Ninth Progress Report

Private Property

Coiste Uile-Pháirtí an
Oireachtais ar an mBunreacht

The All-Party Oireachtas
Committee on the Constitution

Baile Átha Cliath
Arna fhoilsiú ag Oifig an tSoláthair

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The All-Party Oireachtas Committee was established on 17 December 2002. Its terms of reference are:

> *In order to provide focus on the place and relevance of the Constitution and to establish those areas where Constitutional change may be desirable or necessary, the All-Party Committee shall complete the full review of the Constitution begun by the two previous committees. In undertaking this review, the All-Party Committee will have regard to the following:*
>
> *a* *the Report of the Constitution Review Group*
>
> *b* *participation in the All-Party Committee would involve no obligation to support any recommendations which might be made, even if made unanimously*
>
> *c* *members of the All-Party Committee, either as individuals or as Party representatives, would not be regarded as committed in any way to support such recommendations*
>
> *d* *members of the All-Party Committee shall keep their respective Party Leaders informed from time to time of the progress of the Committee's work*
>
> *e* *none of the parties in Government or Opposition, would be precluded from dealing with matters within the All-Party Committee's terms of reference while it is sitting.*

The committee comprises ten TDs and four senators:

Denis O'Donovan, TD (FF), *chairman*
Pádraic McCormack, TD (FG), *vice chairman*
Barry Andrews, TD (FF)
James Breen, TD (IND)
Ciarán Cuffe, TD (GP)
Senator Brendan Daly (FF)
Senator John Dardis (PD)
Jimmy Devins, TD (FF)
Arthur Morgan, TD (SF)
Dan Neville, TD (FG)
Senator Ann Ormonde (FF)
Jan O'Sullivan, TD (LAB)
Peter Power, TD (FF)
Senator Joanna Tuffy (LAB)

The secretariat is provided by the Institute of Public Administration:

Jim O'Donnell, *secretary*

While no constitutional issue is excluded from consideration by the committee, it is not a body with exclusive concern for constitutional amendments: the Government, as the executive, is free to make constitutional proposals at any time.

The All-Party Oireachtas Committee on the Constitution
Fourth Floor, Phoenix House
7-9 South Leinster Street
Dublin 2

Telephone: 01-662-5580
Fax: 01-662-5581
Email: info@apocc.irlgov.ie

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Foreword

With the publication in February 2003 of its *Eighth Progress Report: Government* the committee completed its study of the Articles in the Constitution dealing with the major institutions of state. It then turned to the study of the Articles dealing with fundamental rights.

The committee had already, exceptionally, examined one of those Articles (40.3.3°: the right to life of the unborn) in its *Fifth Progress Report: Abortion*, published in November 2000 in response to the *Green Paper on Abortion* (1999), which was referred to the committee for its consideration and recommendations. It then decided to prioritise study of Article 40.3.2° and Article 43, which deal with private property.

On 29 February 2000, the Taoiseach wrote to the then chairman, Brian Lenihan TD (see Appendix 1), suggesting that the committee, when it came to examine the personal and property rights aspects of the Constitution, should consider the need for updating provisions which pertain to planning controls and infrastructural development. In its examination of the Articles relating to property the committee was particularly concerned, therefore, to establish whether the balance struck in them between the rights of the individual and the exigencies of the common good was such as to impose unnecessary impediments to legislation which would either control or otherwise regulate the price of building land on the one hand or which would seek to eliminate many of the obstacles to the speedy roll-out of major infrastructural projects on the other hand. *Chapter 1 – Property rights – the constitutional balance* is mainly concerned with this issue. It also considers property referencing, red safety zones, ground rents, access to the countryside and property of religious and educational institutions.

Chapter 2 – The dynamics of the property market examines how the property market works and how the planning system operates on it. It makes recommendations as to how the value created by the community through the planning system should be recovered by the community so as to finance community objectives. It also makes recommendations in regard to the provision of social and affordable housing.

Chapter 3 – Managing the planning system analyses the criticisms made to the committee about how the planning system operates. It makes recommendations on zonings and re-zonings, development control and consent, provision of infrastructure, provisions for compulsory purchase, and rural housing.

In order to support the public debate that will inevitably follow upon our report, we reproduce in an appendix a broad and representative collection of the submissions made to the committee. I would like to thank my colleagues on the committee, in particular our vice-chairman, Pádraic Mc Cormack. I would also like to thank our secretary, Jim O'Donnell and his colleagues Tom Turley and Jackie Magrath.

Denis O'Donovan TD
Chairman
April 2004

PRIVATE PROPERTY

Introduction

In order to provide the general context for its study of private property the committee invited written submissions from the public in a series of public notices in the national press (11-13 April 2003) and on local radio stations (14-21 April 2003). The proposed deadline was 31 May 2003. A copy of the notice is reproduced in Appendix 2. The committee received 140 submissions, 77 from individuals, 62 from organisations and groups. It also received a petition on clamping signed by 57 persons and a submission from The National Rifle and Pistol Association of Ireland relating to the impounding of privately-owned pistols and rifles by the garda authorities. Some individuals and organisations requested the committee to give them an opportunity to support their written submissions with oral presentations. The committee, anxious to inform itself as fully as possible, decided to hold hearings in public, assisted by the recording facilities of the Houses of the Oireachtas. Accordingly the committee was reconstituted for the month of July as the Joint Committee on the Constitution by resolutions of both Houses of the Oireachtas.

The schedule for the public hearings was as follows:

Tuesday 15 July 2003

The Law Reform Committee of the Law Society of Ireland
John Costello
Rossa Fanning
William Devine
Alma Clissmann

The Society of Chartered Surveyors
Joseph Bannon
Donal ffrench-O'Carroll
Barry Boland

Irish Auctioneers and Valuers Institute
Aidan O'Hogan
Professor Alastair Adair
Alan Cooke

CORI Justice Commission
Fr. Sean Healy
Sr. Brigid Reynolds

Dublin 15 Community Council
Barbara Brennan
Kieran O'Neill
Charlie Kurtz
Irene Martin

Keep Ireland Open
Roger Garland
Prof. Frank Winder
David Herman

Professor Gerry Whyte
Associate Professor of Law
Trinity College Dublin

ACRA The National Body for Residents' Associations
Tony O'Toole
Eoin O'Cleary
Edward Doyle

Wednesday 16 July 2003

Sinn Féin
Aengus Ó Snodaigh TD
John Dwyer

Dublin Transportation Office
John Henry
James Muldowney

The Irish Senior Citizens' Parliament
Michael O'Halloran
Sylvia Meehan
Ina Broughall

Cunnane, Stratton, Reynolds (Town Planners)
John Crean

FEASTA Foundation for the Economics of Sustainability
Emer Ó Siochrú
John Jopling

The Office of the Ombudsman
Patrick Whelan
Willie O'Doherty
Maureen Beehan

The Mountaineering Council of Ireland
Helen Lawless
Milo Kane
Frank Nugent
Seán Quinn

Thursday 17 July 2003

Institute of Professional Auctioneers and Valuers
Liam O'Donnell
Jim Power
Paul Gartlan

The Royal Institute of the Architects of Ireland
Toal Ó Muiré
John Graby

The Labour Party
Pat Rabbitte TD

The Institution of Engineers of Ireland
Paddy Purcell
Peter Langford
Paddy Caffrey
Anne Butler
Liam Connellan

Irish Traveller Movement with Pavee Point
Sinead Lucey
David Joyce
Rosaleen McDonagh
Martin Collins

Jerome Connolly
Human rights consultant
Jerome Connolly
Margaret Burns

Tuesday 22 July 2003

The Workers' Party
Andrew McGuinness
John Lowry
Michael Finnegan

Irish Council for Social Housing
Dónal McManus
Dr Pádraig Kenna

Kildare Planning Alliance
John Sweeney
Paul Croghan
Cllr Tony McEvoy

The Hunting Association of Ireland
Oliver Russell
James Murphy
David Wilkinson
Barry O'Driscoll

Focus Ireland
Declan Jones
Mamar Merzouk
Daithi Downey
Justin O'Brien

Forfás
Evin McMahon
Brian Cogan

The Irish Planning Institute
Louise McGauran
Philip Jones
Ciaran Treacy
Rachel Kenny

Wednesday 23 July 2003

The Irish Farmers' Association
John Dillon
Michael Berkery
Francis Fanning
Jim Devlin

Educate Together
Jane McCarthy
Paul Rowe

Chartered Institute of Building
Kevin Sheridan

Irish Uplands Forum
Adrian Phillips
Joss Lynam

The Irish Landowners' Organisation Limited
Roderic O'Connor
John P Maxwell

The Green Party
Deirdre de Búrca
Dan Boyle TD

Irish Home Builders Association and Construction Industry Federation
Noel O'Connor
Jim Wood
Ciaran Ryan
Matt Gallagher
Liam Kelleher

An Taisce
Michael Smith
Sinéad Dullaghan

Farmers and Property Owners' Association (Wicklow Uplands) Limited
Edmond Kenny
John Hamilton
Seán Byrne

A number of individuals and organisations that wished to appear before the committee but that could not do so in July were accommodated by the committee in meetings it arranged in its offices in Phoenix House, Dublin 2. The schedule of these meetings was as follows:

Tuesday 16 September 2003

Simon Communities of Ireland
Conor Hickey
Noeleen Hartigan

John Fitzgibbon
Ground Rents and other issues

Irish Creamery Milk Suppliers' Association
Jackie Cahill
Tommy Cooke
Lorcan McCabe
John Enright

Irish Council for Civil Liberties
Aisling Reidy

Wednesday 17 September 2003

William K Nowlan
Chartered Surveyor, Town Planner, Management Consultant and a member of the Valuation Tribunal
William K Nowlan
Kevin Nowlan

Tom Dunne
Head of School of Real Estate and Construction Economics
Faculty of the Built Environment
Dublin Institute of Technology

Threshold
Aideen Hayden
Lillian Buchanan
Patrick Burke
Dr P J Drudy

Tuesday 23 September 2003

Railway Procurement Agency
Frank Allen
Conleth Bradley BL
Darragh Byrne
Una Henshaw

National Roads Authority
Michael Tobin
Peter Corcoran

Barbato Borza
Owner of a commercial premises who experienced difficulties with the compulsory purchase order procedure.
Barbato Borza
Patricia Higgins

The School of Philosophy and Economic Science
George Campbell

John McGrath
Owner of a private residence who experience difficulties with the compulsory purchase order procedure

Royal Town Planning Institute
Kieran Kennedy

In carrying out its study the committee was able to draw on the expertise of the following: Gerard Hogan SC, BCL, LLM (NUI), LLM (Penn), MA, Barrister, Fellow of Trinity College Dublin, joint editor of *The Irish Constitution* (J.M. Kelly); Tom Dunne, Chartered Surveyor, Fellow of the Society of Chartered Surveyors, Fellow of the Royal Society of Chartered Surveyors, Fellow of the Irish Auctioneers and Valuers Institute, Head of the School of Real Estate and Construction Economics, Faculty of the Built Environment, Dublin Institute of Technology; and Terry Prendergast, Lecturer in Planning, Faculty of the Built Environment, Dublin Institute of Technology. The committee acknowledges the value to it of having available such a consultative resource when it was pursuing its analysis and arriving at its recommendations

The committee appreciates the generosity and forbearance of the staff of the Houses of the Oireachtas who, at little notice and at a time when many other committees of the Oireachtas were pressing to complete their work before the summer recess, undertook the extra substantial burden involved in the committee's public hearings: Kieran Coughlan, Clerk of the Dáil, Deirdre Lane, Clerk of the Seanad, Paul Conway, the Superintendent of the House, Patricia Doran, who acted as Clerk of the Joint Committee, Alan Murphy, who directed the filming of the hearings, and Anne Robinson, the Editor of Debates. The committee is most grateful to Art O'Leary, Director of Committees, who made a committee room in Leinster House available for the hearings.

Chapter 1

Property rights – the constitutional balance

Article 40.3.2° provides as follows:

2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Article 43 provides as follows:

1 *1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.*
2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

2 *1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.*

Introduction

In February 2000 the Taoiseach wrote to the then chairman of the All-Party Oireachtas Committee on the Constitution (Deputy Brian Lenihan) in which he asked the committee to consider the present constitutional provisions in respect of property rights and specifically the necessity for up-dating those provisions which pertain to planning controls and infrastructural development. In effect, therefore, the committee was asked to traverse much of the ground covered by the *Report of the Committee on the Price of Building Land* in 1973 ('the Kenny Report') and to examine afresh the question of whether the Constitution imposes unnecessary impediments to legislation which would either control or otherwise regulate the price of building land on the one hand or which would seek to eliminate many of the obstacles to the speedy roll-out of major infrastructural projects on the other hand.

In this context, the committee considers that its principal function is to examine the property rights provisions of the Constitution generally (albeit principally from the standpoint of the planning and development process) and to express a view on whether, as commonly perceived, they are weighted too heavily in favour of the individual. In this regard, the committee proposes to examine the recommendations of the *Report of Constitution Review Group*.[1] As part of these deliberations, the committee proposes to consider whether legislation which sought to impose controls on the price of building land would survive constitutional challenge and, in particular, could the key recommendation of the Kenny Report – namely, that local authorities should be empowered compulsorily to acquire land in designated areas at existing use value plus 25% – be safely enacted in the knowledge that it was likely to survive constitutional challenge.

Many of the submissions received by the committee sought fundamental reform of the entire system of the compulsory purchase of land and the compensation rules associated therewith. The system traces its origin to the Lands Clauses Consolidation Act 1845 and a patchwork of other Victorian legislation which conferred on each householder the right to connect up to the public water[2] and sewage systems.[3] The compensation rules

1 Pn. 2632 (1996).
2 Waterworks Clauses Act 1847, section 53.
3 Public Health (Ireland) Act 1878, section 27.

2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

originally contained in the 1845 Act were designed in an era when the concept of statutory land zoning and planning permission was unknown and the need for compulsory acquisition of lands (railways aside) was nothing as pressing. It is not surprising, therefore, that these statutory rules reflected the idea that a landowner should receive compensation where he was denied the right to do as he pleased with his property. In the intervening period since the 1845 Act the compensation rules have been eroded somewhat by a series of statutory provisions, most notably when the first comprehensive system of planning legislation was enacted via the Local Government (Planning and Development) Act 1963. For the first time a comprehensive system of planning control was superimposed on all land and with it the idea that a refusal of planning permission because a particular development would be injurious to the public interest or contrary to the proper planning and development of an area would not necessarily attract compensation. These rules were re-enacted with modifications most recently in the Second, Third, Fourth and Fifth Schedules of the Planning and Development Act 2000. But while it must be acknowledged that, naturally, a landowner must, in principle at least, receive full open market compensation of the existing *use value* of the lands for the compulsory acquisition of his lands, it does not necessarily follow that *all aspects* of the compensation and compulsory acquisition – whose fundamental features, after all, long predate the enactment of the Constitution – are *constitutionally* required.

Some submissions argued for the inclusion of justiciable socio-economic rights (such as the right to housing and shelter) in the Constitution. Notable among the submissions were those from CORI Justice Commission, Jerome Connolly (Human Rights Consultant), Focus Ireland, Irish Council for Civil Liberties, Irish Traveller Movement and Pavee Point, Simon Communities of Ireland, Threshold, and Professor Gerry Whyte. At present, with the exception of the right to free primary education in Article 42, the only justiciable rights contained in the Constitution are traditional civil and political rights (right to liberty, free speech etc.). The committee agrees that the question of socio-economic rights is one which merits extensive debate. It bears upon a fundamental constitutional issue – the separation of the powers of government. Professor Gerry Whyte, in his written submission to the committee, in dealing with the right to shelter, outlined the current position in regard to socio-economic rights.

> Until relatively recently, the most controversial aspect of the current debate about the inclusion of socio-economic rights within the Constitution was whether the courts should play any role in recognising such rights. That issue was decisively resolved by the Supreme Court in 2001 when the court held in two cases, *Sinnott v Minister for Education* and *TD v*

> *Minister for Education*, that judges are precluded by the doctrine of separation of powers from becoming involved in issues of distributive justice, i.e. issues involving the allocation of public resources. The court also expressed concern about the spectre of an unelected judiciary usurping the function of a democratically accountable parliament and executive; about the lack of expertise that judges have when it comes to socio-economic issues; and about the unsuitability of existing court practices and procedures for dealing with issues of policy.

Professor Whyte goes on to argue cogently in his submission that 'all of these objections to judicial recognition of implied socio-economic rights can be countered'.

The committee feels that the issue should be discussed in the round through an examination of all the socio-economic rights that have been proposed rather than the single one of shelter. It has decided, therefore, to examine social and affordable housing in terms of legislative but not constitutional provision. It will discuss the question of whether the Constitution ought to include justiciable socio-economic rights in a later report.

Conclusion

The committee does not propose to consider the issue of socio-economic rights in this report, but will defer consideration of this to a later report.

The committee received a few submissions relating to moveable property but decided to concentrate on the vast and complex issues relating to real property.

In Appendix Three we present a broad selection of the written submissions made to the committee. Many expressed views about constitutional and legal issues in the course of their presentations. Notable among these was the submission from the Law Reform Committee of the Law Society.

The committee first proposes to set out the salient developments so far as the constitutional law and jurisprudence is concerned.

Constitution of the Irish Free State 1922

The Constitution of the Irish Free State of 1922 contained no general provisions dealing with property rights. However, Article 8 of the 1922 Constitution did contain specific constitutional guarantees dealing with the property of religious denominations and educational institutions. Article 8 reflected an obligation

contained in Article 16 of the Anglo-Irish Treaty of 1921 and a similar provision had been contained in section 5 of the Government of Ireland Act 1920. Indeed, provisions of this kind had been first contained in the Government of Ireland Bill 1886.[4]

It will thus be seen from this context that the object of Article 8 was not to protect property as a thing in itself, but was rather part of a package designed, in particular, to protect minority churches and educational establishments from the threat of oppression at the hands of the majority. Article 44.2.6° of the present Constitution now provides:

> The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

Although this provision is slightly re-cast from the earlier Article 8, it respects the substance of the earlier guarantee.

Although the threat of oppressive treatment of minority churches (insofar as it ever historically existed) has vanished, Article 44.2.6° remains unaltered. Its retention in its present form may be regarded by some as salutary, but several parties who made submissions to the committee drew attention to the practical difficulties which this provision has created. The committee proposes to consider Article 44.2.6° in conjunction with the other constitutional provisions dealing with the protection of property rights.

Article 40.3.2° and Article 43 of the Constitution

The Constitution of 1937 was notable in that it contained two separate provisions dealing with the right to property. Article 40.3.2° and Article 43. Article 40.3 provides:

> 1. The State guarantees in its laws to respect, and, so far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2. The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

Article 40.3.2 is thus, therefore, directed at the personal and individual rights of citizens and among the rights expressly so protected is the right to property. Article 43 on the other hand is exclusively concerned with the right to property:

4 See generally Jaconelli, 'Human Rights and Home Rule' (1990-1992) 25-27 *Irish Jurist* 181.

> 1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
> 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
>
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

The existence of these two separate constitutional provisions has caused the courts considerable difficulties over the decades. In the end, however, the courts have concluded that the two provisions inform each other 'so that both have to be taken into account when considering constitutional protection of property rights'[5] But this is not the only difficulty created by these provisions. As the Constitution Review Group observed:

> the language of Article 43 is particularly unhappy. Several commentators have drawn attention to the contrast between Article 43.1 and Article 43.2. In a famous dictum, Wheare contrasted the stress placed on the right of private property in Article 43.1 – 'calculated to lift up the heart of the most old-fashioned capitalist' – with that placed on the principles of social justice and the exigencies of common good in Article 43.2 – 'the Constitution of [former] Jugoslavia hardly goes further than this.' It was, he said, a classic example of giving a right on the one hand and taking it back on the other: see *Modern Constitutions* (Oxford, 1966) at p. 63. In addition, Mr Justice Keane has spoken of the 'unattractive language' and 'tortured syntax' of Article 43: see 'Land Use, Compensation and the Community' (1983) 18 *Irish Jurist* 23.

The Review Group added that another difficulty was that these provisions were

> particularly open to subjective judicial appraisal, with phrases such as 'unjust attack', 'principles of social justice' and 'reconciling' the exercise of property rights 'with the exigencies of the common good. [6]

5 Kelly, *The Irish Constitution* (Dublin, 2003) at 1978.
6 *Cafolla v. O'Malley* [1985] IR 486.

Despite these difficulties, it is important not to lose sight of the fact that a significant majority of constitutional challenges in the area of property rights fail. Contemporary cases where such claims have been rejected include restrictions on the use of gaming machines;[7] control of land use on which national monuments are situated;[8] domestic regulations dealing with the superlevy regime on milk production;[9] challenges to the taxi licensing regime affecting the capital value of a taxi plate[10] and the operation of the 'red zones' adjacent to airports which may have the effect of significantly impairing the right of landowners to obtain planning permission for development underneath aircraft flightpaths.[11] Moreover, the right of the Oireachtas to impose restrictions on the right to property in the public interest is by now well established and much of the subjectivity and uncertainty of the relevant constitutional provisions has been tempered on the one hand by the evolution of the proportionality doctrine and by the emergence of relatively settled case-law on the other.

Early case-law

The early case-law created considerable difficulties and uncertainties, not least the total difference in emphasis between the Supreme Court decisions in the *Sinn Féin Funds* case in 1947 as compared with the subsequent decision in *Attorney General v Southern Industrial Trust Ltd*. (1960).

In the *Sinn Féin Funds* case, *Buckley v Attorney General*[12], the principal plaintiff was the president of Sinn Féin. Her party had claimed ownership of certain funds deposited by the former trustees of Sinn Féin after the Civil War split, but in an effort to forestall such a court application, the Oireachtas enacted the Sinn Féin Funds Act 1947. This Act purported to direct the High Court to dismiss the action which was then pending, to confiscate the funds without compensation and to transfer the monies to a charitable board which would then proceed to distribute it to veterans of the War of Independence. Not surprisingly, the Supreme Court held this legislation to be unconstitutional on the ground that it violated the separation of powers. The Court, however, also rejected out of hand the suggestion that the property rights guarantees did not confer any enforceable or justiciable rights.

In *Southern Industrial Trust,* on the other hand, the Court upheld the constitutionality of legislation that permitted the forfeiture without compensation of a motor vehicle which, unbeknown to the unsuspecting motor leasing company that had leased it, had

7 *Cafolla v. O'Malley* [1985] IR 486.
8 *O'Callaghan v. Commissioners for Public Works* [1985] ILRM 364.
9 *Maher v. Minister for Agriculture & Food* [2001] 2 IR 139.
10 *Hempenstall v. Minister for Environment* [1994] 2 IR 20; *Gorman v. Minister for Environment (No.2)* [2001] 2 IR 414.
11 *Liddy v. Minister for Public Enterprise* [2004] 1 ILRM 9.
12 [1950] IR 67.

subsequently been used by the lessee as a vehicle for cross-border smuggling. The Court's conclusions and its reasoning seemed totally at odds with the earlier decision in *Buckley*. It is, perhaps, not altogether surprising that the reasoning in *Southern Industrial Trust* has subsequently been disapproved.[13]

The constitutionality of this system of restricting compensation was upheld by Kenny J in *Central Dublin Development Association Ltd v Attorney General*,[14] albeit in a context where he considered (a) that the restrictions on the grant of compensation were not as restricted as the plaintiff had suggested and (b) that if the plaintiff's arguments on the constitutional issue were correct, many statutory restrictions on the right to property – he particularly instanced the Rent Restrictions Acts – would be unconstitutional.[15] While preferring the analysis contained in *Sinn Féin Funds* to that of *Southern Industrial Trust* – he saw these two Supreme Court decisions as mutually inconsistent – he nevertheless upheld the constitutionality of the legislation:

> Town and regional planning is an attempt to reconcile the exercise of property rights with the demands of the common good and [Part IV of the 1963 Act] defends and vindicates as far as practicable the rights of the citizen and is not an unjust attack on their property rights.

Such was the state of constitutional law prior to the publication of the Kenny Report (see Appendix 4).[16]

Kenny Report

In 1971 Mr Justice Kenny was asked by the Minister for Local Government to chair the Committee on the Price of Building Land and that committee ultimately reported in March 1973. The committee was appointed against a backdrop of significant increases in the value of agricultural land adjoining urban areas. These lands acquired value in part because of the public provision of services which made them then suitable for housing development. The committee was thus asked to suggest measures for controlling the price of land required for housing and other development and for ensuring that some or all of the increase in the value of development that was attributable to the decisions or operations of public bodies could be secured for the benefit of the community, ie, the element of 'betterment' that arose from works

13 See, e.g., the comments of O'Higgins CJ in *Blake v. Attorney General* [1982] IR 241 and those of Keane CJ in *GM v. Murphy* [2001] 4 IR 113.

14 (1975) 109 ILTR 69. (The case was decided in 1969, but belatedly reported).

15 Thus, Kenny J acknowledged that the power to make a development plan would:
> necessarily decrease the value of some property, but I do not think that the Constitution requires that compensation should be paid for this as it is not an attack on property rights. If this argument were correct, many owners of houses would have been entitled to be paid compensation when the Rent Restrictions Act 1946 was passed.

16 *Report of the Committee on the Price of Building Land* (Prl. 3632).

(such as the provision of roads, drainage etc.) of local authorities and state bodies to such lands.

The principal conclusion of the majority (which included Judge Kenny) was in the following terms:

> Our proposal is not that a local authority should have the power to acquire land anywhere at a price below its market value. It is that a court should be authorised to operate a form of price control in designated areas. In that sense the proposal involves a delimitation of property rights but one which is no more restrictive than other forms of price control. We believe that the limitation is not unjust because the landowners in question have done nothing to give the land its enhanced value and the community which has brought about this increased value [through the provision of these additional services] should get the benefit of it.[17]

The committee had previously recommended that a local authority should have the power to acquire lands contained within a designated area and compensation would be assessed by the High Court and 'would be the existing use value at the date of the application to assess the compensation plus 25% of it.'[18] This report was, however, delivered against this uncertain background and a paucity of relevant case-law. Nevertheless, the majority – having reviewed cases such as *Sinn Féin Funds* and *Central Dublin Development* – concluded that such a proposal would not be found to be unconstitutional. In the light of subsequent developments, the following passage may be regarded as especially noteworthy:

> The Constitution does not give to each citizen the right to get the full market price for any of his property which he decides to sell. If it did, then all price controls would be repugnant to the Constitution and we are convinced that this is not the law. Moreover, if each citizen has the right to get the full market price for any part of his property which he decides to sell, each owner of house property must have the right to get the full market rent for it when he lets it. But if this is the law, the Rent Restrictions Acts and the Landlord and Tenant Acts, both of which regulate the amount of rent which a landlord may lawfully get for some types of property and which, in effect, prevent him from realising the full market price on sale of property by giving privileges to tenants, are repugnant to the Constitution. *Nobody has ever suggested this in the thousands of cases under those Acts which have come before the courts.*[19]

17 Para. 93 of the report.
18 Para. 85 of the report.
19 At page 47 of the report. Emphasis supplied.

Of course, some eight years later, in *Blake v. Attorney General*, the Supreme Court held those self-same Rent Restrictions Acts unconstitutional. Whether it was for this or other reasons, the conclusions of the Kenny Report were never acted upon. Writing in 1984, the then Government backbencher and leading constitutional scholar, John Kelly TD, noted that

> …the official view, strengthened certainly by the outcome of the litigation about rent control legislation [*Blake v Attorney General*], is that statutory restriction of the free market price in such a context would be constitutionally fragile.[20]

Writing at about the same time, the present Chief Justice acknowledged that the prospects of the majority recommendations in the Kenny Report 'now surviving the constitutional process in the courts seem distinctly less promising.' Keane J was also careful to note, however, that:

> There are, of course, significant differences between the legislation [proposed in the Kenny Report] and the Rent Acts. The latter code sought to protect an admittedly vulnerable group in society – the tenants – at the expense of another group – the landlords – in an unjust and arbitrary fashion without any provision for compensation……Given that the Rent Acts were in their origin temporary legislation designed to deal with emergency conditions, the legislature may readily be acquitted of any conscious act of injustice. The more glaring injustices only became obvious with the passage of time and the emergence of different social conditions.[21]

A critical question for the committee, however, is whether the conclusions of the Kenny Report are still valid in view of the constitutional jurisprudence which followed in the subsequent thirty years. We propose, however, to defer consideration of this question until we have further reviewed the case-law and further legislative developments in 1990 and 2000.

Case-law of the 1980s

While the Kenny Report may have been handicapped by a paucity of case-law on the topic, the 1980s witnessed a significant increase in litigation in this area. In *Blake v Attorney General*[22] the Supreme Court held that the Rent Restrictions Acts 1946-1967 were

20 Kelly, *The Irish Constitution* (2nd edition, 1984) at 659. Cf. also the views of the Legal Adviser to the Minister for the Environment reproduced in the *Report of the Joint Oireachtas Committee on Building Land* (1985):

> The rights [in] Article 40 are very strongly stated and I am satisfied that this proposal of the Kenny Report would have little chance of surviving a constitutional challenge in the courts based on the argument that it would amount to an unjust attack on the landowners' property right. This opinion is strengthened by the views of the Supreme Court in the recent cases [*Blake v. Attorney General*] on the constitutionality of the Rent Restrictions Acts.

21 'Land use, Compensation and the Community' (1983) 18 *Irish Jurist* 23, 30.

22 [1982] IR 117.

unconstitutional. The court departed from the earlier decision in *Southern Industrial Trust*, stressing that the legislation in question here was arbitrary and unfair: rents had been fixed at absurdly low levels, no allowance had been made for inflation and no regard was had to the means or income levels of either landlords or tenants. This was followed by decisions such as *Brennan v Attorney General*[23] (where a system of rates for farmers based on arbitrary factors such as the value of crops the land in question had produced in the 1850s was found to be unconstitutional) and *Gormley v Electricity Supply Board*[24] (where the absence of a system of enforceable compensation to the landowner for works done on his or property by the ESB was found to be unconstitutional).

On one view, these decisions suggested a more maximalist approach to the issue of property rights. But, in reality, these were cases where the anomalous character of the legislation in question in each case had led the courts to hold that the plaintiff's property rights had been violated. It must also be recalled that in other cases from this period the courts had drawn attention to the fact that the property rights provisions were far from absolute and that, in some cases, even far-reaching interferences with such rights could be justified by reference to the common good. Thus, in *Cafolla v O'Malley*[25] Costello J had expressed the view that restrictions reasonably required by the exigencies of the common good could not amount to an unjust attack on property rights, and listed as examples of such legitimate restrictions laws prohibiting fishermen from fishing at certain times and limiting the nature and size of the catch; restrictions on the hours of trading in licensed premises; and laws regulating the prices at which goods could be sold or services remunerated. On appeal, the Supreme Court endorsed this approach saying

> such restrictions would not be an unjust attack on the plaintiff's property rights when they were so clearly imposed with due regard to the exigencies of the common good.[26]

In *O'Callaghan v Commissioners of Public Works*[27] the Supreme Court held that Article 43 did more than merely institutionalise private property; it also authorised the state in certain circumstances to regulate the exercise of property rights and had to be read in conjunction with Article 40.3, when the question of unjust attack on the property rights of the citizen was in issue, so as to give effect, so far as possible, to both provisions. In this case, the National Monuments Act 1930, as amended, was held to be justified in terms of the common good; and furthermore, as it was neither arbitrary nor selective, it did not constitute an unjust attack on the plaintiff's

23 [1984] ILRM 255.
24 [1985] IR 129.
25 [1985] IR 486.
26 [1985] IR 486 at p 500.
27 [1985] ILRM 364.

property-rights. A similar theme may be detected in the judgment of the Supreme Court in *Madigan v Attorney General*[28] where the constitutionality of the residential property tax on private dwellings created by the Finance Act 1983 was under challenge. Here O'Higgins CJ said that tax measures which necessarily interfere with citizens' property rights

> cannot be challenged as being unjust on that account, if what has been done can be regarded as action by the State in accordance with the principles of social justice and having regard to the exigencies of the common good as envisaged by Article 43.2.[29]

Penultimately, in *In re Article 26 and the Employment Equality Bill 1996*[30] the Supreme Court, asked to rule on, *inter alia*, the constitutionality of provisions in the Bill requiring employers to provide appropriate facilities for employees with disabilities, admittedly began with a re-statement of the distinction between Article 43 and Article 40.3 as stated in *Blake v Attorney General*[31] but then proceeded to consider whether the legislative provisions, which did not allow for the payment of compensation to employers, were consistent with the requirements of social justice within the meaning of Article 43.2.1°.

The Supreme Court began its reasoning on this issue by accepting that the proposed legislation restricted a property right, the right to carry on a business and earn a livelihood, and that it was enacted by the Oireachtas in an attempt to secure a specific aspect of the common good, namely, the promotion of equality in the workplace between workers with disability and other workers. What remained for the Court to decide was whether the manner in which it was proposed to restrict the employers' property rights constituted an unjust attack on such rights. In deciding whether the failure of the Bill to provide for compensation amounted to an unjust attack on property rights, the Court considered that it should have regard to whether the restriction on property rights was consistent with the requirements of 'social justice' within the meaning of Article 43.2.1°. The Court continued:

> In reading Article 43 of the Constitution it is important to stress the significance of the word 'accordingly' which appears in Article 43, s.2, sub-section 2. It is because the rights of private property 'ought' in civil society to be regulated by 'the principles of social justice' that the state may, as occasion requires, delimit their exercise with a view to reconciling it with the 'exigencies of the common good'. It is because such a delimitation, to be valid, must be not only

28 [1986] ILRM 136.
29 [1986] ILRM 136 at 161.
30 [1997] 2 IR 321.
31 [1982] IR 117.

> reconcilable with the exigencies of the common good but also with the principles of social justice that it cannot be an unjust attack on a citizen's private property pursuant to the provisions of Article 40, s.3 of the Constitution (see judgment of Walsh J in *Dreher v Irish Land Commission* [1984] ILRM 94).[32]

It must be acknowledged, however, that the reasoning in this case stands out as the most pro-property rights decision of recent years. It is, perhaps, one of the few instances where a legislative measure was found to be unconstitutional on this ground where the arbitrary or unfair character of the impugned legislation was not self-evident.

Emergence of Proportionality Doctrine during the 1990s
The 1990s also witnessed significant litigation in this area. The major doctrinal development was the endorsement by the courts of the principle of proportionality. In other words, legislation which sought to curb or restrict a constitutional right in the public interest would only be upheld where, in the words of Costello P in *Heaney v Ireland* .[33]

> The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
> (b) impair the right as little as possible, and
> (c) be such that their effects on rights are proportional to the objective.[34]

This doctrine has proved to be enormously influential in the realm of property rights. It has, moreover, proved an objective template whereby the constitutionality of legislation restricting or abridging property rights can be evaluated. The modern case-law demonstrates that provided the essence or core of the right in question is respected and that the legislation is based on rational considerations, then in principle the Oireachtas enjoys a wide 'margin of appreciation' in such matters, ie it enjoys a relatively wide discretion as to the manner in which it chooses to regulate or even restrict property rights.

Implications of the Supreme Court decision in the Planning and Development Bill in 2000
Perhaps the most critical issue confronting the committee is whether a landowner denied planning permission in respect of a proposed development which would have involved a change in

32 [1997] 2 IR 321 at p367.
33 [1994] 3 IR 593.
34 [1994] 3 IR 593 at 607.

existing land use can claim that he is constitutionally entitled to compensation. In other words, adopting the lexicon of US constitutional law, can the landowner maintain that the denial of such permission amounts to a 'taking' of property by the state for which compensation is *constitutionally* required. We must stress here that the committee is concerned at this point solely with the question of whether this is constitutionally required and *not* with the question of whether compensation is at present payable under the applicable statutory regime.

This issue was at the heart of the decision of the Supreme Court in *Re Planning and Development Bill 1999*.[35] The overall significance of this decision is that it sets out the balance to be struck between the protection of property rights on the one hand and the common good in regulating or restricting property rights on the other. The judgment of Keane CJ sets out in comprehensive detail the applicable principles:

> There can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property. As Walsh J pointed out [in *Dreher v Irish Land Commission*], even that may not be a sufficient measure of compensation in some cases: hence the additional elements of compensation payable in compulsory acquisitions of land effected under the Lands Clauses Consolidation Act as determined under the Assessment of Land (Acquisition Of Compensation) Act 1919 as subsequently amended, by virtue of which the landowner is to be compensated, not merely for the market value of his land, but also for such additional elements of damage to him as disturbance, injurious affection and severance.[36]

The Chief Justice went on to observe, however, that special considerations obtained in the case of planning and land use requirement:

> There are, however, special considerations applicable in the case of restrictions on the use of land imposed under planning legislation, such as those now under consideration. Under the Local Government (Planning and Development) Act, 1963 proposed to be repealed and re-enacted with many modifications by the Bill, where the value of an interest of any person existing in land to which a planning decision related was reduced, the person was entitled to be paid by way of compensation the amount of such reduction of value and, in the case of the occupier of the land, the damage (if

35 [2000] 2 IR 360.
36 [2000] 2 IR 360 at 352.

any) to his trade, business or profession carried out on the land. This *prima facie* entitlement to compensation was, however, severely curtailed in a number of respects and the validity of these provisions in constitutional terms was considered in detail by Kenny J in *Central Dublin Development Association v Attorney General.* He rejected the contention that such limitations constituted an arbitrary confiscation of such rights: he said that a provision, in particular circumstances envisaged by the legislation, that an interference with one of the rights of property was not to be the subject matter of compensation was not a breach of Article 43 and did not fail to defend and vindicate the personal rights of property. He also concluded that it was not an unjust attack upon such rights.

Planning legislation of the nature now under consideration is of general application and has been a feature of our law ever since the enactment of the Town and Regional Planning Act, 1934, although it did not take its modern, comprehensive form until the enactment of the 1963 Act. Every person who acquires or inherits land takes it subject to any restrictions which the general law of planning imposes on the use of the property in the public interest. Inevitably, the fact that permission for a particular type of development may not be available for the land will, in certain circumstances, depreciate the value in the open market of that land. Conversely, where the person obtains a permission for a particular development the value of the land in the open market may be enhanced. As Finlay CJ observed in *Pine Valley Development Ltd v The Minister for the Environment and the Attorney General:*

> What the Minister [for Local Government] was doing when making his decision in 1977 to grant outline planning permission to the then owner of these lands was not intended as any form of delimitation or invasion of the rights of the owners of those lands but was rather intended as an enlargement and enhancement of those rights.
>
> The purchase of land for development purposes is manifestly a major example of a speculative or risk commercial enterprise. Changes in market values or economic forces, *changes in decisions of planning authorities and the rescission of them*, and many other factors, indeed, may make the land more or less valuable in the hands of its purchasers. [Emphasis added][37]

The Chief Justice continued:

37 [1987] IR 23 at 37.

Decisions of the United States Supreme Court in this area are of limited assistance, having regard to the significantly different terms of the Fifth Amendment which simply provides that: 'Private property [shall not] be taken for public use, without just compensation.'

However, it may be noted that in *United States v Fuller* 409 US 488, it was held that where the government had *'condemned'* – ie sought to acquire compulsorily – certain lands, the assessment of compensation could legitimately be made on the basis that an element of the value of the land arising from the availability of grazing permits in respect of other land need not be taken into account. Rehnquist J speaking for the court said:

> These cases go far toward establishing the general principle that the government as condemnor may not be required to compensate a condemnee for elements of value that the government has created, or that it might have destroyed under the exercise of governmental authority other than the power of eminent domain [ie compulsory purchase]. If, as in *Rands* the government need not pay for value that it could have acquired by exercise of a servitude arising under the commerce power, it would seem *a fortiori* that it need not compensate for value that it could remove by revocation of a permit for the use of lands that it owned outright.

In the present case, as a condition of obtaining a planning permission for the development of lands for residential purposes, the owner may be required to cede some part of the enhanced value of the land deriving both from its zoning for residential purposes and the grant of permission in order to meet what is considered by the Oireachtas to be a desirable social objective, namely the provision of affordable housing and housing for persons in the special categories and of integrated housing. Applying the tests proposed by Costello J in *Heaney v Ireland* and subsequently endorsed by this court, the court in the case of the present Bill is satisfied that the scheme passes those tests. They are rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right and, given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which, in a free and democratic society, should be regarded as pressing and substantial. At the same time, the court is satisfied that they impair those rights as little as possible and their effects on those rights are proportionate to the objectives sought to be attained.[38]

38 [2000] 2 IR 362 at 352-354.

In this regard, the very important decision of the US Supreme Court in *Lucas v South Carolina Coastal Council*[39] is also of assistance. In this case the petitioner acquired two residential lots on a South Carolina barrier island, intending to build single-family homes such as those on the immediately adjacent parcels. At that time, Mr Lucas's lots were not subject to the state's coastal zone building permit requirements. In 1988, however, the state legislature enacted the Beachfront Management Act, which barred Lucas from erecting any permanent habitable structures on his parcels of land. The state trial court found that the ban rendered Lucas's parcels 'valueless,' and awarded compensation on the basis that the regulations amounted to a 'taking' of property without compensation contrary to the Fifth Amendment.

The US Supreme Court held that regulations that deny the property owner all 'economically viable use of his land' constitute one of the discrete categories of regulatory deprivations that require compensation without the usual case-specific inquiry into the public interest advanced in support of the restraint. Scalia J then articulated a most important exception to that principle which is of crucial relevance in the present case:

> Where the state seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our 'takings' jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the state's power over, the 'bundle of rights' that they acquire when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the state in legitimate exercise of its police powers; as long recognized, some values are enjoyed under an implied limitation, and must yield to the police power. And in the case of personal property, by reason of the state's traditionally high degree of control over commercial dealings, he ought to be aware of the possibility that new regulation might even render his property economically worthless (at least if the property's only economically productive use is sale or manufacture for sale)….. In the case of land, however, we think the notion pressed by the council that title is somehow held subject to the 'implied limitation' that the state may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.[40]

39 505 US 1003 (1992).
40 505 US 1003 at 1028.

Scalia J then went on to spell out the implications of this in practice:

> On this analysis, the owner of a lakebed, for example, would not be entitled to compensation when he is denied the requisite permit to engage in a landfilling operation that would have the effect of flooding others' land. Nor the corporate owner of a nuclear generating plant, when it is directed to remove all improvements from its land upon discovery that the plant sits astride an earthquake fault. Such regulatory action may well have the effect of eliminating the land's only economically productive use, but it does not proscribe a productive use that was previously permissible under relevant property and nuisance principles. The use of these properties for what are now expressly prohibited purposes was always unlawful, and (subject to other constitutional limitations) it was open to the state at any point to make the implication of those background principles of nuisance and property law explicit…... this recognition that the Takings Clause does not require compensation when an owner is barred from putting land to a use that is proscribed by those 'existing rules or understandings' is surely unexceptional. When, however, a regulation that declares 'off limits' all economically productive or beneficial uses of land goes beyond what the relevant background principles would dictate, compensation must be paid to sustain it.[41]

This case is of very considerable assistance, since it demonstrates that a property owner cannot claim compensation in respect of land uses not at present permitted either by the general law of nuisance or (even more critically) in respect of which planning permission would be required.[42] Thus, the reasoning in cases such as *Pine Valley, Planning and Development Bill* and *Lucas* all demonstrate a landowner cannot claim that he is constitutionally entitled to compensation where he is denied permission to change an existing land use.

Representative of Chadwick and Goff v Fingal County Council
This issue was also more recently considered by O'Neill J in *Representative of Chadwick and Goff v Fingal County Council.*[43] In this hugely important decision the property arbitrator stated the following question for the opinion of the High Court:

> Am I correct in holding that upon the true construction of section 63 of the Lands Clauses Consolidation Act 1845, the

41 505 US 1003 at 1030-1031.
42 The critical point of detail here is that at the time Lucas acquired the lands the lands were not subject to any zoning or planning restrictions and his proposed use (ie, the construction of houses adjacent to a beach) was consistent with existing use of those lands.
43 High Court, 17 October 2003.

> compensation for injurious affection to the lands retained by the claimants, caused by the carrying out of the works and subsequent use of the motorway, is limited to injurious affection caused by such works on and such use of, the land actually acquired from the claimants?

In this case the council was empowered to construct a motorway from the existing M1 at the airport to the Balbriggan bypass and in the process to acquire, *inter alia*, lands of the claimants. The claimants are the owners of a property on the north side of Malahide estuary. The property is comprised of a substantial three storey eighteenth-century house (which was a listed building) on approximately eighteen acres of land together with farm buildings and a gate lodge.

For the purposes of carrying out the motorway scheme the respondents compulsorily acquired from the claimants some 0.116 acres. This land was comprised in two plots at the eastern end of the claimants' land. No part of this land taken under the scheme formed part of the carriageway of the new motorway. Instead the land was used as part of the embankment leading up to the bridge which spanned the Malahide estuary. The claimants' residence was some 200 metres from the carriageway of the motorway at its closest point and 250 metres from the bridge abutment and it was contended that the value of their property will be depreciated by its proximity to the new motorway.

In their claim for compensation under section 63 of the Lands Clauses Consolidation Act 1845, they claimed to be entitled to recover the entire depreciation in value of their property as 'injurious affection' of their retained lands, caused by the exercise by the respondent of their relevant statutory powers in carrying out the motorway scheme. The council resisted this claim, contending that any 'injurious affection' of the claimants' retained lands was limited to injury caused to those lands by such works as are carried out on, and such user as takes place on the land actually taken from the claimants, and as the land actually taken from the claimants is used merely as a landscaped embankment, and not being part of the carriageway of the motorway, the claimants' claim in respect of injurious affection is limited to such injury, if any, as is caused by that limited use. The council insisted that such a claim cannot extend to the depreciation of their property, caused by the use of the two carriageways as a highway, which are constructed on lands not taken from the claimants.

Section 63 of the Lands Clauses Consolidation Act 1845 provides that:

> In estimating the purchase money or compensation to be paid by the promoters of the undertaking, in any of the cases

> aforesaid, regard shall be had by the justices, arbitrators, or surveyors, as the case may be, not only to the value of the land to be purchased or taken by the promoters of the undertaking, but also to the damage, if any, to be sustained by the owners of the land by reason of the severing of the lands taken from the other lands of such owner, or otherwise injuriously affecting such other lands by the exercise of the powers of this or the special act, or any act incorporated therewith.

It is, of course, also the case that, in principle at least, an adjoining landowner the value of whose lands may be adversely affected by the construction of a utility such as a motorway, but none of whose lands have actually been acquired for this purpose, cannot recover compensation for that loss. One of the issues in *Chadwick* was whether the result ought to have been any different where some part of the landowner's property is acquired: is the landowner then entitled to recover compensation in respect of any depreciation to the retained portion of his lands by reason of the construction of the road or public works in question. O'Neill J surveyed the English case-law dealing with this aspect of the 1845 Act and concluded:.

> I am equally satisfied that the rule which permits compensation to a landowner from whom land has been taken for injury caused by the user of the taken lands but confined to the user on the taken lands is also rational, right in principle and fair as being compensation in respect of an actual wrong, ie trespass, and fair to the rest of the community, in the sense that this is a separate injury to the landowner from whom land is taken, which is not suffered by the rest of the community who live in proximity to the public undertaking but from whom no land is taken.

The judge next considered whether this interpretation was consistent with the Constitution. O'Neill J concluded that it was:

> The review and analysis of the authorities above in my view reveals the position to be that the loss which they now seek compensation for, namely the full depreciation of the value of the property caused by the motorway scheme, is not a loss which was ever a compensatable loss*, in the sense that the use of the land upon which the motorway is constructed could not be said to have been an actionable wrong so far as these claimants are concerned. Thus, the limitation of compensation for injurious affection to that which is done solely on the land taken does not deprive them of compensation for something that they would otherwise have been entitled to compensation for but for the intervention of the relevant statute*. Clearly they were entitled to be paid the value of the land and the expenses or losses resulting from

> the severance of the land taken from the retained land and because what was done on their taken land and the continuing user of it would but for the statute also be a trespass, they were entitled to damages for that. But beyond that at common-law they would have been entitled to no more. Thus in my view under section 63 of the Act as applied in this way, they are entitled to recover the full amount of such loss as is visited on them by the compulsory taking of their land but are not entitled to recover for the additional claimed loss because that loss would not have been recoverable at common law in any event…..Therefore in my view the claimants have not demonstrated that they are denied compensation for a compensatable loss, and in that way that their rights under Article 43 have not been infringed.

The reasoning in *Chadwick* also tends to underpin this analysis, since it demonstrates that the extent of any statutory right to compensation is circumscribed by the existing limitations (whether statutory or common law) on the land use in question and that this restriction on the right to compensation is not unconstitutional.

Implications of ECHR Article 1 of the First Protocol
Before considering in detail the implications of this case-law, it remains to note that Article 1 of the First Protocol of the European Convention of Human Rights guarantees the right to private property in terms which is not, in substance, dissimilar to Article 40.3 and Article 43. Certainly, the methodology applied by the Irish courts on the one hand and the European Court on the other is very similar.[44] Furthermore, the case-law of the European Court of Human Rights on this topic is, in many ways, along the lines of modern Irish case-law. Following the enactment of the European Convention of Human Rights Act 2003, the Irish courts are now empowered to grant a declaration of incompatibility with the Convention, so that, in any event, domestic legislation abridging or restricting property rights can be tested by reference to the guarantees in Article 1 of the First Protocol of the European Convention.

Evolution of the system of compulsory purchase and the compensation rules

The present system governing the compulsory acquisition of land and the payment of compensation may be said to date from the Lands Clauses Consolidation Act 1845. Following the enactment of that Act, the compensation was assessed by a jury and the compensation rules reflected the value of the land *to the owner*, as distinct from its objective, market value. In addition, it was

44 See, e.g., the comments of Keane CJ in *Re Planning and Development Bill 1999* [2000] 2 IR 360 at 356.

customary to add a figure of some 10% of the value to reflect the fact that the land was compulsorily purchased.[45] In addition, section 63 of the 1845 Act – which is still in force – created a right to compensation for severance and injurious affection. This section provided that regard must be had in assessing compensation not only to the value of the land, but also to the damage, if any, to be sustained by the owner of the land taken from the other land of such owner or otherwise injuriously affecting that other land by reason of the exercise of statutory powers.

This system was radically altered by the Acquisition of Land (Assessment of Compensation) Act 1919. The 1919 Act – which is still in force and which remains one of the central pillars of the modern compulsory acquisition system – abolished the assessment of compensation by jurors and replaced it by one under which compensation was determined by an arbitrator drawn from a panel of property arbitrators.[46] Section 2 of the 1919 Act also prescribed six separate rules governing the assessment of compensation. Although these rules have been added to over the years and the additional rules have now been repealed and consolidated as the compensation rules set out in the Schedules to the Planning and Development Act 2000, the basic principle remains, namely, that these rules reflect the basic principle that the value of the compensation should reflect the open market price.

At the date of the enactment of the 1919 Act the system of town planning and allied concepts such as the necessity for planning permission and the making of development plans was still in its infancy. In many ways, the compensation rules – despite significant amendment and revision in the meantime, most notably by the Local Government (Planning and Development) Act 1963 and the Local Government (Planning and Development) Act 1990 – have never quite come to terms with the advent of a strict system of land use planning.

The Local Government (Planning and Development) Act 1963
The Local Government (Planning and Development) Act 1963 came into force on 1 October 1964. For the first time, substantial legal constraints were placed on the owners of development land so far as their right to develop their land as they saw fit was concerned. Significantly, the then existing land use compensation rules were amended by the addition of ten new such rules. Section 56 of the 1963 Act reflected in part the new thinking that a developer was not to be compensated where planning permission was refused in respect of developments which consisted in the making 'of any

45 Keane, *The Law of Local Government in the Republic of Ireland* (Dublin, 1982) at 263.

46 1919 Act, s 1. Rule 1 of the compensation rules also expressly prohibited the practice of making an extra allowance to reflect the fact that the property had been compulsorily acquired.

material change in the use of any structures or other land'.[47] In addition, section 56(1)(b) of the 1963 Act provided that compensation would not be payable where development was premature having regard to factors such as deficiencies in water or sewage supply or road layout. Other statutory provisions similarly permitted planning permission to be refused without compensation in a range of circumstances, including that the proposed development would be a traffic hazard[48] or endanger public health or would 'seriously injure the amenities or depreciate the value of property in the vicinity'.[49]

Local Government (Planning and Development) Act 1990

The Local Government (Planning and Development) Act 1990 represented the first major inroad into the scheme of compensation established by the 1963 Act. The 1990 Act re-stated and extended the rules for the determination of the amount of compensation; set out the types of development in respect of which a refusal of permission will not attract compensation and the reasons for the refusal of permission which would exclude compensation. Just as importantly, section 25 significantly restricted the right of a landowner to connect to a sanitary authority sewer (particularly in cases where such a development was regarded by a local authority as premature) and section 26 provided that a dwelling house 'which is an unauthorised structure or the use of which constitutes an unauthorised use' would not have the right to connect up to the public water supply. Despite the concerns which had been voiced in some quarters about the constitutionality of a measure such as the 1990 Act which might restrict the entitlement of landowners to compensation where planning permission was refused, so far as the committee is aware, no plaintiff has come forward to contend that any of the changes effected by the 1990 Act was unconstitutional. While the committee does not for a moment suggest that this fact alone is conclusive, it does provide some evidence that the Oireachtas was too cautious in this area in the past.

Planning and Development Act 2000

The Local Government (Planning and Development) Act 1963 and the Local Government (Planning and Development) Act 1990 were repealed by the Planning and Development Act 2000. Part XII of the 2000 Act and the Second to Fifth Schedules now re-state in consolidated form the majority of the compensation rules and the circumstances in which compensation is either payable or not payable following the refusal of permission or the attachment of conditions to planning permission.

47 Section 56(1)(a).
48 Section 56(1)(e).
49 Section 56(1).

Are the conclusions of the Kenny Report still valid?

Against this complex background, the committee now returns to the most central and critical question which it is required to consider: do the conclusions of the Kenny Report remain valid? Of course, the committee agrees with several submissions which make the point that it is impossible to be definitive on this question. As the Labour Party submission cogently argued:

> Every opinion the all-party committee receives on this question is, however, of necessity speculative. The only way of finding out whether such proposals will survive constitutional scrutiny is to incorporate them into legislation and await the outcome of the constitutional challenge.[50]

Judged by contemporary case-law, it is nevertheless very difficult to see why the recommendations contained in the Kenny Report would not survive constitutional scrutiny. In the *Planning and Development Bill* the Supreme Court held that the Oireachtas was entitled to conclude that 'the provision of affordable housing and housing for persons in special categories and of integrated housing' was rationally connected

> to an objective of sufficient importance to warrant interference with a constitutionally protected right and, given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which, in a free and democratic society, should be regarded as pressing and substantial.[51]

By extension, therefore, the imposition of price controls on building land would be regarded as an objective of social importance which would warrant interfering with a constitutional right.

Existing land use plus 25%

There then remains the question of whether the Oireachtas has respected the core of the constitutional right at issue. Here again it is hard to see so far as the principal and controversial element of the Kenny Report recommendations – namely, to place a cap on the compensation payable by a local authority in respect of acquired land at the existing use value plus 25% – that it does not respect the core of the constitutional right to property. This is all the more so given that it is clear from a range of subsequent cases – *Pine Valley, Planning and Development Bill* and *Chadwick and Goff* – that a landowner has no constitutional right to use his land in a manner inconsistent with appropriate land use restrictions, so that, in constitutional terms, the value of the land must be measured prima facie by reference *to existing land use values*.

50 At page 10 of the submission.
51 [2000] 2 IR 321 at 354.

Moreover, contrary to what some have argued, this conclusion is not at all affected by the decision in the Rent Restrictions Acts case, *Blake v Attorney General*. That case did *not* decide that all forms of price control were unconstitutional: all it decided was that the form of rent control sanctioned by the Rent Restrictions Acts 1946-1967 was unconstitutional. It must be recalled, however, that key elements of the legislation which led to that finding included the arbitrary selection of the properties which were to be subject to rent control; the freezing of rents at wholly uneconomic levels without reference to the means of either landlord or tenant and the fact that the landlord was effectively precluded from ever recovering the land in question. The proposals in the Kenny Report appear to the committee to be very much at the opposite end of the spectrum, in particular given that the landowner will receive the existing land use value, plus 25%.

Of course, it might be argued that the 25% figure is itself arbitrary. But a line has to be drawn somewhere and the Kenny Report presumably recommended a figure of this kind in order to put beyond question any argument as to whether the landowner received a fair recompense for the compulsory acquisition above and beyond the existing use value. While this committee is not necessarily wedded to the 25% figure, we are nonetheless of the view that the landowner should receive a figure in excess of the existing land use, if only to assist in repelling any possible constitutional challenge.

There are, however, other aspects of the Kenny Report which may require reconsideration. Thus, for example, the majority concluded that the act of designation of the lands in question constituted the administration of justice in a matter which was not a limited matter and which, accordingly, could only constitutionally be performed by a judge having regard to the provisions of Articles 34 and 37 of the Constitution:

> In our view, it is probable that the courts would hold that the decision as to whether the lands should be included in a designated area was an administration of justice…..The decision to include lands in a designated area will have the effect that the owner whose lands are acquired by a local authority will not get the full market value for them. Therefore the power to include the lands in a designated area would not be 'limited' within the meaning of that word as used in Article 37; its exercise could affect in a far-reaching way the fortunes and property of the owner. We therefore advise that the jurisdiction to designate an area must be conferred on a court established under the Constitution if it is to be valid.[52]

52 At paras. 99-101.

It may be questioned, however, whether in the light of subsequent case-law on Articles 34 and 37 of the Constitution[53] the Kenny Report's conclusion that the act of designation of lands is a judicial function is necessarily correct. The modern case-law suggests that the act of designation is an executive or even an administrative function, albeit one that must be discharged reasonably in the light of the constitutional right to fair procedures.[54] Indeed, if the analysis of this issue contained in the Kenny Report was correct, it would seem to follow that many other legislative schemes which involve the designation of property for, e.g., urban renewal purposes or the re-zoning of land, would likewise be unconstitutional if not performed by a judge. It may be noted, moreover, that in the one prominent case where the constitutionality of such a system of property designation was challenged, *Ambiorix Ltd v Minister for Environment (No.2)*,[55] the plaintiff challenged the constitutionality of the designation provisions of the Urban Renewal Act 1986 on the ground that that Act did not identify sufficient 'principles and policies' for the purposes of Article 15.2.1 so that the Minister in so designating was in reality exercising legislative powers. Lynch J. concluded that the 1986 Act did set forth such principles and policies and rejected the constitutional challenge. What, perhaps, is significant is that the plaintiff did not even attempt to argue that such designation powers were judicial in character and there is no suggestion whatever in *Ambiorix (No.2)* that this might be so.

Likewise, it has been held that while the assessment of compensation payable following the compulsory acquisition of land is a judicial function, it is nonetheless a 'limited' judicial function for the purposes of Article 37.1 of the Constitution, so that such an assessment by the property arbitrator under the 1919 Act is not unconstitutional.[56]

The position of land which has already been zoned

What, then, is the position of land which has already been zoned? If the land is zoned, then, of course, this reflects the fact that the land has been deemed, in principle, to be suitable for development. As the land use has, at least, potentially changed, this, of course, would have to be reflected in the price payable on a compulsory acquisition of those lands. This naturally begs the question of whether the State should pay an additional sum over and above existing land use values in the case of zoned land. The

53 See, Kelly, *The Irish Constitution* (4th edition, 2003) at 1030-1035.

54 See, eg *MacPharbtalain v Commissioners for Public Works* [1994] 3 IR 353.

55 [1992] 2 IR 37.

56 See, eg, *An Blascaod Mor Teo. v. Commissioners of Public Works*, High Court, 27 February 1998. Note also that in *Melton Enterprises Ltd v Censorship of Publications Board* [2004] 1 ILRM 260 the Supreme Court held that it was only where the judicial powers in question were "profound and far reaching" that they could not be regarded as "limited" within the meaning of Article 37.1. By this standard, it would be difficult to how the assessment of compensation following a compulsory acquisition could be regarded as the exercise of a judicial power which is not "limited" within the meaning of Article 37.1.

committee does not feel it necessary to answer this question at this stage. It would, however, probably be necessary for any legislation which sought to give effect to the recommendations of the Kenny Report (or some variation thereof) to ensure that the owners of zoned land did not lose out financially by reason of that fact. In other words, the additional premium (whether of 25% or some other figure) which the State is prepared to pay landowners following the compulsory acquisition of non-zoned land should not result in such landowners doing better than if the lands in question had been zoned.

Hoarding of zoned land

It has been suggested to the committee that one of the contributory factors to present housing difficulties is that certain landowners had accumulated large landbanks at the outskirts of urban areas which they then released in drips and drabs in order to manipulate the market and artificially to maintain high land prices. Again, the committee does not consider that such a problem is either directly caused by the Constitution or can be solved through the expedient of a constitutional amendment. Instead, the committee considers that such a problem is best tackled through legislative measures which would discourage land hoarding in this fashion. These measures might, for example, include taxation changes which encouraged the early exploitation of zoned land and, conversely, penalised those landowners who did not do so. (See also page 86.)

The necessity for an objective justification for compulsory acquisition

It goes without saying that nothing in this Report is intended to suggest that land can be acquired by public authorities save where there is a clear and objectively justifiable necessity to do so. Compulsory acquisition is a necessary tool of last resort for the State and public authorities, but it must be recognised that such acquisitions are burdensome and unwelcome to the landowner. This is especially so where the land in question contains an existing dwelling.

Conclusions

1 Many of the difficulties associated with the system of compulsory purchase and compensation have their origins in the nineteenth-century legislation dating back to the Lands Clauses Consolidation Act 1845. It does not follow that all of these particular compensation rules are constitutionally required.

2 It seems clear from the Supreme Court decisions in *Pine Valley* and the *Planning and Development Bill* that a landowner's property rights only extend to existing and permitted land uses. Accordingly, in many instances, there is no constitutional right to receive compensation where planning permission has been

denied and this is certainly so where the application for permission would involve a material contravention of a development plan.

3 Accordingly the committee is of the view that, having regard to modern case-law, it is very likely that the major elements of the Kenny Report recommendations – namely that land required for development by local authorities should be compulsory acquired at existing use values plus 25% – would not be found to be unconstitutional. Indeed, it may be that in certain respects, the Kenny Report was too conservative, since there seems no necessity that either the act of designating the lands in question which are to be subjected to a form of price control or the payment of compensation to the landowners thereby affected would require to be performed by a High Court judge.

4 The committee is not, therefore, persuaded that the existing constitutional provisions place any unjustified impediment to infrastructural development. It does not, therefore, consider that constitutional change is necessary before any reform of the existing system of compulsory purchase and acquisition is attempted. The committee suggests instead that there should be a thorough-going revision and reform of the complex and byzantine legislation in this area, not least matters such as the necessity for property referencing in every area (no matter how trivial the interference) and the rule whereby every landowner is deemed to own from the centre of the earth to the sky.

Special cases: property referencing

Many of the submissions drew attention to the huge burden which the present system of property referencing entailed for all major infrastructural projects. This burden was especially severe in urban areas where major projects such as LUAS or the Dublin Port Tunnel were severely handicapped by a combination of factors associated with the referencing system: much of the land was unregistered and property referencers frequently encountered pyramid titles where the owners of intermediate or superior interests were either difficult to trace or, in some instances, were missing. Even where the landowners could be traced, in many instances, the interference with their property rights was either purely theoretical (such as where there were deep excavations under their land which did not in any material way affect their interests) or *de minimis* (such as where it was sought to affix a bracket to city centre commercial property). Many of these difficulties are caused by the operation of the principle *cujus est solum, eius est usque ad coelum et ad inferos*, i.e. that a landowner owns from the centre of the earth to the sky. While this maxim may not be quite as absolute as the language may suggest,[57] nevertheless the operation of this principle has the

57 See Wylie, *Irish Land Law*.

potential to cause significant difficulties for infrastructural projects.

Conclusion

The committee considers that the most appropriate way forward is for legislation dealing with infrastructural projects to dispense with the traditional cumbersome referencing system. Instead, the legislation should place the onus on landowners to come forward and to demonstrate how they would or might be affected by, for example, the construction of an underground railway link beneath their land. In the majority of cases, the interferences would be at best de minimis and would, therefore, not create any need for compensation.[58]

Special cases: 'red safety zones'

'Red safety zones' is the informal title given to designated areas in the vicinity of airports and aircraft flightpaths. The effect of the designation of an area within a 'red zone' is that it then becomes the policy of bodies such as the Irish Aviation Authority to oppose any application for planning permission in respect of development within these areas. There is no legislation, as such, governing this designation, but in practical terms this has the effect of restricting development within the red zones, even where they are already zoned as suitable for such development. No compensation is payable on this account to the developer and the constitutionality of this was upheld in *Liddy v Minister for Public Enterprise*.[59] Here Finnegan P said:

> The objective of preventing development which might endanger or interfere with the safety of aircraft or the safe or sufficient navigation thereof is clearly a valid and appropriate one based on the common good and therefore an appropriate matter to be balanced against the constitutional rights in relation to private property.[60]

Running parallel to the system of 'red zones' is the system of 'protected areas'. By virtue of section 14(1) of the Air Navigation and Transport Act 1950 the Minister for Public Enterprise may by order declare areas adjacent to airports to be protected areas where he is of the view that the 'unrestricted use of a particular area of land in the vicinity of an aerodrome would interfere with the

58 Thus, by analogy with *Electricity Supply Board v Gormley* [1985] IR 129 (where the Supreme Court held that the imposition of 'the relatively minor burden' on landowners to cut or lop trees, shrubs and hedges in a manner not to interfere with electricity lines was not unconstitutional), it could be argued that in the majority of cases landowners cannot complain about infrastructural projects which only marginally affect their land or the enjoyment of its amenities.

59 [2004] 1 ILRM 9.

60 [2004] 1 ILRM 9 at 21.

navigation of aircraft flying to or from that aerodrome.' Where the area is declared to be a protected area, no development can take place save with the consent of the Minister. Section 14(2), however, provides for a system of compensation to any person with an interest in land injuriously affected by the refusal of the Minister to grant a building permit or any condition attached to such a permit.

Conclusion

The committee is satisfied that the operation of the red zones system is liable to cause hardship to landowners affected thereby. While it is obviously in the public interest that development in the vicinity of an airport and underneath aircraft flightpaths should be restricted, it is only fair that landowners affected thereby should be entitled to some measure of compensation in respect of these (potentially) far-reaching restrictions. The committee accordingly recommends that the existing scheme of compensation provided in section 14(2) of the 1950 Act in respect of 'protected areas' should be extended to those landowners affected by the operation of the 'red zones' system.

Special cases: ground rents

The issue of ground rents is a particularly difficult question in this context (see in particular the submission from ACRA in Appendix 3). As a preliminary, it is worth noting that the term 'ground rent' has never been the subject of statutory or judicial definition. The *Conroy Commission on Ground Rents* (1964) observed (at para 147):

> We treat as 'a ground rent' the rent payable under any lease which is defined as, or is deemed to be, a building lease or a proprietary lease by the Landlord and Tenant (Reversionary Leases) Act 1958.

The Conroy Commission recommended that a residential lessee should have the right to purchase the lessor's interest and all interests up to the freehold estate. While any possible system of the payment of compensation by the State to ground landlords for the extinguishment of their ground rent was outside the terms of the Conroy Commission, the commission recommended that any legislative scheme should ensure a purchase price which avoided any element of confiscation:

> It should give the landlord a reasonable income having regard to the income he has forfeited through having to sell the ground rent and also to the nature of the security.

The commission further observed that the market price increased significantly where the lease had less than twenty-five years to run and thus recommended:

> When the lease has less than twenty-five years to run the prospective increased rent should be a factor in determining the purchase price. The shorter the lease has to run, the greater should be the effective increased rent on the price.

Effect was given to the recommendations of the commission via the Landlord and Tenant (Ground Rents) Acts 1978. The Landlord and Tenant (Ground Rents)(No.2) Act 1978 makes provision for enhanced compensation for expired leases and for those due to expire within fifteen years. Following a request to that effect by the Minister for Justice during the passage of the legislation, the Landlord and Tenant Commission advised that fifteen years should be substituted for the twenty-five years set out in the 1967 Act in order to reflect changed economic conditions.

It appears that, subsequent to the enactment of the 1978 Act, the purchase price was calculated by applying to the ground rent a 'multiplier' that reflected the comparable yield on government securities. At present, the multiplier yields a purchase price of about fifteen times the annual ground rent. A further consideration is that leases become more valuable as they approach their expiry date because of the potential for increased rental income.

At the moment, having regard to the provisions of section 7 of the Landlord and Tenant (Amendment) Act 1984, there are three variables taken into account in calculating the ground rent purchase price: fifteen years, the one-eighth fraction[61] and the open market price. In effect, as a result of these statutory changes, the maximum purchase price for a ground rent is the one-eighth value of the full occupation rent of the property covered by the lease.

Constitutional considerations

There can be little doubt but that ground rents are a form of property and, as such, *prima facie* enjoy constitutional protection. But it is equally clear that, subject to certain exceptions, a ground rent is, in reality, no more than a right to receive an income. A *bare* ground rent does not entitle the ground landlord to any other form of proprietary right: there is no right to occupy the property or derive any *other* benefit from it. In addition, of course, the capital value of these leases increase as they approach their expiry dates.

So far as the constitutional question is concerned, the proportionality doctrine – which the committee has already set out – requires that three inter-related and somewhat overlapping issues be examined.

61 The one-eighth fraction is the fraction used to calculate the maximum rent to be reserved under a reversionary lease. The Landlord and Tenant Act 1931 provided that the rent to be fixed by the court should not be greater than one-quarter of the full occupation rent of the property covered by the lease. By section 18 of the Landlord and Tenant (Reversionary Leases) Act 1958 the fraction was reduced to one-sixth and by section 26(1) of the Landlord and Tenant (Ground Rents) Act 1967, it was reduced to one-eighth.

First, does the abolition of ground rents serve a legitimate aim? Secondly, is the interference with the property rights proportionate? Thirdly – assuming the answer to the first question is in the affirmative – has adequate compensation been provided?

Does the abolition of ground rents serve a legitimate aim?
There is little doubt that ground rents hugely complicate modern conveyancing. The abolition of ground rents would lead to the simplification of conveyancing, the avoidance of lengthy and convoluted titles and would generally promote smoother property transactions. All of these objectives would certainly be in the public interest and, to that extent, their abolition would serve a legitimate legislative aim.

The Oireachtas might also consider that it is somehow inequitable that the de facto full owner of the property should have to pay a continuing ground rent on the property. In that regard, it may be noted that in *James v United Kingdom*[62] – a case where the European Court of Human Rights held that the (UK) Leasehold Reform Act 1967 did not violate Article 1 of the First Protocol ECHR – that court observed:

> Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces. The margin of appreciation is wide enough to cover legislation aimed at securing greater social injustice in the sphere of persons' homes, even where such legislation interferes with existing contractual relations between private parties and confers no direct benefit on the state or the community at large. In principle, therefore, the aim pursued by the leasehold reform legislation is a legitimate one.[63]

If the Oireachtas elected to legislate on this basis, the decision in *James* provides support for the contention that the abolition of ground rents on this basis would also serve a legitimate aim.

Whether the abolition of ground rents would be proportionate
So far as Irish constitutional law is concerned, as we have already seen the *locus classicus* on the doctrine of proportionality is the following passage from the judgment of Costello J in *Heaney v Ireland:*[64]

> In considering whether a restriction on the exercise of rights is permitted by the Constitution the courts in this country and

62 (1986) 8 EHRR 123.
63 (1986) 8 EHRR 123, 143.
64 [1994] 3 IR 593.

elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights and the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court of Human Rights….and has recently been formulated by the Supreme Court of Canada in the following terms:

> The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
> a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
> b) impair the right as little as possible; and
> c) be such that their effects on rights are proportionate to the objective.[65]

So far as the first ground is concerned, it is plain that, for the reasons just mentioned, the objectives underpinning any desire to abolish ground rents warrant overriding the ground landlord's property rights and these concerns are pressing and substantial. The position of the ground tenant must, of course, also be considered: he or she may be indifferent to the ground rent issue and may not wish to be compelled to purchase the ground rent. Nevertheless, the abolition of ground rents is rationally related to these objectives and is not based on arbitrary or unfair considerations. The abolition of ground rents is prompted principally by the desire to simplify land tenures in general and property conveyancing in particular. In addition, there are many who consider that the very existence of such ground rents to be an unjustified feudal relic which has no place in a modern society. These considerations are certainly not arbitrary or irrational. These considerations, in principle, would justify the compulsory abolition of ground rents, even if this interferes with the constitutional rights of ground landlords and ground tenants. There is, however, no half-way house which would enable the Oireachtas to take a less restrictive alternative short of abolition. The achievement of these legislative objectives requires the abolition of ground rents and, to this extent, the Oireachtas would have impaired the rights in question as little as possible.

The final consideration under this heading is whether the effect on rights is proportionate to the objective. The short answer is that the interference would probably be regarded as proportionate if the ground landlord receives full compensation for the extinguishment of his ground rent.

65 [1994] 3 IR 593, 607, quoting from *Chaulk v R* (1990) 3 SCR 1303, 1335-1336. This principle has been subsequently applied and endorsed by the Supreme Court: see, eg, *Murphy v IRTC* [1999] 1 IR 12, 26, per Barrington J.

Whether adequate compensation is being provided
There remains the question of whether adequate compensation will be provided and, of course, what is adequate compensation for this purpose. In contrast to the position with regard to applications for a planning permission involving a change in the current land use where, as we have seen, no constitutional right to property is involved, this type of case *is* different because an existing species of land tenure (however antiquated or even dubious its origins) *is* being abrogated or extinguished in the public interest.

The issue of compensation has been judicially considered by the Supreme Court in a number of cases. In *Dreher v Irish Land Commission*[66] the plaintiff challenged the constitutionality of the Land Act 1936 whereby, following the compulsory acquisition of a farm, he was paid in land bonds. The net effect of this was that the cash value he received was £29,400 rather than the £30,000, but the plaintiff contended that as the legislation deprived him of some of the admitted value of his land it was unconstitutional. The Supreme Court upheld the constitutionality of the 1936 Act, with Walsh J observing that as the legislation required the land bonds to be issued at a rate which made them 'as near as could reasonably be achieved equal in value to price fixed', it could not be read 'as creating any reasonably avoidable injustice or indeed any real injustice.' Walsh J added:

> It may well be that in some particular cases social justice may not require the payment of any compensation upon a compulsory acquisition that can be justified by the state as being required by the exigencies of the common good. It is not suggested that the present case is one such, nor is it in dispute that in the present case the appellant was entitled to just compensation for the land compulsorily acquired from him. It does not necessarily follow that the market value of lands at any given time is the equivalent of just compensation as there may be circumstances where it could be considerably less than just compensation and others where it might in fact be greater than just compensation. The market value of any property whether it be land or chattels or bonds may be affected in one way or another by current economic trends or other transient conditions of society.[67]

In *O'Callaghan v Commissioners of Public Works*[68] part of the plaintiff's lands were sterilised by the making of an order under the National Monuments Act 1930 which order was designed to preserve a pre-historic monument. The plaintiff, however, had been substantially on notice of the order before the purchase of the lands in question. The Supreme Court, however, held that the

66 [1984] ILRM 94.
67 [1984] ILRM 94, 96.
68 [1985] ILRM 364.

absence of any compensation provided by the 1930 Act in respect of this order did not amount to an unjust attack on the plaintiff's property rights. This case may, however, turn on its own special facts[69]: the relatively small amount of the plaintiff's lands which was sterilised and the fact that the plaintiff was, in effect, on notice of the making of the order before he purchased the lands in question.

The final case is *Dublin Corporation v Underwood,*[70] a case where the Supreme Court had to consider the level of compensation payable to an investor whose investment property was the subject of a compulsory purchase order. In the High Court Budd J held that the defendant was entitled to compensation by reference to the principle of equivalence and that he should receive neither more nor less than his total loss. The Supreme Court held that Budd J was correct, with Keane J adding:

> It would be patently unjust for the dispossessed owner to receive less than the total loss which he has sustained as a result of the compulsory acquisition: such a construction of the legislation would be almost impossible to reconcile with the constitutional prohibition of unjust attacks on the property rights of the citizens….It is accepted that the claimant held these properties as an investment and would have continued to hold them as such if they had not been compulsorily acquired. He wishes to replace them with a corresponding investment. The payment to him of the market value of the properties will enable him, so far as money can do it, to replace the acquired properties, but he will sustain additional expenses in the form of stamp duty, legal and agent's fees. If he is not paid these latter sums, he will not have been compensated in full for the loss of his existing investments.[71]

Finally, it remains to note that in *James v United Kingdom* the European Court upheld the radical reform effected by the Leasehold Reform Act 1967:

> On the view that Parliament took, it logically follows that 'in equity' the tenant should only be required to pay for that of the property which he has not already paid for, that is the value of the ground. The 1967 basis of valuation, although it

69 As Keane CJ pointed out in *Re Planning and Development Bill 1999* [2000] 2 IR 321, 351:

> It was pointed out in [*Dreher*] that there was a statutory requirement that the land bonds should be issued at a rate which kept them as near as could be at par value during the period of the issue….During the currency of the period when they could have been realised by the plaintiff, they actually stood at one stage above par. The case, accordingly, should be regarded as one which was essentially decided on its special facts, as Henchy J made clear in a brief concurring judgment.

70 [1997] 1 IR 69.

71 [1997] 1 IR 69, 129.

> excludes the 'merger value', does compensate the landlord for the existing investment value of his interest in the ground. The objective pursued by the leasehold reform legislation is to prevent a perceived unjust enrichment occurring on the reversion of the property. In the light of that objective, judged by the court to be legitimate for the purpose of Article 1, it has not been established, having regard to the respondent state's wide margin of appreciation, that the 1967 basis of valuation is not such as to afford a fair balance between the interests of the private parties concerned and thereby between the general interest of society and the landlord's right of property.[72]

If one attempts to sum up this case-law, one can reach the following conclusions on the compensation issue: A ground rent is a species of property right which, as such, is protected by Article 40.3.2° and Article 43 of the Constitution. Any abolition of ground rents would be unconstitutional in the absence of compensation which reflects the 'principle of equivalence', ie, the ground landlord must receive compensation in respect of the full measure of his loss. In the light of *Underwood*, it would seem that the landlord must receive full monetary compensation for the extinguishment of his right to receive an income, save perhaps where anything less than full compensation is *de minimis*. In so far as *Dreher* suggests otherwise, it must be regarded as a case presenting with special facts where the interference was regarded as *de minimis*.

Conclusions

Having examined the ground rents issue, the committee is of the view that:

a) A ground landlord's ground rent represents a right to an income which, in principle, is constitutionally protected.
b) Provided adequate compensation is provided, the abolition of ground rents would not be arbitrary or based on unfair considerations and, as such, would not be unconstitutional. There are clear public interest justifications for the abolition of ground rents and these plainly warrant overriding the ground landlord's property rights.
c) The critical question is whether any legislation abolishing or extinguishing ground rents provides adequate compensation.
d) The real question, perhaps, is what is adequate compensation in this context. So far as the majority of ground rents are concerned – ie where the ground rent has more than fifteen

72 (1986) 8 EHRR 123, 148. It may be noted that in *Re Planning and Development Bill 1999* [2000] 3 IR 321 the Supreme Court referred with approval to the decision in *James*, with Keane CJ observing (at 356):

> It will be seen that the tests adopted by the European Court of Human Rights in that case do not differ in substance from those which have been applied by the courts in this jurisdiction in this area.

years to run – it is difficult to see why the fifteen year multiplier at present operated under sections 9 and 10 of the 1978 (No. 2) Act would not be constitutionally acceptable. In other words, if at the moment, a ground tenant can elect to purchase the ground rent at this price under the 1978 (No. 2) Act, it is hard to see why this should be regarded as constitutionally objectionable. It may be, indeed, that a lesser multiplier would also be constitutionally acceptable, but this would in part turn on current investment yields etc.

e) There remains the question of ground rents where less than fifteen years remains to run. While acknowledging that there appears to be nothing magical or sacrosanct about the fifteen-year period – so that the Oireachtas could probably reduce this fifteen-year period with prospective effect – the fact remains that – at some date chosen by the Oireachtas – an enhanced price will have to be paid in those circumstances by the ground tenant in respect of the ground rent. Any legislation providing for the abolition of the ground rents will have to deal with this special situation and provide for the payment of enhanced compensation in those circumstances.

Recommendation

The government should prepare legislation to abolish ground rents which embodies a scheme of adequate compensation.

Special cases: access to the countryside

In recent years there have been increasing problems with access to the countryside, particularly on the western seaboard. As Keep Ireland Open put it in its submission: 'Hitherto open commanages have been divided and fenced, access has been denied to beaches, archaeological sites and other amenities'.

The Mountaineering Council of Ireland reported to the committee that it recently undertook a membership survey and got over 1,000 respondents. It revealed that 48% of them had experienced specific access difficulties. These occurred mostly in the West and South-West. An Óige – the Irish Youth Hostel Association wrote that in recent years access to the countryside in all parts of Ireland had become an issue not only for its members but also for its visitors from abroad.

The situation is affecting our tourist industry. Bord Fáilte research shows that 250,000 visitors to the country each year engage in hiking or hill walking, a figure that has been consistently achieved each year since 1996. The statistics also show that hill walking is more popular and valuable to the Irish economy than cycling and angling combined. But Bord Fáilte sees restricted access as a threat. Its 2003

strategic development plan warns: 'Let it be emphasised once again that access is the most critical issue for the developers of the walking product right now and needs to be solved post-haste'. In terms of international competition, Ireland's access conditions are deteriorating. Keep Ireland Open told the committee: 'Ireland is at variance with any country we have studied, including Sweden, the UK, France, Germany … Every country we have studied had some legal provisions for people to walk on suitable terrain'. In Scotland, our direct competitor for hill walking tourism, parliament has brought in legislation to allow freedom to roam everywhere, except in the immediate vicinity of buildings and across pastures.

A number of submissions made to the committee proposed that the Constitution should be amended to secure access to the countryside. Friends of the Irish Environment argued:

> The Constitution should provide for a right of access to the countryside limited by law in the interests of protection of agriculture and other legitimate use of land and privacy. As with all constitutional provisions this should be general for specific regulation by statute. The provision of the Swedish constitution is a good model:
> All persons shall have access to nature in accordance with the right of public access, notwithstanding the above provisions. [Article 18, Swedish Instrument of Government, Chapter 2: Fundamental Rights and Freedoms.]
>
> We suggest either the Swedish formulation or
>
> The State acknowledges the right of the citizens to have physical access to the land, regulated by law, in a manner and at locations compatible with protection of the environment, the carrying out of agriculture and other legitimate uses of land, privacy and other appropriate considerations.

The Green Party similarly proposed that 'the Constitution should provide for a right of access to the countryside limited by law in the interests of protection of agriculture and other legitimate use of land and privacy'.

The Irish Uplands Forum wrote in its submission:

> The Irish Uplands Forum has studied Article 40.3.2° and Article 43.2.1° and 2° and considers that if applied in a balanced manner these are compatible with the wider access to the countryside which we consider necessary for the recreation and health of the Irish people, and for the development of rural tourism, especially walking.

> The wider access which we consider necessary is, in the main: 1) waymarked ways, both long-distance and local; 2) agreed access routes from the public road to the open hillside; 3) sustainable and reasonable access for responsible walkers to the open uncultivated uplands.
>
> The wider access to be coupled, for the landowners involved, with: indemnity from any claims by recreational users; compensation for damage to property by recreational users; tax relief to compensate for the general 'wear and tear' on the land by recreational use; payment for work done in caring for and maintaining paths across their property.
>
> Finally, the wider access to be coupled, for user organisations, with education in the sustainable and responsible use of the countryside.

However, the great majority of those who made submissions felt that the best way to minimise tension between landowners and recreational users was through negotiation, the promotion of 'a Code of Good Practice' and the creation of a legislative basis to sustain good relations. An Taisce presented this view:

> All citizens should be exposed to a good environment. The Swedish Fundamental Law recognises a right of access to nature. In an increasingly urban environment access to the countryside should be guaranteed as an essential component of a full life … Local authorities should facilitate access to the countryside through provision of networks of bridleways and by encouraging farmers, for example by underwriting insurance, to allow walkers on their land. It is debatable whether it should be recognised in a modern Constitution.

The Chartered Institute of Building 'supports the desirability of access to the countryside by all, and would welcome a study of the issues involved in providing sensible solutions, which would ensure that such access would prevent a negative impact on sensitive environmental areas, and not adversely infringe the rights of landowners'.

The Irish Creamery Milk Suppliers Association put the farmers' position this way:

> Over the last twenty years, Irish agriculture has become a hugely regulated and mechanised sector. A farm is now a very dangerous place, especially for people not from rural areas, due to the presence of livestock, machinery and other hidden dangers. It is unfair that a farmer can be liable to prosecution by people who have accidents while trespassing on his/her land.

> It should be taken for granted that all farmland is dangerous and out of bounds unless the individual or group has received permission from the farmer to enter the land or is working for the farmer on the land. In addition, there are animal disease issues as well as financial penalties related to agri-schemes that may arise as a result of people damaging a farmer's land.

The Irish Farmers' Association wrote in its submission:

> Farmland is an integral feature of our high quality countryside and rural environment. The citizens of the state and visitors alike access the Irish countryside for a wide range of pursuits including fishing, hunting, walking and general visual enjoyment. In practically all instances, access to the countryside and farmland takes place without objection from farmers. To facilitate responsible entry to lands the IFA, in 1995, prepared a *Farmland Code of Conduct* (see Appendix 3) for people entering land, which was supported by all the key organisations representing outdoor pursuits.
>
> … While the Occupiers Liability Act 1995 affords occupiers of land a reasonably high level of protection against claims from recreational or trespasser entrants to land for injury or damage, the outcome of recent court cases threatens this assurance. Also, landowners bear the costs of cover for public liability insurance against claims from third parties.
>
> IFA submits that the property rights of farmers should not be diminished by the conferring of any general rights of access to farmland to the public. Such a move would create significant problems for the farming community with regard to property damage and security. It would also damage the good relationship that exists between the farming community and those who wish to enjoy the countryside in a co-operative and responsible way. It would not eliminate that minority of instances that currently exist where individual farmers feel compelled to object to certain entrants onto their lands.

The Irish Landowners' Organisation wrote in its submission:

> Farms are potentially hazardous areas with working machinery, livestock and areas such as coastal paths. Landowners need to retain control of the right to access. Access can be achieved by negotiation, which allows both parties to appreciate that there are responsibilities which attach to all rights.

Conclusion

The committee is satisfied from its examination of Article 40.3.2° and Article 43 that no constitutional amendment is necessary to secure a balance through legislation between the rights of individual owners and the common good.

The Occupier's Liability Act 1995 sought to address the question of the exposure of landowners to claims. It sought to set down rules upon which landowners who, exercising the common duty of care, could rely to ensure that they did not become liable for injury or damage sustained by entrants while on their property. Should it transpire that the 1995 Act is found on appeal by the courts to be ineffective for this purpose, the committee would urge the Oireachtas to repair the legislation as quickly as possible.

The submissions reveal certain shortcomings in the existing legislation but also certain capacity within it that is not yet being used. The Labour Party in its *Freedom to Roam, Rights of Access and Public Rights of Way* submission (see Appendix 3) and the Mountaineering Council of Ireland in its submission and environmental policy documents (see Appendix 3) together provide a useful survey of the legislative and other measures that might be taken in creating a comprehensive access policy.

The submission from the Office of the Ombudsman (see Appendix 3) reveals shortcomings in protecting public rights of way at the level of the planning authorities which need to be addressed.

However, it is clear that legislative and administrative actions will succeed only if they are laid down on a bed of mutual understanding between landowners and those who seek to enjoy the space they own.

The submission of the IFA, Connemara (see Appendix 3) gives an understanding of the situation of certain landowners, most of them small farmers, that is not always readily available to townspeople:

> Land in and around large towns and cities became very valuable, the greater Dublin area being a prime example because of the policy of allowing the continued expansion of the city. On the other side of the coin, within the past few years vast tracts of land in what are popularly described as more remote areas, for example Connemara and Mayo, have been designated Special Areas of Conservation (SACS), to protect flora and fauna that has become rare elsewhere because of development. In many cases the designated land includes enclosed improved lands and all development is effectively banned. This designation is compulsory and financial considerations and implications for the landowner

> are ignored. An SAC compensation scheme was promised when the restrictions were first introduced but none has yet been delivered other than a mountain de-stocking scheme to tackle overgrazing. Restrictions on property use and farming practice are such that conservation of flora and fauna now takes absolute precedence over every other land use. Although it is often claimed that traditional farming practices are allowed this is not the case, affected land that has not been ploughed for ten years cannot be disturbed even though it might have often been tilled in the past, some areas that were fertilised for generations can no longer be fertilised, the use of herbicides and pesticides is banned, and in most cases all that is now allowed is light grazing to maintain the habitat … The only significant rights left to the landowner are the right to trade the property and the right to determine who has access to it, but if public access were to become a right, then much of this land would certainly cease to be a tradeable commodity and without a market value it would truly become the walkers' land.

A countryside forum

A national structure to promote and sustain mutual understanding on the issues surrounding access to the countryside is currently under examination. This follows an initiative in 2003 by the Minister for Community, Rural and Gaeltacht Affairs to establish a Rural/Agri Tourism Advisory Group consisting of official and voluntary interests to consider the difficulties that had emerged in relation to access to some waymarked ways following the cessation of payments for access under REPS. The advisory group reported in January 2004 and recommended that a Countryside Recreation Council be established on the lines of the Northern Ireland Countryside Access and Activities Network (CAAN). This would be based on the idea that growth in recent years in the use of the countryside for recreational purposes has benefits for all rural communities, including landowners, service providers and recreational users of the countryside. This increased use also brings with it the need for a sustainable approach to be taken in the management and development of all related resources and also to ensure that rural communities see the benefit from this increased use of the countryside. The Countryside Recreation Council would work towards these aims and would also provide a forum for resolving disputes in relation to access.

Conclusion

The committee favours the establishment of a Countryside Recreation Council with national, regional and local reach. The use of the Northern Ireland model would make for easy alignment of joint tourism projects as well as avoidance of the heavy, initial mapping costs that seem to be a concomitant of the approach

taken in England and Wales. The management issues of what structure the Council should have and who should control it are government issues, but the committee would draw attention to the importance of the planning authorities with their relevant statutory and executive powers. Their part in the Council and its work needs to be carefully factored in.

Special cases: property of religious and educational institutions

Article 44..2.6° of the Constitution provides that:

> The property of any religious denomination or any educational institution shall not be diverted save for necessary works of public utility and on payment of compensation.

As previously noted, the original version of this clause dates back to the Home Rule Bills and a virtually identical version of this provision was contained in section 5 of the Government of Ireland Act 1920, Article 16 of the 1921 Anglo-Irish Treaty of 1921 and Article 8 of the Constitution of the Irish Free State.

Article 44.2.6° was, of course, designed as an important safeguard for minority churches against potentially oppressive state behaviour. The committee considers it fair to observe that such a threat, in so far as it ever existed, has long since passed. However, apart from recommending one minor technical amendment,[73] the Constitution Review Group saw no reason for change.

Other commentators have been more critical of this provision:

> It is a curious, and in some ways, inapt provision: witness its strange intrusion of a reference to 'any educational institution', which might seem more appropriate in Article 42. Moreover, if 'diverted' means 'compulsorily acquired', then the provision for compensation is probably superfluous since it is a general rule that compensation must follow such acquisition…..[74]

In the present context, however, the critical issues concern the meaning of the phrases 'diverted' and 'necessary works of public utility.'

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73 The Review Group commented (at 387) that:
> the word 'diverted' in the English language version does not correspond with the words 'a bhaint díobh' in the Irish language version. In any event, the use of the word 'diverted' in this context is euphemistic and unsuitable. The Review Group accordingly recommends that 'diverted' be replaced by 'compulsorily acquired.'

74 Casey, *Constitutional Law in Ireland* (Dublin, 2000) at 706.

The phrase 'diverted' has been described as a 'euphemism' and as practically synonymous with compulsory acquisition. The proposed sense of Article 44.2.6 comes across in the Irish text which refers to 'a bhaint díobh.' Echoing an earlier recommendation of the Constitution Review Group, and assuming that Article 44.2.6 was to be retained in its present form, the committee would recommend that the word 'diverted' be deleted and replaced with the words 'compulsorily acquired.'

The words 'necessary works of public utility' gives rise to more difficulties. Article 8 of the 1922 Constitution referred to 'roads, railways, lighting, water or drainage works or other works of public utility' and although this phraseology was not repeated in Article 44.2.6, it is surely legitimate to invoke Article 8 as a guide to the scope of this phrase. It has been suggested that the acquisition of lands to facilitate local authority housing might not come within this phrase[75], but this would seem too narrow a view of 'necessary works of public utility'. The Kenny Report suggested that Article 44.2.6 precluded the acquisition of property by a public authority for transfer to private builders for the construction of factories or houses[76] and this view seems correct.

A number of submissions made to the committee called for revision of this provision. In effect, many of those opposed to Article 44.2.6 in its present form objected to the high level of protection afforded to religious and educational institutions. They considered that Article 44.2.6 was at once unduly protective of such institutions while placing a further obstacle in the way of public authorities who wished to acquire lands for public purposes from religious bodies and educational institutions.

Conclusion

Article 44.2.6° has served its historic purpose but is now redundant. While for that reason its removal may be desirable the committee believes that the balance inherent in the Article and the manner in which it has operated in practice does not make its removal or amendment necessary at present.

Recommendations of the Constitution Review Group

The issue of property rights was also considered by the Constitutional Review Group in 1996. It discussed the major case-law in this area and suggested arguments for and against change. It then concluded:

> The Review Group recognises that some of the difficulties of interpretation to which these provisions have given rise have

75 Keane, *Law of Local Government in Ireland* (Dublin, 1980) at 225.
76 At page 54 of the Report.

> now been clarified by the case-law. It further observes that some of the possible fears about an absolutist interpretation of these provisions, which would severely handicap the Oireachtas in areas such as planning law, have not been realised. Serious consideration was given to the suggestion that these provisions – for all their drafting imperfections – should be left unamended, largely because the law has been, to some extent, at least, clarified through the case law. As already indicated, this suggestion was rejected because the present provisions were regarded as unsatisfactory. The Review Group is of the opinion that it ought to be possible to re-draft these provisions so that a more direct self-contained clause would clearly set out the extent of the State's powers to regulate, control or even extinguish property rights. Any re-draft might contain elements of the present provisions of Article 40.3.2 and Article 43, including those provisions which expressly subordinate the exercise of property rights to the requirements of social justice.[77]

A majority of the Review Group[78] accordingly recommended the deletion of Article 43 and the words 'and property rights' in Article 40.3.2, with their replacement by a single self-contained property rights provision in which the protection of property rights was re-cast. The Review Group then set forth its views on the re-cast property rights clause suggesting that it might contain:

i a statement that every natural person is entitled to peaceable enjoyment of his or her own possessions and property
ii) a guarantee that no one shall be deprived of his or her own possessions and property save in the manner envisaged by the new qualifying clause
iii) a guarantee that the State shall not pass any law attempting to abolish the general right of private ownership or the general right to transfer, bequeath and inherit property
iv) a new qualifying clause which would provide that such property rights, since they carry with them duties and responsibilities, may be subject to legal restrictions, conditions and formalities, provided these are duly required in the public interest and accord with the principles of social justice. Such restrictions, conditions and formalities may, in particular, but not exclusively, relate to the raising of taxation and revenue, proper land use and planning controls, protection of the environment, consumer protection and the conservation of objects of archaeological and historical importance.[79]

77 Pn. 2632 at 364.
78 A minority of the Review Group favoured the retention of Article 43.2 in its present form.
79 At 366.

