances, rather than the open market value as currently applies. This would align the level of charge with the potential for residential development of the site, while also providing some measure of relief where residential development of a site is unviable for reasons outside of the site owner's control.

Hardship mechanism

While the above suggestion could achieve some level of relief for developers impacting by viability challenges, this approach may not fully relieve developers who are simply unable to bring forward development of a site due to viability issues; some level of RZLT may still be due, albeit on a lower market value.

We therefore propose the inclusion of a mechanism which would allow developers to request relief on a case-by-case basis where undue hardship falls on the developer due to the application of RZLT in respect of land where development is commercially unviable for reasons outside the site owner's control.

b. Judicial Reviews

RZLT should not be charged in a site in all scenarios where a Judicial Review is initiated either on a planning decision, zoning decision or inclusion on a RZLT map, irrespective of the outcome of such a Judicial Review and irrespective of who initiated the Judicial Review.

Our reasoning is that, in these cases, the Judicial Review proceedings are taken to overturn a decision by a state body. There is no justice for a homebuilder or homeowner to have to pay a tax for either a scenario where (i) a planning permission has been refused and reapplication is necessary, (ii) a decision of a planning authority or ABP on a planning application (as opposed to an appeal) is awaited, (iii) a permission granted is quashed by a court (often on legal technicality) and new decision or reapplication is necessary – something that is not the fault of a homebuilder – or (iv) in the case where a homebuilder's own request for Judicial Review is granted, as this circumscribes their access to justice.

In the latter scenario, the proposed measure would in any case only act as a pause to paying the RZLT during the period a project is subject to Judicial Review – the obligation is reinstated once the courts have made a decision. We also fear that such a measure would mean that more Judicial Review actions would be taken by objectors to a development to frustrate the process in the hope that the project would become unviable with the additional tax liability being incurred– a clear abuse of the courts and justice.

c. Refund or Deferral Mechanism

A refund or deferral mechanism could be introduced into the RZLT rules which would allow for relief from RZLT incurred on a relevant site where that site is subsequently developed for commercial or residential purposes. Importantly, the amount of the relief would be determined with respect to the date that the application for planning permission under which the development occurred was filed with the Local Authority/ABP. This would have the benefit of incentivising landowners to bring forward applications for planning permission and subsequent development of relevant sites, while not punishing developers who experience significant delays in the planning process before a commencement notice can be filed with respect to a development.

If deemed necessary, the value of this relief could then be tapered if commencement of development did not occur within a certain agreed time period after successful grant of planning permission. This would ensure the policy intention of incentivising the prompt development and use of zoned land would continue to be met.

d. Tax relief

There should be a relief for the RZLT paid against capital losses for tax purposes under all tax heads. In its current guise, RZLT can arise in many cases where the homebuilder is doing everything they can to progress the completion of units. In those cases, the RZLT is a cost of doing business, and is directly related to the land held and so should be deductible on a disposal of the land.

e. Ringfencing of funds

We believe that the RZLT should not be a revenue raising measure but should incentivise the delivery of new homes. As with the proposals for Land Value Sharing being considered by Government, proceeds from the RZLT should be ring-fenced for the sole purpose of providing infrastructure to facilitate the development of new homes on the site against which the tax is levied. This would offset the reliance on Local Authority levies for the provision of infrastructure delivery and utility connections and allow the proceeds of the tax to directly address some of the reasons why land is not being developed in the first place. By ringfencing the tax like this, infrastructure and utility connections can be put in place which will ultimately underpin the delivery of new homes with a mechanism to be agreed with the landowner to offset this reduced direct build cost to ensure the purchasers of the new homes benefit from this through reduced purchase prices. This is a targeted way to reduce new home costs. Government and Local Authorities should therefore also actively engage with landowners paying the RZLT to identify barriers to the delivery of housing on residential sites.

f. Change of ownership prior to completion of development

As noted above, it is unclear from a policy perspective why a deferral of tax should cease to apply simply because there is a change of ownership of a site prior to completion of a residential development. The effect of this provision is to crystallise Residential Zoned Land Tax with respect to a site that may otherwise be cancelled on completion of the development. This creates a permanent cost on the existing holder of the site, potentially slowing and reducing the overall supply of housing, directly in contrast to the Government's stated objectives in this regard.

We recommend that the deferral available on commencement of residential development of a site should not be withdrawn where there is a bona fide change of ownership of the site prior to completion in circumstances where the acquirer intends to complete development of the site.

6. Appendix 1: SHD Judicial Reviews Year on Year 2018-2021

Year	Grants of Grants	Judicial Review of Grants	JRs as percentage
2018	26	3	12%
2019	71	8	11%
2020	97	25	26%
2021*	31	19	61%

** January to May 2021 inclusive.*

Property
Industry Ireland
Ibec

84 - 86 Lower Baggot Street
Dublin 2
Ireland.

info@propertyindustry.ie
+353 (0)1 605 1666
www.propertyindustry.ie