The Review Group noted that i) and ii) were based on Article 1 of the First Protocol to the European Convention of Human Rights. iii) was a slightly amended version of Article 43.2.1 of the Constitution. iv) the new qualifying clause was in turn loosely based on, and adapted from, the qualifying clause contained in the free speech provisions of Article 10(2) of the Convention. The Review Group then concluded that these recommendations would give the Oireachtas:

> extensive rights to regulate and control the exercise of property rights, it would also provide a safeguard against the risks of disproportionate or arbitrary interference with such rights by the State and would enable the courts to take into account the effect of the interference with the property rights of the individual in determining whether such interference was constitutionally valid or not in particular situations. Such a clause would indicate explicitly but in a non-exclusive manner the many kinds of circumstances in which property rights can be regulated by the State.

The views of the Review Group are probably best regarded as expressing an ideal state of affairs. The committee would happily endorse these recommendations if it were asked in turn to suggest a new form of wording for Article 43. But this is not quite the same thing as saying that constitutional change is *imperative and necessary*. The committee can, at most, say that these suggested changes would probably represent a distinct improvement over the present wording in terms of style, clarity and explicitness.[80] But in the light of the analysis of the case-law which the committee has conducted in this report, it cannot – as yet, at least – say that such change is *necessary and imperative*. Obviously, if contrary to the committee's analysis, the Oireachtas subsequently sought to give effect to the key recommendation of the Kenny Report by capping the price of development land in the manner already described and this legislation was later found to be unconstitutional, then this entire question would have to be reviewed.

Conclusions

1 While the committee agrees that the formulation of the relevant constitutional provisions in regard to property rights is wordy and invites subjective judicial assessment and is to that extent unsatisfactory, we note that many of the uncertainties have been clarified by the extensive case-law. We do not consider that it is correct to say that this case-law bears out the frequent criticism that the property rights provisions unduly protect the right of property or create undue difficulties for the Oireachtas where it

80 Thus, in its submission, the Law Society of Ireland argued (at page 16) that 'whilst this suggested wording [of the Review Group] is perhaps somewhat more modern and focused, it offers not a single tangible advantage over the existing provisions.'

attempts to regulate or control such property rights in the public interest.

2 Although constitutional change may not be strictly necessary, the committee nonetheless think that change along the lines recommended by the Constitution Review Group may be desirable. The new wording proposed by the Constitution Review Group would have the merit that the property rights provisions were contained in a single self-contained constitutional provision and would perhaps more clearly articulate in express terms the proper balance which must be struck between the rights of property owners on the one hand and community interests on the other.

Chapter 2

The dynamics of the property market

Introduction

In Chapter 1 we analysed what discretion the state had, under the Constitution, in seeking to maintain a proper balance between the rights of the individual and the exigencies of the common good in relation to private property. Close analysis of the relevant text of the Constitution and of the case-law established that the state's discretion was a broad one.

There are two areas in which there is a pressing need for the state to act in the interest of the common good. One is in relation to strategic infrastructural projects, that is to say the basic systems that support the country's transport, energy, communications and environmental services. The other is the supply of social and affordable housing. In pursuing the common good in these areas, the state must necessarily operate in the property market – a complex, dynamic environment. It uses the planning system to act.

In order that it can act effectively as well as constitutionally, the state must have available to it not only constitutional advice but also advice on a) how the property market works, so that it can identify the set of policy instruments that will achieve the objectives it selects and b) how the planning system, which uses the policy instruments, should be managed so as to operate effectively and efficiently.

A valuable resource

The submissions made to the committee are a valuable resource in formulating such advice (see Appendix 3). They represent the experience of many of the people who have encountered problems and present their suggestions on what should be done, often supported by professional advice. The bulk of the submissions refer only in part to specific constitutional/legal issues that are the prime concern of the committee. While collectively they provide much insight into the processes and dynamics of the property market, they do not of their nature seek to be comprehensive. The committee decided that the submissions would be most effectively deployed if they were analysed against a framework of the property market derived from the professional literature.

Some basic conditions

Stability and fairness There are two basic criteria which any interventions by the state in the property market should meet. The property market is possibly the major arena in which the value of each person's assets is determined. Stability in the operations of that market offers certainty. Certainty is essential for traders and investors, including banks, whether domestic or foreign, so as to allow progressive and increasing development. In the case of housing measures, prudence requires the avoidance of the creation of negative equity. The second *Bacon Report* (1999) alludes to this:

> Some believe that an appropriate solution to the current problem of deteriorating house price affordability is to engineer in some way an across the board reduction in new house prices from their current levels. Most usually, it is argued that a reduction in land prices (again, engineered in some way) should be the means used to bring about this outcome. If such an outcome could indeed be brought about, affordability for first time buyers would be improved. However a negative side effect of this approach would be to risk creating a negative equity problem for many house purchasers and most new house purchasers over the past two years or so. The likelihood is that the magnitude of the problem that would be created in this way would be as large and could be greater than the problem that would be resolved.

Fairness is essential to creating and maintaining public support for the market system. The rights of the individual and those of the community must be fairly balanced. There must be equality of opportunity in the market. This means that the operations of the market must be supported by as much public information on its operations as possible. It is instructive at this point to recall a recommendation (yet to be accepted) in the Kenny Report, published three decades ago:

> Any member of the public should be able to find out what prices have been paid for land and the nature of the dealings in it. Under the law as it is now, this is not possible. This has the further disadvantage that it is not possible to compile accurate statistics for the whole country in relation to land prices. This information is essential for policy-making decisions.

The planning system itself must be transparent. Where the market system (which is embraced by the state) is operating against the needy, appropriate interventions must be made by the state through the planning system.

More housing A major theme of the submissions is that prices are driven upwards by the degree to which the supply of houses fails

to meet the need for them and that therefore enough houses should be provided to stabilise prices. While the analysis that follows ranges widely, the provision of development land for housing and the servicing of that land must be seen as a major underlying concern.

Complexity The analysis quickly reveals that the problems thrown up by the property market are complex. However, several broad principles can be established whose application in turn helps to reduce the number of measures that may be taken in relation to particular problems. Those measures – referred to as policy instruments – often require research and close analysis to determine their efficacy. Some of these policy instruments have been identified and used in Ireland but there are many others available in the experience of developed countries across the world. These clearly ought to be made available to the national toolkit. It should be noted that the National Economic and Social Council is engaged in a wide-ranging study of policy instruments applied in housing and land policy. In the meantime, problems must be engaged with the skills and knowledge at present available. Adjustments must be made quickly if particular policy instruments are not working. This means that, critically, high-quality knowledge of the operations of the market and the operation of the planning system within it must be made available continuously and quickly. The analysis also shows that the property market in fast-developing urban areas is exceptionally complex and that Irish experience of it is only quite recent. It is apparent that when the state intervenes to achieve a particular effect it sometimes fails because the policy instruments it uses are too blunt. Even when it seeks to operate with great sensitivity it may find itself involved in creating an apparatus so extensive, and therefore expensive, that it consumes the savings anticipated. For example in Britain the Town and Country Planning Act of 1947, which proceeded from the *Report of the Expert Committee on Compensation and Betterment* (Uthwatt Report 1942, see Appendix 5), even though it was meant to nationalise the development rights in all land in Britain and thereby stabilise the cost of land, proved far too complex and expensive to administer and met with such widespread public opposition that it became unworkable. It is in the nature of the situation, then, that patience and understanding must be exercised where people may be using the best knowledge and policy instruments available but failing to achieve.

How the property market works

In this chapter we examine the property market and how the planning system operated by the state acts upon it. Many of the submissions received by the committee fell into two broad groups. One group felt that the property market worked well and was now delivering a remarkable number of houses annually (such that the

supply would soon bring about a levelling off in the price of houses). This group felt that most difficulties lay in the working of the planning system. They pointed to their experience that serviced land was not being made available quickly enough and that the procedures which they were obliged to follow in regard to securing a grant of planning permission were cumbersome and slow.

The other group was concerned with a variety of problems in the property market, problems so large that a radical measure such as a constitutional change was necessary to address them. Members of this group were concerned with such things as the phenomenal increase in the price of houses and the concomitant weakness in the provision of social and affordable housing, the price of development land, the hoarding of development land, the levels of compensation for land compulsorily acquired for infrastructural development, and the windfall gains which the system was creating for a few.

In order to fully understand the problems and evaluate the various solutions proposed to solve them the committee explores in this chapter the dynamics of the property market and the problems created by the action of the planning system upon it.

Land and landed property: has our past had any influence?

In Ireland we have historical perspectives on landed property that set us apart in some respects from many western democracies. The surrender and re-grant policy pursued by the Tudors in the sixteenth century uprooted the land tenure system that had prevailed for almost two millennia under the Brehon law and that had a strong communal character. The expropriation of native Irish landowners a century and a half later, following the Williamite wars, was another major upheaval: it resulted in about five thousand families that formed the Protestant Ascendancy holding more than three quarters of the land of Ireland. It needed the land war of the late nineteenth century to usher in a final settlement of the land question.

To the particular conceptions of land and landed property developed by these and related Irish experiences can be traced the high levels of home ownership that mark Irish land development in the twentieth century and into the twenty-first. The Institute of Professional Auctioneers and Valuers in its written submission to the committee put it in the following way:

> Ireland has one of the highest levels of home ownership in the EU, standing at seventy-eight percent, compared to an EU average of just sixty-one percent. This characteristic of the Irish population has long historical and sociological roots, dating

back to both the famine and Ireland's colonial past. Owning one's own home is a key desire of most Irish people of working age, primarily reflecting the need for security of tenure.

The impact of economic development and urbanisation

Prior to the industrial revolution, land was the main form in which wealth was acquired and stored in all countries. With industrialisation came urbanisation and the emergence of other ways of holding wealth. The nineteenth and twentieth centuries saw enormous growth in many cities in Europe and in America and the process has continued since then. Urbanisation has however been a distinctly weaker process in Ireland. The nineteenth century witnessed the progressive collapse of the colonial underpinnings of many of our towns while at the same time the tenant farmers – the nation-forming class in the countryside – saw their interests advanced as owner-occupancy of farms gradually became the norm.

What was to become the Republic of Ireland had, as a result, a dominant rural ethos and much of the built heritage of the towns that existed at the birth of the state was not prized. In some cases public buildings were regarded as the leftovers of a colonial past and an alien presence in Irish towns and cities. The further weakening of the economic life of southern Irish towns and villages was a feature of the first half of the twentieth century, particularly of the period immediately after World War II when there were high levels of emigration, peaking in the late 1950s. Only since the mid-1960s has more than half the population of the Republic of Ireland lived in towns. Not surprisingly therefore, in the popular and dominant narratives of Irish history, urban life and urban culture played only a modest part. This ethos still has an important influence on our understandings of landed property and rural and urban development.

Population, 000s

	Urban	Rural	Total
1926	959	2013	2972
1946	1161	1794	2955
1956	1287	1611	2898
1961	1307	1512	2819
1966	1445	1439	2884
1971	1585	1393	2978
1979	1873	1495	3368
1986	2002	1538	3540
1996	2108	1518	3626
2002	2334	1583	3917

A great change The latter half of the twentieth century saw a great change in Ireland. Economic development, prompted by the First Programme for Economic Expansion of 1958, increased the emphasis on urban development. While agricultural land remained important, urban landed property became increasingly so. The creation of urban property assets required to accommodate industry, commerce and an increasingly affluent population became more and more important in people's consciousness. Urban property markets too became more important as property values rose (which they sometimes spectacularly did, as in the case of development land on the outskirts of Dublin). Industrialisation and urbanisation came to predominate.

A new approach? The rate of change may have outpaced the change in our underlying understanding of the exigencies of urban life and the economics of urban landed property rights. Managing and controlling urban land and planning for the physical development of towns and cities requires a different approach to that required for managing a rural and agricultural environment. It demands a different mind-set.

How urban property is created Clearly urban property does not exist in nature. It is created through a process of physical development that is supported by the provision of infrastructure at local, regional and national levels. What are needed in urban areas to allow people to live, work and engage in social activities are buildings, infrastructure and services. Urban land contributes to the creation of these. Without the necessary permissions and the physical structures and services, land itself cannot satisfy most human needs in urban areas. It is only as an ingredient in the process of producing useable space that urban land acquires its value. The physical land is not more important than the other ingredients but it is the only one that cannot be moved elsewhere and must be used in a specific location. Without accessibility, infrastructure and services and the capacity to use it, urban land will not have economic value. (In an urban area some buildings will be suitable for particular uses either by virtue of location – closeness to similar users, access to transport nodes, for example – or because the particular physical form facilitates a specific use.)

Whereas the amount of agricultural land is to all intents and purposes fixed, new developments and building at higher densities can increase the supply of space in specific urban locations which, if supported by efficient and effective transportation, can meet the demand for convenient accommodation. Land use and transportation planning is vital to the success of urban development. It is of interest to note at this point the view of the Dublin Transportation Office in its written submission to the committee that a

more orderly and socio-economically viable pattern of urban development could be achieved if strategic integrated land use and transportation planning principles were adopted and adhered to.

More particularly in an urban area the relationship of one building to another and to its surroundings is of acute importance. Important also is the way buildings can be used both in terms of rights to use particular parts of them in particular ways and rights to use them for particular time periods. Urban areas are an amalgamation of physical assets that have been produced in response to human needs, in forms that reflect these needs and have a relationship to each other. Urban areas are, consequently, constantly evolving, diverse and not particularly bounded by natural constraints. The process of creating further urban assets is complex and dynamic and requires careful management and control. Urban areas are a manifestation of the complexity of modern social and economic life and are much more difficult to understand, manage and control than rural areas.

The role of the state Given the level of complexity, the diversity, the physical relationships and the effect of juxtaposed uses, the inevitable change and development in urban areas must occur through a mixture of state and municipal regulation of social and economic activity. This process must be planned, organised and controlled and it must be facilitated by appropriately qualified staff deployed in organisations equipped to understand, anticipate and plan for the needs of urban areas. Inherent in the process is the need to balance private and common interests. In some instances decisions must be made in the interest of the common good (openly accepted by virtually all who made submissions to the committee), to 'limit the absolute enjoyment of private property', in the words of the Irish Auctioneers and Valuers' Institute, 'by controls, by equitable taxation measures, land and building usage, regulation of condition of occupancy and at times extinguishment of property rights and ownership, subject to appropriate and equitable compensation'.

Is there something special about the legal rights to landed property?

Economic activity brings with it the need to exchange landed property and property related services and this creates property markets. The success of urban areas is fundamentally affected by the ease with which accommodation and space can be bought, sold and rented in those markets. The activity is described as follows by the Irish Auctioneers and Valuers' Institute in its written submission to the committee: '[as] well as making a major impact on society through the provision of housing, property makes a significant

contribution to economic competitiveness and the regeneration of urban areas'. Property markets exist in the form of a series of formal and informal arrangements bringing together buyers and sellers and distributing urban assets among competing users. To understand these markets one must grasp clearly the nature of what is exchanged and understand the different kinds of legal interests there can be in urban landed property.

The law of real property,[1] or land law, is concerned with the rights and liabilities that arise in society in respect of land. It defines the wide variety of rights and liabilities over landed property that make up ownership. These rights and liabilities are created by the actions of private parties and by the actions of the state. The Irish Planning Institute in its submission to the committee referred to the separation of 'ownership rights and development rights' and Tom Dunne, head of the School of Real Estate and Construction Economics, Dublin Institute of Technology, in his oral submission to the committee said that development land could be thought of as an amalgam of three separate property rights, 'the right to occupy and use land, the right to develop or change use and the right to connect to infrastructure'.

These rights, however, cannot simply be exchanged in the same way as other goods and services that are traded in markets. The law establishes the nature of the rights involved and how the parties to property rights may deal with them.

Can one own land completely? The largest bundle of rights to landed property recognised in our land law is the fee simple or freehold estate and within the law the owner of these rights is free to use and enjoy the land much as he or she pleases. At a popular level it might be thought that such an owner not only owns the soil but also everything up to the sky and down to the centre of the earth, that he or she is as close as legally possible to complete ownership in the same way as one might own a car or other personal property.

The rights of others The owner of the fee simple or freehold estate in landed property will, however, never enjoy such wide-ranging rights as this suggests, particularly in complex urban areas. Landed property will always be owned subject to extensive state control and interference through legislation and subject to rights that others may have acquired by way of other land transactions or agreements. Examples of these rights are leases, mortgages or other agreements such as the right of support owed to owners of adjoining properties (such as might exist in a terrace). What an owner of landed property has is a bundle of legal rights. These can be transferred as a whole, re-bundled or separated out and sold in parts.

1 The law distinguishes between real property, that is immovable property such as land or houses, and personal property, that is movable property such as money or jewels.

It is worth noting that the exact rights transferred can be, and frequently are, assembled to meet the individual needs and preferences of the seller or buyer. Each piece of landed property will therefore be defined by a unique legal title whereby the exact nature of the rights bought and sold in the market are defined and clarified as much as possible. This is done by lawyers who are skilled in interpreting land law and applying it to particular circumstances and who can provide buyers and sellers with a suitable title and an understanding of what is traded.

Regulation by the state Often the state has to alter or limit the rights which comprise property interests for the purpose of regulating social and economic activities in the interests of the common good. The Royal Institute of Architects of Ireland had this in mind when it wrote to the committee:

> Land is a finite resource, whose productive (or less productive) use has external impacts on other land users and on the landless. The external effects of private land use, and of how private use is controlled, can cause problems for the social and economic fabric at several levels; from society's ability to provide transport and water infrastructure, to climate change exacerbated by excessive use of private transport.

The state can by law circumscribe or remove some of the bundle of rights that comprise particular landed property interests, and it has done so extensively in the past. Examples of this include the granting of security of tenure to tenants, control of the airspace over property by the air navigation acts or control of use and development of property under the planning acts.

Property markets, therefore, are best understood as markets where legal rights relating to property are exchanged rather than as markets for the land and buildings themselves. What is traded in a property market are rights to use land and buildings coupled with responsibilities to the state and others. Inherent in these rights also, importantly, is the right to deny access to others. Development rights, which are regulated through planning legislation, represent just one suite of rights involved. Since the introduction of the 1963 Planning Act, development rights are no longer inherent in the right of ownership of property. Indeed the planning system is constructed on the principle that the state has the right and the need to alter the bundle of legal rights that relate to property.

Do the normal rules of economics apply directly in the property market?

No. Landed property has particular characteristics that make orthodox economic analysis difficult. This was recognised early in

the development of economic science and so the treatment of land value is a distinct theme in economic theory. Land value, as a rule, is neither prominent nor discussed fully in standard modern textbooks. The Irish Auctioneers and Valuers' Institute had the following comment in its written submission to the committee:

> Land is heterogeneous not homogeneous. It is traded infrequently in a series of linked sub-markets. Transaction costs limit the ease of market entry and exit and aggravate liquidity. Sub-markets are not merely geographically defined, but are also product differentiated. In residential land, for example, separate sub-markets exist for bulk land, small housing sites and sites suitable for apartment development. The number of buyers and sellers for land as a whole, let alone in each sub-market, is limited.

There is a view that the widespread nature of such imperfections makes property markets among the least efficient of all. There are seven important characteristics that have a bearing on this issue.

Characteristics of the property market

Cyclical features
The first characteristic of property markets is that they have different cyclical features to other markets. Property market cycles can endure over longer periods and be more pronounced than those of other markets. Mostly they will lag behind macroeconomic cycles, taking longer to wax and often waning quickly, sometimes very quickly. The transition from one phase of the market to the other can be speedy and sensational, with property values rising or falling dramatically.

This renders the urban land market vulnerable to speculative bubbles, which can be hugely influenced by government policy. The reverse is also true: it is just as easy to induce damaging slumps. In the past government policy in Ireland has acted in a pro-cyclical way and amplified the natural boom/bust cycle of the market.

Prices relative to incomes high
The second characteristic of property markets is that the price of property is usually very high relative to the incomes of those wishing to buy. Borrowing is therefore required for purchase and the terms and cost of borrowing – that is to say bank lending policies and interest rates – have a strong influence on the demand and activity in the market for landed property. If the income of some is not sufficient to allow them to repay borrowings they will be precluded from the market and forced to rent. CORI Justice Commission refers in its written submission to the report *Housing Access for All?* (2002):

> The report projected that as a result of uneven development, socially and spatially, there will be a significant increase in the levels of unaffordability recorded among Irish households. It predicts that thirty-three percent of new households will not be able to afford to become home-owners and that this figure rises to forty-two percent in urban areas, compared to thirty-two percent in rural areas.

Housing is a special case Property markets will not of themselves supply everyone with a home which they can own. Where there is an overall shortage of housing, those at the bottom end of the market will be priced out because the market rations the available accommodation among competing bidders. On the other hand if property prices are low, supplying those at the bottom end of the market may not be sufficiently profitable to encourage development. It follows that direct, non-market provision of accommodation will be necessary at all stages of the cycle. An approach to housing economics, therefore, which is more in tune with societal requirements than with pure market requirements is needed to deal with the challenge of providing housing for people at the lower end of the market. The housing policy and advisory organisation Threshold wrote the following to the committee:

> The Irish housing system is, above all, dominated by market provision (by private developers) while the non-market components (eg local authorities, housing associations, co-operatives) have been strongly residualised. Market provision increased from 67 percent of the total in 1975 to 90 percent in 2002 while non-market provision declined to only 10 percent over the same period.

Property markets come in two forms
The third characteristic of property markets is that they operate on two levels: they are simultaneously consumer markets and investment markets. In a modern dynamic society some at all income levels will choose to rent, and investors will make property available to them. Property is a suitable vehicle for investment – it endures over time, it is a convenient and secure asset from the point of view of lending institutions, and the rights of both owners and occupiers can be separated under the legal code. Renting is common in the case of commercial property because capital employed in many business activities produces returns in excess of the return or the benefit to be earned from investing in one's own building.

The property investment market is influenced heavily by activity in other investment markets – especially the stock market. Investment markets often reinforce each other and this can have the effect of amplifying cycles, driving prices either too high or too low from an owner-occupier perspective.

It is worth noting that because landed property assets are extensively used as collateral for bank lending, any precipitate government action effecting a sharp and substantial reduction in values might well pose serious difficulties for the banking sector, among others.

Unexpected effects of dual nature In ways such as those described above the market throws up more complex features and activities than the straightforward supply of accommodation might suggest. Solutions to urban problems must take account of the effect of investment capital flowing to the property investment market compared to other investment markets. It is entirely possible to create conditions where too much investment money chases too little investment opportunity in the property market and prices are driven up. It is possible to provoke speculative activity by unsuitable intervention with, for instance, the benign intention of helping people to secure a house, an office or a factory. The Institute of Professional Auctioneers and Valuers was firm in its view about official interventions in the housing market in the past:

> The timing of many interventions was cyclically wrong. They have tended to increase volatility of house prices, and have generated considerable uncertainty. Market forces generally deliver the most desirable outcome and where possible they should be left to operate as freely as possible.

Property markets are essentially local
The fourth characteristic of property markets is that they are essentially local, not national or international: they are very distinct from each other in different geographical locations. National policies can have profoundly differing effects on different local or regional markets.

Price comparisons and substitution are difficult
The fifth characteristic of property markets is that each property is unique, not only because of location but also in terms of physical layout, form, condition and legal title. This makes price comparisons and substitution of one property for another difficult. Solutions which involve applying a convenient administrative formula may fail because every property has the potential to become an exceptional case.

Lack of comparative information Property markets are far from transparent. Information about them is often distorted by rumour, and there is little agreement about the definition of common terms. Jerome Casey, in an analysis published in *Building Industry Bulletin* (July 2003) which he submitted to the committee, provided an insight into the failure of our current data-collection systems. He described the lengths to which one must go – via planning authorities and various agencies including the Land Registry, the Companies' Office, the Valuation Office, the Registry of Deeds –

in order to compile basic information about ownership, permission status, transactions, etc:

> Like most property law, the search process requires punctilious persistence rather than genius. But viewed against the needs of an information society, the process could not be seen as transparent, either for policymakers in housing, or for the general public.

Because statistics about property markets are deficient, research relating to them is poor and predictions and modelling is difficult. Hence government intervention is often poorly targeted and can have unintended effects.

Government policy should aim to increase transparency in the property market by insisting on a simple system for land and title registration and by making transaction prices public. That is the case in many other jurisdictions. Such measures would assist the efficiency of compulsory purchase procedures. They would also assist the process of analysing urban areas by providing basic working data needed to underpin good planning and public policy.

Recommendation

In order to encourage transparency in property markets and research, transaction details should be gathered and published by the state. All lands and titles should be registered by a specified date. Auctioneers and estate agents, who generate, supply and promote market information, should be regulated by either an independent body or the state.

Limited numbers of sellers and buyers

The sixth characteristic of property markets reflects the fact that each particular holding exchanged is unique in terms of the legal title to it, its location and its physical form. It may also be unique in terms of the size of the holding or the large amount of money required to fund its purchase.

Thus in any given case there may be only a very small number of owners and an equally small number of buyers. Indeed the number of individuals involved may be no more than a handful. Specific categories of property may come on the market only infrequently as is the case with agricultural land suitable for development. When such property does come on the market and alternative properties are poor or inadequate as a substitute, or simply limited in availability, the vendor achieves something of the power of a monopolist in dealing with purchasers.

For a market to work efficiently neither sellers nor buyers ought to be able to influence trading unduly. In fact, in the case of property transactions there are often circumstances where this does not apply. It is in the nature of the market that sellers may be able to influence the rate and timing of supply of some categories of property holding. It is also in the nature of the market that in some circumstances there will be only a limited number of possible buyers who have access to the large amounts of capital required.

At some times, particularly when the economy is prospering and there is a ready demand for property, vendors will have the upper hand in the transaction and purchasers will be in the weaker bargaining position of having few options.

Where there are barriers to entering the market to supply serviced and zoned development land, for example, the smooth operation of the market can be inhibited to a point where the normal criteria associated with supply and demand may not apply.

Tax and property
The seventh characteristic of property markets, and particularly house markets, is that they are greatly influenced by national and local tax policies. Ireland's tax system is particularly favourable to the ownership of a principal private residence. In fact Ireland is exceptional in western countries in not having local taxes on residential property to fund local government. This absence of taxes encourages people to store their investment wealth in their homes and it actually keeps prices here higher than they would be if residential property were taxed.

High transaction costs Transaction costs, however, are high. Stamp duty is seen as high, as is VAT. Legal and other professional advice, essential when property rights are transferred, is costly. The Society of Chartered Surveyors took the opportunity in its submission

> … to once again condemn the punitive nine per cent stamp duty on house purchases and trust that with the relative reduction or increased affordability of housing, the rate can be brought down to nominal levels. The high rate of stamp duty inhibits essential mobility within the housing market, such that it is all too common to find single occupiers in family houses.

The Irish Home Builders' Association also referred to transaction costs: 'other government interventions in recent years have increased the price of housing including the increase of VAT to 13.5% and the increase by 50% of the level of stamp duty payable on land transactions'.

Conclusion

Property markets are quite unlike other markets and have characteristics that require special attention. Unfortunately housing, planning and taxation policies have not taken sufficient account of these characteristics, nor of the interaction between planning and urban property markets. It is not surprising that there are deficiencies in our planning system when looked at from an urban perspective, deficiencies that manifest themselves in particularly high development land values.

House prices and development land

Land has little or no intrinsic value above its agricultural value if it cannot be used for a purpose other than an agricultural one. The value of land suitable for development is directly related to the value of the buildings that may be erected on it. The value of those buildings is determined by supply and demand.

Increased demand Increased demand for accommodation arises from increased economic activity and population growth. At first this demand will be met by the occupation of vacant accommodation: those requiring accommodation will bid against each other for the available supply and prices will go up. This will encourage the more efficient use of the existing stock but it will also act as a signal to developers to provide new accommodation.

In any given period the addition of new buildings to the existing stock will be very small in proportion of that stock. The value of new buildings will therefore be influenced to a substantial degree by the stock of existing buildings. Prices will be set primarily by demand for the existing stock and not by the flow of new buildings.

Builders are price takers The decision to develop or not takes as a given the price that can be achieved for the finished product – buildings available for occupation or use. In the housing market builders are price takers and will sell their product at a price determined by the market and not by the value of land and the cost of construction.

The inputs needed to provide buildings comprise the site (the development land), the construction materials, labour, professional expertise, finance, and the enterprise of the developer. All but the first will be in generous supply compared to the supply of land. Consequently most of the increase in the value of property resources will descend to the site. Because of this the value of the site as a factor in production is called a derived demand. Put another way, the value of development land is the residual after all other costs involved in the construction process have been taken into account.

The price of development land

When analysing problems in housing markets or in other property markets, urban economic theory points to two important principles. First, the price of landed property, including housing, is not determined by the cost of production. Second, the value of development land is the result of high property prices not the cause. These are important insights, which allow a better understanding of the problems of urban development.

The Society of Chartered Surveyors in its submission to the committee spoke of house prices as 'fundamentally a function of the balance between supply and demand and the economic capacity of purchasers, coupled with market expectation on interest rate predictions'. William K Nowlan, chartered surveyor and town planner endorsed the view 'that house prices are set by the competitive market process, which regulates supply and demand of completed new buildings, and not by the simple cost of land or by the cost of any other input.' The Construction Industry Federation agreed:

> The value of development land is a residual deriving from the uses to which the land can be put. The price which, for example, a house builder or commercial developer is prepared to pay for a plot of land is the price which remains after labour, materials, overhead and profit are deducted from the estimated selling price of the premises on the developed site.

It must be acknowledged that this is not the perspective of the determination of house prices taken by all in our society. As with many issues in economics there are alternative views and it has been suggested recently that an alternative is the case (see Roche, *Quarterly Economic Commentary*, ESRI, Winter 2003). Also, property developers often argue that the main determinant of high house prices is the cost of materials and labour combined with the high cost of development land. And there have been many calls in recent times for the capping of land values, in the expectation that such a measure will have the effect of reducing the price of houses. The Irish Auctioneers and Valuers' Institute, however, expressed a different view to the committee: 'any capping of the value of land to the landowner will significantly reduce the future supply of building land [because landowners will simply not sell until a future date in the expectation that the capping will be removed] and any consequential reduction in the supply of houses will, inevitably, result in even higher house prices'.

The determination of house prices

The popular perception is that the price of a house is determined by adding the cost of construction to the cost of the site. This is based on what may be called a building-block approach to price determination. It sees the price of houses being driven by the price of land and the costs associated with labour, materials and levies imposed by local authorities. This may have been true in the past, in rural economies where people had access to sites from local farmers.

A combination of statutory land use planning and urbanisation changes the relationship between the cost and the price of houses fundamentally, and the building-block approach outlined above, although widely held, is thought to be incorrect by many professionals practising in the property market and certainly by the majority of those professionals who made submissions to the committee. They are supported in this view by urban economic theory.

With the onset of rigorous planning and urbanisation, people no longer have the option of selecting a site for a relatively small sum from a range of willing farmers. Mostly they must buy either an existing property or a new one situated on land zoned for development. Because planners must prioritise the areas selected for development the demand for housing is forced through zoning to go to particular locations. In this way the supply of development land is constrained compared to a rural, agricultural environment.

It is builders who compete for the available supply of development land in urban areas. This is so because most new homes in urban areas are bought from builders. Builders first determine the price they can expect for the houses they will build. They will look at what is available in the market, much as a purchaser might, and will conclude that their product will sell for a somewhat similar price. (Before pressing ahead, it is worth noting that the comparison is not of like with like – the existing houses upon which it is based are typically supplied with extensive community services as well as physical and social infrastructure.) Then they will have regard to what it will cost them to build, in terms of labour and materials. A simple subtraction of the latter from the former, and taking into account financing costs and margins, will give them the price they can pay for the land.

So the price of development land in urban areas will be derived from competition among builders taking as a given the price at which they can sell their product. Of course getting all this right and doing so on borrowed money is difficult and property development is undoubtedly a risky business in normal times. The Construction Industry Federation noted this risk when it wrote of

the 'lapse from the time land is purchased in a zoned or un-zoned state, through the submission of planning application to the local authority, the appeals process, and the provision of services'. Clearly, however, rapidly increasing house prices provide much cover for even large-scale miscalculations.

It follows from the above that, far from pushing up the price of houses, the price of development land is pulled up by high house prices: the price of the land is a result, not a cause. It also follows that while it may be prudent at times to provide tax or other subsidies in specific locations or for periods of recession, such measures can have the effect of driving up the price of houses and building land. This is the case when there is excess demand for the available stock of accommodation and prices are high.
For example, attempts by government to deal with high house prices by providing subsidies have ultimately had the unintended effect of increasing the value of development land. Many government interventions in the market provide examples of this.

The need to re-conceptualise development land

We need to re-conceptualise landed property if we are to provide a legislative and administrative framework capable of solving problems of urban development. We must move away from an understanding of land and property rooted in a nineteenth-century agricultural economy. Landed property is traded in sophisticated and dynamic markets which, although having their own particular characteristics, still obey the laws of supply and demand – which are difficult to buck. As in other markets, scarce assets attract high prices. The market will ration them efficiently and, if properly regulated, is capable of doing so fairly. Where the market fails, measures need to be adopted that work with the market and do not serve to frustrate it and throw up unintended consequences that make matters worse.

Conclusion

The committee accepts the view of the majority of professional commentators that, in the case of dwellings in urban areas, high house prices are not primarily the result of high development land prices. Instead high development land prices mainly result from high house prices.

Our planning system is framed on an understanding that problems that arise from development are amenable to administrative solutions. Often these 'solutions' have the effect of frustrating if not contradicting market forces. John Crean, a chartered town planner and associate director with Cunnane Stratton Reynolds Town Planning and Landscape Architecture, informed the committee that

> … the difficulties in developing lands cannot simply be presented as the fault of landowners/developers. Given the present legislative framework and the operation of the development plan and planning application system by local authorities, the development of lands will always be difficult to promote when it is accepted that all development proposals must go through an extended gestation period and detailed assessment process that begins long before a planning application is made, this being the case even where appropriate services are available.

Congestion, inadequate infrastructure and a lack of services are the result of our present planning system. The urban form that has developed in Ireland is a product of our planning system. High development land prices originate in our planning system, a system that restricts the amount of zoned and serviced land available to the market in locations desired by people expressing their desires through the market.

W K Nowlan reminded the committee of a view widely shared in the submissions that 'the limitations in supply brought about by the slow delivery of planning decisions and the slow supply of infrastructure by local authorities has inhibited the ability of the development industry to respond to the demand for new houses and buildings and the ensuing scarcity has forced up the price of houses'. The Institution of Engineers of Ireland pressed the same point before the committee in regard to major infrastructural development projects which 'are subjected to a significant planning approval process and most require an environmental impact assessment in accordance with EU directives. The planning process can be a major constraint to timely implementation of infrastructure development ….' The Forfás submission was in agreement that the '… *speed of the planning process* is a key issue that has been identified by the Agencies as an impediment to the effective rollout of economic infrastructure' [Forfás emphasis].

The need for formal land use planning in urban areas

Responding to increases in demand

Only a small proportion of the total property resources in a given urban area will be exchanged in any one year. This mirrors the situation nationally where there are approximately 1.4 million dwellings, of which about 50,000 (or 3.5%) are sold annually. Even allowing an additional figure of 50,000-70,000 units built each year one sees that the vast majority of the stock of accommodation does not come to the market.

Clearly if there is a sustained increase in economic activity all property prices and rents will rise progressively as the available stock of accommodation is rationed among competing users. The market will ensure that the price of the existing stock will be bid up to a level where it will become profitable for developers to provide new accommodation. Developers will redevelop existing property by increasing its accommodation density, and they will build new stock. Increasing competition among them will bid up the price of available sites.

In such manner the price mechanism operates in property markets in much the same way as it does in other markets. Prices and rents send signals to those who own or can develop property that there is a demand for change. The demand will signify a need to change the use of some existing buildings or a need for additional supply – or a combination of both.

It is difficult to estimate with any degree of accuracy the total accommodation that will be needed at any given time in urban areas, not to mention the accommodation needed for particular groups of users. The complexity of urban areas and their dynamism is such that accommodation needs and uses are ever changing. The market can, as we have seen, achieve a reasonably satisfactory allocation of existing urban property among competing users. The economic forces are strong and because property assets are expensive relative to incomes there are strong incentives to develop and accommodate changes in demand patterns.

Nevertheless, because of the inefficiencies inherent in the property market which we alluded to when describing its characteristics, price signals do not work as effectively as in other markets. As a consequence, adjustments to supply and demand will be slow and the indicated solutions may be less than good when viewed from the perspective of the community. It is in the natural order of the market for example that difficulties will occur with supply when demand increases. The market is cyclical, it can deliver booms as prices overshoot on the way up and slumps as they collapse on the way down.

Moreover private sector developers, because they seek to maximise profits, will often neglect the provision of social services and public utilities needed to support development. Also, decisions about the use and development of particular properties will sometimes be made by individual developers without adequate knowledge of what is happening in the market as a whole.

Planning and market deficiencies

Market decisions alone are not, therefore, capable of providing optimum solutions to urban problems. Such decisions, for example,

must be taken against the background of a soundly based projection of future needs. Experience suggests that what is needed to achieve the optimum allocation of land uses in urban areas is a combination of a formal land-use planning system and a market mechanism. Left to themselves markets will result in sub-optimal solutions to urban problems. But, equally, planning alone, without taking into account market conditions and forces, will not produce satisfactory solutions to problems of urban management and development.

Planning helps the market to work in a number of ways. Firstly, some land uses in urban areas can be provided only by the state. Optimum road design and construction for example require the acquisition of particular properties through a process of planning and compulsory purchase. The market, operating alone, cannot normally provide what are generally seen as non-profit-making uses of land, including sewage systems, schools, open spaces and other infrastructure.

Secondly, a system of formal land use planning offers assurance that the types of buildings constructed, how they are built, the uses to which they are put and their compatibility within their locations are subject to control in the interests of the common good. Such planning gives property owners the security of being surrounded by compatible land uses and enhances the value of their properties.

Thirdly, solutions to some urban problems may require a level of co-operation among property owners that can be difficult to achieve because of competing interests, or may be beyond the capacity of individual property owners. Urban dereliction is an example: solutions here often require a capacity and assurance that can only be provided by an overarching authority.

Fourthly, urban property markets are volatile. In fluid economic and social circumstances property developers have great difficulty anticipating, planning and providing for the needs of people and organisations. Property development takes time and this adds to the challenge. Land use planning provides a framework against which developers can judge the likely demand for their product. It also gives investors a degree of security that the value of their investment will be protected from the danger of oversupply.

Getting the balance right is crucial. If planning policies are too restrictive they will protect what is a restricted supply, and the provision of new accommodation will be constrained as a result. Having said that, however, all planning suffers from the deficiency that it is not possible to forecast accurately what will be the circumstances that will apply during the currency of a development plan. Plans must therefore be flexible, depending on the accuracy of the underlying information and the dynamism of the planned environment. Overconfidence in the efficacy of planning and the

absence of necessary flexibility are among the explanations for failures in planning.

Planning must take account of the dynamics of urban property markets. When assisted by an appropriate planning system, these markets can accommodate the complexities of urban areas. The signals about land and property use indicated by changes in property values and rents need to be understood and taken account of by planners, and interpreted as an indication of the desires of people and organisations regarding future use patterns of property in urban areas. Planning should make room for market-driven changes.

Understanding property markets will help to analyse problems associated with high house prices and the price of development land. The increase in value created by granting permission to develop agricultural land for urban use is not inherent in land. It flows from the regulation and control of development and the restriction of rights to develop to particular lands selected on the basis that this will serve the interests of the community as a whole.

Under a system of formal land use planning, development rights are denied to some property owners and are concentrated and enhanced in the case of others under the planning system. If, in addition to this, the amount of land zoned for development is inadequate, the value of the zoned land will be increased by an even greater amount than might be expected. In these circumstances the economic value that flows from development rights and from the provision of infrastructure, if given by way of gift to the owners of zoned development land, distorts the operation of the market. The super profits available to those dealing in this land send a signal to entrepreneurs to involve themselves in the acquisition and holding of zoned development land.

The planning system should not facilitate the distortion of the market in the manner described above. Developers of urban property should rather be competing with each other to meet the needs of those requiring accommodation and should be rewarded for doing this. Competition should be on the basis of innovation in meeting the varied accommodation needs of buyers or on the basis of providing accommodation at the cheapest possible price. The planning system can provide developers with incentives to compete against each other in acquiring the limited supply of land coming to the market, the principal incentive being access to the profits to be made from adding to the supply of urban property.

This analysis points to the critical need to zone and service an adequate amount of development land in order to allow the process of urban development to take place in a way that meets the needs of those seeking accommodation in the market. Just what

is an adequate amount of zoned land is, of course, a matter of judgment. Judgment about this matter should not be based solely on an estimate of the amount of land required to build new accommodation to house anticipated future population growth. That would presume control over the rate at which development land comes to the market during the timeframe of a development plan. The Planning and Development Act 2000 confers no such control: it leaves the rate at which zoned land comes to the market up to the individuals who own the land.

In fact a marginal shortage, resulting say from a landowner deciding not to bring zoned land to the market, can have a disproportionate effect in the market. Such a deficiency in the supply of zoned land to the market will very probably result in a substantial increase in the value of the land that does come to the market. Values may indeed have to lift substantially in order to tempt some reluctant landowners to sell despite valid personal reasons for not doing so.

The solution might appear to be to zone and service much more land than that required to meet forecast development needs. Local authorities are, however, understandably reluctant to do this because the resources available to service land are scarce. Plainly it would be wasteful to provide services to land that may not be developed for a generation.

It makes sense to service only land that is set out for development within the timeframe of the development plan. Scarce resources required to provide infrastructure must be prioritised and used in a cost-efficient way. As a result of this, and bearing in mind that planning authorities have no real control over the rate at which zoned land will come to the market, there may be a perceived shortage of development land. Once there is a perception of shortage, speculators will buy land with the intention of cashing in on anticipated price rises and, having bought it, they are likely to have an incentive to maintain the shortage and keep values up by not developing the land until it suits their interests. This is unlikely to accord with either the needs of the market or the timeframe of the development plan.
Hoarding development land There has been considerable comment on the apparent concentration of the ownership of development land in the hands of relatively few people and it is often proposed that development interests hoard land. The effect of this would be to increase the price of development land.

As against that, it is suggested that developers must maintain a steady supply of land as part of the development process and that they are acting prudently in providing a steady source of development land for their construction labour force. This is a form of integration of the production process that is familiar in other industries and, as in the case of other industries, where anti-trust

measures operate against cartels, measures should similarly be taken to prevent the monopolisation of development land.

'Hoard' is a word with pejorative connotations. Misers hoard from a neurotic fear of the future. Monopolists hoard to secure their monopoly. 'Stockpile' describes the same process without importing the same motives. Some submissions made to the committee suggested that hoarding of development land was common. When pressed, however, those who made the submissions were unable to provide clear evidence of land hoarding in the sense of a deliberate policy of accumulating land holdings and withholding these from the market. Regardless of how one defines 'hoarding' or how common the practice of hoarding may be, resourceful entrepreneurs will take a system as they find it and work it to their advantage. The planning system as operated at present facilitates those with the resources to buy up development land and hold on to it: this, as we have shown, creates a distortion of the market. On the contrary, the planning system should be designed and managed rather to make the market work in the interests of the common good. That can be achieved by ensuring entrepreneurial incentives are available within the system to produce desired outputs – quality accommodation provided by suppliers competing on the basis of efficiency and cost and not on the ability to command and control basic ingredients.

It is evident from the submissions put before the committee that the operation of the planning system has indeed not been sufficiently aligned with the interests of the common good in this way. The streamlining of the planning process and the introduction of additional time-limits on planning authorities, introduced in the Planning and Development Act 2000, will improve efficiencies in the operation of the planning system. The system is now more tailored to ensure that adequate land is zoned for development. It does not however ensure the timely release of development land onto the market; the land zoned as adequate may not be adequate.

Options to buy land A further effect of the planning system that must be considered in this context is the possibility of acquiring options to buy agricultural land which may in the longer term be expected to be zoned for development. Acquiring options is a process whereby a farmer or landowner could be approached and offered a specified cash sum immediately in return for giving to a speculator an option to buy at a price above agricultural land values, such option to exist for a stated number of years.
In line with the committee's position that information about land ownership and transactions should be available to the public, because of the public interest at play, the existence of options should be included in the categories of transactions to be revealed publicly as a measure to achieve transparency in property markets generally (see above page 75).

It may be thought that, if a particular piece of land that is zoned for development and serviced is not brought to the market, the zoning could be changed because of that at the next review of the development plan. In many cases, however, the reasons for zoning the land in the first place will remain valid. These could be proximity to infrastructure, the existence of other nearby housing which, when added to, might create the critical mass for the provision of needed facilities, or some physical constraint on developing alternative lands.

A better solution in the committee's view would be to have a system whereby charges increase during the currency of a development plan. The base rate could be set having regard to the priority attributed in the plan to the urgency of developing particular lands. This could increase to a point where after six years the charges would amount to the difference between development land value and agricultural land value. At that point the owner may be presumed to have chosen to forgo the benefit of having land zoned for development. The local authority concerned could then acquire the lands by compulsory purchase in the interests of the common good.

Recommendations

1 When planning authorities are adopting their development plans they should ensure that sufficient land is zoned to meet the anticipated needs for the duration of the plan. They should anticipate delays in bringing serviced and zoned land to the market.

2 The government should devise a scheme comprising a structure of progressive charges, whereby planning authorities can secure the release of development lands where development is not being actively pursued by the owners or the development land is not being placed on the market by them.

3 The existence of options should be included in the categories of transactions to be revealed publicly as a measure to achieve transparency in property markets generally.

Plainly there is no sense in zoning only sufficient land to meet projected development needs if all of it does not then become available to the market. Zoned and serviced lands close to urban areas where there is a high demand for accommodation and which have been provided with expensive infrastructure are a resource which, if withheld from development, diminish the wealth of the community**.** The reality is that the planning system puts owners of development land in something of a monopoly position. As structured at present, the system gives an economic and monetary

incentive to developers to act against the public interest by timing their disposals to maximise the gain to themselves. This situation is not a flaw thrown up by market economics, it is the way the planning system is allowed to operate.

The zoning decision of the planning authority to concentrate development by confining it to particular lands is the mechanism that creates the primary escalation in land values. Clearly the benefit of this escalation should flow to the community and not exclusively to the small number of people who happen to own the land that is zoned.

What was not understood or appreciated when planning became mandatory under the Local Government Planning and Development Act 1963 was the difference the planning process could cause in relative land values when there are even marginal shortages in the amount of serviced land available or when zoned land does not come to the market for development. Neither was it appreciated that this phenomenon would open the way for intense speculation in development land. This lack of appreciation led to flaws in the 1963 Act. They remain today.

Conclusion

There is a need for a system of formal land use planning designed to manage and regulate the market for property resources in urban areas. Land use planning must be implemented in a way that works with markets and reflects an understanding of the dynamics involved. Otherwise the market signals will be distorted and difficulties of accommodation supply will arise.

Increasing property values, betterment and value capture

The term 'betterment' is often used in discussions and debates about planning. It refers to the increase in the value of landed property owing to planning decisions taken by planning authorities. The Kenny Report (1973) examined the concept (see Appendix 4):

> When a local authority carries out a scheme for sanitary services or builds a road or does other improvements, the land which benefits from these will get a higher price when sold. This increase in price is called 'betterment', an ambiguous term because it is sometimes used to describe the increase in the price caused by the works, sometimes to describe the increase in price brought about by all economic and social forces including planning schemes and sometimes to describe the part of the increase which ought to be recoverable from the owner.

Increases in the value of particular properties result from a variety of influences. Identifying the increase that could be securely attributed to planning decisions is more difficult than might be thought. The principal reasons for increasing property values are: a) generally improving economic conditions; b) the effects of formal land use planning; c) the provision of infrastructure and general urban improvements; d) transport policies; e) tax policies.

a) generally improving economic conditions General improvements in the wealth of society flowing from economic growth will lift the value of all assets including landed property. The Institute of Professional Auctioneers and Valuers referred the committee to 'a fundamental transformation' in the Irish economy over the past decade:

> This transformation was characterised by several factors that created significantly higher demand for housing. These characteristics include strong economic growth, a sharp decline in unemployment, net inward migration, strong growth in disposable incomes, a young demographic profile, high household formation, falling household size, and strong investor demand. Furthermore, the market received a significant structural boost from a once-off decline in interest rates due to EMU entry.

It is inherent in a free market system that general increases in the wealth of a society will result in particular increases in the wealth of individuals – who may or may not have done anything to earn those increases. Where value increases in this way and there is a sale, the state claims a proportion of the increase by way of a capital gains tax (CGT). To take by taxation *all* of the increase in the value of landed property caused by the factors that led to universal increases in the value of assets in the economy generally would be to single out landed property as a particular and exceptional case – and one subject to arbitrarily punitive treatment.

b) formal land use planning A formal system of land use planning will increase the value of particular interests in landed property by restricting development to particular areas or by designating uses to which particular buildings or lands can be put. Changes to zoning, an increase in permitted densities or changes in use categories can profoundly affect the value of properties.

In the past, development land was singled out for particular treatment in Ireland. CGT of sixty per cent was applied to development land following publication of the *Report of the Joint Oireachtas Committee on Building Land* (1985) when the general level of CGT was forty per cent. The 1985 committee report contained the following conclusion:

> There is a wide range of measures available to the state to ensure that costs incurred by local authorities are recovered, that undesirable effects of windfall gain on the market and on the implementation of planning are minimised and that the overall treatment of returns from land are fair and reasonable. Taxation measures (capital gains, corporation and income) are the appropriate method for general treatment of windfall gain but there is a need for improved information and examination to establish their full effectiveness.

The 1985 committee's intention was to capture the windfall gains made from permitting development. It was a recognition that particular windfall gains flowed from planning decisions and should be recouped on behalf of the community. This higher rate of CGT was removed in recent years because it was seen as a blockage to development property being brought to the market.

Whether these windfall gains should be captured in this way or by an alternative method remains a contentious issue. The answer must depend on whether other measures succeed in capturing some of the gains. If no other measures are in place then the argument for applying a higher rate of CGT is strengthened, although one must consider the market effects of applying such a high rate of tax, including the propensity to provoke avoidance. One issue should be clearly understood. Applying a higher rate of CGT is unlikely to bring down the price of development land. By reducing incentives to bring development land to the market the effects are likely to be adverse.

Through planning, development rights are granted to some landed property owners but not to others and decisions are made on the basis of development plans adopted democratically by planning authorities. These plans are devised and implemented in the interests of the common good. It would seem reasonable as well as logical that the community which, through a planning authority, made the development plan and provided the infrastructure and services required for development should get the value of the development rights thereby created. The question posed to the committee by the Dublin Transportation Office seems compelling:

> … is it just, that a landowner as well as being compensated for disturbance, severance and injurious affection should also be compensated at market value for land taken to facilitate a metro line when much of the land value enhancement is derived from the prospective provision of the said line?

The National Roads Authority reinforced the point:

> The profit accruing where land is or is about to be serviced goes to the owner. We would strongly argue that as the

> provision of the services by a public authority is largely responsible for the increase in land price, the community which provided the services has a legitimate claim to the profit.

It is certainly not easy to discern a requirement in the property provisions of the Constitution that a right with economic value created by one body should be transferred as a gift to another who does nothing to create that value. The Green Party shares this view:

> We agree with the general concern that the state should be able, in a fair manner regulated by law, to recover increases in value resulting from zoning or planning decisions. We do not believe that the current constitutional provisions would prevent this.

The most spectacular example of increases in property values owing to planning decisions is of course the zoning of what was formerly agricultural land on the outskirts of rapidly developing cities. In a written submission to the committee from Kilkenny County Council is a statement that 'the zoning of land from agriculture to housing can change value from eight thousand euro an acre to two hundred and fifty thousand euro plus an acre'. In this case the value is not only increased by the expectation of permission to develop but also by the associated expectation that other lands will not be zoned.

Another example is permitting the density of development to increase in particular urban locations where demand for accommodation is high. The Royal Institute of Architects of Ireland touched on this issue when writing about the current priority 'to provide housing in places and at densities which minimise the need for new roads, sewers, water mains, schools etc, in line with the 1999 Department of Environment and Local Government *Residential densities: guidelines to planning authorities'.*

Planning decisions such as zoning agricultural land for development or permitting increased density, as exemplified above, will make some properties more valuable: they will enhance or 'make better' the rights to those properties.

Inevitably, following the introduction of a new development plan, or when lands are rezoned during the currency of a plan, questions will arise as to whether those who gain from the planning process by having the value of their lands increased should benefit in this way. Many feel that this aspect of betterment should not accrue to individual property owners and that the gains should be passed to the community at large. This view sees that the grant of permission creates the development value and transfers it to the landowner. This is a form of betterment and should be recouped, although

quantifying it and separating it out from other causes of increases in value presents difficulties.

c) infrastructure The provision of service infrastructure is part of the process that transforms agricultural land into development land by allowing access and by providing drainage, sewage, water and other services. Public authorities provide much of the required infrastructure and such provision increases the value of the land. The Society of Chartered Surveyors reminded the committee that 'in practical terms, planning authorities are the only bodies in a position to provide the bulk of infrastructural services'. The Society continued as follows:

> The value of a location, and the land within it, is socially and economically created. Infrastructure, broadly defined, is a major component of that enhancement and historically has been paid for by the taxpayer. Therefore, the Society recognises the vital and valuable contributions of publicly provided services to the development process, and acknowledges that this increased value should be recovered for the community at large.
>
> However, we are of the view that taxation has its limitations and tends to inhibit the supply of land coming to the open market and encourages ever more complex tax avoidance schemes. We have long been of the view that the recovery of the true added value of infrastructural schemes is the best, most efficient and fairest, by means of statutory levies, way of recovering that gain for the community.

Apart from services provided directly to individual properties, social infrastructure provided to the surrounding area – we mean such things as schools, shops, parks and libraries – improve the quality of life generally and are reflected in increased property values. These are often not profitable to supply and are generally provided by non-market means, although William K Nowlan demonstrated in his submission to the committee that 'the pricing in of the cost of *all* social infrastructure is not a novel concept':

> For example if one looks at the commercial new towns that have been developed in the USA one will find that the developers of those new towns automatically paid for all infrastructure associated with their comprehensive developments and not just for the piped infrastructure which is traditionally provided by Irish local authorities.
>
> I believe that if a levy scheme were introduced that took into account the downstream demand and cost of additional schools, hospitals, transport etc, this would result in a significant element of the windfall gain or betterment, now

> being enjoyed by individual landowners, being available for investment in the required facilities.

d) transport The provision of new transport facilities has a marked effect on property values. Enhanced access increases property values in the areas served and it usually also results in substantial increases in the value of properties immediately adjoining nodal points. The Dublin Transportation Office wrote about this:

> Paradoxically, the government or its agents are often obliged to compensate a landowner for elements of value that the government has created by re-zoning and/or the provision of infrastructure. In addition, the value of the retained land may also be significantly enhanced when the scheme underlying the compulsory acquisition is implemented, for example the provision of a metro often leads to significant land value enhancement in close proximity to the station. Such financial benefits accrue to the landowner.

It has long been recognised that the introduction of transportation facilities increases the value of properties in the areas served. In the case of some favourably located properties the increase in value is very significant and can unquestionably be attributed to a particular scheme. Often, however, the increase in value is difficult to quantify precisely. Consequently devising a scheme to capture the value created, or the 'betterment' conferred on individual properties, has proved difficult if not impossible.

Often the lands compulsorily acquired for such schemes include sufficient adjoining lands to allow the public some recoupment of the capital costs by enabling the planning authority to dispose of the surplus property with the benefit of the development potential created by the scheme.

In the USA the process of compulsory acquisition for urban improvements is known as condemnation. 'Excess condemnation' was used as a means of recovering some of the benefits created by urban improvements undertaken by public authorities and utility companies. It gave public authorities powers to purchase lands in a defined area adjoining the lands taken for the purpose of the improvements with the object of securing by subsequent sale the benefit or the increase in value brought about by the improvement.

Recoupment in this form was practised during the nineteenth century in the UK when new streets were constructed or existing streets were improved or widened by local authorities. It was recognised that in those cases, and in the absence of recoupment measures, the benefit of the increases in value arising from such improvement would go to the adjoining landowners and the cost would be borne solely by the promoter. Recoupment was seen as a

means of avoiding a situation arising where all bore the cost of improvements but the benefits were disproportionately distributed.

e) taxation Finally, measures which exempt categories of property from taxation can increase their value. Many tax breaks are aimed at facilitating development. In the past, and particularly in difficult economic circumstances, when the value of property was low, the cost of construction and development often exceeded the market value of the completed development. To maintain employment in the construction industry and to facilitate development, the tax system may be used to increase the value of property and raise it above the threshold of construction cost, thereby making development profitable. Even in favourable economic times, in marginal areas and in parts of urban areas where there is dereliction or where the market is reluctant to supply sufficient accommodation, targeted tax breaks can make the difference between profitable and non-profitable development.

Where the value of a property exceeds the costs of providing it however, development will take place and the price of development sites and land will increase. Hence it may be appreciated that the effect of tax incentives in these circumstances may be to increase the value of development land. Tax measures, therefore, should be applied only where the consequences of doing so have been assessed and quantified.

Conclusion

The committee supports the need for a greater recognition of the necessity to consider the impact of taxation policies on land use planning and the need for greater research into the negative effects of particular measures.

Recouping betterment

The committee is agreed that the community should recoup the increase in the value of land arising from the provision of public infrastructure and services.

The most radical proposal for securing betterment for the community presented to the committee was the implementation of the central recommendation of the *Report of the Committee on the Price of Building Land* (Kenny Report 1973). That recommendation sought to control the price of building land coming to the market and secure for the benefit of the community all or a substantial part of the increase in the value of land attributable to the operations of public authorities in providing physical infrastructure. In essence this scheme (described in the Kenny Report as the Designated Area Scheme) allowed the planning authorities to

acquire development land at existing use value plus a percentage of that value (25%) and to dispose of the land to developers – at a price offered by the free market – or use it for their own purposes. In this way the planning authorities would capture betterment created by the provision of physical infrastructure, which it could put to the provision of services including social and affordable housing and physical/social infrastructure. (See Appendix 4 for extract from the Kenny Report.)

In their joint submission to the committee the National Roads Authority and the Railway Procurement Agency (Luas) proposed the implementation of the Kenny Report:

> Our fundamental submission is that the committee should act on the Kenny Report, and by so doing the Oireachtas can enact legislative measures which can provide for *inter alia* compulsory purchase, infrastructural development and land use development which will have a *new, clear* and *unambiguous constitutional* underpinning.

The submission from Forfás also favoured Kenny.

> The normal principle for compensation in litigation is to put a party back into the position in which they were prior to the events giving rise to the litigation taking place. We therefore recommend that the enforced procurement of land should be at *prices based upon a fair-value rather than a speculative-value assessment*. This would limit hedging and restrain the excessive rate of land price growth witnessed in recent years.
>
> The problem of highly inflated land costs was highlighted by the Kenny Report in 1973. It recommended that development land be purchased at a rate no more than 25% greater than its existing use value. In such an instance, 'compensation' might not be equal to 'market value' because it need not include 'hope value'. The *Dreher* case (*Dreher v Irish Land Commission*, 1984) later upheld the view that compensation need not be fixed at market value, albeit that this was not the central thrust of this particular judgement.

The principal change proposed to the committee by CORI also reflected a Kenny-type solution. CORI recommended 'the introduction of a law confining the re-zoning of land to those lands in the ownership of local authorities':

> Operationally, this legislative change would require local authorities to first purchase land (either voluntarily or compulsorily) before then proceeding to re-zone it. Taking the example of land being re-zoned from agricultural use to development/housing use the process would involve a local

> authority purchasing the land at agricultural prices plus a small margin for the owner. The re-zoning would then occur while the land was in local authority ownership and so the windfall gain on the land's value would be internalised to the local authority. The land would then be sold on to the developing agent.
>
> Simply, this change would eliminate speculation and ensure that all windfall gains resulting from re-zoning would be retained by the local authority. CORI Justice Commission believes that the profit from this process should then be targeted on addressing the ongoing social housing problems being experienced in Ireland.

We have already noted that the Kenny scheme would not require a constitutional change (see above Chapter 1, page 43). This removes one of the major fears prevalent in the 1970s about introducing the scheme. The Designated Area Scheme is more practicable than the ambitious national scheme proposed in the Uthwatt Report in Britain in the 1940s which had a considerable influence on the Kenny committee. The Uthwatt committee, in an attempt to grapple with the problems of compensation and betterment, recommended that the development rights in all land outside built-up areas should, on payment of fair compensation, become vested in the state. This proposed nationalisation of development rights subsequently failed the test of practicability and was abandoned. (For a summary of legislative solutions to the problem of recouping betterment proposed in the United Kingdom, including the landmark Uthwatt Report, see Appendix 5)

Because of the understandings of Articles 40.3.2° and 43 that prevailed in the 1970s Kenny took a much narrower view of the discretion available to the state in recovering the value created by decisions of the state – the Kenny committee believed that only those areas could be designated where the state had provided, or was about to provide, physical infrastructure. Kenny excluded from designation areas where value had increased solely due to decisions of planning authorities in regard to zoning. This exclusion flowed from a belief that it would be repugnant to the Constitution to include such lands. Its particularity fostered the impression that the scheme was complex and impractical. Our analysis in Chapter 1 shows that the state has a wider discretion in these matters.

The committee's analysis of the dynamics of the market in Chapter 2 shows that betterment proceeds from three sources: 1) zoning, 2) physical infrastructure and 3) social infrastructure. The committee takes the view, in contrast to Kenny, that all these forms of betterment should be recovered for the benefit of the community. It believes that a Kenny-type mechanism modified in the light of current constitutional development and supplemented by the policy

instruments that have since been developed to recover betterment – particularly under the influence of the Joint Committee on Building Land (1985) – would best achieve this.

The committee sees a modified Kenny-type mechanism operating a) to control the price of development land coming to the market and b) to recover betterment.

Control of the price of development land coming to the market
The committee's analysis shows that, as it operates at present, the planning system increases – sometimes vastly so – the value of land that has been zoned for development. The price per acre that such land commands may give the impression that the cost of building sites is a major contributor to the rise in the cost of houses. However, the density of housing in urban areas tends to generate a situation where the site cost accounts for a relatively small percentage of the asking price of the house. Nonetheless, because the number of people who own development land is relatively small, the planning decision of the community creates windfall profits for them. As we have seen, it leads or is likely to lead to land hoarding and the taking up of options, conditions that distort the market and lead to the virtual exclusion of new entrants – usually a potent source of competition in open markets.

The committee believes that a Kenny-type mechanism would allow the community to remove these sources of distortion in the market. By controlling the price of development land in urban areas as it comes on the development market, the mechanism can be expected to have a similar influence on the price of development land in rural areas.

The recovery of betterment
The committee's analysis also shows that rises in the price of houses essentially derive from the interplay of supply and demand. In a buoyant market this leads to high, and sometimes very high, profit margins for sellers. These profits are further inflated if the state fails to recover the costs it incurs in providing both physical and social infrastructure – that is to say if it fails to recover the betterment the community has created.

A Kenny-type mechanism would operate effectively and efficiently in the recovery of betterment, and do so in a way that allows free play to the market. It would allow the state to plan its varied and necessary services – physical infrastructure, schools, hospitals, libraries, social and affordable housing – on the basis of a fixed price for, and an accessible supply of, development land coming to the market. It would allow the local authority to engage private productive resources on a competitive basis to provide its physical and social infrastructure needs. It could supply the development land needs of public organisations engaged in strategic infrastructural programmes on the basis of what it itself paid to

acquire the land. It could supply the development land needs of private developers, which are based on the local area development plan, on the basis of open market competition. In a rising market this would aim to recover for the benefit of the community the cost of the land and the betterment.

The treatment of non-designated areas
As we have suggested, the control of the price of development land in the designated areas would operate with dampening effect on the price of land in rural areas. The recoupment of betterment in those areas could be achieved through such measures as

- development charges/levies. (These may also be known as impact fees)
- planning gain. Planning gain enables local authorities and developers to enter into agreements, as part of the grant of planning permission, covering the provision of infrastructure and services, including social infrastructure such as schools. Agreements under Part V of the 2000 Act are an example of planning gain
- taxation, this could vary from taxing the gains from increases in value to an annual site value tax.

Some of these measures are already operating to recover betterment in both urban and rural areas.

The Kenny-type solution would create the prospect of a better balance being established between the rights of individual owners and the common good. The Kenny Report envisaged that in order to secure and maintain the balance an independent referee was needed. It proposed that a new jurisdiction should be conferred on the High Court to secure the fair operation of the scheme. The committee's analysis established that this function need not necessarily be one for the judiciary but in view of the concerns that could be anticipated as a result of the new powers conferred on local authorities it recommends that it should be.

The committee is aware that, even if the constitutional issue is settled, certain practical concerns about the Kenny proposal have been voiced. The resolution of these issues require rigorous analysis of the kind being carried out by the National Economic and Social Council.

In little more than a decade following the Kenny Report the government established the Joint Committee on Building Land (JCBL) and charged it with the task of considering and making recommendations with regard to legislative and other measures dealing with the supply and cost of building land. Its report, entitled the *Report of the Joint Committee on Building Land*, was published in 1985. The JCBL was established following a period of increasing

land prices and growing concern over the twin issues of supply and cost. It established that the 'typical' price of an undeveloped site in Dublin rose by 340% from 1971 to 1983 and over the same period, the average price of a new house increased by 530%.

The JCBL concluded that failings existed in the urban land market arising from the holding of land by public bodies and the private sector and for other reasons arising from the operation of the planning system. A number of practical recommendations were made, aimed at developing policy to ensure the effective operation of the land market. Policy proposed included measures to guide, regulate and supplement market behaviour.

The JCBL formed the view that a substantial part of the increase in land values should be acquired by the community, subject to minimising any consequential effects on supply, availability and price. It did not however favour implementation of the recommendations of the Kenny Report and considered that there were alternative, more effective ways of dealing with land problems. Its view was that

- development levies were the most appropriate method for recovering costs of services
- the recommendations made in the report would substantially reduce distortions in the market
- taxation was the most appropriate method of recoupment of gains from increases in land values.

As we have seen, a special higher rate of capital gains tax was introduced on foot of the JCBL report but was subsequently reduced to the common lower level because it was having the effect of reducing the amount of development land being brought to the market.

Following consideration of the policy instruments designed to recover betterment recommended by the Kenny Report, the JCBL and the submissions, the committee makes the following recommendation.

Recommendation

The community should recoup the increase in the value of land arising from planning decisions and from the provision of physical and social infrastructure.

The major recommendation of the Kenny Report (the Designated Area Scheme) is the most secure scheme both for capturing betterment for the community and for controlling the price of building land particularly in regard to social and affordable houses in urban areas. This should be re-examined with a view to implementation following such modifications as are necessary or

desirable in the light of experience since its publication. Betterment in non-designated areas should be recovered through the instruments listed below.

If the Kenny scheme is not proceeded with the committee is aware that there are a number of different mechanisms which, combined, could recover betterment in both urban and rural areas:

- development charges/levies. (These may also be known as impact fees)
- planning gain. Planning gain enables local authorities and developers to enter into agreements, as part of the grant of planning permission, which will require the provision of infrastructure and services, including social infrastructure such as schools. Agreements under Part V of the 2000 Act are an example of planning gain
- taxation, this could vary from taxing the gains from increases in value to an annual site value tax
- compulsory acquisition of land at existing use value in specified locations to provide for social and affordable housing and other uses related to the public good.

Some of these measures are already being employed. However they do not operate to control the price of building land.

The special cases of social and affordable housing

There are serious and difficult questions surrounding the constitutional status of rights to housing. Whatever about these questions one thing is certain, the provision of shelter is a prerequisite of human existence.

The question of homelessness and its causes are complex and may not require simply an accommodation response. In the more simple case of meeting a requirement of a suitable place to live, the questions of affordability and access to suitable housing for those of limited means must be considered. In its written submission to the committee the Chartered Institute of Building expressed the view that

> … citizens should, at the very least, be afforded adequate standard affordable housing accommodation that reflects standards appropriate to the twenty-first century and not 'stop-gap' temporary or semi-permanent accommodation in inappropriate concentrations or locations.

CORI Justice Commission in its written submission to the committee presented the following analysis of current social housing needs.

> According to the *Housing Statistics Bulletin* (September 2002) from the Department of the Environment and Local Government, on 28 March 2002 there was a total of 48,413 households on local authority housing waiting lists. This figure represents a growth rate of 76.5 percent since 1996, and indicates that about 130,000 people are in need of accommodation.
>
> Concurrent with this growth in waiting lists has been minimal growth in the provision of local authority social housing. Since 1996 the overall stock has increased by only 4,395 units or 4.47 percent. It is little surprise, therefore, that local authority waiting lists are increasing substantially.

The Irish Council for Social Housing (ICSH) represents over 200 non-profit, voluntary and other social housing organisations that provide over 15,000 units of rented accommodation to individuals and families on low incomes, elderly persons, homeless and vulnerable persons, and people with disabilities. According to its written submission to the committee ICSH members 'provide 1 in 4 of all new social rented housing and in 2002 completed 1,360 new social rented homes'. [The figure for 2003 is about 1,750 homes]. The submission continues:

> Housing associations work in partnership with local authorities and in the majority of cases housing associations house people from the local authorities' waiting lists. These individuals or households have been deemed by local authorities as in need of social rented housing …. [The housing associations] are now permitted under the provisions of the Planning and Development (Amendment) Act 2002 to provide affordable housing and a new tenure known as equity-sharing. Both of these (affordable and equity-shared housing) will now allow housing associations to provide housing for marginal home-owners and households who cannot afford a full mortgage. As housing associations will be able to provide housing for a wide range of socio-economic households it should also mean that housing association developments will become more socially integrated.
>
> In addition, the *Programme for Government* includes the commitment that the government will be committed to assist the voluntary and co-operative sector to complete up to 4,000 units per year during the period of the National Development Plan. In order to achieve this government target, or make progress in achieving it, there is a need for a sufficient amount of residential land to be made available to housing associations.

The ICSH points out in its submission that in the 1980s and 1990s housing associations were able to source a significant amount of land/buildings, at below the market value or in some cases at no

cost, from religious institutions for new housing projects. However, by the year 2000 this source had 'dried up to a large extent'. Additionally, rural-based housing associations were able to acquire land for social housing from community councils or other local community organisations, in some cases at below the market value, another source which is no longer available because community land banks have been severely reduced. Also, since the late 1990s, 'the number of low-cost (subsidised sites) provided by local authorities to housing associations for social housing projects has fallen dramatically'. In recent years housing associations have had to rely on the open market for the acquisition of sites and, because of limited resources, this has meant that they are unable to buy land in certain locations: 'many of the sites acquired by housing associations on the open market have been in locations outside the main urban areas or in less sought-after areas'.

The provisions of the Planning and Development Act 2000 have been a welcome development for the ICSH. Housing associations are now working in partnership with local authorities and private developers to provide social and affordable housing developments under Part V of the Act, under which the land cost element has been reduced to existing use value. However, because of the massive inflation in house prices over the past six years a significant amount of the funding provided by government for increased social housing programmes is being absorbed in increased land costs. Bearing this in mind the Irish Council for Social Housing in its written submission to the committee requested the committee to address the issue of land costs in order to find some means of reducing or, at the very least, stabilising the cost of social rented housing. It recommended that in the case of compulsory purchase orders 'public bodies should not have to pay the full market value of the land acquired especially as the increase in value of land may have largely resulted from the action of public bodies through re-zoning or the provision of infrastructure'.

In providing accommodation directly to those who cannot participate in the market, care must be taken to ensure that such accommodation is provided in addition to the market-supplied accommodation. Also, such direct provision would require extra resources to be applied to zone and service the additional land. If this is not done then all that will be achieved will be an allocation of some housing resources – that would have been supplied in any event – by means of an administrative system. Administrative allocation which is not additional to normal market supply would have the unintended effect of reducing supply to the market, which could affect prices. Also it must be recognised that the availability of such accommodation at what would in effect be subsidised prices would increase demand for such accommodation and have the unintended effect of considerably lengthening local authority waiting lists. Hence in responding to the problem of providing accommodation at the bottom of the market

one could create the impression that the problem is growing. This issue was covered in the written submission to the committee by the Irish Home Builders Association.

> We would urge that local authorities identify lands in their development plans that would be reserved for social and affordable housing in particular. It has been the long-held view of the Irish Home Builders Association, as supported by the *Department of the Environment and Local Government Guidelines on Site Selection for Social Housing*, that such an approach would enable residential areas to be planned in a socially inclusive manner and would act as a control on the value of any such zoned lands. Accordingly, the value of these lands would enable a greater supply of affordable housing to be brought to the market without influence from external market and competitive forces.

At some basic level the provision of a certain amount of social housing for those who cannot provide accommodation because of limited means should be seen as part of the basic supports of a civilised society. *This should be seen as part of the infrastructure needed for society to operate and should be provided and funded in the same way as other basic infrastructure.*

Planning authorities are obliged to consider housing needs as part of the planning process and social housing needs must be allowed for. Inevitably the question of funding arises. If it is accepted that social housing is part of the infrastructure to be provided by local authorities it should be funded in the same way. This argues for the inclusion of social housing under the definition of 'public infrastructure and facilities' in section 48 of the Planning and Development Act 2000. This would enable local authorities to include the cost of providing the planned supply of social housing in the scheme for determining the amount of development levies.

As noted earlier in this report, Part V of the Planning and Development Act 2000 represents an innovative and radical measure aimed at providing social and affordable housing. It can provide affordable housing in areas where market conditions drive prices above the means of those who could afford to buy elsewhere but may have good reason, employment or social, to live in a particular area.

Still at the early stages of implementation, the measure should be the subject of continued monitoring. In particular, it is important that local authorities do not lose control over site selection for social housing under the provision introduced in the Planning and Development (Amendment) Act 2002, whereby a developer can provide sites or land in an alternative location in lieu of ceding 20% of the land, sites or housing units comprising a development.

Conclusion

In free market conditions it is entirely to be expected that a boom will magnetically attract all the production resources into satisfying the market demand. Our analysis, however, shows that social and affordable housing are special cases that must be treated by special interventions. The committee was impressed by the clarity with which a number of organisations – Irish Council for Civil Liberties, CORI, Threshold, Irish Council for Social Housing, Simon, Focus Ireland, Irish Traveller Movement – presented the level of need that exists and the creativity and energy with which they formulated solutions.

Recommendations

1 Section 48 of the Planning and Development Act 2000 should be amended to include social housing under the definition of 'public infrastructure and facilities'.

2 Local authorities should identify lands in their development plans reserved for social and affordable housing in order a) to ensure that a greater supply of social and affordable housing is made available without influence from external market and competitive forces b) to enable residential areas to be planned in a socially-inclusive manner and c) to control the cost of zoned lands designated for the provision of social and affordable housing.

3 In the case of compulsory purchase orders relating to the provision of social and affordable housing, public bodies should not have to pay the full market value of the land acquired, especially because the increase in the value of the land will have largely resulted from the action of public bodies through re-zoning or the provision of infrastructure.

4 If the committee's recommendation in relation to the implementation of the Kenny Report is adopted the objectives for social and affordable housing can be more readily achieved.

Chapter 3

Managing the planning system

The planning system is the set of laws, processes and agencies through which the state acts on the market. The committee acknowledges that a considerable amount has been achieved by the construction and property industries and the planning system in delivering infrastructure and housing resources in recent years. The creation of up to 70,000 housing units in 2003 alone is a phenomenal achievement in international terms. Nonetheless, submissions to the committee contained a wide range of criticisms in regard to the management of the planning system. A representative selection of these follows.

The Construction Industry Federation advised the committee that

> critical shortages in terms of water, sewerage and road networks, which persist throughout the country, are limiting the pace with which zoned residential land can be developed. Local authorities must, therefore, utilise existing mechanisms to increase the supply of zoned and serviced land for housing in order to meet the levels of demand projected in their own housing strategies and development plans.

The Chartered Institute of Building expressed itself

> … opposed to blanket indiscriminate zoning categories, without regard to the appropriateness of these zoning categories and the negative impact on amenities and services in these areas. In built-up areas in the Dublin region many high amenity areas are under constant attack from the very local authorities who are overturning their own county development plans and building on these with impunity. Where public bodies are property owners they should recognise that they are mere custodians and should respect the right to enjoyment of amenities by all sections of the community irrespective of whether the amenity is in public or private ownership. We contend that properties adversely affected by insensitive decisions by local authorities should be the subject of an independent third-party appeal system.

The town planners Cunnane Stratton Reynolds wrote that 'the development of large land holdings are often made slow, difficult and tortuous as a result of the established planning system and the failure of local authorities to use measures to enable the swift development of key lands'.

Dublin 15 Community Council called for a fresh initiative

> to bring the spiralling cost of development land under control and to de-politicise the land zoning process. The opportunity to make excessive profits from land re-zoning must be minimised. What we propose is the establishment of a National Land Bank Management Agency. This national agency will be responsible for
>
> - implementation of the National Spatial Strategy
> - implementation of the Strategic Planning Guidelines for the Greater Dublin Area
> - implementation of future government policy/initiatives that involve planning and development
> - the review and delivery of county and city development plans.

Forfás in its submission pointed to important benefits which could be realised by the following:

> *Codifying and/or reducing timescales for the handling of planning and development applications*
> - Introduction of a *fixed period for lawyers, valuers and arbitration boards* to assess land compensation awards following the example of Spain, where mandatory deadlines for the negotiations of CPOs are set.
> - Lower *public display/statutory consultation periods* from ten weeks for development plans and facilitate greater public consultation during these periods, following the example of other countries such as Denmark.
> - A *fast-track system for strategic national projects* (for example motorways, key roads etc) that are key to achieving national policy objectives (e.g. National Spatial Strategy). Lengthy planning procedures and waiting times act as a disincentive to investment. For planning purposes, such projects should be ranked and prioritised rather than be subject to the orderly queue approach that persists at present. It may also be appropriate for An Bord Pleanála to establish separate divisions for public and private planning applications in order to fast-track projects of significant public value.
> - Review of *Environmental Impact Statements* by An Bord Pleanála should be within the *statutory timing guidelines*.
> - The current 18 week *time limit* for decisions by An Bord Pleanála should be *mandatory*, rather than recommended.
>
> *Streamlining and defining stages and decision-making mechanisms*
> Under the above heading consideration could be given *inter alia* to the inclusion of '*public values' in arbitration cases*

where issues arise between infrastructure projects and national monuments. The National Monuments Act 1994 allows the minister (as final arbitrator) to adjudicate only on a project's archaeological merits. It should be possible to balance archaeological and nature conservation interests with other interests such as reasons of overriding national or regional importance including social and economic reasons, where appropriate.

Redefining the roles and numbers of participant stakeholders

- Review the rationale for allowing *third parties appeal* on the basis of 'point of law of exceptional public importance'. While the right to broad rights of appeal under the Aarhus accords are recognised, we believe a more robust assessment of the merits of cases and the motivation behind applications for leave for judicial review would be beneficial. While the agencies accept that testing the grounds for *locus standi* may lead to greater delays in the legal process, we believe that consideration should be given to requiring non-government organisations (NGOs) to satisfy certain requirements before being accorded this status to challenge environmental authorisations. Considerations should also be given to requiring An Bord Pleanála to examine the merits of any appeal, within two to three weeks, when it can be objectively demonstrated that this appeal is being brought for frivolous, trivial or vexations reasons (e.g. to delay a project) or where the appellant has a history of opposition to a particular development.
- *Property ownership should not extend to all land beneath the surface.* Land beneath a depth of ten metres or more, should be deemed to fall under public ownership. This would facilitate the building of infrastructural projects which involve tunnelling.
- Each *national infrastructure project should be made the responsibility of a single government department or agency* and that entity should take the role of national project manager for the delivery of the infrastructure. Consideration should be given to the feasibility of increasing the NRA's direct involvement in road project planning, design and construction and the implications of such a change should be determined.

The Irish Homebuilders' Association pointed out to the committee that

> … despite additional resources being given to it, An Bord Pleanála has also been given many additional responsibilities under the Planning and Development Act 2000. These include additional referrals under Part V in relation to the

> provision of social and affordable housing as well as the consideration of compulsory purchase orders made by local authorities.
>
> We are very concerned that these new additional requirements will place the Board's resources under increasing pressure and will impact on its ability to meet the statutory four-month objective period for determining planning appeals. It is clear that the majority of large developments are appealed to the Board and that significant overruns occur that mean final decisions are often delayed well beyond the objective period.

The Irish Planning Institute recommended a number of improvements in relation to the zoning of land which could 'ensure greater transparency and accountability, and reduce the public perception of unfairness in the system':

> Firstly, directions given by elected members under section 11 (4) (d) of the Planning and Development Act 2000 which relate to what shall be included in the managers draft development plan should *not* be given in respect of zoning of land. At this *pre draft* stage in the development plan preparation process neither the local authority planners nor the manager has yet recommended a strategy for the proper planning and sustainable development of the area in question. Therefore it is premature for elected members to give directions in relation to the zoning of specific landholdings. At the *draft* and *amended draft* stages of the development plan process elected members should not be permitted to give directions in relation to the zoning of particular land holdings unless the direction is in response to a submission made in respect of same. Any direction must include reasons to explain how the direction accords with the proper planning and sustainable development of the area.
>
> Secondly, where a county plan (or indeed a local area plan) is being reviewed, and changes are sought in zoning or in policies for development, all submissions to the draft plan or amended draft plan (whether they be from landowners, builders or residents and community groups) should be heard in the first instance, in public open session, by an independent inspector. This inspector would have to have regard to the views of the local authority planners on these submissions. This inspector, who might be appointed by the department or by An Bord Pleanála, would then report to the councillors, in a written public report, on the proposed re-zoning or other changes and on their acceptability from the point of view of proper planning and sustainable development. To preserve local democracy, it would still be

for the councillors to make the plan, but they should be required to state their reasons for doing so, and in a public forum. If they went against this outside, objective and public advice, the electorate would be entitled to draw their own conclusions.

Thirdly, to avoid the problems which have become evident, where zoning decisions are made by a simple majority of councillors who happen to be there on the day of the vote, all re-zonings – all changes in zoning in plans – would have to obtain a three-quarters majority of the council in order to pass. (This already applies to material contraventions, so members are already used to the process.) It would ensure that only those re-zonings with a wide measure of political support would get through, and of course would make any future attempts to 'influence' such decisions much more difficult.

The Society of Chartered Surveyors added the following: 'whilst acknowledging the importance of public participation in such matters, the Society is of the view that the promotion of such zonings and re-zonings should only be at the instigation of professional planners, subject to the overriding confirmation of elected representatives'.

The above criticisms relate to shortages in zoned land, delays in bringing zoned land to the market, deficiencies in the employment of zoning categories, failures in transparency and accountability, slowness in handling planning applications, and under-resourcing within agencies. In order that these and other criticisms may be evaluated it is necessary to understand how the planning system came into being, how it has developed, what is being demanded of it, and what resources it commands.

Origins of the planning system in Ireland

The adoption of the Town and Regional Planning Acts 1934-39 introduced physical planning to Ireland. Interestingly, one of the reasons given for the hesitancy of the government to enact legislation in regard to planning was the potential for compensation claims which might arise. Indeed, one of the eight parts of the 1934 Act was entitled 'Compensation and Payment for Betterment in Respect of Planning Schemes'. The key mechanism of the Acts whereby planning was to be promoted was via plans referred to as 'Planning Schemes', which would be prepared by planning authorities. The adoption of the Acts by planning authorities was discretionary and in the depressed economic climate of the time, when limited development was occurring, it was not surprising that reaction to the legislation was lukewarm. As a result of this lack of

enthusiasm, combined with the difficulty of the procedures involved, only one Planning Scheme was prepared (which was not subsequently adopted). By 1952, it is estimated that just seventeen planning authorities had adopted the Acts.[1] The 1934 Act contained a provision whereby planning authorities could recoup from property owners three-quarters of the increase in value brought about by the provision of a Planning Scheme or by the carrying out by the authority of works following on from a provision of a Scheme. A safeguard was provided in the event that the property owner did not carry out development.

The Planning and Development Acts

The Planning and Development Act 1963
What was to become the cornerstone of the Irish planning system, the Local Government Planning and Development Act 1963 (the 1963 Act) came into operation on 1 October 1964. This Act was amended over the period 1976-1999 by eight planning Acts which dealt with weaknesses in the system as they arose over time. The 1963 Act differed fundamentally from its predecessors in that planning now became a mandatory function of the eighty-seven planning authorities established to carry out planning functions. Planning authorities were required to prepare development plans for their areas. Whereas previously owners of land and property could develop their holdings as they saw fit, subject to legal obligations regarding neighbouring properties and matters covered by bye-laws, the Act made development subject to control. Planning permission was now required for development. Development would only be granted planning permission by planning authorities if it was consistent with the development plan for the area. A right of appeal to the minister against an adverse planning decision was available.

Given the rights to private property contained in *Bunreacht na hÉireann* it is no surprise that Part VI of the Act dealt with the issue of compensation. The Act provided that if the value of a person's land was reduced by reason of an adverse planning decision, compensation could be payable based on an amount which represented the reduction in the value of the land. Compensation would not be payable, however, in the case of a range of circumstances, for example refusal of permission on grounds of traffic safety, public health, injury to amenities of nearby properties. The Act was the subject of a constitutional challenge taken in March 1968 by the Central Dublin Development Association.[2] The challenge failed, largely because of the provisions for compensation provided for in the Act.

1 Nowlan, K. I., 'The Evolution of Irish Planning 1934-1964', in Bannon, M. (ed) (1989), *Planning: the Irish Experience, 1920-1988*, Dublin, Wolfhound.
2 *Central Dublin Development Association v Attorney General*, 109 1LTR 69.

Although the Act included provisions for compensation, no direct provision for betterment was made. It did however allow planning authorities to impose conditions on a grant of planning permission, requiring financial contributions towards expenditure on public services (including the provision of open space) which facilitated a development.

The Irish planning system adopted in 1963 differed from that in Britain in one key aspect – third parties were permitted to appeal decisions on planning applications. This right of appeal was made to the minister until the establishment of An Bord Pleanála in 1976.

The Local Government Planning and Development Act 1990
The Local Government (Planning and Development) Act 1990 (the 1990 Act) addressed the issue of compensation resulting from an adverse planning decision. The 1963 Act sought to achieve a balance between the need to control development for the good of the community and the requirement to compensate an individual who had suffered loss as a consequence of an adverse planning decision. The perception however arose in the 1980s that the desired balance was not being achieved. Growing concern arose over the amounts of compensation being sought; a total of £68 million was claimed from planning authorities between 1982 and 1986.[3] A number of court cases clarified, and in doing so broadened, the circumstances under which compensation would be payable.[4] It became clear, and was exploited by some, that a refusal of permission on any undeveloped land could lead to a successful compensation claim. Planning authorities, given the demands on their limited finances, were not in a position to pay the claims made and used a variety of means to avoid payment. But this compromised the proper planning and development of their areas.

It was against this background that the 1990 Act emerged. The Act dramatically reversed the balance between the common good and the private individual in relation to compensation. The 1990 provisions have been updated and further strengthened in the Planning and Development Act 2000.

Key provisions introduced in the 1990 Act included the following: wider non-compensatory provisions; new rules for the assessment of compensation; removal of automatic right of connection to a public sewer. The consequences of these provisions are that the right to compensation arising from adverse planning decisions has been severely restricted. In addition, the amount of compensation payable has been substantially reduced.

3 An Foras Forbartha (1987), *Planning Statistics 1986*.
4 *Viscount Securities Ltd v Dublin County Council*, 112 1LTR 17 and *Dublin County Council v Shortt* (1983) ILRM 377.

The Planning and Development Act 2000
The adoption of the Planning and Development Act 2000 (the 2000 Act) followed a comprehensive review of planning legislation which began in 1997. Three core principles inform the 2000 Act:[5]

a) an ethos of sustainable development
b) a strategic approach
c) delivery of a high quality performance.

The phrase 'sustainable development' has been included, but not defined, in the Act. Planning authorities are now required, in making development plans, to set out an overall strategy for the proper planning and sustainable development of an area. Similarly, when making a decision on a planning application, the planning authority is restricted to considering the proper planning and sustainable development of the area.

Under the 2000 Act, development plans will continue to operate as the basic planning policy document at local level. They will, in future, operate within the context of a hierarchy of plans. The National Spatial Strategy will establish settlement strategy at national level. Regional planning guidelines, prepared by the regional authorities, will set the context for development plans at regional level. Planning authorities also have the opportunity, if they see fit, of making local area plans for any part of their areas. The hierarchy of plans will address the problem which existed hitherto – the fact that development plans operated in a policy vacuum.

The 2000 Act seeks to ensure the delivery of an efficient service by the introduction of strict time limits on the development plan process, development control and enforcement procedures.

Radical feature A radical and innovative feature of the 2000 Act was included in Part V, which related to the provision of social and affordable housing. Part V provided that a planning authority could attach a condition on a planning permission requiring that a developer enter into an agreement under which up to 20% of the land, sites or houses comprising a development would be ceded to the planning authority, with land costs based on existing use value rather than market value. Part V was a response to growing concern over the serious problem of scarcity in the housing supply and rising house prices.

At Bill stage, Part V was referred by the President to the Supreme Court under the Article 26 of the Constitution procedure. The Court found the provision to be constitutional.

Part V has since been amended by the Planning and Development (Amendment) Act 2002. Under its provisions, developers have

5 Grist, B. (2003), 'Planning', in *Local Government in Ireland*, Dublin, Institute of Public Administration.

greater choice in meeting requirements to provide social and affordable housing. The developer may now propose to provide land, sites or houses at an alternative location within the functional area of the planning authority or pay a sum of money in lieu.

Institutional framework

Local level The planning system is largely administered through the local government system. Under the 1963 Act, all existing local authorities, with the exception of town commissioners, adopted the functions of planning authorities. Planning authorities perform a range of important functions including the preparation and adoption of development plans, housing strategies and development levy schemes, the determination of planning applications, the carrying out of planning enforcement and the acquisition of land.

The local government structure in Ireland has its basis in local government legislation of the late nineteenth century and, with the exception of the Dublin city and county areas, the local government areas established at that time have remained largely unaltered. At present, there are eighty-eight planning authorities comprising twenty-nine county councils, five city councils, five borough councils and forty-nine former urban district councils (renamed town councils in 2001). The borough councils and town councils have responsibility for a reduced range of functions, with the larger authorities often taking responsibility for planning functions in the town councils.

In 1940, under the County Management Act 1940, a unique management system was introduced for the administration of local government. Under the Act, the functions of local government were divided into two categories; 'executive' and 'reserved'. The former functions are the responsibility of the city or county manager and the latter are the responsibility of the elected representatives. In general, the elected representatives are responsible for matters concerning policy and finance, with the manager responsible for the day-to-day implementation of policy. In the context of the planning system, the elected representatives adopt a development plan and the manager determines planning applications. The power of the elected representatives was enhanced in 1955 with the introduction of what have been commonly referred to since as 'Section 4s' under the City and County Management (Amendment) Act 1955. 'Section 4' motions allowed the elected representatives to direct the manager in the performance of his/her duties. These motions have, in the past, been used frequently to direct a manager to grant planning permission for developments that would otherwise have been refused. The procedures governing 'Section 4' motions were amended in 1991 following a growing belief that the system was open to manipulation. Such resolutions now have to be proposed

by at least three-quarters of the elected representatives of the electoral area where the site is located, and passed by three-quarters of the total number of elected representatives from the authority.

The operation of local government has been the subject of recent reform arising from the publication of a major policy document, *Better Local Government*, in 1996. Reforms have included the abolition of the dual administrative/professional structure and the establishment of Strategic Policy Committees (SPCs). The objective of *Better Local Government* is to secure the optimum use of resources through increased emphasis on corporate planning.

Regional level Two separate administrative structures exist at regional level – the regional authorities and the regional assemblies. The regional tier of government in Ireland has traditionally been weak because the majority of functions are carried out at either national or local level.

Eight regional authorities have been established since 1994. The authorities consist of city and county councillors and are appointed by local authorities. The authorities co-ordinate some of the city/county and sub-county activities and play a monitoring role in relation to EU structural funds. The Planning and Development Act 2000 gives a statutory basis to Regional Planning Guidelines (RPGs) prepared by regional authorities. This is expected to enhance the role of this tier of government. RPGs are seen as one of the main vehicles in delivering the National Spatial Strategy, providing the link between national strategic planning and local development plans. One regional strategy has been prepared, the Strategic Planning Guidelines for the Greater Dublin Area 1999. RPGs for the remaining seven regions are in preparation.

In 1999 a new regional tier consisting of two regional assemblies was established, based on the regional authority structure. The role of the assemblies is to promote the provision of public services in their areas, monitor the impact of selected EU programmes of assistance, manage new regional operational programmes in the Community Support Framework (CSF) and monitor the general impact of an EU programme of assistance under the CSF. Membership comprises elected representatives from city and county councils.

National level The main bodies/organisations with responsibility for planning and development at national level are the Department of the Environment, Heritage and Local Government, An Bord Pleanála and the Environmental Protection Agency.

The Department of the Environment, Heritage and Local Government is responsible for a wide range of functions including policy and legislation in the areas of planning, environment, housing and heritage, and general guidance of planning authorities

in the performance of their duties. One important and valuable task recently performed by the Department has been the consolidation and updating of the planning code into the Planning and Development Act 2000. Under the 2000 Act the minister has the power to issue guidelines to planning authorities regarding their functions. Since the mid-1990s the department has taken a pro-active approach in the issuing of guidance documents, which now have a statutory basis. The issuing of such guidelines is a welcome development. Prior to this, planning authorities operated in a policy vacuum, and no mechanism existed to ensure consistency in the application of planning policy. Recently issued policy guidelines have included *Guidelines to Planning Authorities on Residential Density 1999* and *Retail Planning – Guidelines for Planning Authorities 2000*.

Ireland is unique in Europe in that it has a national planning appeals system, available to both first and third parties, operated by an independent body, An Bord Pleanála. An Bord Pleanála was established in 1977 to determine planning and other forms of appeals that had previously been determined by the minister. Its role has been expanded in the 2000 Act under which it has assumed additional responsibilities.

The procedure for adopting the chairperson and ordinary members of An Bord Pleanála is 'at arms length'. The chairperson is appointed by government following a selection of suitable candidates by a committee, the composition of which is set out in the legislation.[6] The ordinary members (with the exception of one civil service appointee) are selected by the minister having been put forward by organisations prescribed in the legislation. This method of appointment has proved successful, with the Board's impartiality in decision-making widely recognised. Difficulties however have arisen owing to the large increases in the volume of appeals which the Board has been required to determine. In the period 1994 to 2000 the number of appeals to the Board doubled. Although strict time-limits were imposed on the Board in 1992, it had increasing difficulty in meeting the four-month time-limit for determining appeals. The percentage of appeals disposed of within the four months/eighteen weeks statutory objective period in 2002 was thirty-six percent: this compares with twenty-nine percent in 2001 and forty-seven percent in 2000. The average time taken to decide in 2002 was twenty-three weeks.

The Environmental Protection Agency (the EPA) was established by government in 1993. The agency has responsibility for a wide range

6 The committee for appointment of the chairperson of An Bord Pleanála comprises the president of the High Court, the cathaoirleach of the General Council of County Councils, the secretary-general of the Department of the Environment, Heritage and Local Government, the chairperson of An Taisce, the president of the Construction Industry Federation, the president of the Executive Council of the Irish Congress of Trade Unions and the chairperson of the National Women's Council of Ireland.

of environmental functions. One of its main functions is the issuing of Integrated Pollution Control (IPC) licences. These licences are issued in respect of industrial and other activities which could potentially cause pollution. The IPC licensing system operates in parallel to the planning application/appeal system, with similar timeframes.

Issues arising

The preceding description of the planning system provides a context within which issues – and criticisms – can be analysed. A full analysis in many cases requires both experience and rigorous technical evaluation. In what follows the committee deals with issues arising from its major concern with the impact of the management of planning on the delivery of infrastructure and housing. Its recommendations are based on its own experience, the experience presented in the submissions and the technical advice available to it both in the submissions and from its technical advisors.

Planning procedures
The vast majority of developments, unless exempted under the legislation, require planning consent. Although the consent procedure differs in the case of private and local authority projects, all major projects are subject to Environmental Impact Assessment (EIA). Changes incorporated in the 2000 Act allow for an alignment of CPO, EIA and the planning consent process.

The planning process, for the main part, operates through local planning authorities and may be examined under the main functions of 1) development planning and 2) development control.

The planning system has come under scrutiny for perceived delays in the delivery of projects, despite provisions introduced in the 2000 Act to tighten procedures and streamline and co-ordinate the consent process.

Development planning
The 2000 Act has imposed very tight timescales on planning authorities in the preparation and adoption of development plans. Prior to the adoption of the Act, planning authorities were required to review the development plans for their area(s) every five years. With the consent of the minister, this period could be extended. In the past planning authorities experienced difficulties in achieving the five-year timescale for the review of their plans. Research undertaken by An Foras Forbartha in 1983 revealed that three-quarters of planning authorities were failing to review their plans within the statutory timeframe.[7] The fact that the Dublin City

7 Grist, B. (1984), *The Preparation of Development Plans*, An Foras Forbartha.

Development Plans were reviewed in 1971, 1980 and 1991, and the Dublin County Development Plans in 1972, 1983 and 1993, is telling. It is difficult to see how development plans which had originally been adopted years earlier could remain relevant and responsive in a rapidly growing urban area, without recourse to the facility available to planning authorities to vary development plans at any stage. This situation improved with the subsequent round of development plans, with some notable exceptions.

Under the 2000 Act, development plans must now be reviewed every six years. Rigid, tight timescales have been introduced regarding adoption procedures in order to ensure no time slippage. Anecdotal evidence suggests that planning authorities are experiencing difficulties in meeting the new development plan time schedules. Greater flexibility in permitting planning authorities to commence the development plan review process early, in order to gain extra time at the later stages, albeit within the overall six-year timeframe, would be particularly useful in the case of the larger, more complex development plans.

One innovative and positive feature introduced into the new development plan procedures requires planning authorities to engage in public consultation prior to the preparation of the draft plan. This addresses the unsatisfactory situation, which had existed heretofore, where the role of the public was confined to that of reacting to proposals, rather than contributing to their formulation. The first phase of the development plan review process involves consultation with both the public and a variety of statutory authorities. Advertisements in newspapers circulating in the area invite submissions. Public meetings and oral hearings may also be conducted. It would appear that most planning authorities are engaging in a series of public meetings to inform the preparation of the latest round of development plans.

The power of the minister to extend the period for reviewing a development plan has been removed in the 2000 Act, and this option will no longer be available to planning authorities. In future, development plans will have to be adopted within the statutory timeframe. In order to achieve this, the duty is now placed on the manager to complete the process in the event that the elected members fail to adopt the plan within two years of the first phase of public consultation. Elements of the plan already agreed by the elected members must be included in the plan.

The adoption of development plans within the timescales imposed in the 2000 Act is likely to place planning authorities under pressure, given the resource constraints. On the other hand, ensuring that development plans continue to remain relevant for the duration of their six-year life will pose a challenge, particularly in the case of those plans for rapidly expanding urban areas.

Although the opportunity exists, as before, for a planning authority to vary a development plan when it considers it necessary, it may continue to prove difficult for plans to remain responsive to changing market and economic conditions. It is more than likely that some development plans, in particular those of the larger urban areas, will be out-of-date in certain respects before review. In such areas and other areas subject to rapid growth, a four-five year review timeframe of development plans would be more appropriate. In areas subject to less change, the six-year timeframe would be workable.

Flexibility in the development plan system could be enhanced by the use of local plans. Under the 2000 Act, planning authorities have the option of making a local plan for any part of their area. The preparation of local plans is mandatory for all towns with a population greater than 2,000. Such plans could however be prepared for expanding suburban areas and areas in need of renewal etc. The procedures for the preparation and adoption of a local plan are simpler and more straightforward than those relating to the making of a development plan. The local plan must however be consistent with the development plan.

Development plans must now be consistent with national plans, policies and strategies relating to proper planning and sustainable development as the minister determines. In addition, planning authorities are required to have regard to any regional planning guidelines in force when making and adopting a development plan. The DTO in its written submission to the committee stated the following:

> Recent case law has demonstrated that the term 'have regard' in this context sets an extremely low compliance threshold and effectively allows a Development Plan which pays scant regard to the overarching principles contained in the Strategic Planning Guidelines to be legitimately adopted. In essence a change in legislation is required to ensure compliance with the relevant Strategic Planning Guidelines.

The objective of the 2000 Act to establish a clear hierarchy of plans will assist in achieving consistency at local planning authority level and in facilitating the delivery of infrastructure projects. The National Spatial Strategy establishes a coherent planning framework for Ireland for the next twenty years. Regional planning guidelines provide the important link between national strategy and local development plans, covering a twelve-year to twenty-year period. To date, the absence of national strategic planning and regional planning has meant that local planning has operated in a policy vacuum. The inclusion of clear non-conflicting policy objectives for the provision of key infrastructure projects at national, regional and local level will enhance public awareness and reduce inconsistency

in approach between planning authorities. It is important that development plans include clear, unambiguous policies and objectives for the delivery of infrastructure, including the identification of specific sites where appropriate, and route reservations.

There is also a need for further national guidance for planning authorities. The development of such guidance has been important in ensuring a consistent, uniform approach to planning applications at local level. An example of this is the planning guidance on the development of telecommunications infrastructure issued by the Department of the Environment and Local Government. ERM[8] suggests that such guidance may now be necessary in respect of broadband infrastructure.

Conclusion

There is a need for continued and increased national planning guidance by the DoEHLG. Topics that should be covered include development control, rural housing, broadband infrastructure, Strategic Development Zones and the design of buildings.

Development plans are required under the 2000 Act to set out an overall strategy for the proper planning and sustainable development of the whole functional area of the authority. Consisting of a written statement and a plan or plans, they indicate development objectives for the area in question. These development objectives have been expanded in the 2000 Act and include zoning, the provision of infrastructure, the protection of the environment, the renewal of areas in need of regeneration and the provision of accommodation for travellers.

Zoning Zoning is an internationally employed mechanism used in development plans to segregate parcels or areas of land and ascribe to them broad classification of appropriate use. Zoning land use classifications traditionally employed by planning authorities include residential, commercial, industrial, open space and agricultural use. Combinations of uses or mixed use can also be indicated.

Zoning performs the important function of segregating incompatible land uses and, in doing so, ensuring orderly development. For example, residents of residentially zoned areas have an expectation that the residential character of the area will be maintained and incompatible uses will not be permitted. It is also clear that the grouping of industrial activities into appropriately located, industrially zoned areas makes for sound planning policy, both

8 Environmental Resources Management Ireland Ltd (2003), *Cross Country Comparison of the Delivery of Economic Infrastructure Projects*, Report for Forfás.

with regard to the needs of the industrialist and the community at large. The grouping of similar activities with similar requirements can make the provision of the necessary infrastructure to serve such activities (roads, public transport, open space, water and sewerage supply) more efficient and reduce potential conflict.

In their written submissions to the committee, a wide range of contributors stressed the necessity of zoning (An Taisce, Dun Laoghaire Rathdown County Council, FEASTA, the Irish Homebuilders' Association). An Taisce and FEASTA in their written submissions to the committee drew attention to the importance of zoning for efficient infrastructure provision and the development of sustainable compact settlements.

Zoning as a planning mechanism has however come under criticism for being too rigid and static, often merely reflecting existing land use. At EU level the role of single use zoning classification has been questioned.[9] Rigid zoning, in particular the segregation of residential and employment areas, is considered to have contributed to sprawling suburban development, unsustainable commuting patterns and visually monotonous urban environments. The concept of 'mixed use' zoning is gaining popularity. In the Dublin Docklands, the planning scheme areas (the IFSC, Docklands North Lotts and Grand Canal Dock Area) are being developed on the basis of a 60:40 residential/commercial land use mix. On all sites over 0.2 hectares, 60% of the land area must be devoted to residential use and 40% to commercial use. In terms of floor space, the percentages invert – with 60% allocated to commercial use and 40% to residential use. This aim is to provide a mixed-use area with a strong residential component, thus creating a vibrant, sustainable urban area. The Chartered Institute of Building in its written submission to the committee contends that the zoning of land

> … should take account of the needs of the wider community and should take account of the residents, users and occupiers of the properties in the immediate vicinity. We are opposed to blanket indiscriminate zoning categories, without regard to the appropriateness of these zoning categories and the negative impact on amenities and services in these areas.

In considering the sophisticated and technical nature of the zoning/re-zoning process the committee concluded that because elected members must engage in discussion and debate with their authorities' planning professionals they should have the resources to draw upon a relevant range of professional advice on the issues that arise in the process of development planning.

9 European Commission (1990), Green Paper on the Urban Environment.

Recommendation

Planning advice, provided by suitably qualified professionals, should be made available to elected members of planning authorities in the drawing up and variation of development plans. To enhance the independence of the advice the elected members should themselves select the appropriate advisors.

In the Irish context, the transparency of the process for the zoning/re-zoning of land has been the subject of public debate and has been raised in written submissions made to the committee (CORI, Dublin 15 Community Council, the Irish Planning Institute, the Society of Chartered Surveyors).

The adoption of a development plan is a reserved function of the planning authority. At the outset of the development plan review process, the role of the elected members has been strengthened in the 2000 Act and they may issue directions to the manager regarding the preparation of a draft development plan. The members are subsequently involved at all stages of the development plan process and finally adopt the plan by way of simple majority vote.

The process of adoption of development plans has led to concerns over the transparency and accountability of the adoption system. The 2000 Act has tightened the development plan timeframe, but has left the procedure for adoption of plans intact. This approach is supported by the IAVI which, in its written submission to the committee, states that it

> … does not see any need to change the existing legislative framework surrounding the zoning of land. The existing process is a democratic and transparent one that affords a level of flexibility which we believe to be desirable and potentially indispensable in the attraction of foreign, direct investment that is essential to the continuing welfare of the state.

However, in their written submissions to the committee, the Irish Planning Institute and the Society of Chartered Surveyors made recommendations to amend the legislation in this regard.

The Irish Planning Institute recommends the following:

1) Directions given by elected members to the manager at the pre-draft stage should not relate to the zoning of land. At the following draft and amended draft stages, the elected members should likewise not be permitted to give directions regarding the zoning of particular land holdings, unless in response to a submission.

2) All submissions to a draft development plan, local area plan or amended draft plan should be heard in public by an independent inspector, who would prepare a written public report for the elected members.

3) All changes in zoning in development plans would have to obtain a three-quarters majority of the elected members in order to pass. This currently applies to material contraventions and Section 140s (formerly Section 4s).

The Society of Chartered Surveyors in its submission to the committee suggests that the promotion of zonings and re-zonings

> should only be at the instigation of professional planners, subject to the overriding confirmation of elected representatives.

The revelations of the Tribunal of Inquiry into Certain Planning Matters and Payments (Flood/Mahon), which is charged with investigating all improper payments made to politicians in connection with the planning process, have clearly shaken public confidence in the part played by politicians in the zoning/re-zoning of lands particularly. Irrespective of the numbers involved – and it should be noted that the majority of members of local authorities repudiate any suggestion that they may have engaged in corrupt practices – measures must be taken to restore public confidence.

On the other hand, councillors are the agents of local democracy and their knowledge and understanding of people's requirements must be allowed to have a due influence on the planning system. A study of the issues involved should be carried out by government.

Strategic Development Zones Strategic Development Zones (SDZs) are an innovative feature introduced in the 2000 Act. Their objective is to streamline the planning process in respect of specific sites designated for specified types of development considered to be of social or economic importance to the state. The selected sites are designated as SDZs by government. The types of development for which an SDZ may be established are not specified in the legislation but could include industrial, commercial or residential development. An order is made setting out the types of development designated and the development agency/agencies responsible for preparation of a draft planning scheme. Once designated by government, the draft planning scheme must be prepared for the site within two years. The planning scheme indicates the types and extent of development, overall design, transportation proposals, infrastructure and community facilities. Once prepared, it is submitted to the planning authority and placed on public display. The consideration of the planning scheme is a reserved function of the authority. Once made by the planning

authority, the decision on the planning scheme can be appealed to An Bord Pleanála. The Board then makes the final decisions on the scheme, and can approve it with or without modifications, or refuse to approve it. Once a development is approved, a developer is still obliged to apply for planning permission for it. The planning authority must grant permission for any development which is consistent with the scheme. There is no appeal provision against the planning authority's decision.

The central objective of SDZs is to speed up the planning process through the removal of the right to appeal on adoption of the planning scheme. As such, SDZs will speed delivery of housing. Indeed the first three designated SDZ sites were for the purposes of housing in the Greater Dublin Area at Adamstown (South Dublin), Hansfield (Fingal), and Clonmagadden Valley (Navan). An Bord Pleanála has approved the SDZ at Abbotstown, for the development of 8,000-10,000 dwellings and 125,000 square metres of non-residential development. The decision of the Board was delivered within the eighteen-week statutory period.

The SDZ mechanism may also prove useful for the delivery of infrastructure projects that are site specific. The fact that there is little flexibility for alterations to design and layout once the planning scheme is approved will however act as a deterrent to the use of this mechanism. The use of SDZs for contentious infrastructure projects could also give rise to public unease, owing to the lack of an appeal mechanism.

Conclusion

In considering the range of issues involved in the process of development planning the committee concluded that there was a need for a national development forum through which the best thinking and practice would be made available continuously to the whole planning system.

Recommendation

The government should establish a body drawn from the planning, construction, property and environmental interests, together with the state regulatory bodies concerned with planning, to meet as a national forum for the built environment. The body would aim to inform national planning policy based on experience and research commissioned from appropriate research agencies.

Development control

The planning consent process differs depending on whether the project is undertaken by a private developer/state authority or a local authority. Different procedures have also been introduced

under the Roads Act 1993 for approval of motorway and roads schemes. All major projects are subject to Environmental Impact Assessment (EIA), which requires the preparation of an Environmental Impact Statement (EIS). Industrial activities which have the potential to cause environmental pollution require an IPC licence from the Environmental Protection Agency.

Development consent Private developments and developments by state authorities (unless the proposed development is exempted) are subject to an application for planning permission to the local planning authority. Strict time limits operate within which the planning authority must determine such applications. Recent research indicates however that time taken to determine planning applications varies across planning authorities.[10] Reasons for this inconsistency can relate to staffing levels, organisational difficulties, deficiencies in the applications lodged etc.

Once determined by the planning authority, a planning decision can be appealed by either the first party or a third party to An Bord Pleanála. The percentage of third-party appeals had been increasing, and in 2001 and 2002 represented 45% and 50% respectively of determined appeals. The 2000 Act has introduced important restrictions in respect of the right to third-party appeal. Under its provisions, this right is restricted to those persons who have made submissions in writing to the planning authority on the planning application and have paid the appropriate fee. Such submissions must have been made within five weeks of the date of lodgement of the application.

In 2002, the total number of appeals received in the year dropped to 4,562. Although representing a 16% decrease on the number received in 2001, it represented a 17% increase on the annual average of 3,889 for the period 1993-2001. The number of cases disposed of within the statutory eighteen weeks was, at 5,892, the highest since the establishment of An Bord Pleanála. This figure represented 36% of all cases.

Since January 2001, An Bord Pleanála has assumed the function of approval of all major local authority infrastructure projects and determination of compulsory purchase orders. The Board states that it is

> … acutely aware of the importance of discharging these cases promptly to ensure that planning delays do not disrupt capital programmes. Structures and procedures are in place in the Board to ensure that these cases are given priority consideration and are not delayed by pressure of planning appeal cases[11].

10 Jerome Casey and Co Ltd (December 2002), *Benchmarking Planning Authorities*, Building Industry Bulletin.

11 An Bórd Pleanála (2003), *Annual Report 2002*.

Recommendation

Planning authorities and An Bord Pleanála should be adequately resourced to expedite the planning process. Human resource management within planning authorities should provide for economics skills and take measures to foster a continuing improvement of the understanding of urban and regional economics by those working in the planning system at all levels. It should also anticipate the cyclical nature of property markets and the complexity of the process of physical development by ensuring the maintenance of core experience and skills and the maintenance of inventories of skilled personnel available on a temporary basis.

Provision of infrastructure

The timely delivery of key infrastructure projects is necessary for the efficient operation of the economy and the maintenance of a competitive environment for investment. Ireland has well-recognised infrastructural deficits in certain areas, which are being addressed in the implementation of the National Development Plan 2000-2006. Further high levels of investment in infrastructure are anticipated beyond the life of the current NDP. The Construction Industry Federation in its written submission to the committee states that:

> We should not underestimate what has been achieved in some areas, but we started the 1990s lagging European norms, and the extraordinary economic and employment growth of the late 1990s (to which the construction industry both contributed and from which it benefited) has served to highlight the inadequacy of our infrastructure in a range of areas.

Current key issues regarding infrastructure provision relate to the systems that have evolved to deliver infrastructure projects and the capacity of the organisations involved to deliver such projects. In Ireland, in common with many of our European counterparts, infrastructure provision is for the most part delivered by local authorities or state bodies, with the use of Private Public Partnerships (PPPs) becoming more common.

Conclusion

The committee recognises that there is a greater need for co-ordination between national agencies, government departments and local authorities responsible for the delivery of infrastructure, including social infrastructure, by setting out guidelines clarifying their roles and responsibilities.

Current infrastructure provision
Infrastructure deficits are recognised to exist nationally in the following areas: road, rail, water, waste and broadband. Information on current infrastructure provision was obtained from ERM – Environmental Resource Management Ireland Ltd, *Cross Country Comparison of the Delivery of Economic Infrastructure Projects*, which formed part of the submission by Forfás to the committee.

Road In comparison to other European countries and arising from a dispersed settlement pattern, Ireland has an extensive system of public roads. The main form of state investment in recent years has been in the national primary network, as detailed in the NDP. Significant progress has been made in the delivery of improvements to the network, facilitated by

- the establishment of National Road Regional Design Offices
- increased funding for the planning and design of projects
- streamlining of the planning process.

Delays in the delivery of road projects have been addressed by the National Roads Authority through the tightening up of management procedures for road development, particularly in regard to public/private partnerships. Several key proposals by the NRA have been the subject of judicial and European Commission review due to action by third parties. The NRA has, in response, initiated a more structured approach to consultation at preliminary design stage which should assist in addressing key public concerns.

Rail Rail infrastructure has, until recently, suffered from decades of under-investment. The lack of investment has resulted in slower operating speeds and poorer quality of service, thus reducing the competitive position of rail services.

The transport of people and goods by rail is more environmentally sustainable and safer than road transport and in recent years the investment needs of the rail system have begun to be addressed. Significant investment has occurred, including fleet acquisition, upgrading of track and other infrastructural elements and stations, with the objective of improving safety and increasing reliability and capacity. Significant investment in the sector is still necessary. Much of the network is constrained by the fact that it is single-track and continued investment in rolling stock is required.

The LUAS Light Rail system is undergoing completion in Dublin and will be operational in 2004. The Railway Procurement Agency (RPA), established by government, has been charged with the delivery of the project. LUAS is currently the largest transport infrastructure project in Ireland. Delays incurred in the delivery of the project have not been significant and can be attributed to detailed finalisation of the route, rather that arising from the

planning consent process. The RPA in its written submission to the committee states:

> Generally it has been our experience that the procedures in relation to the application for a Railway Order, the holding of a public inquiry, and the making of the Order by way of statutory instrument have achieved a reasonable balance between the protection of property rights and allowing infrastructural development to proceed. However the RPA has concerns about the process for compulsory acquisition of property referenced by the Railway Order that has just been made.

Indeed it is generally recognised that the Dublin Light Rail Transport Act 1997 provided an equitable and effective legal and planning framework to implement the LUAS project.

Water/Wastewater Key infrastructural investment has occurred in water/wastewater projects. The water/wastewater programme under the NDP is recognised as performing well with the successful development of infrastructure in urban areas. Projects have included the Dublin Bay Project at Poolbeg, the Limerick and Cork Main Drainage Schemes and sewerage treatment schemes in various towns throughout Ireland. No significant delays have occurred in the delivery of waste/wastewater projects.

Waste management The provision of waste management facilities is proving to be one of the most divisive areas of infrastructure provision in Ireland, with proposed projects meeting extensive public resistance. The reason for the level of resistance to such projects can be traced to poor management in the past of waste management facilities, and a concern over new technologies for treating waste. The public unease over waste management will remain until public understanding is improved and public concerns are addressed.

Waste management has become increasingly more sophisticated and Ireland is moving away from its former over-reliance on landfill as a waste disposal option. Whereas local authorities/state bodies are generally key providers of infrastructure projects, in the area of waste management the private sector has become involved in the development of modern disposal facilities.

Progress has been hampered in the delivery of waste management facilities owing to delays in the adoption of Regional Waste Strategies. Following an amendment to the Waste Management Act 1996, all counties/cities now have a Waste Management Strategy in place. Delays in the delivery of the necessary infrastructure are likely to arise from ongoing public concern over proposed technologies and the operation/management of facilities.

Broadband The extent of broadband infrastructure in Ireland is inadequate and requires considerable investment in order to close the gap between the information/communications sector in the country and that of the world's most advanced economies. Continued government funding will be required to advance the roll-out of the programme. Differences in approach by planning authorities point to the need for guidance by the Department of the Environment, Heritage and Local Government on the handling of applications for broadband infrastructure.

Consent process and procedures
All infrastructure projects require planning consent of some form. Private projects require planning permissions and will first involve an application to the local planning authority. Almost all major projects are subsequently appealed to An Bord Pleanála. Local authority projects are the subject of approval by the Board if an Environmental Impact Statement is required, as is the compulsory acquisition of land by local authorities. The role of An Bord Pleanála has been expanded in the 2000 Act: it has taken over additional functions previously exercised by the minister. It is evident that the Board is devoting resources to ensure that infrastructure proposals are dealt with speedily. The SDZ for Adamstown was dealt with within the statutory eighteen-week period. The Board is clearing motorway, wastewater and waste management projects generally within four-six months. When this function rested with the Department of the Environment, Heritage and Local Government decisions were rarely made in less than a year.

It would appear that inconsistencies exist at planning authority level with regard to the length of time taken to determine planning applications. The 2000 Act has addressed the time taken to deal with additional information requests by planning authorities on applications. Planning authorities operate within strict timeframes, and the 2000 Act has tightened these in order to ensure that planning applications are not delayed in the system. The provisions of the Act will reduce delays but will have resource implications for planning authorities. There is a need for guidance from the Department of the Environment, Heritage and Local Government for planning authorities on development control. The guidance produced on this topic, *Development Control – Advice and Guidelines*, dates from 1982 and is no longer relevant.

As noted earlier, Ireland has a unique planning mechanism, in that it provides for appeals by third parties of planning decisions taken at local level. The appeal process is widely accepted and employed. It allows the public to participate in the decision-making process. The facility for oral hearings permits an informal forum for the presentation of one's views. There is a broad degree of public acceptance of the appeal procedure. It is also relatively inexpensive to operate, particularly in comparison to court proceedings.

The fine-tuning and streamlining of consent procedures has been a theme in written submissions to the committee. Unease has been expressed over additional statutory consent requirements, over and above formal planning consent. Additional licences for projects affecting for example national monuments, foreshore areas or public rights of way may not be sought until late in the process and can subsequently cause delay, and point to the necessity for increased co-ordination and consultation.

Co-ordination and consultation

The importance of co-ordination and consultation between government departments and agencies involved in infrastructure delivery is critical to the timely delivery of projects. Such high-level consultation is particularly necessary at the preliminary design stage of a project. For example, there have been cases where the lack of proper identification of natural heritage sites in the past has led to delays in delivery of road projects, in cases leading to the redesign of the route. Guidelines for the conduct of such consultation is recommended, clarifying the roles and responsibilities of agencies. It is also necessary that the designation of heritage sites – Special Areas of Conservation, Special Protection Areas and National Heritage Areas – be finalised as soon as possible.

The facility for consultation with the wider community is well established in the planning system, once a project has been submitted for planning consent. Developers have traditionally been slow however to engage in 'pre-application' consultation, although non-statutory consultation has become more common at an early stage of project design/route selection. It is recognised that public consultation can be a difficult task with local feelings running high in relation to particular classes of infrastructure projects. The process of explaining the nature of the project, the technologies involved (if applicable), the process of site/route selection etc, can allow a greater understanding of the process and issues involved. Such increased understanding may not translate into fewer objections to the project, but it may reduce local tensions and promote understanding of the decision-making process. The Dublin 15 Community Council in its written submission to the committee refers to its experience of consultation regarding state projects:

> There is an attitude of paternalism and tokenism in many public bodies that see genuine public participation/ consultation as a hindrance rather than a help. Yet we can point to our own experience here in Dublin 15 where active participation in such matters has provided valuable insight and solutions for such projects, thereby saving the exchequer substantial monies in the longer term. There is a huge repository of knowledge, common sense and good ideas in the public domain waiting to be harnessed.

Environmental Impact Assessment/Strategic Environmental Assessment
Environmental Impact Assessment (EIA) is the systematic examination of the likely environmental effects of a development so that optimal decisions can be made and adverse environmental impacts avoided. It informs the decision-making process, its purpose being to ensure adequate consideration is given to the environmental effects of a development in arriving at a decision on whether or not the development should take place. Two European Directives establish a regulatory basis for EIA throughout Europe. The Environmental Impact Assessment is written up in the form of an Environmental Impact Statement (EIS). In Ireland, the developers of a project generally draw up the EIS. This also occurs in respect of infrastructure projects. ERM notes that this is not always the case in other European countries where the EIS is not necessarily carried out by the developer and suggests that there may be a case in Ireland for an EIS to be carried out independently of the agency responsible for developing the project (ERM – Environmental Resources Management, *Cross Country Comparison of the Delivery of Economic Infrastructure Projects*).

It is acknowledged that the separation of the development/design process from its environmental assessment would pose challenges in terms of ongoing co-ordination, with both processes having to run in close parallel. It could also contribute to delays. It would however establish greater independence between both processes and would reinforce greater transparency in the development/consent process. Ongoing training for those involved in scoping and assessing EISs in planning authorities and An Bord Pleanala is also important.

An EU Directive on Strategic Environmental Assessment will come into operation throughout Europe in July 2004. The Directive requires the environmental assessment of plans and programmes. SEA will in future be necessary for a range of plans and programmes including regional planning guidelines, city and county development plans and waste management plans. In the interim, the 2000 Act requires development plans and regional planning guidelines to include information on the likely significant effects on the environment of their implementation. SEA will provide a context for EIA, facilitate consultation between authorities on strategic projects and assist in the consideration of impacts. It may also assist in the selection of appropriate sites/routes for projects subject to EIA.

A provision exists in the European Directives on EIA permitting a member state to exempt, in exceptional cases, a specific project from the requirement to prepare an EIS, subject to certain requirements regarding informing the public and the European Commission. In Ireland the power to exempt projects in exceptional cases rests with An Bord Pleanála. Whereas this procedure could in theory be used

to speed up the delivery of infrastructure projects, the wisdom of using it would be open to question. It is likely that the Board would require some alternative assessment of the environmental effects of the project, as permitted in the legislation. Public consultation would also need to be accommodated.

Judicial review

The validity of planning decisions made by planning authorities or An Bord Pleanála can be challenged in the courts by way of judicial review. The 2000 Act has tightened procedures for judicial review, and in doing so has further restricted the scope for such action. At present however the judicial review procedure can take nine to twenty-four months before a judgment issues (Galligan, E., lecture on Judicial Review delivered to Irish Planning Institute Seminar, 4 December 2003). Thus, while planning authorities and An Bord Pleanála operate within strict timescales, considerable delays can occur once the planning decision is reached. The establishment of a special division of the High Court and the appointment of additional High Court judges with specific responsibility for planning/environmental matters would be a positive move towards reducing delays in this regard.

Infrastructure delays

Delays in the delivery of key infrastructure projects occur for a variety of reasons arising from the complexity of the issues involved. Not all projects have been subject to delay; delays in a number of key projects have obscured the fact that a large number of such projects have been delivered in an efficient, timely manner. The delivery of key projects would be assisted by the following:

- formal public consultation prior to the seeking of planning consent for a project. This will improve public awareness and understanding of the processes and issues involved although not necessarily reducing opposition to certain projects.
- improved compulsory purchase procedures.
- greater co-operation and co-ordination between government departments and agencies. It may be necessary to produce guidelines defining roles and responsibilities in this regard.
- increased policy guidance from the Department of the Environment, Heritage and Local Government to planning authorities. Topics which require immediate attention are development control procedures, development plans, SDZs and policy in respect of broadband infrastructure.
- adequate and continued resourcing of An Bord Pleanála and planning authorities to ensure timely decisions.
- consideration to be given to the independent preparation of Environmental Impact Statements for certain public infrastructure projects.
- adoption of a single procedure for the approval of large key infrastructure projects, or categories of infrastructure projects.

The Dublin Light Rail Transport Act 1997 provided an equitable and effective legal and planning framework to implement the LUAS project, and could act as a model for similar legislation. Clearly environmentalists and local residents will have to be assured that their concerns are adequately addressed and aired as part of any such procedures.

The Institution of Engineers of Ireland in its written submission to the committee put forward a number of measures for fast tracking projects of national interest:

- a specialist 'one stop shop' planning body should be established either separately or as a division of An Bord Pleanála with responsibility for assessing planning applications for infrastructural projects which are in the national interest.
- mandatory timetables for decisions should be given for all infrastructural projects and these target deadlines should be met.
- a special division of the High Court should be formally established to deal with legal challenges to infractructural and environmental planning.

Recommendations

1 Strategic transport, sewerage and water supply infrastructural projects should be regulated by a specific statute and there should be a 'one stop shop' planning procedure for them.

2 A special division of the High Court should be established to deal with legal challenges to infrastructural and environmental planning so that judicial skills in these matters can be concentrated and decisions expedited.

Legislative provisions for compulsory purchase

The right to compulsorily acquire immovable property is an essential tool of a modern state. Securing the rights of private property is, however, essential for prosperity in a free market system and for democracy. Consequently, the system of identifying lands for compulsory acquisition, the procedures for acquisition and the rules for assessing compensation are at the sharp end of the conflict between private rights and the common good.

In Ireland the procedures for identifying property interests to be acquired and the procedures for acquisition are very complicated. Often they are contained in particular pieces of legislation related to the establishment or governance of the authority charged with responsibility to provide and maintain utilities, facilities or networks which make up the basis of the infrastructure of the state. Mostly they are provided for through legislation establishing the powers of local government. In all cases the legislation is either old or based on, or

linked inextricably to, older legislation. Indeed most of the legislation dealing with compulsory procedures has roots in the laws enacted to provide for the railways in the UK in the nineteenth century.

The procedures and processes used, based as they are on a combination of a myriad of complex and unconsolidated legislation and supported by a vast collection of case law, are tremendously complex. Interpreting this legislation is very difficult and in particular cases that come to courts, seeking the true meaning of particular provisions is arduous and leads to considerable delay. Moreover, the complexity of the procedures involved must make them vulnerable to judicial review.

The legal foundation for the assessment of compensation in any particular case will be governed by the legislation giving the authority to compulsorily acquire land. This may specify particular methods for doing this but in many cases the assessment of compensation in cases where property is being acquired relies on partly codified statute law that provides a set of basic rules for assessing compensation and largely dates from the nineteenth century.

A large body of case law also exists where issues were thrashed out and many useful principles have been established to guide those claiming and assessing compensation. The law on the assessment of compensation provides a sophisticated and subtle set of rules which bring a great deal of rigour to the assessment of compensation. Moreover, there is a system of dispute resolution that is exacting but fair. There are, however, some issues that need to be reconsidered and dealt with. These include the date of valuation of the property to be acquired.

The rules for compensation are grounded in the fundamental principle that an owner is entitled to be compensated on the basis of the market value of his property. The intention is that the owner's wealth is not diminished in amount but it is compulsorily changed in form. This is a fundamental principle and great care and thought should be taken and given if it is to be departed from.

Nonetheless Ireland requires an efficient and effective process of compulsorily acquiring land. There is a pressing need for reform of the legislation in this area to produce the transport and services infrastructure needed for a modern industrialised and urbanised state. What is required is a standardised regime which is clear, as simple, certain and speedy as possible, and which is written in plain English.

This could be done by enacting consolidated legislation providing standardised procedures for identifying the property to be acquired and the rules and processes for assessing compensation.

Under existing law the onus is on the acquiring authority to identify all the legal interests in the lands to be acquired. New rules could be put in place whereby when a scheme has been decided on and lands identified as being required, the owners of legal and compensatable interests should be obliged to identify themselves and their interest to the acquiring authority. To trigger this, appropriate notice could be placed in the media circulating in the area concerned and attached to the buildings and lands concerned.

Recommendations

1 Legislation relating to compulsory purchase procedures and rules for assessment of compensation should be consolidated and reconfigured in a form that could be attached to any statute giving compulsory purchase powers to an authority.

2 The procedure for establishing interests in land to be compensated should allow for the notification of interested parties by advertising in the media circulating in the local area concerned and by fixing an appropriate public notice to the lands concerned for a minimum specified period.

3 The right to compensation for the acquisition of property rights below a specified depth under the surface should be removed. This should be done without prejudice to the right to claim compensation for any injury or damage that might arise from an undertaking.

Residential density

Residential densities in Ireland are low in comparison with most European countries and this has manifested itself in the form of sprawling suburbs outside urban areas, developed at densities generally in the range of 15-25 houses to the hectare (6-10 houses/acre). This form of development is recognised as unsustainable. It is wasteful of urban land, leads to inefficient use of infrastructure and services, gives rise to unsustainable commuting patterns and in addition can create a visually monotonous urban environment.

In order to address this situation, the then Minister for the Environment and Local Government issued *Guidelines for Planning Authorities on Residential Density* in September 1999. The guidelines encourage the use of increased residential densities in a range of locations including town centres, brownfield sites, inner suburban/infill sites and outer suburban/greenfield sites. The guidelines state that firm emphasis must be placed on qualitative standards in relation to design and layout in order to ensure that high quality residential environments are achieved.

At the time of the issuing of the guidelines, many of the larger urban authorities were already seeking higher densities on sites in their areas. However, resistance to high densities outside of the major urban areas was anticipated.

Conclusion

Given that the most recent guidelines on residential density have been in operation for four years, it may be appropriate to carry out a monitoring review of their impact and their integration into the policies of planning authorities.

Rural housing

Policy relating to rural housing has become one of the most divisive planning issues facing policy makers today. Opinions have become rigidly polarised, making the achievement of a consensus on the issue difficult. Opponents of rural housing cite environmental degradation, groundwater pollution, unsustainable commuting patterns, adverse impact on the landscape and difficulties in providing infrastructure and services as reasons why such development should not be permitted. Those in favour of rural housing point to the importance of maintaining the vitality of rural areas, the need to maintain a critical population mass to retain services, and the fact that good quality housing can be provided relatively cheaply in this manner.

It is regrettable that for an issue that gives rise to such polarised views, little research has been conducted on the topic. The last major piece of research on rural housing was carried out in 1989 (Jennings, R. and Bissett, S. (1989), *A Study of the New House Purchaser*, ERU). It is probably true that the training of planners is focused on town planning. There certainly appears to be a lack of understanding of the social and cultural needs of rural communities and therefore a lack of creativity in coming to grips with the problems encountered by them.

Recommendation

Research should be commissioned into the direct and indirect costs of rural housing.

There is a general recognition of the need to distinguish between the housing needs of local residents and what is termed 'urban generated' rural housing. The National Spatial Strategy states that rural generated housing should be accommodated. In contrast, the Strategy states that urban generated housing should, as a general principal, be located within built-up areas. County development

plans reflect this distinction, frequently requiring that an applicant have a local connection with the area in which permission is sought.

Conclusion

Those who live and work in a rural area should be facilitated to build appropriately designed houses in such areas, subject to safeguarding the environment and in particular the landscape and areas of high amenity.

County development plans should identify those areas that can accommodate rural housing and those landscape areas in which housing will not be permitted.

In cases where a son or daughter may wish to build near a parent or parents living alone in the country, so as to be able to provide care as required, exceptional consideration should be given.

Chapter 4

Conclusions and recommendations

Chapter 1

Private Property – the constitutional balance

Introduction

Conclusion

The committee does not propose to consider the issue of socio-economic rights in this report, but will defer consideration of this to a later report.

Compulsory purchase, existing land use and the Kenny Report

Conclusions

1 Many of the difficulties associated with the system of compulsory purchase and compensation have their origins in the nineteenth-century legislation dating back to the Lands Clauses Consolidation Act 1845. It does not follow that all of these particular compensation rules are constitutionally required.

2 It seems clear from the Supreme Court decisions in *Pine Valley* and the *Planning and Development Bill* that a landowner's property rights only extend to existing and permitted land uses. Accordingly, in many instances, there is no constitutional right to receive compensation where planning permission has been denied and this is certainly so where the application for permission would involve a material contravention of a development plan.

3 Accordingly the committee is of the view that, having regard to modern case-law, it is very likely that the major elements of the Kenny Report recommendations – namely that land required for development by local authorities should be compulsory acquired at existing use values plus 25% – would not be found to be unconstitutional. Indeed, it may be that in certain respects, the Kenny Report was too conservative, since there seems no necessity that either the act of designating the lands in question which are to be subjected to a form of price control or the payment of compensation to the landowners thereby affected would require to be performed by a High Court judge.

4 The committee is not, therefore, persuaded that the existing constitutional provisions place any unjustified impediment to infrastructural development. It does not, therefore, consider that constitutional change is necessary before any reform of the existing system of compulsory purchase and acquisition is attempted. The committee suggests instead that there should be a thorough-going revision and reform of the complex and byzantine legislation in this area, not least matters such as the necessity for property referencing in every area (no matter how trivial the interference) and the rule whereby every landowner is deemed to own from the centre of the earth to the sky.

Property referencing

Conclusion

The committee considers that the most appropriate way forward is for legislation dealing with infrastructural projects to dispense with the traditional cumbersome referencing system. Instead, the legislation should place the onus on landowners to come forward and to demonstrate how they would or might be affected by, for example, the construction of an underground railway link beneath their land. In the majority of cases, the interferences would be at best de minimis and would, therefore, not create any need for compensation.

Red safety zones

Conclusion

The committee is satisfied that the operation of the red zones system is liable to cause hardship to landowners affected thereby. While it is obviously in the public interest that development in the vicinity of an airport and underneath aircraft flightpaths should be restricted, it is only fair that landowners affected thereby should be entitled to some measure of compensation in respect of these (potentially) far-reaching restrictions. The committee accordingly recommends that the existing scheme of compensation provided in section 14(2) of the 1950 Act in respect of 'protected areas' should be extended to those landowners affected by the operation of the 'red zones' system.

Ground rents

Conclusions

Having examined the ground rents issue, the committee is of the view that:

a) A ground landlord's ground rent represents a right to an income which, in principle, is constitutionally protected.

b) Provided adequate compensation is provided, the abolition of ground rents would not be arbitrary or based on unfair considerations and, as such, would not be unconstitutional. There are clear public interest justifications for the abolition of ground rents and these plainly warrant overriding the ground landlord's property rights.
c) The critical question is whether any legislation abolishing or extinguishing ground rents provides adequate compensation.
d) The real question, perhaps, is what is adequate compensation in this context. So far as the majority of ground rents are concerned – ie where the ground rent has more than fifteen years to run – it is difficult to see why the fifteen year multiplier at present operated under sections 9 and 10 of the 1978 (No. 2) Act would not be constitutionally acceptable. In other words, if at the moment, a ground tenant can elect to purchase the ground rent at this price under the 1978 (No. 2) Act, it is hard to see why this should be regarded as constitutionally objectionable. It may be, indeed, that a lesser multiplier would also be constitutionally acceptable, but this would in part turn on current investment yields etc.
e) There remains the question of ground rents where less than fifteen years remains to run. While acknowledging that there appears to be nothing magical or sacrosanct about the fifteen-year period – so that the Oireachtas could probably reduce this fifteen-year period with prospective effect – the fact remains that – at some date chosen by the Oireachtas – an enhanced price will have to be paid in those circumstances by the ground tenant in respect of the ground rent. Any legislation providing for the abolition of the ground rents will have to deal with this special situation and provide for the payment of enhanced compensation in those circumstances.

Recommendation

The government should prepare legislation to abolish ground rents which embodies a scheme of adequate compensation.

Access to the countryside

Conclusion

The committee is satisfied from its examination of Article 40.3.2° and Article 43 that no constitutional amendment is necessary to secure a balance through legislation between the rights of individual owners and the common good.

The Occupier's Liability Act 1995 sought to address the question of the exposure of landowners to claims. It sought to set down rules upon which landowners who, exercising the common duty of care, could rely to ensure that they did not become liable for injury

or damage sustained by entrants while on their property. Should it transpire that the 1995 Act is found on appeal by the courts to be ineffective for this purpose, the committee would urge the Oireachtas to repair the legislation as quickly as possible.

Conclusion

The committee favours the establishment of a Countryside Recreation Council with national, regional and local reach. The use of the Northern Ireland model would make for easy alignment of joint tourism projects as well as avoidance of the heavy, initial mapping costs that seem to be a concomitant of the approach taken in England and Wales. The management issues of what structure the Council should have and who should control it are government issues, but the committee would draw attention to the importance of the planning authorities with their relevant statutory and executive powers. Their part in the Council and its work needs to be carefully factored in.

Property of religious and educational institutions

Conclusion

Article 44.2.6° has served its historic purpose but is now redundant. While for that reason its removal may be desirable the committee believes that the balance inherent in the Article and the manner in which it has operated in practice does not make its removal or amendment necessary at present.

The Constitution Review Group

Conclusions

1 While the committee agrees that the formulation of the relevant constitutional provisions in regard to property rights is wordy and invites subjective judicial assessment and is to that extent unsatisfactory, we note that many of the uncertainties have been clarified by the extensive case-law. We do not consider that it is correct to say that this case-law bears out the frequent criticism that the property rights provisions unduly protect the right of property or create undue difficulties for the Oireachtas where it attempts to regulate or control such property rights in the public interest.

2 Although constitutional change may not be strictly necessary, the committee nonetheless think that change along the lines recommended by the Constitution Review Group may be desirable. The new wording proposed by the Constitution Review Group would have the merit that the property rights provisions were contained in a single self-contained constitutional provision and would perhaps more clearly

articulate in express terms the proper balance which must be struck between the rights of property owners on the one hand and community interests on the other.

Chapter 2

The dynamics of the property market

Lack of comparative information

Recommendation

In order to encourage transparency in property markets and research, transaction details should be gathered and published by the state. All lands and titles should be registered by a specified date. Auctioneers and estate agents, who generate, supply and promote market information, should be regulated by either an independent body or the state.

Characteristics of the property market

Conclusion

Property markets are quite unlike other markets and have characteristics that require special attention. Unfortunately housing, planning and taxation policies have not taken sufficient account of these characteristics, nor of the interaction between planning and urban property markets. It is not surprising that there are deficiencies in our planning system when looked at from an urban perspective, deficiencies that manifest themselves in particularly high development land values.

House prices and development land

Conclusion

The committee accepts the view of the majority of professional commentators that, in the case of dwellings in urban areas, high house prices are not primarily the result of high development land prices. Instead high development land prices mainly result from high house prices.

Planning and market deficiencies

Recommendations

1 When planning authorities are adopting their development plans they should ensure that sufficient land is zoned to meet

the anticipated needs for the duration of the plan. They should anticipate delays in bringing serviced and zoned land to the market.

2 The government should devise a scheme comprising a structure of progressive charges, whereby planning authorities can secure the release of development lands where development is not being actively pursued by the owners or the development land is not being placed on the market by them.

3 The existence of options should be included in the categories of transactions to be revealed publicly as a measure to achieve transparency in property markets generally.

Conclusion

There is a need for a system of formal land use planning designed to manage and regulate the market for property resources in urban areas. Land use planning must be implemented in a way that works with markets and reflects an understanding of the dynamics involved. Otherwise the market signals will be distorted and difficulties of accommodation supply will arise.

Taxation

Conclusion

The committee supports the need for a greater recognition of the necessity to consider the impact of taxation policies on land use planning and the need for greater research into the negative effects of particular measures.

Recouping betterment

Recommendation

The community should recoup the increase in the value of land arising from planning decisions and from the provision of physical and social infrastructure.

The major recommendation of the Kenny Report (the Designated Area Scheme) is the most secure scheme both for capturing betterment for the community and for controlling the price of building land particularly in regard to social and affordable houses in urban areas. This should be re-examined with a view to implementation following such modifications as are necessary or desirable in the light of experience since its publication. Betterment in non-designated areas should be recovered through the instruments listed below.

If the Kenny scheme is not proceeded with the committee is aware that there are a number of different mechanisms which, combined, could recover betterment in both urban and rural areas:

- development charges/levies. (These may also be known as impact fees)
- planning gain. Planning gain enables local authorities and developers to enter into agreements, as part of the grant of planning permission, which will require the provision of infrastructure and services, including social infrastructure such as schools. Agreements under Part V of the 2000 Act are an example of planning gain
- taxation, this could vary from taxing the gains from increases in value to an annual site value tax
- compulsory acquisition of land at existing use value in specified locations to provide for social and affordable housing and other uses related to the public good.

Some of these measures are already being employed. However they do not operate to control the price of building land.

Social housing

Conclusion

In free market conditions it is entirely to be expected that a boom will magnetically attract all the production resources into satisfying the market demand. Our analysis, however, shows that social and affordable housing are special cases that must be treated by special interventions. The committee was impressed by the clarity with which a number of organisations – Irish Council for Civil Liberties, CORI, Threshold, Irish Council for Social Housing, Simon, Focus Ireland, Irish Traveller Movement and Pavee Point – presented the level of need that exists and the creativity and energy with which they formulated solutions.

Recommendations

1 Section 48 of the Planning and Development Act 2000 should be amended to include social housing under the definition of 'public infrastructure and facilities'.

2 Local authorities should identify lands in their development plans reserved for social and affordable housing in order a) to ensure that a greater supply of social and affordable housing is made available without influence from external market and competitive forces b) to enable residential areas to be planned in a socially-inclusive manner and c) to control the cost of zoned lands designated for the provision of social and affordable housing.

3 In the case of compulsory purchase orders relating to the provision of social and affordable housing public bodies should not have to pay the full market value of the land acquired, especially because the increase in the value of the land will have largely resulted from the action of public bodies through re-zoning or the provision of infrastructure.

4 If the committee's recommendation in relation to the implementation of the Kenny Report is adopted the objectives for social and affordable housing can be more readily achieved.

Chapter 3

Managing the planning system

Development planning and planning procedures

Conclusion

There is a need for continued and increased national planning guidance by the DoEHLG. Topics that should be covered include development control, rural housing, broadband infrastructure, Strategic Development Zones and the design of buildings.

Recommendation

Planning advice, provided by suitably qualified professionals, should be made available to elected members of planning authorities in the drawing up and variation of development plans. To enhance the independence of the advice the elected members should themselves select the appropriate advisors.

Conclusion

In considering the range of issues involved in the process of development planning the committee concluded that there was a need for a national development forum through which the best thinking and practice would be made available continuously to the whole planning system.

Recommendation

The government should establish a body drawn from the planning, construction, property and environmental interests, together with the state regulatory bodies concerned with planning, to meet as a national forum for the built environment. The body would aim to inform national planning policy based on experience and research commissioned from appropriate research agencies.

Development control and consent

Recommendation

Planning authorities and An Bord Pleanála should be adequately resourced to expedite the planning process. Human resource management within planning authorities should provide for economics skills and take measures to foster a continuing improvement of the understanding of urban and regional economics by those working in the planning system at all levels. It should also anticipate the cyclical nature of property markets and the complexity of the process of physical development by ensuring the maintenance of core experience and skills and the maintenance of inventories of skilled personnel available on a temporary basis.

Provision of infrastructure

Conclusion

The committee recognises that there is a greater need for co-ordination between national agencies, government departments and local authorities responsible for the delivery of infrastructure, including social infrastructure, by setting out guidelines clarifying their roles and responsibilities.

Recommendations

1 Strategic transport, sewerage and water supply infrastructural projects should be regulated by a specific statute and there should be a 'one stop shop' planning procedure for them

2 A special division of the High Court should be established to deal with legal challenges to infrastructural and environmental planning so that judicial skills in these matters can be concentrated and decisions expedited.

Legislative provisions for compulsory purchase

Recommendations

1 Legislation relating to compulsory purchase procedures and rules for assessment of compensation should be consolidated and reconfigured in a form that could be attached to any statute giving compulsory purchase powers to an authority.

2 The procedure for establishing interests in land to be compensated should allow for the notification of interested parties by advertising in the media circulating in the local area concerned and by fixing an appropriate public notice to the lands concerned for a minimum specified period.

3 The right to compensation for the acquisition of property rights below a specified depth under the surface should be removed. This should be done without prejudice to the right to claim compensation for any injury or damage that might arise from an undertaking.

Residential density

Conclusion

Given that the most recent guidelines on residential density have been in operation for four years, it may be appropriate to carry out a monitoring review of their impact and their integration into the policies of planning authorities.

Rural housing

Recommendation

Research should be comissioned into the direct and indirect costs of rural housing.

Conclusion

Those who live and work in a rural area should be facilitated to build appropriately designed houses in such areas, subject to safeguarding the environment and in particular the landscape and areas of high amenity.

County development plans should identify those areas that can accommodate rural housing and those landscape areas in which housing will not be permitted.

In cases where a son or daughter may wish to build near a parent or parents living alone in the country, so as to be able to provide care as required, exceptional consideration should be given.

APPENDICES

APPENDIX 1

APPENDIX 1

Letter from An Taoiseach to the chairman of the All-Party Oireachtas Committee on the Constitution

Oifig an Taoisigh
Office of the Taoiseach

29 February 2000

Mr Brian Lenihan TD
Chairperson
All-Party Oireachtas Committee on the Constitution
Houses of the Oireachtas
Kildare Street
Dublin 2

Dear Brian

I am writing to you in relation to the consideration by the All-Party Committee on the Constitution of the personal and property rights aspects of the Constitution.

As you are aware, major strategic issues arising in relation to the delivery of accelerated infrastructure projects are at present under consideration by the Cabinet Committee on Infrastructural Development and Public Private Partnerships. At its meeting on 15 February 2000, the Government endorsed an integrated package proposed by the Cabinet Committee of changes to the existing statutory approval and judicial review processes in order to underpin accelerated delivery of infrastructure under the National Development Plan.

These measures include proposals for improvements to the existing processes – from the design to the delivery stages. Changes will be made in respect of the planning process, the Planning Bill, judicial review and courts related issues. I enclose a copy of the press release issued by the Government announcing the measures involved.

In the course of preparing the package of measures announced, a large number of matters in, or recognised as being in, the Constitution which have a bearing on planning cases which come before our Courts were identified. The most important of these are as follows:

- the right to hold and dispose of property
- the right of access to justice
- the right to reasons in respect of decisions
- the right to a decision within a reasonable time
- the right to fair procedures
- the principle of proportionality
- justice, save in special and limited cases as may be prescribed by law, must be administered in courts
- the High Court's full original jurisdiction in and power to determine all matters (including review of planning decisions).

While the Report of the Constitution Review Group dealt extensively with various provisions in and rights under the Constitution, none of the recommendations it made involving change in the Constitution were of a kind which had specific bearing on judicial review but some did, in one form or another, relate to the planning process. The matters touched upon by the Review Group which were of note to the Government were the following:

- the Constitution Review Group favours an amendment of the personal rights provisions in the Constitution to provide a comprehensive list of fundamental rights which could specifically encompass personal rights which have been identified by the Courts
- the Constitution Review Group does not consider that the Constitution's property provisions are satisfactory in their present form. In this context, the Group recommended that the Constitution should expressly provide that property rights may be qualified, restricted or even extinguished by legislation where there are clear social justice or other public policy reasons for doing so. The Group felt that aspects of the First Protocol of the European Convention on Human Rights could provide useful models for any rewording of the private property provisions of the Constitution. Such rewording should provide for the inclusion of a new qualifying clause which would specify that property rights carry with them duties and responsibilities but that these may be subject to legal restrictions, conditions and formalities, provided these are duly required in the public interest and accord with the principles of social justice – these may relate to proper land use and planning controls and protection of the environment.

The Government feel that these are imaginative recommendations which take account of prevailing conditions in the property area. They think that the approach recommended by the Constitution Review Group in its Report is well-rounded and puts into proper context the matter of personal and property rights.

I understand that the All-Party Committee will soon be turning its attention to the personal and property rights aspects of the Constitution. The Government has asked me to request that the Committee, in examining the personal and property rights aspects of the Constitution, should consider the need for updating provisions which pertain to planning controls and infrastructural development.

The Cross Departmental Team which assists the Cabinet Committee, which is chaired by Ms. Mary Doyle of my department, can be contacted for further information or assistance that your Committee may require.

It would be appreciated if you could keep me informed of developments in this matter.

Yours sincerely

Bertie Ahern TD
Taoiseach

APPENDIX 2

APPENDIX 2

Notice inviting submissions

THE ALL-PARTY OIREACHTAS COMMITTEE ON THE CONSTITUTION

PROPERTY RIGHTS

The Committee invites written submissions.

Bunreacht na hÉireann (the Constitution of Ireland) makes provision in relation to private property in two Articles.

Broadly speaking, Article 40.3.2° pledges that the State shall vindicate the property rights of every citizen. Article 43, however, acknowledges that these rights ought to be regulated by the principles of social justice.

Following the enactment of the Constitution, legislation relating to private property has been developed in line with those Articles and elucidated by the courts in a substantial body of case law.

The All-Party Oireachtas Committee on the Constitution, which is charged with reviewing the Constitution in its entirety, is now examining these Articles to ascertain the extent to which they are serving the good of individuals and the community, with a view to deciding whether changes in them would bring about a greater balance between the two.

The Committee wishes to invite individuals and groups to make written submissions to it on such issues as

- **the right to private property**
- **private property and the common good**
- **compulsory purchase**
- **the zoning of land**
- **the price of development land**
- **the right to shelter**
- **infrastructural development**
- **house prices**
- **access to the countryside**

Submissions should reach the Committee at the address below before 31 May 2003.

THE ALL-PARTY OIREACHTAS COMMITTEE ON THE CONSTITUTION
Fourth Floor, Phoenix House
7-9 South Leinster Street, Dublin 2
Fax: 01 662 5581 Email: info@apocc.irlgov.ie

APPENDIX 3

Submissions

Contents

APPENDIX 3

Submissions

This appendix reproduces a broad selection of the written submissions made to the committee. The selection is made on the basis of the intrinsic reference value of the submissions. Care has been taken to ensure that the range of views presented to the committee is widely represented.

AN ÓIGE – THE IRISH YOUTH HOSTEL ASSOCIATION

ACCESS TO THE COUNTRYSIDE

An Óige was founded in 1931. At the end of that year it had just 215 members and two hostels. Nearly 73 years later, An Óige has 33 Youth Hostels, located country-wide providing inexpensive, good quality accommodation for individuals, families and groups both from here and abroad. Many of our visitors like nothing more than enjoying outdoor activities with a hint of adventure. Hill walking plays a big part in the activities of our members and visitors. Every Sunday three-hike programmes are run 52 weeks of the year, which attract many members, who experience the mountains in the Wicklow area. Our Regional Groups in Cork/Kerry and Kilkenny are also active hill walkers and cyclists.

The Aims of An Óige are:

1 to help all, but especially young people, to a love and appreciation of the countryside, particularly by providing simple hostel accommodation for them whilst on their travels
2 to foster an appreciation of the Irish cultural and historic heritage
3 to co-operate with other organisations for the following purposes
   a) To preserve the beauties of the countryside
   b) To secure and mark rights of way and other footpaths
4 to co-operate with kindred associations in other countries
5 to take any other steps calculated to further such objectives.

Over the period of 73 years, many thousands of visitors both from home and abroad have used our hostel facilities to visit many of the remoter areas of Ireland (In 2000, 229,257 overnights; in 2001, 204,274 overnights; in 2002, 202,573 overnights). Many such visitors return in their mature years usually introducing their offspring to the wonders of the outdoors. An Oige hostels, being situated in remote regions, bring much need tourism to small rural communities.

Over recent years access to the countryside in all parts of Ireland has become an issue not only for our members but also for our visitors from abroad.

All land in Ireland is owned, either by private individuals, or state bodies. Recreational users do not have a legal right of entry to land. For many years the great majority of rural landowners gave access to the Irish countryside and this has long been appreciated by generations of hill walkers.

However, access is at the discretion of the landowner, who may prohibit entry or withdraw consent without prior notice to recreational users. This situation contrasts with that which obtains in most other parts of Europe, where varying degrees of public access to land are formally defined. An initiative in providing access must be founded on the goodwill of landowners. An Óige accepts that landowners have legitimate concerns in regard to liability issues but it was hoped that the Occupiers Liability Act gave adequate protection to landowners in this regard.

An Óige would like to support the principle that there should be access to open country for the purpose of recreation, this also applies to access to mountains, crags, the coast and other areas visited by responsible recreational users.

An Óige also supports the principle of freedom to roam over rough grazing land, that is about 7% of the total land area.

An Óige would also support a network of well-marked, maintained right-of-way in lowland areas to allow short walks and to reach open ground.

It is hoped that the thorny issue of right of access will be addressed by this committee and put the uncertainty that exists currently finally onto a proper legal footing.

AN TAISCE

AN TAISCE'S APPROACH

An Taisce's approach to property rights is driven by its remit. We consider that our remit is to promote sustainable development (being a balance of economic, social and environmental factors) rather than simply the economy; and to promote quality of life rather than simply consumption. An Taisce looks to the long term as well as to the short term and to the public interest rather than private interests. These factors animate our approach to property rights – as to other matters, and so infuse this submission.

RIGHTS

An Taisce supports the constitutional recognition of general social, economic and environmental rights as well as general civil and political rights.

Rights, in our view, have at least two facets.

1 Rights are untrumpable (i.e. unyielding, even to the public interest).
More general rights e.g. generic 'civil', 'political', 'social', 'economic' and 'environmental', rights are untrumpable. For example in the abstract individuals have 'civil rights'. More specific 'rights' under these categories e.g. (under the head of 'civil rights') 'the right to freedom of expression' and 'the right to liberty' lack the quality of untrumpability – since you may not falsely shout 'fire!' in a crowded cinema and you are not free to kill your neighbours. It is confusing to describe 'the right to freedom of expression' and 'the right to liberty' as rights.

Some specific rights are fundamental. They are untrumpable. Fundamental rights like justice, fairness and the right to be treated equally are untrumpable. They prevail in all circumstances in civilised societies.

2 Rights are essential to the fulfilment of human potential or 'nature' and the maintenance of human dignity and integrity. Where they do not have this quality we prefer the term 'entitlement'. For example there is no right, as opposed to entitlement, to watch TV.

IS THERE A RIGHT OF/TO PROPERTY?

Property is not a general or a fundamental right. It is not untrumpable. Everyone concedes that it must yield to the public interest in certain circumstances. It fails the first test.

Nor is property essential to fulfilment of human potential or nature and the maintenance of dignity and integrity: some humans live dignified lives to their full potential without owning significant property. Rather, the assertion of property rights has historically been associated with the protection of commercial and business interests. It fails the second test.

Property lacks both of the qualities necessary to be a right.

Briefly, An Taisce considers that property is an 'entitlement' that may be exercised only where it is in the public interest.

SHOULD PROPERTY BE RECOGNISED IN THE CONSTITUTION?

The background information received from the committee posits two principal reasons for suggesting there is a right of property:

i) while the State has legitimate reasons to control and regulate the exercise of property rights, it is necessary and desirable to provide protection against the risk of arbitrary or disproportionate deprivation or interference by the State. The prosperity of the State depends in substantial measure on property – whether land, building, equity or any other form of wealth – being available as a source of, or security for investment

ii) the right to property is one that has received international acknowledgement: see, for example, Article 17 of the United Nations Universal Declaration of Human Rights and Article 1 of the First Protocol to the European Convention on Human Rights.

On balance, An Taisce inclines to endorse the views of the UN and ECHR that property should be recognised, though, we submit, as an 'entitlement' not a 'right'. We do not believe the entitlement is a human right or a fundamental right or even a 'right' in the stringent sense of the word.

It appears that most progressive European constitutions do not expressly recognise a right to property.

The chief reasons for recognising property at all are economic and practical. Without it our economy risks collapse and we would surrender our competitiveness internationally. As a mere – albeit important – practicality, it should be afforded a place in the Constitution separate from the recognition of fundamental rights in Article 40.3. Any recognition of property should be under Article 43 only.

In any event, any new formulation of the protection of property entitlements should be accompanied by a clause which would allow the Oireachtas to qualify the exercise of the entitlement in the public interest including for reasons of the economic public interest, social justice or environmental reasons in cases where there are clear objective reasons for doing so and where the legislation is proportionate to the aim sought to be achieved.

Ideally the distribution of property in the public interest would be equitable. That said, the public interest in this case should internalise the concept of legitimate expectation so that a necessary practical restraint on the absolutely equitable distribution of

property is the requirement for commercial certainty in a capitalistic society. In other words a wholesale redistribution of property is undesirable because it would generate economic chaos.

NEED FOR CHANGE

An Taisce feels that clarity is needed and can best be obtained by a referendum. We believe the existing ambiguity has driven a conservative approach on the part of those charged with the public interest and the common good. It has militated against dynamic use of laws to protect the environment and promote good planning, against a robust dismissal of excessive compensation claims by landowners to planning authorities, and against effective use of compulsory purchase orders.

EXISTING CONSTITUTIONAL GUARANTEE OF THE RIGHT TO PRIVATE PROPERTY

Currently, the right to property is guaranteed by two separate provisions of the Constitution – Article 40.3.2° and Article 43. Broadly speaking, Article 40.3.2° pledges that the State shall vindicate the property rights of every citizen. Article 43, deals with the institution of property itself and acknowledges that these rights ought to be regulated by the principles of social justice. See *Blake v Attorney General* [1982] IR 117.

Following the enactment of the Constitution, legislation relating to private property has been developed in line with those Articles and elucidated by the courts in a substantial body of case law.

The separated principles have been criticised in a number of respects:

i) the fact that there are two separate constitutional provisions dealing with property rights has itself given rise to much confusion.

ii) the language of Article 43 in particular is unhappy. Several commentators have drawn attention to the contrast between Article 43.1 and Article 43.2. In a famous dictum, the constitutional expert Wheare contrasted the stress placed on the right of private property in Article 43.1 – 'calculated to lift up the heart of the most old-fashioned capitalist' – with that placed on the principles of social justice and the exigencies of common good in Article 43.2 – 'the Constitution of [former] Jugoslavia hardly goes further than this'. It was, he said, 'a classic example of giving a right on the one hand and taking it back on the other': see *Modern Constitutions*, Oxford, 1966, p 63. In addition, Mr Justice Keane has spoken of the 'unattractive language' and 'tortured syntax' of Article 43: see '*Land Use, Compensation and the Community*' (1983), 18 Irish Jurist 23.

iii) both Article 40.3 and Article 43 are particularly open to subjective judicial appraisal, with phrases such as 'unjust attack', 'principles of social justice' and 'reconciling' the exercise of property rights 'with the exigencies of the common good'.

NATURAL RIGHT

Article 43.1.1° contains an acknowledgment that man, by 'virtue of his rational being' has the natural right to private ownership 'of external goods'. It seems unhelpful to root property, or indeed any right, in so controversial and ethereal a base. An Taisce considers that any 'entitlement' to property must be rooted in, and limited by, the public interest as outlined above. Such complicated circumscriptions scarcely suggest that property is a right or something 'natural'.

Article 43.1.2° provides that, by reason of the existence of the foregoing natural right to property, the state 'accordingly' guarantees to pass no law abolishing the general right of private ownership or the general right to transfer and bequeath property.

Since An Taisce considers the 'right' to property to be trumpable in the public interest we see no reason to deny to the State the power to amend its attitude to the institution of property through legislation. For this reason we have not followed the Review Group's view that the Constitution should guarantee that the State guarantees to pass no law attempting to abolish these rights.

SOCIAL JUSTICE

Article 43.2.1° provides that the state recognises that the exercise of property rights ought to be regulated by reference to the principles of social justice. Article 43.2.2° provides that the state may delimit the exercise of these rights by law (although the Irish text simply refers to 'teorainn a chur') with a view to regulating their exercise so as to meet the exigencies of the common good. Again, An Taisce believes 'social justice' requires that the exercise of property 'rights' should be equitable, with the primary necessary restraint on an equitable distribution of property being the requirement for commercial certainty in a capitalistic society.

In any event, An Taisce considers that social justice, the common good and the public interest amount to the same thing and we favour the last term throughout as being precise and comprehensive.

An Taisce believes that property must yield to a wide variety of countervailing public interests which should be defined more precisely. This in turn means that the state must have the means to register these countervailing public interests including extensive taxation powers, powers of compulsory acquisition and a general capacity to regulate (and even in some cases to extinguish) property rights.

The language of Article 40.3.2° and Article 43 has given rise to difficult questions of interpretation, although it seems that some of these difficulties have been clarified by the contemporary case-law. Contemporary judicial thinking seems to stress that, while the state may regulate and interfere with

property 'rights', it may not do so in a manner which disproportionately interferes with such 'rights'. This principle of proportionality accords with An Taisce's view that the entitlement to property in particular cases must be subject to the public interest and the need for certainty. As Costello P said in *Daly v Revenue Commissioners* [1996] 1 ILRM 122:

> But legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved. When, as in this case, an applicant claims that his constitutionally protected property rights referred to in Article 40.3.2° have been infringed and that the State has failed in the obligation imposed on it by that Article to protect his property rights he has to show that those rights have been subjected to an 'unjust attack'. He can do this by showing that the law which has restricted the exercise of his rights or otherwise infringed them has failed to pass a proportionality test...

There have been only about seven cases where a plaintiff has established an unconstitutional interference with his or her property 'rights' and in nearly every such case the potential arbitrariness of the interference in question was fairly evident.

LEGAL ENTITIES

As to whether legal entities should be afforded the constitutional 'right' to property, An Taisce considers that since legal persons are the creation of statute, the protection of the 'rights' and interests of legal persons is a matter for the Oireachtas alone. There is no need to go further in order to emulate the provisions of Article 1 of the First Protocol of the European Convention on Human Rights and the economic and practical reasons which justify recognition of Property do not require its extension to legal entities.

WHETHER THE CONSTITUTION SHOULD RETAIN THE 'DUAL PROTECTION' OF PROPERTY RIGHTS OF ARTICLE 40.3.2° AND ARTICLE 43

Some of the difficulties of interpretation to which these provisions have given rise have now been clarified by case law. Some of the possible fears about an absolutist interpretation of these provisions, which would severely handicap the Oireachtas in areas such as planning law, have not been realised, though many state authorities are reluctant to assert the public interest over vested interests in particular cases – for example the enforcement of planning and conservation laws. Nevertheless in the interests of both clarity and simplicity it ought to be possible to re-draft these provisions so that a more direct, self-contained clause would clearly set out the extent of the state's powers to regulate, control or even extinguish property entitlements.

The courts have found it more or less impossible to adhere to a strict categorisation of Article 40.3.2° in contrast with Article 43 property rights. Even if the utility of differentiating between the institution of property and the protection of individual property rights were clear, An Taisce considers it would be preferable to deal with property in a single self-contained Article. Since property is not a fundamental right it should appear under Article 43, not Article 40.3.2.

WHAT THE ELEMENTS OF A NEW ARTICLE SHOULD BE

A new self-contained Article on property might state the following:

i) every natural person is entitled to the peaceable enjoyment of his or her own possessions and property subject to iii).
ii) Property has its duties as well as its entitlements (to paraphrase Drummond).
iii) Property entitlements, since they carry with them duties, may be subject to legal restrictions, conditions and formalities, provided these are duly required in the public interest. Such restrictions, conditions and formalities may, in particular, but not exclusively, relate to the raising of taxation and revenue, proper land use and planning controls, protection of the environment, consumer protection and the conservation of objects of archaeological, artistic, cultural or historical importance.

Note: i) is based on the first paragraph of Article 1 of the First Protocol of the European Convention on Human Rights. The qualifying clause at iii) is loosely based on, and adapted from, the qualifying clause contained in the free speech provision in Article 10.2 of the European Convention on Human Rights.

THE RIGHT TO PRIVATE PROPERTY

See above

PRIVATE PROPERTY AND THE COMMON GOOD

The Constitution should recognise that property entitlements should be regulated by law in accordance with the public interest. An Taisce considers that the public interest includes the common good. We therefore prefer the former term throughout. The public interest should now be explicitly defined to include a number of important societal goals adumbrated below.

Sustainability is an important element of the 'public interest'. An amendment to the Constitution could usefully include explicit inclusion of the concept of sustainability and intergenerational equity. Sustainability is a concept which postdates the Constitution. It should now be recognised as it has been in the South African Constitution and the draft EU Constitution.

The Brundtland Report defines sustainability as 'meeting of the needs of the present generation without compromising the needs of future generations'. This is a core principle of global and international

application. It forms part of the state's international commitments made through UN forums including the Rio Earth Summit. It has been incorporated in Irish legislation in the Planning and Development Act 2000 and is a guiding principle in the Amsterdam Treaty of the EU and the draft Constitution for the EU. Without the concept the rights of future generations would be excluded from the public interest.

An Taisce is impressed by the South African provisions on sustainability and the environment, though it would prefer the term entitlement to right. Section 24 of the South African Bill of Rights states that

> Everyone has the right [sic] – (a) to an environment that is not harmful to their health or well-being; and (b) to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that – (i) prevent pollution and ecological degradation; (ii) promote conservation; and (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development

Quality of Life is an important element of the 'public interest'. The tacit goal of society seems to have emerged as the promotion of quality of life. This should be recognised. Too often standard of living is used as a very poor indicator of this. This is responsible for many poor decisions. To promote quality of life it is necessary to systematically monitor it through indicators.

The Constitution should assert that an important goal of society is the improvement of the quality of life. Perhaps this is important enough to merit a mention in the Constitution's Preamble.

The Constitution should assert that the quality of life should be regularly and systematically monitored by official scrutiny of quality of life indicators.

Planning and development significantly affect quality of life. The Constitution should assert that proper planning and development is an important means to the improvement of the quality of life.

In accordance with the Amsterdam Treaty and the Draft Constitution on the Future of Europe, the Constitution should guarantee the 'right to an improving environment'. An Taisce considers any review that omitted this right would soon be anachronistic.

COMPULSORY PURCHASE

An Taisce considers the CPO process should be much more widely – and less tentatively – used. When a justifiable case can be made for CPOs, compensation should be for existing value and use only but should also include a small increment in recognition of compulsion. An Taisce supports implementation of the Kenny Report in this respect. Widespread use of CPOs was essential to some of the great feats of modern planning e.g. Britain's new towns like Milton Keynes. It is essential to successful planning in Ireland where there is a housing crisis.

THE ZONING OF LAND

Zoning, infrastructure provision and planning permission add considerable value to land. An Taisce considers that developers should be required to comply with community-driven plans and that particular developments should be levied or incentivised in proportion to their scores against multifarious (approximately 100) quality criteria under the three general heads of Design, Provision of Amenities and Impact on Community. If landowners do not develop zoned land they should pay penal rates of taxation on windfall (completely unearned) zoning profits.

The zoning of land for development is necessary for efficient infrastructure provision and the development of sustainable nucleated settlements. An Taisce believes that a land-use commission should certify zonings and rezonings for compliance with relevant criteria. This should include compliance with national spatial strategy, regional planning guidelines, proper planning and sustainable development, flood-plane strategy etc.

The Constitution should merely recognise that a national land-use commission should certify the appropriateness of land zonings.

The Constitution should assert that planning and development should serve the community and the public interest.

THE PRICE OF DEVELOPMENT LAND AND HOUSING

Since land now represents such a significant element of the cost of housing, we have treated development land and housing together.

Unacceptably high land and property prices are denying individuals their rights to accommodation and a high quality of life and making Ireland's agriculture uncompetitive.

Again, An Taisce considers the most important thing the Constitution can do to avert galloping house prices is to assert that landowners should pay penal rates of taxation on windfall zoning profits.

Furthermore it should be possible, in every town and village in Ireland, for the local authority to compulsorily purchase backland sites at current-use market value with a small increment (as suggested in the Kenny Report) for appropriate mixed-use development including social and affordable housing. The Constitution should recognise that compulsory purchase powers should be available to local authorities to promote the public interest.

The Constitution should recognise that 20% of housing should be social or affordable and that developers must yield land at existing-use value (plus an increment) for this purpose or, where this is not possible, must pay a levy to the same value. An Taisce considers all residential developers (including one-off-housing builders) should be levied to provide for social and affordable housing in nucleated settlements or, where possible, integrate such housing in their developments.

THE RIGHT TO SHELTER

Everyone who has need of accommodation has a right to accommodation. There is an *entitlement to social and affordable housing* because basic human endeavours can only be conducted against a background of proper housing. This should be recognised in the Constitution.

Elderly and retired people have a right to the same standard of housing as working people.

INFRASTRUCTURAL DEVELOPMENT

Infrastructural development that serves the public interest should prevail over private property. An Taisce considers it would be contrary to the dignity of the Constitution to afford infrastructure – a means to an end – any explicit recognition in the state's fundamental Constitution.

ACCESS TO THE COUNTRYSIDE

All citizens should be exposed to a good environment. The Swedish Fundamental Law recognises a right of access to nature. In an increasingly urban environment access to the countryside should be guaranteed as an essential component of a full life. If it is a right it is an obscure one which might be dealt with through legislation which reflected the subordination of property rights to the public interest. Perhaps it too is better described as an entitlement. Local authorities should facilitate access to the countryside through provision of networks of bridleways and by encouraging farmers, for example by underwriting insurance, to allow walkers on their land. It is debatable whether it should be recognised in a modern Constitution.

Perhaps the Constitution should recognise a right to personal development and include access to nature as a vehicle to this end.

COMPOSITION OF FUTURE REVIEW GROUPS

According to background documentation from the All-Party Committee on the Constitution there have been many reviews of the Constitution since its promulgation in 1937. In 1966, at the instigation of the then-Taoiseach, Seán Lemass, an informal Oireachtas committee undertook a general review of the Constitution and issued a report a year later. In 1968, a legal committee, chaired by the Attorney General, produced a draft report. The 1972 Inter-Party Committee on the Implications of Irish Unity addressed constitutional issues in relation to Northern Ireland. Its work was continued by the 1973 All-Party Oireachtas Committee on Irish Relations and later by the 1982 Constitution Review Body, a group of legal experts under the chairmanship of the Attorney General. None of these three groups published a report. The New Ireland Forum was established in 1983. Its report in 1984 covered some constitutional issues. In 1988 the Progressive Democrats published a review entitled Constitution for a New Republic. Constitutional issues in regard to Northern Ireland were again addressed by the Forum for Peace and Reconciliation established by the government in October 1994. The forum suspended its work in February 1996 but met once more in December 1997. The Constitution Review Group, an expert group established in 1995, published its report in July 1996. The All-Party Oireachtas Committee on the Constitution 1996-97 published two progress reports in 1997 and the All-Party Oireachtas Committee on the Constitution 1997-2002 published five progress reports and two commissioned works.

Membership of the review bodies has been wide-ranging but has never comprised environmentalists or those promoting good urban and regional planning. Since sustainable development is now an uncontroversial goal of society it is self-evident that persons representing its component sectoral agendas should be present in future review groups, i.e. representatives of environmental social, economic and cultural agendas as well as the usual political sectors.

SOURCES OF DEMANDS FOR CONSTITUTIONAL CHANGE

The reviews – and political experience – have apparently identified seven major sources of the demands for Constitutional change:

1 Northern Ireland
2 European Union
3 international human rights developments
4 socioeconomic change
5 working experience of the Constitution
6 outmoding of some provisions
7 inaccuracies in the text.

An Taisce would like to suggest an eighth source of demands for constitutional change – the environment – and that in future reviews, where relevant, environmentalists and/or planners should be included on the review body.

AONTACHT CUMANN RIARTHA ALTREABHTHOIRI (ACRA)
GROUND RENT SUB COMMITTEE

SECTION 1: DEMOCRACY IN ACTION TO END 'LANDLORDISM'

Nowhere better than in Ireland is the right to the ownership of private property respected. It is a constitutional right of every citizen, jealously safeguarded in our courts. But even in medieval times the laws governing land tenure had to be seen as legally respectable. The rights of the landlord as well as the tenant were subject to traditional reservations; both parties had certain obligations, duties and responsibilities. This

does not apply to today's ground rent landlords who have been compelled to admit in court that in return for ground rent, exacted annually, they give absolutely nothing – neither goods nor services, for this feudal rent.

Today we are witnessing a public campaign against ground rents levied on the foundation-land of urban dwellings – a modern footnote to the history of the Land League, when Michael Davitt in 1879 saved tenant farmers from paying exhorbitant rents. Evictions were stoutly resisted, and farmers in some cases came to own their holdings. It reads like a novel, the story of man's progress from feudal serfdom ('As well be hung for a sheep as a lamb' is a proverbial memory of savage laws), to the freedom and self-respect taken for granted in modern democracies. Nowhere is that story more dramatic than in Ireland's history of the past 800 years.

The most recent milestone in that history is ACRA's National Campaign against Ground Rents attached to the foundations of dwelling-houses, especially in our cities and towns. Its objective, to consign to the dustbin of history this medieval relic. The effort will continue, even if it takes ten, twelve or more years to throw off at last this 800-year-old imposition.

Not unexpectedly, the landlords' reaction was aggressive. ACRA's Campaign continues, steadily gaining momentum. Ground rents are still being withheld by hundreds of thousands of householders. The landlords stand to lose ten million euro approximately a year, year after year. With the weight of the law behind them, and no way ashamed of appearing in their true-blue colours, certain landlords have proceded to take vengeful action.

SECTION 2: THE CAMPAIGN

The ACRA campaign which commenced in June 1973 against ground rent was loud and insistant enough to be heeded by political leaders. It exacted from Fine Gael and the Labour Party a Bill on ground rent which surfaced eventually in 1976. The Bill with many defects reached its second stage only in Dail Eireann as 1977 was the election year.

In the same year, 1977, the Fianna Fáil's pre-election promise was that if returned to power they would introduce a Bill abolishing all residential ground rents. This was changed to read 'a scheme leading to the abolition of residential ground rents'.

The Fianna Fáil party went half-way to achieving their objective when in 1978, the creation of new residental ground rents was made illegal. Existing ground rents, however, would continue as before, with all their hateful – and surely unconstitutional demands and threats. But if the law had reason to make new ground rents illegal what reason couldjustify old ground rents being considered legal? In the same year 1978 use of the eviction weapon while the lease runs – was prohibited for non-payment of one year's ground rent or more.

To be fair, our legislators have been responsible for a number of reforms and improvements during recent decades. Yet, when reminded of the continuing injustice of ground rents, many politicians have been apathetic. This is regrettable.

Fear of infringing upon the landlord's constitutional rights has been one excuse offered by politicians. Their apathy in the face of insistent demands for justice is deplorable but understandable – especially in view of the inhibiting influence (never mentioned) of powerful vested interests.

SECTION 3: RENT IN PERPETUITY

A notable absurd feature of this archaic law is that ground rent payments go on for ever. When you die, your heirs inherit not alone your house but also your ground rent. Only the farmers, with Davitt's help, succeeded in shaking off their parasitic landlords. In their case the farm-land was productive; in the case of dwellings, land is no more than a site, a mere foundation, with its garden in front and back a general social amenity.

Having paid for his house, paid a 'site-fine' (which equalled nearly a half years salary) to clinch the deal, and planted a few flowers, the householder expects he has acquired a total unit. Not so. The contract he signed, under duress included an everlasting debt – to a ground landlord. This is a manifest injustice which common sense must reject, as it would any absurd imposition.

The ongoing ACRA ground rent campaign of non-payment has led to over twenty thousand court cases (approximately) and 176 court cases for committal to prison. Five householders have been jailed. This steady resistance of householders to this feudal rent, allied to inflation effects, means that the whole ground rents system lies in ruins. Effective and immediate legislation must be enacted to terminate this feudal imposition. If not, legal problems and injustices will be created for thousands of families into the future.

A current case graphically highlights the invidious exploitation that is taking place under the guise of legitimate business.

> A Dublin householder whose ground lease has expired is to-day struggling to hold onto the family home. The Ground Rent landlord is demanding a sum of €54,000 for the freehold interest plus legal fees of €127 per hour until an agreement is reached.

This is the frightening prospect that faces people with expired leases who have already paid the full market price for their home. There are unfortunately many other similar examples around the country and the law as it stands supports the landlord against the householder. This is clearly unjust and social justice demands that the law be changed.

The amount demanded in these cases is based on a formula in the current legislation, which allows the landlord to claim $^1/_8$ of the market value of the family

home. The amount demanded can be higher or lower than that in our example depending on the location and value of the house.

SECTION 4: THE LAW – RENEWAL OF AN EXPIRED LEASE

The alternative exploitive position for the householders who cannot find the money to buy out the expired lease from the ground rent landlord is even more horrendous. The householder may be offered a renewal of the lease for a period of years – usually 35 years only, which in effect is an occupational lease. The current formula for the **new** ground rent per annum is computed on the basis of the open market rental value of the house. In other words, the total rental income per year on the house is divided by one eighth and that **now** becomes the new ground rent per annum and reviewable every five years upwards to take into account inflationary effects.

Ground rent landlords have always attempted to extract the maximum in these circumstances, just as they seek rental income in perpetuity under the ground rent code and give nothing in return. They would appear to have paraphrased the slogan 'To Hell or to Connaught' to read 'To Hell with Householders'. This is precisely what the feudal ground rent system means.

This is sheer terrorism for people. It is legalised plunder. Home owners hands are tied behind their backs not only by the government's inaction but apparent support for this form of terrorism. The spectacle of an Irish Government facilitating the imprisonment of Irish home owners in the interest of perpetuating an alien imposed feudal system that also caused such hardship, fear and terror in the lives of our recent forefathers, is indefensible, it is shameful, it is terrible hypocrisy.

The government is claiming that it cannot interfere with the constitutional rights of these land speculators. There is a terrible analogy here. Would any politician dare defend the constitutional rights of drug dealers to pursue their 'business deals'. Of course not, because they invade the home and destroy young lives. Land speculators invade the home and destroy helpless elderly lives. There is no difference between them. They belong in the same category. Both their motives are the same – greed for money at anyone's expense, young or old it does not matter.

SECTION 5: MINORITY RIGHTS VERSUS MAJORITY RIGHTS

Minority Rights (Landlords Rights) should never supercede the rights of the majority (Householders). Ground rent tenants (both members and non-members of ACRA) are unknown to themselves, losing the protection of the 1978 (No. 2) Act by not taking action before the lease expires. As a result, they will pay a substantial part of the market value of the home they have lived in for generations to acquire freehold. Many of these people who are elderly approach ACRA when it is too late to help them.

SECTION 6: CONSTITUTION

To cite 'constitutional difficulties' shows an extraordinary degree of political bankruptcy. If the government feels there are constitutional difficulties it should deal with this problem in the same manner as it dealt with the 'Social Housing Bill'. This Bill was referred to the Supreme Court to test is constitutionality before it was signed into law.

The legislative ending of ground rents must now rank as one of the more urgent and necessary reforms, which is within the power of the Oireachas to effect. 'Constitutional difficulties' should no longer be allowed to delay and obstruct this necessary reform. All the parties in Dáil Éireann now agree that the feudal ground rent system should be terminated.

Ground rent landlords have exerted enormous pressure and influence out of all proportion to their numbers. They have the money, the land through conquest and the confiscation that followed, and employ the best brains in the legal profession. So what chance has the householder got against such power and influence?

Reference to the landlords' rights under our Constitution rings very hollow for Irish people. Note: ground rent landlords can sell their interest in the land to whom they like, unknown to the householder.

Any ground rent landlord, subsequently buying the ground underneath a family residential home that has been paid for, not just once but many times over, should not have the protection of the Constitution of this Republic of ours.

On 15 January, 1977, Dr. Michael Woods T.D., Fianna Fail party while in opposition introduced a comprehensive bill which would have democratised Irish land law legislation and ended forever a feudal system imposed to create power and subservience. It had all party support. Eamon Gilmore T.D. Labour Party introduced an identical Bill at ACRA's request on 8 February, 2000.

This Bill is now not being progressed on the grounds that it is 'unconstitutional'. What does this mean? That our Constitution is so flawed that it protects the rights of ruthless speculators rather than the basic human rights of the common (elderly) people? That our government in its collective wisdom cannot make the necessary changes? This is a human rights issue. Elderly people being thrown into an arena to pit their wits and strength against ruthless landlords and speculators with the law on their side, is inhuman and uncivilized. The government must account for its willingness to continue to operate this unjust, alien-imposed feudal system.

SECTION 7: LEGISLATIVE PROPOSALS TO DATE

Over the years since 1974 there have been many proposals and attempts to rid the country of this feudal

tribute as follows: This may help you get a grasp of the demand of the peoples wishes and concerns. This is not an exhaustive list –

- Landlord and Tenant Bill 1977 – January 1977
  Coalition – Minister for Justice – Michael Cooney – Fine Gael Party
- Landlord and Tenant Ground Rent Bill 1977
  Minister for Justice – Mr. Gerry Collins – T.D. – Fianna Fáil Party
  Became Law on 16 May 1978
- Landlord and Tenant (Ground Rent) (No. 2) Bill 1978
  Minister for Justice – Mr. Gerry Collins – T.D. – Fianna Fáil Party
  Became Law on 1 August, 1978
- Landlord and Tenant (Ground Rents) Bill 1982
  Deputy – Proinsias De Rossa – Workers Party 10 June, 1982
- Landlord and Tenant (Ground Rents) (Amendment) Bill 1984
  Deputy – Michael Woods – Fianna Fail
  Proposed an Amendment to terminate household Ground Rents held by Local Authorities.
- Ground Rent Bill Proposals – 1989
  Deputy – Anne Colley – Progressive Democrats 30 January, 1989
- Eleventh Amendment of the Constitution – 21 February, 1991
  'No provision of this Constitution invalidates laws enacted to terminate any obligation on domestic householders to pay Ground Rent to Ground Landlords'
  Deputy – Eamon Gilmore – Workers party
- Statute of Limitations (Amendment) Bill 1991 – 7 May 1991
  To 2 years instead of 6 years
  Deputy – Michael Bell – Labour Party
- Landlord and Tenant (Ground Rents) Bill 1994
  Deputy – Gay Michell – Fine Gael Party – 24 June 1994
- Landlord and Tenant (Ground Rent Abolition) Bill 1997
  Deputy – Michael Woods – Fianna Fáil Party
- Landlord and Tenant (Ground Rent Abolition) Bill 2000
  Deputy – Eamon Gilmore – Labour Party

Note: The above propsed Bills by *Dr. Michael Woods T.D.* and *Mr. Eamon Gilmore* covered the following Proposal:
BILL
(as initiated)
entitled

> An Act to provide for the abolition of ground rents and to provide compensation to those whose interests are affected as aforesaid, to provide for the apportionment of certain rents, to make provision in relation to the waiver and relaxation of certain restrictive covenants in leases, to provide for the arbitration of disputes arising out of the titles of persons whose interests are hereby enlarged to the fee simple, to provide for the registration of titles enlarged to the fee simple, to amend in other respects of law of landlord and tenant, and to provide for other matters connected to the matters aforesaid.

SECTION 8: ACHIEVEMENTS

Despite the actions of ACRA and the promises of the political parties, all that existing ground rent lessees got was the prohibition of the right of a ground rent landlord to evict the family from the family home while the lease runs. We also achieved the right to buy out on the ground rent landlord's terms which amounts to paying the ground rent in perpetuity providing you qualify. The buying out scheme has of course been rejected and ACRA now boycott the scheme because it is not in the economic interest of a householder to do so.

SECTION 9: ACTION REQUIRED

The cry that landlords make against outright abolition of ground rent is that it would be unconstitutional. ACRA will not be drawn into any constitutional diversion. It cannot be unconstitutional for a government to right a wrong. And there is sufficient room within the Constitution for government action.

Article 6 of the Constitution states:

> All powers of government, legislative, executive and judicial, derive, under God, from the people, whose right it is to designate the rulers of the State and in the final appeal, to decide all questions of national policy, according to the requirements of the common good.

The common good of the modern Irish democracy has for long demanded that ground rent be abolished but the legislators have hesitated unnecessarily.

Article 40.3.2 states:

> The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

Ground rent has long obstructed and impeded the property rights of thousands of citizens. The rights which Irish farmers won before the state was founded and which they confirmed by their campaign against land annuities after the state came into being – the rights of proprietary without let or hinderance – is still denied to-day to the Irish householder.

The Constitution, in the ACRA view, makes it incumbent on government to legislate all ground rent out of existence.

The clear duty of the state to legislate to abolish ground rent emerges from the Articles of the Constitution quoted above, and any use of Article 43,

which upholds the right of private ownership, by the Landlord is an attempt to deny the right of private ownership to the householder.

As Article 43.1 itself states:

> The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions ought, in civil society, to be regulated by the principles of social justice.

Subsection 2 of Article 43.2 puts the State's duty even more emphatically:

> The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigiencies of the common good.

In other words, the government, under the existing Constitution, can act to restore justice to the people. Should the government find any difficulty in resolving the difficulty the following addition to the private property Articles in the Constitution must be put as follows:

> Nothing in this Constitution shall invalidate legislation enacted by the Oireachtas and containing such terms as the Oireachtas shall see fit for the purpose of terminating Ground Rents on private dwellings as defined in the Landlord and Tenant Ground Rent Acts 1967 to 1984 and any amendments thereto hereafter to be enacted – 'or alternatively Eamon Gilmore's proposal (see section 7).

Such a form of words if put to the people will put to an end to the feudal ground rent system in Ireland.

The above proposed addition – refers to ground rent only which is a unique form of property with no parallel in history and not to be confused with property as we know it.

SECTION 10: CONCLUSION

In summing up, the following must be dealt with:

- expired and expiring leases;
- ground rent contracts are suspect, i.e. all signed under duress – not equal to the deal;
- valuations that are less than the ground rent;
- jailings;
- seizure of goods;
- site fine – already paid for the land (equalled nearly a half years salary);
- allowance for ground rent already paid;
- no interest in any monies due to the ground rent landlords on settlement;
- freehold immediately;
- ground rent to be a contract debt only;
- many homeowners have paid more than once for the plot on which their homes stand through site fines and ground rent. This must end. Ground rent is dead and the urban householder is not going to foot the bill for the obsequies.

Note:

ACRA does not pursue a policy of vindictive opposition to particular persons or groups who happen to benefit from ground rent. Whether they be native or foreign, resident or non-resident, the particulars of the individual landlords are of no account. ACRA's campaign is directed against the ground rent system rather than the landlords. Indeed, when it comes to the point where any ground rent landlord might claim actual personal hardship resulting from abolition of ground rent, ACRA concedes that the government should institute some scheme to alleviate such hardship. Gratuities, as distinct from compensation, could be paid from some central state fund in cases of proven personal hardship resulting from the final abolition of ground rent.

CHARTERED INSTITUTE OF BUILDING

The Chartered Institute of Building, Ireland (CIOB), is a multi-disciplinary professional institution with over 2000 Irish members drawn from a broad spectrum of professions including surveying, architecture, engineering and project management disciplines. We are operating in Ireland for over forty years and our membership embraces professionals in the public and private sectors of the industry.

In the documentation received you requested that we respond to such issues as:

- the right to private property
- private property and the common good
- compulsory purchase
- the zoning of land
- the price of development land
- the right to shelter
- infrastructural development
- house prices
- access to the countryside.

GENERAL ISSUES RELATING TO PROPERTY IN A CONSTRUCTION CONTEXT

The Chartered Institute of Building has considered the key issues in the context of the impact of future changes on individuals, corporate bodies, the viability and sustainability of the construction industry, and the common good. The issues considered have resonances across a broader spectrum of policy areas, planning and related legislation, and practices in relation to the acquisition, ownership and use of property. This is particularly pertinent in relation to developed land for residential and infrastructural development.

While we recognise that the proposed changes relate primarily to *constitutional reform*, they should be considered in the context of recent developments in relation to strategic infrastructural developments, i.e. delays and significant cost overruns in the

pre-construction stages of major roads projects, delays in implementing transportation initiatives (i.e. LUAS and integrated transportation) and the disproportionate increases in residential accommodation costs. With regard to the latter, the proposed changes in property rights should be considered in the context of the relative success, or otherwise, of recent Government initiatives such as the Bacon reports and recommendations, and the Department of the Environment and Local Government and Construction Industry Council 'Strategic Review of the Construction Industry'. Recent revelations in the Flood Tribunal of speculative acquisition and rezoning of land, reinforces the imperative that, in such circumstances, individuals or corporate bodies should not unduly benefit at the expense of the wider community. Cognisance would also need to be taken of recent highly publicised cases where fraud, tax evasion and other criminal activities were the subject of investigations, some of which involved the Criminal Assets Bureau.

Whatever constitutional changes to the property rights of individuals and corporate bodies are enacted, they should reinforce the objectives of initiatives for the 'common good' without unduly prejudicing the rights of individuals or communities and should recognise the right to enjoyment of amenities by all sections of the community, irrespective of whether the amenity is in public or private ownership. The proposed changes should also be considered in the light of recent changes in planning legislation, in particular Parts V (Housing Supply), and IX (Strategic Development Zones) of the Planning and Development Act 2000. These provisions were seen as 'fundamental in terms of increasing the supply of housing generally and in particular the supply of social and affordable housing'. 'Arising out of the commitments in the government programme, '*An Action Programme for the Millennium*', a comprehensive review of planning legislation was initiated in August 1997. The principle of the review was to ensure that the planning system of the twenty first century would be strategic in approach and imbued with an ethos of sustainable development and would deliver a performance of the *highest quality*'. This objective should be applied to all national accommodation initiatives regardless of categories of persons requiring accommodation.

Part VIII (of the Planning and Development Act 2000) relating to the consultation process by local authorities (regarding the local authority's own developments), while this is an improvement, in its attempt to clarify the consultation role of local authorities on it's predecessor Part X, it could still give rise to serious misgivings in relation to arbitrary decisions by local authorities.

This requires particular consideration in relation to individual's rights in the event that changes to the Constitution result in the dilution of the rights of individuals.

Where the state authorities are compulsorily acquiring land and/or properties in the interest of development for the 'better good,' these proposed changes should ensure a mechanism for a fair and speedy process, in an equitable and non-contentious manner.

1) THE RIGHT TO PRIVATE PROPERTY

The Chartered Institute of Building supports Article 40.3.2° and Article 43 protecting the individual citizen's property rights. The CIOB agrees that the Constitution should expressly provide that such property rights can be qualified, restricted etc by legislation where there are clear social justice or other public policy reasons for doing so. We would however stress that safeguards are addressed in changes to the planning legislation to tighten the Planning and Development Act 2000 (in particular Part VIII) in respect of the consultation process by local authorities to ensure that an effective appeals mechanism (e.g. to an Bord Pleanála) is available to affected parties and ultimately to the courts to ensure that a fair and impartial appeals system is provided.

2) PRIVATE PROPERTY AND THE COMMON GOOD

The CIOB supports the recommendation to amend the Constitution so that the provisions dealing with property rights are in a single self-contained Article. For the reasons outlined in our introductory paragraph we agree that the common good should take precedence over individual rights and in particular the rights of speculative corporate bodies. We would caution against statutory bodies exploiting this provision in a cavalier manner. With regard to the question 'whether the protection of property rights should extend to legal persons, such as limited companies, we support the majority of the Review Group decision to oppose affording constitutional protection of private property to legal persons.

We concur that constitutional protection in relation to private property should not be afforded to legal persons, in support of the majority position taken by your committee i.e. that:

- the rights protected by the Fundamental Rights provisions of the Constitution are clearly intended to relate to the individual as a human person. It would be wrong to extend any of these provisions to legal persons
- legal persons enjoy the privilege of limited liability and the other benefits of incorporation. They must, however, also accept some of the disadvantages of incorporation, among them the absence of any constitutional rights
- if legal persons were accorded constitutional rights, including the constitutional right to the protection of property, it might mean that corporate resources and financial power could be employed to challenge the constitutionality of legislation, something which might have unwelcome legal, financial and social consequences

- in any event, the use of the derivative action by shareholders provides adequate protection for the rights of individuals which may be indirectly affected by legislation impacting on the company
- since legal persons are the creation of statute, the protection of the rights and interests of legal persons is a matter for the Oireachtas alone
- there is no need to go further in order to emulate the provisions of Article 1 of the First Protocol of the European Convention on Human Rights.

subject to adequate safeguards in European and National legislation.

3) COMPULSORY PURCHASE

We agree with the need for compulsory purchase and indeed sequestration by state agencies in the event of criminal activities and serious fraudulent acquirement by property owners. Where title of land is difficult to establish, particularly in contrived situations where offshore companies have been established to frustrate a transparent record of ownership, the state should endeavour to close this loop, notwithstanding its obligations under E.U and International Law. In the case of non-speculative bone fide owners of property we believe that any changes to the Constitution would be hollow unless it is accompanied by a fair, meaningful, non-adversarial, system of adequate remuneration and timely acquisition in the interest of efficiency and the common good.

4) THE ZONING OF LAND

We contend that the zoning of land should take full cognisance of the immediate and projected needs of the wider community and should take account of the residents, users and occupiers of the properties in the immediate vicinity. We are opposed to blanket indiscriminate zoning categories, without regard to the appropriateness of these zoning categories and the negative impact on amenities and services in these areas. In built-up areas in the Dublin region, many high amenity areas are under constant attack from the very local authorities who are overturning their own county development plans and building on these with impunity. Where public bodies are property owners they should recognise that they are mere custodians and should respect the right to enjoyment of amenities by all sections of the community irrespective of whether the amenity is in public or private ownership We contend that properties adversely affected by insensitive decisions by local authorities should be the subject of an independent third party appeal system.

5) THE PRICE OF DEVELOPMENT LAND

We believe that the price of development land should be such that provides a reasonable return on investment and should not be based on exorbitant opportunistic rates that pertain, particularly in relation to rezoning bonanzas or speculative purchases in anticipation of rezoning. We believe that the price of development land, in particular land for residential occupancy, should reflect a sustainable, affordable resource for the benefit of the broader community. Failure to ensure an adequate supply of properly serviced land, in appropriate locations, and control the spiralling cost of developed sites, could seriously undermine the economic viability of the economy and contribute to a downturn in the economy.

6) THE RIGHT TO SHELTER

We believe the right to *adequate* shelter is a fundamental one and should be cherished in the constitution. The record of some local authorities and other statutory agencies is far from satisfactory and patchy in relation to the response to the provisions in the Bacon recommendations and subsequent legislation. It is our view that citizens should, at the very least, be afforded adequate standard affordable housing accommodation that reflects standards appropriate to the 21st century and not 'stop-gap' temporary or semi-permanent accommodation in inappropriate concentrations or locations. We believe that the relevant state agencies should have regard for the overall good of the entire community and not just arbitrary expedient solutions.

7) INFRASTRUCTURAL DEVELOPMENT

We believe that a more systematic approach should be taken in the planning and implementation of infrastructural development with regard to the planning process, consultation with all affected stakeholders and the acquisition of land. Procurement procedures should be fine-tuned and the multi-agency (statutory) players should consult in a meaningful fashion to provide state-of-the-art infrastructures using best practice systems and methodologies to provide value for money infrastructural projects within time and within budget. This would include public private partnerships and partnering options, where appropriate.

8) HOUSE PRICES

Bacon and other industry reports have addressed the issue of the provision of supply of affordable housing. In the light of the recommendations in the Bacon reports, it is time to re-examine the effectiveness or otherwise of these recommendations and the extent to which the various local authorities and other state agencies have implemented the recommendations. Notwithstanding an evaluation of this process, it is apparent that the main components contributing to high house prices are inflated site costs and paradoxically falling interest rates. This is particularly so in the Greater Dublin and Leinster regions.

9) ACCESS TO THE COUNTRYSIDE

The CIOB supports the desirability of access to the countryside by all, and would welcome a study of the

issues involved in providing sensible solutions, which would ensure that such access would prevent a negative impact on sensitive environmental areas, and not adversely infringe the rights of landowners.

RECOMMENDATIONS

We would respectfully propose that consideration be given to the following recommendations:

- amend the constitution in a fair and equitable manner along the lines of the proposals in this document, to mitigate costly site acquisition costs and unnecessary delays in procurement of sites, and provide appropriate safeguards by amending Part 8 of the Planning and Development Act to ensure transparency and accountability by recourse to an independent statutory agency i.e. An Bord Pleanála.
- within two years, carry out a study in conjunction with the representative industry bodies, of the effectiveness of the statutory agencies, in respect of the implementation of the Bacon recommendations, and the changes in the planning regulations.
- implement a more systematic approach in the site acquisition, planning and implementation of infrastructural development with regard to the planning and consultation processes, with all affected stakeholders.
- procurement procedures should be further examined and fine-tuned, where necessary.

CONCLUSION

The Chartered Institute of Building welcomes the consultation on the issues associated with property rights and with property rights, comes responsibilities to the overall common good. We broadly support the decision not to extend the constitutional rights to legal persons, given that adequate provision is already contained in E.U. legislation, but would caution against giving a blunt instrument to local authorities and other state agencies to severely limit the property rights of individuals in the absence of balancing rights in the Planning Acts. We contend that Part VIII of the Planning and Development Act should be further strengthened, by providing recourse to appeal to Bord Pleanála. We fully support the need to ensure that frivolous, vexatious or other ill-considered objections should not be allowed to unnecessarily delay the implementation of major projects that are beneficial to the community. Equally we would not suggest that any constitutional guarantees would be required in relation planning matters as a quid pro quo for dilution of the property rights of individuals. We would, however strongly recommend that local authorities be legally obliged through amendments to Part VIII to behave in a responsible manner with regard to consultation and in the event of failure to reach agreement, that an independent third party (e.g. An Bord Pleanála) should adjudicate and not force appellants to seek unnecessary judicial reviews as the only viable alternative**.** We believe it is appropriate to critically examine the issues in this regard with a view to making changes.

We welcome the review and look forward to positive actions that will facilitate an equitable approach to property ownership, and enable infrastructural development to proceed in an efficient manner for the benefit of the community as a whole.

JEROME CONNOLLY – HUMAN RIGHTS CONSULTANT

PROPERTY RIGHTS AND THE RIGHT TO SHELTER

Access to property is in practice essential to the effective enjoyment of other important rights and to the satisfaction of basic needs. This is especially true in relation to housing, shelter and accommodation. However there is nothing in the right to property, taken in isolation, to ensure that everyone will be able to acquire or inherit property in the first place. The complexity and interdependence of modern societies is such that the economic value of property can rarely be said to depend solely on the work and effort of its owner. While in practice the state has asserted its power to control monopolies, regulate prices, expropriate property and so on, it is still true that for as long as there are substantial inequalities in the distribution of property, the beneficial impact of publicly funded activities on property values will be unequally distributed across the population.

In face of this reality, the majority of Irish citizens would probably agree with the proposition that some inequality in wealth and property is justifiable and reasonable, but only provided that it is not such as to significantly affect the basic rights of others in an adverse way, and that it is balanced by a concern for social justice, care and provision for the weak, vulnerable and needy.

The predominant form of property in Ireland is housing. Housing has two aspects: a) its function in giving shelter, privacy, and a sphere of necessary spatial independence and creativity to individuals and families, b) its function as capital. Since the same piece of property is liable to serve both functions, a constitutional right to property must be drafted with a view also to its implications for housing and shelter.

To treat the right to property in isolation from other rights is increasingly difficult to justify in the light of modern developments in rights.

> While all human rights are clearly indivisible and interdependent, the right to housing is a right most closely related to the right to own property. Since the right to adequate housing may be an integral and important part of the right to own property, its absence must be regarded as a deprivation of other fundamental human rights such as the right to liberty and security of person

(UN Commission on Human Rights, study on *'The right of everyone to own property alone as well as in association with others',* Final report of Mr. Luis Valencia Rodriguez, independent expert, E/CN4/1994/19, 25 November 1993, par. 111).

The assertion of property rights has historically been divorced from the basic right to housing/shelter. In the existing Constitution there is no explicit right to housing or shelter. While it may be possible, as the Report of the Review Group on the Constitution suggests, that the constitutional right to life also encompasses a right to the basic means of subsistence, this is however neither clear nor certain. Such uncertainty is highly unsatisfactory, and constitutes a basic deficiency in the protection which the Constitution affords to fundamental rights. Furthermore, even if shelter is accepted as an element of a right to the basic means of subsistence, it would still fall well short of a right to adequate housing, as this is stated for example in the UN Covenant on Economic, Social and Cultural Rights, to which Ireland is a party.

One of the two principal reasons given by the Review Group on the Constitution as to why the Constitution should expressly protect property rights was that 'the right to property is one that has achieved international acknowledgement'. If the fact that a right has been internationally acknowledged is held to be an important reason for expressly recognising it in our Constitution, then a right to adequate housing has at least an equal claim to be similarly recognised on the same grounds. It is enumerated in the majority of the main UN human rights instruments which Ireland has ratified and in an impressive number and range of other authoritative international human rights documents.

The primary way in which most Irish people satisfy the basic human need for shelter is through their access to housing, whether by ownership or rental. There is however a small residual group which is either unhoused or housed in unacceptably poor conditions. Realistically, the members of this group are unlikely to be able to secure even minimally decent and appropriate housing through their own efforts.

To maintain a right to property, however phrased, in the constitution without complementing it with a right to minimally adequate shelter as part of a wider right to adequate housing would perpetuate a failure to protect a right essential not only to life but to at least minimally decent conditions of life.

> The right to a secure place to live is a fundamental one. 'The sense of security, dignity and community gained from being able to retain a home is an essential prerequisite for the pursuit and exercise of a variety of other human rights, including the right to choose one's place of residence, the right to vote, the right to popular participation, the right to health, the right to a safe environment and other rights comprising a dignified life.' (*The Right to Adequate Housing*: working paper submitted by Mr. Rajindar Sachar, Expert appointed by the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, E/CN.4/Sub.2/1992/15, paras. 17, 19)

The Constitution Review Group gave it as its opinion that 'it is necessary and desirable to provide protection [of the right to property] against the risk of arbitrary or disproportionate deprivation or interference by the state'. It observed in this connection that the prosperity of the state depends substantially on property being available as a source of, or security for, investment. However, while this will always be a major consideration in public policy, it does not in itself constitute grounds for enumerating a right to property. In contrast, protecting the right to property in order to safeguard against arbitrary or disproportionate deprivation by the state is both desirable and legitimate, but raises the question of how the Constitution should address the more urgent deprivation of those who do not have any adequate access in the first place to that primary form of property that we call housing or shelter

RECOMMENDATIONS

Good constitutional drafting makes it desirable that each article and subsection be clear and focused. It would therefore be inadvisable to include a specific right to housing or shelter in the same article as the right to property, with one exception. The Constitution Review Group recommends that the Constitution should expressly provide that property rights can be qualified or restricted by legislation where there are clear social justice or other public policy reasons for doing so. I would urge that one of the social justice or public policy reasons in question be explicitly defined as the need to respect, protect and promote the needs of the individual and family group in regard to shelter and housing.

The right to housing *per se* should then preferably be addressed in two separate articles :

a) a general article stating the right of any person in a situation of extreme hardship to the satisfaction of his or her basic human material needs, as a minimum the right to shelter, food, clothing and basic medical care, as specified in Recommendation No. R (2000) 3 of the Committee of Ministers of the Council of Europe urging member states (which would include Ireland) to establish a legally enforceable right to a basic minimum of subsistence, *including shelter.*

b) an *article specifically enumerating a right to housing,* utilising the phraseology now current in the United Nations, i.e. by defining the state's duty to respect, protect and promote the right to housing and shelter, in the sense in which 'respect', 'protect' and 'promote' have been expounded by the UN. Such an article could be drafted using appropriately qualifying phrases already in the Constitution, as has been suggested in more detail by the Irish Commission for Justice and Peace in its submission

to the Joint Oireachtas Committee on the inclusion of certain social and economic rights in the Constitution, including the right to housing (see Irish Commission for Justice and Peace, *Re-Righting the Constitution*, 1998).

CONSTRUCTION INDUSTRY FEDERATION

INTRODUCTION

The Construction Industry Federation, with 3,000 members, is the Social Partner for the construction sector. Membership covers general contracting, house building, civil engineering, mechanical and electrical contracting, and a range of specialist subcontractors. In addition to member associations, the Federation has 13 branches throughout the country.

The Federation endorses the detailed submission of its member association, the Irish Home Builders Association. It also, with this submission, responds to the invitation of the Oireachtas Committee.

PRIVATE PROPERTY

The right to private property is a basic tenet of a democratic society, fundamental wherever democracy flourishes.

The need for a balance between private property and the common good is also enshrined in the Constitution, and supported by an extensive body of case law.

A rapidly developing economy will bring issues relating to the appropriate balance to the fore. But it's important to recognise the long-term horizons relating to infrastructure provision of all kinds, and the more certain and more transparent the code, the greater will be the level of economic activity. Uncertainty is the enemy of investment, whether public or private. Efficiency and effectiveness in the delivery of infrastructure and housing require confidence in the processes involved.

COMPULSORY PURCHASE

Local authorities already have significant powers of compulsory purchase in relation to lands in private ownership. The exercise of these, at the earliest possible stage, produces cost certainty for the local authority.

The existing powers can be used not just to acquire land for transport and infrastructure needs, but also for housing.

Any existing exemptions should be reconsidered.

THE ZONING OF LAND/THE SERVICING OF LAND/HOUSING SUPPLY/SPATIAL STRATEGY

Housing supply is bound up with the availability of zoned and serviced lands. The Planning and Development Act 2000 calls for the zoning and servicing of sufficient residential lands to ensure a good supply relative to development needs. Part V of the 2000 Act obliges local authorities to prepare detailed estimates of housing demand for all sectors through the preparation of housing strategies as part of the development plan process.

However, experience on the ground shows that the availability of serviced development land is not being adequately addressed. Critical shortages in terms of water, sewerage and road networks which persist throughout the country, are limiting the pace with which zoned residential land can be developed. Local authorities must therefore utilise existing mechanisms to increase the supply of zoned and serviced land for housing in order to meet the levels of demand projected in their own housing strategies and development plans.

The shortage of serviced land must be placed in the context of Ireland's public infrastructure deficit. The lack of adequate social and productive infrastructure, including schools, public and private transport networks, telecommunications and health services, restricts both the location and supply of housing. What is required is an integrated approach to housing supply that marries land use and transportation planning, and co-ordinates the provision of services and infrastructure so as to maximise the opportunities for residential development in appropriate locations.

However, it is equally clear that opportunities are being lost to increase housing supply in areas that already boast the necessary infrastructure because of the hesitancy of local authorities to implement fully the government guidelines on residential densities, which were published in 1999. The guidelines recommended that increased residential densities should be implemented along transportation networks and in and around town and city centres. While the guidelines state that the greatest efficiency in land usage on green field sites for instance will be achieved by providing net residential densities in the general range of 35-50 dwellings per hectare, most development plans restrict densities at below this level. In framing their development plans, local authorities must take cognisance of the guidelines and seek to implement higher densities in suitable locations.

The need to adopt an integrated approach to zoning and servicing of land and the supply of housing is underpinned by the recently published National Spatial Strategy. If the regional development envisaged in the strategy is to be achieved, additional requirements for housing will occur in those areas selected to act as regional gateways and development hubs. In this way, housing supply is an important spatial planning issue. Achieving increased housing supply in the right locations for regional development requires that sufficient lands be zoned and serviced not just during the lifetime of development plans, but right through to 2020, and that future housing demand be integrated more effectively with transportation planning and

provision of other services and infrastructure. In many areas outside Dublin this represents a significant challenge that requires a commitment to advance provision of infrastructure and to certainty in terms of funding.

THE PRICE OF DEVELOPMENT LAND

The value of development land is a residual deriving from the uses to which the land can be put. The price which e.g. a house builder or commercial developer is prepared to pay for a plot of land, is the price which remains after labour, materials, overhead and profit are deducted from the estimated selling price of the premises on the developed site.

The issue is complicated by inflation, or the expectations of inflation. A house builder developer will cost houses based on the current replacement cost for equivalent land. These cost structures represent the floor below which supply will be affected. The market, as represented by the balance between supply and demand, determines the actual price set.

Given the timescales which lapse from the time land is purchased in a zoned or unzoned state, through the submission of planning application to the local authority; the appeals process; and the provision of services, any prudent house builder developer requires ownership of a series of sites at any one time. In manufacturing terms, these sites will vary from being the equivalent of searching for new raw material, purchase of raw material, delivery and storage of raw material, through work in progress to finished output. The sequence is in fact longer on the property development side, because of the stages in the planning process, and the uncertainty as to time and outcome which exists.

THE RIGHT TO SHELTER

Strong supply of housing of all types and tenures is the best way to ensure that house waiting lists are at a minimum.

There are a wider range of issues involved in seeking to ensure minimal or non-existent social requirements for shelter.

INFRASTRUCTURAL DEVELOPMENT

The country has an acknowledged infrastructural deficit of several different types. These deficits are being addressed in the National Development Plan. This will not succeed in their elimination. An objective of having an infrastructure comparable with Europe's more developed member states is in any case a moving target. Research bodies such as the ESRI foresee a need for further high levels of investment in infrastructure for at least a decade beyond the expiry of the current NDP.

The main categories of infrastructure we include here are:

- transport, public and private.
- housing.
- water and waste water.
- solid waste.
- energy and telecommunications
- education and health.

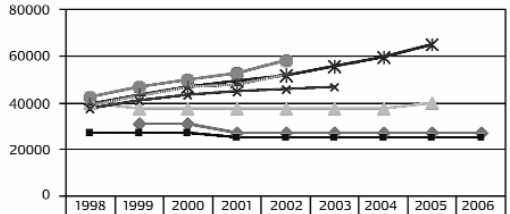
Delivery of this infrastructure in a sustained way requires multi-annual capital budgeting, a commitment to longer term planning, and programme and project management consistent with cost-effective implementation.

We should not under-estimate what has been achieved in some areas, but we started the 1990s lagging European norms, and the extraordinary economic and employment growth of the late 1990s (to which the construction industry both contributed and from which it benefited) has served to highlight the inadequacy of our infrastructure in a range of areas.

HOUSE PRICES

House prices in any one year are the outcome of well in excess of 100,000 sales and purchases by sellers and buyers. By volume and value, 60% of these sales are of second-hand houses. The stock of second-hand houses is fixed in supply, so net additions to stock result solely from new house construction. When demand increases, the price of second-hand housing rises. When demand increases, the price of new housing rises also, but the effect is moderated by increasing supply. Over time, it's natural that these market segments interact with one another i.e. the price level of second-hand housing lifts that of new, while the additional supply of new housing moderates the price increases of second-hand housing.

Since 1997, a variety of analysts have put forward their estimates of the demand for housing, for the period to 2006. These figures are illustrated in the chart and graph below, along with figures showing actual housing supply for the years 1998 to 2002.



	1998	1999	2000	2001	2002	2003	2004	2005	2006
ESRI (T) April 1997		31,000	31,000	27,000	27,000	27,000	27,000	27,000	27,000
DKM May 97	26,807	26,807	26,807	25,247	25,247	25,247	25,247	25,247	25,247
PA (T) 1999	39,600	37,500	37,500	37,500	37,500	37,500	37,500	40,000	
Bacon II (P) Mar 99	37,400	40,600	43,400	44,900	45,800	46,800			
Bacon III (P) June 2000			46,850	49,242	51,740	55,219	59,560	64,760	
Actual supply (T)	42,349	46,512	49,812	52,602	57,695				
Actual supply (P)	39,093	43,024	46,605	47,727	51,932				

The actual level of supply, i.e. the supply response of housebuilders, has each year since 1998 exceeded the most optimistic forecasts of housing demand. Without that strong supply response, upward pressures on house prices would have been greater.

Ireland is now building houses at an extraordinary rate of 15 per thousand of the population. This is five

times the German rate, six times the UK rate, and three times the European average. There's nothing like it in the developed world.

The reason for this huge housing supply and demand rests in the fact that Ireland's housing stock in the mid-1990s was approximately one-third less per 100,000 than the European average. We have been rapidly moving towards European housing stock norms. A deficit still remains, but the gap has been narrowed significantly. The exceptional demand for housing from the mid-1990s onwards results from Ireland's extraordinary economic growth rates, the sustained drop in interest rates, inward migration, and demographic and social factors. We believe that the housing market is now moving into equilibrium, and that the thrust of policy should be to ensure stability and continuity in the marketplace, both of supply and demand.

CONCLUSIONS AND RECOMMENDATIONS

In this submission, we are not repeating the more extensive report submitted by the Irish Home Builders Association. We endorse this report, and attach its conclusions and recommendations. (Appendix 1).

In particular, we endorse the section on affordable housing and the proposals dealing with joint ventures between local authorities and developers/builders. (Appendix 2).

This is a proven method of delivering affordable housing quickly, and in a way which meets the requirements of the local authorities. It is particularly appropriate for developments in the major urban areas, where price pressures have been greatest.

Appendix 1

EXTRACT FROM: IRISH HOME BUILDERS ASSOCIATION PROPERTY SUB-COMMITTEE REPORT TO ALL-PARTY OIREACHTAS COMMITTEE ON PROPERTY RIGHTS

Conclusions and recommendations

• The full servicing of lands zoned for residential use in development plans is essential in order to ensure the proper and timely development of such lands. We urge local authorities to consider the use of public private partnership and other forms of joint ventures to help the speedy removal of any infrastructural deficiencies.

• We strongly advocate that a mechanism must be found to bring more zoned and serviced lands to the market as a means of preventing undue pressure that would result from a restricted supply of such lands.

• Furthermore we would urge that local authorities identify lands in their development plans that would be reserved for social and affordable housing in particular. It has been the long held view of the IHBA, as supported by DoE&LG Guidelines on Site Selection for Social Housing, that such approach would enable residential areas to be planned in a socially inclusive manner and would act as a control on the value of any such zoned lands. Accordingly the value of these lands would enable a greater supply of affordable housing to be brought to the market without influence from external market and competitive forces.

• The private sector has been the dominant sector and has been responsible for the delivery of increased levels of housing to meet unprecedented levels of demand.

• It is worth noting that the leading analysts and commentators did not anticipate the level of demand that subsequently became a reality. The following chart illustrates the projected levels of demands by a number of leading analysts. [see Chart 3 in original document]

• We would recommend in order to overcome these delays and enable lands identified in current development plans to be developed in accordance with proper planning and sustainable development in a time consistent with the projections made in those plans, that the servicing of zoned lands should be achieved by private investment.

• We would strongly urge that lands suitable for rezoning for residential use be identified at a much earlier stage even in advance of the rezoning itself. This would enable local authorities to arrange for the servicing of lands at a much earlier stage and would bring certainty to the planned, co-ordinated development of lands. Such a proposal would give a greater horizon to development and allow local authorities to properly plan for all services including roads, water and waste water/sewage treatment plants in a more effective and efficient manner.

• Such a mechanism could help resolve a major and serious delay in bringing many zoned lands to development.

• It is clear that a moderation in house prices has occurred consistent with the significant increase in supply since 1998. We believe that this moderation will be sustained if supply is maintained at levels consistent with demand.

• House price increases in the second hand market have been consistently increasing at a faster pace than new house prices. It is also clear that increased new housing supply from 1999 onwards was matched by significant reductions and moderation of annual new house prices. Chart no 11 [refer to chart in original IHBA submission on p. 145] clearly shows that the level of annual new house price increase has fallen to approx. 8% in 2002 compared to a level of 23% in 1998.

• We believe that this lower and moderate level of increase can be sustained if supply is maintained at a level consistent with demand. However, we would caution that as reported by leading independent Quantity surveying firms' pressure will continue as a result of regulations, delays in planning and appeal

processes, increasing insurance costs and high wage inflation in the construction sector.

• Some local authorities do not advertise for applications for inclusion on affordable housing lists for houses delivered on foot of agreements with builders under Part V of the Planning and Development Act 2000. As a result they do not operate from a list of eligible applicants and very often allocation of affordable housing is restricted to lower income groups and not to those intended by the legislation, i.e. middle income groups, teachers, nurses, guards, etc.

• Many local authority lists of applicants for affordable housing do not include applicants from these types of income groups. Local authorities therefore often require affordable housing under Part V of the Planning Act to be sold at much reduced levels so as to meet the repayment abilities of lower income groups.

• Local Authorities are confusing affordable housing under Part V of the Planning and Development Act 2000 with the DoE&LG Affordable Housing Scheme which is intended for lower income groups and which can avail of substantial site subsidies. These are totally different schemes with different criteria and target groups.

• There is evidence that this is already occurring and this is counter to the spirit of the Act and may cause political difficulties.

• The IHBA has been promoting the use of joint ventures between local authorities and private housebuilders as a means of delivering significant increases in levels of affordable housing. The IHBA launched its initiative at its mid-year media briefing in July 2002. That initiative clearly showed that if every local authority brought forward from their land banks sites, either individual or bundled sites, of just 3 hectares it would be possible to build up to 8,000 additional affordable houses.

• However, despite additional resources being given to it, An Bord Pleanála has also been given many additional responsibilities under the Planning and Development Act 2000. These include additional referrals under Part V in relation to the provision of social and affordable housing as well as the consideration of compulsory purchase orders made by local authorities.

• We are very concerned that these new additional requirements will place the Bord's resources under increasing pressure and will impact on their ability to meet the statutory 4 month objective period for determining planning appeals. It is clear that the majority of large developments are appealed to the Bord and that significant overruns occur which mean final decisions are often delayed well beyond the objective period.

• Information on delays in the planning system as evidenced by the CSO and others against a background of demand for current supply increases and projected population growth represents serious reading.

• Unless the level of permissions for houses and apartments increases and is delivered faster, further demand pressures will occur. The complexities of the planning process take time, however feedback from our members around the country indicates a lack of commitment on the part of local authorities to facilitate the implementation of proactive pre planning discussions.

Appendix 2

EXTRACT FROM: IRISH HOME BUILDERS ASSOCIATION PROPERTY SUB-COMMITTEE REPORT TO ALL-PARTY OIREACHTAS COMMITTEE ON PROPERTY RIGHTS

7 Joint ventures

7.1 The IHBA has been promoting the use of joint ventures between local authorities and private housebuilders as a means of delivering significant increases in levels of affordable housing. The IHBA launched its initiative at its mid-year media briefing in July 2002. That initiative clearly showed that if every local authority brought forward from their land banks sites, either individual or bundled sites, of just 3 hectares it would be possible to build up to 8,000 additional affordable houses.

7.2 The IHBA raised the matter during several meetings of the Housing Forum, established under the Programme for Prosperity and Fairness (PPF). The following national agreement Sustaining Progress includes an objective that the 'government is committed to an ambitious scale of delivery of affordable housing for the target group through this new affordable housing initiative and the other affordable housing coming through arrangements under Part V of the Planning and Development Act 2000 as amended.'

Already examples which demonstrate the success of these schemes are in place. Developed by members of the IHBA they clearly show the benefits of such joint ventures between local authorities and private builders.

7.3 Fingal County Council in partnership with Shannon Homes (Dublin) Ltd and Architects McCrossan O'Rourke Manning have delivered in excess of 750 houses on a site owned by the Council at CastleCurragh, Blanchardstown, Dublin. The development has been completed in less than 3 years compared to the Council's own estimate of 10 years were it left to develop the site in normal arrangements.

Three bed houses in the scheme sold as affordable houses at €130,000

Similarly, Dublin City Council in partnership with Park Developments Ltd and John Sisk & Co. are developing a scheme of affordable houses at Cedar Brook, Cherry Orchard, Dublin.

Units at this scheme start at below €120,000.

These two schemes will provide over 1,000 affordable homes. The initiatives have resulted in a return equivalent to almost 5 years supply of housing on the local authorities lands.

The ultimate beneficiaries were the people who bought the houses at affordable prices.

We would strongly urge that greater use of these schemes is made by local authorities to increase supply by bringing forward lands which otherwise would not be developed for many years.

CORI JUSTICE COMMISSION

In making this submission we approach the issue:

- from a social justice perspective drawn from catholic social thought which has a long tradition of addressing this and related issues
- from a rights-based perspective believing that every person has a range of human rights that incorporates civil, political, economic, cultural and social rights
- with a special concern for the issue of social housing, the lack of which is now reaching crisis proportions in Ireland and has the potential to undermine much of the progress that has been made on a wide range of fronts over the past decade.

1 CATHOLIC SOCIAL THOUGHT TRADITION

The following are among the most important observations that catholic social thought brings to bear on the issue of property rights.

1.1 The goods of creation are destined for the whole human race. The appropriation of property is legitimate for guaranteeing the freedom and dignity of persons, and for helping each of them to meet his/her basic need and the needs of those in his/her charge. The right to private property, acquired by work or received from inheritance or gift, does not do away with the original gift of the earth to the whole of humankind. The universal destination of goods remains primordial, even if the promotion of the common good requires respect for the right to private property and its exercise.

This has been and remains a core understanding in catholic social thought on this issue. It reflects the position, for example, of Cyprian in the third century when he challenged those who accumulated property for their exclusive use and reminded them that all of God's creation belongs to all people. Likewise in the fourth century Gregory of Nyssa taught that the right to private property was not absolute; rather it yields to the demands of one's fellow human beings. Many other examples could be cited on this issue.

More recently, Pope John Paul II in his encyclical *Sollicitudo Rei Socialis* in 1988 wrote that:

> It is necessary to state once more the characteristic principle of Christian social doctrine: the goods of this world are originally meant for all. The right to private property is valid and necessary, but it does not nullify the value of this principle. Private property, in fact, is under a 'social mortgage', which means that it has an intrinsically social function, based upon and justified precisely by the principle of the universal destination of goods. (no. 42)

This is a core value the CORI Justice Commission brings to this debate.

1.2 The right to private property is not absolute. Political authority has the right and duty to regulate the legitimate exercise of the right to ownership for the sake of the common good. This position was very strongly put forward by Pope Paul VI in 1967 in *Populorum Progressio* where he stated that:

> Private property does not constitute for anyone an absolute and unconditional right. No one is justified in keeping for his exclusive use what he does not need, when others lack necessities. In a word, according to the traditional doctrine as found in the Fathers of the Church and the great theologians, the right to property must never be exercised to the detriment of the common good. (no.23)

More recently, Pope John Paul II has re-iterated this point in his encyclical *Centisimus Annus* when he wrote that:

> The Church teaches that the possession of material goods is not an absolute right, and that its limits are inscribed in its very nature as a human right.… The Successors of Leo XIII have repeated this twofold affirmation: the necessity and therefore the legitimacy of private ownership, as well as the limits which are imposed on it'. …God gave the earth to the whole human race for the sustenance of all its members, without excluding or favouring anyone. (nos. 30/31)

1.3 From this flows a realisation that *in the right to private property there is rooted a social responsibility.* This was spelt out by Pope John XXIII in 1961 in his encyclical *Mater et Magistra* when he wrote:

> Private ownership should safeguard the rights of the human person, and at the same time make its

> necessary contribution to the establishment of right order in society….It is not enough to assert that man has from nature the right of privately possessing goods as his own, including those of productive character, unless, at the same time, a continuing effort is made to spread the use of this right through all ranks of the citizenry. (nos. 112 and 113)

A few years later the second Vatican Council emphasised this when, in its constitution *Gaudium et Spes*, it wrote that:

> God intended the earth and all it contains for the use of every human being and people….Whatever the forms of ownership may be, as adapted to the legitimate institutions of people according todiverse and changeable circumstances, attention must always be paid to the universal purpose for which created goods are meant. In using them, therefore, a man should regard his lawful possessions not merely as his own but also as common property in the sense that they should accrue to the benefit of not only himself but of others. (no. 69)

It went on in the same document to state that:

> By its very nature, private property has a social function deriving from the law of the communal purpose of earthly goods. (no. 71)

1.4 The Irish Catholic Bishops Conference, in its pastoral letter *The Work of Justice* in 1977, linked this understanding of property to the whole area of housing and did so in the strongest terms. It stated:

> Bad housing is an important factor in the generation of poverty and its perpetuation. The most determined efforts of some families to better their conditions and raise themselves above the poverty line are defeated by the miserable conditions in which they are obliged to live. The marriages of considerable numbers of young couples are put under unreasonable strain because of their inability to find suitable accommodation at prices they can afford. …The Catholic principle of "private ownership with social function" applies with particular cogency in this area. The making of exorbitant profits through speculation in land in connection with housing development is particularly morally blameworthy (nos. 105/106)

1.5 Consequently, in reviewing the issue of private property the CORI Justice Commission proposes that the following be recognised and acknowledged by the All Party Oireachtas Committee on the Constitution:

- the goods of creation are destined for the whole human race
- the right to private property is not absolute.
- in the right to private property there is rooted a social responsibility
- the making of exorbitant profits through speculation in land in connection with housing development is particularly morally blameworthy
- the state has a responsibility to organise itself in such a way as to ensure that the preceding four points are acknowledged, recognised and acted upon.

2 A RIGHTS-BASED PERSPECTIVE

A right to appropriate accommodation is an issue that arises in the context of discussing the right to private property.

2.1 Social, economic and cultural rights should be recognised in the Constitution

The CORI Justice Commission believes that Ireland and the EU need to acknowledge that human rights go beyond civil and political rights and also incorporate social, economic and cultural rights. Social, economic and cultural rights should be acknowledged and recognised just as the civil and political rights have been. Among others, seven basic rights that are of fundamental concern to people who are socially excluded and/or living in poverty should be acknowledged and recognised. These are the rights to:

- sufficient income to live life with dignity
- meaningful work
- appropriate accommodation
- relevant education
- essential healthcare
- cultural respect
- real participation.

Until these rights are incorporated into the Constitution, Ireland will continue to have a major credibility problem, as it will be failing to match its commitment to civil and political rights with an equal commitment to social, economic and cultural rights.

2.2 Social, economic and cultural rights should be justiciable

The CORI Justice Commission believes that social, economic and cultural rights should be justiciable. This issue of justiciability has been a major sticking point in progressing their recognition. The reasons for this resistance can be put under three main headings i.e.

- these rights are not, and should not be seen, in the same context as civil and political rights which are justiciable.
- there should not be a situation where a person can appeal to the Supreme Court, for example, if they do not have appropriate accommodation; and
- these issues should be addressed in the political and not the judicial arena.

The CORI Justice Commission believes each of these objections can be addressed.

- The issue of whether or not social, economic and cultural rights are on an equal footing with civil and political rights is an issue on which much has been written. Most progressive societies now acknowledge that social, economic and cultural rights are human rights just as civil and political rights are, and they accept they shouldbe capable of being vindicated when they are not honoured by the government of the day.
- There are a wide range of declarations and protocols on human rights that recognise the importance of social, economic and cultural rights. A wide range of bodies including the United Nations, the Council of Europe and the European Union has developed these. We do not repeat these here but they form part of the context within which we make this submission.
- To ensure that the recognition of social, economic and cultural rights goes beyond words, however, it is essential to address the question: how can such rights be made justiciable (capable of being vindicated in law) in a way that respects the political process and does not destroy the balance of power between the judicial and the governmental dimensions of society?

The CORI Justice Commission suggests the following as a viable way forward that would respect concerns expressed particularly by politicians while also respecting the need for people's rights to be justiciable. Our proposal has a number of components.

- These social, economic and cultural rights would be recognised in the Irish Constitution.
- Following on this recognition there would be a requirement to have legislation ensuring these rights could be vindicated. We suggest the following might achieve this without producing a non-viable situation that would see every individual pursuing, for example, access to appropriate accommodation, right up to the Supreme Court.
- There would be a legal requirement on each incoming government to set out concrete targets on each of the range of social, economic and cultural rights recognised in the Constitution. The specific list of rights would already be set out in legislation and should cover the listing outlined above or some similar range of rights.
- The targets set out in such legislation would have to be for specific periods of time, e.g. two and four years (these particular time-frames would also be set out in the legislation).
- Failure to achieve these targets would be justiciable on a class-action or similar basis but not on the basis of every individual bringing their particular case to court.

Could this be done in practice? Let us take as an example the first right listed above, i.e. the right to sufficient income to live life with dignity.

The present government has already set a target (in the *National Anti-Poverty Strategy*) for the lowest social welfare payment for a single person to reach 30 per cent of gross average industrial earnings by 2007. To achieve this it has also agreed in the new national agreement, *Sustaining Progress*, to take the necessary steps during the coming three years to ensure this target is met by 2007.

Consequently, if there was a requirement on the government to set a two and a four-year target on income adequacy, it could base its targets on the commitments it has already made. It could set a two and four-year target for income adequacy that would satisfy the requirement to set targets to meet the right.

Subsequently, if the targets were honoured the right would be respected. If the targets were not honoured the government would be answerable in a court for their failure to meet the target they themselves had set.

The only acceptable defence in this situation would be for government to prove that the economic situation had genuinely changed so much compared to what had been expected when the targets were set, that the government genuinely was not in a position to meet its targets. If that could not be demonstrated, then the government would be legally obliged to implement its own target on the issue.

This proposal respects the political process and ensures it maintains its primary role. However, it also ensures that a person's rights are respected if, for example, a government decides deliberately to ignore them.

The proposal would have the additional benefit that general elections would be fought in part at least on the basis of real proposals and commitments in areas that were of real concern to people. It would also ensure that politicians were more easily held accountable for the commitments they made.

2.3 Consequently, in reviewing the issue of private property the CORI Justice Commission proposes that the All Party Oireachtas Committee on the Constitution:

- acknowledge that human rights go beyond civil and political rights and also incorporate social, economic and cultural rights.
- propose that, among others, the following social, economic and cultural rights be

included into the Constitution:
i) sufficient income to live life with dignity.
ii) meaningful work
iii) appropriate accommodation
iv) relevant education
v) essential healthcare
vi) cultural respect
vii) real participation

- accept that social, economic and cultural rights should be justiciable
- outline the necessary legal instruments required to ensure these rights would be justiciable.

3 HOUSING

In approaching the issue of private property in the context of Ireland today, we believe that issues surrounding housing and accommodation deserve particular examination. We therefore welcome the committee's decision to review these issues and in particular we welcome its focus on Article 43.2.1° of the Irish Constitution. CORI Justice Commission believes that, in spite of the central position given to social justice in this article, it has been continuously overlooked in practice.

3.1 Housing and accommodation in Ireland today

During the last decade improved levels of economic growth combined with low interest rates resulted in high levels of housing inflation. This in turn resulted in a crisis in housing provision in both the public and the private sectors. In the private sector, this crisis is evident from the rapid increase in house prices and from the severe difficulties experienced by first-time buyers seeking affordable houses. In the public sector, the demand (waiting lists) for public housing has increased substantially in the past five years at a time when house building in the public sector has been at a very low level. The substantial numbers of people experiencing homelessness is another major factor in this context.

3.1.1 Current social housing needs

According to the Housing Statistics Bulletin (September 2002) from the Department of Environment and Local Government, on 28 March 2002 there was a total of 48,413 households on local-authority housing waiting lists (see table 1 below). This figure represents a growth rate of 76.5 per cent since 1996, and indicates that about 130,000 people are in need of accommodation.

Concurrent with this growth in waiting lists has been minimal growth in the provision of local-authority social housing. Since 1996 the overall stock has increased by only 4,395 units or 4.47 per cent. It is little surprise, therefore, that local-authority waiting lists are increasing substantially.

Table 1: The need for and supply of local authority (LA) social housing, 1996-2002

	Households on LA waiting lists	Stock of LA housing units	Waiting list as % of rental stock
1996	27,427	98,394	28
1999	39,176	99,163	40
2002	48,413	102,789	47

Source: Department of the Environment and Local Government, *Housing Statistics Bulletin,* various issues

A closer examination of the 48,413 households on the waiting lists is presented in table 2 below. It shows that the largest category of households on the lists are those labelled as being not able to meet costs of existing accommodation. This group accounts for 44 per cent of the waiting list or 21,452 households. The recent Housing Statistics Bulletin (September, 2002: 59) further indicates that since 1999 this group has grown from a situation where it accounted for 34 per cent of the list. This growth can be directly related to excessive house prices and rent increases over recent years. A comparison with 1999 also reveals that all bar two of the categories experienced a growth in the number of households on the waiting lists. Only the categories of 'existing accommodation unfit' and 'elderly persons' saw their waiting lists decrease.

The Department of the Environment and Local Government analysis of the 2002 figures also reveals that 32 per cent (15,522) of all those households on the waiting lists consist of single-person households. Single-parent households, consisting of one adult and one child, make up a further 29 per cent (14,039) of the waiting list. When assessed by income level the report shows that 85 per cent (41,447) of households have an annual income of less than €15,000 and that within these 32,528 households (67 per cent of the total waiting list) are households with an annual income of less than €10,000. Finally, some 5 per cent (2,700) of households on the waiting list are households who have obtained refugee status, have obtained work permits or have permission to remain in the state.

When the 48,413 households are classified by the length of time they have spent on the waiting list the figures reveal that 25 per cent of all households have been waiting for more than three years. A further 14 per cent are on the list for between 2-3 years while 22 per cent are waiting for between 1-2 years. The remaining 38 per cent have been waiting for less than a year (including those classified as first time) (September, 2002: 84-85).

Table 2: Breakdown of the local authority housing waiting list by major categories of need, 2002

Category of need	Number of households	% of waiting list
Homeless	2468	5.10
Travellers	1583	3.27
Existing accommodation unfit	4065	8.40
Existing accommodation overcrowded	8513	17.58
Involuntarily sharing of accommodation	4421	9.13
Young persons leaving institutional care	82	0.17
Medical or compassionate grounds	3400	7.02
Elderly persons	2006	4.14
Disabled or handicapped	423	0.87
Not able to meet costs of existing accommodation	21452	4.31
Total	**48413**	**100.00**

Source: Department of the Environment and Local Government, *Housing Statistics Bulletin,* September 2002:59 and CORI Justice Commission (2003: 79)

In a recent survey, Focus Ireland (2002) identified that a number of local authorities, including those in Waterford, Westmeath, Monaghan and South Cork, all experienced a doubling in size of their housing lists between November 2000 and November 2001. From the perspective of vulnerable households it is becoming more difficult to get a local-authority house. Single people are also disadvantaged on housing lists because most current housing developments are for families. Time spent on the waiting list is getting longer as is the waiting list itself. Rents continue to rise in the private rented sector, even though house prices have stabilised. Little progress has been made in advancing the Traveller Accommodation programme. Homelessness is obviously a growing problem.

3.1.2 Future social housing needs

A recent report entitled *Housing Access for All?* (2002) was published by four voluntary organisations, namely Focus Ireland, Simon Communities of Ireland, Society of St Vincent de Paul and Threshold. This report examined thirty-three housing strategies and twenty homeless actions plans with the intention of assessing the current and future housing and accommodation problems faced by disadvantaged social groups.

The report projected that as a result of uneven development, socially and spatially, there will be a significant increase in the levels of unaffordability recorded among Irish households. It predicts that 33 per cent of new households will not be able to afford to become home-owners and that this figure rises to 42 per cent in urban areas, compared to 32 per cent in rural areas.

Table 3: Projected social housing provision and need, 2003-2005

	2003	2004	2005
Average annual additional social need	9238	9238	9238
Average annual social supply	10605	10605	10605
Cut in aggregate waiting lists	1367	1367	1367
Adjusted waiting lists by year end	**54688**	**53321**	**51954**

Source: Adapted from Focus Ireland et al (2002: 11)

Based on these projections the report proceeds to set out the future picture of social housing demand over the next three years. Table 3 presents these figures. It shows that in 2003, 54,688 households will be in need of social housing and that this figure will reduce slightly before 2005. The report further concludes that at the current rate of progress it will take thirty years to eliminate the housing waiting list. Clearly the scale of the need for social housing remains very large and the speed at which it is being addressed remains inadequate.

Further housing and accommodation issues need to be addressed among:

- people no longer able to buy affordable housing
- new job-seekers from abroad
- homeless persons
- refugees and asylum-seekers
- Travellers.

3.2 Specific issues for the committee to consider

In the context of these ongoing problems, CORI Justice Commission wishes to raise issues under four of the headings suggested by the committee.

3.2.1 The right to private property/private property and the common good

- CORI Justice Commission recognises that the right to property is an important right. However we believe that the right as set out in the Constitution at present was framed in a context that was far different from the reality of Ireland in 2003. Consequently, we urge the committee to consider and accept the proposals summarised in 1.5 above. We believe these proposals situate the right to property within an appropriate context that is valid at all times.
- We also believe the proposals contained in 1.5 above would go some way towards

restoring the balance between property rights and the common good, a balance that has been lost in recent years and that needs to be secured for the future.

3.2.2 A rights-based approach

- The CORI Justice Commission believes that social, economic and cultural rights should be recognised and made justiciable. Consequently, we urge the Committee to consider and accept the proposals set out in 2.3 above.
- We also urge the Committee to accept a methodology for ensuring such rights would be justiciable. A possible approach that could be used has been outlined under 2.2 above.

3.2.3 Compulsory purchase / The zoning of land

- We believe that compulsory purchase is an underused tool of spatial development.
- We also recognise that the zoning of land for particular purposes is a necessity. However, the zoning and re-zoning processes have been open to substantial abuse over recent decades.
- CORI Justice Commission believes that a number of changes should be made to the way in which zoning decisions occur. The principal change we propose is the introduction of a law confining the rezoning of land to those lands in the ownership of local authorities.
- Operationally, this legislative change would require local authorities to first purchase land (either voluntarily or compulsorily) before then proceeding to rezone it. Taking the example of land being rezoned from agricultural use to development/housing use the process would involve a local authority purchasing the land at agricultural prices plus a small margin for the owner. The rezoning would then occur while the land was in local authority ownership and so the windfall gain on the land's value would be internalised to the local authority. The land would then be sold on to the developing agent.
- Simply, this change would eliminate speculation and ensure that all windfall gains resulting from rezoning would be retained by the local authority. CORI Justice Commission believes that the profit from this process should then be targeted on addressing the ongoing social housing problems being experienced in Ireland.

3.2.4 The right to appropriate accommodation

- The right to appropriate accommodation is one of the seven social, economic and cultural rights proposed for recognition in the Irish Constitution by the CORI Justice Commission and listed above. This is a basic right that should be available to all in a developed society such as Ireland. However, as our commentary above indicates, there are many in Irish society today who do not experience this right.
- We urge the committee to accept our various proposals on this issue and so, vindicate this basic right that should be available to every person in Ireland as well as throughout the world.

3.2.5 The price of development land

- CORI Justice Commission believes that rezoning land for development should occur in the interest of society. Currently, the price of development land incorporates large windfall profits made by speculators who gain as a result of decisions made in the political process. We believe that it is possible to internalise these gains and ensure that such profits primarily flow to local authorities.
- Implementing this procedure would also allow local authorities to control the price of development land. Therefore its price, and that of the housing etc built upon it, should decrease.

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JOHN CREAN – CUNNANE STRATTON REYNOLDS

1 INTRODUCTION

As a chartered town planner with extensive experience and knowledge of the planning system in the Republic of Ireland I write in respect of the committee's work so as to:

i detail the practical difficulties associated with development of lands.
ii identify the practical problems faced by developers in processing planning applications through the planning system.
iii set out the practical measures already in the planning statutes to encourage the rapid development of lands.

I trust that my comments, which are based on practical experience as a person who has both written development plans and local area plans on behalf of planning authorities and attempted to promote development on behalf of developers, are of assistance to the committee in their work.

1.1 Executive summary

The development of lands will often require the provision of necessary public infrastructure. In this context, it is important to accept that the quick and speedy development of lands can only be encouraged where developers definitively know that local authorities will develop the infrastructure necessary to facilitate the development of lands. Without the necessary infrastructure, lands cannot be developed irrespective of zoning status.

It is an unreasonable infringement of private property rights where landowners are often advised (by planning authorities in the pre-planning process) that development of their lands will not be possible without improvements to local services and infrastructure that they themselves (the developers) cannot afford to carry out in a commercially viable manner.

Given the above, the difficulties in developing lands cannot simply be presented as the fault of landowners/developers. Given the present legislative framework and the operation of the development plan and planning application system by local authorities, the development of lands will always be difficult to promote when it is accepted that all development proposals must go through an extended gestation period and detailed assessment process that begins long before a planning application is made. This being the case even where appropriate services are available.

The established planning system provides reasonable measures to facilitate the development of lands and encourage developers to promote their development lands through statutory provisions such as:

i) section 10(8) of Planning and Development Act 2000 (as amended)
ii) part 8 of the Planning and Development Regulations 2001
iii) section 15[1] of the Planning and Development Act 2000 (as amended).

2 STATED OBJECTIVE OF THE REVIEW OF THE CONSTITUTION

The stated objective of the government in promoting this review would appear to be to ensure that lands (particularly housing lands) zoned for development are released for development. It appears that the current commonly held view is that development lands are not released for development as a result of land hoarding by speculators and developers.

While this may be the case in a small number of instances, the development of large land holdings are often made slow, difficult and tortuous as a result of the established planning system and the failure of local authorities to use measures to enable the swift development of key lands.

Each of these two broad areas, the difficulties presented by the current planning system in releasing lands, and the failure of local authorities to facilitate development through the accelerated planning measures in the Planning Act 2000 shall be addressed in more detail below.

3 THE DIFFICULTIES PRESENTED BY THE CURRENT PLANNING SYSTEM IN RELEASING LANDS

Under the current Planning and Development Act 2000 (as amended) the development of land is controlled in the first instance by the development plan system which establishes zoning controls over the development of lands.

3.1 Land zoning – the operation of the development plan

Under the development plan system, the zoning of lands can occur in three ways. Firstly, the local authority's own planning staff can propose the zoning of lands in a draft plan[2] for approval by the members. Secondly, lands can be zoned for development as a result of either first party or third party submissions requesting the zoning of specific lands (subject to the approval of the council) and thirdly, lands can be zoned for development on foot of the motions proposed and passed by individual council members during the development plan review.

Under this system, it is quite possible that lands can be zoned for development against the

wishes of the local land owners. The probity of penalising a landowner in this instance where lands are zoned for development against a landowners wishes and withheld for good reason (e.g. they may be in a productive use such as farming) suggests that any punitive system of charges for withholding development lands may not be reasonable.

It is also important to note that the vast majority of development plans when zoning development lands make allowance for the fact that some zoned lands will either not be developed by choice or will not be developed due to service/financing constraints.[3] Very often planning authorities, particularly in the case of residential land development, zone 2 to 2.5 times the area of land that they would require on the basis of the population projections for a particular area. Again, in these circumstances it may not be reasonable to penalise landowners for 'withholding' development lands that are not necessarily needed for development in the first instance.

Should the above points be ignored, landowners could be compelled to develop lands that are not necessary for development. This would encourage a situation where:

i) all zoned lands are built on and ultimately provide for more development, houses for example, than actually required; thereby causing an oversupply of housing lands,
ii) a consequent reduction in overall property values due to an oversupply on the market,
iii) the potential development of negative equity, and
iv) the over development of towns to a point where public services and infrastructure cannot cope and require additional central government funds to assist development.

A similar assessment can be applied to all forms of zoned lands.

While it is reasonable to encourage the development of lands, it is not reasonable to expect it to operate in isolation without impacts on all the areas of property supply and development. Any tampering in the current system is likely to have severe implications for the overall operation of the development system.

3.2 Land zoning – the practicalities of development

Lands zoned for development may not necessarily be suitable for development. In many instances, lands zoned for development in a development plan are:

- unserviceable.
- extremely difficult and expensive to service and access (to the point where they are uneconomic development propositions).
- capable of development pending the provision of public infrastructure.
- developable pending the provision of appropriate infrastructure such as roads improvements, junction improvements.

In this context, any government review of the issues pertaining to the failure to develop lands must recognise that the process of zoning lands can often precede the development of available infrastructure that will facilitate development. The provision of temporary services infrastructure and access solutions is often not favoured by planning authorities.

Having regard to the above facts, it must be accepted that there are many constraints to the submission of a viable planning application.

3.3 Land zoning – established remedies to facilitate the development of lands

There are many statutory provisions that enable the development of lands. A number of these are detailed below.

- *The de-zoning of lands*
  The Planning and Development Act 2000 (as amended) makes specific provision for the 'de-zoning' of lands without compensation; see Section 10(8) of the Planning and Development Act 2000.

  Having this provision means that developers can lose the zoning designation of a land area where they fail to develop it, or fail to make progress towards its development in the life of a development plan.

- *Monitoring of the development plan process*
  As noted above, the Planning and Development Act 2000 (as amended) makes specific provision for the 'de-zoning' of lands without compensation. This is an important punitive provision for planning authorities anxious to promote the development of lands.

  Under the provisions of the Planning and Development Act 2000, all city and county managers within 2 years of the preparation of a development plan must review its performance and the attainment of its objectives (Section 15 of the Planning and Development Act 2000 (as amended)).

  Having regard to this, it is reasonable to suggest that the likelihood of zoned lands being developed could be assessed at that stage and recommendations made public that lands which councils believe are potentially unlikely to be developed in the term of the plan will be considered for de-zoning in the forthcoming development plan review (which would statutorily have to commence within 4 years of the adoption of the plan; within 2 years of the

review of the plan performance by the city/county manager).

- *The strategic development zones (SDZ)*
  Part 9 of the Planning and Development Act 2000 (as amended) establishes statutory provisions for the identification and planning of what are essentially areas where accelerated planning provisions apply and the opportunities for objecting to planning applications through an appeals process are removed due to the provision of specific public consultation and appeal procedures in the adoption of the 'planning scheme' for the SDZ.

  The SDZ procedure has been infrequently used by planning authorities as a means of facilitating the release of large areas zoned for development. The preparation, consultation, publication and confirmation of the Adamstown SDZ in the South Dublin area has taken many years (3-4).[4] During that time land owners have essentially held zoned development lands in expectation of the finalisation of the SDZ so that development could proceed. Having regard to the relative slowness of the SDZ procedures (which ironically were formulated as an accelerated planning procedure) the question that must be asked as to whether or not it is reasonable in any circumstance to place time limits on zoning designations when lands cannot be developed due to the delays in the administration of the planning system and the development of necessary infrastructure.

- *The opportunity for planning authorities to act as a developer or in partnership with developers*
  Many zoned lands have potential to provide for a range of needs including residential needs. These have, however, been restricted by third party appeals that are often vexatious, frivolous and related more to the desire to protect individual rights than promote the common good.

  While the right of individuals to their own inherent property rights is enshrined in the Constitution and in planning legislation, certain planning authorities have recognised the desirability of developing specific sites to meet necessary local demands (such as local housing needs) in the interests of sustainable and balanced development. In such cases councils, such as Cork City Council, have used their powers under *Part 8* of the *Planning and Development Regulations 2001* to facilitate the development of lands that have been previously refused permission on appeal by An Bord Pleanála. In these cases, the local authority has joined a landowner to ensure that in developing such lands, appropriate advice on design and layout (thereby promoting better design and development) is provided prior to the *Part 8* procedure.

  This type of approach has been available to local authorities from the introduction of the local government (Planning and Development) Act 1963. Under Section 77 of that Act this was an explicit right of local authorities and the fact that it was infrequently used perhaps suggests that the real difficulty in delivering lands for development lies not with the reluctance of developers to release lands for development but in the administrative and financial constraints at local government level.

- *Compulsory Purchase Provisions*
  There are extensive compulsory purchase provisions in the *Planning and Development Act 2000* to facilitate the acquisition and development of lands by local authorities. If councils are so convinced that lands can be developed these provision would be more extensively used.

3.4 Development constraints – dealing with the administration of the planning system

In real terms, many developers where they have purchased zoned lands want to see them developed as fast as possible as they have generally entered into a finance arrangement to secure the lands and their development.

However, in practical terms, many planning authorities will not entertain planning applications on substantial development sites without prior pre planning consultation; to which developers are statutorily entitled. This in essence is only the start of a development process whereby developments have to be agreed in principle, designed, submitted for planning and processed through the planning system (often to An Bord Pleanála level). In practical terms this often involves the planning process for large sites taking over 2 years.

In some cases, where councils prefer to see the use of an action area plan[5] to control the overall form and layout of development in an area, even obtaining council's agreement to the contents of the action area plan can take several years. This approach has been adopted in development plans adopted by Wicklow County Council[6] and in the development control process where An Bord Pleanála has refused developments on the basis that local area plans/action area plans should be prepared[7] to guide development. In these cases the

planning process is used to restrict development rather than promote development.

4 IMPLICATIONS FOR PUNITIVE TAXES/ MEASURES ON DEVELOPERS FOR FAILURE TO DEVELOP LANDS

The use of punitive measures involving financial penalties on developers to compel the development of lands may not be practical. These practical considerations are discussed below.

To tax landowners who do not develop zoned lands, can be seen to be unreasonable when one considers the following points;

i) many do not want their lands zoned for development.
ii) many have their lands zoned for development even though it may form part of a parcel of lands not required for development (See Section 3.1 above).
iii) many development plans zone a parcel of land for a particular use, such as residential, but within that zoning up to 30 land uses can be acceptable ranging from housing to petrol stations, subject to compliance with planning controls. If punitive measures are applied and based on a valuation, what land use is used to quantify the valuation?
iv) if a developer has been subject to punitive measures for not developing lands and makes an application for the development of lands and is either refused permission by the council or An Bord Pleanála, will the land owner be compensated for the costs involved in making a planning application or the financing the penalties imposed?

To impose zoning options on lands whereby specific zonings may last only a number of years may be unreasonable when one understands that;

i) large sites are often subject to sale, design, financing and planning application preparation processes that take 1–3 years.
ii) in many cases, applications will not be made on large sites until appropriate infrastructure is put in place by local councils as an application would be refused on the basis of prematurity. Is it reasonable to remove zonings from lands where councils fail to deliver necessary infrastructure or refuse to allow a reasonable temporary alternative measure to be put in place?
iii) is it reasonable to put zoning options in place where such measures already exist in the planning codes given the provisions of Section 10(8) of Planning and Development Act 2000 (as amended)?

How does one deal with 'brownfield land'?

Many lands, while not declared derelict sites under the Derelict Sites Act, are not used for any particular purpose in areas within town centres, suburban areas and lands within other urban fringe areas. Very often, these lands can if developed contribute significantly towards meeting housing and other needs but remain undeveloped for a number of years. Are landowners of these sites to also be penalised for failure to develop?

i) The development of town centre lands or other 'brownfield' lands is often difficult to achieve except over long timescales due to land assembly, financing and other planning constraints. To place penalties on the failure to develop such lands would be unreasonable.

5 CONCLUSION AND SUMMARY

It was noted above that the development of lands will often require the provision of necessary public infrastructure. In this context, it is important to accept that the quick and speedy development of lands can only be encouraged where developers definitively know that local authorities will develop the infrastructure necessary to facilitate the development of lands. Without the necessary infrastructure, lands cannot be developed irrespective of zoning status.

Having regard to this, it is unreasonable to infringe upon private property rights where landowners are often advised (by planning authorities in the pre-planning process) that development of their lands will not be possible without improvements to local services and infrastructure that they themselves (the developers) cannot afford to carry out.

Given the above, the difficulties in developing lands cannot simply be presented as the fault of landowners/ developers. Given the present legislative framework and the operation of the development plan and planning application system by local authorities, the development of lands will always be difficult to promote when it is accepted that all development proposals must go through an extended gestation period and detailed assessment process that begins long before a planning application is made. This being the case even where appropriate services are available.

Furthermore, the established planning system provides reasonable measures to facilitate the development of lands and encourage developers to promote their development lands through statutory provisions such as:

i) section 10(8) of Planning and Development Act 2000 (as amended)
ii) part 8 of the Planning and Development Regulations 2001
iii) section 15 of the Planning and Development Act 2000 (as amended*)*.

Perhaps the only revision to the Planning Code that could be encouraged would be a provision whereby landowners would be notified of any review of Section 15 of the Planning and Development Act 2000 (as amended) that their lands are being considered for de-zoning at the next development plan review.

Notes:

1 The only revision to the planning code that will be discussed below is a provision whereby landowners would be notified of any review of Section 15 of the Planning and

Development Act 2000 (as amended) that their lands are being considered for de-zoning at the next development plan review.

2 Or a proposed local area plan

3 Often developments that have planning permissions cannot be developed due to the imposition of excessive financial contributions. The future adoption by the majority of planning authorities of their Section 48 Development Contribution Schemes is unlikely to address this although it may allow for specific once off infrastructure charges to be challenged.

4 This SDZ has only recently been confirmed by the Planning Authority

5 Councils may require as an objective of the development plan the preparation of an action area plan by developers to address design and servicing constraints.

6 Such as the Wicklow Town Environs Local Area Plan

7 An Bord Pleanála File Ref PL 13.127360 Refusal of permission for the development of a housing scheme outside Limerick City.

MINISTER FOR COMMUNITY, RURAL AND GAELTACHT AFFAIRS

REVIEW OF ARTICLES 40.3.2 AND ARTICLE 43 OF THE CONSTITUTION IN RELATION TO PRIVATE PROPERTY RIGHTS.

The minister is responsible for rural development, including the development of the rural economy. The minister welcomes the review of these Articles.

In recent years a number of issues have arisen in relation to access to the countryside and recreational use of the countryside. These issues have been a source of conflict between some landowners and recreational users of the countryside.

Until 2000 the Rural Environmental Protection Scheme (REPS) implemented by the Department of Agriculture and Food provided for payments to farmers who undertook to give public access to their land for environmentally friendly leisure and sporting activities. The inclusion of the payment in the scheme assisted in the development of new waymarked ways in the countryside. From 2000, however, the new REPS did not include such a provision, at the insistence of the European Commission. This led to a situation where some farmers decided to withdraw the access previously afforded and has proved to be a bone of contention between some farmers and those representing recreational users of the countryside.

The committee may wish to note that a consultation group has been established by the minister to consider the issues involved in this matter.

Against this background the members of the All-Party Committee may wish to take into account, in their examination of the elements of a new Article, the issue of access to the countryside and the rights and obligations that should be placed on both landowners and recreational users.

DUBLIN 15 COMMUNITY COUNCIL

SUMMARY

The review of the constitutional provisions governing property rights is a pivotal opportunity to assist in the delivery of an environmentally sustainable and socially just society.

- The Constitution should expressly protect the rights to property
- The Constitution should expressly provide that such property rights can be qualified, restricted etc by legislation where there are clear social justice or other public reasons for doing so. Due regard to be had to the need to restrict the property ownership rights in the constitution to development property, because the development potential is directly attributed to the (existing or future) provision by the state of water supply, sewage, roads, rail and transport infrastructure
- Create a single self-contained article in the Constitution dealing with property rights, using clear and simple language
- We do not recommend the affording of constitutional protection of private property to legal persons.
- Establishment of a national land bank management agency to own and manage all residential and industrial development lands as a mechanism for ensuring the protection of the greater good and ensuring the benefits of productive wealth is shared by the widest possible numbers of our society.

Any conclusions reached by the committee should seek to formulate an amendment, which is predicated upon pre-eminence of social justice and the common good over those of the individual. This should help to deliver strong, structured and robust processes, which assist in the delivery of open, transparent and participative government.

BACKGROUND

The Dublin 15 Community Council welcomes the examination of property rights by the Committee on the Constitution. The assertion of these rights has had a fundamental and profound influence on societal and economic development in Ireland. The content of the committee's invitation for submissions in the national press indicates the broad range of issues that this area of the Constitution has the ability to impact upon.

It would be our view that this element of the

committee's work has come at an appropriate time – excessive inflation of the past eight years in the residential property sector, controversy/corruption in the planning and development process, infrastructure delays and costs etc.

It is felt by many that the laws, regulations and processes that have devolved from our present constitutional provisions governing property rights have taken place in a manner and way such as to largely benefit a select minority of our society.

One of the consequences of this has been to alienate many from the democratic process. This manifests itself in the context of this paper, the inability of individuals to purchase their own homes and the lack of access and ability of ordinary citizens to influence the planning and development process.

The committee now has a window of opportunity to tackle these and the associated issues and to eliminate the inequities that have emerged in our society since the sixties with regard to the exercise of property rights.

Our submission will seek to highlight issues/areas that we feel need to be addressed.

PLANNING AND DEVELOPMENT PROCESS

In any examination of property rights we must consider the role and effects that the planning and development process has in such matters. This process has a material and lasting influence on society and the environment in which we live. It determines where we live, the type of housing, type of community we live in, the infrastructure/facilities or lack of them necessary to sustain a modern community, to the provision of transportation/communication links etc. Hence the importance that the system and the associated processes are beyond reproach, inclusive and transparent. It is, in our opinion, the primary vehicle for delivering an environmentally sustainable and socially just society.

Vast fortunes have been made in recent decades through the use and exploitation of this process. Society has been severely and negatively impacted upon by a system that is widely held to be 'developer led'. The various disclosures emanating from the recent tribunals are a shocking exposure of corruption in the planning process in the Greater Dublin metropolitan area.

It would not be desirable from a societal perspective to await the final outcome of the Flood Tribunal, but rather to learn from those disclosures to date. The existing system has in our view been brought into disrepute and should be replaced with systems that minimises the opportunity to unduly influence or corrupt the processes involved.

ZONING OF LAND

The single element that has been the most controversial aspect of the planning process is that of the zoning of land. Land is our nation's most precious resource. Hence the importance that should be attached to its development in a manner consistent with sustainable development and the common good. The essential point here is that rezoning of land is only possible because the state has (or will have to) provide the necessary infrastructure.

We would also ask your committee to consider the area of control of development land (or land with development potential). It is reported in the media that a small number of developers have control over a significant land bank that has been/will be utilised to build new residential accommodation in the eastern part of the country. Such a situation is unsatisfactory from a planning and competition perspective.

Since the original constitution was framed two significant changes have happened:

- the urban population of the state has exploded, while the rural population has decreased, this is most evident in the expansion of the Dublin Metropolitan area
- the Planning and Development Acts (from the 1960s to date) have conveyed a value on 'development' land.

The differential value between development land and agricultural land is directly attributed to the provision by the state of necessary infrastructure, i.e. schools, water supply, sewage, roads rail and transport infrastructure. True the developer does construct the 'last piece' where water and waste connects to the individual house or factory and distributor roads within an estate, but this is the inexpensive part and useless without the rest of the backbone of the infrastructure.

We do not believe the originators of our Constitution intended that the state (and its taxpayers) should fund the development value of zoned land.

We have developed thoughts on ways to improve the effectiveness, transparency and openness associated with the rezoning of land. Some years ago we suggested that greater use of the Kenny report be made and that a national executive agency be formed to manage development land as a national resource. We have similar positive experiences here in the past from the setting up of such bodies, e.g. The National Treasury Management Agency, formed to manage the national debt; an undertaking which has been very successful in attaining its objectives.

NATIONAL LAND BANK MANAGEMENT AGENCY (NLBMA)

In our opinion a fresh initiative is required to bring the spiraling cost of development land under control and to de-politicise the land zoning process. The opportunity to make excessive profits from land rezoning must be minimised.

What we propose is the establishment of a national land bank management agency.

This national agency will be responsible for:

- implementation of The National Spatial Strategy

- implementation of the Strategic Planning Guidelines for the Greater Dublin Area
- implementation of future government policy/initiatives that involves planning and development
- the review and delivery of county and city development plans.

We propose that:

All lands deemed to be development land by a national land bank management agency shall be temporarily vested in the agency and architectural competitions established for each development area structured as follows:

1 The agency shall invite competition entries from developers comprising
   - house and development design
   - tender price for the site
   - tenders will be open to EU firms to ensure competition and that we can exploit 'Best in Class' practices from abroad.

2 The agency shall establish selling prices for each house type in the development

3 The agency shall ensure that all required infrastructure will be provided before development commences, funded by the tender prices paid for the site

4 The commission shall ensure that large infrastructure components (such as public transport, roads, schools and recreational facilities etc), are funded by the contributions from several such development sites, exchequer financing and, where appropriate EU funds

5 The agency shall review the rationale behind any land rezoning from agricultural to other uses to certify that the decision is consistent with the implementation of
   - the National Spatial Strategy,
   - the Strategic Planning Guidelines for the Greater Dublin Area,
   - implementation of future government policy/initiatives that involves planning and development.

   The agency shall have the authority to reject re-zonings that do not conform to the above, or where corruption is suspected (pending an investigation). The agency shall not have the authority to initiate zonings; there needs to be a clear separation of roles between the political/consultative process and the strategic overview to ensure corruption in the planning/zoning process does not re-emerge.

   A senior judge or civil servant with a background in planning and development should head up the agency. Staff should be experienced planners, well remunerated. Seek a mix of staff, and recruit planners from other EU countries where there has been sound planning and development practices for many years, e.g. Holland.

   The advantages are numerous for such an initiative.

   - A holistic, structured and professional approach can be brought on a national basis to the future delivery of city and county development plans
   - Ensures openness, transparency and preserves the integrity of the system
   - Assists the restoration of balance and morality into the sphere house purchase
   - Will lead to consistent and speedier delivery of government initiatives such as the implementation of The National Spatial Strategy and the Strategic Planning Guidelines for the Greater Dublin Area
   - Will help to arrest the spiraling inflation with regard to the provision of public and private residential accommodation
   - Will ensure that infrastructure is provided in a timely manner and lead development, rather than lag development as at present
   - Will help to ensure that social and affordable housing needs are addressed.

   As an alternative to the foregoing, deeper consideration should be given to the Kenny Report and its suggestions for dealing with the issues referred to.

OTHER SUGGESTIONS

We have set out hereunder a list of initiatives and suggestions, which attempt to redress some of the shortcomings/inequities/imbalances that exist in the current system.

- Developers should provide land (at average agricultural land values) to local authority and state agencies for the following – primary and secondary schools, community centres and health centres. This should be pro-rated according to the percentage of land owned in a local area action plan. Such lands to be identified and dedicated at the outset of approval of an area action plan, development plan or strategic development zone.
- Developers should provide land (free of charge) to local authority and state agencies for the following – distributor road access, access to provide utilities (drains and water supply) or services/facilities associated with the provision of public transport. The land for these services should be provided on request (of local authority) in advance of development (rather than lag development at present)
- Higher density development (where higher density is based on access to public transport) should be required to contribute to the cost of that transport infrastructure as permitted by the Planning and Development Act 2000. (Contribution should be in proportion to the value of the additional sites made possible due to the increased densities)
- No land should be re-zoned to residential without giving the local authority the opportunity to acquire

sites for social and affordable housing at current land values
- Development of new areas needs to be infrastructure led, with developers contributing to the up front costs
- Developers holding back development to increase prices; need to establish mechanism to prevent this happening (i.e. rezone to agricultural/amenity zoning without compensation)
- 10-year planning permissions should be conditional on putting the entire infrastructure in place in the first phase
- New rezoned lands should be levied *ab initio* to fund infrastructure costs
- Examine the profit margins of new residential property developments to determine if excessive margins exist in the current market and develop suitable strategies to ensure competitive forces erode excessive margins
- With regard to the foregoing we suggest that government give consideration to implementing a special tax on developers, similar to the special levy in the last budget with regard to financial institutions. The additional tax raised should then be ring fenced to ensure that the funds be utilised to provide the relevant local authority with additional funds develop necessary facilities/infrastructure (e.g. additional social and affordable housing). It would be important that this was structured in a way as to ensure that the developer was not allowed to pass this additional tax onto house buyers.

ENFORCEMENT PROCESS

Our planning system allows a planning authority to permit a development that would in the absence of suitable conditioning, be prohibited. It is clearly understood by all parties that the conditions are an integral part of the permission. The attached conditions are a necessary safeguard that the development concerned will proceed in the prescribed manner in the interests of the proper planning and development of an area. It may therefore be said that attaching of conditions to a planning permission by a planning authority is a mechanism for reconciling the exercise of property rights with the exigencies of the common good. Despite that knowledge it is an area that in practice has led to the clear subordination of the common good to that of the developer. Time and time again communities have come up against a 'brick wall' in dealing with errant developments. The issue has become so bad that the recently retired Ombudsman specifically referred to it as a real problem area in local government. While the Planning and Development Act 2000 has gone some way towards redressing the imbalance, it still leaves much to be done to protect communities and the common good from 'rogue developers'.

TAKING IN CHARGE BY LOCAL AUTHORITIES OF DEVELOPMENTS

Of particular concern to the community is our lack of 'right' to and inability to insist that estate/developments be taken in charge by the functional authority. We know of estates that have literally been left out on a 'limb' by developers for decades. The councils will refuse to take them over until all works outstanding are complete – and the developer is happy to dispute the requirements or simply is not prepared to carry them out. And there the issue remains – in no man's land – and to the community it appears that no one really seems to care at official level as there is no effective enforcement mechanism to force the issue. We would urge the committee to devote some time to this issue; as matters stand we have a significantly reduced access to the planning system and there seems little appetite to pursue developers. Contrast that with the regular complaints by developers about delays in the planning system, insisting that they must have planning decisions completed within a given time frame. Resources have been ploughed into that area – and have we seen a corresponding increase in the enforcement sections manpower/resources etc.

We need greater protection of the common good in this sphere of the planning process as it has a real impact on our ability to enjoy the amenities to which we, as members of society, are entitled.

ASSOCIATED ISSUES

We have listed additional aspects of the planning and development process that we believe are inequitable and highlight the regularity with which the planning and development and associated processes subordinate the rights of the community to those of the individual property owner – see Appendix 1.

HOUSE PRICES

The authors of the original Constitution sought to ensure that they bequeathed to us a living document that would enable Ireland to evolve into a caring and embracing society that would be capable of advancing the quality of life of all of the people of Ireland.

Over the decades this has led to the expectation that for the majority of us, we would in our lifetimes own our own homes and that those less fortunate would be provided with adequate accommodation in which to live. However, that aspiration is fast disappearing from today's Ireland.

In 1995 it required 5 times average earnings to purchase a home, now it has doubled to 10 times average earnings. Home ownership is now fast becoming a luxury; to be attained only by the most highly paid members of society. Housing is now no longer affordable for the majority of our young people. That fact alone has major ramifications for the existing and future economic and societal development of Irish society.

THE ECONOMIC IMPACTS

In the past decade we have witnessed a transformation in the economic fortunes of our country, largely due to massive inward investment attracted by

- Low tax environment for business
- Availability of highly skilled 'knowledge' workers for a 'knowledge' economy
- Stable social/economic environment

Already there is strong anecdotal evidence that the lack of affordable residential accommodation is starting to encourage our skilled indigenous graduates to emigrate. Amongst them will be many of the entrepreneurs of the future – the lifeblood of an economy. Unaffordable house prices also serve as a barrier to the immigration of other skilled workers required by our knowledge economy.

- The amount of disposable income available to new homeowners has greatly diminished in recent years (higher mortgages/transportation costs/child minding etc), thereby severely restricting their ability for discretionary purchases. This played out overtime will see a contraction in economic activity in the country
- The reduction in disposable income will impact on exchequer funding and the state's ability to provide the infrastructure/services that a modern Ireland requires
- Increased house prices makes Ireland a less attractive destination for inward investment as it makes it harder to attract skilled workers to Ireland
- The high level of house prices has afforded developers the opportunity to reap 'super' profits on residential developments, thereby concentrating a disproportionate amount of productive wealth into the hands of a small number of individuals. This has major consequences for the economy.

THE SOCIETAL IMPACTS

The societal impacts of soaring asset prices in relation to residential accommodation have yet to be fully understood. However, we can see some of those effects filtering through.

- Households now require both partners to work to maintain mortgage payments – the element of choice has been largely removed from the present generation of new parents. Families now experience less time with each other. The quality of life has been eroded, in particular that available to the family unit
- Individuals now have to spend an excessive number of hours per day commuting to their places of work/study. This places an unhealthy level of stress on individuals and has health/environmental implications for society. Also discourages mobility of employment amongst workers
- The new towns/cities which have sprung up in the Greater Dublin Area and adjacent counties are largely devoid of community and social facilities; hence making it more difficult to establish a sense of community. That impacts on our notion of ourselves as a 'caring society'
- Increasing the rate of homelessness and forcing additional persons onto the public housing lists
- Single persons and middle income couples now face increased social exclusion due to their inability to access the housing market, either public or private
- Impoverishing today's families and hindering the middle aged to prepare for retirement as they struggle to assist children with housing costs.

The government reacted to rising house prices by establishing the Bacon reports and undertaking a number of other initiatives. However, these were rendered largely ineffective due to the effectiveness of the developers lobby and the failure to be radical enough in tackling the issues involved. Indeed it may be said that the failure of these initiatives was due to the subordination of the common good to those of the individual property owner.

In examining this issue over the past six years we have seen little change, despite awareness at official level as to the causes behind and the means used to sustain the escalation in house prices. Amongst those we feel as relevant to this submission -

- Highly effective industry lobby
- Perceived scarcity factor
- Hoarding and holding back of development land by developers
- Use of the 'trickle' effect-controlled release/phasing by developers of housing units
- Avoidance by developers of competition between each other.

The lobbying by a number of developers to reverse the social and affordable housing provisions evidences examples of this. A further example was the restoration of investor relief in the last budget; as a consequence prices of new residential accommodation rose by 15% shortly thereafter.

Rising house prices are of concern to the great majority of the population and need to be arrested. To do this a greater sense of balance has to be injected into the equation with regard to the competition between the common good and the interests of the individual. As a moral society we cannot continue to allow the needs of a few take precedence over the needs of many.

We would suggest the following be considered -

- Elimination of tax incentive based property schemes (primarily used by top earners as a tax avoidance measure)
- Restriction/elimination of investor relief
- Bring the purchase of new homes under the control of the Director of Consumer Affairs and ensure that the purchase of new residential accommodation is covered by the Sales of Goods and Services Act. This is desirable to protect consumers in the largest

financial commitment of their lifetime. We regulate the institutions who lend the money, but strangely enough not the builder who takes the money!
- Additionally, where anti-competitive behaviour exists in the industry the director should be empowered to examine the issues
- Introduce a tough 'Use it or Lose it' provision in the Planning and Development Act to ensure that hoarding or holding back development land is disincentivised. This would involve the dezoning of land after a reasonable period and not be subject to compensation beyond the original agricultural/previous use value of the land prior to its rezoning for development. Such land could be subsequently acquired by an executive agency/local authority for use to provide housing/requisite amenities for the community. The NLBMA referred to earlier would be in an ideal position to police such a measure.

SOCIAL AND AFFORDABLE HOUSING / SHELTERED HOUSING

We have a duty to provide the members of society with shelter and to care for the less well off in our society. This is what the authors of our original Constitution intended. It is a pity therefore that the social and affordable housing provision should have been allowed to be frustrated by the developers lobby.

We need to have a robust policy that addresses social, affordable and sheltered housing and does not allow the development lobby to exercise an unhealthy degree of influence over that element of social policy. While the social and affordable housing issue has received regular media and political comment, it is noted that little is being done to prepare for an ageing population and the need to provide sheltered housing for the elderly, and indeed the disabled. We would like to see greater provision for such initiatives in future development and area action plans.

INFRASTRUCTURAL DEVELOPMENT

We will refer to two categories of infrastructure -

- State/National Development Plan projects
- Local infrastructure necessary to support emerging communities

State projects

The high costs and delays associated with state projects are a regular topic of discussion in our national media over the past number of years. We wish to give our own perspective on aspects of this issue.

Ireland has a largely immature infrastructure and through the National Development Plan seeks to redress this imbalance. However, price escalation, delays etc. have on many occasions frustrated the delivery of projects.

- Additional delays/expense have occurred on many showcase projects due to facilitating 'vested interests'. By this we mean inappropriate zonings/rezoning of lands that may need to be acquired, thereby creating a 'windfall' for the landowners in question
- Failure to adequately consult with the affected residential and business community in advance of the launching of major infrastructure initiatives
- There is an attitude of paternalism and tokenism in many public bodies that see genuine public participation/consultation as a hindrance rather than a help. Yet we can point to our own experience here in Dublin 15 where our active participation in such matters has provided valuable insight and solutions for such projects, thereby saving the exchequer substantial monies in the longer term. There is a huge repository of knowledge, common sense and good ideas in the public domain waiting to be harnessed
- Failure to 'plan in' to projects adequate mitigates to alleviate community concerns regarding air/noise/light pollution, safety and severance issues. Other countries do this as a matter of routine at the very outset of a project. Here we seek to ignore or deny an issue exists in these areas, thereby alienating communities from the outset.

Local infrastructure

A prime objective for the community council in making this submission is to increase the awareness amongst policy makers of the need to have infrastructure lead development. The systematic failure over decades to provide roads, public transport, schools, recreational/community facilities for newly emerging communities in advance of development is exacting a high price on those communities.

We would ask the committee to consider the reasons why our planning and development processes have allowed this situation to persist for so long, when we have known that our European neighbours have been doing it right for years. Have we as a society placed the interests/rights of a few above those of the greater good? Have we allowed the benefits of policy decisions accrue to the few, and by the same token failed to ensure that those benefits are passed onto the wider community in the form of the provisionsof schools, public transport, better quality housing, facilities etc.

An example would be the implementation of the Guidelines for Planning Authorities for Residential Density, which has permitted/insisted on higher density housing (thereby generating higher profits for development land) and promised higher standards and safeguards etc – yet we have not seen those delivered on. The classic example is the proximity of the development to a rail corridor, e.g. Maynooth rail service. If it is less than a kilometre, higher densities can be placed in the development – no regard is had to the carrying capacity of that rail service. Communities then face the struggle to get on train services that cannot cope with the demand.

Again we see this as an example of allowing developers 'plough ahead' with higher profit schemes

while authorities fail to ensure that matching services/facilities are provided in advance or in parallel with the housing.

COMMENT ON THE CONSTITUTION

The explanatory material supplied by the secretariat for the committee has been of great assistance to the community council in considering the various options considered by the committee to date.

We would broadly agree with many of the conclusions as outlined. Specifically we agree with the following:

- The Constitution should expressly protect the rights to property
- The Constitution should expressly provide that such property rights can be qualified, restricted, or even (in special cases) extinguished by law, and where there are clear social justice or other public reasons for doing so
- Create a single self-contained article in the Constitution dealing with property rights, using clear and simple language
- We do not recommend the affording of constitutional protection of private property to legal persons.

We would also point out that we agree with the view expressed by some members in the review paper that historically the assertion of individual property rights has been associated with the protection of commercial and business interests. Accordingly, the necessity to temper such a provision with one that allows the Oireachtas to qualify such rights in the public interest and for reasons of social justice. In particular, there is a need to put in place a mechanism for taking the 'profit' out of the rezoning of land or in having to pay compensation for the dezoning of lands.

The treatment of lands set aside for residential development needs to be carefully considered.

Any conclusions reached by the committee should seek to formulate an amendment, which is predicated upon pre-eminence of social justice and the common good over those of the individual. This should help to deliver strong, structured and robust processes, which assist in the delivery of open, transparent and participative government.

It is our hope that the committee will see this as a pivotal opportunity to assist in the delivery of an environmentally sustainable and socially just society. It is time to move away from the historical perspective of assisting the exploitation of individual property rights by a minority of society at the expense, in many cases, of the common good.

Appendix 1

COMMUNITY ACCESS TO PLANNING AND DEVELOPMENT PROCESS

PRESENT POSITION

- A developer will be afforded the opportunity to hold pre-planning discussions with the council officials to discus the developer's proposals. Indeed this is encouraged to 'iron out' any potential difficulties
- Community will not be afforded such an opportunity to discuss proposals/clarify issues associated with the proposal, even though they may directly impact on the community
- Developers usually have professionals representing them. In the 'normal' course of events relationships will develop between the planning professionals
- This gives the developer hidden/unfair advantages over the community, i.e. they have direct personal access to planners/council officials. Through this direct contact they seek to influence decision-makers towards delivering a favourable outcome for their principals. This can have a prejudicial effect on community concerns
- Generally planning authorities do not allow the community to make a written representation on a (proposed) development, unless the developer has lodged a formal application. This is supposedly to 'protect ' the landowner (developer's) constitutional rights
- Verbal representations from the community will not be accepted in any circumstances, either before *or* after a planning application has been lodged. We are expected to make a written submission, which will only be accepted if accompanied by the appropriate fee and within the prescribed time frame
- The current system creates an imbalance which greatly favours the developer by allowing them a highly effective communication/lobby channel which is not available to the community. This pre-planning practice does not treat all interested stakeholders equally and actively discriminates against the community. Indeed it is in our opinion that these pre-planning practices carried out by planning authorities effectively subordinates the wider property rights of the community to those of developers
- We also believe that the foregoing issues referred to are contrary to the principles of the doctrine of Local Agenda 21 and European Conventions.

All stakeholders in the planning process should have an *equal* opportunity to have their views considered by the planning authorities. To do so is to encourage/practise transparency and thereby minimising the opportunity to discredit/corrupt the planning process. Planning authorities should not seek to use supposedly constitutional issues to shield theirs or developers' deliberations from public scrutiny on planning and development issues.

COMMUNITY PERCEPTIONS

- Planning and Development issues developer led
- Community involvement to date has had little real impact. 'Tokenism'
- Information deficit – difficult to get information on planning/development issues
- Government fees levied on community participation in the planning and development process – which is designed to discourage participation in the process (now found to contravene the European Community conventions governing this area)
- Lack of transparency, openness in the planning system, i.e. developer has ready access to councillors/ planners, e.g. pre planning discussions. Only written submissions accepted from public on planning applications
- No record (file notes) of pre-planning discussions are maintained for public inspection as to matters raised or agreed at such discussions. This coupled with fact that the planning officer's report, in our past experience, seldom actually commented on matters/issues raised by communities in their submissions. It merely stated that a number of objections were received and their contents noted. Whereas, the content of the developer's application received detailed comment. We had no way of knowing to what extent, if any, community concerns were considered. We would point out that An Bord Pleanála planning reports contain specific reference(s) to issues raised by appellants.

SUGGESTIONS TO IMPROVE ACCESS BY THE COMMUNITY TO THE PLANNING PROCESS

In light of the current scandals that continue to regularly unfold with regard to the planning process it is important that confidence be restored in the system.

Planning and development has a major impact on the social and economic fabric of our society. Therefore it is vital that we, as primary stakeholders, have an equal opportunity to participate in the determination of the kind of society that we, as a people wish to create.

To help in this process we would suggest that the Department of the Environment and planning authorities consider the following initiatives in addition to those mentioned already in our submission.

ELIMINATE FEES TO ACCESS THE PLANNING AND DEVELOPMENT SYSTEM

Revert to the situation prior to the introduction of fees. Complaint to the EU regarding the introduction of fees has been held to be valid.

PRE-PLANNING PROCESS

Despite the assertions of planning authorities, it is our view that there is no constitutional/legislative impediment to planning authorities holding pre-planning discussions with interested parties (other than land/ property owners). We would refer to a survey by the Sunday Tribune and the then Minister of the Environment in 2000 – which supports the views contained in this submission, that pre-planning access should be granted to interested stakeholders. Interestingly, it confirms the view, which we have previously stated to our own planning authority that there are no legal impediments to holding such discussions. Nevertheless, planning authorities continue to use constitutional property rights as a reason to deny such access to the community at large.

In the interest of transparency and equality, it is suggested that the pre-planning process be open to all interested parties. That the content of such discussions/ meetings or other representations be documented by way of file notes. This is regular practice for government departments, solicitors, barristers, accountants, doctors, bankers and many others. Such file notes should be available for public inspection/scrutiny and contained in the planning file, if a formal application is lodged. As such they will form part of the basis for deciding on any formal planning application for the site in question. With electronic storage/imaging techniques there are no logistical impediments to implementing such a policy.

PLANNING OFFICER REPORT IN RESPECT OF PLANNING APPLICATIONS

In the interest of completeness and transparency that it be a requirement of the consideration of a planning application that the report of the planning officer refers specifically to and comments on the issue(s) raised by third parties when referring to objections received in respect of planning applications. This will help to assure third parties that their views have received adequate and fair consideration in the deliberation process. It will also help to ensure that the planning authorities do give adequate thought to the objections/observations raised by third parties. They would, if this were adopted, be expected to comment upon them, rather than as at present stating… 'objections were received from a number of third parties and their views were taken into consideration'.

DUBLIN PORT COMPANY

Dublin Port Company ('the Company') is the company charged with the management control and development of Dublin Port, the state's most important port.

The port comprises 270 hectares and the ability of the Company to increase the area by means of infill or acquisition is extremely limited in view of its location viz. a viz. the City of Dublin. Dublin Port is the largest port in Ireland and approximately 40% of goods imported into and exported out of the country are

shipped through Dublin Port. Within the last ten years alone the tonnage throughput through Dublin Port has increased by 234% and is currently in the order of 22m tonnes per annum. It is anticipated that this tonnage will increase by 60% over the next ten years.

As the throughput in the port increases, the demand for space for the temporary storage of goods imported or for export becomes more acute. The ability of the Company to provide the space required is seriously hampered by the provisions of the Landlord and Tenant Acts. Notwithstanding the strategic importance of the port, the Company is bound by all of the provisions of the Landlord and Tenant Acts.

It is submitted that the operators of the main strategic ports within Ireland should be exempt from the Landlord and Tenant Acts in the same way as the operators of the major airports. It is submitted also that the operators of the ports should also have similar rights to compulsorily acquire land as the operators of the major airports and local authorities, as this is clearly in the public interest.

The Company's two main difficulties with the Landlord and Tenant Acts are in relation to the control which the Company may have over the use to which its property is put by its lessees and the ability of the Company to lease land to third parties for port-related uses without the third parties acquiring Landlord and Tenant rights to renew leases for periods of over twenty years, therefore tying up land which might be better used for port development purposes.

Dealing with the first issue relating to user, approximately 60% of the port area is occupied by third parties under lease from the Company. The majority of the leases are long-term and many of same were granted over thirty or forty years ago, with the properties no longer being occupied by the original tenants. When the leases were originally granted, they were granted to particular tenants who were to use the property leased for specific purposes which in the main would be for the temporary storage and/or processing of goods imported or to be exported through the port. The Landlord and Tenant Acts restrict the ability of a landlord to object to tenants changing the use to which they put premises held by them under lease and as a result there are many areas within the port which are being used for purposes which could be operated elsewhere and it is not essential that the particular business be carried on within the port area. As a result, there is limited availability of land within the port area available for use by businesses that by their very nature require to be located adjacent to port quaysides.

The second main difficulty under the Landlord and Tenant Acts is the fact that where tenants occupy property under a lease for over five years and use the property continuously for business purposes, the tenants acquire rights to new leases of the property for a period of up to twenty-five years and on expiration of the new lease have entitlements to further leases. These provisions cause very considerable difficulty to Dublin Port Company in that it cannot let property to a particular tenant for a period in excess of five years, otherwise the property could become tied up for twenty or more years. Even if the Company and the tenant were to agree that the term of the lease was only to be for ten years and that the tenant would not exercise its rights under the Landlord and Tenant Acts, such an agreement would not be enforceable because it is not possible to contract outside the provisions of the Acts. Therefore, if the Company wishes to retain a tenant in the port area it has to relocate the tenant every five years and this is highly undesirable both from the Company's and the tenant's viewpoints. Port operators need to limit the periods for which lands are occupied by tenants so as to ensure that the lands are fully utilised in accordance with up-to-date practices and procedures within the port. The last twenty years have witnessed very significant and material changes in such practices and are continuing.

The Company submits that in view of Dublin Port's strategic importance to the economy of the country, and its unique location which limits its ability to expand its boundaries, the port should be treated in the same way as the main national airports and be excluded from the provisions of the Landlord and Tenant Acts. Should the port be excluded from the provisions of the Acts, the Company and its tenants would be enabled to negotiate and agree tenancies on terms which are acceptable to both the Company and the tenant commercially and also protect the future development of the port.

The Company would also submit that in view of the importance of the port that it be afforded the same powers as local authorities and the operators of the main airports to compulsorily acquire land needed for the development of the port. As indicated above, there is an urgent need for these powers to enable the Company to re-acquire land which has been leased and which is not being used for purposes which benefit the development of the port.

Legislation in relation to strategic ports should provide that where a mutually agreed contract expires the parties thereto are not forced by outside sources to contract further in relation to a particular property. This obligation is unique to Landlord and Tenant legislation and there is no reason why the parties should not be allowed to contract, as they both freely desire.

DUBLIN TRANSPORTATION OFFICE

ROLE OF THE DUBLIN TRANSPORTATION OFFICE

The Dublin Transportation Office was established by ministerial order on 9th November 1995 (WI No. 289 of 1995 as amended).

The principal function of the DTO is the co-ordination and monitoring of strategic land use and transportation planning – under the aegis of the Department of Transport – in accordance with the principles, goals and objectives set out in *'A Platform for Change'* [Dublin Transportation Office].

In addition, as part of its ongoing land use and transportation planning role, the DTO is required to review and update the strategy, at least once every five years. It is a prescribed body for the purposes of the Planning and Development Act 2000 and as such it reviews and reports on major planning applications and development plan reviews. The DTO is also involved on an ongoing basis in the development and review of the strategic planning guidelines for the Greater Dublin Area.

The Department of Transport *'Statement of Strategy: 2000-2005'* includes the following strategy:

> To monitor and oversee the implementation of '*A Platform for Change*' and other integrated urban transport Strategies.

As can be seen from the above, the DTO is deeply involved in all aspects of land use and transportation planning. It is particularly interested in removing any barriers to the timely and economic provision of transportation infrastructure and the promotion of sustainable land use development policies.

PRIVATE PROPERTY AND THE COMMON GOOD

The implementation of the DTO strategy for the Greater Dublin Area as outlined in the aforementioned document *'A Platform for Change'* is largely dependent on the implementation of a sustainable regional planning strategy which seeks to integrate the provision of transportation infrastructure with land use planning in order to derive the attendant socio-economic and quality of life benefits in the interests of the common good.

Articles 40.3 and 43 of the constitution afford property rights a high status in the hierarchy of 'enumerated' constitutional rights. However these articles (particularly Article 43) also seek to balance such rights against the 'exigencies of the common good'.

A body of case law has built up which has sought to resolve these competing interests. From a physical/social planning standpoint the Supreme Court judgement on the Planning and Development Bill 1999 'In the matter of Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill 1999' represent a high point in the resolution of these competing interests and seemed to tilt the balance in favour of the common good. More specifically, the Supreme Court endorsed the view that a grant of planning permission essentially constituted an enlargement/enhancement of property rights and effectively conferred a benefit on the property owner. It is contended that this rebalancing of these interests should be made manifest in the written text of the Constitution.

The implementation of sustainable planning strategies seeks to enhance the socio-economic well-being of the population at large. Such goals and objectives are of sufficient importance to warrant specific acknowledgement in the text of the Constitution in order to allay concerns that are regarded as pressing and substantial.

It is acknowledged that the existing body of case law has evolved in a manner that allows the legislature to draft appropriate statutes, which from a transport infrastructure provision standpoint would meet the interests of the common good. However the use of the term 'have regard to' instead of 'shall comply with' in the Planning and Development Act, 2000 when addressing the relationship between development plans and regional planning guidelines has effectively meant that the latter can be virtually ignored. This in turn will have severe economic/quality of life consequences in the medium/long term future.

It is contended however that specific acknowledgement in the written text of the Constitution that property rights may be subject to legal restrictions provided they are required in the interests of the common good and accord with the principles of social justice should be made manifest. Examples of such restrictions should be set out and should include 'sustainable land use and transportation planning' as well as 'the protection of the environment'.

COMPULSORY PURCHASE

One of the major problems encountered with regard to the provision of transportation infrastructure relates to the high costs associated with the acquisition of property interests.

Paradoxically, the government or its agents are often obliged to compensate a landowner for elements of value that the government has created by rezoning and/or the provision of infrastructure. In addition, the value of the retained land may also be significantly enhanced when the scheme underlying the compulsory acquisition is implemented, e.g. the provision of a metro often leads to significant land value enhancement in close proximity to the station. Such financial benefits accrue to the landowner.

Is it just, that a landowner as well as being compensated for disturbance, severance and injurious affection, should also be compensated at market value for land taken to facilitate a metro line when much of the land value enhancement is derived from the prospective provision of the said line? Retained lands may also derive a significant land value enhancement directly from rezonings and from the provision of the new service.

If significant benefit is derived from the provision of such infrastructure it does not seem equitable that market value should always be paid for the acquisition of such lands especially where the landowner derives significant benefit. Existing land use value may be a more appropriate measure. As Walsh J observed in *Dreher v Irish Land Commission*:

> It does not necessarily follow that the market value of lands at any given time is the equivalent of just

> compensation as there may be circumstances where it could be considerably less than just compensation and others where it might in fact be greater than just compensation.

It is contended that in many instances where land is acquired for transportation infrastructure projects, that existing use value compensation would be just compensation and would not imply a disproportionate burden on the landowner. Although the rules for the assessment of compensation could be changed to accommodate this contention, it is suggested that an appropriate acknowledgement in any revised article on property rights in the Constitution would render such changes well nigh impregnable from a constitutional challenge.

THE ZONING OF LAND

The zoning of hitherto non-development lands for development purposes invariably leads to massive increases in the value of such lands. Where large scale rezoning is carried out, which flies in the face of the principles of sustainable integrated land use and transportation planning, economic benefits are derived by a few and significant long term socio-economic/quality of life disbenefits accrue to the many.

Such actions are contrary to the interests of the common good. Zoning should therefore be carried out in accordance with a strategic plan, and that appeared to be the intention of the Planning and Development Act 2000. However the said Act simply required that in the preparation of development plans it is necessary to 'have regard' to the strategic planning guidelines. Recent case law has demonstrated that the term 'have regard' in this context sets an extremely low compliance threshold and effectively allows a development plan which pays scant regard to the overarching principles contained in the Strategic Planning Guidelines to be legitimately adopted.

In essence a change in the legislation is required to ensure compliance with the relevant Strategic Planning Guidelines. The necessary changes could be accommodated in the context of the current interpretations of the Constitution in terms of balancing the rights to private property against the exigencies of the common good as set out in the relevant case law.

However it is posited that proper planning and sustainable development and the protection of the environment should be set out – *inter alia* – as specific legal restrictions on property rights because they are required in the interests of the common good.

PRICE OF DEVELOPMENT LAND

In Dublin at present, very significant tracts of development land, which are located relatively close to the city, are withheld from the market. This leads to price inflation, leapfrog development, the creation of an artificial shortage of development sites and the re-zoning of lands distant from Dublin, to serve the needs of commuters to the capital.

Development land in relatively close proximity to the city is being hoarded and treated as a 'commodity'. The land value enhancement that accrues to such land is largely derived from government fiat, i.e. rezoning and or the provision of infrastructure.

In essence, it is a benefit that is conferred on the landowners by the community at large. The long term diseconomies associated with such hoarding practices are very significant. The quality of life issues associated with the resultant commuting are also significant.

Much of this 'hoarded' development land could be released and developed and – *ceteris paribus* – this would lead to a decrease in the price of development land. Admittedly such land could be compulsorily acquired but the costs would be prohibitive under the current compensation regime.

However, if compensation were based on existing use value the costs would not be prohibitive. Since much of the land value enhancement associated with such lands is a benefit derived from government fiat, it seems reasonable that compensation should be based on existing use value plus a stipulated percentage as outlined in the Kenny Report. Severance, injurious affection and disturbance should all attract compensation where appropriate. The goal should be to release such development lands for development purposes. If the owners continue to hoard such lands to the detriment of the proper planning and sustainable development of the area and the economic well being of the population at large, a way must be found to release it for development in the interests of the common good.

At present agricultural lands are exempt from rates. Thus, the holding of development land, the existing use of which is 'agriculture' does not attract rates, notwithstanding the fact that such lands are zoned for development purposes.

If such lands could be compulsorily acquired at existing use value or existing use value plus a stipulated percentage of same, then the incentive to hoard land would be reduced. Furthermore, if such lands were subjected to site value rating then the incentive to hoard would be further diminished.

Changes to the compensation code to allow compulsory purchase below market value at existing use value would relieve the scarcity of development land thereby reducing the price of such land. In addition, the introduction of site value rating would increase the costs of holding such lands and thereby ensure that they would be brought to the market sooner.

It can be argued that Articles 40.3 and 43 of the Constitution as interpreted by the courts in the aforementioned body of case law (especially the recent Article 26 referral on Part V of the Planning and Development Bill 1999) could accommodate such changes to the compensation rules.

However, such changes might also be subject to constitutional challenge and it is therefore recommended that any change to the constitutional provisions in relation to property rights should include a qualifying

clause that would specify legal restrictions on such rights, which are duly required in the interests of the common good.

A qualifying clause similar to that which is outlined at 6(IV) on page 366 of the *Report of the Constitution Review Group, May 1966*, which specifies – *inter alia* – the following legal restrictions on the right to private property would be appropriate:

- the raising of taxation and revenue
- sustainable land use and transportation planning
- the protection of the environment

INFRASTRUCTURAL DEVELOPMENT

One of the principal obstacles to the efficient and cost effective provision of transportation infrastructure is the high cost of acquiring the necessary property interests.

International studies demonstrate that the provision of metro or light rail lines invariably benefits properties which are located in the immediate vicinity of such lines and this benefit often manifests itself as an increase in the value of such properties.

Paradoxically however, the government when acquiring the land to facilitate the provision of such projects is often obliged to pay highly inflated prices which result from development potential based on new zonings/rezonings which in turn are facilitated by the provision of the said infrastructure.

The interests of the common good are not well served if the government is required to compensate a landowner for elements of value that the government has created. The current compensation rules effectively oblige the government to do so.

It is posited that existing use value plus disturbance, severance and injurious affection would be a more equitable basis for compensation and would reduce the costs of transportation infrastructural development.

However, such a change in the compensation code might be subject to constitutional challenge and it is therefore recommended that any change to the constitutional provisions in relation to property rights should include a qualifying clause that would specify legal restrictions on such rights, which are duly required in the interests of the common good.

A qualifying clause similar to that which is outlined at 6(IV) on page 366 of the Report of the Constitution Review Group, May 1966, which specifies – *inter alia* – the following legal restrictions on the right to private property would be appropriate:

- the raising of taxation and revenue
- sustainable land use and transportation planning
- the protection of the environment.

HOUSE PRICES

The dramatic increases in house prices over the past 6 years can be attributed to a number of factors:

a) low interests rates
b) a booming economy
c) excess of demand over supply
d) lack of capacity in the construction industry
e) demographic factors including increased in-migration
f) general inflationary pressures
g) the high cost of serviced sites

The increases have been most pronounced in areas characterised by existing building stock that is relatively close to the city or enjoys ease of access to the city centre.

However, annual double-digit house price inflation has also occurred in the new build sector and the dramatic increase in the price of zoned residential lands has contributed significantly to these price rises. The relative scarcity of services sites which are available on the market and the control of the supply of such sites by a relatively small group of developers has helped to maintain the high price of serviced sites which in turn manifests itself in high house prices.

Because of the artificially created scarcity of serviced residential lands in relative close proximity to the city, 'leapfrog zoning' has taken place in many towns outside the Greater Dublin Area. In such towns good quality housing is being provided at significantly lower prices when compared to equivalent specifications in relatively close proximity to Dublin. Thus, the high price of houses coupled with the artificially created scarcity of serviced development sites in relative close proximity to the city leads to unsustainable urban sprawl and a concomitant high level of commuting/car usage.

A more orderly and socio-economically viable pattern of urban development could be achieved if strategic integrated land use and transportation planning principles were adopted and adhered to.

Such plans and principles however will not contribute towards the reduction of house prices if strategically located tracts of land, which ought to be developed, are held back from the market.

Thus the timely release of strategically located tracts of land at prices that are not prohibitive is a key element in the pursuit of sustainable land use and transportation planning for the overall conurbation.

In balancing the right to private property with the exigencies of the common good, it is difficult to justify a scenario whereby a small number of developers/landowners can withhold significant tracts of key lands (in terms of location) from the market indefinitely and in the event of such lands being compulsorily acquired, obtain huge sums in compensation essentially for benefits conferred on such lands by the community through rezoning and/or the provision of infrastructure. The release of such lands would reduce/eliminate the scarcity factor and this in turn should contribute towards a reduction in house prices or at worst, a slowing of the rate of increase.

Changes to the compensation code to allow compulsory purchase below market value at existing use value would relieve the scarcity of development land thereby reducing the price of such land. In addition, the introduction of site value rating would increase the

costs of holding such lands and thereby ensure that they would be brought to the market sooner.

It can be argued that Articles 40.3 and 43 of the Constitution as interpreted by the courts in the aforementioned body of case law (especially the recent Article 26 referral on Part V of the Planning and Development Bill 1999) would accommodate such changes.

However, such changes might also be subject to constitutional challenge and it is therefore recommended that any change to the constitutional provisions in relation to property rights should include a qualifying clause that would specify legal restrictions on such rights, which are duly required in the interests of the common good.

A qualifying clause similar to that which is outlined at 6(IV) on page 366 of the *Report of the Constitution Review Group*, May 1966, which specifies – *inter alia* – the following legal restrictions on the right to private property would be appropriate:

- the raising of taxation and revenue
- sustainable land use and transportation planning
- the protection of the environment.

SUPPLEMENTARY SUBMISSION TO THE ALL-PARTY OIREACHTAS COMMITTEE ON THE CONSTITUTION: PROPERTY RIGHTS

INTRODUCTION

This supplementary submission has been prepared by the Dublin Transportation Office in response to an invitation following a verbal presentation to the All-Party Oireachtas Committee on the Constitution on the subject of property rights. It is important to stress that this document should be read in conjunction with the original written submission (May 2003) on which the said verbal presentation was based.

This paper initially sets outs the main substantive arguments which have been put forward against any change being made to the Constitution in relation to property rights and then subjects them to analysis. The case for change is then outlined and a proposed new self-contained article, which deals exclusively with property rights, is set out.

Article 45, which deals with Directive Principles of Social Policy that are intended for the general guidance of the Oireachtas in making laws, is then addressed and a new amendment, which complements the new article on property rights, is proposed.

Finally, overall conclusions are set out.

SUBSTANTIVE ARGUMENT

It has been argued that constitutional change should not be undertaken as it has the unavoidable effect of casting the settled jurisprudence of the courts into doubt until new cases are decided under the amended constitution.

The Eighth Amendment [Article 40.3.3] has been cited as an example that illustrates this point. It states that:

> The State acknowledges the right to life of the unborn and, with due regard to the equal right to life of the mother, guarantees in its laws to respect and as far as practicable, by its laws to defend and vindicate that right

After its insertion some contended that this amendment could be used to prevent a woman travelling abroad for an abortion even to a country where abortion was legal. Furthermore, the Eighth Amendment was invoked[1] to prevent the dissemination of information on abortion. These unanticipated consequences led to the insertion of the Thirteenth and Fourteenth Amendments which foreclosed each of these possibilities.

In 2002, a proposed Twenty Fifth Amendment to the Constitution sought to allow the creation of legislation permitting abortion where there is a real and substantial risk to the life of the mother but not permitting it in cases where the risk arose from the prospect of the mother committing suicide. The proposal was narrowly defeated.

It has been argued that this example underlines the need for extreme caution in relation to any proposal to change the Constitution. It has been further argued that the subsequent history of the Eighth Amendment, as outlined above, illustrates the difficulties in drafting constitutional provisions that will cover all contingencies and not give rise to unintended consequences.

The alternative approach of enacting legislation and allowing it to be constitutionally tested, either by way of Article 26 reference or by private challenge, has been cited as the preferred option for the achievement of constitutional change.

ANALYSIS

It is pertinent to point out that between 1939 and 2001 twenty-three amendments to the Constitution were made. The Eighth Amendment is the only one that has been fraught with difficulty. However, it has to be acknowledged that this amendment and the unsuccessful Twenty-fifth Amendment attempt to deal with issues that are uniquely visceral and almost incapable of unambiguous resolution.

In contrast, balancing property rights against the exigencies of the common good is relatively straightforward compared to balancing a mother's right to life against the right to life of the unborn. The issues associated with the latter touch on our very existence and embrace core religious/philosophical beliefs, which are not necessarily founded on reason.

It is somewhat disingenuous to imply that the difficulties, which arose from the Eighth Amendment, are a portent of what might happen should a constitutional amendment be passed in relation to property rights.

In contrast to the Eighth and the failed Twenty-fifth Amendment, any proposed amendment in relation to property rights can be phrased in a manner that is

substantially clear and precise. Furthermore, altering the relevant constitutional provisions in order to recalibrate what is essentially a mechanism for regulating the distribution of wealth cannot be compared with the delicate and complex task of balancing the right to life of a mother against the right to life of the unborn. The former relates to material assets, the latter goes to the very core of our existence.

In essence, to compare the right to life with property rights is both incongruous and misleading. To use such a comparison as the keystone of an argument against changing the Constitution, so that it more accurately reflects the pressing needs of society in relation to property rights, does not stand up to scrutiny. Moreover, the other twenty-two amendments have been successfully inserted into the Constitution without giving rise to undue jurisprudential turbulence.

The alternative proposal, namely, to allow legislation to be passed and tested on an incremental basis will effectively stifle necessary legislative initiatives in the subject area.

Generally, those who initiate such legislation are often apprehensive of the possibility of constitutional fragility. In the absence of clearer guidelines being set down in the Constitution, proposed statutory provisions are often 'watered down' in deference to the perceived exalted status of property rights. Sections 48 and 49 of the Planning and Development Act 2000 amply illustrate this point. The existing level of constitutional uncertainty in relation to property rights stifles legislative initiatives that are now essential to ensure the timely release of development lands and the economically sustainable provision of transportation and other infrastructure.

SUBSTANTIVE ARGUMENT

It has also been argued that any attempt to insulate a proposed new statutory regime from meaningful constitutional review by prior amendment of the Constitution would be disrespectful to the doctrine of the separation of powers and if accomplished, would somehow impugn the role of the judicial branch. Such a course, it has been further argued, would represent an unsubstantiated and unreasoned rejection of the jurisprudence of our courts on this issue.

ANALYSIS

The Constitution is a dynamic set of overarching legal principles which should reflect the moral and political values of the people over time.

Article 46 of Bunreacht na hÉireann provides that only the people can amend the Constitution. Such amendments must be initiated in Dáil Éireann and passed by the Dáil and the Seanad. They must then be put to the people and carried by majority vote in a referendum. A significant body of case law indicates that the courts are extremely reluctant to prevent a referendum proposal, passed by the Oireachtas, from being put to the people.[2] This case law represents explicit recognition by the courts of the important role of the Oireachtas and the people in shaping and guiding the evolution of the Constitution in a manner which is consistent with the socio-political mores of the times.

Thus, the courts are very supportive and protective of the important role of the Oireachtas and the people in the ongoing evolution of the Constitution. The courts' reluctance to interfere with this process is a manifestation of their respect for the doctrine of the separation of powers and the fundamental principles of a participatory democracy.

It is important to point out that the 1922 Constitution permitted amendments to be carried out by the Oireachtas alone. This is not permitted under the 1937 Constitution (with the exception of the two-year transition period 1937-1939). Thus, the drafters of the 1937 Constitution sought to ensure an enhanced role for the people in a participatory democracy by stipulating that only the people can amend the Constitution.

Article 6 of the Constitution contemplates the establishment of the legislative, executive and judicial branches of the government. However, it also refers to the residual powers that the people reserve to themselves

> in final appeal, to decide all questions of national policy according to the requirements of the common good

To suggest that legislative change following an amendment of the Constitution would in some way disrespect the doctrine of the separation of powers is illogical and is not supported by the relevant jurisprudence in the area. Furthermore, it is misleading to imply that a proposed change to the Constitution necessarily represents an attempt to insulate a new statutory regime from meaningful constitutional review. Proposed new legislation can still be subjected to Article 26 scrutiny or to private constitutional challenge. In the event of such a challenge or an Article 26 referral, the courts' role is to examine the legislation (existing or proposed) with a view towards determining whether it accords with the guiding principles set out in the Constitution. This role remains untrammelled. However, Article 46 clearly states that proposed amendments must be passed by both houses of the Oireachtas and then submitted to the decision of the people by referendum.

SUBSTANTIVE ARGUMENT

It has also been argued that there are practical and philosophical objections to the premature amendment of the Constitution in the absence of contemporaneous decisions of the Supreme Courts that appear to be frustrating the wishes of the democratically elected branches.

ANALYSIS

This argument seeks to ascribe an elevated or almost exclusive role to the Supreme Court in the evolution of the Constitution. It is in direct conflict with the central provisions of Article 6 and Article 46 insofar as it seeks to reduce the role of the people and the Oireachtas in shaping the ongoing evolution of the Constitution in a participatory democracy.

To date, twenty-two amendments have been successfully incorporated into the Constitution (many issues in relation to the Eighth Amendment have still to be resolved). However, only three amendments were made in response to court decisions or Article 26 references and these are synopsised below.

The Ninth Amendment 1984 was inserted following an Article 26 reference which found that a provision in the Electoral Bill 1983 that proposed to extend the right to vote in Dáil elections to British citizens resident in Ireland was unconstitutional. The Ninth Amendment altered Article 16 to allow for the extension of the vote to non-nationals.

The Fourteenth Amendment 1992 was introduced in response to a number of Supreme Court decisions[3] that found that the ban on abortion also precluded the distribution of any information that might facilitate abortion. This Amendment (40.3.5.) prohibits the Eighth Amendment (40.3.3.) from being used to prevent information being distributed in this state concerning abortion lawfully available abroad.

The Seventeenth Amendment 1997 arose as a result of the Supreme Court decision in *Attorney General v Hamilton*.[4] The court found that the rule of cabinet confidentiality meant that the content of cabinet discussions could not be revealed even in evidence given to a court of law or a tribunal. The amendment relaxed the rigidity of this rule and allowed the High Court to require the giving of such evidence in certain circumstances.

The remaining twenty amendments were not introduced as a result of Supreme Court decisions that appeared to frustrate the wishes of the democratically elected branches. These amendments dealt with a wide range of issues some of which are outlined below:

- entry into the E.E.C. (1972)
- reducing the minimum voting age from 21 to 18 (1973)
- removing the clause recognising 'the special position of the Roman Catholic Church' (1973)
- foreclosing the possibility of impugning decisions taken by the Adoption Board on the grounds that they were not taken by a court (1979)
- explicitly recognising the right to life of the unborn child while also guaranteeing the equal right to life of the mother (1993)
- allowing the Oireachtas to legislate for divorce (1995)
- extending the grounds for refusing bail (1996)
- ratification of the Good Friday Agreement and allowing the former legal claim over Northern Ireland to be dropped (1999)
- abolition of Capital Punishment (2001).

It is difficult to see how the above amendments – which have played a very significant role in the evolution of the Constitution – could have been catered for in a timely fashion had the Oireachtas been obliged to await Supreme Court decisions that appeared to frustrate its wishes.

Furthermore, the said argument ignores the expense of mounting a constitutional challenge, not to mention the issue of *locus standii*. These effectively restrict access to the courts on constitutional issues.

Finally, this argument calls into question the role of the various all-party democratically elected constitutional review groups that have reported on the Constitution over the years.

SUBSTANTIVE ARGUMENT

It has been argued that from a physical/social planning standpoint, the landmark Supreme Court judgement 'In the matter of Article 26 of the Constitution and in the matter of Part V of the Planning and Development Bill 1999' represents a turning point in the resolution of these competing rights and seems to tilt the balance in favour of the common good. It is contended that this rebalancing of these competing interests (i.e. property rights and the common good) by the Supreme Court is sufficient to facilitate further legis-lative initiatives without the need to make any changes to the text of the Constitution.

ANALYSIS

Although the provisions of Part V of the Planning and Development Act 2000 survived the Article 26 referral, the Supreme Court took the opportunity to assert that:

> There can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property.

It is noted that the Supreme Court chose to use the term 'at a level equivalent to at least market value' as opposed to 'just compensation' or 'fair compensation'. Since a significant element of market value can often be attributed to government 'fiat' (through zoning and/or the provision of infrastructure) it is contended that the term 'just compensation' which could embrace valuations less than market value, would have been a more appropriate term to use. As Walsh, J., observed in *Dreher v Irish Land Commission*:

> 'It does not necessarily follow that the market value of lands at any given time is the equivalent of just compensation as there may be circumstances where it could be considerably less than just compensation and others where it might in fact be greater than just compensation'.

In view of the above, it is perhaps slightly ironic that one of the most significant aspects of the judgement in the aforementioned Article 26 referral may have been

the Supreme Court's endorsement of the view that a grant of planning permission constitutes an enlargement/ enhancement of property rights and effectively confers a benefit on the property owner. The court however does not appear to see any inconsistency in asserting that in the event of compulsory acquisition, the government should normally pay the owner for enhanced value which was exclusively created by government actions (e.g. zoning/provision of infrastructure).

Since the 'social housing measure (Part V)' survived constitutional scrutiny, it is apparent that the above-mentioned Supreme Court judgement represents a step forward in favour of the common good and at the expense of property rights. However, the general judicial presumption in favour of 'at least open market value' as the basis for compensation in the event of expropriation is a significant check on any perceived radical advance in favour of the common good.

It is therefore contended that the principle of 'just compensation' in the event of expropriation should be made manifest in the constitution.

THE CASE FOR CHANGE

As the arguments against amending the Constitution in relation to property rights have been addressed, it is now appropriate that the case in favour of such an amendment be crystallised.

Article 40.3 and 43 are characterised by the use of subjective terms such as 'unjust attack', 'principles of social justice', 'natural right' and reconciling rights with the 'exigencies of the common good'.

Without further clarification of the meaning of these terms, the articles that relate to property rights are particularly vulnerable to subjective judicial appraisal. It is accepted that there will always be a level of subjectivity involved in constitutional interpretation and that absolute clarity would be an unrealistic drafting goal given the organic nature of the document. However, it is contended that clearer guidelines in relation to the interpretation of the subjective terms outlined above would be achieved by drafting a new self-contained article which is more consonant with the needs of contemporary society.

Generally speaking, the text of the constitution represents the starting point for any constitutional argument and in many cases the language of the text is decisive. However, in relation to the fundamental rights provisions (Articles 40-44), especially those which relate to property rights, the jurisprudence indicates that the significance of the text, which is quite vague and ambiguous, is much reduced. Although the case law in this area has attempted to clarify the scope of property rights in the context of the exigencies of the common good, the essential problem remains, namely, that the wording of the two articles is so vague and subjective that it is open to a wide range of interpretations.

In the face of irreconcilable difficulties with the text, the courts appear to have resorted to the 'proportionality test'. This test [5] which features as a core principle in the Draft Treaty Establishing a Constitution for Europe has often been used by the European Court of Human Rights and has been formulated in the following terms:

> The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns which are pressing and substantial in a free and democratic society. The means chosen must pass a proportionality test. They must:
> a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations,
> b) impair the right as little as possible, and
> c) be such that their effects on rights are proportional to the objective.

Should a legislative proposal/measure fail to meet the proportionality test it will be deemed to be an 'unjust attack' on the constitutional right and therefore unconstitutional.

While the 'proportionality test' provides a more objective analytical framework against which legislation can be tested in terms of its compliance with the Constitution, it does not eliminate a substantial element of subjective judicial appraisal. Thus, there remains a significant element of subjectivity and uncertainty in relation to property rights in the Constitution.

If the importance of the text of the constitution is diminished because of its vagueness and its role is largely usurped by the emergence of an ever-growing body of jurisprudence then clarification of the text by amendment will ensure that the will of the people on this important issue is made manifest in accordance with the principles which underpin Article 6 and Article 46.

A constitutional amendment, which can only be effected by referendum, would elucidate contemporary society's view on how the balance should be struck between two competing interests, namely, property rights and the exigencies of the common good. Such an amendment would provide clearer guidelines for the interpretation of the Constitution by the courts. It would provide a more structured and objective method for judicial analysis and it would constitute a significant reduction of the democratic deficit which has emerged in relation to the evolution of the Constitution in this key area.

Finally, the fact that there are two separate constitutional provisions (40.3 and 43) dealing with property rights has given rise to confusion. It is felt that a single self-contained article which deals exclusively with property rights should replace these provisions insofar as they relate to property rights.

THE PROPOSED NEW AMENDMENTS

In devising a new article it is crucially important to take cognisance of the economic role of property in the Irish economy.

The right to own property and the ability to use it

for collateral purposes is one of the key characteristics that often distinguish advanced economies from underdeveloped/undeveloped economies. This important right and the necessary commercial certainty associated with it are inextricably interwoven with the development of the Irish economy. Thus, in the interests of economic certainty/stability, it is crucial that any diminution in the status of property rights must not be disproportionate. It must be the minimum necessary in order to achieve a goal which is demonstrably in the interests of the common good. The timely and economically efficient provision of essential infrastructure and housing in a sustainable manner is the manifestation of such a goal, the achievement of which is essential for future socio-economic development.

This leads on to the concept of sustainability that, in essence, highlights the need for inter-generational equity and post-dates the Irish Constitution. However, it is a key principle in the Draft Treaty Establishing a Constitution for Europe. *The Brundtland Report*, in essence, defines sustainability as:

> meeting the needs of the present generation without compromising the needs of future generations

This concept has become an inherent part of state policy and the long title of the Planning and Development Act 2000 includes the goal

> to provide in the interests of the common good, for the proper planning and sustainable development…

though the concept of sustainability is not defined in the Act.

It is appropriate that any new constitutional provision in relation to property rights should specifically acknowledge the importance of this concept by making explicit reference to it. It should serve as a useful guideline for the elucidation of the exigencies of the common good.

TEXT OF NEW SELF-CONTAINED ARTICLE ON PROPERTY RIGHTS

Every natural person shall have the right to the peaceable possession of his or her possessions or property.

The state guarantees to pass no law attempting to abolish the right to private ownership or the general right to transfer, bequeath and inherit property.

Property rights, since they carry with them duties and responsibilities, may be subject to legal restrictions, conditions and formalities, provided they are duly required in the public interest and accord with the principles of social justice and the principle of proportionality. Such restrictions conditions and formalities may, in particular, but not exclusively relate to:

- the raising of taxation and revenue
- the payment of just compensation in the event of expropriation
- sustainable land use and transportation planning
- the protection of the environment
- conservation of objects of archaeological and historical importance.

ARTICLE 45 – DIRECTIVE PRINCIPLES

The Directive Principles of Social Policy contained in Article 45 are prefaced by a declaration that they are intended for the general guidance of the Oireachtas and that

> The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of the Constitution.

However, on a number of occasions the High Court has held that Article 45 can be used to elucidate other provisions in the Constitution. In two instances [6] it was used to clarify the meaning of the term 'exigencies of the common good'.

Thus, Article 45 could be amended to give guidance to the legislature in the preparation of statutes that would have to accord with the overarching principles set out in the proposed new article dealing with property rights. The latest jurisprudence also indicates that these more expansive guiding principles could be used to elucidate the provisions set out in the new article on property rights.

It is therefore recommended that an additional directive principle be inserted into Article 45 and this is outlined below:

ARTICLE 45 AMENDMENT

'The State shall promote balanced and sustainable development and in endeavouring to meet the needs of the present generation it shall ensure, insofar as is practicable, that the needs of future generations are not compromised'.

OVERALL CONCLUSIONS

As already stated, the Dublin Transportation Office is particularly interested in the removal of any barriers to the timely and economic provision of transportation infrastructure and the implementation of sustainable land use and transportation planning.

The inflated prices paid for land constitute a significant element of the cost of providing transportation and other infrastructure. Paradoxically, the compensation paid for such land often includes a significant element of value which is created by government action (e.g. zoning/rezoning and the provision of infrastructure). In addition, the value of retained lands often increases dramatically. In these circumstances it is difficult to argue that open market value represents 'just compensation'.

It is considered that the development of the jurisprudence in this area has not unambiguously resolved the competing interests of property rights and the common good. While it is difficult to achieve absolute clarity in this area it is contended that the proposed constitutional changes will give clearer

guidelines to the courts and underpin the necessary initiatives which must be taken by the legislature. Moreover, the holding of a referendum will allow the will of the people to be made manifest on this important issue. Without these changes, the slow paced evolution of the law in this area is likely to continue to the detriment of the sustainable physical and socio-economic development of the country as a whole.

Finally, it must be stressed that the proposed amendments outlined above should not be perceived as a panacea but merely a set of facilitatory measures to aid the development of the necessary legislation that in essence will be the core challenge.

Notes:

1 See Attorney General (S.P.U.C.) v Open Door Counselling [1988] I.R.593, S.P.U.C. v Coogan [1989] I.R.734 and S.P.U.C. v Coogan [1989] I.R.734.
2 See Finn v Attorney General 1983 I.R.514, Riordan v An Taoiseach (No.2) (unreported, Supreme Court, November 19, 1998), Morris and O'Maoldomhnaigh v An Taoiseach (unreported, Supreme Court, February 2002).
3 Attorney General (S.P.U.C.) v Open Door Counselling [1988] I.R.593. S.P.U.C. v Coogan [1989] I.R.734. S.P.U.C. v Coogan [1989] I.R.734.
4 Attorney General v Hamilton (No.1) [1993] 2.I.R.250.
5 The test was also used in: In the Matter of Article 26 of the Constitution and in the Matter of Part V of the Planning and Development Bill 1999.
6 Landers v Attorney General [1973] 109 I.L.T.R.1. Attorney General v Paperlink Ltd. [1984] I.L.R.M. 373.

DUN LAOGHAIRE – RATHDOWN COUNTY COUNCIL

COMPULSORY PURCHASE

The current system of compulsory purchase is a long drawn out process. Despite improvements whereby appeals are now made to An Bord Pleanála, many delays are still being experienced. The committee should examine the system used in other European countries where the system is more stream-lined.

ZONING OF LANDS

A full free market does not pertain in the market for development land. Zoning artificially curtails the free market and seriously limits the supply of land. Clearly, zoning is necessary to achieve government objectives relating to the compact urban form, higher densities and prevention of urban sprawl into the countryside. The increase in the value of land created by zoning for development should accrue primarily to the community in order to finance all community facilities. The price of development land is seriously inflating the cost of providing infrastructure, roads, LUAS etc and seriously impacting on the county council's ability to buy land for social housing. For example, confirmed CPO in Cabinteely for social housing has not been pursued because of market value.

With regard to access to the countryside the new responsibility on planning authorities to maintain rights of way contained in Section 208 of the Planning and Development Act 2000 is overly onerous and ultimately self defeating.

TOM DUNNE – DUBLIN INSTITUTE OF TECHNOLOGY

INTRODUCTION

Ireland, like many other countries with high rates of economic growth, is urbanising rapidly. There has been considerable emphasis on planning for this through the National Development Plan, the National Spatial Strategy, development guidelines and other measures. Through these the state intends that a proper planning process will lead growth rather than leaving it to market forces to drive development in what are regarded as undesirable directions. The latter it is feared will lead to unsuitable social, economic or physical outcomes.

Unintended results have flowed from the implementation, or flawed implementation of many of these policies and have given rise to the issues noted by the All Party Oireachtas Committee on the Constitution in their recent call for submissions on a variety of problems.

All planning suffers from the deficiency that it is not possible to forecast accurately what will be the circumstances that will apply during the currency of a plan or what the outcome will be. Consequently all plans must be tentative and flexible to a greater or lesser extent depending on the accuracy of the information used in the formulation process and the dynamism of the environment in which the plan will operate. Overconfidence in the efficacy of planning and a lack of proper and efficient methods to provide for the necessary flexibility could be among the explanations for the perceived failures in planning. But also the legislative framework for the planning system could contain detailed flaws that mitigate against the plans prepared and operated under it.

This paper discusses issues around these and is intended as a contribution to the deliberations of the committee.

To do this it considers the nature of spatial planning and its role in providing for the physical development that accompanies economic growth. It then goes on to analyse briefly the property market and to examine some of the characteristics of landed property as an economic good. From that it looks at the interaction between high house prices and the high price of

development land and considers approaches to dealing with problems flowing from those phenomena. Finally it proposes solutions which would be easy to implement and would require only a modest change to existing planning legislation.

The argument underlying this paper is that the planning process is not sufficiently informed by an adequate understanding of urban and property economics. It also suggests that legislative instruments used to implement planning in Ireland and the use of many fiscal supports are flawed. It is these that give rise to high development land prices and the incapacity of local authorities to respond to and provide for the demand for infrastructure and services flowing from economic growth.

PLANNING AND SPATIAL ECONOMICS

Problems of urbanisation are often discussed without a sufficient appreciation of the power of the economic forces that shape the built environment. Indeed it could be argued that inherent in the country's approach to physical planning is an assumption that economic forces can largely be controlled and directed to achieve such ends as balanced regional growth or shaping the development of Dublin. But these economic forces are not understood to a sufficient degree. Intensifying suburban development, increasing one off housing in the countryside and the continued growth of Dublin prevail despite numerous attempts at restraint.

Planning for urban land markets is surrounded by uncertainty due to a range of factors. Firstly the data available to planners about activity in the market is particularly poor. Secondly urban land markets are notoriously volatile and prone to periods of great activity with high prices and other periods when property development is very risky and not profitable. These periods can last for a number of years. Hence the delivery of planning objectives can be frustrated by economic conditions during the currency of the plan, especially if the plan has been devised on unrealistic economic assumptions.

Thirdly, in a free market economy, nimble and opportunistic entrepreneurs will act, as they do in all markets, to seek profitable opportunities created by the planning process. Speculation can be seen as the cause of bad planning but it may just be a symptom of a bad plan or flawed legislation. Speculation is a characteristic of all free markets and planners need to recognise this reality. They also need to understand the motives of entrepreneurs and provide plans that recognise land and property speculation is an economic reality. The alternative approach of making the legislative and administrative framework hugely complex, to deal with its worst effects, will frustrate the delivery of the physical development needed for economic growth.

Consequently planning requires a proper understanding of the economic and business forces shaping our towns and cities. Policy makers who may not have sufficient understanding of these forces can propose solutions, which will be less than satisfactory, and in some cases exacerbate the problem. Many of the issues the committee has asked for submissions on, fall in to this area.

In the past, when devising spatial policy and addressing urban and housing problems, both economists and policy makers have not fully understood the economics of landed property and urban areas. As a result some approaches adopted to resolving difficulties arising from administrative instruments such as compulsory purchase orders and the fiscal treatment of development land and property, often made little sense if analysed using theories of urban and property economics.

Moreover spatial planners at both national and local level, politicians (particularly many local councillors) and others involved in the planning process, are not sufficiently familiar with urban economic theory to have an inadequate appreciation of the full effect of these on urban economies.

Spatial economic analysis emerged as a distinct field of academic inquiry during the twentieth century and can be split into two fields, urban economics and regional economics. Urban and regional economics are important parts of the discipline of spatial economics. There is now growing interest in these fields in Ireland in academic and other circles but many existing planners and other policy makers were educated when there was limited knowledge about these fields in Ireland. Internationally over the last decade there has been an increase in interest in spatial economics with the issues involved being brought to wider audiences.

An extensive literature is now available to assist with the analysis of problems of urban development, housing and property economics. This provides insights that may not be familiar to many who are faced with resolving the problems of rapid urbanisation. Indeed many economists whose principal focus and interest has been on other aspects of economics, may not be familiar with the particular methods of analysing urban and property problems identified in the literature on urban and property economics. The familiar tenets of economics have to be adjusted to deal with situations where markets work in a substantially different way than might be expected.

From the literature we learn that there is increasing interest in spatial economics and this parallels the need to better find solutions to the effects of rapid economic growth on our towns, cities and countryside. Some of the insights found in the literature on urban economics will be of assistance to the committee in considering the issues set out in the notice seeking written submissions. The following draws on urban and property economic theory and should be of help to the committee when considering the list of issues before it.

THE PROPERTY MARKET AND LANDED PROPERTY AS AN ECONOMIC GOOD

The landed property market is not an efficient market in economic terms and has particular characteristics

that make it difficult to analyse using traditional economic criteria. This leads to problems implementing development plans, to high development land values and with access to housing and shelter.

It is crucial to appreciate that property markets are not easily understood and indeed work in ways that are economically idiosyncratic. There are a number of reasons for this. First landed property can be held as an investment and as a consumer good. Second each property is unique. Third, transaction costs are very high and fourth, the property market is not merely a market for land and buildings it is best understood and analysed as a market in legal rights.

The consequences of each of these characteristics are worth exploring in the interests of understanding the issues before the committee.

1 Property can be both an investment and a consumer good

Landed property can be bought both for consumption and investment purposes often necessitating finance to purchase as prices are high. Landed property is one of the three main investment media. Consequently capital values will be determined as much by reference to conditions in other investment markets as by demand for the use of accommodation. Hence there is a significant interaction with investment and finance markets. Of crucial importance also is the availability of finance on favourable terms.

Therefore the property market is best analysed as two markets with different influences on each. First there is a consumer market where demand and supply interact to ration space among competing users and determines rent levels. Second there is an investment market where the most significant influence may be sentiment in the equity and bond markets as well as the rate of interest on borrowings. In general it may be said that the investment market determines the capital values of existing property assets while the consumer market determines rental values. This duality has profound implications for policy makers looking at problems in urban areas.

Solutions to urban problems should have regard to the effect of investment capital flowing to the property sector compared with other assets in the investment market. It is entirely possible to create the conditions where too much investment money chases too little investment opportunity in the property market. It is easy to provoke a speculative bubble by unsuitable intervention with the benign intention to help people find a house, an office or a factory.

The tax treatment of property is hugely influential in determining the profile of investment in property markets. In particular the lack of taxes on residential property encourages people to store their investment wealth in houses. In Ireland the lack of local taxes on residential property, a unique characteristic of our tax code, keeps residential property prices here higher than they would be if residential property was taxed as it is in other countries.

In short, the urban land market is prone to speculative bubbles, which can be hugely influenced by government policy. The reverse of this is also true. It is just as easy induce damaging slumps. Much of government policy in the past has acted in a pro-cyclical way and amplified the natural boom/bust cycle of the market.

2 Each property is unique

Partly because title issues are complex but also because of the heterogeneous nature of land and buildings, each property is unique. Price comparisons are much more difficult than for other goods bought and sold making valuation difficult. As a consequence the property market is far from transparent, a normal requisite for an efficient market.

Also, this characteristic makes it difficult to apply generic administrative approaches to solving urban problems. Solutions which involve applying a convenient administrative formula to individual properties will probably fail because every property affected can become an exceptional case due to particular unique features.

Government policy should aim to increase transparency in the property market by insisting on a simple system for land and title registration and making transaction prices public, as is the case in many other jurisdictions. Measures such as this would assist the efficiency of compulsory purchase procedures. They would also assist the process of analysing urban areas by giving the data that is needed to provide the information needed for good public policy.

3 Transaction difficulties and costs

Transaction costs for exchanging landed property interests are high. High levels of stamp duty compared to those charged for transferring other property assets add to this. Also, as the public has an imperfect understanding of what is actually bought and sold in the property market, legal and other professional advice is essential when property is being acquired.

Moreover, because the law surrounding landed property has roots deep in history and is surrounded by concepts that are archaic if not arcane, legal and other issues are complex and demand legal advice to sort out. This costs money. These factors impede the operation of landed property markets.

In order to help urban property markets work more efficiently, government policy should have an objective of reducing the transaction costs associated with the exchange of landed property. Measures should include reducing stamp duties and codifying and simplifying the law surrounding legal interests in landed property. Policy in this area should include a statutory legal requirement for the legal profession to use plain English as much as possible.

Also all documentation surrounding compulsory purchases of land and the planning system should be written in plain English.

4 The property market is a market for property rights

The constitutional protection for landed property can be considered in the light of an understanding of what is traded in the property market and has economic value. The property market rather than being a market for land and buildings is in fact a market in the rights to land and buildings. This is a very important characteristic to understand when considering the question of windfall profits from development land rezoning.

There can be no such thing as absolute ownership of land and buildings. The state provides a system of categorising the types of ownership of landed property by law and a structure defining the rights to property interests.

Also, it is axiomatic that ownership of property rights is constrained by the rights of other property owners. Moreover, other people may have property rights affecting any piece of landed property; e.g. rights of way or of support to adjoining buildings. In short, ownership of property entails responsibility to the community generally and other property owners.

The largest collection, or bundle, of rights to land and buildings that a person can own is a freehold interest and these rights can be unbundled and disposed of separately. The state often has to alter or limit the rights comprising property interests by legislation in the interests of the common good or to regulate social and economic activities. Put another way the state can by law circumscribe or remove particular parts of the bundle of rights that comprise particular landed property interests and has done so in the past. Examples of this include the granting of security of tenure to tenants, control of the airspace over property by the air navigation acts or control of use and development under the planning acts.

What is traded in a property market is therefore rights to use land and buildings coupled with responsibilities to the state and others. These are not immutable and are subject to law and obligations to others. Development rights, which are regulated through the planning process, are just one of the rights involved. Since the introduction of the 1963 Planning Act these are no longer inherent in property interests. Indeed the planning system is constructed on the principle that the state has the right and the need to alter the bundle of rights that comprise legal property interests.

All property owners benefit from the planning system in that at the very least it protects individual properties from inappropriate development on neighbouring property. More widely, complex modern urban environments require a formal statutory planning system to work effectively and secure the interests of all property owners and the integrity of the property they hold. To have such a system it is necessary to give the state or a local authority control over development. This requires the removal of the right to develop without permission from the bundle of legal rights which a person holds to a piece of property

However, development rights have economic value and the consequences of having removed these rights is that property values are affected. The grant of permission to develop, therefore, confers an economic value to a property owner. Where a property is developed and permission is being granted for further development, such development rights already exist.

Through planning development, rights are granted to some landed property owners but not to others and decisions are made on the basis of development plans adopted democratically by planning authorities. These plans are devised and implemented in the interests of the common good. It would seem logical that the community who, through a planning authority, made the development plan and provided the infrastructure and services required for development should get the value of the development rights thereby created. It does not seem to be logical to argue that the Constitution would require that a right with economic value created by one body should be transferred as a gift to another who does nothing to create this value.

CONSEQUENCES OF THE ECONOMIC CHARACTERISTICS OF LANDED PROPERTY

Where knowledge of market conditions is defective price signals work less efficiently and adjustments to supply and demand are slow. This is the case in the property market. Relatively high transaction costs, incurred either in obtaining market knowledge or in the administrative procedures involved, restrict the extent to which market signals can motivate a response to increased demand.

Eventually the market will respond to signals indicating increased demand and additional buildings will be provided but this will take time, perhaps years. In the meantime limitations on the market, through inadequate or poor planning or other restrictions make it easy for imperfect competition to exist in the short run. In contrast, for people seeking accommodation the near future will be a crucial factor in making decisions about accommodation. They will have to bid against competitors for accommodation available on the market. Hence the effect of restrictions is to drive up prices in the short term.

The consequences of the above and other characteristics of landed property are that the market will respond slowly to increases in demand for accommodation in the economy. Thus, it is in the natural order of the market that periodic shortages occur and these

will be associated with high prices. The corollary is also true. When demand falls off the supply of property available in the economy will remain and prices will contract. Consequently the market is volatile and prone to booms and busts when prices overshoot both on the way up and on the way down.

This points to the need for the government to be careful about policies that affect landed property particularly in the area of taxation. Pro cyclical taxation and grant aid policies will amplify booms and busts in the property market. The same can be said of the lending policies of financial institutions.

All in all these characteristics make property markets difficult to regulate and manage from a policy perspective. Understanding them will help to analyse problems associated with high house prices and the price of development land.

One important consequence of the economic characteristic of landed property is that the increase in value created by granting permission to develop agricultural land is not inherent in the land. Development rights, which are denied to some property owners, are concentrated and increased by the local authority through the planning system and infrastructure provision and transferred to land zoned for development. The economic value that flows from denying development rights to others and from the provision of infrastructure, should not be given by way of gift to the owners of zoned development land. Instead the value of development rights should be kept by the planning authority. The question at issue is just how should this be done and this is discussed later in this paper.

HOUSE PRICES AND DEVELOPMENT LAND

As we have seen, land by itself has little or no intrinsic value above its agricultural value. Clearly if you cannot use land it will have no economic value. The value of land suitable for development is directly related to the value of the buildings that may be erected on it. The value of those buildings will be determined by supply and demand.

The value of landed property is not determined in the same way in the short term as the value of other commodities but is influenced to a substantial degree by the stock of existing buildings which have been constructed in a given location over past years.

Increased economic activity and population growth will give rise to increased demand for accommodation. At first this demand will be met by occupying vacant accommodation from the existing stock. Those requiring accommodation will bid against each other for the available supply and prices will go up. At first this will encourage the more efficient use of existing buildings. It will also act as a signal to developers to provide more accommodation. But in any given period the new addition to the existing stock will be only a very small proportion of that stock. Therefore the market is dominated by the existing stock of buildings. Prices will be set primarily by demand for the existing stock and not by the flow of new buildings coming onto the market in any given period.

The decision to develop or not takes as a given the price that can be achieved for the finished product of buildings available for occupation or use. Thus, for example, in the housing market builders are price takers and will sell their product at a price determined by the market and not by the value of land and the cost of construction.

The inputs needed to provide buildings comprise the site or development land, to which is added construction material, labour and professional expertise, finance and the enterprise of the developer. All but the first will be in relatively unlimited supply compared to the supply of land. Consequently most of the increase in the value of property resources will descend to the site or development land. In this way the value of development land and sites as a factor of production is what is called a derived demand. Put another way the value of development land is the residual after all other costs involved in the construction process have been taken into account

When analysing problems in housing markets or in other property markets, urban economic theory points to two important principles that should be understood by those framing urban and regional policies. First, the price of landed property, including housing, is not determined by the cost of production. Second the value of development land is the result of high property prices not the cause. These are important insights from urban economic theory, which allow a better understanding of the problems of urban development.

The perspective of developers

On first consideration these principles might appear to contradict common experience and not appear in accordance with a general understanding of how the market for land and buildings works. This is understandable.

From the perspective of a particular developer or house builder it can appear that high land or site costs drive up the price at which they will offer their product to the market. Indeed, once development land or a site has been acquired it becomes a fixed cost to developers and builders. If there are complaints about the high price of property they will argue that the high cost of land forces them to sell at high prices. If prices stumble but demand remains, developers and builders will argue that it is the high price of land that is causing the affordability problem. They will suggest that for developers to be able to supply houses and other buildings profitably, government must subsidise developers or purchasers by tax breaks or grants or some combination of both.

This may appear to be the case from the particular perspective of a developer. But urban economic theory demonstrates it is wrong to conclude that particular examples based on the experience of the individual builder or developer will point to a general truth. In

simple terms, in the case of development land it is not correct to argue from the particular to the general. The general case is that high house prices cause high land prices and not the reverse. This is so even if there are many examples of individual developers who all share the same experience.

It follows that while it can be prudent at times to provide tax or other subsidies for specific locations or for periods of recession, in times of economic growth they will usually have the effect of increasing the value of development land and sites and drive the prices of houses and building land higher in boom times.

It may be concluded from this discussion that tax and other financial inducements intended to subsidise developers or to assist purchasers with the acquisition of property, including houses, find their way into higher development land values. This is even more the case when there is excess demand for the available stock of accommodation and prices are high. Attempts to deal with say high house prices, by providing subsidies ultimately have increased the value of development land. Hence, high development land values are an unintended result of government action in housing and other markets. Many government interventions in the market provide a good example of this theory in action.

THE INTRODUCTION OF PLANNING TO IRELAND

High development land values are a common characteristic of countries experiencing rapid economic growth. The reverse is also true. Economic recession or stagnation results in relatively low values for development land. Indeed they may not be significantly higher than underlying agricultural values. In the absence of land zoning confining property development to a restricted part of the lands surrounding an urban area, development land values would eventually decline to agricultural land values the further out from the centre of urbanisation one moved.

In the conditions that existed in Ireland in the late 1950s the economy was stagnant and land values on the periphery of urban areas would not have been particularly high. The main concern of a developer contemplating a housing development would have been the ability to connect to sewers and a water supply. There was no need to seek approval for the development. It should also be noted that at that time capital was scarce and difficult to access by way of a mortgage, and rates were payable on residential property. These factors and others would have kept ambient house prices down and hence development land values were not high.

A person wishing to provide themselves with a house or other property would have had the choice of buying, buying a property built by a developer or buying a site at a price not significantly above agricultural land values and building themselves. During the period of economic prosperity in the early 1960s land values would have increased but in the absence of zoning, which came with the development plans published in the late 1960s, development land values would not have been dramatic. This was the background against which the Planning act of 1963 was devised and passed.

In the circumstances that applied in Ireland in the late fifties and early sixties it is perhaps not surprising that the consequences of introducing a planning system with development plans and zoning were not given sufficient attention when enacting the '63 Planning Act. The consequences for the value of development land of introducing the planning system, and particularly development plans which allowed land zoning, were not properly addressed in the 1963 Act.

It says something that now we can hardly imagine a situation where such a process did not exist. But it is worth recalling the fact that what the '63 Planning Act did was to remove from property owners the right to develop their property and provide a procedure where if they wanted to do so they needed the permission of the planning authority.

In a sense this was a modern version of surrender and re-grant. On introduction the '63 Act removed development rights from all property owners. It also instituted a process whereby the right to develop was granted by a planning authority following an application for permission to develop. All landowners whose land was suitable for development lost some value in 1964. However, as we see from the earlier part of this discussion, because of the economic conditions at the time this would not have been as great as might be thought if one considered the levels of development land values that now prevail. In any event doing this was necessary to bring into operation the development plans devised under the Act.

The planning process confined development to those lands the planning authority thought it appropriate to develop. By doing so they automatically restricted the amount of development land available. The demand was concentrated on land which had been designated in the development plan as being suitable for development. This has the effect of increasing the value of the zoned land and reducing the value of land not zoned to agricultural land values, plus perhaps some element of value attributable to the hope that it would be zoned in the future.

ZONING AND DEVELOPMENT LAND PRICES

If a planning authority does not zone an adequate amount of land, the value of the zoned land would be increased by an even greater amount than might be expected. Just what is an adequate amount of zoned land is, of course, a matter of judgement and judgements about this are hard to make and are influenced by political and financial considerations.

In any event it should not be simply based on an estimate of the amount of land required to build new accommodation to house anticipated future population growth. This implies control over the rate at which

development land comes to the market during the timeframe of the plan. The Planning Act confers no such power and leaves the rate at which zoned land comes to the market up to the individuals who own it.

In fact a marginal shortage, resulting perhaps from the personal decisions of individual landowners not to bring zoned land to the market, can have a disproportionate effect and drive up prices. Such a deficiency of the supply of zoned land on the market, even if it is just marginal, will result in a big increase in value of the land that does come to the market. Indeed, values may have to increase very substantially to tempt a reluctant landowner to sell despite personal reasons for not doing so.

The solution would appear easy. Simply zone and service much more land than that required to meet forecasted development needs. Local authorities are, however, understandably reluctant to do this because the resources available to service land are scarce. Plainly it would be wasteful to provide services to land that may not be developed for a generation.

It makes sense only to service land that the plan sets out for development within the timeframe of the development plan. The implied expectation is that land will come to the market because of the uplift in values due to zoning. It is questionable whether windfall profits act as an incentive in this way. If they do not it means that development plans are based on what is essentially an act of faith when, as indicated above, no real control can be exercised over the rate at which serviced and zoned land will come to the market.

DEVELOPMENT LAND VALUES AND SPECULATION

Inevitably, scarce resources for infrastructure must be used in a cost efficient way and prioritised. As a result there may be a perceived shortage of development land. Once shortages are perceived, speculators will buy land to cash in on anticipated price rises. Moreover, having acquired land, a speculator has an incentive to maintain the shortage and keep values up by not developing the land until it suits their business interests. This may not be in accordance with the needs of the market or the timeframe of the development plan.

This is an inevitable outcome of a market economy interacting with the planning system. In a market economy, nimble entrepreneurs will seek opportunities to make money where the system creates suitable conditions. This is not bad in itself but it can be a problem if the planning system facilitates and encourages it. It is clearly damaging if it results in very high land prices and a shortage of development land coming on the market. If the planning system creates fertile conditions for speculators to amass super profits from their activities, this should be taken as clear evidence of a defect.

Plainly there is no sense in only zoning sufficient land to meet projected development needs if enough of it is not available to the market. The reality is that the planning system puts owners of development land in something of a monopoly position. As presently structured, however, it gives an economic and monetary incentive to developers to act against the public interest by timing their disposal decisions to maximise the gain to them. This situation is not a flaw with market economics, it is the way the planning system is allowed to operate that creates the conditions to allow this.

As has been noted above, before the '63 Planning Act, property development took place with out planning regulation and the difference between the values of agricultural land and development land were not great. The zoning decision of the planning authority to concentrate development and confine it to particular lands is the mechanism that creates the primary escalation in development land values above those prevailing if the land could be put solely to agricultural use. Clearly the benefit of this should flow to the community and not just to the small number of people who happen to own the land that is zoned.

What was not appreciated nor understood when the planning system was devised was the difference the planning process could create in relative land values if there were marginal shortages in the amount of serviced land or if this land did not come to the market for development. Neither was it appreciated that this would open the way for intense speculation in development land. This lack of appreciation led to flaws in the 63 Planning Act that remain today.

A BRIEF HISTORY OF ATTEMPTS TO DEAL WITH WINDFALL PROFITS FROM HIGH LAND PRICES

Since the introduction of the planning system in 1964 public interest in the problem of high development land values has waxed and waned with the booms and busts of the property market.

In times of economic growth high development land values eventually emerge, hit the headlines and are seen as a problem. First they are perceived to drive up the price of property. Secondly the vast windfall profits, made from the sale such property, offend many who have an instinctive feeling that something must be wrong with a system that hands vast wealth to a few for so little economic effort. Also high land values cause problems for public authorities in acquiring land for the provision of infrastructure. Eventually there is a move to investigate the situation.

In the past by the time the matter was moved to a point where policy options are considered the economic conditions that created the problem have abated and perhaps this is why the problem remains unresolved. It is interesting to note that there is now increasing interest in finding measures to deal with issues arising from high development land values just as the economy moves down a gear or two. Nonetheless there is a lot to be learned from reviewing past attempts to deal with issues surrounding the high price of development land

THE KENNY REPORT

When the problem of high land values and the windfall profits made from zoning became a problem following the introduction of the '63 Planning Act a Committee on the Price of Building Land produced what is called the Kenny Report. In fact this committee had divided views about what should be done and majority and minority reports were produced.

The majority report suggested that local authorities designate areas required for development for the next five years (the statutory period for development plans at the time) and buy the land, compulsorily if necessary, at existing use value (agricultural value). It would then be sold to the market at development value. Clearly if all landowners were to get was agricultural land values, the incentive to bring zoned land to the market would have been removed and the state would have had to buy most of the land through compulsory purchase procedures which are necessarily cumbersome and time consuming.

This would have created a monopoly on the supply of development land. Also, the amount of development land coming on the market would have been dependent on the financial resources of the authority and their efficiency. If they were not able to acquire all the land needed and only acquired some land leaving others to sell privately on the market at development value this would have created the conditions for endless legal challenges to the legislation. The minority of the committee felt that this procedure would have been cumbersome, unfair and open to constitutional challenge.

Moreover, it probably would have led to some undesirable practices to incentivise those who owned development land to bring it to the market. Developers seeking land on which to build might have created vehicles to arrange partnerships with landowners or other methods to circumvent the measures adopted to give effect to the reports proposals.

The majority proposals were in many ways a product of a time when, politically and philosophically, central planning by government and non-market solutions to economic and social problems were more acceptable. Nothing was done in any event and the problem faded with the recession in the mid 1970s which resulted in falling development land values.

Implementing the Kenny Report proposals has now become shorthand for doing something about the shortage of development land on the market and capturing the windfall profits made from the sale of development land. They remain an attractive proposition for the political left and are often cited as something that could be done by government. However the criticisms remain valid. The administrative problems associated with this solution would still need to be addressed. Moreover, it is unlikely that a public sector monopoly of the supply of development land would be successful in meeting the needs of a dynamic and highly market orientated property industry. It is entirely likely that such a scheme would collapse if it were to be implemented.

JOINT OIREACHTAS COMMITTEE ON BUILDING LAND

The problem re-emerged in the late 1970s and early 1980s and a joint committee of the Oireachtas investigated the issue. This committee concluded that the most appropriate approach to recouping the value from rezoning was through a combination of development charges and taxation. In a subsequent budget a rate of 60% (20% higher than the standard rate) was applied to profits from rezoning land through the capital gains tax code. The other part of the solution, development charges, could be applied in particular circumstances under the planning acts.

As a result of the report measures were implemented which dealt to some degree with the problem of speculative profits on building land. It was not an entirely satisfactory solution but it did serve to ameliorate some of the worst excesses of speculation in land.

But these measures did not address the problem of the connection between servicing and zoning particular lands and bringing those lands to the market. Nor did this solution provide the resources to local authorities to provide the infrastructure for development or a means of benefiting from the value they created by the provision of this infrastructure.

There, however, the matter stood until recently when two things changed. The capital gains tax code was changed and the planning bill published.

THE SITUATION TODAY

As a measure to encourage supply, the capital gains tax on the sale of residential development lands was reduced following the first Bacon Report. The Minister for Finance made it clear, however, that he intended to re-instate the higher rate in the future – otherwise a landowner could gain more by holding on to land and capturing any increase in value.

Clearly this incentive depends upon the expectation that the minister will actually apply the higher rate of tax at some specified time in the future. But the argument that landowners need an incentive to bring land to the market will more than likely remain and will be adduced at any time it is suggested that the higher level of capital gains tax is proposed to be re-introduced.

In reality it seems unlikely to many given the present approach to taxation that the higher rate will be reinstated for the foreseeable future. Therefore, the incentive to bring land to the market early to avoid a higher rate of tax rather than waiting to capture future increases in value fails.

THE EXPERIENCE IN THE UK

Not surprisingly, given that the original planning legislation in Ireland, the '63 Planning Act, was based on UK legislation, there are a lot of similarities both in the measures adopted but also in the problems arising from them.

The problem of the effect on land values of establishing the role of planning in a welfare state had been the subject of much debate in the UK when the planning process was reformed there after WWII. As might be expected in a more urbanised society which had seen a vast amount of urban development in the 19th and 20th centuries, there was a great awareness of the effects of planning decisions on land values.

By the end of WWII the question of capturing the increases in the value of some property holdings flowing from favourable planning decisions and compensating those who lost the right to develop or were otherwise adversely affected, had been the subject of political debate in the UK for well over a century. This was commonly referred to as the Compensation-Betterment problem. Attempts to deal with it had been made in the nineteenth century in England both by local authorities and by some railway companies with mixed success.

In the UK also the introduction of a legislative planning process effectively removed development rights from all property owners and created a process where the right to develop any particular property would be granted by a planning authority following an application for permission to so do. This permission was granted following an assessment of the development proposal against criteria laid down in a development plan adopted for the area in which the property was located.

The principal recommendation of the Uthwatt Committee, set up during WWII to consider the issues surrounding the proposed introduction of a new planning regime after the war, were that the development rights in all land outside built up areas should, on the payment of compensation, become vested in the state and that there should be a prohibition against development of such land without the consent of the planning authority.

What it was intended to compensate for was the loss in the value of land which prior to the introduction of the planning system could have been developed but after planning was not zoned for development and could only be used for agriculture. This recognised that the introduction of a planning system which zoned land for development and reserved other land for agriculture or as a green belt increased the value of some land and decreased the value of other land. The intention was to acquire land, zone some for development and sell it at a premium. The resulting profits were intended to provide the funds to compensate those who were not lucky enough to have their land zoned for development.

What was called shifting land values was a consequence of introducing the planning system which provided for land zoning. *The Uthwatt Report* 1941 discussed in some detail the problem of shifting land values under such a planning code. It defined betterment as 'an increase in the value of land resulting from the action of government (local and national) whether positive, an increase due to public works or improvements, or negative, an increase due to the restriction on the development or use of other land.'

It should be remembered that in the absence of planning all land would have had some development value but as this was spread over all land and not confined to that land zoned for development, land values would have been substantially less. Confining all development to particular zoned lands concentrated development value to those lands.

Two main pieces of legislation, The Town and Country Planning Act 1947 and the Land Commission Act 1967, were based on this report.

Not surprisingly the UK Labour Party proposed the nationalisation of development values with the Conservative Party arguing against. The Town and Country Planning Act 1947, introduced a system of nationalising development values and the supply of land for development dried up because there was not sufficient incentive for landowners to free up land for development. Naturally on the return to government of the Conservative Party it was repealed in 1954.

The UK Finance Act of 1965 brought in a system of capital gains taxation that captured some of the windfall profits made from development land but the matter still remained one of considerable political contention. A Land Commission Act was passed in 1967 but repealed in 1971. The UK Finance Act again tried to come to terms with the problem in 1974 and again in 1975 a Community Land Act was passed but again repealed shortly afterwards.

It can be seen from the above that many proposals to deal with the issue failed because of insufficient political consensus or because the procedures involved proved to be unworkable or too complex.

It can be said that in the end a pragmatic solution evolved using a combination of capital gains taxes, development levies or charges, negotiated planning gain and rigorous enforcement of the green belt policies. In short the UK experience indicates that the compensation betterment problem is a complex problem not amenable to easy solutions.

APPROACHES TO BE ADOPTED TO DEAL WITH HIGH DEVELOPMENT LAND PRICES

Having considered the issue of the high price of development land and the problems surrounding high house and property prices, it can be seen that the issues involved are complex. It would appear from the history of attempts to deal with the question of capturing for the state the value created by the act of granting a planning permission on development land, and providing the necessary infrastructure, that the most effective solution is a combination of three elements. A capital gains tax on profits made from the sale of development land, negotiated planning gain and development levies.

A combination of these measures could bring down the ambient value of development land and make the

market for development land work more efficiently. These are dealt with more fully below.

CAPITAL GAINS TAX

An appropriate level of capital gains tax on profits made from the sale of development land should exist. Such a system existed until recently and could readily be reinstated. Reflecting the reality of windfall profits from development land, CGT was at 60% in the past, a rate of 20% above the standard rate of CGT. There would seem to be strong arguments on equity grounds, and on the grounds of economic efficiency, that a rate of CGT above that applied to other gains should be made in the case of development land. In particular, given the present CGT regime where inflation is not taken into account in calculating capital gains, this would provide a disincentive to hold on to development land for long periods of time. Moreover, such a high level of CGT would provide something of a disincentive to speculation.

PLANNING GAIN

Planning authorities should be given a clear statutory authority to negotiate with developers and get them to provide additional infrastructure facilities to accompany development. This could be done quite easily. Large developments should come automatically with a range of social and public amenities, e.g. playgrounds for children. Also, a specific contribution should be made by developers to the education authorities for the provision of additional schools and to the health authorities for the provision of the local accommodation needed by public health system.

The justification for this is that property is sold on the implicit assumption by purchasers that these will be provided in the area and part of the value of a property is the capacity to access community amenities.

DEVELOPMENT LEVIES

At present these exist but the schemes devised to apply them are based on the cost to the local authority of providing the infrastructure. This is then apportioned to development land in accordance with a specified formula. This measure is flawed in concept and only goes part of the way to recouping the value created by infrastructure provision. Local authorities should be empowered to devise a scheme for the application of levies in accordance with the value added to development land which is the subject of a planning permission and not on the basis of the cost to them of such provision as is provided for in the legislation.

The Planning Act of 2000 sets out a system of levying development contributions and specifies that these should have regard to the cost of provision of the services. The Act specifically excludes benefits accruing from existing services, which is significant.

This goes to the heart of the problems with the planning code in Ireland including the high price of development land. The formula used in the Act is inadequate to recoup value created by the actions of a planning authority. It also does nothing to encourage the owners of zoned land to bring it to the market speedily.

This can be best illustrated by considering a hypothetical situation where land on the outskirts of Dublin cannot be developed because of a lack of services which would only be provided by a public authority. The market value of this land would reflect the lack of supporting infrastructure and the consequent inability to develop. Clearly, the value would be substantially below that which would apply if planning permission had been granted and the services provided.

The Planning Act allows planning authorities to recoup the part of the cost of providing infrastructure and services but not the increase in value conferred on the owner by connecting to these and the decision to grant planning permission.

It would be more equitable if the basis for estimating the contribution from developers was based on the value created by the activities of the local authority and not on the cost to them of these. To do this they should be able to charge to the developer the addition to the value of the land arising from the provision of the infrastructure, the services and by the grant of planning permission.

This would be the difference between the value before the services were provided and permission granted and the value afterwards. The 'before' figure would reflect a combination of hope value and existing use value. The 'after' figure would be the market value with the benefit of the services and the planning permission reflecting the certainty that development could proceed immediately. The difference between these figures should be the development levy.

To enable a planning authority to encourage landowners to bring land to the market it should have the power to rebate the development charge in the event of the landowner developing the lands within a specified time which could be specified in the development plan. This measure would deal with one of the main deficiencies of the existing arrangements under which planners have no mechanism for influencing the rate at which development land comes on the market or is developed.

This approach would change the role of a planning authority from being a regulator and provider of services and infrastructure, to one of development enabler. Under this arrangement the value created by the actions of the planning authority is shared between both developers and the community in proportion to their contribution to creating the development value.

In passing it is important to point out that any schemes for charging development levies should be devised in a form that creates certainty in the minds of prospective developers as to the nature of the obligations they may have to meet in the event of them getting a planning permission.

It would also be important that the planning function within local authorities employ professionals equipped with the financial and economic expertise needed to evaluate development proposals and negotiate with developers. These professionals should be qualified in finance and/or property economics.

Using a combination of capital gains tax, development levies or charges and negotiated planning gain would have three benefits. First, it would substantially remove the incentive to speculate in development land. Second, it would help to ensure orderly development in accordance with plans devised by planning authorities by giving them some control over the rate at which the zoned lands will come to the market. Third, by being able to capture the increase in the value of zoned lands it should help to provide planning authorities with the means to service a sufficient quantity of development land to ensure that the market for development land works more efficiently and make the planning system self-financing. Such an approach would reduce the price of development land and contribute to the solution of the housing crises.

SUMMARY OF RECOMMENDATIONS

- There is a need for greater research into, and understanding of, spatial economics at all levels in the planning process.
- Government policy in the area of planning and the built environment should be more closely integrated with tax and other policies to ensure a more joined up approach to providing the physical development which comes with economic growth.
- There is a need for increased transparency in property and urban land markets. This could be achieved by:
  i) publishing transaction prices.
  ii) reducing transaction costs by codifying the legal basis for property ownership and simplifying conveyencing.
  iii) writing all documents associated with landed property in plain English
- The mechanisms for dealing with development land in the tax code and the planning acts should be reformed:
  i) by taxing at an appropriate level the windfall profits made from the disposal of such land
  ii) by facilitating local authorities negotiating with developers to attain planning gains as part of permissions to develop
  iii) by changing the Planning Act to allow Local Authorities to capture the value they create by providing infrastructure and services and by regulating development through plans.

EDUCATE TOGETHER

Educate Together is the representative body for multi-denominational education in Ireland. We are the fast growing sector in primary education in this country – there are currently 28 Educate Together schools, with 6 more sanctioned for 2003. We are a registered Patron Body, and therefore have a legal responsibility around the provision of accommodation for all schools under our patronage. We are extremely concerned about the provision of permanent school buildings for schools in our sector – in effect the current structure of primary education in Ireland is based on the premise of a privately owned and managed school system, therefore for an organisation like Educate Together, which has no assets or funds, the issue of school accommodation is a major one.

It is in light of on-going difficulties for most schools in this sector, as well as the huge difficulties facing all parents in this country who wish to exercise their constitutional rights around the education of their children, we are making the following brief recommendations:

- Local planning authorities should be empowered to require the transfer of lands for schools to the state as a condition of re-zoning or planning permission and that this should be written into planning legislation as soon as possible.
- The provision of land for educational use (which may also have a role for community use), to be included as part of the requirement for the provision of infrastructure.
- Where land is zoned for educational use, land should be provided to the state for the provision of education, at either the cost of agricultural land or at the cost of purchase.
- Stipulations should be laid down for anyone entering the land/speculative market, that the profits to be made on the land only apply to a certain percentage of the land, as the remaining percentage will have to be provided for infrastructural/community/educational use. This will ensure that the expectations are transparent and obvious from the beginning of the process, and anyone purchasing land or in possession of land for development, is aware of how they can proceed with this development.
- An appropriate ratio is established between the number of housing units being built and the hectarage of land that will as a result be required to be transferred.
- Radical joint use approaches are explored with local authorities for the provision of joint campus provisions which would include community usage outside the school day, at weekends and during the holidays.
- A formal forum to be set up which links local authorities and the Deptartment of Education and Science around the zoning of land, to ensure that the land which is zoned for educational use is

appropriate, suits the DES requirements adequately, and represents the best option regarding the location of a school, taking surrounding infrastructure, transport system, demographics, demand, into account.

FARMERS AND PROPERTY OWNERS ASSOCIATION (WICKLOW UPLANDS) LIMITED

INTRODUCTION

The constitutional position with respect to property rights is that in Ireland they are natural rights antecedent to positive law. This means that the state in restricting them is restricting an existing right. *Dicta* in recent cases which take the view that the state in regulating property is sometimes conferring a right on individuals (e.g. by giving them planning permission) are wrong. They reflect the position with respect to property rights in the UK and many EU countries which do not have a constitutional provision stating:

Article 40.3.2°:

> The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

Article 43:

> The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
>
> The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit the property.
>
> The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
>
> The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

1 Property rights are essential in a democratic society. The right to respect for private property is a fundamental human right. It is guaranteed in the Irish, US and many other Constitutions and in the European Convention of Human Rights. One has only to look at what transpired in Eastern Europe, and what is happening in some parts of Africa (Zimbabwe in particular), to see what happens in a society where private property rights are not respected. We all know that the differences between privately owned and publicly owned property in local authority housing estates. People can only operate in an environment where the rule of law is secure, where legal procedures are transparent and where property rights are protected. The perception that this is the case in Ireland is an important reason why we have so much inward investment. The perception to the contrary is an important reason for the lack of inward investment in some Eastern European countries and Africa.

2 If private property rights are not properly respected or if they are unduly restricted, people will not invest in property or in commercial and industrial activities involving property because the risk and rewards for their investment will too uncertain. So for example, if a landlord's rights to charge a rent which gives an economic return on a capital investment are unduly restricted, he will not invest in property. People who want to rent property will be homeless, rents will increase, the workforce will not be able to expand due to shortage/ high cost of accommodation. The dereliction which resulted from rent restrictions imposed in the 1940s is an example of the ill effects of excessive interference with property rights.

3 The Constitution provides that property rights can be limited in the interests of the common good. But what is the common good? Who defines it and how is it defined? In defining the common good, there are at least three important aspects

a) *Who defines the common good?*

The decision on what is, or is not, for the common good is essentially a political decision. It must be democratically made by elected representatives. It cannot be by bureaucrats who are unaccountable to the electorate and who are not empowered to make decisions between competing interests. The procedure must be open, honest, competent and transparent. It is clear from the Flood Tribunal and otherwise that the procedures by which property rights are restricted, although theoretically open, honest and transparent, have not operated properly in recent years. In particular, there is a loss of confidence in the procedure whereby land was compulsorily acquired or zoned or identified for different, allegedly public, uses. It is also clear that elected representatives have failed to exercise their powers and duties to provide some unpopular public infrastructure (such as landfills, or travellers' halting sites) properly or competently.

b) *Why was a particular piece of property/location selected?*

The reason why a particular piece of land was selected for lucrative development or for less lucrative development or for a particular development has not always been transparent. In many cases, it cannot be shown objectively that a

particular piece of land was the best, or almost the best, place for a particular use of the land or for a building. This may be because of incompetent advice by consultants, or professional staff in public authorities, or because of reliance on outdated data, failures to reassess old plans etc. Examples are the public car park in Dublin airport which has never been used as a car park, the inner ring road in Port Laoise, the proposed interpretative centres in Luggala and Mullaghmore.

c) *What is the common good?*

It is commonly assumed that the common good is for public purposes. But what are public purposes? Is it is sufficient for public purposes that the public ultimately benefits from the legislature's action in some general way although a particular public authority or the private sector may be the immediate and greater beneficiaries? Neither the Oireachtas nor the courts have ever adequately addressed this important policy issue. One view would argue that the definition of public purpose should be limited to necessary works of public utility such as roads, sewage plants, landfills etc. But the definition of necessary is one which is expanding all the time so that, while many would not have regarded a sports facility as necessary in the 1960s, more would now. Another view would argue for a somewhat wider definition of public purposes which would also embrace works which benefit the public less immediately and directly. The arguments for the latter view are more persuasive in a democracy which purports to foster public-private sector co-operation but, if this view prevails, additional safeguards must be provided to prevent administrative abuses and abuses of power by the public sector. It takes little imagination to justify almost anything as being for the common good and Mr. Justice Holmes's warning that 'we are in danger of forgetting that a strong public desire to improve the public condition is not enough to achieve that desire by a shorter cut than the constitutional way of paying for change' is one which ought to be heeded in the Ireland of the twenty-first century.

Several decades ago in Ireland the common good was generally understood to mean essential works of public utility, i.e. public infrastructure such as housing, roads, schools, hospitals etc. Mr. Justice Kenny once commented on what he considered to be the limits of public powers in his *Report on the Price of Building Land* when he stated:

> It is doubtful that land which it is proposed to acquire for municipal housing could be regarded as diverted for necessary works of public utility. But if the land was being acquired because it would be suitable for letting to builders who intended to construct houses or factories, the proposal would certainly not be to acquire it for necessary works of public utility.

This view does not prevail nowadays and the Supreme Court has (probably incorrectly) held that restrictions on property rights in order to ensure the availability of affordable housing are for the common good. Nowadays the common good is taken to mean something that furthers economic and even social progress, e.g. urban renewal, social and affordable housing etc. Under urban renewal Acts and other urban renewal legislation, public authorities can acquire land for 'urban renewal' purposes. In fact, 'urban renewal purposes' potentially means for any redevelopment at all in an urban area. In effect, public authorities in areas designated under the Urban Renewal Acts have carte blanche to acquire any land they like. The Crosbie case is one of the most obvious abuses of public power in the history of the State. In Crosbie, land was acquired by CPO for urban renewal purposes, specifically a sports centre. (One might quibble about whether a sports centre is a public purpose but assume that it is.) When the plan to put a sports centre in the Docks was abandoned, the CHDA refused to return it to the owner. They subsequently sold it at an enormous reputed profit of over £15 million. It is submitted that that land should have been returned to Mr Crosbie who was as capable as the CHDA or the developers to whom CHDA subsequently sold the land, of developing that land for urban renewal purposes. This is what would have happened in Germany where property rights are not deemed to be natural rights antecedent to positive law. Crosbie lost his case for the return of his land in the High Court but it is submitted that this may have been because the property rights aspects of the case were not fully considered.

Examples of where the common good has been too broadly defined in law or in practice

i) Listing the interiors of private houses or other properties for preservation. It is difficult to appreciate what interest the State has, or how it can justify, compelling the owners of private property to get permission to decorate the interiors of their houses or properties.

ii) Planning authorities in giving reasons for refusing planning permission too often use illegal reasons which are not objectively justifiable in order to deny the applicant for planning permission his or her right to compensation. This is a well-known and widely acknowledged phenomenon evidenced by

the fact that less than £10 million in compensation for refusing planning permissions has been paid in the history of the State. The reason for this is because planning authorities are acting illegally in giving non-compensatable reasons for refusing planning permissions.

iii) Likewise An Bord Pleanála sometimes fudges the issue of compensation by giving reasons for refusing permission which are practically impossible to interpret. One person known to us has spent over €8000 in legal fees trying to get a decision by An Bord Pleanála interpreted.

iv) Planning authorities have illegally sterilised lands from development by making developers make section 38 agreements under the pre-2000 Planning Acts.

SUBMISSION

1 The existing provisions with respect to private property rights in the Constitution should be preserved unaltered.

2 Legislation permitting interferences with private property rights should be drafted to deter abuses of legislative powers.

3 The common good should be narrowly described and should be for necessary works of public utility or for other social or economic reasons agreed at government level in pursuit of competently prepared and objectively justifiable economic or social programmes with defined targets and time frames.

4 Interferences with property rights should only be to the extent necessary for the common good and no further.

5 Individuals responsible for abuses of power in public authorities should be held personally responsible.

6 Public authorities restricting property rights should be required to explicitly justify the restrictions and to give reasons for the restriction.

7 Property appropriated by or on behalf of public authorities should be returned to the owner (unless he agrees otherwise) if not used for the purposes acquired within a given time frame.

8 Property held by companies or in private trusts should benefit from the same protection as property held by individuals.

ACCESS

1 Access to lands should be achieved by negotiation with individual landowners. Many of our members both wish to and are required to manage their lands for conservation purposes. This requires the ability to maintain supervision of access especially where this might conflict with that objective. More importantly some of our members own land in proposed Special Areas of Conservation and proposed Special Protected Areas. We are advised that unrestricted access would be both harmful and illegal under the requirements of the habitats directives.

2 Where access to land has been negotiated it should be understood that this imposes a financial burden on landowners who should be compensated. This arises from damage to fences, litter, etc.

3 In addition the law relating to public liability for all landowners whether consenting or not still imposes a potential financial risk. We submit that the public should be made aware of and educated about the inherent dangers posed by both unfamiliar terrain and other normal farming practices. They should then also be deemed to have accepted responsibility for themselves and their dependants for accidents that may occur under these circumstances.

4 Landowners entering into access agreements should also have the ability to restrict access to their lands at certain times and for certain purposes.

5 Landowners should at all times have the powers to prevent access by dogs and other animals.

COMPENSATION

Where restrictions and or compulsory purchase is found necessary over lands this should be subject to full and fair compensation.

FEASTA

INTRODUCTION

Change to the Constitution re property rights is not functionally or legally necessary for social equity and sustainability. All the powers required reside in the current provisions – if broadly interpreted and fully and fairly utilised. A debate to reinforce important principles and dispel misunderstanding is more necessary than an amendment.

The information campaign and debate leading to a referendum to change the Constitution concerning private property is more necessary than a successful amendment. The necessary principles are already implicit in the subordination of the rights of private property to the 'common good' in the Constitution. A campaign would challenge the exclusive meaning of the rights of private property promulgated by powerful vested interests which has grown to dominate – to the

point where serious social, economic and environmental damage has been done to the fabric of the country.

An economic system of property in land has evolved which results in high and rising prices that impact adversely on the vast majority of Irish people and from which only a minority gain greater material wealth. Not only is this wealth, generated by the simple ownership of land, unearned in the strict economic sense, it is necessarily gained at the expense of others. Successive governments have taken various steps to try to mitigate these losses and protect various categories of loser. These measures are never enough. That is because the norms and internal dynamics of the land ownership system that drive these inequalities remain intact. Feasta is asking the government and the Dáil to address the problem at its roots. This requires imagination and political will.

The principles which should guide our thinking in relation to property and which need to be debated and agreed are outlined below. Then follows suggestions of amendments to the Constitution, which although not strictly necessary would include these principles and clarify this new understanding. The final sections of this submission illustrate these principles in relation to the subject areas listed in the call for submissions.

1 SUSTAINABILITY IS AN IMPORTANT ELEMENT OF THE COMMON GOOD

An amendment to the Constitution could usefully include the explicit inclusion of aims relating to sustainability, i.e inter-generational equity and the protection of the environment over the long term, the need for which was which was not as apparent to the original draftsmen as it to us today as we reach the limits of global exploitation.

1.1 Sustainability is a well-defined term first used in the Bruntland Report, 'i.e. the meeting of the needs of the present generation without compromising the needs of future generations'. This is a core principle of global and international application. It forms part of the state's international commitments made through UN forums including the Rio Earth Summit and the Johannesburg World Summit on Sustainable Development. It has been incorporated in Irish legislation in the Planning and Development Act 2002 and is a guiding principle in the EU Treaties.

1.2 The principle of sustainability is implicit in a broad interpretation of the term 'common good' but it has been interpreted narrowly to infer the common good of the existing generation of citizens as judged by the needs of today without regard to future scenarios based on the exercise of the rights in question. For instance, farmers claim that their welfare and that of rural communities gives them the right to benefit from the development of dispersed one-off houses. The sustainability test would project this interpretation of property rights into the future to reveal that this option will not be possible for later generations because of the cumulative effect of numbers of houses within objective spatial and economic limitations.

2 FAILURE OF THE OLD 'PROPERTY OWNERSHIP RIGHTS' MODEL

The ownership rights model of property utterly fails to incorporate an understanding of property rights as inherently limited both by the property rights of others and by public policies designed to ensure that property rights are exercised in a manner compatible with the common good as enunciated in the Constitution. Derived from Roman/Norman concepts, the ownership rights model has a built-in bias towards greater inequality of power relations and concentration of wealth.

2.1 The ownership rights model of private property structures legal doctrines in a rule-exception format to the effect that owners win in a dispute unless specified conditions are established.

2.2 The property ownership concept sometimes creates an assumption that sets of rights are bundled and must be owned by the same person.

2.3 Calling something a property ownership right creates an implication of a strong moral claim to immunity from non-consensual loss or harm and places a heavy burden on those seeking to regulate the property right.

2.4 The idea of property ownership rights creates a perception and presumption that the right is alienable (can be bought and sold) in the market place and conversely, that non-alienable rights (that can't be bought and sold, i.e. human rights) do not count as property rights.

3 USEFULNESS OF A SOCIAL RELATIONS MODEL OF PROPERTY

A better concept of property is that of a set of *social relations*; a system composed of entitlements which shape and are shaped by social relationships. Such a concept can better frame distributive issues that should enter our decisions about the initial allocation of property rights, as well as their definition and limitation over time. A number of reasons warrant this new model, not least that it accords better with the older Gaelic concept of property in land as inseparable from the people of the land (tuath = tuatha)

3.1 Property rights can be bundled in different ways and multiple models exist for defining and controlling property relationships.

3.2 Property rights must be considered as contingent and contextually determined – as is clear

in 'nuisance doctrine'. The context in which property rights are exercised and their actual effects on others has always been of crucial importance.

3.3 Property law and property rights have an inescapable distributive component. The prevailing norms of private property, as has operated in most developed countries including the United States, have always contained a tension between the norm of protecting the rights of title holders (however defined) and the norm of shaping property rules to ensure widespread access to the system by which such titles are acquired.

3.4 Property law helps to structure and shape the contours of human relations and can only be adequately understood in that light. Non-property rights based on equality, liberty and human dignity have always limited property rights and recent international law requires that property rights should also be limited by the constraints of environmental sustainability.

3.5 Finally and not least, our concept of property should include the fact that owners have obligations as well as rights dictated both by enlightened self-interest of the owners themselves and by considerations of justice.

4 THE INTRINSIC DIFFERENCE BETWEEN NATURAL AND MAN-MADE CAPITAL OR PROPERTY

The phrase 'the right to private property' in the Constitution does not recognise the fundamental differences within classes of property – in particular that between property in natural and man-made capital.

4.1 Natural capital is that which is 'God given'; the earth's resources of land, water, minerals, the electro magnetic and radio spectrum, ecosystems, diversity of life forms, genetic codes and also includes the collective of human knowledge and culture.

4.2 Man-made capital is that which is primarily created by individuals albeit using natural capital as a necessary input; physical property such as homes, factories, offices, machinery, tools, roads, railways, automobiles, agricultural products, livestock etc. and non-physical property such as businesses, company shares, specific patents, copyrights, brands etc.

4.3 Property rights in man-made capital derive from the labour, ingenuity and risk invested by individuals in their creation, which is widely recognised culturally and socially by democratic states. Even so the use of these rights must be constrained by the overarching goals of the common good and a more clearly stated objective of sustainability.

5 THE COMMON SHARE IN NATURAL CAPITAL ARISES FROM HUMAN CONSCIOUSNESS

The provisions relating to 'private property' and the 'common good' in the Constitution are insufficient to describe the complex relations between private rights and community rights in natural property. In particular, the concept of common share arises in all property in natural capital even before the use rights are constrained by the common good.

5.1 Property rights in natural capital are not founded on individual effort and investment in their creation (they are by definition pre-existing). As individuals have not created natural goods, no individual can lay full claim to them. However, this does not infer that humanity, as a whole, has no claim to the earth's bounty. Collectively, humanity has a claim recognised in all religions and spiritual traditions, which derives from its unique attribute of consciousness. But, although humanity's birthright to the earth is collectively based, it must be shared fairly by every human individual for sustainability. The reasons for this are practical and urgent.

5.2 As the earth's only conscious entity and one which is impacting adversely on the global ecosystem, humanity now has to choose between a short-lived wasteful and carbon energy dependant mono-culture mining the earth's natural capital or, a long-term diverse ecosystem, stewarded by humanity and sustained by the earth's natural solar income.

5.3 By recognising our common share in the earth's resource and our individual responsibility, we can create the dynamic to switch to this necessary stewardship role. This is beginning to be recognised at many levels; globally through the Rio and the Johannesburg summits on sustainable development, in EU directives and nationally in Ireland's policy for sustainable development.

5.4 The capacity of the atmosphere to absorb greenhouse gases requires a global governance to ensure equitable and sustainable management through the global Kyoto agreement. In many other instances, such as for land and mineral resources, the nation state is the appropriate management and distributive agent.

5.5 The Irish citizen's right to a common share of inheritance in national natural capital should be recognised in property rights and ensured by the Constitution.

6 COMMON SHARE IN NATURAL CAPITAL ARISING FROM VALUE ADDED BY THE COMMUNITY

The second community claim to an interest in property in natural capital comes from value added by the

community at national and local level. Most if not all value in natural property depends on and is derived from, community need and investment. This is very clear in the case of land, which is fixed in location and limited in supply. Land in a remote area with no infrastructure and low population is of much lower value than that in a populous area with adjacent infrastructure and convenient services.

6.1 All natural property includes a balance of public and private rights that are contingent and contextual as the social relations model of property illustrates. These relations must be constantly reviewed in terms of economic efficiency, social equity and environmental sustainability.

6.2 Economic efficiency requires that the community's interest in property in land and other natural resources be recognised and factored into market transactions to prevent capitalisation of 'economic rent' into damagingly high land values or wasteful and profligate use. Economic efficiency also requires that the community gets a return from investment in infrastructure from the consequential rise in rents and capital values in land.

6.3 Social equity requires that ownership of land and other natural resources be possible for all citizens, which is clearly not currently the case for aspiring farmers and first time house buyers. The monopoly characteristic of land operating un-modified within the market system, concentrates ownership in the hands of fewer and fewer people until social or economic breakdown drives major redistributive adjustments, i.e. the Great Hunger followed by the Land Acts. Modifying social relations in natural property by including recognition of the common share as part of title fosters continual turnover, redistribution and wider possession thus obviating major upheavals.

6.4 Environmental sustainability requires that all resource use be reduced recognising its real limitations in supply or capacity. In particular, land use must be made more efficient by creating more integrated compact settlements as urban and rural sprawl is rapidly devouring resources and reducing transport and energy options for the future.

7 THE COMMUNITY'S COMMON SHARE OF NATURAL RESOURCES SHOULD BE COLLECTED THROUGH APPROPRIATE TAXES, CHARGES AND ROYALTIES ON THE USE OF NATURAL RESOURCES AND PARTICULARLY ON LAND

The fundamental cause of the problems that have prompted this review of the Constitution is the failure to recognise the interests of the community sufficiently in property in land and other natural resources. Feasta holds that this *common share* of natural capital in land should be recognised in an *annual rent* or tax paid by the landowner to the community as part of a 'tax shift' from income taxes.

7.1 An annual site value tax should be levied on owners of development land including housing development land. This tax should be a percentage of the increased value due to zoning, infrastructure provision and the increased needs of the community. Where un-zoned land is given planning permission for a higher use (such as agriculturally zoned land for housing use), the tax should be a multiple of the annual site development tax. This tax could reduce taxes on transactions which inhibit turnover such as stamp duties and even capital gains taxes.

7.2 Local rates currently levied on commercial property should be replaced by a dual system comprising a community land tax on the land value of the site (ignoring the building or other man-made property) and a separate charge for services similar to the successful local dual tax in Pennsylvania US.

7.3 Immediate notice should be given of a community land tax on the site value of all existing residential property owner-occupied, holiday and investment to be levied within a short time frame. The community land tax should displace tax on income and should not be an additional burden on the normal working family. It should include measures to mitigate the effects on recent buyers of over-priced housing.

7.4 Other charges, royalties or taxes should recompense the community for the use of natural resources; – natural gas, minerals, water, the capacity of the atmosphere to absorb gases (carbon taxes), and the capacity of the land to absorb waste etc. on a user or polluter pays principal.

8 SUGGESTED AMENDMENTS TO THE CONSTITUTION INCORPORATING PRINCIPLES

Article 40.3
2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen (add: including that of their common share in the natural resources of the nation.)

Article 43.1
1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external (add man-made) goods. (add: and private use rights and a

common share in the natural resources of the nation and the earth)

Article 45.2
The State shall, in particular, direct its policy towards securing:

1 That the citizens (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.

2 That the ownership and control of the (add man-made) material resources of the community may be so distributed amongst private individuals (omit: and the various classes) as best to subserve the common good (add: and that the benefit and enjoyment of natural resources may be shared so as best to serve equity and sustainability).

3 That, especially, the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities (add: and natural resources of the nation) in a few individuals to the common detriment (add: and unsustainability).

4 That in what pertains to the control of credit the constant and predominant aim shall be the welfare of the people as a whole.

5 That there may be established on the land in economic security as many families as in the circumstances shall be (omit: practicable) (add: sustainable) to subserve the common good.

9 COMPULSORY PURCHASE

Compulsory purchase should be an instrument of last resort to deliver essential infrastructure development or environmental protection for the common good and sustainability. Compulsory purchase is intrinsically difficult to apply consistently and as such is not appropriate as a general instrument to deliver affordable housing or sustainable settlement development. When a justifiable case can be made for CPOs, compensation should be for existing use only but should also include a sum in recognition of compulsion.

9.1 The rights to possession and enjoyment are an important entitlement of property and a fundamental human right. The case outlined above for recognition of community rights in property in natural capital is not an argument for widespread state appropriation of land of existing private titleholders – even with compensation. It has been applied notoriously inconsistently with different treatment of developer landowners and farmer landowners under Part V. The preferential treatment of farmers for compensation for compulsory acquisition for road projects is another illustration of its vulnerability to special pleading and political pressure. A CPO 'use it or lose it' policy can not be fairly enforced in the current situation where too much land is zoned in some locations (urban areas) and too little is zoned in others (most rural villages with no area plans).

9.2 Compulsory purchase should only be considered where development is required of a scale requiring land covering a number of properties where the existing owners are not capable of the collective action to develop it themselves for the benefit of the community. More effort should be made by the government to obviate the need for compulsory purchase for sustainable settlement development by promoting community land companies/trusts for example by removing stamp duty on the transfer of freehold private property into its equivalent in company shares.

9.3 Compensation for compulsory purchase is a separate issue and one that does touch on the concept of common share. The question arises whether the compensation for land value should be that of the existing value before the needed development takes place or potential value of the land following development. Where an effective annual land tax is charged, the difference would be significantly reduced. In any case, the landowner should not be paid more than existing value following the logic that the community has itself created the increased value in the land. However, Feasta recommends that along with existing value and relocation expense compensation, a further sum should be paid to the landowner arising from the compulsory nature of the transaction. Compensation moreover should be adjudicated quickly and paid promptly to minimise harmful impact to the landowner.

9.4 In general, it can be argued under the social relations and common share principles that individuals have rights to the existing (previously socially negotiated) use rights to their land but not automatically to new, previously unused use rights. Under this reasoning for instance, the individual property owner has no rights in relation to previously unused space deep under his land that is needed for a tunnel or rail system and should not be compensated for them. Nor, under this reasoning, does the land owner have automatic rights to housing, industrial or other development on land previously used only for agriculture.

9.5 The fact that compulsory purchase under the Kenny report or under a 'use it or lose' basis is being considered by the government is

testament to the poor functioning of the market based on a flawed property ownership model and the lack of annual rent or taxes on land.

10 THE ZONING OF LAND

The zoning of land for development is necessary for efficient infrastructure provision and the development of sustainable compact settlements. Zoning, infrastructure provision and planning permission add considerable value to land. This value should be recouped on behalf of the community that created it, by an annual site value tax on designation or permission.

10.1 Attempts to capture the betterment value created by zoning, infrastructure provisions and planning permission by way of development site tax or other CGTs or planning gain on development and sale have always failed. The nature of land is that it is fixed in location and supply and thus competition is limited. Landowners can and will withdraw their land from development where their profit expect-ations are disappointed. Demand then builds up and political pressure is brought to bear to eliminate the offending tax or regulation. Attempts to raise the 20% CGT on development land after the 'temporary' period elapsed for this concession was stymied by this inherent set of relations. With interest rates at a historic low, the costs of holding land can be negligible if the land was bought some time in the past. By recouping the common share on an annual basis through an annual site value tax, the government can rebalance the relative strengths of buyers and sellers, increase land sales turnover and lower land values within the current market system without onerous regulation.

10.2 Development plans typically zone lands for need far in excess of their 5-year timeframe in order to ensure that an acceptable level of development is carried out and (according to elected representatives) to distribute the benefits of such designation to as wide a group as possible. This has led to leapfrog development and excessive sprawl, as those landowners with least economic power to wait (in the least favoured locations) will develop first. Economically powerful landowners (often with land in the best locations) will wait until conditions are optimum before selling or developing. Sprawl and premature development places a cost on the community and on the environment.

10.3 An annual development site tax, levied at zoning would ensure that the benefit of designation is partly captured by the community. This tax, based on the value of the land (thus higher for more valuable locations), would ensure that the best-located sites are developed early where the community has already made the investment in infrastructure and services. Less pressure for premature zoning from landowners on planners and elected representatives would lead to development plans with a more compact footprint and greater credibility

10.4 Zoning is not a necessary condition for the betterment value created by the community to be captured by private landowners. Nearly 38% of all new housing is built on un-zoned land in the countryside availing of publicly provided and maintained roads. The granting of planning permission creates this value and estimates of its total value are €810 million per annum. Furthermore, the landowners selling such sites are exempt from Part V of the Planning and Development Act, which provides for some distributive element to the community. Given that the annual servicing of scattered dwellings will place a further burden on the community this seems a particularly anomalous exception. In the very limited cases where the granting of planning permission for housing or other development on un-zoned land is sustainable, a very high multiple of the tax should be exacted on such land sales so that the intent of the annual site value tax on zoned land is not undermined.

11 THE PRICE OF DEVELOPMENT LAND

The price of development land, unacceptably and unsustainably high in the Irish market, is a direct result of the current property system that fails to recognise the fixed nature of land and the common share in the social relations governing property in land. This can be addressed even under the current provision of the constitution by means of an annual site value tax.

11.1 Economists will describe how the high cost of housing land is related to the demand and supply in housing. Housing demand is high because of demographic change, low interest rates and economic growth. A shortfall in housing supply allows sellers to extract a high if not the maximum price from buyers. Land price is a residual of the market price less construction, fees and finance costs. Land now represents 60% of the total cost of the housing unit compared to 10-15% before the boom. The larger part of developers' profits derives from the increase in land values from the time they bought it to the time they sell. Thus, developers try to amass a land bank well in advance of their capability to build – adding to scarcity.

11.2 The government introduced measures to increase supply though tax reliefs and incentives directed at landowners and developers – with mixed effects. Equally if not more effective, would be measures to increase supply by

preventing land hoarding and land banking through an annual site value tax. In the latter case, the revenue would accrue to the community that created the value.

11.3 As well as reducing prices in the medium term through increasing supply, an annual site value tax would reduce the price of land in the short term through its capitalisation into calculations by intending buyers, as Part V did when it was introduced under the Planning and Development Act.

11.4 It is not necessary to introduce new compulsory purchase powers to ensure a ready supply of development land at an affordable price as shown above. It is also impractical given the sheer level of land purchase involved if the CPO powers were not to discriminate in favour of some landowners over others.

11.5 Furthermore CPO acquisition would still leave the problem of the mechanisms for the appropriate allocation of the land to new developers and of ensuring they or the subsequent purchasers of the housing do not make windfall gains at either the community's or earlier landowner's expense.

11.6 Finally, the impact on the general housing market, (on developers who develop promptly in good faith on land they bought at full price for instance), would be very problematic. On the other hand, a general site value tax on all designated development land would be fair and simple, would reward efficient and prompt housing development and foster competition in design and construction quality.

12 THE RIGHT TO SHELTER

The right to *a common share* of the national natural resources is a fundamental universal right based on the individual existence. It implies a right to shelter irrespective of need which is a stronger and less divisive than a simple 'right to shelter' with its concomitant risk of moral hazard and lack of limits. The lack of good affordable housing in sustainable integrated settlements is caused by the nature of the current property ownership model that does not fully recognise common share in natural resources which can be redressed by appropriate taxation.

12.1 The social housing sector and others involved in social and community developmental work have put forward a compelling case for a 'right to shelter'. Feasta supports much of their argument but suggests that a more fundamental right, that of common share, would deliver both shelter, sustainable settlements and access to the resources for a sustainable livelihood without the potential unintended consequences of a 'right to shelter'.

12.2 The term 'right to shelter' suggests provision based on need. History has shown the difficulties of basing rights and supports on need without, at the same time, providing a perverse incentive not to provide for oneself, of creating further markers of social difference and exclusion of recipients and of undermining the general taxpayer support necessary for sufficient investment.

12.3 The 'right to shelter' is also somewhat problematic in terms of sustainability as it could be interpreted to privilege existing individuals at the expense of future generations and it does not acknowledge the limits of natural resources. Feasta accepts that the promoters do not intend that interpretation, but we have seen how narrow interpretation of broad concepts has led to inequality and environmental damage in the past. Absolute rights are appropriate for rights dependent only on human will, i.e. justice, free speech etc. Rights that relate humans to finite natural resources are better framed within the limits of those resources.

12.4 Irish housing policy has historically focused on providing housing directly by local authorities for those in need and this is widely acknowledged to have led to problems of ghettoisation and exclusion. Recent developments by housing associations and social rental co-operatives to deliver wider housing provision have been constrained by lack of funding and their charitable remit. Part V of the 2000 Planning and Development Act has introduced yet another sector of housing provision and recipient; the affordable house and eligible buyer. All of these sectors are mutually exclusive with little movement of users between tenures, categories and local authority areas. The system to support each sector is getting more unwieldy and complicated. There is also no easy way to cross compare each sector's effectiveness and value for money.

12.5 The Rental Supplement programme, introduced very much as a stop-gap measure, provides some flexibility to housing benefit recipients and some element of social mix. But as the rent supplements were paid to tenants in an unregulated private residential rented sector, and as they had no effective competition from the not-for-profit sector (because of sectoral barriers described above), they inflated rents at the bottom end of the market. The government had to cap rental supplements as costs grew out of hand.

12.6 A single housing benefit or voucher paid directly to the recipient, usable for all sectors would give much needed choice and flexibility and help create more heterogeneous communities.

All other supports and tax reliefs should be removed. The community land tax (see below) would provide ample resources for a universal single housing benefit. Even better would be a broader single benefit (more like a citizens income) usable for all public services, housing, health and education.

12.7 In general, the tenant/home purchaser would pay the open market rent or price for the housing. But it may also be possible to provide reductions arising from the retention of land in community ownership provided under Part V for all tenures. (See Feasta submission on Part V). [For a copy of this document, please contact Feasta].

12.8 Under such a universal, transparent system, there would be no fundamental reason why all housing sectors; public, private and third (not-for-profit) sector should not provide housing for all social groups. Indeed such competition would be necessary so that the housing benefit would not simply inflate prices and rents as happened in the rental supplement scheme. Each sector would bring their particular ethos, sources of capital finance, efficiencies and skills to their task and competition would ensure quality and innovation.

13 INFRASTRUCTURE DEVELOPMENT

Infrastructure development by the local and central government is necessary for well-planed, efficient and sustainable development. That it generally benefits the common good is not sufficient reason to fail to recoup the very significant gains by private landowners as part of common share arising from such community investment.

13.1 Infrastructure development can range from small water schemes to elaborate public transport projects. All add value to land that should be recouped in annual rent or tax for the community. The recovery of the actual costs of the infrastructure should not be the basis to recoup the community for its common share. The value added often comprises more than the cost of the construction and other direct costs as it includes the value of government powers to consolidate land, create way leaves and rights of way etc.

13.2 Conditions to planning permissions requiring payment for infrastructure provision is an unsatisfactory method of capturing common share for a number of reasons. It is almost impossible to work out the exact cost of the relevant infrastructure relative to a single site, bearing in mind further development sites will also benefit. Existing developed property owners who equally benefit in many cases from new infrastructure get a free ride. The huge variation in the level of these charges between different local authorities and different projects undermines its legitimacy and creates damaging uncertainty. An annual site value tax on all landowners benefiting from new infrastructure is a fairer, simpler method to recoup betterment value as part of the common share in property.

13.3 The cost of major transport infrastructure projects has led the government to consider Public Private Partnerships financed by taxes and tolls on users. It is unfair to require the community to pay all the costs of these projects while the millions of capital value added to private property is largely untouched. In fact, were the government to decide to capture this value through an annual site tax or levy or bond on benefiting landowners, the PPP process might be unnecessary as the government might well be able finance the project on the projected tax income stream.

14 HOUSE PRICES

House prices and rent levels in the private rented sector are a continuing cause of concern in terms of social and intergenerational inequity. Demand side measures such as a community land tax on all property owners as part of a tax shift from income taxes to dampen price and rent inflation are now inescapable.

14.1 With modest economic growth and even taking into account the supply side effects of an annual site tax on development land, the demand for and therefore the price of housing in Ireland might remain relatively high for some time. This is because of our young and growing population and the fact that the second hand house market also impacts on general price levels. In a low inflation environment (unlike in the past) high initial costs of housing will remain high over time impacting on social capital. Young people will suffer while older people who have bought their homes or investment property some time ago will continue to gain disproportionately. A further community land tax on all owners of property including residential should be considered urgently. This would immediately reduce the capital value of all housing in the marketplace including that of investment property and as a residual, the value of development land as described before. This measure would have to be well flagged in advance and introduced sensitively to mitigate the burden on recent housing purchasers. It should not increase the total tax burden on the average family but should be undertaken as part of a 'tax shift ' from income taxes to environmental taxes of which land is an important element. (For further detail see Feasta's submission on Part

V.) [For a copy of this document, please see Feasta].

14.2 If instead as is more likely, we face economic stagnation (see Economist report in *Irish Times* 29/5/03) and house prices fall, a community land tax as part of a tax shift from income tax is still indicated. Taxes on labour and capital dampen investment in these factors and thus economic growth but not annual taxes on land. This is the up-side of the fixed and pre-existing nature of land – in a virtuous circle, the higher the annual taxes on land, the more it is brought into production rather than the opposite with labour and capital.

14.3 The drop in the value of people's homes may lead to lower consumer confidence and borrowing (it has no effect on the quality of the housing) but this would be largely offset by higher investment in construction. With buoyant tax receipts from the annual site value tax and community land tax and with extra levies on benefiting landowners from infrastructure, the government could maintain its infrastructure development programme (advisedly with more emphasis on public transport) and thus further compensate for consumer caution.

14.4 Substantial landowners with investment property may well be net payers under this shift but as land-owning as an activity does not add to GDP, negative macro effects would not arise. However, Feasta recognises that senior citizens dependant on rental income without offsetting income tax savings will lose. For this and other reasons (see Feasta's policy on renewable energy and book; Ireland's Transition to Renewable Energy, shortly to be published), we recommend programmes to encourage private and public pension funds to invest in renewable energy generation- which Feasta believes will deliver the most secure returns to investors in the energy-scarce times ahead.

14.5 It might seem counter intuitive that a tax on land under your property would reduce and not raise land prices but this is the nature of 'land rent' as first outlined by the economist David Ricardo in the 19th century. The fundamental choice is simply this, either the state captures the common share value in land for the community or the private landowner does. If the state does, then the opportunity arises for a reduction in other taxes and an orderly regulation of land prices. If it does not, then land prices will rise in tandem with economic growth and will collapse as growth falters, the balloon bursts and everyone loses (except the very wealthy who invariably win within the present system.)

14.6 Ideally, the site value tax and community land tax should be raised by the local authority and used to provide housing and other local services supporting sustainable settlements and lifestyles. Local authorities need an independent source of funding to carry out their duties effectively and to ensure genuine local accountability within a democracy.

14.7 It is worth reiterating again that the community land tax differs from old fashioned rates in a very important respect; it does not tax the buildings or improvements that the developer or householder has made with their labour and investment but simply the existing but not now acknowledged common share of the value of the land.

15 ACCESS TO THE COUNTRYSIDE

The controversies around access to the countryside for recreation arise from the fundamental misunderstanding of property rights described earlier. Given the history of the land struggle in Ireland and high subsidisation of farming, the social relations model of property rights suggests that public access rights to uncultivated farmland be recognised in the Constitution both through the common share and common good concepts. In addition, a community land tax on farmland would provide an effective framework for sustainable agriculture and rural regeneration.

15.1 The property ownership concept of property in land creates an image of a single owner with absolute power within rigidly defined spatial boundaries. However, this not an accurate description in contemporary life. The spouse and children have rights that are not mentioned in the title but are protected by law. Nuisance law regulates considerably what the owner can do with his property. If it is mortgaged the mortgage company or bank has clear rights to the property. The most central right associated with property is the right to exclude, yet current legislation limits the right of owners to exclude members of the public on an invidious basis such as race or cultural background. The social relation model is a better conceptual tool to address issues of access and use.

15.2 Landowners today forget that their title was gained at the expense of earlier titleholders under the Land Acts following the famine. Those earlier title-holders gained at the expense of the Norman and Gaelic chieftains who held land in trust for their clan. The purchase price paid by the lucky tenant farmers was discounted by a considerable percentage, and payment was not immediate nor was it in cash. Tenant farmers, big winners under the Land Acts, benefited again from the operations

of the Congested Districts Board and later Land Commission. The few landless labourers who survived the famine got a meagre 3/4 acre for a county council cottage after a long campaign. Urban tenants got nothing. This illustrates the point made previously that property rights are not fixed but contingent and contextual. They have been amended in the past to respond to urgent social conditions and the time has come again to do so.

15.3 Until very recently the custom was to pass the farm to only one child in the family, usually a son. The disinheritance of the other children was necessary for farm viability but nevertheless represented loss to them. The remittances from the non-inheriting family emigrants were a big factor in keeping the farmer on the land when times were hard. Therefore, the property in land farmers now enjoy was partly paid for by others within the community. The situation is no different today as 80% of farmer's income comes from the cheque in the post paid for by taxpayers. The current Fischler Proposals entail 'decoupling' of farmer supports from agricultural production which recognises, under 'modulation', the other values and uses of farmland for which it is willing to pay. These uses include recreational use by the community, which infers recognition of a general public right to access. Without access to enjoy the Ireland's wonderful landscapes and environmental bio-diversity, the potential for rural enterprises based on catering for visitors will be irreparably damaged. Therefore, Feasta maintains that the general right of public access of non-cultivated farmland is underpinned by both the principles of common share and of common good.

15.4 Public access to land alone is not sufficient to deliver the common share; it should also be reflected in a community land tax in common with all property in land. A notional land tax for farmers was floated in the 80s but vanished without proper consideration. It should be seriously considered again in the light of the high costs of collection and low returns of income tax and the high cost of farmland. High land costs prevent entry of new farmers with energy, imagination and appreciation of a rural lifestyle. Organic, low energy and diversified farming supplemented by other rural enterprises, including renewable energy generation, is the model showing most sustainability given the looming shortage of cheap oil. Both the traditional family farmer and the green 'downshifter' fit this model and both would be supported by an appropriate tax system based on the quality of the land. No further tax should be levied on the farming enterprise. This would favour genuinely efficient farmers with low external inputs and reduce the price of farmland (as described before in the case of housing) to allow new entrants and competition on an equal basis.

15.5 A community land tax would also provide a framework for a new legitimacy for EU payments to farmers in the event of complete 'de-coupling' from production. The community could see that it was getting a portion of the value of the payments with the farmers' primary role changing from that of food producer to steward or custodian of the land on their behalf.

15.6 A community land tax on farmland would also provide a fair framework for restrictions on use under environmental conservation designations. Farmland comprising high scenic views and bio-diversity under use restrictions, gives a lesser use value to the private owner but a higher use value to the community. Therefore the community land tax paid by the owner to the community should be substantially reduced if not relieved altogether. Under this scenario, farmers would actively care for the environment and some landowners might even campaign to have their area designated.

FOCUS IRELAND

PREAMBLE

As part of the fundamental rights of all Irish citizens, the Constitution of Ireland (Bunreacht na hÉireann) declares as a personal right under Article 40.3.2° that:

> The State shall, in particular, by its laws protect as best as it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen

Furthermore, the Constitution of Ireland (Bunreacht na hÉireann) states under Article 43 on Private Property that:

> The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods
> Art 43.1.1°
>
> The State accordingly guarantees to pass no law attempting to abolish the right to private ownership or the general right to transfer, bequeath, and inherit property
> Art 43.1.2°
>
> The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this

> Article ought, in civil society, to be regulated by the principles of social justice
> Art 43.2.1°
>
> The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good'
> Art 43.2.2°

The All-Party Oireachtas Committee on the Constitution, charged with reviewing the Constitution in its entirety, is now examining these Articles to ascertain the extent to which they are serving the good of individuals and the community, with a view to deciding whether changes in them would bring about a greater balance between the two.

1 INTRODUCTION

Focus Ireland welcomes this opportunity to submit to the All Party Oireachtas Committee on the Constitution's examination of Article 40.3.2° and Article 43 of the Irish Constitution (Bunreacht na hÉireann) to ascertain the extent to which they are serving the good of individuals and the community.

The scope of the issues under examination by the Committee is considerable and this submission will focus on those considered most germane and of immediate relevance to the work of Focus Ireland.

On this basis the submission looks in detail at the issue of social, economic and cultural rights in terms of access to housing and shelter and the right to housing. Additionally, the submission includes opinion and evidence-based arguments on the relationship between private property and the common good, the zoning of land, the price of development land and related issues pertinent to access to housing and accommodation in Irish society.

2 ESTABLISHING A RIGHT TO HOUSING IN THE IRISH CONSTITUTION (BUNREACHT NA hÉIREANN)

Housing and accommodation are fundamental to survival and to living a dignified life with peace and security. Without adequate housing and accommodation, employment is difficult to secure and maintain, physical and mental health is threatened, education is impeded, violence is more easily perpetrated, privacy is impaired and relationships are strained.

Unlike other EU countries, Ireland has no established right to housing or accommodation for its citizens[1]. Indeed housing rights in Ireland are historically weak by way of comparison to our European neighbours.

Homelessness on the other hand is perhaps the most extreme denial of housing rights in society and is a phenomenon directly resultant from poverty and social exclusion. Over the period since the early 1990s, Ireland has witnessed a consistent growth in the numbers of persons officially assessed as homeless.

In 2002, the official number of homeless people had increased to 5,581 from 5,234 over the three years since 1999. Meanwhile during this same time the housing waiting lists have shot up 23% to a record high of 48,413 households, representing approximately 140,000 people in total in serious need of housing and accommodation.

Without a right to housing, the extent, nature and experience of homelessness in society is deepened, exacerbated and prolonged.

Homelessness in Ireland is now at crisis level and the absence of a right to housing means that an important aspiration for society – the prevention and elimination of homelessness – remains unfulfilled.

Focus Ireland believes that the absence of a right to housing in Irish society means that our government, officials and administrators respond in a lesser way to the challenge of homelessness and housing need.

We commend the development of policy on homelessness since 2000 – particularly in terms of the improvements in co-ordination and inter-agency working, as well as in the resources made available to statutory and voluntary sector.

Nonetheless, we are of the opinion that deficiencies and deficits in current policy, ongoing problems of inadequate funding and expenditure and failures in implementation are exaggerated by the absence of an overarching right to housing that is enforceable through the courts and obliges the statutory bodies to ensure direct provision to meet housing needs is adequate, appropriate and timely.

We do not however adopt the naïve position that a right to housing will of itself deliver an immediate and lasting solution to homelessness and housing need in Irish society.

We recognise that even where such a right is laid down in Europe the law is not always applied, that insufficient resources are often allocated, that some groups – for example ethnic minorities – are excluded from access to the legal system, and that procedures for enforcing a right to housing can become so bureaucratic as to actually prevent or obstruct the right becoming operationalised and real.

Notwithstanding this, we remain convinced that such difficulties can be successfully overcome and that adoption of a right to housing would provide a legal basis to ensure Irish housing and homeless policy, and the statutory bodies charged with its implementation, meets the needs of people out of home and in need of housing and accommodation.

3 ADDRESSING THE DEFICIENCIES OF IRISH HOUSING LAW ON HOMELESSNESS

Another compelling rationale for the adoption of a right to housing within the Irish Constitution (Bunreacht na hÉireann) is the opportunity to make such a right justiciable in law so that it addresses key current housing law deficiencies with regard to homelessness.

The Housing Act, 1988 provided a legal definition of homelessness for the first time. The Act also specified local authorities as the statutory agencies with responsibility for homeless persons as well as extending the powers and responsibilities of local authorities to assess and respond to the needs of homeless people.

Under Section 2 of the Act a person is to be regarded as homeless by the relevant housing authority if:

a) there is no accommodation available, which in the opinion of the authority, he, together with any other person who normally resides with him or who might reasonably be expected to reside with him, can reasonably occupy or remain in occupation of, or

b) he is living in a hospital, county home, night shelter or other such institution and is so living because he has no accommodation of the kind referred to in paragraph (a) and he is, in the opinion of the Authority, unable to provide accommodation from his own resources.

Yet the 1988 Act has been subject to growing criticism since its introduction. The primary criticism arising is that the 1988 Housing Act obliges local authorities to assess homelessness but does not place any obligation on them to house people assessed as homeless.

Furthermore, the *Review of Service Provision for the Homeless in the Dublin Region* in 1995[2] stated that the Act:

> resulted in a lack of clarity in the respective responsibilities of Housing Authorities and Health Boards regarding the provision of services to the homeless. While the Act imposed a clear responsibility on Housing Authorities to provide accommodation for homeless people it created uncertainty regarding which agency should have primary responsibility of the provision of care, support, resettlement and outreach services for the homeless

Secondly, it has long been argued by NGO homeless service providers, that the definition of homelessness in the Act is too narrow and does not include those people threatened with homelessness.

Thirdly, under the 1988 Act local authorities have a duty to conduct regular assessments of homelessness in their areas as part of the tri-annual Assessment of Housing Needs.

Concerns are regularly expressed about the methods used to gain data and the figures that result from that assessment. It is generally felt among NGO homeless service providers that the assessments seriously underestimate the true figures on homelessness.

The Dublin based Homeless Agency has sought to refine the definition of homelessness used among Dublin homeless service providers by building on that detailed in the Act.

This operational definition has subsequently become established and is used across statutory providers in the Dublin region. For example, in March 1999 a multidisciplinary group from the Eastern Health Board issued a report recommending that

> All agencies should use the following definition of homelessness, consistent with that of the Homeless Initiative:[3]
>
> Those who are sleeping on the streets or in other places not intended for night-time accommodation or not providing safe protection from the elements or those whose usual night-time residence is a public or private shelter, emergency lodging, B&B or such, providing protection from the elements but lacking the other characteristics of a home and/or intended only for a short stay.

This definition was adopted by the Forum on Youth Homelessness, the subsequent Youth Homelessness Strategy and remains core to the Homeless Agency Action Plan *Shaping the Future*.

It is the opinion of Focus Ireland that this be considered as a formal definition of homelessness capable of being adopted into any future housing legislation referring to homelessness or seeking to improve the 1988 Act via amendment based on the introduction of a right to housing in the Irish Constitution (Bunreacht na hÉireann).

4 POLICY RECOMMENDATIONS TO GOVERNMENT ON A RIGHT TO HOUSING

There have been a number of policy recommendations made to government supporting the adoption of a right to housing, however one of the most recent and comprehensive investigations of housing and accommodation in Ireland was undertaken by the National Economic and Social Forum (NESF) in 2000.

On the basis of its particular remit on social inclusion and equality (as given to it by the government) the Forum established a Project Team on Social and Affordable Housing and Accommodation that prepared a report on the basis of a very extensive process of consultation with a wide range of housing interest groups, at both national and local levels, as well as with experts in the field.

The project team set itself the aim of evaluating the effectiveness of current housing policy for those who are socially and economically excluded. Their central aim was to identify ways to improve housing policy and practice, particularly for those who are socially and economically excluded.

Furthermore, the project team focused on how best social and affordable housing can contribute to an overall integrated housing policy in a manner that will promote social inclusion, and in the course of its work identified the following themes for consideration:

- the delivery of housing as a public service
- increasing the availability of affordable housing
- recognising the social aspects of housing provision
- promoting integration and reducing social segregation.

One of the major conclusions of the final report, *Social and Affordable Housing and Accommodation: Building the Future* (published in 2000), was that:

> access to adequate shelter is one of the most basic human needs and should be seen as a fundamental human and social right. Individuals, families, communities and economies cannot be sustained without adequate accommodation (ibid, pp5)

On this basis, the NESF made the following one of its main recommendations to government:

- Good quality, secure and affordable housing should be a social right and given statutory backing

Focus Ireland wishes to re-iterate its acceptance of this conclusion and its support for the recommendation to Government to give statutory backing to a right to housing. We commend both to the Oireachtas Committee on the Constitution for consideration and adoption.

5 IRISH OBLIGATIONS UNDER INTERNATIONAL LAW TO ESTABLISH A RIGHT TO HOUSING

Below we set out a short evidence-based rationale for our claim that the establishment of a right to housing is required in Ireland to meet our obligations under international law[4].

To begin with, it is important to note that additional to stated housing and homeless policy[5] – homelessness is considered by the Irish government as a denial of the opportunity for every household experiencing poverty and disadvantage to have available to them:

> housing or accommodation which is affordable, accessible, of good quality, suitable to their needs, culturally acceptable, located in a sustainable community and as far as possible in a secure tenure of their choice.
>
> Government of Ireland, *National Anti-Poverty Strategy Building an Inclusive Society*, February 2002, pp13.

Since 2002, the Irish National Anti-Poverty Strategy (NAPS) has been an important and contested policy arena for establishment of actions and the setting of targets to prevent and eliminate homelessness in Ireland as part of an overall drive to prevent and eliminate homelessness and social exclusion.

The NAPS emerged from the Irish Government agreement to meeting Commitment 2 of the Copenhagen Declaration arising from the UN World Summit (held in Copenhagen in March 1995). The commitment that was agreed is as follows:

> We commit ourselves to the goal of eradicating poverty in the world, through decisive national actions and international co-operation as an ethical, social, political and economic imperative of humankind.

This commitment was bolstered by the UN General Assembly resolution 50/107 of 20 December 1995, in which the Assembly proclaimed the first United Nations Decade for the Eradication of Poverty (1997-2006).

In addition, the UN General Assembly and the Commission on Human Rights have subsequently recognised that poverty is a human rights issue.[6] To quote from the Commission on Human Rights:

> Poverty and exclusion from society constitutes a violation of human dignity

In the words of the UN Economic and Social Council, the Copenhagen commitment means:

> Governments committed themselves to endeavouring to ensure that all men and women, especially those living in poverty, could exercise the rights, utilise the resources and share the responsibilities that would enable them to lead satisfying human lives and to contribute to the well-being of their families, their communities and humankind and committed themselves to the goal of eradicating poverty throughout the world through national actions and international co-operation, as an ethical, social, political and economic imperative of humankind'

Details on the original NAPS (1997 – 2001) were submitted to the UN Committee on Economic, Social and Cultural Rights (CESCR) in 1999.

This was in part fulfilment of Government obligations to submit a report (every five years) to the CESCR covering all the rights as set out in the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)[7].

The function of the report is to detail what the State is doing to implement the rights to housing, health, education, and so forth as set out in the Covenant. In May 1999, the concluding observations of the CESCR on the Irish report on the implementation of the International Covenant on Economic, Social and Cultural Rights was published.

While commending some developments in Ireland, particularly the NAPS and the poverty proofing of some policy proposals, the Committee expressed regret that the Covenant has not been fully incorporated or reflected in domestic legislation and that it is rarely invoked before the courts.

The Committee also regrets that the NAPS

> does not adopt a human rights framework consistent with the provisions of the Covenant.[8]

Arising from this criticism, the Committee recommends that Ireland:

- Incorporate justiciable economic, social and cultural rights into domestic law, and
- Integrate a human rights approach into the National Anti-Poverty Strategy

Of direct relevance to our obligation to make this legal covenant justiciable in Irish law is Article 11 of the Covenant that states:

> The State Parties to the present Covenant recognise the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The State Parties will take appropriate steps to ensure the realisation of this right

Secondly, the adoption of a right to housing is likely to form part of the complement of social, economic and

cultural rights established as part of the *EU Charter of Fundamental Rights* currently being developed as an integral element of the Constitution of the European Union, the first draft of which has recently been issued (May 26th 2003).

The current Charter of Fundamental Rights explicitly reaffirms the set of rights that result from the constitutional traditions and international obligations common to the Member States, from the Treaty on European Union, the Community Treaties, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the Community and by the Council of Europe.

In addition the Charter of Fundamental Rights reaffirms the case-law of the Court of Justice of the European Communities and of the European Court of Human Rights. Nonetheless, the Charter explicitly recognises due regard for the powers and tasks of the Community and the Union and the principle of subsidiarity.

The Charter of Fundamental Rights is therefore a next step in making a fundamental set of rights more visible and seeks to do so in light of social change and scientific and technological development.

Indeed, Focus Ireland has previously argued that the set of social, economic and cultural rights as stated in the Charter do not go far enough. For example, Article 34 on Social Security and Social Assistance states:

> in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national laws and practices.

Housing assistance is not defined in this context and there is no reference here to issues of access, quality or security of tenure, all of which bear heavily on the housing status of an individual or household. There is no articulation here of a right to shelter or a right not to be homeless.

On this basis Focus Ireland argues that *Article 31* of the *European Social Charter* (revised), 1996 presents a more complete set of rights. It states that:

> With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
> - To promote access to housing of an adequate standard
> - To prevent and reduce homelessness with a view to its gradual elimination
> - To make the price of housing accessible to those without adequate resources.

Notwithstanding this, we know that the Irish State exempted itself from the provisions of Article 31 above on the grounds that:

> in view of the general wording of Article 31 of the Charter, Ireland is not in a position to accept the provisions of the Charter at this time'[9]

In the opinion of Focus Ireland, it is therefore incumbent on the All-Party Oireachtas Committee on the Constitution to seek to obtain a right to housing in Irish society as a basic and fundamental human right in order to ensure that housing rights extended to other EU citizens are equally available to Irish citizens.

Not to do so ignores the significant work of a key government advisory body (the NESF – see above) as well as the details of the forthcoming social, economic and cultural rights that will be established under the EU Constitution.

Furthermore, it would perpetuate the failure of the NAPS to regard poverty and social exclusion as a human rights issue and will continue to ignore our legally binding obligations to ensure the rights set out in the *International Covenant on Economic, Social and Cultural Rights* are met.

6 UNDERSTANDING AND DEFINING A RIGHT TO HOUSING

A right to adequate housing can be understood as incorporating the following seven key elements:

- security of tenure
- availability of services, materials, facilities and infrastructure
- affordability
- habitability
- accessibility
- location
- cultural appropriateness.

Defining a right to housing is somewhat problematic but is achievable. Arguably the most authoritative interpretation of the right to adequate housing under international human rights law is provided by General Comment No. 4 adopted by the UN Committee on Economic, Social and Cultural Rights (CESCR).

This general comment elaborates in detail the seven key elements of adequate housing. In short, it states the following:

Security of tenure

Security of tenure is the cornerstone of the right to adequate housing. Secure of tenure protects people against arbitrary forced eviction, harassment and other threats.

Availability of services, materials, facilities and infrastructure

Adequate housing requires access to potable drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage, refuse disposal, site drainage and emergency services. When one or more of these attributes of adequate housing are not available, the right to adequate housing is not fully in place.

Affordability

The housing affordability principle stipulates simply that the amount a person or family pays for their housing must not be so high that it threatens or compromises the attainment and satisfaction of other basic needs. The lack of affordable housing is a major problem in Ireland where individuals and families living in poverty find it impossible to access adequate housing via the private market.

Habitability

For housing to be considered adequate, it must be habitable. Inhabitants must be ensured adequate space and protection against the cold, damp, heat, rain, wind or other threats to health or structural hazards.

Accessibility

Housing must be accessible to everyone. Disadvantaged and socially excluded groups should be ensured some degree of priority consideration in housing. Both housing law and policy must ensure their housing needs are met. Additionally, in rental housing markets, discrimination against disadvantaged groups is common and poses a significant barrier to housing access.

Location

For housing to be adequate, it must be situated so as to allow access to employment options, health care services, schools, childcare centres and other social facilities. It must not be located in polluted areas.

Culturally adequate

The right to adequate housing includes a right to reside in housing that is considered culturally adequate. This means that housing programmes and policies must take fully into account the cultural attributes of housing which allow for the expression of cultural identity and recognise the cultural diversity of the State's population.

7 OTHER ISSUES RELEVANT TO THE OIREACHTAS COMMITTEE'S EXAMINATION OF ARTICLES 40.3.2O AND 43 OF THE IRISH CONSTITUTION (BUNREACHT NA hÉIREANN)

This submission concentrates on making the argument for the adoption of a right to housing in the Irish Constitution (Bunreacht na hÉireann). Nonetheless, given the extensive set of other issues set out for examination by the Oireachtas Committee, we offer the following short statements of opinion and evidence-based argument for consideration against the following topics.

Private property and the common good

Focus Ireland asserts that the constitutional right to private property established by Articles 40.3.2° and 43.1.2° be contingent to the principles of social justice and the exigencies of the common good as set out in Articles 43.2.1° and 43.2.2°, and that on this basis, Irish legislation ensures an equal balance between the interests of the individual and the community in the pursuit of these rights.

The zoning of land

Focus Ireland re-iterates its demand that a dedicated policy of public land banking is formulated and adopted by Government. This policy is required to ensure multi-annual programmes of social and affordable housing development occur without an over-reliance on land acquisition via the private market at considerable cost and expense to the Exchequer, and the subsequent diminution of social and affordable housing output due to the cost of land purchase absorbing a disproportionate amount of capital expenditure compared to actual cost of construction.

The price of development land

Focus Ireland commends the recommendations of the 1973 Committee on the Price of Building Land, chaired by Mr Justice Kenny for dealing with the problems of betterment arising from the re-zoning of land for development. The two central objectives of the Committee were to consider measures to reduce or stabilise the price of serviced and potential building land and to ensure that the community acquired on fair terms the betterment element arising from works of local authorities (e.g. rezoning, servicing, designation). The principal recommendation, which remains un-adopted, is that local authorities should be able to acquire potential development land designated by the High Court at existing use value (rather than the usually much higher 'development' value) plus 25 per cent.

Access to the countryside

By way of an amendment to the Criminal Justice (Public Order) Act, the Housing (Miscellaneous Provisions) Act, 2002 criminalised trespass on public and private land and in certain cases provides for the right of arrest without warrant. Focus Ireland asserts this legislation to be discriminatory against those groups in Irish society without access to appropriate housing and accommodation and shares the viewpoint of the Human Rights Commission and the Equality Authority in this regard. We call for this legislation to be repealed and for the issue of trespass to be de-criminalised and dealt with under civil, not criminal law.

Appendix A

INTERNATIONAL LEGAL RESOURCES ON HOUSING RIGHTS

Housing rights are entrenched in a number of international human rights instruments. The legal resources listed below – declarations, covenants and conventions – together form the body of international law recognising housing rights. In legal terms, the most powerful documents are called conventions, covenants or charters. They are legally binding treaties. Declarations and recommendations are also of vital importance, but are accorded less legal weight than conventions, covenants and charters.

THE UNIVERSAL DECLARATION OF HUMAN RIGHTS (UDHR)

The Universal Declaration of Human Rights is the first major international agreement on human rights. It is considered to have been the inspiration to all subsequent human rights treaties. It is also the first human rights standard to recognise housing rights. Adopted and proclaimed by the General Assembly on 10 December 1948, Article 25 of the UDHR enshrines a specific right for everyone to adequate housing:

> Article 25. Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (ICESCR)

At the international level, the most significant articulation of the right to housing is found in the International Covenant on Economic, Social and Cultural Rights (ICESCR). The ICESCR became law on 3 January 1976 and is now legally binding on more than 140 countries. The right to adequate housing is found in article 11(1). This is the most legally significant universal codification provision recognising this right and has been subject to the greatest analysis, application and interpretation of all international legal sources of housing rights. Although the Covenant recognises the right to housing as a part of the larger right to an adequate standard of living, under international human rights law the right to adequate housing is understood as an independent or free-standing right. The Committee on Economic, Social and Cultural Rights (CESCR) is responsible for monitoring State party compliance with the Covenant.

> Article 11(1). The State parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and for his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION (CERD)

The Convention on the Elimination of All Forms of Racial Discrimination became law on 4 January 1969 and is currently legally binding on 158 countries. The UN Committee on the Elimination of All Forms of Racial Discrimination (CERD) monitors compliance with the Convention.

> Article 5(e)(iii). In compliance with the fundamental obligations laid down in article 2 of this Convention, State Parties undertake to prohibit and eliminate racial discrimination in all of its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin to equality before the law, notability in the enjoyment of the following rights:…(e) in particular…(iii) the right to housing.

CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW)

The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) became law on 3 September 1981 and is now legally binding on 163 countries. The UN Committee on the Elimination of All Forms of Discrimination Against Women monitors State party compliance with the Convention.

> Article 14(2)(h). State Parties shall take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right…(h) to enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.

CONVENTION ON THE RIGHTS OF THE CHILD (CRC)

The Convention on the Rights of the Child became law on 2 September 1990 and is now legally binding on 191 countries. The Committee on the Rights of the Child monitors State party compliance with the Convention.

> Article 27(3). State Parties in accordance with national conditions and within their means shall take appropriate measure to assist parents and others responsible for the child to implement this right and shall in the case of need provide material assistance and support programmes, particularly with regards to nutrition, clothing and housing.

EUROPEAN CONVENTION ON HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (ECHR)

There are 41 States parties to the Convention. 38 countries have ratified the Protocol No.1. Thirty-one countries have ratified Protocol No. 4. Individual and group complaints alleging violations of the ECHR can be submitted to the European Court of Human Rights and Fundamental Freedoms.

Article 8(1) states:

> Everyone has the right to respect for his private and family life, his home and his correspondence.

Article 1 of Protocol No. 1 of the ECHR states:

> 1(1) Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> 1(2) The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Article 2(1) of Protocol No. 4 of the ECHR states:

> 2(1) Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

EUROPEAN SOCIAL CHARTER

The European Social Charter was adopted in 1961 and then revised and amended in 1996 to include Article 31 on housing rights. State compliance with this Charter is monitored by the European Committee of Independent Experts. Housing rights provisions are also found in articles 16 and 19(4) of the Charter and within article 4 of the Additional Protocol to the Charter.

Article 31 — The right to housing

> With a view to ensuring the effective exercise of the right to housing, the Parties undertake measures designed:
>
> - to promote access to housing of an adequate standard;
> - to prevent and reduce homelessness with a view to its gradual elimination
> - to make the price of housing accessible to those without adequate resources.

Article 16 —The right of the family to social, legal and economic protection

> With a view to ensuring the necessary conditions for the full development of the family which is the fundamental unit of society, the Contracting Parties undertake to promote the economic, legal and social protection of family life by such means as social and family benefits, fiscal arrangements, provision of family housing, benefits for the newly married, and other appropriate means.

Article 19 — The right of migrant workers and their families to protection and assistance

> With a view to ensuring the effective exercise of the right of migrant workers and their families to protection and assistance in the territory of any other Contracting Party, the Contracting States undertake … (4) to secure for such workers lawfully within their territories, insofar as such matters are regulated by law or regulations or are subject to the control of administrative authorities, treatment not less favourable than that of their own nationals in respect of the following matters … (c) accommodation.

Article 23 — The right of elderly persons to social protection.

> With a view to ensuring the effective exercise of the right of elderly persons to social protection, the Parties undertake to adopt or encourage, either directly or in co-operation with public or private organisations, appropriate measures designed in particular: to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: (a) provision of housing suited to their needs and their state of health or of adequate support for adapting their housing.

Article 30 — The right to protection against poverty and social exclusion

> With a view to ensuring the effective exercise of the right to protection against poverty and social exclusion, the Parties undertake:
>
> a. to take measures within the framework of an overall and co-ordinated approach to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance;

Article 4 of the Additional Protocol to the European Social Charter

> With a view to ensuring the effective exercise of the right of elderly persons to social protection, the States parties undertake to adopt or encourage, either directly or in cooperation with public private organizations, appropriate measures designed in particular:
>
> to enable elderly persons to choose their life-style freely and to lead independent lives in their familiar surroundings for as long as they wish and are able, by means of: provision of housing suited to their needs and their states of health or of adequate support for adapting their housing [and] to guarantee elderly persons living in institutions appropriate support, while respecting their privacy, and participation in decisions concerning living conditions in the institution.

EUROPEAN COMMUNITY CHARTER OF FUNDAMENTAL SOCIAL RIGHTS (1989)

Article 29:

> All disabled persons, whatever be the origin and nature of their disablement must be entitled to additional concrete measures aiming at improving their social and professional integration. These measures must concern, in particular, according to the capacities of the beneficiaries, vocational training, ergonomics, accessibility, mobility, means of transport and housing.

Notes:

1 Portugal led the way in the adoption of housing rights into her constitutions and laws, declaring in 1976 that 'everyone shall have the right to a dwelling of adequate size satisfying standards of hygiene and comfort and preserving personal and family privacy'. EU countries with a right to housing in their constitution (and year it was enacted) are Portugal (1976); Spain (1978); Netherlands (1982); Belgium (1994). In Italy, a right to housing has been upheld by their supreme court. The following German regions have a right to housing enshrined in their state constitutions: Barvaria; Bremen; Berlin and Brandenburg. The following countries have a right to housing enshrined in parliamentary law: Britain (Housing (Homeless Persons) Act, 1977, since amended); France (Loi Besson, 1990) and Belgium (Loi Onkelinx, 1993).

2 Quoted in *Under One Roof – a report on the future options for the organisation of homeless services in Dublin*, Homeless Initiative, June 1998

3 Later renamed the Homeless Agency

4 Details of the full extent of our international obligations towards establishing a right to housing are set out in Appendix A.

5 Homeless – *An Integrated Strategy*, *Youth Homeless Strategy*, and *Homeless Preventative Strategy*.

6 See General Assembly resolution 55/106, 4th December 2000 and Commission on Human Rights resolution 2001/31, 23rd April 2001

7 Ireland signed the International Covenant on Economic, Social and Cultural Rights on 1st October 1973 and ratified it on 8 December 1989.

8 UN Economic and Social Council, Concluding observations of the Committee on Economic, Social and Cultural Rights, Ireland. 14/05/1999. E/C.12/1/Add.35. Section D, paragraph 11.

9 Taken from the Declaration contained in the instrument of ratification and in a letter from the Permanent Representative of Ireland, date 4th November 2000. The other exemptions taken refer to Article 8, paragraph 3; Article 21, paragraphs a and b; and Article 27, paragraph 1, sub-paragraph C.

FORFÁS

1 INTRODUCTION

Forfás, in conjunction with the enterprise development agencies, IDA Ireland and Enterprise Ireland, has prepared this paper in response to an invitation by the All-Party Oireachtas Committee inviting submissions on the issue of property rights.

The agency's interest in this matter is restricted to those areas of national enterprise and infrastructure development which may be affected by the provisions of the constitution pertaining to property rights. The agencies will limit their submission to the enterprise critical issues of:

1 private property and the common good;
2 compulsory purchase;
3 the price of land; and
4 infrastructural development and planning.

Following a brief outline of each of the key issues, the submission will set out a number of recommendations that will focus primarily on the need to address uncertainty, costs and speed of delivery with respect to the planning and completion of infrastructure and major economic projects that we believe are in the national interest.

We ask the committee to note that recommendations in section 2.2 may be the only ones which require constitutional change. While the proceeding sections may not have direct constitutional implications, we ask the committee to support any changes required to ensure that the Agencies' recommendations are adopted.

2 PRIVATE PROPERTY AND THE COMMON GOOD

2.1 *Issue*

The Constitution is a 'living document', which is subject to interpretation by the courts. Over time, it appears that the balance between private rights and the public good has been subject to change. During the 1960s, 70s and 80s the courts appeared to favour private property rights at the expense of social projects. Since the 1990s the balance has been moving towards limiting the rights of private property in order to pursue desirable social objectives.

The constitutionality of Part V of the Planning and Development Bill 1999 was upheld by the Supreme Court following a referral of that legislation to the court by the president. The court examined the provisions for affordable and social housing, which can require a developer to cede up to 20 per cent of a site (or otherwise to provide serviced sites or completed houses) for this purpose. The Bill provided that the value of land to be transferred should be calculated at 'existing use value',

which is the value without benefit of planning permission. It was argued to the Supreme Court that this provision represented an unjust attack on property rights. The Supreme Court rejected this view and held that while a citizen subject to compulsory acquisition of land would usually be entitled to market value, this was not an absolute rule. The Supreme Court held that special considerations applied to the planning Acts as every person who acquires or inherits land takes it subject to any restrictions which the general law of planning imposes on the use of property in the interest of the common good.

The Supreme Court, in In re. Article 26 of the Constitution and Part V of the Planning and Development Bill 1999, held that the Oireachtas had imposed a limit on compensation in order to pursue a desirable social objective and this interference with property rights was proportionate and constitutional.

2.2 *Recommendations*

Given that questions as to the constitutionality of measures adopted to further infrastructural projects will invariably come down to weighing the competing interests concerned, it is recommended that Article 43 of the Constitution be amended so as to make explicit the heavy weight that ought to be attached in any such balancing exercise to the high level of public good associated with an orderly, cost-effective, and efficient delivery of necessary public infrastructural projects.

2.2.1 *Suggested amendments to Article 43*

A suggestion, which might be considered by the Oireachtas Committee, would be to revise the wording of Article 43.2.1° and Article 43.2.2° to include the following:

Article 43.2.1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice and by the need to pursue desirable national objectives including the provision of important public infrastructure in the interests of the common good.

Article 43.2.2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good and to have particular regard to desirable national objectives including the provision of essential public infrastructure in the interests of the common good.

We also recommend the addition of a further article 43.2.3° that would help to remove any remaining ambiguity.

Article 43.2.3° In particular, in reconciling the exercise of the said rights with the exigencies of the common good, the State may pay particular regard to the need to pursue desirable national objectives, including the provision of essential public infrastructure in the interests of the common good in an orderly, cost-effective, and efficient manner.

3 COMPULSORY PURCHASE

3.1 *Issue*

Uncertainty in the planning process can act as a deterrent against investment. The CPO process can cause considerable delays in the delivery of infrastructure projects. This need not be the case, however. Once a Notice to Treat is served, which allows the transfer of land to the local authority, any outstanding compensation issues are referred to an independent arbitrator if required. This need not prevent the works for which the lands were required to be commenced. A recent example of this is land acquired for the South Eastern Motorway. Work has commenced despite the compensation claims being unresolved. While work can continue in this instance, the uncertainty surrounding the scale of compensation required makes investment less attractive.

3.2 *Basis of compulsory purchase powers*

Local authorities have powers to purchase land by agreement or compulsorily. These powers are derived from legislation in a number of areas as follows:

- Power to acquire land by agreement or compulsorily under Section 213 of the Planning and Development Act 2000;
- Power to acquire land in advance of need;
- Power to acquire land for road operations under Section 84 of the Local Government Act, 1946 and under the Roads Act, 1993;
- Compulsory acquisition from statutory undertakers or state-sponsored bodies where Section 130 of the Transport Act precludes the compulsory acquisition of land occupied by a body corporate for the purpose of any railway, tramway, harbour, dock, inland navigation, e.g. land owned by CIE, Aer Rianta, a Harbour Authority etc.

Compulsory purchase procedures for public infrastructure projects such as road schemes, water supply and sewage facilities are a feature of all developed countries. The compulsory acquisition of land is constitutional if this is for the common good and the Courts have consistently upheld the legislative provisions permitting this. Within this process is the basic premise that all landowners must be adequately compensated for the loss of their land.

Until recently, the CPO process came within the jurisdiction of the Minister for the Environment and Local Government, who had the ability to make recommendations on the order. Under the Planning and Development Act 2000 however, this process now comes under the jurisdiction of An Bord Pleanála.

An Bord Pleanála reviews the CPO and the findings of the local authority. Generally an oral hearing is conducted to hear the views of all parties involved. In making a final decision, the Bord may uphold the order as made by the local authority, or may invalidate the order. If the order is upheld, the local authority will issue a Notice to Treat, allowing the transfer of ownership of land. The actual serving of such notices is generally dependent on resources being made available to the authority by either the NRA or the Department of the Environment and Local Government.

The determination of compensation in relation to a CPO can be a long and complicated process, though once an order has been made, compensation claims do not have to be finalised prior to the commencement of works. Compensation is based on the market value of the land at the time of the Notice to Treat. To improve the efficiency of the CPO process, the following recommendations are made.

3.3 *Recommendations*

Consideration be given to the establishment of a dedicated national system for assessing CPOs, e.g. a specific court, tribunal or independent assessment board has the potential for streamlining and accelerating the CPO system. This matter warrants further investigation, including the roles and responsibilities of the court and the nature of the legislative amendment required. Of more significance may be the need to consider such a court in the context of general reform having regard for the demands on the judicial system in planning and related administrative law actions.

In the context of the preceding recommendation, the agencies recognise that measures, which at first glance appear attractive, may not necessarily achieve the desired result. The recent addition of a Notice to Treat in planning legislation is a case in point. The intention of the change was to eliminate, at an early stage, those planning cases that had no real chance of success and thus speed up the final determination of the planning cases. However, experience has shown that the first hurdle in planning cases (the Motion to Notice) takes as long as a substantive hearing would have taken.

Introducing clear and consistent mechanisms through which compensation might be calculated in an efficient manner would reduce the current uncertainty, making investment in public projects a more attractive option.

4 THE PRICE OF LAND

4.1 *Issue*

In recent years, there has been extensive commentary on the escalating costs involved with public infrastructure projects, such as roads and light rail. Much of this cost inflation originates from expenditure on land purchase[1]. One particularly contentious issue has been the manner in which land value is calculated. The potential for an infrastructural development can bestow considerable 'hope value' on a piece of land. This has the potential to encourage private speculation, which can stifle social development.

4.2 *Recommendations*

The normal principle for compensation in litigation is to put a party back into the position in which they were prior to the events giving rise to the litigation taking place. We therefore recommend that the enforced procurement of land should be at prices based upon a fair-value rather than a speculative-value assessment. This would limit hedging and restrain the excessive rate of land price growth witnessed in recent years.

The problem of highly inflated land costs was highlighted by the Kenny Report in 1974. It recommended that development land be purchased at a rate no more than 25 per cent greater than its existing use value. In such an instance, 'compensation' might not be equal to 'market value' because it need not include 'hope value'. The Dreher case[2] later upheld the view that compensation need not be fixed at market value, albeit that this was not the central thrust of this particular judgement.

Given the significance of our recommendation relating to compulsory purchase compensation, it was felt necessary to provide greater detail on this proposal:

4.2.1 *Calculating compensation*

1 The current method of calculating compensation, when land is compulsorily acquired or planning permissions refused, is defective. Powerful interest groups have, in the past,

negotiated compensation packages substantially more generous than those awarded to individuals.

2 The common price calculated is the market value of the land. This is reasonable if the land has already claimed market value e.g. if an existing shop is being demolished to make way for a road.

3 There is no constitutional requirement that the price paid should be the market value for land. The Constitution requires that fair compensation be paid. *(Dreher v Irish Land Commission)*

4 We would support a pricing mechanism less dependent upon anticipated land values, particularly where these values incorporate anticipated increases in the event of public infrastructure developments, i.e. when the value is only an estimated value based to a large extent on future potential uses of the land. Notwithstanding, where a future potential rise in value is likely, then value should be calculated as the existing use value plus any loss the owner can prove he has incurred in buying, and since buying, the land plus a reasonable return on a speculative investment, e.g. if he borrowed to buy the land reasonably believing (because of zoning in a development plan, proximity to a proposed new development) that it would have a higher value use. A possible model would suggest payment of cost price plus any interest on borrowings plus a given per cent over the prevailing interest rate. In this way, the landowner:

- will not lose money on the investment;
- will get a reasonable return on the investment; and
- will not get an exorbitant return simply because the State needs the land.

An investor's reasonable investment backed expectations should not be frustrated, but neither should windfall gains arise due to public action, e.g. the zoning of land or the construction of a new road.

5 INFRASTRUCTURAL DEVELOPMENT AND PLANNING

5.1 *Issue*

The speed of the planning process is a key issue that has been identified by the agencies as an impediment to the effective rollout of economic infrastructure. Certainty, speed and consistency from the planning process are essential to ensuring the timely and efficient rollout of economic infrastructure.

5.2 *Recommendations*

While recognising the requirement for due process, the Agencies believe that important benefits could be realised by undertaking the following:

1 codifying and/or reducing timescales for the handling of planning and development applications
2 streamlining and defining stages and decision making mechanisms
3 redefining the roles and numbers of participant stakeholders.

5.2.1 *Codifying and/or reducing timescales for the handling of planning and development applications:*

- Introduction of a fixed period for lawyers, valuers and arbitration boards to assess land compensation awards following the example of Spain, where mandatory deadlines for the negotiations of CPOs are set.
- Lower public display/statutory consultation periods from 10 weeks for development plans and facilitate greater public consultation during these periods, following the example of other countries such as Denmark.
- A fast-track system for strategic national projects (e.g. motorways, key roads etc.) that are key to the achieving national policy objectives (e.g. National Spatial Strategy). Lengthy planning procedures and waiting times act as a disincentive to investment. For planning purposes, such projects should be ranked and prioritised rather than subject to the orderly queue approach that persists at present. It may also be appropriate for An Bord Pleanála to establish separate divisions for public and private planning applications in order to fast-track projects of significant public value.
- Review of Environmental Impact Statements by An Bord Pleanála should be within the statutory timing guidelines.
- The current 18 week time limit for decisions by An Bord Pleanála should be mandatory, rather than recommended.

5.2.2 *Streamlining and defining stages and decision making mechanisms*

- Under the above heading, consideration could be given *inter alia* to the inclusion of 'public values' in arbitration cases where issues arise between infrastructure projects and national monuments. The National Monuments Act, 1994 allows the minister (as final arbitrator) to adjudicate only on a

project's archaeological merits. It should be possible to balance archaeological and nature conservation interests with other interests such as reasons of overriding national or regional importance including social and economic reasons, where appropriate.

5.2.3 *Redefining the roles and numbers of participant stakeholders*

- Review the rationale for allowing third parties appeal on the basis of 'point of law of exceptional public importance'[3]. While the right to broad rights of appeal under the Aarhus accords are recognised, we believe a more robust assessment of the merits of cases and the motivation behind applications for leave for judicial review would be beneficial. While the agencies accept that testing the grounds for *locus standi* may lead to greater delays in the legal process, we believe that consideration should be given to requiring non government organisations (NGOs) to satisfy certain requirements before being accorded this status to challenge environmental authorisations. Considerations should also be given to requiring An Bord Pleanála to examine the merits of any appeal, within 2-3 weeks, when it can be objectively demonstrated that this appeal is being brought for frivolous, trivial or vexations reasons (e.g. to delay a project) or where the appellant has a history of opposition to a particular development.
- Property ownership should not extend to all land beneath the surface. Land beneath a depth of ten metres or more, should be deemed to fall under public ownership. This would facilitate the building of infrastructural projects which involve tunnelling.
- Each national infrastructure project should be made the responsibility of a single government department or agency and that entity should take the role of national project manager for the delivery of the infrastructure. Consideration should be given to the feasibility of increasing the NRA's direct involvement in road project planning, design and construction and the implications of such a change should be determined;

6 CONCLUSIONS

This paper has explored the manner in which 'property rights', as they are enshrined in the Irish Constitution, affect the enterprise agenda. In examining areas of compulsory purchase, the price of development land and infrastructural development and planning, the Agencies conclude that increasing certainty surrounding existing procedures and streamlining the planning processes involved could have significant benefits in terms of reducing the costs and increasing the speed at which public infrastructure projects are delivered. In particular, our submission recommends consideration of a further Article 43.2.3º in the Constitution to re-emphasise the importance of the 'common good' in the context of infrastructure development. We hope that the All-Party Oireachtas Committee will look favourably on this recommendation.

Appendix 1

FORFÁS – COUNSEL'S OPINION

1 I have been asked to review a draft document prepared for presentation to the All-Party Oireachtas Committee on the Constitution on behalf of the various enterprise development agencies. The requested review is from a constitutional perspective. I propose dealing with the four substantive sections of the draft document in the order in which they appear therein.

2 Private property and the common good

I agree with the general approach set out in this section. The general description of the historical tendency of the courts is a reasonable interpretation, and would be in agreement with the views expressed by many commentators. I do feel that the precise nature of the recommendation might, however, be altered. I should first set out my reasons, and then set out a suggested approach.

As will be seen from all of the case law, these questions ultimately come down to ones of balance. In the more modern case law, a doctrine of proportionality has been developed which formed part of the basis of the analysis of the Supreme Court in In re. Article 26 of the Constitution and Part V of the Planning & Development Bill, 1999. That doctrine in the way in which it has developed requires that three tests be met before a measure which might interfere with a person's rights can meet constitutional scrutiny. These are:-

a) That there be a rational connection between the good sought to be achieved and the interference with the rights of the individual concerned;
b) That the rights are interfered with in the least obtrusive manner consistent with achieving the good concerned; and
c) That there is a proportionality between the good to be obtained, on the one hand, and the infringement of the individual's rights, on the other hand.

It will, therefore, be seen that these matters almost invariably come down to a balancing exercise between the undoubted public good

of infra-structural projects (or, more accurately, legislation designed to make such projects more achievable), on the one hand, and the undoubted interference with the rights of individuals necessary to give effect to such projects, on the other hand. No matter what the wording of the Articles of the Constitution concerned, it seems to me inevitable that questions involving the constitutionality of legislation or measures designed to promote infrastructural projects will come down to a somewhat subjective view as to the balance concerned. However, what the wording of the Constitution may be able to do is to effect the weight to be attached to certain of the matters to go into that balance.

In those circumstances, might I propose that the recommendation should be based upon a suggestion of making explicit provision in the Constitution to the effect that a high weight is to be attached to procuring, in an efficient and cost effective manner, necessary public infrastructural projects. If that advice were to be accepted, the recommendation might commence with a paragraph, such as:

> Given that questions as to the constitutionality of measures adopted to further infrastructural projects will invariably come down to weighing the competing interests concerned, it is recommended that Article 43 of the Constitution be amended so as to make explicit the heavy weight that ought to be attached in any such balancing exercise to the high level of public good associated with an orderly, cost-effective, and efficient delivery of necessary public infrastructural projects.

It might then go on to suggest the addition of a further Article 43.2.3:

> In particular, in reconciling the exercise of the said rights with the exigencies of the common good, the State may pay particular regard to the need to pursue desirable national objectives, including the provision of essential public infrastructure in the interests of the common good in an orderly, cost-effective, and efficient manner.

Finally, under this heading, the last paragraph of the text should be altered to read:

> The Supreme Court decided in In re. Article 26 …

rather than 'in relation to'.

The above is the proper title of the case. Article 26 is only appropriately mentioned as part of that title, as it is the article which allows references by the president to the Supreme Court. If it is not considered appropriate to refer in formal terms to the title of the case, then all reference to Article 26 should be deleted.

3 Compulsory purchase

There seems little constitutional element to this section. As the text correctly points out, the courts have consistently upheld CPO schemes as being permitted under Article 43 as being an appropriate de-limitation of rights to property in the common good. While compensation is assumed, the precise basis of the calculation of compensation does not appear to be constitutionally mandated, though it would, of course, have to be reasonable or 'fair'. Otherwise, and save in unusual circumstances, there would be a significant risk of a disproportionate interference with an individual's rights notwithstanding the desirability in the common good of the infrastructural project concerned. If compensation were to be unreasonably low, then a court would be likely to take the view that it was unfair to place the burden of providing what was, undoubtedly, a desirable project to an unreasonable extent on the individual from whom necessary land (or interests in land) had to be acquired. While the precise threshold of reasonableness or fairness in this context has never been fully worked out in the courts, I believe that a fair margin of latitude would be allowed to the legislature in determining the proper basis of the calculation of compensation. [See also para. 4].

Insofar as the recommendations touch upon legal questions, even though not constitutional ones, I would, as a personal view, indicate a slight caution about the adoption of specialised divisions of the courts as a solution to the undoubted difficulties encountered with delay in the event of judicial challenge. Ireland is a small jurisdiction. While there is a reasonable volume of cases before the courts at any given time which might come within a loose 'planning/CPO' area, there can be little doubt that it is inevitable in a small country that significant fluctuations in the volume of such cases, and the demands which they place upon the courts system are likely to occur. There is always a risk in allocating such cases to a specialised division that that division will suffer bottlenecks itself on those occasions when the demand upon its services is particularly high. In the current system, the President of the High Court operates an ad-hoc urgency listing system whereby cases of particular public importance are given priority, and have judges made available to hear them outside the ordinary listing system. It is doubtful if there would be a justification for such a measure in respect of planning/CPO cases if it had its own specialised division. It is at least possible, therefore, that the creation of a specialised division could at certain times lead to even greater delay. While the proposal has a certain

superficial attraction, I am not sure that it will, necessarily, achieve the end desired.

An analogy with a measure already adopted might be considered. As part of the general measures introduced by way of amendment to the Planning Code, with a view to speeding up the process whereby definitive decisions in relation to planning matters are made, the planning legislation was amended so as to require a person seeking a judicial review of a planning determination to bring a Motion on Notice prior to being given leave to pursue judicial review proceedings. In practice, what this means is that a proposed applicant for judicial review in a planning case has to fight a contested application (at which the planning authority whose decision he wishes to question, and any legitimately interested third party, are entitled to be represented). This is in distinction to the ordinary position in relation to judical review proceedings where an applicant has to pass a relatively low threshold in persuading the court that he has an arguable case before being given leave to commence the proceedings. In addition, the applicant in a planning case has to satisfy the court that he has 'substantial grounds' rather than the lower threshold applicable in ordinary judicial review cases. The intended effect of these measures was to cut off a significant proportion of planning cases at birth (i.e. those which had no real merits or chance of success), and, thus, speed up the final determination of the planning process in such cases. However, in practice, the effect has been to elevate the appli-cation for leave into a full hearing frequently lasting some days, and, in effect, taking as long to get on for hearing in the list as a substantive hearing would have taken in the first place. Furthermore, in the event that the applicant gets over the hurdle of establishing that he has substantial grounds, there is then a further delay until court time can be found for a second substantive hearing before the matter is finally determined. It was aptly described by one senior judge as a change from a system which provided for one long hearing to one that requires two long hearings in many cases. Thus, a measure which had superficial attractions when introduced has, at least arguably, proved to be counter-productive, or, at the very least, has been of significantly less benefit in achieving its ends than had been thought.

However, given that the recommendation under this heading quite properly acknowledges that the matter warrants further investigation, I would not quibble with its current text. It does not appear to me, however, to have any constitutional implications one way or the other.

4 Price of land

In the recommendations section, I think it may be going a little far to suggest that the principle contained in the Kenny Report was upheld in the Dreher case. It is true to state that in that case Walsh J. said the following:

> It may well be that in some particular cases social justice may not require the payment of any compensation upon a compulsory acquisition that can be justified by the state as being required by the exigencies of the common good.

He went on to say that:-

> It does not necessarily follow that the market value of lands at any given time is the equivalent of just compensation as there may be circumstances where it could be considerably less than just compensation, and others where it might, in fact, be greater than just compensation. The market value of any property, whether it be land, or chattels, or bonds, may be affected in one way or another by current economic trends or other transient conditions of society.

It is, therefore, correct to state that, in the view of Walsh J. in that case, compensation did not have to equate to current market value. It is certainly consistent with the view expressed in the Kenny Report, but does not involve an express exclusion of 'hope value'.

However, a slight re-wording of the paragraph which referred to the fact that Dreher provides support for the view that compensation need not necessarily be fixed at market value would seem appropriate. It should be noted that Dreher was a case involving land bonds which (on the facts of the case) were worth somewhat less on the open market than the value of the acquired lands assessed by the court in the compulsory acquisition process. This resulted from interest rate movements during the currency of an individual year (the rate of land bonds being fixed at the beginning of the year). On that basis, the Supreme Court was happy to accept that the Appellant was entitled to 'just compensation', and had had it in that he had received land bonds to a nominal value equivalent to the market value of his land which only happened to be less valuable at the date of delivery of the bonds to him than their par value by virtue of the vagaries of the interest rate market. The statements of general principle referred to above are clearly, therefore, largely *obiter*. However, having regard to the existing jurisprudence of the courts in relation to compensation, and the added weight to be attached to the necessity of procuring public infrastructural projects in a cost-effective way (if the suggested amendments referred to above at para 2 are adopted) the state should

have the capacity, consistent with the Constitution, to adopt a compensation scheme which excludes hope value. Indeed, it is difficult to see why there should be any constitutional entitlement to receive compensation based on a valuation attributable only to the existence of at least a proposal for an infrastructural development where the compensation is being paid so that that infrastructural development can be carried out. If the infrastructural proposal were abandoned, then one would be left with existing use value without any 'hope value'. The normal principle of compensation in litigation is to put a party back into the position in which they were prior to the events giving rise to the litigation taking place. Applying that principle to the CPO regime, it would seem that one should get the value that would have been present prior to the infrastructural project being mooted in the first place. Obviously, the practicalities of disentangling how much of its current value may be so attributable is a matter to which attention would need to be given.

I do not believe there is any constitutional element which requires comment in relation to the calculating compensation paragraph.

5 Infrastructural development and planning

Again, there do not seem to be significant constitutional issues involved. The recommendations under the heading 'Codifying, and/or reducing time scales for the handling of planning and development applications' are substantially administrative.

One comment which I would make is that where mandatory time scales are imposed it is necessary to give very careful consideration to what is to happen if they are not met. Describing a measure as mandatory without there being some consequence of failing to comply is really a misnomer. There would, therefore, need to be well worked out policies as to what is to happen if, for example, An Bord Pleanála does not make a decision within the eighteen week time limit. Does a project go ahead, does it not go ahead, does one have to go to court seeking mandamus against An Bord Pleanála? Without an effective enforcement mechanism, mandatory time limits are unlikely to be of any great value.

Under the heading 'Redefining the roles and numbers of participant stakeholders' I would reiterate the caution which I expressed earlier in these advices. Excluding NGOs from being able to bring judicial review proceedings in respect of environmental authorisations without registration may well work in itself, but is likely to lead to the identification of individuals without assets to bring the same proceedings.

The problem with having a process designed to test the *locus standi* of individuals prior to their mounting a challenge is that that issue in itself may turn into a significant legal case requiring court time and imposing delay. This would be particularly so if the criteria upon which *locus standi* is to be determined, are, to any extent, subjective (e.g. motivational) rather than objective (e.g. residents in a relevant location, or the like).

There can be little doubt that a person would be likely to challenge a contention as to their motivation, and if that issue was a preliminary to proceedings being permitted, the potential of an increased delay prior to final determination rather than a shortening of the process looms large.

In the case of objective criteria it is unlikely that the sort of groups involved would not find a suitable individual who would meet those criteria. I might add that I have been involved in a number of cases where a tactical decision to concede liberty to seek judicial review was taken by notice parties (i.e. developers) precisely on the basis that they felt (correctly, in my view) that even though they had a reasonable chance of cutting off the action at birth, the risk of failing so to do, and, thus, having to face into a more acutely delayed hearing, was not worth taking.

Again, I would wonder about the practicality of requiring An Bord Pleanála to examine the merits of an appeal within two to three weeks when it is 'alleged' that an appeal is being brought for the wrong reasons. Such an allegation would then be likely to be made in a very large number of cases by developers desirous of expediting the consideration of their case, thus defeating the whole purpose, and making it, in practice, impossible to meet the time limit. Perhaps, some such rule based on an objective criteria (such as demonstrable previous formal opposition) might be workable.

Appendix 2

ERM CROSS COUNTRY COMPARISON STUDY

CASE STUDY 1: CITY LINK, MELBOURNE, AUSTRALIA

1.1 Project details

Melbourne City Link is a $2 billion (AUD) privately-funded toll road that connects three of the city's major freeways.

The project is in two parts: the Western Link, which connects the Tullamarine Freeway to the West Gate Freeway; and the Southern Link,

which connects the West Gate Freeway to the Monash (formerly South Eastern) Freeway.

In 1992 a consultative committee was established by the then Minister for Planning and Housing. This committee was to guide the scoping, consultation and preparation of the Environment Effect Statement (EES, similar to the EIA in the Irish context).

In terms of the EES, the primary objectives identified for the project were to:

- reduce through traffic on inner city streets;
- improve the environment around the river, gardens and entertainment precinct;
- optimise economic benefits while minimising financial costs;
- improve access between industry and the port, rail and airport facilities; and
- minimise environmental and social implications along the bypasses and feeder roads.

In total, the preparation of the EES took 22 months, after which it was placed on public exhibition. Meetings and workshops were held, leaflets distributed and comments and submissions were requested. A total of 130 submissions were received, which were reviewed by an independent panel. The panel recommended that the development should proceed with changes to the original proposal.

The objectives for the project, and the project brief were developed by the consultative committee, and outlined the role of the government, risk allocation, performance parameters, urban design considerations, and standards for design, construction, operation and maintenance. The Victorian Government issued these objectives and the brief in September 1994.

The government and the winning private developer, Transurban City Link, are parties to a concession deed pursuant to the Melbourne City Link 1995. Under this deed, Transurban is to design, build, finance, operate, levy tolls, and maintain the road for a period of 34 years.

Under the deeds, additional consultation with affected municipalities and community groups was required on architectural features of the project such as noise walls, gateways and landscaping. Under this process, all affected municipalities are given details on the proposed design and notification was given as to where design plans can be inspected by the community. Affected municipalities and groups had 20 days to consider the plans and make written submissions to the Melbourne City Link Authority, the new body established to co-ordinate and oversee the project. These proposals were then discussed between the Authority and Transurban for determination.

By December 1997, all residents who made a submission were formally responded to. In addition, those residents who had also written outside the formal process were advised of outcomes. Further briefings of council officers were held in January and February, and final engineering design packages were forwarded to councils.

Construction works commenced shortly afterwards. As the work proceeded, local issues requiring further attention were addressed, with advice being provided from relevant local councils. The authority and Transurban worked together to address community concerns and believe that this work has resulted in an enhanced design.

According to project documentation, the community consultation has resulted in:

- improvements to the aesthetic design of the noise walls from the road and residential side;
- provision of transparent noise walls in locations where homes would otherwise be seriously overshadowed by the noise walls;
- additional landscaping to screen the impacts of the walls;
- improved access and connection points along the shared pathway;

The project has now been fully completed. The last section of the road was opened on 28 December 2000.

1.2 Innovative features

Transurban, the public company responsible for the project, was listed on the Australian Stock Exchange in 2000. This has allowed the general community to access shares in the toll road, perhaps enhancing acceptance of the project.

1.3 Key features relevant to Ireland

- Extensive public and stakeholder consultation was undertaken during *all* stages of the project. This consultation began very early in the process, prior to the project design or tender stage;
- The project was also subjected to an independent review at the land use planning stage, where all submissions from the consultation stage were considered;
- The government departments and agencies relevant to the project were co-ordinated through a new, central agency – the CityLink Authority.

CASE STUDY 2: ORESUND BRIDGE, DENMARK AND SWEDEN

2.1 Project details

This ambitious project aimed to create a fixed link across the Øresund, including the building of a new motorway and railway in both

Sweden and Denmark, the construction of a tunnel, an artificial island and a bridge that connects Copenhagen and Malmö.

In 1992, the Danish and Swedish governments signed a formal agreement to establish a fixed link across Øresund. The agreement was ratified by the two countries' parliaments in August of the same year. In the following year, Øresundskonsortiet was formed, a partnership agreement between A/S Øresund and Svensk-Danska Broförbindelsen SVEDAB AB, effectively giving both governments a 50% stake in the project.

The Swedish Government agreed the construction details of the project in 1994, including a number of wide ranging environmental considerations to be met. In the same year, the Danish Ministry of Transport approved the general design, alignment and environmental conditions for the works on Danish territory.

An extensive environmental impacts assessment for the project was undertaken. The Swedish and Danish authorities had defined a number of criteria for the permitted impact on the environment in the Baltic Sea and Øresund. The environmental criteria were subject to public hearings in Denmark in accordance with the Public Works Act and the Raw Materials Act. In Sweden, the environmental requirements were drawn up by the Water Court and the Licensing Board for Environmental Protection, in connection with an application for concession in accordance with the Water Rights Act, Act of the Management Natural Resources etc. and the Environmental Protection Act. Extensive investigations were undertaken in relation to environmental measures, with mitigation and design amendment satisfying the requirements of both Governments.

With these arrangements finalised, a contract was signed with the construction company, Øresund Tunnel Contractors, a consortium of individual companies from Sweden, the UK, the Netherlands, Denmark and France. The total contract for the project was DKK 3.98b (€5.36b at current value). In addition, a contract for the dredging and construction of the artificial island was signed with Öresund Marine Joint Venture at a value of value of DKK 1.4 billion (€1.88b).

The construction commenced in 1995, and was completed and the bridge opened to traffic in July 2000.

Since the completion of the Øresund Fixed Link, Øresundsbro Konsortiet is responsible for operating the 16 km long coast-coast link between Denmark and Sweden. The individual parent companies of the two countries are responsible for the operation of the landworks within those countries.

In accordance with the agreement between the Swedish and Danish Governments, Øresundsbro Konsortiet has the right to collect fees from users of the Øresund Bridge. The fees cover operating expenses, interest charges and repayment of the construction loans for the coast-coast link and the landworks on both sides of Øresund

2.2 Key features relevant to Ireland

- Extensive environmental impact assessment was undertaken to ensure minimal environmental damage was caused during the construction phase or by the final infrastructure;
- It is evident that initial arrangements between the two governments cemented the roles and responsibilities each would play in the project. Appointment of contractors for all stages of construction was undertaken in a co-ordinated manner;
- Arrangements were made in the initial stages of the project for the management of the completed project.

CASE STUDY 3: BALDOVIE WASTE TO ENERGY PLANT-DUNDEE CITY COUNCIL

3.1 Project details

In 1996, the existing incinerator in Baldovie, Dundee, Scotland was forced to close following the introduction of the EC Directive 89/429/EC, which introduced more stringent environmental emission limits and resulted in the closure of many other existing incinerators in the UK.

In 1993, Dundee District Council (DDC) undertook an extensive assessment of municipal waste disposal practices and facilities within the area with a view to considering the most effective waste disposal strategy for the future. It was concluded that incineration, coupled with energy recovery, was to be the most economically viable and environmentally satisfactory solution.

A joint venture, with private sector partners, was determined the most cost effective method of delivering the project after DDC determined that it did not have the financial resources to complete the project alone.

Dundee Energy Recycling Ltd (DERL) was the special purpose company established to design, build and operate the waste facility.

The agreement reached between the company and DDC allow DERL to generate income from a number of different sources including:

- Charging a 'gate fee' per tonne of waste disposed. A rate has been agreed between DERL and the DDC, with the neighbouring Angus Council, and the Greater Glasgow Health Board, for the disposal of municipal and clinical waste;

- The sale of power generated by the Plant. DERL have also secured a power purchase agreement which guarantees sales of the electricity generated by the plant to the Scottish electricity companies; and
- Sale of recovered ferrous and non-ferrous metal.

The Plant was opened in 1999.

On 2 May 2000, DERL signed a 'Good Neighbour' Charter with local residents groups. The charter, believed to be the first of its kind in the UK, provides for regular meetings between community groups and DERL; access to information about the plant and the right to visit the facility. A liaison group comprising 2 representatives from DERL, 3 members of the community and 2 Dundee City Councillors has been established.

3.2 Technical capabilities of the facility

The incineration process carried out by DERL will burn mainly municipal waste in two 17 MW thermal input bubbling fluidised bed boilers, the first of their kind in the UK. The steam raised is used to generate electricity in a single condensing turbine generator with up to 8.3 MW being exported to the national electricity network. The plant is designed to treat 120,000 tonnes per year of waste with each boiler capable of burning waste at a nominal design rate of 7.6 tonnes/hr per boiler.

3.3 Key features relevant to Ireland

- The use of the Good Neighbour Charter has potential to be introduced to Ireland, where this could be used both in similar projects, but also for any situation where there is tension between a required facility and surrounding community groups. The use of this tool could be included in a suite of public consultation measures;
- The use of the waste facility to generate electricity for re-sale back to the electricity companies.

CASE STUDY 4: THE DUBLIN BAY PROJECT

4.1 Project details

Previously in Dublin, waste water from most of Dublin City and surrounding areas was pumped to the Ringsend Treatment Works, where it received preliminary treatment before being discharged into Dublin Bay. Waste water from elsewhere in the city still flowed directly into the sea. The Department of Environment and Local Government, with partial funding from the EC Cohesion Fund, have supported Dublin City Council in constructing a €254m waste water treatment plant in Ringsend.

This project was one of the biggest projects of its kind carried out in Europe, and commenced operating in 2002.

The facility was constructed through a design, build and operate process. As part of the tendering process, Dublin City Council insisted that:

- The upgrading of the Ringsend Treatment Works should be achieved on the existing site at Ringsend.
- The standard of treated wastewater should comply with all EU and Irish statutory requirements.
- The pumping station at Sutton should be designed to the same high standard as the Award winning West Pier Pumping Station at Dun Laoghaire.
- The process should ensure that EU Bathing Water Quality Standards could be achieved at Dollymount Strand.
- The surrounding area should be kept free from odours from Ringsend Treatment Works.
- Structures at Ringsend should be designed to take account of the sensitivity of the site.

A significant consultation process was undertaken for this project, including:

- Monthly meetings with residents were held in Sutton and Ringsend.
- A quarterly newsletter is produced and distributed to organisations and individuals in areas around Ringsend and Sutton;
- Public exhibitions were held and were well attended by individuals and interested organisations. A video was also produced and played at the public exhibitions;
- A questionnaire was developed and sent to homes across Dublin that might be directly affected by the project. In addition, a more general questionnaire was distributed to determine the public's views on the project, the results of which were considered during the planning phase;
- The Elected Members of Dublin City Council and Fingal County Council were given a comprehensive presentation on the project and invited to tour the Ringsend site and see the pumping station at Dun Laoghaire;
- Organisations with a particular interest in the project were invited to attend meetings with the consultants to discuss their concerns and to get information about the project. Residents of Sutton and surrounding areas were also invited on a bus tour to visit the pumping station at Dun Laoghaire so they could get an idea of the kind of building that was being proposed for Sutton.

The EIS for the project was completed in February 1997, and was approved by the Minister for the Environment in June the same

year. Planning approval was granted in 1997, and construction commenced in January 2000. The plant is now fully operational.

4.2 Key lessons for other projects

Many major infrastructure projects provide positive benefits to the community yet still attract considerable objection and opposition from some sectors of the community. This project demonstrates that this does not have to be the case. A significant reason for this is that there was an established pattern of usage at the site. Equally important was the level of community interaction through the process with a demonstrable benefit being an outcome to the project, i.e. improvement to the condition of Dublin Bay, perhaps the key amenity of the city.

CASE STUDY 5: CONNECT ONTARIO: BROADBAND REGIONAL ACCESS (COBRA), CANADA

5.1 Introduction

This case study provides an example of a programme enabling the development of broadband investment in Ontario, Canada, rather than actually being involved in the direct provision of the infrastructure itself. It is included here to demonstrate that while the research indicates that governments are likely to be the main provider and instigator of the broadband infrastructure projects, there are alternatives to direct provision, often enabling the involvement of the private sector.

5.2 Project details

Connect Ontario: Broadband Regional Access (COBRA) is a three-year $55 million programme to provide high-speed telecommunications in rural and northern Ontario. The wider Connect Ontario programme aims to improve community-based information and services. COBRA provides the necessary broadband infrastructure for communities to provide web-based services.

The overall goals of the programme are to:

- Create affordable, competitive access to connectivity for underserved communities across Ontario, building towards comprehensive provincial access to broadband connectivity.
- Ensure that the Government of Ontario is able to reach all Ontarians with broadband-based government services.
- Enable rural and remote communities in Ontario to fully participate in the digital economy.

COBRA will provide broadband connectivity to core public institutions in regions currently without access to high-speed communication services, providing a foundation for growth and innovation. The aggregating of telecommunications infrastructure demand is expected to foster improved connectivity access for homes and businesses in small and rural communities and regions. Connect Ontario: Broadband Regional Access builds on significant government investment to date.

COBRA encourages public-private partnerships to create the infrastructure for affordable, reliable broadband connectivity to about 80 per cent of Ontario's geographic regions. COBRA will fund regional infrastructure projects to an overall expenditure limit of 50 per cent of the total eligible capital costs. Consideration will be given to contributing more than 50 per cent of project costs in hard-to-serve regions where there's limited private-sector investment. The programme will also provide funding of up to $100,000 for the development of business plans in eligible low-density regions.

The Ministry of Enterprise, Opportunity and Innovation and Management Board Secretariat are jointly funding the COBRA initiative. The Ministry of Northern Development and Mines will be responsible for promotion and partnership development in the North.

The government's role in the project includes:

- partnerships and programme development;
- review and approval of regional proposals;
- contract and partnership management; and
- monitoring and evaluation.

In order to qualify for the programme, a partnership must be led by not-for-profit organizations or municipality, though may include other partners such as tourism organizations, chambers of commerce, First Nations and residential associations.

5.3 Key features relevant to Ireland

Like the broadband infrastructure programme in Ireland ('19 Towns'), this programme provides funding for broadband infrastructure. Unlike the Irish programme, this programme encourages the creating of PPPs and the involvement of non voluntary organisations.

In addition, the COBRA programme espouses the principles of social inclusion, aiming to allow a remote population to fully participate in their community and local political environment.

CASE STUDY 6: EASTERN FREEWAY (EFF), MITCHAM VICTORIA

6.1 Background information

The Planning system in Victoria, Australia, is reasonably similar to that of the Irish system, though there are some significant differences.

This case study relates to the extension of an existing freeway, some 20 years after the initial phase was constructed. The existing Eastern Freeway travels from the outskirts of the city centre, and travels to Mitcham, a suburb in the east of Melbourne. The extension would allow the road to be continued to Ringwood.

A reservation for the freeway was determined in the early 1980s where a route selection process was undertaken and the most appropriate route identified. This process was completed using best practice methods of the time. The land for the reservation was then undeveloped, as was the surrounding area. With the reservation in place however, residential development had occurred over time, up to the reservation boundary.

The reservation is zoned within the planning scheme (development plan) and development of this land is prohibited. If the road does not proceed, the reservation is removed and the land offered for sale. In this case, this land was used for open space and parkland while it was awaiting confirmation that the project would proceed. An area within the reservation was of particular importance, with the Mullum Mullum Creek and environs of high ecological importance, though this was not realised prior to the land being subject to the road reservation.

In Victoria, the process for amending the planning scheme, whether the zoning maps (as the case for a freeway reservation) or the policy section, is relatively simple. In addition, it is continual and ongoing process rather than being required on a medium term, statutory basis.

6.2 Project details

In 1998, the Victorian State Government approved the development of the Eastern Freeway Extension (EFE). That is, the approved funding for the project and committed government support. The detailed design was now underway.

While the reservation was in place, the most appropriate alignment of the road within the reservation had not been determined. In addition, the high environmental importance of Mullum Mullum Creek was not factored into the designation of the original reservation. A route selection procedure was then undertaken by VicRoads (state government road agency), and four possible options were identified (see table).

With these options identified, community consultation began in 2000.

The consultation process was extensive. The following describes the key tasks that were undertaken:

- All technical reports and government documents were available for the public to view;
- Property owners who may have been affected by the development were consulted individually, in person, allowing all implications to be fully explained and queries answered;
- Public information displays were established in 10 different locations, and were available to the public for a three week period;
- 9 community information sessions were held; and
- Comments were requested from all interested stakeholders.

In total, over 800 submissions were received. The submissions raised a large number of issues, including the suggestion of a new route, which was essentially a combination of options, and involved the construction of a 1.5km tunnel, small deviations from the original Reservations (thus requiring Planning Scheme Amendment) and without the compulsory purchase of residential properties. This route option was then further investigated by government – costs were determined and the feasibility of the option assessed.

The 'community consultation option', as it was to be known, was accepted by the government as the preferred route option. The change to the reservation was approved by the Minister for Planning under the usual process

	Cost Estimates	Land Acquisition Implications (number of additional properties likely to be acquired)	Planning Scheme Implications	Environmental Impacts			Impacts on Park Road Ramps
OPTION DESCRIPTION				Hillcrest	Chaim Court Area	Mullum Area	
Mullum Creek (Donvale Chaim Court Short Tunnel	$263m	0	None	High	Low	Medium	Possible
Long Tunnel outside existing reservation (Portal east of Park Road)	$321m	20-45	Major	Low	Low	Low	Possible
Long Tunnel within existing reservation (Portatl west of Park Road.	$366m	0	None	Low	Low		Possible
Separate Tunnels under Chaim Court and part of Hillcrest Area	$302m	0	None	Medium/High	Low	High	Possible

for a planning scheme amendment. This took place in 2001.

An environmental effects statement was prepared and considered by an independent panel, the findings of which were built into the final designs for the road.

Construction of the road has now begun and is expected to be completed by 2004. In general, the project is supported by the public, and the community consultation process was well received.

6.3 Key Features relevant to Ireland

- The extensive consultation process played a significant role in the community acceptance of the proposal. This is particularly true in the case of the potential compulsory purchase of residential properties.
- The consultation was used to drive the design process, not invite submissions on a finalised product. This also plays a role in the community acceptance of the project, in that they are likely to feel that their involvement is worthwhile.
- The flexibility of the Victorian planning system allows the relatively easy amendment to the planning scheme, ensuring that simple statutory amendments do not delay the wider project.

CASE STUDY 7: SHANNON/ FOYNES PORT ACCESS ROUTE

7.1 Project details

The Port of Foynes is one of Ireland's largest deep water facilities. It is operated by Shannon-Foynes Port Authority, a state company established under the Harbours Act 2000. The port authority handles some 10 million tonnes through its terminals on the Shannon estuary with the port in Foynes being the largest general cargo facility.

Arising from the large volume of road based cargo, the town of Foynes was experiencing increased congestion centred on the N69, designated as a notional secondary route. Limerick county council, in association with the National Roads Authority, the Port Company and the Department of the Environment, developed a port access route which would take most of the port related traffic out of the town and would underpin the port's own development plans.

The route involved the construction of a 1.5 km single carriageway to include approximately 700 metres on the existing N69 and 800 metres through private property, some state property and the port itself. In addition to concluding design of the road and the preparation of a financial package involving 4 state supported bodies, the council successfully concluded negotiations with Irish Rail to enable the creation of a right of way over the Limerick-Foynes railway.

This rail line is in a care and maintenance mode with Irish Rail.

The overall budget for the road was circa €4 million. The project programme including land acquisition, design and approval and the tendering/award of contract, were all passed successfully. Coffey Construction was awarded the contract and commenced work in September 2001. There was a 15 month construction period. Coffey Construction, working in close liaison with the Road Authority and the Port, completed work 3 months ahead of schedule in line with budget.

The road remains closed to date. No trains have travelled on the line for several years. One engine was noted during construction.

At onset of construction, Limerick County Council requested an agreement to be put in place in time for project completion and were informed that Iarnrod Éireann's solicitors would prepare agreement on time. Limerick County Council were not aware of any potential delay on behalf of Iarnrod Éireann until construction neared completion. Despite continuous requests by the council, a draft level crossing agreement was not produced by Iarnrod Éireann until Dec 2002 – this draft agreement was subject to Rail Safety Inspectorate approval which has further delayed the process.

The current situation has caused considerable frustration on the part of the board and officials of Shannon/Foynes Port, the members and officials of Limerick County Council and the people of Foynes, a number of whom began using the road prior to Irish Rail installing boulders to block access.

7.2 Key lessons

This project, while relatively small scale, presents an extreme example of institutional breakdown. This is a relatively common feature of infrastructure provision in the state notwithstanding a highly developed project management framework. In effect, there remains in much of Irish infrastructure planning, a need to address statutory requirements that are not within the immediate design/programming associated with infrastructure.

A level crossing agreement is not 'out of the norm' and indeed is standard when a public road crosses a railway. Limerick County Council, as the lead authority, made every effort to ensure that requirements were communicated in full to Iarnrod Eireann and do not accept any responsibility for the delay which

has ensued. The delay is as a result of the failure of Iarnrod Eireann/Railway Inspectorate to deliver the agreement on time.

CASE STUDY 8: METRO FOUR MASS TRANSIT UNDERGROUND SYSTEM, BUDAPEST, HUNGARY

8.1 Project details

In 1998, the Municipality of Budapest and the state government approved the construction of the Budapest mass transit underground system, named Metro Four. The new transport infrastructure aimed to reduce the car based congestion in the city, improve access across the Danube River, and reduce travel delays for traffic within and entering the city.

A metro system is already in place Budapest, and consists of:

- M1 (5km) opened in 1896 and was the first electrified underground on the European mainland;
- M2 (10km) built in 1970 and connecting both major railway stations in the city;
- M3 (18km), opened in 1976.

The M4 is to be 7.3km long and will run completely underground.

A feasibility study was undertaken over an 11 month period during 1995-96. This was completed with the involvement of international development institutions and funded by the European Community PHARE programme. The study investigated the first of the four metro lines, determined the parameters of the construction work and made recommendations on the economic viability of the project. Environmental impacts were also considered.

The project is expected to cost €1.2b. The European Investment Bank would provide 75% of the total funding, with the remainder to be provided by the Budapest Municipality and the Central Government through the Ministry of Finance. The state contribution to the project however, is currently being disputed. The finance ministry has completed a report in the project, though this has not been accepted by the Budapest Municipality, which claims that the wrong criteria had been used in the evaluation. The ministry, on the other hand, claims that it had asked for the criteria to be specified before the investigation was launched, but received no information.

The management of the project is the responsibility of the DBR Metro Project Directorate, which was established to oversee the implementation of the project.

Recent media articles (*Budapest Business Journal*, 5 May 2003. www.bbj.hu.) indicate that the government is currently preparing to release the project to tender, allowing construction to begin. There is some scepticism however, that the project will be underway in the near future. A number of issues have yet to be clarified including:

- unresolved finance issues, including state/local input
- legal guarantees in relation to the government's long term financial obligations. These issues were first raised over 4 years ago
- the preparation of a new Metro law to resolve issues as mentioned above, and to ensure that political instability does not effect the project.

Despite the uncertainties involved in the project, there is reportedly considerable interest in the tender documents, and there is likely to be a number of competitive bids. These are likely to come from international companies with local expertise being used where required.

8.2 Key features relevant to Ireland

This project demonstrates that despite delays, there remains considerable interest in the construction of the project. It is clearly evident however, that the initial consultation between leading agencies has not been adequately undertaken, despite the willingness of the DBR to issue the tender documents for the construction of the project.

It is assumed that in this case, DBR has been relatively successful in the detailed management, planning and design of the project. It has been delayed however, because the initial funding arrangements between the key stakeholders had not been determined in the early stages of the project.

Notes:

1 'Some land (purchased) for the M50 was 3 times construction costs' *The Physical Planning Process: Issues for IDA Ireland*, submission to Forfás by IDA Ireland, April 2003.
2 Dreher v Irish Land Commission, 1984
3 Planning and Development Act, 2000

FRIENDS OF THE IRISH ENVIRONMENT

1 GENERAL PROVISIONS

A generalised statement in relation to property rights will fail to capture the important distinctions between different forms of property. We believe it would be appropriate to make the following distinctions.

The constitutional provisions should distinguish between, on the one hand

- Property in goods and chattels, and on the other hand
- Property rights in relation to the natural environment – land and other natural resources such as minerals, water, air, and the ecosystem's absorption capacity.

1.1 Goods and chattels

Goods have owners by virtue of the fact that they are created. We believe this ownership constitutes a natural law right and as such should be recognised by the Constitution. Nonetheless, there are instances where these rights must be balanced against the common good. (Of course goods which have been lost, abandoned or otherwise fallen out of ownership do not necessarily have owners and the duty of the state to legislate for the common good is not limited by these natural law rights.)

In relation to the ownership of goods and chattels, we agree with the conceptualisation that ownership of goods exists but is limited by law in the interests of the common good. In this respect, we note the decision of the Supreme Court in the Derrynaflan case, and the findings of the court in relation to goods which are of heritage value. Similarly ownership of goods and chattels, whose ownership would be against the common good interest in biodiversity or sustainability, (e.g. endangered species) must be delimited by law.

A suitable provision could read:

> The State recognises the right of natural persons to ownership of goods and chattels. It shall regulate by law this ownership to reconcile it with the welfare of the people as a whole, with due regard for the welfare of the people of other countries, to ensure the meeting of the legitimate needs of the current generation, to protect the interests of future generations, ensure the maintenance of ecosystem functions, maintain and restore biodiversity, and protect the natural, archaeological, cultural, spiritual and historic patrimony of the nation.

1.2 Land and other non-created forms of property

The natural environment – the land, the sea and the air – is not created by human beings. Therefore they do not automatically have ownership. In addition they are in general limited in quantity. We would emphasise that property rights in land etc. are considerably more complex than the comparatively simple concepts of ownership of goods. Therefore they should be thought of as a complex range of rights rather than as simple ownership.

These property rights do not flow more or less automatically from an act of creation by a person/persons, but are determined by law in the interests of the common good. We believe that the conceptual formulation whereby property in land etc. is stated to be balanced against the common good is not the most meaningful way to think about these property rights. There are in a number of respects common good interests in establishing property rights in relation to land etc. These include (in a non-exhaustive list and no particular order):

- social justice
- the economic security of individuals, families and groups
- the fair comparative treatment of different individuals families and groups
- the protection of the environment
- the maximisation of economic efficiency
- the operation of a sustainable economy and society
- the protection of property in goods and chattels

The legal provisions in relation to property should be designed and elaborated in order to assist in meeting the various common good objectives which society sets for itself.

In this context we submit that the role of the Constitution is to set out in general and non-exclusive terms the common good objectives which must constrain property rights in the natural environment and protect the ecosystem's absorption capacity. We will return later in this submission to objectives which we wish to see included in the Constitution and propose a wording.

As mentioned above, we recommend that the creation of rights in relation to land and other natural resources such as minerals, water, air, the capacity of the ecosystem to process waste, etc. should be governed by common good objectives. We recommend the following common good objectives be considered for inclusion:

- Sustainability, i.e. the meeting of the needs of the present generation without compromising the needs of future generation. This is a core principle. It forms part of the state's international commitments made through UN forums including the Rio Earth Summit and the Johannesburg World Summit on Sustainable Development. It has been incorporated in Irish legislation in the Planning and Development Act 2002 and is a guiding principle in the EU Treaties. We note that it is a principle of global and international application.
- Social justice
- Protection from arbitrary or unfair treatment
- The protection of biological diversity and its evolution

A suitable composite provision could read

> The state shall provide as appropriate for individual, collective and public property rights in relation to land and other natural resources including minerals, water, air, and the capacity of the ecosystem to process waste. These rights will be provided for and regulated in such a way as to promote the welfare of individuals and of the people as a whole, with due regard for the welfare of the people of other countries, to ensure the meeting of the legitimate needs of the current generation, to protect the interests of future generations, to maintain and restore ecosystem functions, to maintain and restore biodiversity, and to protect the natural, archaeological, cultural, spiritual and historic patrimony of the nation. In providing for and regulating such rights, the State shall act in a manner which is proportionate and not arbitrary.

2 SPECIFIC PROVISIONS

In addition, for the avoidance of doubt in some important areas there are a number of specific provisions which would be advisable.

2.1 Access to the countryside

The Constitution should provide for a right of access to the countryside limited by law in the interests of protection of agriculture and other legitimate use of land and privacy. As with all constitutional provisions this should be general for specific regulation by statute. The provision of the Swedish constitution is a good model:

> All persons shall have access to nature in accordance with the right of public access, notwithstanding the above provisions. [Article 18, Swedish Instrument of Government, Chapter 2: Fundamental Rights and Freedoms.]

We suggest either the Swedish formulation or

> The State acknowledges the right of the citizens to have physical access to the land, regulated by law, in a manner and at locations compatible with protection of the environment, the carrying out of agriculture and other legitimate uses of land, privacy and other appropriate considerations.

2.2 The right to shelter

The Constitution should recognise a right to shelter and impose a duty on the state to vindicate that right. Unlike property rights in relation to land, we believe this right to be a natural law right. We are confident that organisations active in the area will propose suitable wording.

2.3 Taxation of land

We agree with the general concern that the state should be able in a fair manner regulated by law to recover increases in value resulting from zoning or planning decisions. We do not believe that the current constitutional provisions would prevent this. However we see no reason not to make an appropriate explicit provision. We believe this recovery of value would most appropriately be done through taxation. Taxation would be superior in all or almost all respects to the recently suggested mechanism of 'step-in rights' by compulsory purchase. It would be easier and cheaper to administer, would raise revenue, be fairer, more transparent, less contestable and involve fewer conflicts of interest and less scope and incentive for corruption. Therefore we recommend that the Constitution specifically provide that the use of land may be taxed.

A possible wording would be:

> The State may, in a manner which is not arbitrary and promotes the common good, impose taxes on the use of land and other natural resources.

2.4 Compulsory acquisition

Powers of compulsory acquisition of property rights are an important element of the delimiting of property rights and the promotion of the common good. We believe the appropriate tests for such acquisition are

- The public interest
- Proportionality, and
- Non-arbitrary in character

A possible wording would be:

> The compulsory acquisition of property rights may be provided for by law but such acquisition must be demonstrated in each case to be in the public interest, proportionate and not arbitrary.

2.5 Rights of fictitious legal persons

We note and agree with the view of the Constitution Review Group in its 1996 report that constitutional protection for property rights should be limited to natural persons. We consider that this is an essential distinction. Legal fictions, as neither human beings nor citizens, are not entitled to the rights of citizens or human beings. Indeed, the vindication of those rights would in all likelihood be an issue primarily in cases where it would be to the detriment of the interests of natural persons or the common good. Fundamentally, as creations of subsidiary law they should not have constitutional rights. As the existence of legal non-natural persons is a matter for statute, so are their rights.

Appendix 1

FRIENDS OF THE IRISH ENVIRONMENT – FOUNDING PRINCIPLES

We support

• A root and branch reform of Irish planning laws. We believe that the planning Acts must contain clear

legally binding land use principles based on the concept of sustainable development.

• The full implementation in Irish law of European environmental legislation with a particular focus on the environmental impact assessment directive and the habitats directive.

• The maintenance of areas of scenic importance in the Irish landscape and the maintenance of traditional economic activities which sustain the population.

• The existing conservation designations and zonings in Ireland including national monuments listed buildings natural heritage areas special areas of conservation and areas zoned for amenity purposes in local authority development plans.

• The idea that urbanisation should not be at the expense of the countryside; the town-countryside boundary must be maintained. The Irish countryside should not be turned into a suburban subdivision.

• The traditional right of access to the land by the people of Ireland as well as the right of public access to the foreshore.

• The maintenance of traditional Irish nucleated settlements including villages towns and hamlets.

• The retention of agricultural land in agricultural use and the retention of rural character including old hedgerows and existing stone walls.

• Non-intensive agriculture with an emphasis on organic farming.

• The rejuvenation of the natural woodlands of Ireland with native species by means of appropriate forest design to avoid monoculture in order to enhance the landscape and enhance the variety of sustainable use of our woodlands.

• The sustainable use of the sea including the maintenance of wild fish stocks.

• Owner-occupied and social housing while opposing investment-led housing.

• Sustainable tourism that favours keeping revenue in the local community where it is spent. We oppose environmentally and socially destructive tourism projects.

• Coalitions of locally owned businesses in order to gain more control of the tourism sector both economically and environmentally.

• Non-car oriented transport both public and private: buses, train, community transport, taxis and bicycles.

• Small scale interventions in the landscape as well as the use of traditional materials in residential building.

We oppose

• The introduction of large centralised out of town shopping centres and support policies to maintain and enhance the viability of the local family owned retail sector.

• The use of flood plains for developments of any kind.

GREEN PARTY

THE RIGHT TO PRIVATE PROPERTY

Private property is clearly a form of political and economic organisation. Property rights regulate relations among people by distributing powers to control valued resources. Property rights often involve bundles of particular entitlements. Amongst the most important of these entitlements are the privileges to use property, the right to exclude non-owners, the power to transfer property, and immunity from non-consensual harm or loss. The classical version of property rights focuses on the concepts of title and ownership and presumes the owner's full control of specific valued resources, with state backing. John Locke's theory of private property is the source of the classical conception of property. Locke justified property on the moral claim of rights and on the utilitarian ground that legal protection for property justly produced or possessed through labour promoted useful work and increased social welfare. Locke qualified his theory with a proviso. He noted that labour creates property rights 'at least where there is enough and as good left in common for others' (Locke 1962).

The Green Party believes that it is time to reconsider the classical conception of property. We believe there is a need to develop a new model of property that conceptualises it as a social system composed of entitlements that shape and are shaped by social relationships. The ownership model of property utterly fails to incorporate an understanding of property rights as inherently limited by both the property rights of others and by public bodies designed to ensure that property rights are exercised in a manner compatible with the public good. The Green Party believes that property rights must be understood as both contingent and contextually determined. We believe that property law and property rights have an inescapable distributive component and that property law helps to structure and shape the contours of social relationships. We believe that property rights are relational, that property rights held by one person often conflict with property rights held by others, that property rights are limited by non-property rights and finally that property is both an individual entitlement and a social system.

(i) Constitutional distinction between different forms of property

The protection given to private property within the Constitution is based on the recognition that land is one of the most valuable forms of productive wealth or capital that individuals can aspire to possess. However, the generalised statement in the Constitution in relation to property rights fails to capture important distinctions between different forms of property. There

is a failure to distinguish between non-created forms of property (ie land) and created forms (i.e. dwellings, buildings, vehicles). We believe this latter form of ownership constitutes a natural law right and as such should be recognised by the constitution, with limited qualifications. These qualifications would concern the ownership of certain goods and chattels that are against the common good interest as regards biodiversity or sustainability. (Examples include endangered species or goods that are of heritage value).

The provisions of the Constitution regarding private property rights should therefore make an important distinction between property rights involving goods and chattels on the one hand, and property rights involving land and other natural resources (ie minerals, water and air) on the other hand, where the broader community has a legitimate interest and a stake.

We recommend that the creation of rights in relation to land and other natural resources such as minerals, water, air, the capacity of the ecosystem to process waste, various forms of intellectual property etc. should be governed by common good objectives. In providing for and regulating such rights, the state should act in a manner that is proportionate and not arbitrary.

PRIVATE PROPERTY AND THE COMMON GOOD

(i) Definition of the Common Good

The reference made to 'the common good' in the Constitution is not sufficiently well defined to reflect the challenges to human welfare, both present and future, that characterise the highly developed society in which we now live. In particular, current public policy neglects the rights and interests of future generations.

The Green Party proposes that a new definition of the 'common good' should be developed to include the concept of 'sustainability'. The new definition should enshrine in the Constitution the rights of current generations to meet their legitimate needs while explicitly protecting the rights of future generations to do the same.

In this regard the definition of 'sustainability' used by the FEASTA organisation (Foundation For Sustainable Economics at www.feasta.org) may be useful. The FEASTA organisation defines sustainability as the right of future generations to inherit an enhanced, or, at least, an equivalent 'stock' of Natural Capital (ie land and natural resources) to that which the current generation enjoys, without any significant deterioration, depreciation or reduction in that stock. The definition of sustainability proposed should also cover the maintenance of ecosystem functions, the maintenance and restoration of biodiversity, and the protection of the natural, archaeological, cultural, spiritual and historic patrimony of the nation**.**

(ii) Right of access to the countryside

We believe that the Constitution should provide for a right of access to the countryside limited by law in the interests of protection of agriculture and other legitimate use of land and privacy.

As with all constitutional provisions this should be general for specific regulation by statute. The provision of the Swedish constitution is a good model. We would suggest either the Swedish formulation or a wording which involves a recognition on the part of the state of the right of physical access to land, regulated by law, in a manner and at locations compatible with protection of the environment, the carrying out of agriculture and other legitimate uses of land, privacy and other appropriate considerations.

(iii) Rights of fictitious legal persons

We note and agree with the view of the Constitution Review Group in its 1996 report that constitutional protection for property rights should be limited to natural persons.

Legal opinion is mixed as to whether the protections of Article 40.3.2 (which refers to citizens) and Article 43 (which refers to 'man, in virtue of his rational being') extend to corporate entities. The Green Party believes that legal persons enjoy the privilege of limited liability and the other benefits of incorporation. We believe they must accept some of the disadvantages of incorporation, amongst them the absence of any constitutional rights. We also believe that if legal persons were accorded constitutional rights, including the right to the protection of property, it might mean that corporate resources and financial power could be employed to challenge the constitutionality of legislation. Indeed, the vindication of those rights would in all likelihood be an issue primarily in cases where it would be to the detriment of the interests of natural persons or the common good. The use of derivative action by shareholders provides adequate protection for the rights of individuals that may be directly affected by legislation impacting on the company. Since legal persons are the creation of statute, we believe that the protection of the rights and interests of legal persons is a matter for the Oireachtas alone.

COMPULSORY PURCHASE

The Green Party believes that powers of compulsory acquisition of property rights are an important element of the delimiting of property rights and the promotion of the common good. The Party wishes to see the Constitution empowering the state to compulsorily acquire property rights to fulfil a broader range of social policy objectives than merely road-building or the provision of transport infrastructure. We believe the appropriate tests for such acquisition are; the public interest; proportionality, and non-arbitrary character. We would propose the following wording for the Constitution:

> The compulsory acquisition of property rights may be provided for by law but such acquisition must be demonstrated in each case to be in the public interest, proportionate and not arbitrary.

However, we also believe that if an equitable system of Land Taxation were introduced, the use of Compulsory Purchase Orders would not be as necessary as people would have a much greater incentive to sell or develop their land.

THE ZONING OF LAND

(i) Windfall tax

We propose a Windfall Tax as advocated in the Kenny Report on Building Land thirty years ago. This proposal is based on the principle that communities, rather than developers should benefit from the excessive profits accruing from rezoning land. We propose that the level of the Windfall Tax should be linked to the increase in value on development land caused through local authority rezoning or through proximity to other development.

THE PRICE OF DEVELOPMENT LAND

(i) Control of price of development land

The prices paid for serviced land suitable for building and for potential building land near cities and towns in the state contribute greatly to the cost of housing – these prices are much higher than for comparable land which is used for agriculture only. We believe that such prices should be controlled.

We support the main recommendation of the Kenny Report (1973) regarding land reform that Local Authorities should be able to acquire potential development land designated by the High Court at its existing use value plus 25%, rather than the much higher development value.

(ii) The introduction of land taxation

The Green Party believes that the nettle of land and property taxes has to be grasped. Such taxes can play a positive role in levelling the playing pitch in achieving equity in housing provision. We agree with the general concern that the state should be able, in a fair manner regulated by law, to recover increases in value resulting from zoning or planning decisions. We do not believe that the current constitutional provisions would prevent this. However we see no reason not to make an appropriate explicit provision. We believe this recovery of value would most appropriately be done through taxation. Taxation would be superior in all or almost all respects to the recently suggested mechanism of 'step-in rights' by compulsory purchase. It would be easier and cheaper to administer, would raise revenue, be fairer, more transparent, less contestable and involve fewer conflicts of interest and less scope and incentive for corruption. Therefore we recommend that the Constitution specifically provide that the use of land may be taxed.

A possible wording would be:

> The State may promote the common good by imposing taxes on the use of land and other natural resources.

If such taxes are to be introduced they need to be linked to the ability to pay, possibly through the introduction of income limits. The Green Party supports a site value tax, as opposed to a property -based tax like the former domestic rates, which discouraged the improvement and upkeep of houses. We believe that an Annual Development Site Tax on the site value of development land should be triggered on the zoning of the land, or on the granting of planning permission. This Annual Development Site tax should be made available to local authorities (and through them to housing associations, housing co-operatives, community companies or trusts) and should correspond to the increased value of the land due to zoning or granting of planning permission.

THE RIGHT TO SHELTER

(i) Right to shelter or adequate accommodation

Shelter is a need for every person, and adequate housing is a basic human right, being recognised as such in the United Nations Universal Declaration of Human Rights (Article25(l)). Ireland has also signed up to the UN Convention on Social, Economic and Cultural rights which contains a commitment to a right to housing. The Committee on Economic, Social and Cultural rights considered the second periodic report of Ireland on the implementation of the International Covenant on Economic Social and Cultural rights in May 2002. The Committee noted with regret that, despite its previous recommendation in 1999, no steps had been taken to incorporate or reflect the covenant in domestic legislation, and that the Irish state could not provide information on case law in which the covenant and its rights were invoked before the courts. The Committee pointed out that, irrespective of the system through which international law is incorporated into the domestic legal order following ratification of an international instrument, the state party is under an obligation to comply with it and to give it full effect in the domestic legal order. The Committee reiterated its previous recommendation that the state incorporate economic, social and cultural rights in any proposed amendments to the Constitution.

The Constitution should recognise a right to shelter or adequate accommodation and impose a duty on the state to vindicate that right. Unlike property rights in relation to land, it is the view of the Green Party that this right is a natural law right. We would also propose that any right to shelter referred to within the Constitution should explicitly include those with special housing needs.

(ii) Responsibility of state to ensure provision of adequate housing supply

The responsibility of the state to ensure the provision of adequate levels of housing for citizens, in particular social and affordable housing for those on low

incomes, should be referred to within the Constitution.

We propose that Article 43.2.1 should read as follows:

> The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice, and the State shall ensure the provision of an adequate supply of social and affordable housing.

As the lack of suitable sites is often a major problem in the development of new local authority housing, we propose that local authorities be given first call on any state lands which are due to be sold. Local authorities must also be mandated to work with housing co-operatives and other non-profit organisations, and to provide sites and seed funding for joint venture projects with these organisations. Much greater subsidies, whether in money, sites or materials, should also be provided towards non-profit housing organisations including housing co-operatives and voluntary housing associations.

HOOKE AND MACDONALD

SITE COSTS IN DUBLIN

Hooke & MacDonald has taken this opportunity to write to the All-Party committee on the Constitution outlining the details of some recent research we have undertaken on site costs and the cost of development land in Dublin. We believe the findings of our research will be of particular interest to the committee, given that it is currently examining the issue of property rights in the Constitution.

The issue of site costs and the impact they have on new home prices has received a significant amount of attention over the last couple of weeks, particularly following the publication of the Building Industry Bulletin by economist Jerome Casey and also the Central Bank's Autumn Quarterly Bulletin and subsequent comments made by the bank's assistant director general, Dr Michael Casey. In particular, it has been suggested that site costs represent up to 50% of the total cost of a new home in Dublin. However, on further investigation it would appear that such claims are based on hearsay and that they lack quantitative evidence and the necessary analytical analysis.

Our own research on the issue of site costs shows that this figure of 50% grossly over-estimates the contribution of site costs to the price of new homes. To date, as far as we are aware, this is the first time detailed research on the issue of site costs has been carried out. Our findings are based on our extensive in-house database of land sales, along with our experience and knowledge of the residential property market.

We took a sample of 15 plots of development land sold in Dublin over the last 18 months with a total value of approximately €210m and used these to estimate the ratio of site costs to new home prices. Based on our calculations, we estimate that site costs on average account for 27% of new home prices. There is some degree of variation in the figures, with the estimates ranging from between 20% and 37%, which is explained by differences in the individual characteristics of each site, including factors such as location and planning status.

Historically, going back to the 70s and 80s, it was generally accepted that site costs represented an average of around 25% of the cost price of a new home, so in fact at 27% we are looking at only a very marginal increase. This issue is becoming a political football. However, our analysis clearly shows that there is no basis for the statements that have been made on the subject.

Calls for the capping of site prices are not only unnecessary, but are dangerous. A cap on land prices would automatically reduce supply and force new home prices up. Data on price growth shows a greater degree of moderation in prices in the new homes market in comparison to the second-hand market. 2003 will see a further increase in new home completions, which is expected to continue into 2004. This increase in supply should ensure that new homes price growth remains steady over the next year. There is now price stability and moderation in the new homes sector.

While site costs have increased over the last decade, contributing to the growth in the price of new homes, this has to a large extent been driven by the demand for zoned and serviced land, in turn driven by the demand for new homes. Therefore, the way for the government to ease the growth in prices over the medium term is to ensure that the required infrastructure is in place, that sufficient serviced land is available for development and that planning applications are processed as quickly as possible.

INSTITUTE OF PROFESSIONAL AUCTIONEERS AND VALUERS

SUMMARY AND RECOMMENDATIONS

Frequent predictions of an imminent demise of the Irish housing market in recent years have not materialised. Although there have been some features of speculative excess in the market over the past decade, they have been the exception rather than the rule.

The evolution of the Irish housing market over the past decade does not represent a deviation from fundamentals. The Irish economy over that period has experienced a fundamental transformation. This

transformation was characterised by several factors that created significantly higher demand for housing. These characteristics include strong economic growth, a sharp decline in unemployment, net inward migration, strong growth in disposable incomes, a young demographic profile, high household formation, falling household size, and strong investor demand. Furthermore, the market received a significant structural boost from a once-off decline in interest rates due to EMU entry.

The fundamentals now driving the market are changing. The yawning gap between demand and supply has narrowed significantly and the market is now close to a position of equilibrium. Going forward, a number of the factors that were instrumental in causing the rapid upward adjustment to house prices will be less influential. However, reasonable demand will continue to be supported by historically low interest rates, demographics, falling household size and investor demand.

As the market approaches a position of equilibrium, house price inflation is set to moderate, but a sharp decline in house prices is not imminent. Such a stabilisation of house prices would be in the best interests of all interested parties and particularly the stability of the economy.

While now undoubtedly more vulnerable than at any time in recent years due to changed economic circumstances and unprecedented international economic uncertainty, it is reasonably difficult to see a significant reversal in the fortunes of the domestic housing market. The key risk to the market would result from a significant employment shock. Such a shock prompted by the US multi-national sector would very quickly bring the Irish housing market crashing down. Consequently, observers of the Irish housing market should watch developments in US corporate boardrooms rather than domestic developments

Looking out over the medium-term, the dynamics of the domestic housing market look set to change. The market performance in terms of price growth is set to become more divergent, with the likelihood of considerably different price performance at the level of the housing sub-market. With broad equilibrium close to being achieved in terms of demand and supply in the overall market, location will become a more important driver of price.

Housing in most countries is now a very important component of total personal wealth and personal indebtedness. Consequently, its stability has a major bearing on the overall stability of an economy. Hence it is desirable to create a policy environment where house price inflation grows at a more sustainable pace and where mortgage debt does not increase to dangerous levels for individuals and the overall economy. Above all else it is essential to prevent a negative equity situation from developing.

It is imperative that all interested parties, particularly government, work together to pursue policies that will guarantee the overall stability of the housing market, and ensure that the market functions in a manner that will maximise mobility of the labour market and ensure economic stability.

Official interventions in the housing market have had mixed results in the past. The timing of many interventions was cyclically wrong. They have tended to increase volatility of house prices, and have generated considerable uncertainty. Market forces generally deliver the most desirable outcome and where possible they should be left operate as freely as possible.

Government policy towards rural development needs to focus on creating a vibrant rural economy. This will necessitate heavy investment in physical infrastructure and IT capability. Planning laws need to become less rigid in order to attract people to live in rural Ireland. The decision by some local authorities to prevent people from outside the county building a house is totally unacceptable and should be repealed.

Imposing a constitutional cap on development land is feasible, subject to a referendum, but is not desirable. Given time, measures to increase land supply through freeing up the planning process would achieve the desired outcome of price moderation.

The proposal to remove the DIRT liability on savings by first-time buyers that will go towards a deposit on a house would represent a positive help to first-time buyers.

Although not legally enforceable, it would be in the best interests of all interested parties if mortgage providers established a voluntary code of conduct covering areas such a loan to value ratios, the savings record of the borrower and the duration of the loan. The encouragement of fixed rate mortgages for a period of up to 10 years would also provide greater insurance against shocks and reduce risk for borrowers and lenders alike.

INTRODUCTION

Of all possible subjects, the housing market is the one that is guaranteed to attract most media and popular attention in Ireland. This is because Ireland has one of the highest levels of home ownership in the world and housing for many people represents their greatest financial asset and the mortgage on the property very often represents their largest financial liability. Those harbingers of doom who have been predicting an imminent collapse in the Irish housing market over the past five years or so have attracted more than their fair share of media attention. Despite this, the market has not collapsed and indeed continues to grow strongly. The reality is that the Irish housing market over the past decade has not represented an unsustainable bubble. On the contrary the rapid increase in house prices can be easily explained by reference to demographic and economic fundamentals.

This is not to suggest that one should become complacent about the housing market. Given the difficulties facing the global economy at the moment, it is not inconceivable that Ireland could fall prey to a

serious and damaging employment shock. Such an employment shock represents the greatest threat to the stability of the domestic housing market. While, on the balance of probability, such an eventuality appears unlikely, it should not be dismissed as a potential threat. However, providing the global economy does cycle out of the current downturn, most domestic fundamentals are sufficiently strong to prevent the Irish housing market going into a sharp decline. The interest rate environment delivered by EMU certainly provides considerable consolation.

The housing market in Ireland represents a major source of wealth and the associated mortgage debt represents a considerable financial liability. Consequently it is in the interests of all that the market remains stable and sustainable. In this regard, the narrowing of the yawning gap between demand and supply and the accompanying moderation in house prices is desirable. Hopefully the trend of deceleration in house price inflation will continue over the next couple of years. That would prevent a bubble from developing and make the market more stable in the longer-term.

A properly functioning housing and rental market is essential for the economy and for vital labour market mobility. To ensure that this is achieved, government needs to be careful about interference in the operation of the market. Past interventions have not proved particularly successful. All interested parties should however co-operate fully to address issues such as land prices, rural housing, helping first-time buyers and adopting prudent lending policies. By addressing these issues in a constructive way, the operation and stability of the market can only be enhanced.

RECENT HOUSING MARKET TRENDS – A BUBBLE OR NOT ?

As Ireland emerges from the Celtic Tiger period the sharp decline in unemployment and the strong increase in residential property prices are probably the two most noteworthy legacies of the period. The decline in unemployment cannot but be described as a very positive development, whereas the rapid house price inflation has had some undesirable effects such as pricing housing out of the reach of many young people and also increasing the debt exposure of the personal sector to levels that some observers would regard as potentially dangerous. Be that as it may, the reality is that the increase in house prices is a natural consequence of economic progress. The Irish economy over the past decade has been transformed from a relatively under-developed economic entity to a mature developed economy. Such a process will inevitably lead to once-off adjustments in many areas of an economy. In Ireland's case the housing market saw the most radical adjustment, but it should be seen as an adjustment rather than the creation of an unsustainable bubble.

In what is arguably the greatest treatise on bubbles ever written, Charles P. Kindelberger described a bubble as an upward price movement over an extended range that then implodes, and if this negative bubble is extended it becomes a crash. He described a bubble environment as one where there is an urge to speculate and this is transmuted into effective demand for goods or financial assets. This increase in demand will press against the capacity to produce goods, and prices will then rise. These price increases will then give rise to new profit opportunities that will attract further demand. This increased income will then create further demand and so goes the process. This behaviour can be described as 'euphoria', which if it builds up can result in a situation called 'overtrading'. Overtrading may involve pure speculation for a price rise, an overestimation of prospective returns or excessive gearing. Such overtrading can then lead to irrational behaviour or 'mania' and then a 'bubble' that foreshadows the bursting.

Economists normally define a bubble as any deviation from fundamentals. It is difficult to argue that the evolution of the Irish housing market over the past decade represents a deviation from fundamentals. In fact, the increase in prices can be explained fully by fundamentals and it contained few attributes of irrational behaviour. Of course in any price adjustment of this nature there will be some irrational behaviour, but in the context of the Irish housing market, such behaviour is the exception rather than the rule.

In assessing the evolution of the Irish housing market over the past decade, it is important to recognise that a key characteristic of the market is the high level of home ownership. Ireland has one of the highest levels of home ownership in the EU, standing at 78%, compared to an EU average of just 61%. This characteristic of the Irish population has long historical and sociological roots, dating back to both the famine and Ireland's colonial past. Owning one's own home is a key desire of most Irish people of working age, primarily reflecting the need for security of tenure. It is inconceivable that this sociological attribute of the Irish will change and if it were to, it would be a process that could take many years. In assessing the medium-term future of the housing market it is safe to assume that owning one's own home will remain a key desire of Irish people of working age. Of course it is one thing to desire to own one's own home, but it is quite another to actually be able to make it a reality. What we have seen over the past decade was a set of circumstances that certainly facilitated this. The aspiration became a reality for many but it is important to ensure than in the future it remains an attainable aspiration.

THE INFLUENTIAL DEMAND FACTORS

As in any other market, the price of housing is determined by the interaction of demand and supply. During the Celtic Tiger years demand grew strongly, while supply was slower to react. The result was a sharp increase in house prices.

Demand for housing is driven by a number of factors of which the following are the most important:

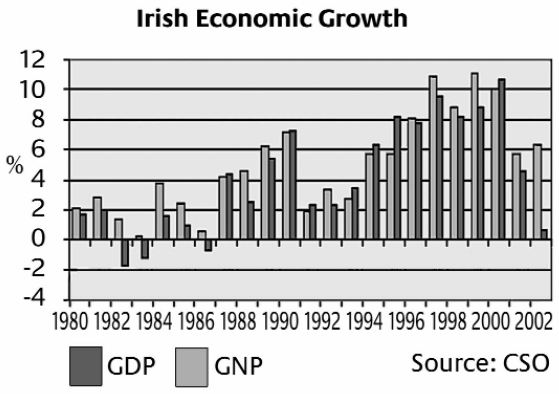
- the economic growth environment, which is a key driver of employment and growth of incomes
- the age profile of the population has a key bearing on the number of people of household formation age
- changing household size
- the extent of inward migration to the country
- affordability or more specifically the ability of young people of household formation age to actually buy a house
- the ability of housing supply to match demand
- the level of interest rates.

Over the past decade all of these factors combined in Ireland to increase the demand for housing in a significant way.

Economic growth

Since the mid-1980s, Ireland has been transformed from one of the most economically imbalanced, backward and depressed regions of Europe, to a country that is now viewed as one of the more developed economies in the region, or indeed in the OECD area. This decade of strong economic and social progress stands out in marked contrast to the preceding decade. For students and other observers of the Irish economy during the 1980s the picture was a very bleak and depressing one. Economic activity was virtually stagnant for much of the decade, the unemployment rate was in high double digits, inflation was considerably higher than in the major European economies, the balance of payments situation was precarious and the public finances were in a state of serious imbalance. This was an environment of depressed demand for housing and a relatively stagnant house price performance.

Figure 1



Due to a combination of sound domestic economic policies and fortuitous external economic developments, the economy was totally transformed in the latter years of the 1980s and during the following decade. Figure 1 demonstrates the strong increase in economic growth since the early 1990s. Between 1990 and 2000 GDP growth averaged 7.2, compared to average GDP growth of 3.2% between 1980 and 1990. Growth was particularly strong in the second half of the decade, averaging 9.8% in real terms between 1996 and 2000.

On the back of this strong economic growth, there was significant wealth creation. In GDP per capita terms Ireland rapidly caught up with the rest of the EU and moved up through the EU average in 1997. It now stands 20% above that average. If this is taken as a gauge of wealth, well then Ireland did truly transform itself from a poor relation in the EU to a first world and relatively wealthy economy in a very short period of time.

Figure 2

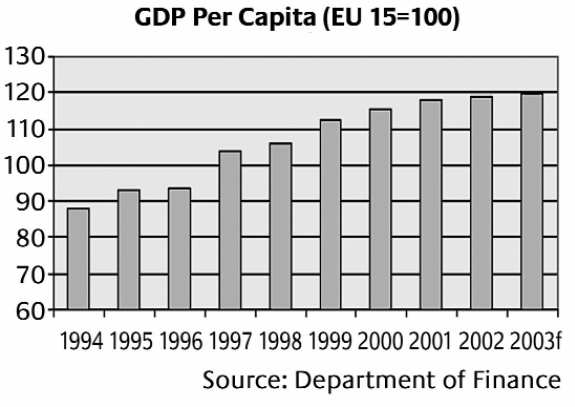
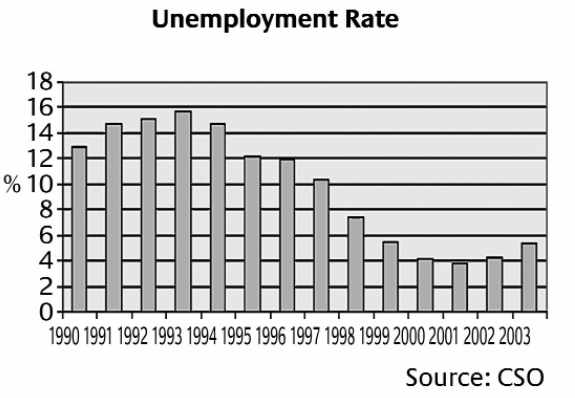


Figure 3



The labour market

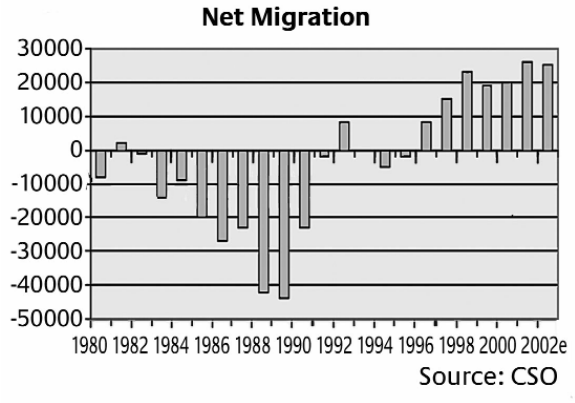
Undoubtedly the most positive and dramatic impact of the rapid catching up period for the Irish economy was the strong growth in employment and sharp decline in unemployment. Ireland in the late 1980s was an unemployment black spot and in the early 1990s, the general domestic and international consensus was that the Irish unemployment rate would be incapable of

falling below 10%. As Figure 3 demonstrates, this proved incorrect and in the face of strong growth in employment the unemployment rate fell very sharply, reaching a low of 3.6% in the first quarter of 2001. Not surprisingly, this transformation of the labour market gave a major boost to demand for housing.

Migration

During the 1980s there was significant net emigration and Ireland lost a large number of talented and skilled individuals during this period. At its peak, there was net outward migration of 44,000 people in 1989. Unfortunately, those that left were amongst the brightest and best educated and this represented a very damaging 'brain drain' and seriously undermined the growth potential of the economy. However, as the economic recovery started to take hold, this trend of outward migration turned around in dramatic fashion and since 1996 there has been strong net inward migration (see Figure 4). This inward migration initially consisted of many Irish who had been forced to emigrate in the 1980s, but more recently there has been a steady inflow of non-nationals seeking to satisfy the labour shortage that emerged in the late 1990s as the economy reached a situation of full employment.

Figure 4



Income growth

As the economy moved on to a higher growth plane in the 1990s, nominal and real disposable incomes expanded at a brisk pace (see Figure 5) due to higher employment, accelerating growth in nominal wages and a gradual reduction in the personal tax burden. This vibrant growth in disposable incomes, and expectations of strong growth in future incomes acted as a major catalyst for strong housing demand.

Demographics

The number of births in Ireland grew strongly during the 1970s, peaking at 74,000 in 1980. This 'baby boom' resulted in a bulge in the population age group between 20 and 34 years in the 1990s, which is the typical household formation age group. This demographic profile resulted in strong demand for housing in the 1990s and fuelled the house price boom. In addition, a sharp decline in the average number of adults per household from 3.6 in the early 1980s to an estimated 2.1 in 1999 also contributed to stronger demand.

Figure 5

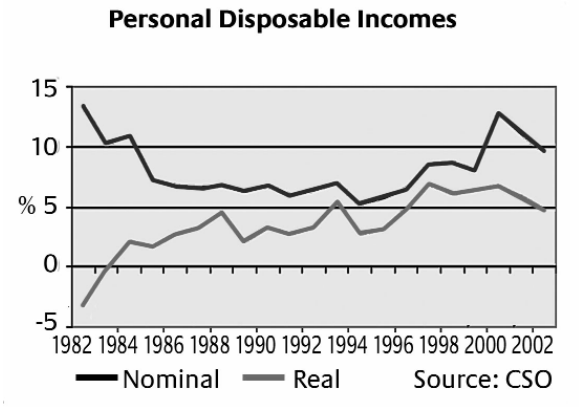


Table 1 Demographic profile

Age-Group	*%*
0-19 Years	29.3%
20-34 Years	24.7%
35-49 Years	20.1%
50 + Years	25.9%

Source: CSO

Household size

There was a sharp decline in the average number of adults per household from 3.6 in the early 1980s to an estimated 2.1 in 1999. This fall in household size also contributed to increased demand.

Table 2 Share of owner occupied dwellings (2001)

Country	*%*
Belgium	72
Germany	39
Greece	80
Spain	85
France	58
Ireland	78
Italy	69
Luxembourg	67
Netherlands	53
Austria	56
Portugal	64
Finland	64
Denmark	59
Sweden	53

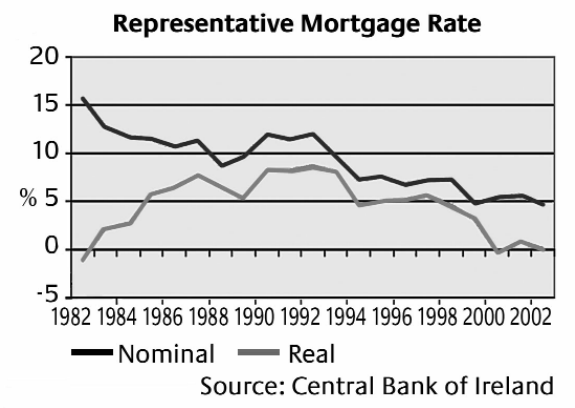
United Kingdom	68
Euro Area	60
EU	61

Source: European Central Bank

Interest rates

As the fiscal situation improved after 1987 and international investor confidence in Ireland improved, interest rates gradually converged towards those prevailing in Ireland's EU partner countries. This process was accelerated by the convergence of member country interest rates in the period leading up to European Economic and Monetary Union (EMU) on January 1st 1999. Since that date Ireland's interest rates are set by the European Central Bank (ECB) and are lower than Ireland ever experienced in the past. Real and nominal mortgage rates fell sharply in the second half of the 1990s and since 1999 real rates have been close to zero. This interest rate environment led to a sharp improvement in housing affordability and helped give a boost to housing demand and prices.

Figure 6



Investor demand

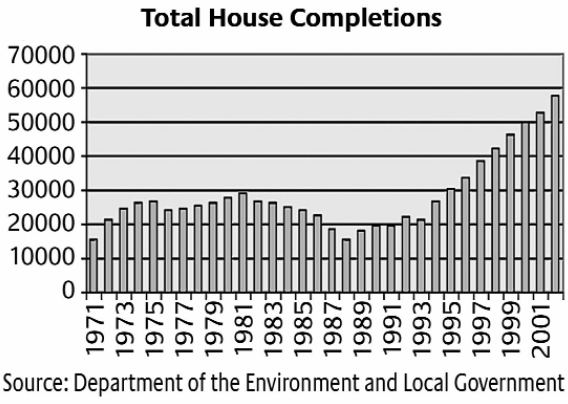
Demand for housing was also boosted by strong demand from investors. This demand was fueled by the prospect of strong capital gains, good growth in rental income, falling interest rates, and favourable fiscal treatment. Over the past three years the very negative equity market environment also made property the preferred investment vehicle for many investors.

All of the aforementioned factors combined to give a significant boost to demand for housing in Ireland. Supply was slower to respond, but has caught up over the past couple of years.

HOUSING SUPPLY

As the demand for housing increased during the 1990s there was a strong response from the market after a modest time lag. The supply of new units started to pick up quite strongly from 1995 onwards. From a low of 15,564 total house completions in 1988, a record number of completions totalling 57,695 was achieved in 2002. Local authority housing accounted for 8.8% of units completed in 2002. Changed demand dynamics, higher house prices and higher prices for development land brought forth the increased supply of new houses. This strong supply response proves that the market functions pretty efficiently and undoubtedly measures to increase supply should form the cornerstone of official housing policy.

Figure 7

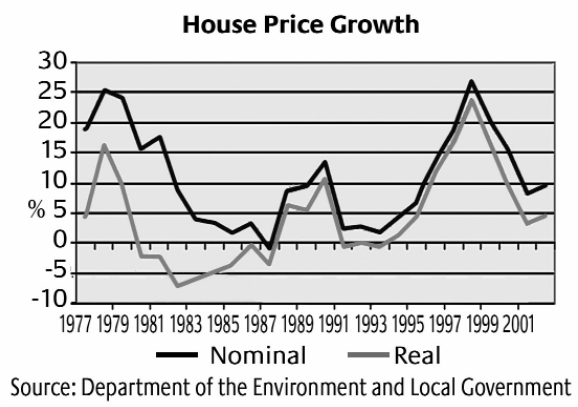


RECENT HOUSE PRICE DEVELOPMENTS

Strong economic growth, rapidly falling unemployment, solid growth in real disposable incomes, net inward migration, falling household size, a bulge in the household formation age segment of the population, historically low interest rates and strong investor demand, all combined to give a major boost to housing demand. Supply did not react as quickly and the net result was a sharp upward adjustment to house prices in the second half of the 1990s. As the gap between demand and supply narrowed, the rate of house price increase moderated and, according to recent figures from the Department of the Environment and Local Government, house price inflation for all types of houses countrywide was running at 9.5% in 2002. This is up from 8.1% the previous year when changes to the tax treatment of investment properties artificially depressed demand from investors, but compares to peak inflation of almost 28% in 1998.

As can be seen in Figure 7, the housing market does tend to move in cycles. Over the past three decades there have been peaks in 1979, in 1989 and again in 1999. Following these peaks the market returned to a more stable time path pretty quickly as market forces exerted themselves. This is what is happening at the moment and is attributable to increased supply, more subdued economic growth and generally less confidence about the future. The recent moderation, which is likely to continue, is testament to the proper functioning of the market.

Figure 8



Source: Department of the Environment and Local Government

THE OUTLOOK FOR THE HOUSING MARKET

Nothing is guaranteed to attract media headlines more than predictions of an imminent collapse in house prices. Over the past 5 years there have been numerous predictions of such a calamity, but it has failed to materialise. On the contrary, the housing market continues to go ahead strongly and despite the significantly changed economic circumstances of the past couple of years, house prices continue to rise. Positive demographics, historically low interest rates, generally healthy levels of affordability, strong investor demand, and a still relatively healthy labour market continue to fuel demand. However, as we have seen above, supply has also increased strongly in recent years and the yawning gap between demand and supply has narrowed considerably. The market is now in aggregate terms close to a point of equilibrium. This suggests that the rate of house price inflation should moderate over the next couple of years. All interested parties should welcome such moderation, as it would prevent a bubble from developing and create a more sustainable housing market in the longer-term.

While now undoubtedly more vulnerable than at any time in recent years due to changed economic circumstances and unprecedented international economic uncertainty, it is reasonably difficult to see a significant reversal in the fortunes of the domestic housing market. The key risk to the market would result from a sharp employment shock. It does not matter how low interest rates are, if one loses one's job, then a mortgage becomes unaffordable. A major employment shock prompted by the US multi-national sector would very quickly bring the Irish housing market crashing down. Consequently, observers of the Irish housing market should watch developments in US corporate boardrooms rather than domestic developments.

Ireland has created a strong multi-national investor base over the past couple of decades, particularly in the IT and chemical and pharmaceutical sectors. The former has seen some retrenchment since 2001, but the latter continues to expand strongly. While an employment shock of sufficient proportions to bring the Irish economy and the housing market crashing down appears unlikely, Ireland cannot afford to become complacent. Maintaining competitiveness is obviously crucial to the continued operation of the multi-national sector in the country and hence to the long-term stability of the economy. The latest World Competitiveness Report shows that the Irish economy has now slipped to 11th in the global rankings. Ireland has seen a steady deterioration in competitiveness over the past 3 years, due largely to high inflation, rising wages, and poor infrastructure, both physical and technological. Government policy will need to address these areas in an aggressive way.

THE FORCES GOING FORWARD

In looking at the medium-term prospects for the housing market it is worth considering the factors that were instrumental in generating the housing boom of the 1990s and extrapolating them forward.

Economic growth

A slowdown in the Irish economy was inevitable as we moved into the new millennium due to the fact that the economy was starting to come up against serious capacity constraints in the form of infrastructural bottlenecks and labour shortages. Such a slowdown was both inevitable and desirable, because after a period of such rapid catch up, growth could not continue at such a rapid pace and should return to levels more consistent with a mature economy. However, the slowdown has turned out to be sharper than anticipated and for reasons that were largely unanticipated, namely Foot and Mouth, the US recession, the global IT meltdown and the events of September 11th 2001.

The global economy will eventually cycle out of this downturn and provided competitiveness issues are addressed, the Irish economy should benefit. However, there will be no return to the growth rates of the Celtic Tiger period. Rather, GDP in the medium-term should settle down around a potential growth rate of 3 to 4%. Economies do not always manage to achieve their potential however, and Ireland's ability to do so will obviously be heavily determined by the external environment and domestic economic policy.

The potential growth rate of an economy is determined by growth in employment and growth in productivity. In the second half of the 1990s, growth in employment averaged just over 5% per annum, and growth in productivity is estimated at around 3%. In an Irish context productivity is difficult to measure because of the transfer pricing activities of multi-nationals, which distort productivity measurement. However, on an estimate of 3%, it would suggest that the potential growth rate of the economy in the second half of the 1990s was around 8%. Economies of course do not necessarily always realise their potential, but in Ireland's case, the growth potential was realised. In the

medium-term, GDP growth of 3–4% should be possible and would represent a good out-turn.

Labour market

Against a background of a sharp slowdown in economic activity since the middle of 2001, the unemployment rate has edged up from a low of 3.6% to 4.6%. This rate looks set to trend higher until the global economy turns around, but it is unlikely to go much higher than 6%. Such a level would still be low by historical and international standards, but the bottom line is that the rapid growth in employment and the dramatic fall in unemployment that helped drive the housing market in the second half of the 1990s will not be seen over the next 5 years.

Migration

The likelihood is that over the next 5 years inward migration will moderate due to lower job availability and higher general living costs. In other words, coming to live in Ireland will come to be seen as an expensive economic choice, and the labour market will be less lucrative.

Income growth

In a changed economic and fiscal environment, growth in real disposable incomes will be more moderate than over the past 5 years. The personal tax burden will not reduce any further and in all probability will rise as the government seeks to restore order to the public finances in a more difficult fiscal environment. Furthermore, employment growth will be lower, as will wage settlements in the exposed parts of the private sector. Future income expectations are a key driver of housing demand and prices, and these expectations are likely to be less ambitious over the medium-term than over the past decade.

Demographics

Demographics will remain a source of demand for housing. There is still a bulge in the household formation age group, the average household size is likely to continue to edge lower, and higher levels of marriage breakdown will create fresh demands for housing.

Interest rates

In an EMU environment where a moribund German economy will continue to depress economic growth in the euro area, the ECB will have to continue to pursue a low interest rate strategy. EMU membership will undoubtedly insulate the Irish housing market from a damaging interest rate shock.

Investor demand

Investor demand for residential property remains very strong and is likely to remain strong despite weaker capital appreciation and rental growth. Interest rates are close to historic lows and will remain low for the foreseeable future. This means that having money on deposit will result in negative real returns, while mortgage rates are now at 55-year lows. Consequently, there is a huge incentive to borrow to invest. Property is also an attractive investment from a fiscal point of view. Furthermore, after three very painful years for equity investors, property should continue to be seen as the investment vehicle of choice, with many investors likely to prove reluctant to invest in equity markets for the foreseeable future.

AFFORDABILITY

Affordability is a term that seeks to measure the ability of a country to pay for its housing stock and service housing related debt. There are many different measures of affordability. Figure 9 below considers the ratio of house prices to personal disposable incomes. An increase in the ratio implies deterioration in affordability. The ratio fell during the 1980s, remained pretty flat for a few years, and then rose strongly in the late 1990s. Over the past couple of years it has levelled off again and is now on a gradual decline. This is a positive development in terms of the stability of the housing market.

Figure 9

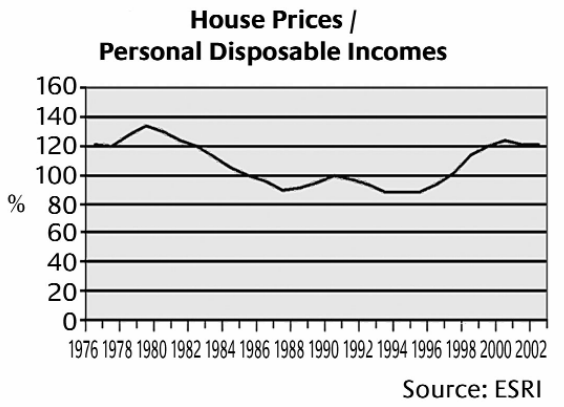
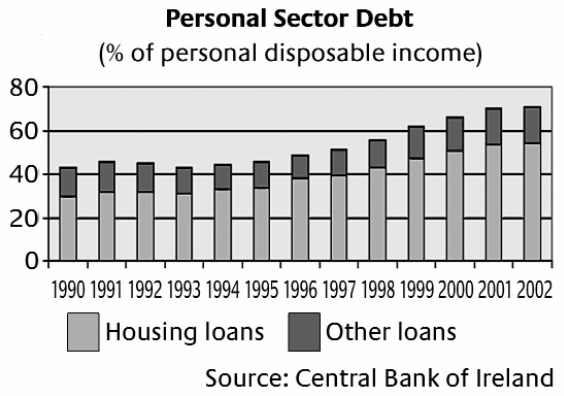


Figure 10



Personal sector debt increased sharply during the Celtic Tiger period. Figure 10 tracks gross personal sector debt as a percentage of personal disposable income, and it further breaks it down into housing related and other loans. The housing component has jumped from 29% in 1990 to an estimated 54% in 2002. This represents a very sharp increase in housing debt exposure, but it also has to be seen in the context of the dramatic catch up experienced by the Irish economy, and the step leap in the housing market.

In an international context, Ireland's exposure to the mortgage debt does not place the economy in a situation of particular vulnerability. Ireland is still below the EU and Euro Area average in terms of the ratio of mortgage debt outstanding to GDP. However, a possible source of vulnerability is the fact that Ireland's debt has built up so rapidly in such a relatively short period of time. Those who have got on the property ladder over the past 5 years or so, at high prices and a high average mortgage, are clearly those most vulnerable to a negative shock.

Table 3 Ratio of mortgage debt to GDP (2001)

Country	*%*
Belgium	28
Germany	47
Greece	12
Spain	32
France	22
Ireland	30
Italy	10
Luxembourg	29
Netherlands	74
Austria	30
Portugal	47
Finland	21
Denmark	67
Sweden	58
United Kingdom	60
Euro Area	33
EU	39

Source: European Central Bank

OUTLOOK FOR HOUSE PRICES

Many of the factors that have driven demand for housing in the Irish market in recent years are likely to become somewhat weaker over the medium-term. Economic growth looks set to be more modest, employment growth will moderate, unemployment looks set to rise gradually, inward migration is likely to decelerate, and income growth is likely to be more modest. On the other hand, investor activity, demographics and interest rates look set to remain strong drivers of demand. The ESRI estimates that the average annual demand for housing will be 48,900 between 2001 and 2006, and 42,000 between 2006 and 2011 (see Table 3). On the supply side, housing completions have increased strongly in recent years and strong supply looks set to continue. A record number of new units were completed in 2002. Residential investment accounted for 8.8% of GDP in Ireland in 2001, compared to an EU average of just 4.9%. This is indicative of the strong supply side response to the housing crisis in Ireland.

Table 4 Housing requirements

	1996-2001	*2001-2006*	*2006-2011*
Population Change	15,400	18,000	16,900
Migration	5,900	5,200	6,100
Change in Headship	12,400	11,400	11,900
Second Dwellings	11,000	14,300	7,100
TOTAL	**44,700**	**48,900**	**42,000**

Source: Duffy, Fitzgerald et al. ESRI Medium-Term Review 2001-2007

Looking out over the medium-term, the dynamics of the domestic housing market look set to change. The market performance in terms of price growth is set to become more divergent, with the possibility of different price performance at the level of the housing submarket. With broad equilibrium close to being achieved in terms of demand and supply in the overall market, location will become a more important driver of price. In an environment where buyers gain more market power, price performance in different locations will be increasingly driven by factors such as infrastructure, public transport and other social amenities. In areas that score highly on these fronts, prices are likely to continue to rise strongly, while demand and prices in other areas are likely to be weaker.

The important point is that the housing market is not a bubble that is about to implode. It is possible to reconcile the large real increases in house prices in Ireland in recent years to fundamentals. House price inflation has started to moderate over the past couple of years as supply has caught up with demand. Going forward the average house price is likely to grow broadly in line with growth in the economy, which is a more sustainable situation.

ENSURING THE STABILITY OF THE HOUSING MARKET

Housing in most countries is now a very important component of total personal wealth and as such its stability has a major bearing on the overall stability of an economy. For example a collapse in house prices would have a very negative wealth effect and seriously undermine consumer spending, and significantly alter the stability of the economic cycle. Likewise, mortgage debt has also become a significant financial liability for the personal sector in most countries. Consequently, rapidly rising house prices and mortgage debt to finance more expensive housing can increase the

vulnerability of an overall economy to some sort of housing market shock. Hence it is desirable to create a policy environment where house price inflation grows at a more sustainable pace and where mortgage debt does not increase to dangerous levels for individuals and the overall economy. Above all else it is essential to prevent a negative equity situation from developing.

In Ireland's case this is particularly relevant at the moment, given the high level of home ownership, the rapid catch up in house prices, and the sharp increase in mortgage debt over the past decade. The Irish economy has undoubtedly become more vulnerable to a negative housing shock that would undermine prices and cause repayment difficulties. The problem is that the most easily identifiable shock, namely an employment shock, is largely outside the sphere of influence of the domestic authorities. Consequently domestic policies need to be compatible with the overall objectives vis-à-vis the housing market insofar as is possible. It is essential that policies towards the housing market insulate the economy and the housing market against the worst effects of such an externally driven shock.

Increasing the supply of housing is clearly the most effective way to create a more sustainable situation, as demand for housing will in the main be determined by macro-economic factors, many of which are also outside of the control of the domestic authorities. In this regard, the supply side response has been positive over the past 5 years but it has to be hoped that if land prices and house prices stabilise, a level supply of new housing will still be forthcoming.

Labour market mobility is a necessary requirement for regionally balanced, sustainable and non-inflationary economic growth. A properly functioning housing market and a properly functioning rental market are necessary to achieve such labour market mobility.

It is imperative that all interested parties, particularly government, work together to pursue policies that will guarantee the overall stability of the housing market, and ensure that the market functions in a manner that will maximise mobility of the labour market.

HOUSING ISSUES AND RECOMMENDATIONS

Official interventions

Official interventions in the housing market have had mixed results. For example, the decision to abolish mortgage interest relief on investment properties forced a sharp pullback of investors from the market during 2001. This resulted in reduced demand for housing and a deceleration in house price inflation. Then when mortgage interest relief was reintroduced for investors in Budget 2002, investors immediately returned to the market and gave another boost to demand and house prices.

The decision to abolish the relief in the first place was flawed. Mortgage interest relief on investment property is a legitimate business expense and as such should be afforded the same treatment as any other business expense. The decision to remove the relief also had the undesirable effect of driving property investors offshore to markets such as Spain and the UK. This did not benefit the Irish economy. Demonising the investor is not a sensible policy as investors are a necessary element of the overall housing market. To provide a proper rental market investors are essential. Following the re-introduction of mortgage interest relief, the supply of rental properties has increased significantly and this has resulted in a welcome moderation of rent costs.

The abolition and the re-introduction of the relief created a distortion in the market, increased uncertainty and price volatility, and undermined the efficient functioning of the rental market. The lesson that should be learned is that the government should be very careful in its interference with the market, because if left to its own devices, the market will almost always achieve a desirable and efficient outcome. Furthermore, it is very difficult to get the timing of intervention right, and if the timing is wrong it can have undesirable and destabilising effects. For example the decision to introduce a maximum stamp duty rate of 9% on commercial property in Budget 2003 was ill advised. It was increased at a time when the commercial property market was already in a significant downturn and was experiencing increased vacancy rates and falling rents. The timing of this change was not good.

Improving labour mobility

A properly functioning housing and rental market is essential for mobility of labour. Labour mobility is in turn essential for balanced regional economic development. Availability of rental property and greater housing turnover are essential to encourage workers to move around for work, either within or between countries. Research has shown that workers will become more mobile if there is a supply of affordable rental properties and if housing transaction costs are moderate.

The current Irish stamp duty regime is penal and acts as a serious disincentive to turnover of housing. The reduction in capital gains tax from 40% to 20% increased the turnover of capital assets, improved economic efficiency, and resulted in a higher tax take under this heading. A reduction in stamp duties on residential property could have a similar effect, by leading to older people trading down and freeing up larger properties for families. The increased activity should at least maintain the tax take and if carefully chosen a new lower rate could actually result in an increased take. Stamp duties, legal and other transaction costs act as a major disincentive to housing mobility, which in turn undermines worker mobility.

Rural housing

For a wide variety of reasons, traditional farming in Ireland is in decline, with more and more people

leaving the land. In the face of reform of the Common Agricultural Policy (CAP), the activities of the World Trade Organisation (WTO) and increased competition from low cost food producing countries, particularly in the context of EU enlargement, this trend of displacement of farmers from the land is set to continue. This threatens to undermine the fabric of the rural way of life and the rural economy. Consequently, there is a need for policies that will generate a dynamic rural economy and rejuvenate a rural way of life that is now under serious threat. Alternative sources of employment need to be provided to prevent displaced workers from the agricultural economy moving into already congested urban areas. Such migratory flows are bad for both rural and urban areas, and they need to be halted.

To help achieve this there needs to be an emphasis on attracting new employment opportunities to rural areas, either through start ups or the attraction of new industries. The National Spatial Strategy needs to be pursued with considerable vigour. The provision of proper physical infrastructure is essential, including roads, sewage, public transport, a proper rail network, and air access where possible. Remote business needs to be facilitated through the provision of adequate IT capability, with widespread broadband availability a minimum requirement.

In order to facilitate rural re-settlement, the planning laws need to be changed. It is totally unacceptable that local planning authorities can prevent non-natives of a county from building a house in that county. This is a serious impediment to labour mobility and rural economic development. Such policies prevent an inflow of talent and help create a moribund and inward looking local economy. People should be given freedom to build in the countryside and those local authorities that are restricting planning for 'outsiders' are undermining the future of rural Ireland. Such policies risk creating a de-populated wasteland. This is not acceptable.

To facilitate proper infrastructural and rural development, the whole planning process as it relates to road and housing development needs to be reviewed and changed. The time taken to go through the appeal process and excessive compensation payments are anti-economic development and anti-progress, and impose a huge cost on taxpayers. A ready supply of zoned and fully serviced land needs to be facilitated by reforms to the planning system.

Land costs

Research has shown that there is a high elasticity of supply of building land. In other words, increased land prices will bring forth an increased supply of development land and consequently a greater supply of new housing. It is also the case that there is a high correlation between land costs and house prices. In recognition of this latter fact, the Taoiseach recently asked the Oireachtas All Party Committee on the Constitution to look at the cost of development land. The suggestion is that the cost of building land be capped through a constitutional amendment. Article 40, Section 2(0) of the constitution states that

> The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Placing a constitutional cap on land prices would appear to be against the spirit of this constitutional right to private property. Furthermore, a constitutional change to cap land prices could be followed later on by measures to cap the price of houses themselves. This would represent a further serious attack on the constitutional right to private property.

The fundamental rights section of the Constitution protects rights to the ownership of basic personal possessions, such as homes and personal goods, but according to some also protects major differentials in the ownership of productive wealth within Irish society. This highlights the importance of the constitutional qualification that property rights must be subject to regulation in accordance with the principles of social justice. In the opinion of the Constitutional Review Group, if the state is to function, property rights must yield to a wide variety of countervailing interests, among them the redistribution of wealth, the protection of the environment, and the necessity for consumer protection. The interpretation of this is that the State may regulate and interfere with property rights, but not in a manner that disproportionately interferes with such rights. It is reasonably clear that on legal grounds the introduction of a constitutional cap on land prices for development could be introduced subject to being passed by popular referendum, but that may not be the best solution.

The stated aim of the Taoiseach is to bring about a situation where 'development enriches the many, and not the few'. The owner of land has the right to maximise the price obtained for it. Interference with this right represents interference with the way in which the market system operates and should be avoided. Rather the way to address this issue is to loosen up the rigid planning laws to bring more development land on stream. Increasing supply is the only sure way of getting the price down, and in such circumstances the owners of land or developers would have a reduced incentive to hold on to land in the hope of getting significantly higher prices at a later date. A market-based solution would be most desirable.

First-time buyers

The removal of the first-time buyers grant was desirable, because it represented false economy for many of them. A more acceptable approach is to instead increase mortgage interest relief for first time buyers. This was done in Budget 2003, but it did not go far enough to help the sector of the housing market that has suffered most in recent years. It would be desirable to increase this relief further in Budget 2004.

The proposal to remove a DIRT liability on savings by first-time buyers that will go towards house purchase would represent a positive help to first-time buyers.

Rental market

The Residential Tenancies Bill is shortly to be published. This Bill will seek to address many of the concerns of tenants and this is to be welcomed. A good tenants charter would help the rental market, but the terms should not be too rigid or tight. Offering security of tenure to tenants after a period as short as six months would be too tight. A period of twelve months would be more appropriate for all concerned. As well as rights, the obligations of tenants should also be provided for.

Voluntary code of practice for mortgage providers.

Deregulation of financial markets played a major part in the creation of the UK property bubble in the late 1980s, which burst with devastating effect. The recent announcement by the Central Bank of Ireland to investigate the mortgage lending practices of Irish financial institutions is a welcome recognition of the dangers of a similar occurrence in Ireland. Over the past decade the Irish mortgage market has seen significant deregulation and the entrance of new players to the market. This has been positive for competition, has reduced mortgage margins, and has satisfied a legitimate demand for mortgage credit in the market. However, excessive credit creation and more particularly lenient lending practices could create serious problems for the overall stability of the housing market and of the overall economy.

It is the long-term interests of all players in the Irish housing market, including financial institutions, vendors, buyers and auctioneers, that the stability and integrity of the housing market is guaranteed. In this regard it would be beneficial to get all lending institutions in the mortgage market to agree a voluntary code of conduct in relation to mortgage lending. This should include areas such as the required deposit, the savings record of the borrower, and the loan to value ratio. It would also be beneficial to agree common standards for stress testing.

A concerted effort to encourage borrowers to lock into long-term fixed mortgage rates would be constructive. This would protect borrowers from the vagaries of short-term interest rate volatility and is a feature of most other housing markets. The Housing Statistics Bulletin December Quarter 2002 shows that in 2002, 59.4% of the total loans approved were variable and 40.6% were fixed. This in itself is a low level of fixed mortgages, but if one considers that a large proportion of those fixed loans were discounted fixed rates for a one-year period, then the underlying situation is less stable. In 1998, 68.9% of loans approved were fixed. The discounted short-term rates on offer for first time buyers look very attractive on the surface, but they can create a false sense of financial security. At the end of the discounted period, the return to standard rates could pose a significant financial shock to some borrowers. A high percentage of loans fixed for periods as long as 10 years would provide a huge level of insurance for individuals, the housing market and the overall economy. Risk reduction is desirable. In exceptional circumstances such as those that prevail at the moment, fixed loans are relatively expensive, but it would still be in the long-term interests of everybody to take the fixed option.

Such a voluntary code of practice should not be seen as a diminution of competition, but would represent a prudential set of standards that would enhance the stability and sustainability of the overall housing market.

THE INSTITUTION OF ENGINEERS OF IRELAND

The Institution of Engineers of Ireland, with over 21,000 members encompassing all disciplines of engineering across both the public and private sectors, is Ireland's largest professional body.

The Institution very much welcomes the review by the committee. We believe the outcome of the committee's deliberations can have a profoundly beneficial impact for society by ensuring that infrastructure essential for social and economic development can be constructed in a timely and cost effective manner.

1 DEFINING A CLEAR VISION FOR INFRASTRUCTURE DEVELOPMENT

Ensuring Ireland's infrastructure deficit is reduced is critical to the social, industrial and economic well being of our country. It involves enormous long-term investment by government and private sector investors and a decision often takes many years to implement.

The institution believes it is essential that government set out a broad vision for what we are aiming to achieve and the principles underpinning this vision. The institution believes the following should be included:

Social equity

All citizens, business and regions of the country should have fair access to quality infrastructure. The rights to private property should be balanced by the rights of society at large and the common good.

Sustainable development

Infrastructure development strategy should be seen as a key element of Ireland's sustainable development

agenda. Pollution minimisation, optimum use of energy, public health, resource conservation/management and improved public safety should form part of the decision making process for infrastructure development. We should leave future generations with infrastructure which provides a quality of life and access to services at least equal to previous generations.

Spatial strategy

Infrastructure development and decisions relating to it should be guided by governments' National Spatial Strategy and what is best for the long term good of society and the economy, and should not be influenced by the vested private interest of individuals or minority groups.

Standards

We should aim to achieve standards of infrastructure and service compatible with our EU partners and international competitors.

Value for money

In decision making and in design and delivery of infrastructure we should ensure value for money is achieved.

Accountability

Those charged with delivering and managing our infrastructure should be held accountable for performance.

Appropriate public/private mix

Our objective should be to ensure that the best possible infrastructure and service compatible with value for money is delivered as quickly as possible.

2 WORKS FOR THE COMMON GOOD

Ireland's constitution recognises the need to balance two very important concepts:

> Article 43.1 acknowledges the natural right to private ownership of external goods
>
> Article 43.2 recognises that the exercise of the right to private ownership ought to be regulated by the principles of social justice and goes on to state '… The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good …'

The Institution of Engineers of Ireland believes that one of the major reasons for the poor record of delivery to date of major projects is because sufficient emphasis is not placed on Article 43.2 which makes reference to 'the exigencies of the common good'. Public infrastructure delivers a benefit to every citizen, to industry, to the economy and to society as a whole. The Institution believes that, in progressing public infrastructure, this fact must be taken more into account and the constitutional requirement relating to 'exigencies of the common good' recognised in government policy, in statutory instruments and in planning and judicial decisions.

This is not to say that the rights of the individual and special interest groups should be ignored. Plans for infrastructure development should be made available for public scrutiny in a transparent and timely manner. Environmental impact assessments should be published and the advantages and disadvantages of development made known to the public. Citizens should have the right to submit their views on proposed development and to object to proposals as they see fit.

However, final decisions should be made in a timely manner and based on a proper balance between the rights of the individual and the needs of society as a whole – i.e. 'exigencies of the common good'.

3 THE PLANNING PROCESS

All major infrastructure development projects are subjected to a significant planning approval process and most require an environmental impact assessment in accordance with EU Directives. The planning process can be a major constraint to timely implementation of infrastructure development and the Institution believes the following key areas in particular require urgent action.

Duplication of authority

The current legislation requires the consideration of certain projects by a number of different authorities. This applies particularly where a project may require approval by a planning authority, An Bord Pleanála, EPA, HSA and the Department of Communications, Marine and Natural Resources. This leads to overlap and potential for confusion which may in turn invite legal challenge. While recognising the absolute right of individuals and organisations to object to proposed projects, the institution believes the current planning process itself contributes to attracting unwarranted objections to infrastructure projects, inordinate delays and significant increase in cost. Recent examples include the Corrib Gas Terminal, the M50 Carrickmines Interchange, the Glen of the Downs Road Project, the Kildare by-pass, the Cork Electricity Transmission Grid Project and a number of waste management projects.

A method of fast-tracking projects of national interest should be established:

- a specialist 'one stop shop' planning body should be established either separately or as a division of An Bord Pleanála with responsibility for assessing planning applications for infrastructural projects which are in the national interest
- mandatory timetables for decisions should be given for all infrastructural projects and these target deadlines should be met
- a special division of High Court should be formally

established to deal with legal challenges to infrastructural and environmental planning.

Time to obtain approval

There is a real concern that for many major projects we have excessively long lead-in times before construction is allowed to commence. If Ireland is ever to redress the infrastructure deficit, it is essential to have an effective, efficient, reliable and transparent regu-latory regime in place.

Urgent consideration should be given to streamlining the appeal and oral hearing process for major infrastructural projects. There is a necessity for much stricter adherence to the subject matter in the conduct of the hearing. DOELG should be requested to prepare guidelines which ensure clarification of the separate roles and functions of the various bodies involved in assessing and approving projects. As part of the training of inspectors it is essential to ensure that they apply these guidelines in a consistent manner.

The general improvement in turnaround of appeal cases by An Bord Pleanála is most welcome. However for foreign direct investment projects it is essential that the standard time-scales outlined for planning approval are maintained, including the 18 week statutory objective period for appeals to the Bord. Without such certainty it will be increasingly difficult for Ireland to be a competitive location for inward investment.

4 SERVICED LAND AND LAND ACQUISITION

Serviced land for housing

The supply of serviced land is a key supply side driver. It is recommended that government introduce economic instruments, with the aim of minimising any benefits from 'holding' developed lands, and to encourage landowners to release these lands onto the market for development. Zoned and serviced lands should not be allowed to remain undeveloped while the landowners hold the property, as its value rises in an imbalanced supply/demand market environment.

The Institution favours a reduced emphasis on outdated single use land zonings in order to allow development to occur in an integrated manner. Housing provisions should increasingly become more an element of mixed used development, rather than as a separated land use, in the interests of securing more sustainable patterns of development.

Following on the success of previous urban renewal strategies, further schemes to encourage the re-development of substantial numbers of brown-field sites and still under-utilised urban properties, should be introduced. The densification and regeneration of the existing urban fabric of the country's towns and cities should go some way to ease supply side pressures.

The operation of the serviced land initiative, under which DOELG grant aid local authorities for the provision of sanitary services for development land, should be examined with the aim of achieving a more dynamic effect on the supply of serviced lands.

The benefits of using strategic development zones (as recommended by Bacon II) as effective instruments to improve housing supply are acknowledged and the use of such zones should be progressed.

Property acquisition for infrastructure development

When private land or other property is acquired by a public body for infrastructure development, the owner should be paid a fair price. However, the Institution believes that in recent years, the public purse is considered to be limitless by some property owners and exorbitant prices are being demanded and indeed in some instances being paid for property. When property is being acquired for infrastructure development, it should be recognised and accepted that this is being done in the common good. It should be recognised that the rights to private property are not unlimited under the Constitution and that the constitution in Article 43.2 allows the state as may be required to '….delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good'. Property owners should not be allowed to hold up essential infrastructure development indefinitely or blackmail the public body involved into paying exorbitant prices.

In relation to price, we have seen instances where decisions by public bodies, to rezone land or to route a road, railway, water supply etc. along a given route, have significantly increased the market value of property. Such decisions should not subsequently be detrimental to the common good by virtue of increased prices having to be paid by public bodies for such property.

In all instances, a fair price should be paid, related to the value of the property prior to decisions being made on rezoning or routing of infrastructure.

IRISH AUCTIONEERS AND VALUERS INSTITUTE

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The IAVI, as the largest real estate organisation, representing over 1,600 qualified property professionals on the island of Ireland, wishes to make the following submission to the All-Party Oireachtas Committee.

2 INTRODUCTION

2.1 The IAVI would urge the government to exercise extreme caution, as the history of public intervention in the property market is a vexed issue with a litany of reports and initiatives

many of which, while well intentioned, have failed to demonstrate a proper understanding of the dynamics that drive property markets. Public sector intervention in a free private market could have major detrimental consequences, only some of which may be foreseen. There are a number of reasons why such unilateral intervention may be considered inappropriate to the efficient operation of property markets.

2.2 The predominantly static and physical nature of real estate and the built environment tends to obscure the fact that property is essentially a dynamic, abstract entity. Physical property operates entirely within a context that is psychological, social and political. Consequently practitioners, users, developers, investors and policy makers need to understand not only the physical, economic and legal characteristics of property but also the psychological and motivational reasons why people invest in property in the first place.

2.3 Property impinges upon virtually every domestic and commercial activity and forms the majority of all tangible assets held by individuals and companies. Home ownership is the most common form of wealth and, in this respect, Ireland has one of the highest levels of owner occupation in the EU with 78% of households living in this tenure, according to 2001 figures issued by the European Central Bank. Only Spain and Greece have higher home-ownership levels, at 85% and 80% respectively. Property in the form of farmland is a further significant type of wealth holding in Ireland. The strength and extent of the property boom in Ireland since the mid 1990s can be seen in the fact that between 1994 and 2002 around 378,000 houses were built, close to 30% of the current housing stock. Output reached 52,600 units in 2001 and 57,700 units in 2002, representing an increase of 9.7% over the previous year. It is estimated that the Irish building industry can deliver approximately 60,000 new homes annually for the foreseeable future, assuming the availability of serviced and zoned land.

2.4 The dramatic uplift of land and property prices in Ireland during the past decade primarily reflects the economic boom over this period. In this respect the analysis provided by the Kenny Report (1973) of an earlier period of dramatic land and house price growth remains pertinent to the current situation. While the underlying economic drivers have changed significantly, the property market response is remarkably similar.

3 THE RIGHT TO PRIVATE PROPERTY

3.1 In addition to economic and social impacts, property has a significant constitutional role in terms of conferring on people the independence necessary for proper citizenship. However public rights over private property have been acquired by a number of different means for example, by grant, implied grant and prescriptive use. According to the common law, restrictions on the use of private property could be imposed by the state (McLean, 2000).

3.2 The IAVI believes that there is no immediate need for constitutional change in order to address the property issue. The Constitution is more than adequate in that it allows for people to own private property and to have that right respected by the ordinary people of this country. It also allows for that privilege to be subject to the 'common good', thereby allowing the state to acquire property or to direct/restrict its use for the benefit of the public good. In other words, the State has the best of both worlds.

3.3 A review group is recommending that Article 40.3.2 (in relation to property rights) and Article 43 should be deleted and replaced by a single Article dealing with property rights. While this may be a sensible approach in the interests of codification, the IAVI believes that difficulties may arise in relation to the compensation code where land is acquired by the state. In this respect the institute believes that the principles surrounding the current compensation code, as defined by statute and by the courts, have upheld property owners' rights and are fundamentally correct and that whilst the acts governing such compensation merit consolidation, the fundamental principles which have been established under that code are correct and fair.

3.4 The IAVI also believes that Article 44 Paragraph 6 should be reviewed and sees no reason why the property of religious dominations, or of any educational institution, should be treated differently from those of any other party and therefore recommends that Article 44 Section 2.6 of the Constitution should be repealed or amended accordingly.

The IAVI in addition requests that the protection of the rights under Articles 40.3.2 and 43 of the Constitution should be afforded to bodies corporate, trusts, partnerships, limited companies, etc.

Although historically, most properties were in private individual ownerships, today because of the scale of values, the needs of syndication and shared ownerships, the requirements of lending institutions and the complexity of

development, the vast majority of commercial properties are held in trusts, partnerships, limited companies and other corporate structures.

There appears to be no reason why these types of ownerships should not enjoy precisely the same private property rights as individuals.

In all other respects the IAVI is sympathetic to the majority recommendation of the 1996 Constitution Review Group as contained in Section 6 of the Chapter 'Private Property' of their report.

4 PRIVATE PROPERTY AND THE COMMON GOOD

4.1 The IAVI recognises and is fully supportive of the need to balance the rights to private property with the common good and accepts the need, in the common good, to be able to limit the absolute enjoyment of private property by controls, by equitable taxation measures, land and building usage, regulations of condition of occupancy and at times extinguishment of property rights and ownership, subject to appropriate and equitable compensation.

The IAVI however, believes that the existing legislative framework, subject to some variations, is more than adequate to accommodate such modifications as may be desirable to resolve existing challenges.

As well as making a major impact on society through the provision of housing, property makes a significant contribution to economic competitiveness and the regeneration of urban areas. International research clearly demonstrates that an efficiently functioning property market enhances economic competitiveness and is critical in attracting foreign investment. Investability, as a measure of investment attractiveness, is strongly influenced by the availability and quality of property, characteristics of the labour market, social factors, transport/ accessibility, and regulatory and planning considerations (Begg, 2002). Further work by Gibb et al (2001) shows that efficient and receptive markets for land and property are essential to capture mobile inward investment. The Taoiseach, in addressing the IMI national management conference in early April 2003, stated quite correctly that the Irish economy needs to be competitive in every aspect. The efficient functioning of the property market is a key ingredient of investability. High levels of property taxes and the adverse effects of public sector intervention simply drive investors to other locations.

4.2 In delivering effective urban regeneration, the raising of property values is vital so that projects can become viable. Otherwise regeneration will not be self-sustaining. Hence an understanding of the dynamics of the property market is essential in explaining why the private sector invests in some areas and not in others. In this context, Gibb et al (2001) discuss the importance of receptive markets for land and property, which lever investment into regeneration schemes. However, the property market is comprised of different elements: the user market, the investor market and the development market. Thus in relation to the commercial market, movement in rents reflects changes in the characteristics and behaviour of the local economy and the demand for accommodation, while yields are determined in the investment market and the macro-economy. Subsequent yield changes reflect investors' perceptions of rental growth and demand for property investment. Property market dynamics are clearly a vital component in economic competitiveness.

4.3 Public policy can have an absolute impact on land and property values. Since the demand for land and property is derived from the demand for the use to which such land and property is put, bidding prices for land and property as a whole should increase if policy enhances economic efficiency by, for example, tackling congestion and improving overall accessibility.

From a neo-classical perspective, value will thus be lost if 'bad' policy/planning decisions produce a less efficient allocation of uses, causing users to locate less optimally, reducing their utility and profitability and causing them to bid less for land. Conversely, 'good' policy/ planning decisions have the potential to add value, by improving accessibility and complementarily within a city, so enhancing utility and profitability and enabling users to make higher bids. For 'as the value of privately owned land may be increased by changes in the public land use infrastructure, town planning can be seen as a means of increasing the values of private and profitable uses of land' (Balchin *et al.*, 1995: 106-7)

4.4 In theory, in a perfectly competitive market, rapid changes in price balance the quantity demanded with the quantity supplied and ensure equilibrium. Such markets eliminate surpluses and overcome shortages quickly. Perfectly competitive markets that are not distorted by external influences will therefore produce resource-efficient allocations. Perfect competition requires many buyers and sellers, who each have freedom of entry and exit, perfect information and a homogeneous product. In practice, the perfectly competitive market does not exist. Although all markets contain some imperfections, certain markets are much

closer to meeting the conditions of perfect competition than others. Land and property markets are far removed from meeting the conditions of perfect competition.

4.5 Land is heterogeneous not homogenous. It is traded infrequently in a series of linked sub-markets. Transaction costs limit the ease of market entry and exit and aggravate liquidity. Sub-markets are not merely geographically defined, but are also product differentiated. In residential land, for example, separate sub-markets exist for bulk land, small housing sites and sites suitable for apartment development. The number of buyers and sellers for land as a whole, let alone in each sub-market is limited. According to Balchin *et al.* (1988), the widespread nature of such imperfections makes property markets among the least efficient of all.

4.6 Where market operations are distorted by external influences, market failure can occur. Externalities, public goods and lost opportunities all provide examples of such distortions within land and property markets (Adams, 1994). Many urban goods, such as roads, parks and the external environment of the city, display elements of publicness. Much past debate has concerned the extent to which such infrastructure could be financed by collecting the betterment it produces in the surrounding areas. New motorway construction, for example, has a direct, and often considerable impact on the value of land that it opens up for development. It can be argued that for any betterment to be collected in full, it would be necessary for the state to acquire not simply the route of the motorway itself but a much wider area, the value of which benefits from increased accessibility. Since in practical terms, this might be very wide, common sense might suggest limiting additional acquisitions to areas with the greatest and most immediate development potential. In this context, it is interesting to note that much of the finance for the development of the Mass Transit Rail (MTR) system in Hong Kong came from the sale of airspace above new stations for intensive office development.

4.7 Market imperfections and failure undermine confidence in market processes and highlight the significance of risk and uncertainty in land and property markets. They suggest that public policy may have a potentially important role in determining the context for land market operations by helping to reduce the extent of market imperfections and failure.

A critical function of markets in a modern economy (including urban property markets) is to convert uncertainty into risk (Van der Krabben, 1995). In a world where many future events are possible, uncertainty refers to a lack of knowledge of all possible outcomes and the impossibility of specifying their likelihood. Risk refers to specific calculations of the likelihood of each possible outcome taking place. Public policy has a key role to play in removing uncertainty, reducing risk and promoting the use of land and property for the common good.

5 COMPULSORY PURCHASE

5.1 The IAVI believes that the existing principles underlying the compulsory purchase legislation are valid and equitable. It accepts that the legislation is complex and diverse and would significantly benefit from consolidation and updating. The level of compensation can vary according to whether the acquisition is by central government or by a local authority. This is clearly unfair and an urgent review of those aspects should be brought into play with any consolidation of the legislation.

However it is principally felt that aspects of the procedural arrangements are inequitable and, specifically, that the timeline for the process should be accelerated.

5.2 The IAVI unequivocally advocates that the principle of open market value should be retained. Any system that provided for compensation at anything less than the open market value would unfairly, unjustly and selectively penalise individual property owners.

5.3 A proposed objective in a local authority development plan for a future road or other public sector development can have disastrous impacts on the value and marketability of property affected by the proposal. Sometimes such objectives can remain in the plan for many years without being implemented. This severely disadvantages those who own property located close to or along the line of the proposed objective. It may be vital for such parties, due to a variety of personal circumstances, to relocate. In many instances they find their properties unsaleable and there are cases of real hardship.

The IAVI would therefore recommend that a new provision be introduced enabling such property owners, in the event that they have failed to be able to sell their properties in the open market, at a price equivalent to the value if such objectives did not exist, to require the authority to purchase the property at that market value (i.e. its non-blighted value). In the first instance this right might be restricted to owner-occupiers, rather than to investors.

The procedure under the compulsory purchase codes, which entitle the acquiring authority to 18 months in which to serve Notice

to Treat, after confirmation of the CPO, is both unproductive and unfair, in effect sterilising the owner's options for an excessive period and often leading to blight of adjacent properties, while the acquiring authority considers its options.

The IAVI recommends that the period for the service of Notice to Treat be reduced to 12 months in all cases and also that provision be made for the service of such notice by the claimant, at any time within the following 6 months, should the local authority have failed to serve it during the 12 month period.

5.4 An acquiring authority should be obliged, from the outset of the process, to supply a detailed information pack to claimants with all relevant information to enable claimants to fully consider their position. Information as to precisely what use the land to be acquired is to be put, the height and extent of any structures to be developed on it, revised drainage and service arrangements, boundary treatments, etc., are all factors which are essential to enable a proper assessment of the property owner's compensation to be formulated. Frequently this information is not now readily available to the claimant and this disadvantages the claimant and increases administrative costs, and introduces avoidable delays into the procedure.

5.5 It is obvious that given the infrastructural projects underway and proposed, the workload of the two state arbitrators is excessive and that delays are being encountered, due to a general lack of skilled resources in this area.

It is recommended by the IAVI that at least two further arbitrators should be appointed on a contract basis to facilitate the major NDP infrastructural programme and the CPO processes, which are a fundamental necessity for the fulfilment of that programme. Alternatively, the state should consider appointing a panel of valuers who can act as arbitrators, from which an arbitrator who is available to deal with the matter immediately, can be chosen. It is also apparent that the net of valuers traditionally appointed by local authorities and acquiring authorities should be widened, as the concentration of appointments to a small panel has simply exacerbated them.

In this regard the IAVI suggests that the composition of the Lands Values Reference Tribunal, which selects and appoints arbitrators, should be expanded to include the incumbent president of the IAVI, a body with a degree entry standard for full membership and representing 1,600 auctioneers and valuers, including many at the cutting edge of CPO valuation and acquisition work nationwide.

5.6 The IAVI believes that there are excessive delays in referring the resolution of matters to arbitration and recommends that it be mandatory that, if within six months of Notice to Treat, compensation has not been agreed, the matter be referred to arbitration.

The IAVI also notes that the process of compensation claims at arbitration is excessively confrontational. With formal evidence and cross examination, the present approach is accentuated by the practice of both the acquiring authorities and the property owners, having legal representation in what is primarily a valuation assessment exercise.

5.7 The IAVI advocates the possibility in the event of compensation not being agreed within three months of the Notice to Treat, there should first be an examination of the issues in dispute mediation style by an appropriately qualified and experienced independent valuer who would receive submissions from both parties and hold a hearing if required by one party or if the independent valuer decided it was so appropriate.

Any hearing should be relatively informal and if significant legal differences emerge, these can be referred to an agreed barrister or in a particularly important case could be sent for an opinion of the Court.

The process could be similar to that which currently operates for commercial rent reviews where there is not normally legal representation and where very significant rental amounts can be involved. This process would result in a non-binding third party view of the proper compensation and other related issues.

If either side were unhappy with the outcome of this informal procedure, and after a total of six months from service of Notice to Treat, the parties would have recourse to arbitration, but with there remaining the prospect of costs being awarded against an appellant who receives an award from the arbitrator that is less favourable than that recommended by the independent mediation valuer. The amount of the independent valuer's determination would, for arbitration purposes, become a sealed offer, for consideration by the arbitrator in determining liability for costs.

5.8 Numerous reports in recent times have highlighted over-runs in the case of property acquisition costs for major infrastructural projects. In many instances these have arisen because of the delay factor between the time of the initial assessment of the land value and the date of the Notice to Treat. This would be particularly the case for schemes initially costed in the mid 1990s, but not undertaken for a period of two

to three years thereafter. With compensation based on open market value, historic estimates require a revision in line with property market changes as the process proceeds. Furthermore, the acquiring authority's valuers are frequently asked to calculate levels of compensation without having all the relevant information relating to the scheme, the individual holdings, or the consequences of the acquisition for that individual. Understandably this tends to lead to a significant underestimation of the likely liability.

A team should be established (probably as part of Bord Pleanála) to deal with objections to compulsory purchase orders (as distinct from legal challenges).

5.9 The IAVI notes with concern the arrangements agreed two years ago by the NRA with the IFA and DoE in relation to the acquisition of farming land. This agreement provided for payments in excess of the compensation that would be awarded under the legal compensation principles already established. Whilst the institute has no difficulty with private settlements between prospective acquiring authorities and claimants, the development of this 'farmers package' created, in effect, two codes of compensation, one for farmers/agricultural holdings and a second for all other types of properties – clearly a most undesirable situ-ation. Any new consolidation of the act should eliminate this differentiation and definitively provide for full and unrestricted access (subject only to the making good requirement) for prospective acquiring authorities to the subject lands for such investigative purposes as are reasonably required and the acquiring authorities should be consistent in implementing early Notices to Treat and early Notice of Entry.

6 THE ZONING OF LAND

6.1 The IAVI distinguishes between value enhancement arising through the rezoning of land and that arising as a consequence of investment by the State or by public authorities in infrastructure, which facilitates the development of such land.

Quite often both occur simultaneously. The IAVI does not subscribe to the principle that the rezoning of land (in isolation of the provision of infrastructural improvements and services) should give rise to any entitlement to the state or to a local or public authority for compensation or betterment levies.

Rezoning in principle takes place because of its location, its suitability for practical uses and the natural progression of development and because of optimum land use strategies. Enhancement in these matters is primarily driven by locational issues, factors which are derived from previous acquisition decisions of current landowners or their predecessors. These acquisitions or inheritances were the result of strategic decisions, often by those with good foresight into how development might expand someday, sooner or later.

6.2. The IAVI does not see any need to change the existing legislative framework surrounding the zoning of land. The existing process is a democratic and transparent one that affords a level of flexibility, which we believe to be desirable and potentially indispensable in the attraction of the foreign direct investment that is essential to the continued welfare of the state. The transfer of this process to an un-elected administration, or to the decision of an executive, is not seen as being either essential or desirable.

Nevertheless the IAVI recognises that, in both the national and the common good, general direction as to minimum quantum and locational criteria for rezoning, may need to be imposed from time to time – perhaps by the Oireachtas.

The IAVI also recognises that, where elected council and local authority representatives fail to comply with the minimum criteria, it should be possible for the executive of the local authority to over-ride the elected members' decisions and implement policy compliant zones. It should be the function of the elected government to have adequate lands zoned to meet the residential, commercial and industrial needs of the entire country. In this context government must have regard to the national development plans including the National Spatial Strategy, the Strategic Rail Review and the Strategic Planning Guidelines and should have a bearing on the quantum of land to be rezoned in the relevant local authority development plans.

6.3 It is obvious that the population and economic growth which occurred in the last ten years was not adequately foreseen by planning authorities and was therefore inadequately catered for. This led to an acceleration in the value of the existing zoned lands and the potential for dramatic uplifts in value through the rezoning of other lands to higher value uses. Rezoning per se may not make the lands capable of development, if the appropriate infrastructure and services are not available and, later in this submission, we deal with the matter of infrastructure. Our comments in this paragraph are confined purely to the issue of rezoning.

6.4 If the government is desirous of reducing land values, then in the hypothetical market in

which all sites are adequately serviced, increasing the volume of rezoned land simply as an economic function will, at worst, slow down the growth in value and, at best, stabilize or lead to a reduction in relative land values.

6.5 The IAVI therefore advocates a planned approach to the rezoning of lands and one which in a climate of high demand leads to there always being a generous supply of suitably zoned land for all uses.

7 THE PRICE OF DEVELOPMENT LAND

7.1 Much has been written about the escalating price of development land, especially in the context of the price of residential building land, which is perceived, by many, as being a key influence on the price of new houses.

7.2 The IAVI is absolutely clear that the price of development land is dictated by the residual value which remains having assessed the end value i.e. the total sale proceeds which would be available from the completed development of the optimum development on that land, and deduct all the costs of development and a reasonable profit margin. The value of development land is, of course, dictated in part by zoning, density and traffic restrictions and in part by the availability and capacity of services and infrastructures.

It is readily apparent that several other factors have contributed materially to a real escalation in the price of development land in the last ten years. These factors, many of which are common to development land for different uses, include:

1) the buoyancy in the world and as a consequence the Irish economy
2) the decline in interest rates to their present exceptionally low level
3) the ready and competitive availability of finance both for development and for end users to acquire buildings
4) the demographic growth and profile of the national population
5) the availability, or lack of, necessary infrastructure and services
6) the dearth or glut of suitably zoned and serviced lands
7) the timeframe in which planning permission can be obtained and the costs of achieving those permissions.

It is clearly evident, with hindsight, that the failure to anticipate these key influences over the last ten years and to adequately resource to meet them was a key factor in accelerating the growth in value of development land. In particular, the inability to provide adequate services within a short timeframe, the failure to anticipate the growth in population and prosperity and the inability of the planning authorities to cope with the volume of planning applications within the recommended timeframes, were key influences in restricting the supply of 'ready to go' development land at a time of peak demand, thereby resulting in rapid acceleration of development land values.

Today the situation is less acute. Many major infrastructural and service undertakings are now underway which will be capable of accommodating the needs of the Irish population over the next ten years. The rate of economic growth has slowed. Net immigration no longer appears to be as important a factor in the housing market. The number of planning applications being made is declining and both the local and national planning authorities are increasingly heading towards a situation which will enable permissions to be dealt with within the existing intended legislative timeframe.

Supply and demand are already equal (if not in an oversupply situation) in all markets other than the residential and retail markets.

7.3 The price of building land is not the starting point in any consideration of rapidly escalating house values. Rather it is always the end point, because the price of land is a residual. The demand for property is a derived demand. In other words, it is dependent upon the utility or use to which the land is put. The higher the use in terms of market sector, the higher the value in terms of price. This is the whole basis of the Ricardian theory of land rent.

7.4 Land is merely an ingredient of the end product, but it is unique in that its value is the residue left when one deducts all of the other components – construction costs, planning costs, levies, infrastructural costs for roads, pavements, lighting etc., professional fees, builders' profits, interest, VAT, acquisition costs on the site itself, including stamp duty, legal costs, etc. Building land is expensive because buyers are willing to pay the prices sought in the market for houses and apartments – indeed they are often prepared to pay a good deal more than is demanded by vendors, as auction and private treaty sale results frequently demonstrate. The price people are prepared to pay is influenced by many factors, the primary one being the perceived balance or imbalance of supply and demand in the housing market.

7.5 Land prices are determined by the interaction of supply and demand in the land market. If supply is constrained, or demand stimulated by public policy, then, other things being equal, land prices will rise. The price mechanism thus operates to return supply and demand to a state

of equilibrium. According to Ball et al. (1998: 63) for equilibrium to be feasible 'buyers and sellers must be able to use the full available information when making their decisions and operate according to the arguments of their demand and supply schedules. This may not occur, for example, if planning regulation freezes land supply or restrictive long leases severely distort demand.'

7.6 Whether and how fast equilibrium is achieved will therefore depend on the institutional characteristics of the market. While a shortage of office space, for example, may cause rents to rise sufficiently to make new development viable, how fast new construction is delivered will depend on institutional factors such as the structure of the development industry and the extent of any constraints on availability of materials and labour (including the services of design professionals), even without the existence of a planning system to regulate the scale and location of new development.

7.7 Research investigating the impact of public policies on land and property markets undertaken in the neo-classical economics tradition is strongly focused on how policy directly affects supply and demand outcomes. Much of this work is concentrated on the impact of planning constraints on land and housing markets. Adams and Watkins (2002: 255-6) conclude that: 'Planning constraints lead to higher prices, and densities, restrictions in the quantity of homes supplied and convergence in the type and design of new homes. Although these results are perceived in generally negative terms, there are winners and losers. Higher purchase prices force new buyers to pay more, but existing landowners gain from higher returns through the inflated selling prices in land and housing markets. Developers' profits are dented by higher land prices and lower levels of development but are also inflated by higher selling prices. Residents derive unmeasured utility from the better urban environment associated with protected green belts, but lose out through higher densities and smaller lot sizes within urban areas and at the urban fringe.'

7.8 The signals used by market participants in determining the price of land involve levels of demand, land value, rents and house prices and are not set by the construction industry, but rather by the property industry. This is a fundamental point and highlights the fact that the property industry and the construction industry are not the same. The property industry is much wider than the construction industry and while the two are interlinked, they respond to different market signals.

7.9 The price of land expresses the relationship between demand and supply. It could be argued that capping land price will prove counterproductive to the real concerns of house buyers, by removing the incentive to capitalise on the increased land value by releasing the land for development. In such circumstances (i.e. the introduction of a value capping) there is every reason to believe that many landowners and especially those who hold land rezoned from previous agricultural use, will continue to retain their land until a future date in the hope and expectation that this punitive control will be removed.

7.10 It is the view of the IAVI that any capping of the value of land to the landowner will significantly reduce the future supply of building land and any consequential reduction in the supply of houses will, inevitably, result in even higher house prices.

8 THE RIGHT TO SHELTER

8.1 The IAVI fully endorses a fundamental right to shelter for every citizen. It recognises that the private sector can provide accommodation for most of the population but that there will always be a disadvantaged minority who will need assistance in this task, either by way of subsidy, financial support or physical and practical assistance.

8.2 It is our belief that this need is best and most fairly met by the public sector drawing funds from the National Exchequer rather than imposing selective obligations on individual developers and land owners.

8.3 Nevertheless the IAVI is supportive of the general obligations imposed in Part 5 of the Planning and Development Act 2000 but is conscious of the resistance which has been met from the potential purchasers in relation to the integration of social housing into predominantly private developments, and the potential consequences of this for any developer embracing fully the aspirations of the Act.

8.4 It is this fear which has led to the reluctance of developers to embark on this. It is the IAVI's belief that developers have accepted the financial implications and social obligations of the act and are now interested in finding a practical and implementable solution – preferably through financial contributions, land donation and a complimentary, rather than directly integrated, provision of residential units.

8.5 In this context the recently published draft guidelines are not regarded as being especially accommodating and present concerns as to

delays in procedural approvals, all of which only serve to delay further what is recognised as a being badly needed accommodation supply.

8.6 The IAVI recommends that the Department of the Environment should engage in detail as soon as possible with the IHBA and CIF to agree a mutually acceptable solution, which generates units 'under construction' albeit that these may not be fully integrated.

9 INFRASTRUCTURAL DEVELOPMENT

9.1 It is already apparent that the supply and demand equation in the residential market is reaching equilibrium, as the supply of new homes in the last two years and, most probably, in the current year, will match the underlying volume requirements and begin to erode the deficit in homes which has built up in the last five to seven years.

The IAVI is in principle sympathetic to the view that the value of development land is usually significantly enhanced by the availability of infrastructure and services provided by public, local or national authorities.

9.2 It is equally sympathetic to the view that it is equitable for the state to recoup part of the added value attributable to such enhancement.

9.3 The increase in land price created by infrastructural improvements made by a public body is often referred to as betterment. Betterment is an ambiguous term (Kenny, 1973) reflecting an increase in land value which arises from specific public works, more general planning or infrastructural improvements.

9.4 The term also refers to that part of the increase in land value which in the private sector potentially might be recoverable from the landowner by a service or services provider/facilitator or adjoining landowner, the addition of whose land enables a site to be developed to its full potential.

9.5 For example, it is not uncommon, in the private sector for an owner of a small portion of property, perhaps with road frontage, or needed to facilitate a wayleave to services, to share in the uplift in value on adjoining lands which she/he does not own, when the development of these lands is only fully possible by the addition of the 'small' plot or a wayleave through it.

In those circumstances it would not be uncommon for the small plot holder/facilitator or services provider to receive 25% – 50% of the 'added value' of the adjoining lands which the addition of the small plot holder's land brings, together with a pro-rata payment per hectare for the actual area of the added land.

9.6 The IAVI sees no reason why a similar principle should not apply to public service suppliers of infrastructure and services which similarly enhance land values.

9.7 However it recognises that directly and indirectly the state/public service already does share very significantly in the betterment value through existing taxation measures, i.e. CGT – which typically even having allowed for the limited indexation relief, netts c.15% of the land value, stamp duty, which captures a further 9% and finally but seperately existing services/planning levies payable to local authorities.

9.8 The combination of these, in effect means that already the state and public authorities are recouping almost one third of the total land sale price through taxation.

9.9 This percentage ignores any element of taxation recouped through non-recoverable VAT on residential development. Where residential development takes place and assuming the land cost typically represents 40% of the end value, the 13.5% VAT rate, expressed as a percentage of the initial land cost would be a further 33.3%.

9.10 It can therefore be very clearly seen that already the state and local authorities are regularly capturing for the national and local exchequer between one and two thirds of the actual land value and so it would not be unfair to say that typically on average they are recouping at least half the land sale price.

The land sale price combines both the 'existing use value' and the 'betterment value' and in those circumstances it is probably fair to say that it is typically recovering at least 75% of the betterment value.

This strongly suggests that the state is more than adequately rewarded for its investment in infrastructure. It certainly receives far more of the proceeds than would be the case in the open market for private sector 'facilitators'.

9.11 Nevertheless the IAVI recognises that there may be times and circumstances when it is appropriate for further reclamation of the 'betterment' to be recovered and that given the major national investment in infrastructures and services currently underway and the rapid increase in land prices and prosperity – those circumstances may currently exist in the market.

It recognises that this is especially the case for residential property because it is exempt from rates, and therefore unlike commercial property, has no ongoing contribution to the maintenance of that existing infrastructure or services or the development of new services and infrastructure.

It also recognises that local authorities as distinct from the state need additional funding, and suggest that although there is already a very substantial recovery of the betterment value, there may, in present market conditions be scope for an additional charge in the residential development market, through a super-levy payable before first occupation.

Ultimately the cost of this super-levy will come off the land price and be borne indirectly by the landowner, but paid by the developer.

9.12 While it is accepted that the state should share in at least part of the increase in land value which it has helped create, the major problem lies in formulating a politically acceptable way of doing so. The Kenny Report (1973) clearly demonstrated the failure of the British political system to resolve this issue. Kenny emphasised the fallacy of public policy, which aims to cap land value increases by acquiring land at existing use value and then hoping that it will change hands in the open market at existing use value. He concluded that the UK experience shows this does not happen.

9.13 The UK Government has previously enacted legislation that appears similar to the current study in Ireland. The Community Land Act (1975) (CLA) gave extensive powers to acquire any land suitable for development, by negotiation or compulsory purchase, as long as the existing planning framework was recognised. CLA provided local authorities with the power to secure the implementation of plans under town and country planning legislation. It was viewed as legislation that allowed the community some of the benefits created by the grant of planning consent, i.e. betterment. CLA was linked with the Development Land Tax Act 1976 and allowed gradual progression, to the point at which all land suitable for relevant development would be acquired by authorities under the Act, i.e. brought into community ownership. Following the first appointed day (6 April 1976) authorities were placed under a duty to have regard to the desirability of bringing land into public ownership. They were required to submit policy statements and rolling programmes and were provided with funds so that the acquisition costs (net of tax) would not fall upon ratepayers. Disposals were, of course, at full market value.

After the first appointed day, any land acquired was net of (a betterment) tax (DLT), which was set at 40%. The legislation provided that a second appointed day would follow, at which time virtually all the betterment (i.e. increase in value as a result of planning consent being granted) would be collected as tax. Before the second day dawned the Labour Government lost an election and the Conservative Government abolished the legislation.

The legislation lasted many years with mixed results. In England most of the activity revolved around the collection of tax and most local authorities did little to pursue the policy statements produced. In Wales, the situation was quite different. The Land Authority for Wales (LAW) was established and, with the benefit of compulsory powers and a full range of multi-disciplined professionals, acquired thousands of hectares of land net of tax. Land was also purchased without planning consent at agricultural or hope value and held in a land bank whilst planning consent was pursued. City centre development, industrial, residential, motorway service areas and out of town retail development was 'enabled' by LAW and, even when the CLA was abolished, LAW continued to operate in Wales under a Conservative government. In the late 1990s LAW was merged with the Welsh Development Agency. In essence Wales had a public sector speculator that was born out of a type of legislation that may be considered in Ireland today.

9.14 The IAVI has examined existing arrangements in a number of European countries and has concluded that in the main the most favourable model is one in which betterment/service provision levies are used as the primary means of recovery.

9.15 Such a system has several distinct advantages:

1 It is efficient to collect – payment being a prerequisite to first occupation or letting of the completed units
2 Liability for it arises at the optimum 'cash flow' point, i.e. the point of sale or letting
3 It is levied on the developer rather than directly on the landowners and from a perception viewpoint this is more likely not to impede the supply of land
4 Provided that the amounts of the levies are clearly identifiable and finite at the 'land sale' date, the price the developer will pay for the land will be discounted to reflect the deferred future liability for these charges.
5 An established legislative framework already exists to facilitate the collection of these levies. This framework may need revision but would not face the constitutional challenges which are inevitable in any attempt to cap values or restrict the right of individuals to private property.

9.16 The IAVI equally recognises that it is also highly desirable in the short term that any measures established should not be a deterrent to an increased supply of development land and indeed that it would be beneficial if such

measures could work as an incentive to an accelerated supply of land into the market.

9.17 The IAVI also believes that the introduction of new taxation measures, should, when possible, be seen to be equitable to those who have already made financial commitments under a different regime.

9.18 For these reasons we recommend that should such super-levies be introduced, their impact should be deferred in part to allow those already in the planning process time to complete that phase and go on site. They should equally be progressive, affording concessions to those who develop sooner rather than later.

9.19 We therefore recommend should such super-levies be implemented, they should have a five year phasing in period, with eligibility triggered by the date of the commencement notice and liability calculated by reference to the completion date of each unit in accordance with the following scale:

1 Units for which the commencement notice is issued within 12 months of the date of first announcement Exempt

2 Units for which the commencement notice is issued more than 12 months after and not more than 24 months of the date of first announcement 15%

3 Units for which the commencement notice is issued later than 24 months after and not later than 36 months of the date of first announcement 25%

4 Units for which the commencement notice is issued later than 36 months after and not later than 48 months of the date of first announcement 40%

5 Units for which the commencement notice is issued later than 48 months after and not later than 60 months of the date of first announcement 60%

6 Units for which the commencement notice is issued more than 60 months of the date of first announcement 100%

Note: obviously planning permissions granted before the introduction of such super-levies will be exempt as no conditions will be contained within those permissions in relation to such super-levies

9.20 We recommend that the amount of the super levy be determined on a triennial basis, with specific prescribed and published rates, differentiating between urban and rural areas and within these two definitions, different rates for the different cities which reflect the general relativities in residential values.

Consistent with the National Spatial Strategy, hubs and gateways should command changes proportionately greater than towns/centres not favoured with that status.

9.21 We recommend the magnitude of the super-levy be determined prior to the introduction of any such levies, by An Bord Pleanála following recommendations for a committee made up of 10 Nominees representing each of the following organisations:

Chair – nominated by An Bord Pleanála

2 Members – nominated by the City and County Managers Association

1 Member – a QS nominated by the Society of Chartered Surveyors

1 Member – a valuer nominated by the Commission of Valuations

1 Member – a valuer nominated by the Irish Auctioneers and Valuers Institute

1 Member – a planner nominated by the Irish Planning Institute

1 Member – a developer/builder nominated by Construction Industry Federation

1 Member – an architect, nominated by the Royal Institute of Architects of Ireland

1 Member – a nominee of The Irish Congress of Trade Unions

9.22 The committee would be required to make a recommendation to An Bord Pleanála, whose decision would be final and fixed for a three year period. The levies would, at the commencement of the second and third years of each triennial period, be increased upwards or downwards in accordance with the construction price index.

An Bord, every three years would revise the magnitude of the super-levies in accordance with the terms of reference of the committee.

9.23 The terms of reference for this committee would be to recommend the magnitude of the super levy for the various local authorities, having regard to the added value directly attributable to the planning of infrastructure and services provided by public authorities since a specified starting date, (The IAVI suggested this date should be the effective date for the Planning and Development Act 2000).

In making those recommendations, the committee would be directed to have regard to all of the following

1 The levels of taxation payable to public authorities arising from such land sales

2 Other construction levies payable to the local authority

3 The viability and vitality of development

4 The impending programme of infrastructural and services improvements proposed, underway and already provided by the relevant local authorities and the 'added value' of such infrastructure/services.

5 The prevailing land value rates for residentially zoned and serviced lands

6 The historic, current and estimated future costs of infrastructure and services within the relevant local authorities area with a maximum 5 year time horizon.

9.24 The IAVI anticipates that the super levy element could currently be expected to be on a scale equal to the level of levies already payable – thus giving a potential liability for a 100% increase over levels now prevailing.

9.25 The IAVI recognises that specific and various concessions may be appropriate in certain cases and recommends the following 'adjustments' for these cases:

- in respect of the provision of social housing

  100% exemption

- in respect of the provision of affordable housing

  50% discount

- in respect of the *addition* of dwelling units, on a site of less than 0.5 hectares, where a dwelling already exists and is being retained

  50% discount

- in respect of the addition of a bona fide granny flat/or accommodation for a disabled or impaired person (provided that accommodation continues to be used for a minimum of 5 years by that person or until their demise – if earlier)

  75% discount

9.26 The IAVI also recognises that from time to time it may be appropriate to authorise additional super levies – specifically related to a particular infrastructure or services project (e.g. Metro) which is not within the existing NDP programme. The IAVI recommends that an Bord Pleanála be entitled in these circumstances, upon the request of the Minister for the Environment, to determine such levies following the prescribed committee procedure and terms of reference.

9.27 By their nature, in some instances, super-levies will become payable before the new 'infrastructure or services' which create the betterments are completed and in some cases, even before they are commenced.

Provision would need to be made for the repayment to the developer of such super levies, in the event that, for unforeseen reasons, such infrastructure or services are never completed.

Similarly, provision may need to be made, if the infrastructure is delayed significantly, perhaps with some form of partial rebate to be made in those circumstances.

9.28 Of course, the provision of the infrastructure and services most often precedes the development of the land and the actual cost of the provision of the services and infrastructure is an historic one.

Nevertheless the IAVI believes that in the 'common good', super-levies which are raised should not be fettered by historic cost, as the added value which they bring is current rather than historic value.

In this context the IAVI advocates, if it is necessary to do so, that legislative changes should be made to enable super-levies to be levied at 'current' rates and allow the proceeds of such charges to be applied to the provision of future infrastructure and services, and the care, maintenance and operation of existing infrastructure, without obligation to refund any excess over cost.

10 HOUSE PRICES

10.1 It has been demonstrated that within Ireland many householders are now making a conscious decision to spend the transaction costs of moving on extending their existing homes, rather than taking their preferred option, which is to move up the housing ladder. The net effect is that there are fewer middle and lower priced houses on the market, which inevitably has the greatest impact on the first time buyers, because property availability flows in a downward direction.

Mobility aids the efficient use of our existing housing stock. High stamp duty prevents mobility. Efficient use of our existing housing stock would make a major contribution to any existing or future housing crisis, by ensuring that people reside in houses more suitable to their actual needs. High stamp duty was therefore a causal factor in the recent housing crisis.

Much has been written and spoken in recent times about the dramatic increase in house prices over the last ten years. Most frequently the increase in the price of building land is cited as a principal cause. The IAVI believes this to be a completely erroneous view. Land prices are a residual determined by the end value of the development which can be constructed on such land, less the costs of development and less a profit margin.

Therefore it is clear, and we know this from day to day practice, that the key element in

determining this, for residential development is, at what price will the completed units sell?

The developer and his advisors will make an educated assessment of what the market will be able and willing to pay for the completed units, the rate at which they will sell, the costs of construction and allow a reasonable level of profit as reward.

10.2 Thus it is the ability and willingness of the potential end purchasers, i.e. 'the market' which will ultimately determine the house price and, as a natural consequence, the land price.

10.3 The factors which influence potential purchasers are very similar to those which have influenced the land market, but perhaps with a slightly different emphasis or angle. These may generally be summarised as follows:

1 The buoyancy in the local economy, indigenous employment and pay levels and the levels of disposable income

2 The levels of interest rates, the availability of 'soft' and 'fixed term' mortgage rates and the general availability of mortgage funds

3 The 'stress testing' and qualification criteria imposed by the mortgage providers and the levels of competition in that market

4 The demographic population changes and the changing trends in lifestyle, family units, etc., e.g. divorce, single parents, singles own home ownership expectations, etc

5 The levels of rent pertaining in the market and their relativity to the equivalent monthly mortgage repayment outgoings

6 The levels of supply and anticipated supply of housing units, as compared to demand

7 The timeframes in which 'new houses' can be made available for occupation

8 Levels of confidence in residential property as an investment medium – and the alternative investment opportunities available

9 The availability of equity to support mortgage levels.

10.4 Directly within the power of government, there is very little they can do to materially impact upon items 1, 2, 4, 8, 9 above.

They can, however, and have influenced items 3, 5, 6, and 7 and the IAVI's focus is therefore on these.

10.5 Stress testing

The IAVI is not adverse to existing stress testing and eligibility systems.

It does, however, advocate that a voluntary code of practice be introduced which discourages 'inducement/soft interest rate' first year repayment levels, for first time buyers, inducements which may leave them with a false sense of security and willingness to excessively financially stretch themselves.

Furthermore it believes that the margin which is being currently charged on 5-10 year fixed rate basis, is an impediment to the take up of those loans – a practice which is undesirable in the national interest and advocates encouraging lenders to moderate that margin.

The IAVI recommends that government should address these issues with the mortgage providers initially on a voluntary basis.

10.6 Rent levels

When the government introduced the interest relief restrictions on investors three years ago, the IAVI and others quite correctly predicted that this would result in a significant rise in residential rents.

Quite apart from the upward effect this had on rents, it created an environment where in monthly cash flow terms it became as cheap, if not cheaper, to buy than to rent.

This had the effect of increasing buyer demand in an already limited supply scenario and pushed up house prices even further.

The restoration of interest relief has created a strong level of supply in the rental market with the consequent moderation in rental growth which in turn, is leading to a moderation of house prices generally. This demonstrates the dangers of artificial intervention in the market.

It is the view of the IAVI that although adjustments in the market appear slow, in effect the market does rectify itself best and will reach equilibrium if left alone.

10.7 The biggest factor in the increase in house prices has been the lack of supply at a time of peak demand.

It is readily apparent that today we are already building more new houses than are needed on an annual basis, but that there is still an overall deficit to be made up from 7-8 years of under provision.

The recorded slowing in the rate of growth in new house prices is clear confirmation that supply and demand are coming into equilibrium and our expectation is that this will happen in the near future.

Any measures which intentionally or otherwise deter supply – whether by reducing land supply, delaying planning permissions, undermining confidence and artificially reducing demand will, in the view of the IAVI, be counterproductive.

It is the view of the IAVI that there is only one real solution to achieve a halt to house price inflation and that is a supply led solution

– the production of the necessary number of houses into the market, as quickly as possible.

10.8 It is obvious that the price/value of second hand houses also has an influence on the price of new houses. It is an alternative source of accommodation. Supply in the second hand market has fallen. The IAVI is convinced that a significant level of that decline is due to the exceptionally high levels of stamp duty and especially the low thresholds at which the high rates apply. A reduction in stamp duty rates and a raising of the threshold for the high rates to €1m would certainly promote an increased supply at the lower price levels where the greatest problems exist.

10.9 It is understood by the IAVI that although there are exceptionally high rates of new house sales currently, the vast majority of these are houses sold off the plans which will not be available for occupation for 12 to 24 months.

There is little that can be done about this now, but government needs to ensure that the planning authorities, both local and national, are adequately resourced and focused on progressing applications quickly in order to increase supply.

It is apparent in recent months that the planning delay situation has improved drastically over the last 12 months, but there is still very strong anecdotal evidence that the planning permission timeline is being unnecessarily prolonged because of inadequate resources and competing constraints within the planning authorities. It seems that this is being done by the use of requests for additional information.

The IAVI recommends that additional short term (1-2) year resources be provided to immediately resolve this problem and accelerate supply.

10.10 Finally there is the issue of confidence in the property market. It is apparent that both investors and owner occupiers have confidence in the underlying value of property into the future. This is, perhaps, contrasted with the poor performance of other forms of investment, equities, bank deposits, etc.

It would not be in the 'common good' to undermine this confidence to a degree which might trigger negative equity.

Should any steps be taken by government which would trigger such a scenario, e.g. onerous limitations on borrowing levels, those most likely to suffer are the most vulnerable – those who have bought in the last 3–4 years and who as a natural consequence are likely to have the least equity in the properties.

The IAVI therefore strongly advocates measures which will lead to a more gradual and natural slowdown in values.

11 THE KENNY REPORT

11.1 Frequent reference is made to the recommendations of the 1971 Kenny Report

We have considered the report in detail and whilst many of its findings remain valid today, there have equal1y been many fundamental changes in circumstances which undermine its recommended solution.

11.2 It is notable that the Kenny Report acknowledges that the state does not have any legitimate claim on betterment value arising solely through rezoning or planning decisions – 'Zoning may add a considerable amount to the price. We do not think that an increase in price caused solely by decisions of a planning authority as to zoning can be classified as betterment'.

11.3 The Minority Report specifically highlighted the concerns of the committee members at the concept that compensation paid for land should depart from the established market value principles, and instead be based on existing use value. It is pertinent to note that this group was led by the then commissioner of valuations and that concern over the development of two different codes of compensation was a recurring theme with the committee.

11.4 The commissioner also recommended that a capital gains tax be introduced. This has since been done and goes part of the way to capturing not only part of the betterment value, but also of any capital appreciation in the existing use value.

11.5 The recommended scheme was based on the fundamental plank that local authorities would acquire vast tracts of land and in effect become the land developers releasing the land into the market by way of lease. Since then we have had the legal abolition of new ground rents and ground leases for residential properties, which, in effect, completely undermines one of the key elements of control which was necessary for the recommended scheme to succeed.

11.6 It should also be recalled that at the time of the report, rates were payable on residential properties and that income was a key revenue source for local authorities and one which would have contributed significantly to funding the proposed land acquisition programme. That revenue stream no longer exists and with many local authorities already in deficit and some potentially facing crippling and growing deficits it is patently obvious that the funding required by a local authority for such a land acquisition programme simply does not exist today.

11.7 The report fundamentally sets out a recommendation to capture 75% of the betterment value,

which had occurred through the provision of nationally or locally provided and publicly funded services and infrastructure.

It recognised that not all of the betterment is realisable without the participation of both sides, i.e. the public authority and the private landowner. This is consistent with the private sector experience with marriage value – where the combination of two interests is greater that the direct sum of both.

It is debatable as to whether the 75% of the betterment is the appropriate level but nevertheless as compared to 1971, when the report issued, today through stamp duty, CGT, and VAT (as has previously been highlighted earlier in this submission), the state already captures on average probably 50% of the development land value, which generally would certainly equate to 75% of the betterment value.

In effect therefore the objectives of the Kenny Report have already been achieved without the need to implement its controversial and potentially constitutionally challenging recommendations.

11.8 Finally, the recommended scheme entailed significant and potentially complicated and controversial procedural practices, involving the High Court individually with every planning authority and local authority in the country. At a time when there are already major delays in the legal system and enormous costs, such a scenario is quite simply unthinkable and impractical.

11.9 The IAVI has therefore concluded that whilst there is a considerable amount to be learnt from a study of the report, the concept of simply implementing it, as is being advocated by some commentators and politicians, portrays a poor knowledge or appreciation of its contents and of the fundamentals which have changed in the interim. It is our view that implementing it is both unnecessary and would be completely inappropriate and impractical.

12 ACCESS TO THE COUNTRYSIDE

12.1 The IAVI believes that farmers will continue to honour established public or private rights of way. Any extension of public rights of way/access should be by agreement only and should not be forced on landowners. However it is argued that landowners should be indemnified against any claims arising, say as a result of accidents that are not attributable to actual negligence on the landowner's part.

12.2 Members of the IAVI express the opinion that there is generally no difficulty in gaining access, providing there is prior consultation with the owner or tenant of the lands. Where access is required on other than building land, problems have not been experienced where inspection only is involved.

12.3 The description of 'public right of access' may create some difficulty as it implies that the public seeks right of access without definition of purpose. There have been problems with public access over lands for use of established walks, visits to historical sites or beauty spots. Nuisance has been caused by open gates, disturbance of boundaries, litter and interference with stock. In such instances, problems are relieved by provision of dedicated access points and defined paths with fences. Members are of the view that where this applies, the landowner should receive some compensation for the loss of use of land, and any fencing provided, should be maintained by the state.

13 CONCLUSION

13.1 The IAVI looks forward to co-operating with The All-Party Oireachtas Committee's examination of this topic, particularly in advising on the impact of proposals on the property market. The institute is eager to assist government in coming to a correct decision. The institute recommends that a think tank is established and would be exceptionally willing to appoint a nominee to a think tank group comprising representatives of consumers, professional bodies and other experts to advise the government on the way forward.

13.2 The IAVI strongly recommends that the government does not take any action that may have further restrictions or inhibit the market. It is vital that a balanced, co-ordinated, integrated and well thought out approach is taken to the problem which does not impose a solution from the top, but represents an agreed way forward for all market participants.

13.3 The IAVI believes that the market for housing and housing lands is heading towards equilibrium and will, if not interfered with, find that level of equilibrium within the next 24 to 36 months and is best left alone to achieve that.

13.4 The IAVI sees just cause for the recoupment by local authorities of some of the land's value enhancement deriving from the provision of public infrastructure and services and recommends the introduction of a graduated system of more meaningful levies designed to incentivise and accelerate development within the next three years. The recoupment of these levies for betterment, can, the IAVI believes, be achieved under existing legislative procedures.

13.5 The IAVI is totally opposed to any system in which individual landowners are deprived of

the open market value of their land in the interests of favouring other more disadvantaged members of the community. It is the view of the IAVI that any subsidy of housing costs should be borne by the tax payers at large rather than penalising individual landowners.

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THE IRISH BANKERS' FEDERATION

We would like to comment on the Report of the Constitution Review Group and in particular, issue no 3. 'Whether the protection of property rights should extend to legal persons, such as limited companies'.

We have noted the various arguments put forward and the conclusion of the Constitution Review Group. We would hope that the Oireachtas Committee would review the conclusion of the Review Group for the following reasons.

- The complexity of modern business requires citizens to come together in various types of organisations in order to achieve their economic aim. It is difficult to envisage any area of economic activity where progress could be achieved by individual citizens acting solely or jointly without the benefit of legal person status.
- Not all legal persons can avail of the avenue of shareholder action to vindicate their rights.
- The European Convention on Human Rights protects the rights of legal persons.
- The recent success of the Irish economy has been due partly to its success in attracting direct inward investment, the vast majority of which takes the form of investment in legal persons. The refusal to address the lack of constitutional protection for legal persons when afforded an opportunity to do so could be perceived negatively in international markets.
- While articles 40 to 44 are generally accepted as dealing with the fundamental rights of individuals, Article 43 specifically deals with property rights and is therefore the appropriate place to deal with the property rights of legal persons. In this regard it is noted that Article 44 specifically deals with the property rights of religious denominations so there is a precedent for dealing with property rights of persons other than individuals.

I hope these comments are of assistance to the Committee.

IRISH COUNCIL FOR CIVIL LIBERTIES

The Irish Council for Civil Liberties (An Chomhairle um Chearta Daonna) is an independent non-governmental organisation that works to promote and defend human rights and civil liberties. It was founded in 1976 by, among others, Mary Robinson, Kader Asmal and Donal Barrington.

The ICCL draws on Ireland's international human rights commitments and the standards therein, as well as constitutional protections, to monitor government policy, campaign for reform and promote better compliance with international human rights norms.

The ICCL has actively campaigned in the area of criminal justice and equality and championed the rights of minorities including gay and lesbian rights, Travellers' rights, women's rights, the rights of refugees and asylum-seekers. The ICCL has also specifically conducted several constitutional reform campaigns including around the referenda on abortion, bail and divorce.

INTRODUCTION

1.1 The ICCL welcomes this constitutional review to see whether the balance between private property and the principles of social justice as set out in the Constitution has been achieved

and/or can be improved. The ICCL also welcomes the invitation of the All Party Oireachtas Committee on the Constitution for submissions on property and other rights.

1.2 In any examination of the principles of social justice, it is essential to consider the obligations of the Irish government to deliver and respect economic and social rights guaranteed by international human rights treaties to which Ireland is a party. In this context the ICCL also recalls that the Constitution Review Group (CRG) Report (May 1996) recommended that Article 45 of the Constitution on Directive Principles of Social Policy, if retained, be amended by the addition of further principles to reflect modern concerns in regard to socio-economic rights. The CRG recommended that sources could include the UN Covenant on Economic, Social and Cultural Rights, the UN Convention on the Rights of the Child, and the Council of Europe Social Charter. The ICCL urges the All Party Committee to reconsider this recommendation in its current review.

1.3 The ICCL focuses in its submission on the obligations on the government under its international human rights commitments in respect of the right to private property and the right to housing. International human rights law recognises both these rights as mutually compatible, complementary and part of a holistic framework of rights protection. Therefore the ICCL submits that the Irish Government can fulfil its obligations under the right to housing without undermining the protection to private property as set out in international law.

THE RIGHT TO PROPERTY

2.1 The right to enjoyment of private property is protected by the European Convention on Human Rights (ECHR) in Article 1, Protocol 1 of the Convention.

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

2.2 The right to private property is not contained in the UN International Covenant on Civil and Political Rights but is set out in the Universal Declaration of Human Rights in Article 17:

> 1. Everyone has the right to own property alone as well as in association with others.
> 2. No one shall be arbitrarily deprived of his property.

2.3 The ECHR clearly recognises the right to balance the right to enjoy property with other international obligations. The European Court of Human Rights has indeed made clear that the protection in Article 1, Protocol 1 is directed at arbitrary interference and measures which undermine the very essence of property rights. The court has never held that social policies aimed at the common good have violated the Convention, unless they have been discriminatory.

2.4 According to the European Court of Human Rights, the right to private property contains 'three distinct rules': the first rule, set out in the first sentence of the first paragraph, is of a general nature and enunciates the principle of the peaceful enjoyment of property; the second rule, contained in the second sentence of the first paragraph, covers deprivation of possessions and subjects it to certain conditions; the third rule, stated in the second paragraph, recognises that the states are entitled, amongst other things, to control the use of property in accordance with the general interest. In looking at how the balance should be struck between private property rights and the general interest the court has often noted that compulsory acquisition without compensation could only be justified in exceptional circumstances, but that in other circumstances it was a matter of having a proportionate response.

2.5 This reasoning is set out in the decision of Court, in *James v United Kingdom*:

> As far as Article 1 is concerned, the protection of the right of property it affords would be largely illusory and ineffective in the absence of any equivalent principle. Clearly, compensation terms are material to the assessment whether the contested legislation respects a fair balance between the various interests at stake and, notably, whether it does not impose a disproportionate burden on the applicants.
>
> The court further accepts the Commission's conclusion as to the standard of compensation: the taking of property without payment of an amount reasonably related to its value would normally constitute a disproportionate interference which could not be considered justifiable under Article 1. Article 1 does not, however, guarantee a right to full compensation in all circumstances. Legitimate objectives of 'public interest' such as pursued in measures of economic reform or measures designed to achieve greater social justice, may call

> for less than reimbursement of the full market value. Legitimate objectives of 'public interest' such as pursued in measures of economic reform or **measures designed to achieve greater social justice**, may call for less than reimbursement of the full market value (Emphasis added).[1]

2.6 Significantly the Irish Supreme Court in its examination of the Planning and Development Bill had regard to these protections and this case in relation to state acquisition of private property and the levels of compensation payable.[2]

RIGHT TO HOUSING

3.1 This part of the submission seeks to highlight the international commitments made by Ireland in relation to the right to housing. While the terms of reference of the committee refer to a right to shelter, this is interpreted within all international legal and human rights instruments as forming part of a right to housing, one of a number of socio-economic rights which the Irish state has ratified in international law. It is pertinent therefore, in this review of the Constitution to address these international obligations and include them within the constitutional protection afforded to Irish citizens.

3.2 A failure to examine the right to shelter within the framework of rights to housing could result in minimalist and possibly punitive legal measures in relation to homeless people, such as persist in New York, where a basic right to shelter exists. The provision of basic dormitory accommodation for homeless people, which the right to mere shelter could represent, would involve a step back from the internationally and nationally accepted standards for the provision of housing within the context of enhancing human dignity and human rights. Such a narrow approach does not address the whole range of needs of homeless people, shelter being only one. The international instruments, reports and recommendations already available demonstrate clearly the issues to be addressed in this area, and this submission sets out the relevant documents which are freely available and can be supplied by the ICCL on request.

3.3 It is important, however, to trace the reasoning of the minister who introduced that Bill, which posited the situation of those in housing need against the powerful position of landowners to influence house prices:

> We can talk about the rights of individuals and society and the common good but we should never lose sight of the fact that a public body, that is the local authority, makes millionaires of people overnight simply by drawing a line on a map and rezoning a piece of property. That person, whether a developer or landowner, is made very wealthy by the actions of the State, via the local authorities. There must be some moral responsibility held by people who receive windfalls from the state in that way to give something back. As the senator knows, I am certain that this is constitutional because it meets the criteria of being fair, proportional and equitable but we will not decide that, the Supreme Court may decide it. I am advised that it is constitutional and I am satisfied that it is. As Senator Costello said, if the Supreme Court rules that the Constitution does not allow us as legislators to make decisions here that are clearly for the common good, that everybody in this house and in the country believes are right to ensure that people have a roof over their head, then I agree with Senator Costello that there is something wrong with the Constitution and we should do something about it, but this may not arise.[3]
>
> There are other sections in the Constitution, adjuncts to Article 43 being one of them, which refer to the common good, and under the Constitution, the right to property can be regulated by law. That is what we are doing. It is why Part V is so detailed and complex, as the senator said, but it is complex because we need to be seen to be fair to everybody involved. We have a duty as legislators to provide for those who cannot provide for themselves. We have a duty for social order, equity and so on, but this must be balanced against the rights to private property. We have done that in this Bill.[4]

3.4 Clearly, the duty of legislators to provide for those who cannot provide for themselves is a hallmark of a developed society. It is in this context that we outline the measures and obligations which the Irish state has accepted at an international level, and which can now be introduced into the review of the Constitution by progressive legislators to formally and effectively guarantee the right to adequate, affordable and appropriate housing to Irish people.

3.5 The following is a brief outline of the international instruments and reports which Ireland has accepted in relation to rights to housing at an international level.

United Nations

3.6 The main Article concerned with a right to housing in the Universal Declaration on Human Rights (UDHR) of 1948 is Article 25.[5]

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, **housing** and medical care and necessary social services, and the right to security in the event of un-

employment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

International Covenant on Economic, Social and Cultural Rights

3.7 The International Covenant on Economic, Social and Cultural Rights addressed the right to housing in Article 11.[6]

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and **housing**, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent

3.8 The UN Committee on Economic, Social and Cultural Rights (UNCESCR), which monitors the states parties compliance with Covenant, has prepared General Comment No. 4 on the Right to Adequate Housing,[7] 'as a means of developing a common understanding of the norms by establishing a prescriptive definition'. This general comment spells out the elements of housing policy which states must address in the housing available to its citizens. It sets out here in detail the elements of adequate housing for the international community to recognise. Viewed in their entirety, these entitlements form the core guarantees, which, under public international law, are legally vested in all persons.

1 Legal security of tenure
All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. Governments should consequently take immediate measures aimed at conferring legal security of tenure upon those households currently lacking such protection. Such steps should be taken in genuine consultation with affected persons and groups.

2 Availability of services, materials and infrastructure
All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, clean drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage and emergency services.

3 Affordable housing
Personal or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Housing subsidies should be available for those unable to obtain affordable housing, and tenants should be protected from unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by states to ensure the availability of such materials.

4 Habitable housing
Adequate housing must be habitable. In other words, it must provide the inhabitants with adequate space and protect them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors. The physical safety of occupants must also be guaranteed.

5 Accessible housing
Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other vulnerable groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups.

6 Location
Adequate housing, must be in a location which allows access to employment options, health care services, schools, child care centres and other social facilities. Housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

7 Culturally adequate housing
The way housing is constructed, the building materials used and the policies underlying these must appropriately enable the expression of cultural identity and diversity. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed.

3.9 These extensive entitlements extracted from General Comment No. 4. reveal some of the complexities associated with the right to adequate housing. They also show the many areas which must be fully considered by states to satisfy the housing rights of their population.

Any person, family, household, group or community living in conditions in which these entitlements are not fully satisfied, could reasonably claim that they do not enjoy the right to adequate housing, as enshrined in international human rights law.

3.10 The Committee has also made General Comment No.7 on the Right to Adequate Housing – forced evictions.[8] Following from General Comment No. 4, and with increasing reports of forced evictions, this comment was issued by the committee in 1997.

> The term 'forced evictions' as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.[9]

3.11 Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which can often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.[10]

3.12 The UNCESCR considers that the procedural protections which should be applied in relation to forced evictions include:

- an opportunity for genuine consultation with those affected;
- adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
- information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
- especially where groups of people are involved, government officials or their representatives to be present during an eviction;
- all persons carrying out the eviction to be properly identified;
- evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
- provision of legal remedies; and
- provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

3.13 Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the state party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.[11]

3.14 Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966 sets out the obligation on the states parties 'to recognise' the right of everyone to an adequate standard of living including…adequate housing.[12] The obligation of states to recognise the right to housing manifests itself in several key areas. Firstly, all countries must recognise the human rights dimensions of housing, and ensure that no measures of any kind are taken with the intention of eroding the legal status of this right. Second, legislative measures, coupled with appropriate policies geared towards the progressive realisation of housing rights, form part of the obligation 'to recognise'. Any existing legislation or policy which clearly detracts from the legal entitlement to adequate housing would require repeal or amendment. Policies and legislation should not be designed to benefit already advantaged social groups at the expense of those in greater need. Specifically, housing rights issues should be incorporated into the overall development objectives of states. In addition, a national strategy aimed at progressively realising the right to housing for all, through the establishment of specific targets should be adopted. Thirdly, a genuine attempt must be made by states to determine the degree to which this right is not in place, and to target housing policies and laws towards attaining this right for everyone in the shortest possible time. In this respect, States must give due priority to those social groups living in unfavourable conditions by according them particular consideration.[13]

Concluding observations of the UN Committee on Economic, Social and Cultural Rights

3.15 In May 2002, Ireland's performance in implementing the International Covenant on Economic, Social and Cultural Rights was examined, and the concluding observations offer some clear recommendations which could be progressed by this All-Party Committee to enhance the rights of Irish citizens.[14]

> Para 12. The Committee notes with regret that, despite its previous recommendation in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation, and that the State party could not provide information on case law in which the Covenant and its rights were invoked before the courts.
>
> Para 20 The Committee is concerned that: (a) many new households cannot secure adequate and affordable housing; and (b) some 1,200 families of the Traveller community are living in roadside encampments without access to water and adequate sanitary facilities, and are liable to be forcibly evicted.
>
> Para 21 The Committee is concerned that a large number of persons with mental disabilities, whose state of health would allow them to live in the community, is still accommodated in psychiatric hospitals together with persons suffering from psychiatric illnesses or problems, despite efforts by the State party to transfer them to more appropriate care settings.
>
> Para 23 Affirming that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendation (paragraph 22 of the Committee's 1999 concluding observations) and strongly recommends that the State party incorporate economic, social and cultural rights in the proposed amendment to the Constitution, as well as the other domestic legislation. The Committee points out that, irrespective of the system through which international law is incorporated into the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order.
>
> Para 39 The Committee requests the State party to disseminate its concluding observations widely among all levels of society, and in particular among State officials and the judiciary, and to inform the Committee on all steps taken to implement them in its next periodic report.

Europe

3.16 At European level, there are significant advancements in rights to housing within the Revised European Social Charter (RESC), and the EU Charter of Fundamental Rights and social policy measures.

Revised European Social Charter

3.17 The European Social Charter 1961 (ESC) emanated from the Council of Europe, established in 1949, and contained 19 economic and social rights, 'all expressed in obligations upon the contracting parties to pursue a certain policy which will lead to the progressive realisation of these rights.'[15] The Charter (and revised Charter) provides a number of international norms in relation to housing rights for people with disabilities, families, migrant workers and elderly persons, and has been ratified by Ireland.

> Article 15 – physically and mentally disabled persons
> Article 16 – family to social, legal and economic protection
> Article 19 – migrant workers
> Article 23 – the right of elderly persons to social protection
> Article 30 – protection against poverty and social exclusion

3.18 Since 1996 a new Article 31 in the revised European Social Charter creates an obligation to give effect to a right to housing:

> With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
>
> to promote access to housing of an adequate standard;
>
> to prevent and reduce homelessness with a view to its gradual elimination;
>
> to make the price of housing accessible to those without adequate resources.[16]

3.19 This standard has been adopted by many European States, but in a declaration contained in the instrument of ratification of the Revised Charter and in a letter from the permanent representative of Ireland to the Council of Europe, dated 4th November 2000, the government of Ireland opted out of Article 31 on the right to housing.

> In view of the general wording of Article 31 of the Charter, Ireland is not in a position to accept the provisions of this Article at this time. However, Ireland will follow closely the interpretation to be given to the provisions of Article 31 by the Council of Europe with a view to their acceptance by Ireland at a later date."

3.20 The ICCL recommends that this Article 31 be ratified by Ireland, and that constitutional protection of this and the other international rights to housing be included in the Constitution.

EU Charter of Fundamental Rights

3.21 The EU Charter of Fundamental Rights was 'jointly and solemnly proclaimed' at Nice by the presidents of the European Parliament, the Council and the Commission in December 2000. The Charter does not include a specific right to housing, but only to housing assistance

as set out in Article 34 relating to social and housing assistance. This has been accepted by the Irish government, and steps should now be taken to give effect to this important agreement within the Constitution of Ireland.

> Article 34 – Social security and social assistance: …3. In order to combat social exclusion and poverty, the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the procedures laid down by Community law and national laws and practices.

European Convention for the Protection of Human Rights and Fundamental Freedoms

3.22 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) also has important implications for housing rights beyond Article 1 Protocol 1. The ECHR has added significance following the commitments by the Irish Government in the Belfast/Good Friday Agreement. There must now be an equivalent level of protection of human rights between the two parts of Ireland, and this means that the provisions of the Covenant, as already in force in Northern Ireland under the UK Human Rights Act 1998, must be developed in the Republic.[17]

3.23 The relevant sections of the Convention to housing issues, in addition to Article 1 of Protocol 1 are:

> Article 6 – The right to a fair hearing: civil and criminal matters,
> Article 8 – The right to respect for home and family life
> Article 13 – The right to an effective domestic remedy,
> Article 14 – No discrimination in relation to Covenant rights,

3.24 Article 8 in particular recognises that there are positive rights on states to protect individuals home and family life. A home can mean all living places. There have been a number of cases where the state has failed to take action to inform home owners and families of environmental hazards to their home.[18] States have been found in violation of Article 8 on this basis.[19] The principles developed in these cases indicate that the Irish government has positive obligations under Article 8 to make sure that people's home and family life enjoy minimum safeguards and certain standards including standards relating to health, safety and environment matters. Where states policies mean that certain communities or section of society fail to enjoy adequate protection for their home – whether they are property owners or not – this can bring the state in violation of its obligations under Article 8.

3.25 It is also recalled that the major case in Irish housing policy in 2000, on the constitutionality of the Planning and Development Bill[20] considered the compatibility of the Bill with the provisions of Article 1 of Protocol 1 of the convention.

EU regulations

3.26 EU regulations in the 1960s and 1970s ensured that non-national workers and their dependents were entitled to the same social benefits, including access to housing, as nationals of member states, on the principle of non-discrimination. Regulation 1612/68[21] points out in the preamble that:

> Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country;

3.27 Council Directive 2000/43/EC of June 2000[22] which promotes the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin and specifically:

> Shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to:
>
> …(h) access to and supply of goods and services which are available to the public, including housing.[23]

In order to comply with the directive member states shall take the necessary measures to ensure that:

> Any laws, regulations, and administrative provisions contrary to the principle of equal treatment are abolished.[24]
>
> Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19th July 2003…[25]
>
> Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European parliament and the Council on the application of this Directive."[26]

3.28 This directive places a clear obligation on Irish authorities to examine and amend if necessary any laws, regulations and administrative measures in relation of the supply of housing.

CONCLUSION

The obligations on the Irish government in relation to the right to housing can be found in a multiple of different sources. The ICCL submits that the standards in relation to the right to housing as set out have not been met by the Irish government and that the government is legally obliged to take measures to rectify this situation.

The ICCL submits that the right to enjoyment and protection of private property does not prevent the pursuit of policies which lead to the full implementation of the right to housing. Those policies must simply not interfere with private property rights in an arbitrary or discriminatory manner.

The ICCL recommends that Article 31 of the European Social Charter be ratified by Ireland, and that constitutional protection of this and the other international rights to housing be included in the Constitution.

Notes:

1 James v United Kingdom (1986) 8 EHRR 123.
2 *In re: Article 26 and the Planning and Development Bill 1999*. [2000] 2 IR 321; [2001] 1 ILRM 81.
3 *Seanad Eireann Official Reports*. 26.11.99. p. 44.
4 *Ibid*.
5 *Universal Declaration of Human Rights,* UNGA Resolution 2200A (XX1) UN Doc A/810 (1948).
6 UN Doc. A/6316 (1966) *International Covenant on Economic, Social and Cultural Rights*. UNGA Resolution 2200A (XX1) Entered into force 3 January 1976.
7 UN Doc.E/1991/23. UNCESCR. *General Comment No. 4. The Human Right to Adequate Housing*. Geneva: United Nations.1991.
8 UN Doc. E/1998/22 Annex IV.
9 *Ibid*., para. 3.
10 *Ibid*., para. 10.
11 *Ibid*., paras. 15-16.
12 Alston & Quinn, "The Nature and Scope of States Parties Obligations under ICESCR," 9 HRQ 156-229 (1987).
13 *Ibid*.
14 UN Doc. E/C.12/1/Add.77. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland*. 17/05/2002.
15 Betten & Grieff, EU Law and Human Rights (1998), p. 42.
16 Council of Europe. Revised Social Charter, Article 31.
17 *Government of Ireland. European Convention on Human Rights Bill 2001. Explanatory Memorandum. p. 3.*
18 E.g. *Powell and Ra*yner v UK 21/2/1990; *Lopez Ostra v Spain* 9/12/94.
19 *Guerra and Others v Italy* 19/1/1998.
20 *Re: Article 26. Planning and Development Bill 1999*. [2001] 1 ILRM 81.
21 OJ L 257, 19.10.1968. Regulation (EEC) No. 1612/68 of the Council of 15th October 1968 on freedom of movement for workers within the Community. (as last amended by Regulation No. 2434/92. OJ l 245, 26.8.1992.)
22 Council Directive 2000/43/EC. OJ. L. 180/22. 19.7.2000.
23 Ibid. Article 3 (1).
24 Ibid., Article 14.
25 Ibid., Article 16.
26 Ibid., Article 17.

IRISH COUNCIL FOR SOCIAL HOUSING

SUMMARY OF MAIN PROPOSALS

- The committee should ensure that the right to private property does not cause hardship for a significant number of people in society by putting in place mechanisms to counteract the concentration of land in private ownership.
- In the case of compulsory purchase orders, public bodies should not have to pay the full market value of the land acquired especially as the increase in value of land may have largely resulted from the action of public bodies through rezoning or the provision of infrastructure.
- The process of zoning land for residential purposes would in the future be time limited to 5 years which would be equivalent to the life of the city/county development plan. This zoning would be linked to 'pre-emptive rights' for public bodies who would be offered first choice on the acquisition of the zoned land where they need to develop in the common good.
- The issue of 'betterment' resulting from an increase in land values through the provision of public infrastructure should be immediately prioritised by the committee. It is unacceptable that taxpayers are being asked to contribute twice to the costs of social and affordable housing. Firstly, in the form of new or inhanced infrastructure paid for by public authorities and secondly through extra funding required to purchase land on the open market from landowners who have benefitted from such infrastructure. Therefore, the ICSH would consider it more appropriate that 'betterment' was recovered using the zoning status of land rather than forms of taxes or other duties which are usually transferred to purchasers in higher prices.
- The ICSH perceives the right to shelter as a minimalist and retrograde approach as this approach fails to address the broad range of needs people seeking housing require. Therefore, as Ireland has already ratified a number of international treaties and covenants which link socio-economic rights and a right to housing, these international

obligations should be included within the constitutional protection afforded to Irish citizens.

1 INTRODUCTION AND OVERVIEW

The Irish Council for Social Housing (ICSH) acts as the national representative federation of non-profit housing associations in Ireland. Currently the ICSH has over 200 members located throughout the country who manage over 15,000 units of accommodation. Currently non-profit housing associations provide 1 in 4 of all new social rented housing and in 2002 completed 1360 new social rented homes. Housing associations work in partnership with local authorities and in the majority of cases housing associations house people from the local authorities waiting list. These individuals or households have been deemed by local authorities as in need of social rented housing.

Although non-profit housing associations in the main provide housing for the elderly, the homeless, people with disabilities and low-income families, they are now permitted under the provisions of the Planning and Development (Amendment) Act 2002 to provide affordable housing and a new tenure known as equity-sharing. Both of these (affordable and equity-shared housing) will now allow housing associations to provide housing for marginal homeowners and households who cannot afford a full mortgage. As housing associations will be able to provide housing for a wide range of socio-economic households, it should also mean that housing association developments will become more socially integrated.

In addition, the Programme for Government includes the commitment that the government will assist the voluntary and co-operative sector complete up to 4,000 units per year under during the period of the National Development Plan. In order to achieve this government target, or make progress in achieving it, there is a need for a sufficient amount of residential land to be made available to housing associations. Therefore, housing associations have a keen interest in the whole issue of property rights as the housing association sector will require a significant amount of land for its building programmes over the next 4-5 years. The main features for housing associations obtaining land for social housing can be characterised as follows:-

- Housing associations in the 1980s and 1990s were able to source a significant amount of land/buildings from religious institutions for new housing projects although by the year 2000 this had dried up to a large extent. This land/property has been donated by religious institutions to housing associations for social housing at below the market value or in some cases at no cost to the housing association and the state.
- Housing associations, particularly rural based housing associations have been able to access land for social housing from community councils or other local community organisations in some cases below the market value. Again this avenue for obtaining land has dried up to a large extent as the land banks of community organisations have been severely reduced.
- Housing associations have obtained a significant supply of low-cost (subsidised) sites from local authorities to assist them with their social housing projects. This was particularly the case in the early to mid-1990s when the local authorities own building programme was at a lower level. However since the late 1990s the number of low-cost (subsidised sites) provided by local authorities to housing associations for social housing projects has fallen dramatically. An indication of the drop-off in the number of subsidised sites provided by local authorities to housing associations and individuals is included below.

Year	No. of low-cost sites sold by local authorities
1995	365
1998	279
2001	188
2002(Jan-Sept)	65

As there has been a fall-off in the number of sites provided by local authorities, many housing associations have relied on acquiring sites for housing on the open market. The DoELG did provide resources to housing associations for the acquisition of land in 1998. However, in recent years housing associations have found it difficult to acquire land on the open market for social housing projects. In many cases they have been competing with private developers for land and as the resources available to housing associations are limited to certain levels, it has meant that they have been unable to buy land in certain locations. Therefore, many of the sites acquired by housing associations on the open market have been in locations outside the main urban areas or in less sought after areas. Indeed housing associations would be aware that the land cost of housing projects has increased significantly in recent years and in situations where the land has been sourced on the open market, the land cost can represent over $^1/_3$ of the total cost of the new house for social housing.

The ICSH did welcome the provisions of the Planning and Development Act 2000, in particular Part V, whereby local authorities could reserve a portion of land or new dwellings in a private development for social and affordable housing. Housing associations have been working in partnership with local authorities and private developers over the past year to provide social and affordable housing developments under Part V of the Act. With land being transferred by private developers to local authorities or housing associations at less that the market value, Part V has provided an opportunity to have social and affordable

housing provided at much less cost to the state as the land cost element has been reduced as the developer is compensated for land value at existing use value.

In relation to instruments used in other countries which reduce the cost of land and in turn the cost of social rented housing for low-income and marginalized groups they are varied. A number of countries use zoning as a mechanism to ensure that there is a sufficient amount of land for social housing. In Denmark, the price of land has to be below 20% of the total cost of providing social housing and is usually around 14% of the total cost. In Portugal, land is usually 15% of the total cost. In Holland, land prices for social housing for single family houses are around €12,000 and in situations in Italy the local authority can buy land for social housing at not more than 50% of the market value. Although social housing is not that prevalent in Greece, land is acquired for the state and land owners who sell land for social housing are exempt from tax on land transactions because it is in the public interest. Although governments have different constitutions to Ireland there are a number of countries which use specific legal instruments to acquire land for social housing. In Belgium there is a pre-emption right for housing associations to develop land for social rented housing in certain designated areas and it is also possible in a land-use plan to designate land for social rented housing (similar to Part V of the Planning and Development Act 2000). For example in Flanders it can be determined that a certain % (10-25%) of the new dwellings can de designated for social housing, or a specific zone in a land-use plan can be designated as being reserved for social housing. In Denmark land may sometimes be reserve specifically for social housing in a land-use. In France, local authorities have pre-emptive powers in acquiring land which can be transferred to all social housing organisations. In this case pre-emptive rights means that the landowner offers the land for sale firstly to local authorities.

2 THE RIGHT TO PRIVATE PROPERTY, PRIVATE PROPERTY AND THE COMMON GOOD

The Irish Constitution is clear on the property rights of individuals but it also clearly asserts that the exercise of these rights ought to be regulated by the principles of social justice. There are mechanisms built into the constitution to ensure that the common good can be protected. Article 43.2 of the constitution states that:

> the state, accordingly may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

In addition article 45.2 (iii) asserts that,

> especially the operation of free competition shall not be allowed so to develop as to result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.

Availability of a decent affordable home for people has been a central policy objective of the Irish Government for many years. It can be said that housing is an essential commodity and it would certainly be in the interest of the common good to ensure that the provision of housing is not limited in any way by way of property rights. This would contravene the basic protection of the fundamental principles of social justice and the policy aims of the state.

The policies of the state in this regard are clear in numerous statements. These include DoELG Annual Report 2001

> To enable every household to have available an affordable housing dwelling of good quality suited to its needs, in a good environment and as far as possible at the tenure.

In addition a further policy of the state in this regard includes the Review of the National Anti-Poverty Strategy *Building an Inclusive Society* which states in section 16 that the overall objective

> is to enable households experiencing poverty and disadvantage to have available to them housing or accommodation which is affordable, accessible, of good quality suitable to their needs, culturally acceptable, located in a sustainable community, and as far as possible in a secure tenure of their choice.

(Further issues in relation to Ireland's ratification on international statements or treaties in relation the right to housing are discussed in the section on right to shelter)

The Planning and Development Act 2000 has already demonstrated that the state can interfere in the exercise of property rights where there is social need i.e. provision of social rented housing. In the judgement of the Supreme Court on the constitutionality of Part V of the Planning and Development Act 2000, it found that in that instance the

> objective of Part V was of sufficient importance to warrant interference with a constitutionally protected right and given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which in a free and democratic society should be regarded as pressing and substantial. At the same time, the court is satisfied that they impair those rights as little as possible and their affects on those rights are proportionate to the objectives sought to be attained.

In addition the judgement found

> the owner may be required to cede some part of the enhanced value of the land deriving both from its' zoning for residential purposes and the grant of permission in order to meet what is considered by the Oireachteas to be a desirable social objective, namely the provision of affordable housing and housing for persons in special categories and of integrated housing.

Therefore, the provision of housing for its citizens is in the common good.

In the current climate the Oireachteas may take

action that this common good may not be limited or restrained through the impact of the right to property.

The Committee should ensure that the right to private property does not cause hardship for a significant number of people in society by putting in place mechanisms to counteract the concentration of land for housing in private ownership.

3 COMPULSORY PURCHASE

At present, compulsory purchase by local authorities is not widely used as it can be a cumbersome process and elected members can be reluctant to be involved in the process. In relation to the constitutional position any purchase of land for housing purposes would have to be in the common good. However, local authorities should have the power to acquire land at a price below the market price. This would be particularly the case where land was rezoned and local authorities would have 'pre-emptive rights' (first choice to buy) on this rezoned land. Although this may appear to involve a restriction of property rights it would be no more restrictive than any other price controls. This reduction in property rights would not be seen as an unjust attack on an individual's property rights as the landowners would have done nothing to bring about this enhanced value of land, whereas the community has through rezoning in the planning system.

The new principal of compulsory purchase has already been established under Part V of Planning and Development Act 2000 where, as a condition of planning permission, local authorities could require land to be transferred to local authorities at existing use value (unless land was acquired before August 1999 when the full cost plus holding charges were included) for the purposes of social and affordable housing at levels required in the City/County Development Plan. In this context landowners were required to surrender some part of the enhanced value of the land for a desired social objective.

It would be unreasonable in the case of a compulsory purchase order that the public body should have to pay the full market value of the land acquired, especially as this may have largely resulted from the actions of public bodies through rezoning or the provision of infrastructure.

4 THE ZONING OF LAND

According to figures produced by the DoELG in September 2002 there were over 12,177 hectares of zoned land available for residential housing which could accommodate 327,784 units of housing throughout the country. Therefore, there is currently 5-6 years' land available for housing supply assuming there is a continuous 50-60,000 units of housing completed each year. Once land has been zoned for residential purposes many landowners have retained their land as a long-term investment which confers largely no benefit on society. There is a continuous pressure from many landowners to encourage planning authorities to rezone their land from say agricultural to residential which dramatically increases the value of their land. However, it is not in the common good that the increased value of land from rezoning by a planning authority would accrue to a few landowners. Landowners have been reaping the benefit in higher land values from rezoning decisions which were intended for community benefit through the rezoning of land for housing. This windfall increase in the price of land should be regulated to provide a fair and equitable system.

Therefore, it would be in the common good for owners of land to cede some of the increased value from rezoning. The Supreme Court Judgement in relation to Part V of the Planning and Development Act 2000 found that

> the owner may be required to cede some part of the enhanced value of the land deriving from its zoning for residential purposes and the grant of permission in order to meet what is considered by the Oireachteas to be a desirable social objective, namely the provision of affordable housing and housing for persons in special categories and of integrated housing.

Therefore, with this precedent in mind it would be essential that the increases in land value from rezoning would be recouped by the community.

In addition, there is no time limit on the rezoning of land for residential purposes unless there is an amendment to the City/County Development Plan. Therefore there is no encouragement for landowners to release land until they feel they can obtain a greater appreciation in value of their land. The negative effect of this is that land owners are waiting until the market dictates higher prices and this feeds into greater housing costs both for homeowners and social housing providers. Therefore, it would be important that any new rezoning of land for residential purposes would be time limited for say 5 years which would be equivalent to the duration of a development plan. After this period the zoning status of the land would be reviewed and if there was no intention to develop it for housing purposes then the status of zoning could return to its previous status, i.e agricultural. Alternatively the rezoning of the land for residential purposes could be linked to local authorities having pre-emptive rights to acquire land. The grant of pre-emptive rights (first choice) to local authorities would place local authorities in a position to exercise great influence on the land market. It must also be understood that the development value of land is only realised on the disposal of land. However, most landowners who realise the development value of land are not necessarily the developers of housing.

5 THE PRICE OF DEVELOPMENT LAND

The price of development land for housing has increased dramatically in recent years. Certainly to

allow a greater section of the population to access new housing either as home owners or as social housing tenants there is a greater need for intervention in the land market to reduce the price of land. This again will be important for towns/areas designated as new gateways under the National Spatial Strategy where, with increased population and commercial activity, the value of development land for housing will likely increase dramatically. Therefore, in order to allow people of low to moderate income live and work in these areas, it is important that there are sufficient quantities of serviced land available for housing which would moderate the pressure on land prices as it could provide developers with an increased number of locations in which to develop housing.

6 INFRASTRUCTURAL DEVELOPMENT

In recent years the government has invested heavily in the provision of new infrastructure. This has ranged from new roads and motorways to new and upgraded water and sewerage schemes. Many landowners have directly and indirectly benefited from such investment. The concept known as 'betterment' is described 'as the increase in value of land which accrues to the owners of land as the result of the action of others, more than likely local authorities or other public bodies'.

This has included the provision of infrastructure such as new roads or public transport links which have been paid for by the exchequer. One argument for the recovery of 'betterment' has been described as 'that persons benefited by public expenditure should contribute to such expenditure to the extent of the increased value of their property'.

Therefore, many landowners have accidentally benefited from public expenditure which has not been in the common good as it has benefited only one person, i.e. the landowner. However, 'betterment' can be difficult to recover as the increased value of land for residential housing can be influenced by both general demand and supply factors as well as investment by public authorities. Therefore, in some cases it could be hard to measure which part of the increased value of land is attributable to which reason, general economic factors or public expenditure. However, the community should be entitled to the increase in the price of undeveloped land which is attributable to works carried out by public authorities. Currently, this is absent in the Irish system and is problematic as there may be a number of landowners who have acquired land many years ago and where, due to the expansion of many urban areas, public authorities, particularly local authorities, have invested significantly in infrastructure over that period.

There are a number of mechanisms for recovering 'betterment' due to increased land values which can include various duties and taxes on the increased value of the undeveloped land that a landowner has obtained. Many of these are difficult to administer as has been shown by the British Land Commission in 1967. They (levies and taxes) can also be ultimately passed on to the buyer of a new property or a provider of social housing, i.e. local authority or a housing association. Indeed Part V of the Planning and Development Act 2000 was an attempt to deal with the issue of 'betterment' but was not specifically linked to the increase in land values which were linked to the provision of new public infrastructure. It was realised that Part V of the Act was in common good and that compensation under Part V was requiring landowners if they wished to develop residential land for housing to surrender some part of the enhanced value of the property which had resulted from the operation of a planning scheme for the benefit of the community. However, the ICSH consider that the issue of 'betterment' can be most effectively treated by planning authorities having a pre-emptive right on rezoned land for residential development. The zoning of land would include the requirement for the landowner of the newly zoned residential land to offer to the public authority the first option of buying the land for social and affordable housing.

It is undesirable and contrary to the interests of the community that public authorities should be forced to compete with private persons (landowners) in order to secure land for housing especially as the public authority may have contributed to its increase in its value. In the provision of social housing it is important that tax payers do not end up paying twice for social housing. Firstly by paying for public infrastructure through local authorities and subsequently through higher land costs from landowners whose land has increased partly due to the provision of public infrastructure. There is a need to have value for money in the provision of social and affordable housing so that increased government expenditure on land costs is not absorbed by a few landowners.

7 HOUSE PRICES

In recent years, the problem of housing affordability has dominated the question of access to housing. Many factors have contributed collectively to increased house prices. These include increased population and demographic trends of those in the household formation category (25-34), rising incomes, easier access to cheaper finance, delays in servicing land for housing. Although with lower interest rates, the majority of household costs are falling, especially for older households, a significant amount of new households entering the housing market as first-time buyers are experiencing difficulty accessing the homeownership market. The unrelenting increases in house prices have led to increased housing poverty for those who need greatest protection. The question of house prices is more than an economic issue and is currently contributing to poverty, disadvantage and social exclusion.

Under the Planning and Development Act 2000 each local authority was required to prepare a housing

strategy to assess and forecast the housing needs of the population in its area over the life of the county development plan. These local authority housing strategies demonstrated that on average 25-30% of new households would require some form of social and affordable housing and would experience affordability problems. It was also acknowledged that a higher proportion of new households in a number of local authorities i.e. (Dun Laoghaire 40%) would require some form of social and affordable housing. While it is recognised there have been a number of factors that have contributed to the massive inflation of house prices over the past 6 years, figures from the DoELG Annual Statistics bulletin indicate that increases in construction costs have not been as pronounced as overall house prices. This leads us to the assumption that the non-construction element of house prices have increased dramatically. Non-construction costs could include levies and development charges imposed by the local authority as well as the costs of unlocking a site. However the major part of the non-construction costs of a house would be attributable to the cost of the land/site.

In addition to the increase in house prices for homeowners, the cost of providing social rented housing by local authorities and housing associations has also increased over the last 6 years. Government has provided a significant amount of additional capital funding for increased social housing programmes, however a significant amount of this additional funding has been absorbed in increased land costs. Therefore, the increase in house prices and the cost of new social rented housing has been influenced by increased land costs. Unless the issue of land costs is addressed through the constitutional review group, continued high costs of new social rented housing will remain. Indeed as there is a move to increase residential densities in certain locations and in particular those areas designated as gateways under the National Spatial Strategy, it is imperative that the issue of land costs is tackled now.

Finally, the number of first time buyers entering homeownership has reduced in recent years and also there has been reduced activity of first time buyers in the second hand house market. This has been largely due to the increased cost of houses which has been greatly influenced by increased land costs.

8 RIGHT TO SHELTER

This part of the submission seeks to highlight the international commitments made by Ireland in relation to the right to housing. While the terms of reference of the committee refer to a right to shelter, this is interpreted within all international legal and human rights instruments as forming part of a right to housing, one of a number of socio-economic rights which the Irish state has ratified in international law. It is pertinent therefore, in this review of the Constitution to address these international obligations and include them within the constitutional protection afforded to Irish citizens.

A failure to examine the right to shelter within the framework of rights to housing could result in minimalist and possibly punitive legal measures in relation to homeless people, such as persist in New York, where a basic right to shelter exists. The provision of basic dormitory accommodation for homeless people, which the right to mere shelter could represent, would involve a step back from the internationally and nationally accepted standards for the provision of housing within the context of enhancing human dignity and human rights. Such a narrow approach does not address the whole range of needs of homeless people, shelter being only one. The international instruments, reports and recommendations already available demonstrate clearly the issues to be addressed in this area, and this submission sets out the relevant documents which are freely available and can be supplied by the ICSH on request.

Significantly, the rights in relation to private property have also been examined many times by the European Court of Human Rights in connection with cases dealing with Article 1 of Protocol No. 1 of the European Convention on Human Rights and Fundamental Freedoms. The Irish Supreme Court case relating to the Planning and Development Bill examined these protections in relation to State acquisition of private property and the levels of compensation payable.[1] There are a number of decisions of the European Court of Human Rights, to which appeal can be made by people living in Ireland on this issue.

It is important, however, to trace the reasoning of the minister who introduced that Bill, which posited the situation of those in housing need against the powerful position of landowners to influence house prices:

> We can talk about the rights of individuals and society and the common good but we should never lose sight of the fact that a public body, that is the local authority, makes millionaires of people overnight simply by drawing a line on a map and rezoning a piece of property. That person, whether a developer or landowner, is made very wealthy by the actions of the State, via the local authorities. There must be some moral responsibility held by people who receive windfalls from the State in that way to give something back. As the Senator knows, I am certain that this is constitutional because it meets the criteria of being fair, proportional and equitable but we will not decide that, the Supreme Court may decide it. I am advised that it is constitutional and I am satisfied that it is. As Senator Costello said, if the Supreme Court rules that the Constitution does not allow us as legislators to make decisions here that are clearly for the common good, that everybody in this House and in the country believes are right to ensure that people have a roof over their head, then I agree with Senator Costello that there is something wrong with the Constitution and we should do something about it, but this may not arise.[2]

> There are other sections in the Constitution, adjuncts to Article 43 being one of them, which refer to the common good, and under the Constitution, the right to property can be regulated by law. That is what we are doing. It is why Part V is so detailed and complex, as the Senator said, but it is complex because we need to be seen to be fair to everybody involved. We have a duty as legislators to provide for those who cannot provide for themselves. We have a duty for social order, equity and so on, but this must be balanced against the rights to private property. We have done that in this Bill.[3]

Clearly, the duty of legislators to provide for those who cannot provide for themselves is a hallmark of a developed society. It is in this context that we outline the measures and obligations which the Irish State has accepted at an international level, and which can now be introduced into the review of the Constitution by progressive legislators to formally and effectively guarantee the right to adequate, affordable and appropriate housing to Irish people.

The following is a brief outline of the international instruments and reports which Ireland has accepted in relation to rights to housing at an international level.

United Nations

1 The main Article concerned with a right to housing in the Universal Declaration on Human Rights (UDHR) of 1948 is Article 25.[4]

> (1) Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

2 The International Covenant on Economic, Social and Cultural Rights addressed the right to housing in Article 11.[5]

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent"

3 The UN Committee on Economic, Social and Cultural Rights (UNCESCR), which monitors the states parties compliance with the Covenant, has prepared General Comment No. 4. on the Right to Adequate Housing,[6] 'as a means of developing a common understanding of the norms by establishing a prescriptive definition'. This general comment spells out the elements of housing policy which states must address in the housing available to its citizens. It sets out here in detail the elements of adequate housing for the international community to recognise. Viewed in their entirety, these entitlements form the core guarantees which, under public international law, are legally vested in all persons.

a) Legal security of tenure
All persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. Governments should consequently take immediate measures aimed at conferring legal security of tenure upon those households currently lacking such protection. Such steps should be taken in genuine consultation with affected persons and groups.

b) Availability of services, materials and infrastructure
All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, clean drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, food storage facilities, refuse disposal, site drainage and emergency services.

c) Affordable housing
Personal or household costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Housing subsidies should be available for those unable to obtain affordable housing, and tenants should be protected from unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States to ensure the availability of such materials.

d) Habitable housing
Adequate housing must be habitable. In other words, it must provide the inhabitants with adequate space and protect them from cold, damp, heat, rain, wind or other threats to health, structural hazards and disease vectors. The physical safety of occupants must also be guaranteed.

e) Accessible housing
Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other vulnerable groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups.

f) Location
Adequate housing must be in a location which allows access to employment options, health care services, schools, child care centres and other social facilities. Housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants.

g) Culturally adequate housing
The way housing is constructed, the building materials used and the policies underlying these must appropriately enable the expression of cultural identity and diversity. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed.

These extensive entitlements extracted from General Comment No. 4. reveal some of the complexities associated with the right to adequate housing. They also show the many areas which must be fully considered by states to satisfy the housing rights of their popu-lation. Any person, family, household, group or community living in conditions in which these entitlements are not fully satisfied, could reasonably claim that they do not enjoy the right to adequate housing, as enshrined in international human rights law.

4 General Comment No.7. The Right to Adequate Housing – forced evictions.[7] Following from General Comment No. 4, and with increasing reports of forced evictions, this comment was issued by the Committee in 1997.

> The term 'forced evictions' as used throughout this general comment is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection. The prohibition on forced evictions does not, however, apply to evictions carried out by force in accordance with the law and in conformity with the provisions of the International Covenants on Human Rights.[8]

Women, children, youth, older persons, indigenous people, ethnic and other minorities, and other vulnerable individuals and groups all suffer disproportionately from the practice of forced eviction. Women in all groups are especially vulnerable given the extent of statutory and other forms of discrimination which can often apply in relation to property rights (including home ownership) or rights of access to property or accommodation, and their particular vulnerability to acts of violence and sexual abuse when they are rendered homeless.[9]

The UNCESCR considers that the procedural protections which should be applied in relation to forced evictions include:

(a) an opportunity for genuine consultation with those affected;
(b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction;
(c) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected;
(d) especially where groups of people are involved, government officials or their representatives to be present during an eviction;
(e) all persons carrying out the eviction to be properly identified;
(f) evictions not to take place in particularly bad weather or at night unless the affected persons consent otherwise;
(g) provision of legal remedies; and
(h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.

Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the state party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available.[10]

5 Article 11 of the International Covenant on Economic, Social and Cultural Rights 1966 sets out the obligation on the states parties 'to recognise' the right of everyone to an adequate standard of living including…adequate housing.[11] The obligation of states to recognise the right to housing manifests itself in several key areas. Firstly, all countries must recognise the human rights dimensions of housing, and ensure that no measures of any kind are taken with the intention of eroding the legal status of this right. Second, legislative measures, coupled with appropriate policies geared towards the progressive realisation of housing rights, form part of the obligation 'to recognise.' Any existing legislation or policy which clearly detracts from the legal entitlement to adequate housing would require repeal or amendment. Policies and legislation should not be designed to benefit already advantaged social groups at the expense of those in greater need. Specifically, housing rights issues should be incorporated into the overall development objectives of States. In addition, a national strategy aimed at progressively realising the right to housing for all, through the establishment of specific targets should be adopted. Thirdly, a genuine attempt must be made by states to determine the degree to which this right is not in place, and to target housing policies and laws towards attaining this right for everyone in the shortest possible time. In this

respect, states must give due priority to those social groups living in unfavourable conditions by according them particular consideration.[12]

6 Other UN international instruments which set out rights to housing include:
- The UN Convention on the Rights of the Child (1989).
- The UN Convention Relating to the Status of Refugees (1951).
- The UN International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (1990)
- The Declaration on the Rights of Disabled Persons (1975) of UNGA resolution 2542 (XXIV) on 11 December 1975.
- The Vancouver Declaration on Human Settlements (1976) adopted by the United Nations Conference on Human Settlements in 1976.
- The UN Global Strategy for Shelter to the Year 2000 adopted by the UN General Assembly in resolution 43/181 on 20 December 1988.
- The UN World Conference on Environment and Development (UNCED) of Rio de Janeiro in 1992, which adopted Agenda 21.
- The 1961 ILO Recommendation No. 115 on Worker's Housing.

7 In addition to being included in the various treaties and declarations, the right to adequate housing has also been addressed in many resolutions adopted by all types of United Nations decision-making organs. While such resolutions are not legally binding, they articulate internationally accepted standards. This method of recognition reveals the sustained global attention and support given to the right to adequate housing, at least in principle, by the international community. At a national level, at least 40% of the world's constitutions refer to housing or housing rights.[13]

All of this shows that there is a consistent and progressive development of housing as a right permeating the international and national legal and constitutional arenas. While there are no guarantees that the mere inclusion of housing rights within a Constitution will lead to this right being implemented, the positing of this right alongside other constitutional rights represents an important legal foundation for further action towards ensuring the effective realisation of the right to housing.

Europe

At European level, there are significant advancements in rights to housing within the Revised European Social Charter (RESC), and the EU Charter of Fundamental Rights and social policy measures.

1 The European Social Charter 1961 (ESC) emanated from the Council of Europe, established in 1949, and contained 19 economic and social rights, 'all expressed in obligations upon the contracting parties to pursue a certain policy which will lead to the progressive realisation of these rights.'[14] The Charter (and revised Charter) provides a number of international norms in relation to housing rights for people with disabilities, families, migrant workers and elderly persons, and has been ratified by Ireland.

> Article 15 – physically and mentally disabled persons
> Article 16 – family to social, legal and economic protection
> Article 19 – migrant workers
> Article 23 – the right of elderly persons to social protection
> Article 30 – protection against poverty and social exclusion

2 Since 1996 a new Article 31 in the revised European Social Charter creates an obligation to give effect to a right to housing:

> With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
> - to promote access to housing of an adequate standard;
> - to prevent and reduce homelessness with a view to its gradual elimination;
> - to make the price of housing accessible to those without adequate resources.[15]

This standard has been adopted by many European states, but in a declaration contained in the instrument of ratification of the Revised Charter and in a letter from the Permanent Representative of Ireland to the Council of Europe, dated 4th November 2000 the Government of Ireland opted out of Article 31 on the right to housing.

> In view of the general wording of Article 31 of the Charter, Ireland is not in a position to accept the provisions of this Article at this time. However, Ireland will follow closely the interpretation to be given to the provisions of Article 31 by the Council of Europe with a view to their acceptance by Ireland at a later date.

The ICSH recommends that this Article 31 be ratified by Ireland, and that constitutional protection of this and the other international rights to housing be included in the Constitution.

3 The EU Charter of Fundamental Rights was 'jointly and solemnly proclaimed' at Nice by the presidents of the European Parliament, the Council and the Commission in December 2000. The Charter does not include a specific right to housing, but only to housing assistance as set out in Article 34 relating to social and housing assistance. This has been accepted by the Irish Government, and steps should now be taken to give effect to this important agreement within the Constitution of Ireland.

> Article 34 – Social security and social assistance: …3. In order to combat social exclusion and poverty,

> the Union recognises and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the procedures laid down by Community law and national laws and practices.

4 The European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR) is now beginning to have very important implications for housing rights. The ECHR has added significance following the commitments by the Irish Government in the Belfast/Good Friday Agreement. There must now be an equivalent level of protection of human rights between the two parts of Ireland, and this means that the provisions of the Covenant, as already in force in Northern Ireland under the UK Human Rights Act 1998, must be developed in the Republic.[16]

The most relevant sections of the Convention to housing issues are:

> Article 6 – The right to a fair hearing: civil and criminal matters
> Article 8 – The right to respect for home life, privacy, the home and correspondence
> Article 13 – The right to an effective domestic remedy
> Article 14 – No discrimination in relation to Covenant rights
> Article 1 of Protocol No. 1. The right to peaceful enjoyment of possessions

There is a developing body of case law on housing related issues to complement the case law of the European Court of Human Rights. Indeed, the major case in Irish housing policy in 2000, on the constitutionality of the Planning and Development Bill[17] considered the compatibility of the Bill with the provisions of Article 1 of Protocol 1 of the Convention.

5 EU Regulations in the 1960s and 1970s ensured that non-national workers and their dependents were entitled to the same social benefits, including access to housing, as nationals of member states, on the principle of non-discrimination. Regulation 1612/68[18] points out in the preamble that:

> Whereas the right of freedom of movement, in order that it may be exercised, by objective standards, in freedom and dignity, requires that equality of treatment shall be ensured in fact and in law in respect of all matters relating to the actual pursuit of activities as employed persons and to eligibility for housing, and also that obstacles to the mobility of workers shall be eliminated, in particular as regards the worker's right to be joined by his family and the conditions for the integration of that family into the host country;

6 Council Directive 2000/43/EC of June 2000[19] which promotes the implementation of the principle of equal treatment between persons irrespective of racial or ethnic origin and specifically:

> Shall apply to all persons, as regards both the public and private sectors, including public bodies, in relation to: …(h) access to and supply of goods and services which are available to the public, including housing.[20]

In order to comply with the directive, member states shall take the necessary measures to ensure that:

> Any laws, regulations, and administrative provisions contrary to the principle of equal treatment are abolished.[21]
>
> Member States shall adopt the laws, regulations and administrative provisions necessary to comply with this Directive by 19th July 2003…[22]
>
> Member States shall communicate to the Commission by 19 July 2005, and every five years thereafter, all the information necessary for the Commission to draw up a report to the European parliament and the Council on the application of this directive.[23]

This directive places a clear obligation on Irish authorities to examine and amend if necessary any laws, regulations and administrative measures in relation to the supply of housing.

7 Concluding Observations of the UN Committee on Economic, Social and Cultural Rights.

In May 2002, Ireland's performance in implementing the International Covenant on Economic, Social and Cultural Rights was examined, and the Concluding Observations offer some clear recommendations which could be progressed by this All-Party Committee to enhance the rights of Irish citizens.[24]

> Para 12 The Committee notes with regret that, despite its previous recommendation in 1999, no steps have been taken to incorporate or reflect the Covenant in domestic legislation, and that the State party could not provide information on case law in which the Covenant and its rights were invoked before the courts.
>
> Para 20 The Committee is concerned that: (a) many new households cannot secure adequate and affordable housing; and (b) some 1,200 families of the Traveller community are living in roadside encampments without access to water and adequate sanitary facilities, and are liable to be forcibly evicted.
>
> Para 21 The Committee is concerned that a large number of persons with mental disabilities, whose state of health would allow them to live in the community, is still accommodated in psychiatric hospitals together with persons suffering from psychiatric illnesses or problems, despite efforts by the State party to transfer them to more appropriate care settings.
>
> Para 23 Affirming that all economic, social and cultural rights are justiciable, the Committee reiterates its previous recommendation (paragraph 22 of the Committee's 1999 concluding observations) and strongly recommends that the State party incorporate economic, social and cultural rights in the proposed amendment to the Constitution, as well as the other domestic legislation.

> The Committee points out that, irrespective of the system through which international law is incorporated into the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order.
>
> Para 39 The Committee requests the State party to disseminate its concluding observations widely among all levels of society, and in particular among State officials and the judiciary, and to inform the Committee on all steps taken to implement them in its next periodic report.

Therefore, an approach based on merely providing a right to shelter would not be sufficient to deal with the multiple categories of housing need in our society as many of the most vulnerable in our society require additional support needs to make their right to shelter realisable.

Notes:

1 *In re: Article 26 and the Planning and Development Bill 1999.* [2000] 2 IR 321; [2001] 1 ILRM 81.
2 *Seanad Eireann Official Reports.* 26th November 1999.
3 *Ibid.*
4 *Universal Declaration of Human Rights,* UNGA Resolution 2200A (XX1) UN Doc A/810 (1948).
5 UN Doc. A/6316 (1966) *International Covenant on Economic, Social and Cultural Rights.* UNGA Resolution 2200A (XX1) Entered into force 3 January 1976.
6 UN Doc.E/1991/23. UNCESCR. *General Comment No. 4. The Human Right to Adequate Housing.* Geneva: United Nations.1991.
7 UN Doc. E/1998/22 Annex IV.
8 *Ibid.*, para. 3.
9 *Ibid.*, para. 10.
10 *Ibid.*, paras. 15-16.
11 Alston & Quinn, "The Nature and Scope of States Parties Obligations under ICESCR," 9 HRQ 156-229 (1987).
12 *Ibid.*
13 Leckie, S. (2000) *Legal Resources for Housing Rights.* Geneva: COHRE.
14 Betten & Grieff, EU Law and Human Rights (1998), p. 42.
15 Council of Europe. Revised Social Charter, Article 31.
16 *Government of Ireland. European Convention on Human Rights Bill 2001. Explanatory Memorandum. p. 3.*
17 *Re: Article 26. Planning and Development Bill 1999.* [2001] 1 ILRM 81.
18 OJ L 257, 19.10.1968. Regulation (EEC) No. 1612/68 of the Council of 15th October 1968 on freedom of movement for workers within the Community. (as last amended by Regulation No. 2434/92. OJ l 245, 26.8.1992.)
19 Council Directive 2000/43/EC. OJ. L. 180/22. 19.7.2000.
20 Ibid. Article 3 (1).
21 Ibid., Article 14.
22 Ibid., Article 16.
23 Ibid., Article 17.
24 UN Doc. E/C.12/1/Add.77. *Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland.* 17/05/2002.

IRISH CREAMERY MILK SUPPLIERS ASSOCIATION

INTRODUCTION

The All-Party Oireachtas Committee on the Constitution in April 2003 sought submissions on Article 40.3.2 and Article 43 of the Constitution to ascertain the extent to which they are serving the good of individuals and the community, with a view to deciding whether changes in them would bring about a greater balance between the two.

In this submission, ICMSA outlines its position regarding these two aspects of the Constitution and related issues. The key issue for ICMSA is a person's right to own private property and this must continue to be protected in the Constitution.

Indeed, for the agriculture sector, the right to private property has been a key component in the development of the sector. Today, the agriculture sector supports 137,000 farms producing produce of €5.6 billion. The Agri-Food sector accounts for 8.4% of GDP, 7.1% of exports and 9.5% of employment. The right to private property has been a foundation stone on which this sector has been built and thus must be fully protected into the future.

ICMSA is very concerned regarding the motivation behind the current review of these Articles of the Constitution and believe that an attempt may be made to acquire or reduce the value of private property below current market value. This must not be allowed to happen. If the issue is the price of housing, then address all the issues that impact on house prices. House prices are a complex issue and merely targeting the price of land will not address the cost of housing.

ICMSA fully supports the objectives of the National Development Plan and the National Spatial Strategy and the role they will play in ensuring a more balanced and planned development throughout the regions. Policy must be geared towards creating viable rural communities through the encouragement of industrial and rural development projects.

ICMSA believes the current review should be utilised by the All-Party Oireachtas Committee on the Constitution to develop proposals which will reinforce the Articles in Bunreacht na hÉireann which defend the property rights of each citizen.

THE RIGHT TO PRIVATE PROPERTY

The right to ownership of private property has been a key and fundamental right of every citizen in Ireland and also has been a key factor in the development of the economy and in particular, the agriculture sector.

ICMSA will not support proposals which would dilute or undermine these rights. Any proposals which would see ownership of land revert to the state at a certain depth underground (e.g. 10m) or which would

increase the power of the state to seize land under a compulsory purchase order or some other mechanism or to designate land under a particular directive or regulation would be unacceptable. This would represent confisation and would totally undermine people's right to private property.

ICMSA policy

– ICMSA proposes that any constitutional review of the right to private property must not undermine people's right to private property as currently set out in the Constitution.

PRIVATE PROPERTY AND THE COMMON GOOD

The National Development Plan as well as other measures sets out ambitious plans for Ireland's future. In order to achieve the required outcome, land that is under private ownership is required. ICMSA accepts the need for balance between private property ownership and the common good. Indeed, ICMSA believes that the current balance does not favour the property owner and that greater protection of the property owner's rights should be introduced so that the property owner is fairly compensated and accommodated in the event of the common good infringing on his/her property rights.

In addition, what is the "common good"? This term has been used and abused in the past when it was obvious that the development was not in the common good. Property rights as defined in the Constitution must not be undermined so that vested interests can achieve their objectives through the use of the term, the 'common good'.

ICMSA policy

– A greater level of protection should be provided for landowners where their property rights and the common good come into conflict. In this case, property owners should be properly compensated and accommodated.

– Changes to the Constitution must not be made so that vested interests can use the common good to undermine private property rights.

COMPULSORY PURCHASE

The compulsory purchase of land for infrastructural projects, in particular roads, has been an extremely contentious and difficult issue for landowners in recent years. Family farms in a family for generations have been destroyed overnight by these developments. ICMSA still believes that the authorities still do not understand or appreciate the damage this does to a farm family and local communities. The decision by government in last year's Budget to scrap roll-over relief for capital gains tax purposes showed the extremely poor appreciation of government to the problems encountered by farm families.

The targets under the National Development Plan for road and other developments are not being met and budgets are being exceeded to a large extent. This is primarily due to increased construction costs and poor planning, not the cost of land. It is easy for the infrastructure developers to blame the cost of land for the problems with infrastructure developments rather than admit to their own failures. ICMSA is concerned that the government will amend leglisation to allow the authorities to acquire land at a reduced value. This must not be allowed to happen and would represent a direct attack on people's property rights. Any change to the constitutional rights of property owners must ensure that their right to full and adequate compensation is protected.

ICMSA policy

– The current arrangements in place for a CPO should be enhanced to protect the rights of property owners.

– The roll-over relief facility on capital gains tax should be re-introduced.

THE ZONING OF LAND

It has been estimated that it will be necessary to provide some 500,000 additional dwellings to meet likely demand in the period up to 2010. This will bring the Irish housing stock to around 400 units per thousand population, compared to a European average of 450 per thousand (National Spatial Strategy 2002). It is clear that to meet this demand for additional housing, additional greenfield sites will have to be zoned for residential purposes.

The zoning of land not only has implications for the landowners in question but also the adjoining landowners. In the case of the landowners whose land has been zoned, these people must continue to have the right to sell their land on the open market. There are no proposals to cap the profits of construction companies, architect companies, concrete and timber providers or the legal profession. It would be grossly unfair to cap the price a landowner can receive for his/her land. The issue must be to increase the supply of land, not to cap the price and also what happens to this land when purchased by the developer.

For adjoining landowners, these people must be able to continue to farm normally beside the residential developments. In this regard, the occupiers of the new developments must accept current farm practices. A code should be established outlining the acceptable practices on a farm that nearby residents have to accept. This would apply to housing developments in both an urban and rural setting.

ICMSA policy

– Zoning must be carried out in a balanced way and ensure that supply keeps pace with the demand for development land.

– Agriculture must be allowed to function normally adjacent to land that is zoned for development. A code should be established outlining acceptable practices on the farm.
– The necessary infrastructure and services must be in place before zoned land is developed.

A related and extremely important issue for rural areas is the ability of people to build in country areas. Many farmers have been refused or have found it extremely difficult to obtain planning permission for sons or daughters on perfectly suitable sites. The policies of some local authorities which seek to restrict housing in the countryside and move people to urban areas should be condemned by the All-Party Committee on the Constitution. These policies threaten the very viability of rural areas and are contrary to the principles of the National Spatial Strategy.

Many parts of rural Ireland are suffering from depopulation and losing essential services such as the post office, shops and schools. A viable rural population must be maintained. In this regard, it is essential that people who are from a country area should be allowed to get planning permission in their home area. In addition, people who are working in that area should also be allowed to get planning permission. Where tourism potential exists in an area, tourism developments should also be facilitated. If implemented, this will ensure that a viable rural population can be achieved in all parts of Ireland.

ICMSA policy

– People from a rural area or working in that area should be allowed to get planning permission in that country area and should not be forced to live in nearby towns or villages. Where tourism potential exists in an area, tourism developments should also be facilitated.

THE PRICE OF DEVELOPMENT LAND

The price of land like all commodities is determined by the market, i.e. supply and demand. Indeed, farmers today are being told that they must be able to compete in a more open, unprotected world market. Essentially, farmers are being told to prepare themselves for an unregulated markets where their income will be determined by the supply and demand for food products. In many sectors other than agriculture, the result is also determined by the market with no outside interference.

ICMSA believes that the market should not be interfered with by changes to the Constitution so that developers can purchase land from farmers on the cheap and further inflate their already large profits. On past experience, it is most likely that if the price of land is reduced, the price of housing will not as the developers and other middlemen will simply inflate their profits. There are numerous examples in other sectors where this has occurred, where the price of the primary product has fallen but the price to the consumer of those products has increased.

Where a developer purchases land, ICMSA would support a clause where the developer must develop that land within a certain time period. This would help to ensure a greater supply of housing land.

ICMSA policy

– The market value of land must not be interfered with by changes to the Constitution.
– ICMSA would support a proposal where a developer would have to develop the purchased land within a certain time period.

INFRASTRUCTURAL DEVELOPMENT

Continued infrastructural development based on the principles of the National Spatial Strategy is the key to the future growth and prosperity of the regions. The NSS states that each region should be a focal point for national, regional, and local road and public transport systems, with good access to the national road and rail network and access to airports, with a range of well timed and appropriate services facilitating business activity and deepwater ports. There should also be adequate zoned and serviced land banks for uses such as residential and industrial development.

Infrastructural development in the regions will be central to achieving balanced national development. It will aid rural development projects and play an important role in maintaining the population in rural Ireland. ICMSA fully supports these principles and believes that additional funds should be provided to help the National Development Plan achieve its targets. Obviously, however, this infrastructural development must take place in a suitably regulated and properly planned manner. ICMSA has already outlined in this submission, the association's position with regard to compulsory purchase of land and planning applications. Each of these issues will be important in the context of achieving targets for infrastructural development.

ICMSA is very concerned at the treatment of landowners by government organisations involved in infrastructural development, where in some cases bully boy tactics are adopted in order to get the work completed. Indeed, many landowners have been taken advantage of by these organisations, which is totally unfair and unacceptable. This issue now needs to be re-examined again.

ICMSA policy

– Landowners must be treated fairly where infrastructural developments are taking place on their land. Changes to the Constitution must not undermine their rights.

ACCESS TO THE COUNTRYSIDE

The agriculture sector has played a huge role in the development of the tourism sector through its shaping

and maintenance of our countryside. Indeed, through the co-operation of farmers, many country activities, now part of Ireland's culture, have developed into significant industries as well as providing additional income to rural people.

Over the last twenty years, Irish agriculture has become a hugely regulated and mechanised sector. A farm is now a very dangerous place, especially for people not from rural areas, due to the presence of livestock, machinery and other hidden dangers. It is unfair that a farmer can be liable to prosecution by people who have accidents while trespassing on his/her land.

It should be taken for granted that all farmland is dangerous and out of bounds unless the individual or group has received permission from the farmer to enter the land or is working for the farmer on the land. In addition, there are animal disease issues as well as financial penalties related to agri-schemes that may arise as a result of people damaging a farmer's land.

Maintenance of land in pristine agricultural condition and conservation of the rural environment is widely accepted as a public good. However, ICMSA believes this 'public good' does not extend a right to individuals to consider private owned land as an open walkway or path in the countryside. Problems with field gates being left open, animals being worried by humans and dogs, rubbish left in fields, as well as accidents and injuries sustained are unacceptable. Farmers are adamant that they are prepared to maintain the visual beauty of the countryside for future generations, but this must not occur at the expense of the present generation of landowners. A spirit of co-operation must be developed. In this regard, a country code should be established setting out visitor's obligations when visiting the countryside.

To improve access to the countryside, farmers must be encouraged to provide facilities for access if he/she wishes to provide access to his/her land. Facilities would include stiles, danger warning signs and bins. In the REPS, up to the year 2000, a supplementary measure existed that provided aid to farmers to provide such facilities in co-operation with a local development group. While there was not a significant uptake of the supplementary measure at the time, ICMSA believes that this was due to the terms and conditions of the supplementary measure and if modified, ICMSA believes that the scheme can play a valuable role in improving access to farmland.

ICMSA policy

- ICMSA proposes the re-introduction of the REPS public access supplementary measure as a mechanism to improve access to land.
- A country code should be established which would set out the obligations of visitors to the countryside and the dangers of the countryside.

NATIONAL LAND POLICY

Ireland at present has no national land policy. This will have huge implications for the country going forward unless addressed immediately. In particular for the agriculture sector, there is a serious need for a policy to encourage the restructuring of land and to ensure that the maximum number of farmers have access to additional land to ensure their continued viability.

ICMSA believes that a national land body should be established that would plan the future use of land in Ireland and would introduce initiatives to encourage land restructuring as well as providing incentives to farmers to acquire additional land. A farmer would be definitively defined to ensure that the initiatives would have a real impact on the market and the initiatives would be restricted to specific farmers for the land in question. Initiatives that could be adopted include:

- Stamp duty relief on land purchase
- All repayments (capital and interest) on borrowings by farmers for the purchase of agricultural land to obtain a viable holding should be tax-deductible.
- A tax relief for land consolidation to address the serious fragmentation problem on Irish farms.
- The immediate re-introduction of the roll-over relief facility on capital gains from the disposal of lands.
- The introduction of a low interest loan scheme to assist eligible farmers to purchase additional land and thus improve their viability.

In conclusion, ICMSA is very concerned at the comments regarding a constitutional amendment to address the price of land. ICMSA position is that property rights must not be undermined and this review should be used to address structural issues regarding land and the future uses of land.

IRISH FARMERS' ASSOCIATION

INTRODUCTION

The territory of the Republic of Ireland comprises of c. 6.9 million hectares, of which 4.4 million ha., or 64%, is used for agriculture and c. 650,000 ha., or 9.4%, is used for forestry, much of which is also under the control of farmers. The CSO estimates the number of family farms in Ireland at 136,300 in 2002, and with an average farm size of 32 hectares.

Farmers comprise a significant sector of Irish society who are responsible for and entrusted with the control of a substantial part of the land territory of the country.

THE ZONING OF LAND/PRICE OF DEVELOPMENT LAND/HOUSE PRICES

The *NESC Vision 2002 Report*, which provides the analytical backdrop to the current national partnership

programme, *Sustaining Progress*, focuses on a number of *economic and social vulnerabilities* that have arrived together. It specifically identifies increased development land and house prices as one such vulnerability.

It is important to recognise that the factors that impact on the price of development land, namely the *zoning* of land under the development plan process, and *market demand*, are not factors that can be determined by farmers.

The zoning of land is a matter for the elected representatives to local authorities. The process for review and amendment of development plans is also well established, and includes various notices and opportunities for the public to make submissions on drafts and amendments.

The over-concentration of development in the greater Dublin region is also a major contributor to high prices of development land. While the government has responded by means of publication of the National Spatial Strategy, this is no more than a 'paper plan' to date, and very little is happening at government policy level to achieve genuine balanced regional development. IFA submits that the full implementation of the NSS should be a priority of government. We are also including with this submission *IFA's Submission to Government on the National Spatial Strategy*. [For a copy of this document, please contact IFA].

A transparent market, with sufficient liquidity and low transactions costs, will regulate prices based on the fundamental market drivers of supply and demand. IFA submits that a properly operating market is the best means by which to determine the price of land.

THE RIGHT TO PRIVATE PROPERTY

The protections provided in Bunreacht na hÉireann for the citizens' ownership of private property underpin a stable society. Property ownership also provides the bedrock to our economy and society in a number of ways, including the value attached to home ownership as an incentive to work and as security for the borrowings of individuals and groups.

Family farming in Ireland, throughout the EU, and indeed in the major developed countries of the world, is based on the right of ownership of private property. SMEs, which are a major sector of the economy, are also predominantly privately owned businesses, involving private property ownership.

The state must continue to uphold the individuals' rights to property ownership.

PRIVATE PROPERTY AND THE COMMON GOOD/COMPULSORY PURCHASE/ INFRASTRUCTURAL DEVELOPMENT

The state must provide a fair system for the compulsory acquisition of private property in the common good. Compensation must be calculated based on the full open market value of the property being acquired, as established at the point at which the compulsory powers are exercised.

Due to the nature of such projects, major infrastructural developments impact on individual property owners along their routes in a very arbitrary way. This can give rise to significant impacts outside of the actual land being acquired for the project, which must also be reflected in CPO compensation.

In November, 2000 IFA submitted a set of proposals to government, under the title of *A Code for the Fair Acquisition of Land for Infrastructural Development*, calling for the updating of the compulsory acquisitions processes used by the state in acquiring private lands for road infrastructure. IFA's objective was to seek a rebalancing of the powers of the State with the rights of farmers directly affected by the CPO process for roads, and to bring about greater efficiencies in the assessment, negotiation and agreement of CPO compensation.

Negotiations with government on IFA's proposals, under a government commitment included in the then national partnership agreement (*Programme for Prosperity and Fairness*), culminated with an agreement between the Department of the Environment and Local Government, the National Roads Authority and the IFA. This agreement sets out an updated, detailed statement of the powers and responsibilities of the state and the rights of the individuals directly affected by road infrastructure for national roads. A Copy of the IFA Code together with the *Agreement on the Compulsory Acquisitions of Land for National Roads* is included with this submission. [For copies of these documents, please contact IFA]

We also include copies of agreements reached with the ESB on the provision of overhead electricity transmissions lines and a sample wayleave agreement brokered by the IFA with An Bord Gáis in respect of gas pipeline wayleaves across farmland. [For copies of these documents, please contact IFA]

ENVIRONMENTAL DESIGNATIONS

In recent years the use of land has been affected by the implementation of EU habitat and birds directives through the designation of land as special areas of conservation and special protection areas. Furthermore, national designations through the Wildlife Amendment Act have also been imposed through natural heritage areas. These designations have imposed farming and developmental restrictions on land.

IFA has endeavored to ensure that farmers and landowners are compensated for income losses and actual developmental restrictions imposed. However, the compensation agreements currently in place do not satisfactorily address this issue. This fact has been recognised in the current national partnership agreement, Sustaining Progress.

ACCESS TO THE COUNTRYSIDE

Farmland is an integral feature of our high quality countryside and rural environment. The citizens of the

state and visitors alike access the Irish countryside for a wide range of pursuits including fishing, hunting, walking and general visual enjoyment. In practically all instances, access to the countryside and farmland takes place without objection from farmers. To facilitate responsible entry to lands the IFA, in 1995, prepared a *Farmland Code of Conduct* for people entering land, which was supported all the key organizations representing outdoor pursuits.

Farmers have concerns about certain issues surrounding recreational access to their property. It is important to remember that farmland is a working environment for farmers, containing livestock, crops and machinery activity. This activity can present dangers to recreational users. While the Occupiers Liability Act 1995 affords occupiers of land a reasonably high level of protection against claims from recreational or trespasser entrants to land for injury or damage, the outcome of recent court cases threatens this assurance. Also, landowners bear the costs of cover for public liability insurance against claims from third parties.

Other issues also arise from damage to property and the pressure of numbers of recreational users entering farmlands at particularly popular locations. It is not unexpected that individual farmers who face large numbers of recreational users on their lands would voice their objections. Furthermore, such mass entry onto some lands takes place with an orchestrated and commercial involvement by individuals other than the affected farmers.

IFA submits that the property rights of farmers should not be diminished by the conferring of any general rights of access to farmland to the public. Such a move would create significant problems for the farming community with regard to property damage and security. It would also damage the good relationship that exists between the farming community and those who wish to enjoy the countryside in a co-operative and responsible way. It would not eliminate that minority of instances that currently exist where individual farmers feel compelled to object to certain entrants onto their lands.

THE IFA/FBD GUIDE TO THE OCCUPIER'S LIABILITY ACT, 1995
Incorporating the Farmland Code of Conduct

THE LAW UNTIL NOW

The Occupier's Liability Act, 1995, which came into effect on the 17 July 1995, simplifies and clarifies the law on the liability of occupiers of premises by giving it a firm statutory basis.

Up until now the law in this area was governed by *common law,* i.e. built up as a result of a number of key judicial decisions in a few important legal cases. This situation gave rise to considerable uncertainty among farmers and other landowners in that there were no clear ground rules on which the occupiers could rely to ensure they did not become liable for injury or damage sustained by entrants while on their property. In recent years the growth in the use of the Irish countryside and farmland in particular, for sporting and recreational purposes has also made farmers and other landowners feel increasingly vulnerable to legal challenges in pursuit of personal injury claims.

THE NEW LAW

The Occupier's Liability Act, 1995, repeals the common law duties, obligations and rights of occupiers' of premises that have grown up over many years and replaces them with the statutory provisions contained in the Act. The Act also contains specific provisions which are designed to facilitate the use of land for recreational activities, implementing many of the recommendations contained in the Law Reform Commission's Report on Occupiers' Liability.

DEFINITIONS

The Act contains a number of important definitions, including the definition of *an occupier, a danger* and *premises:*

Occupier: a person exercising such control over the state of the premises that it is reasonable to impose upon that person a duty towards an entrant in respect of a particular danger thereon. This means that the occupier of a premises is anyone in charge of a premises, such as the owner, tenant, etc. Occupancy may also be shared in proportion to the degree of control exercised by each occupant.

Danger: in relation to any premises, means a danger due to the state of the premises.

Premises: includes land, water and any fixed or moveable structures thereon and also includes vessels, vehicles, trains, aircraft and other means of transport.

CLASSES OF ENTRANTS AND THE DUTIES OF OCCUPIERS

Under the Act there are three categories of entrant, namely *Visitors, Recreational Users* and *Trespassers*, with differing duties expected of occupiers towards visitors on the one hand and recreational users and trespassers on the other hand. The three new categories of entrant and the duties owed by an occupier to each are explained below:

	Entrant	Duty of the Occupier
Visitor	A person present on premises at the invitation of the occupier; A person present by virtue of an express or implied term in a contract; An entrant as of, right e.g. gardaí, meter-readers, salesmen etc.	A duty to take such care as is reasonable in all the circumstances to ensure that a visitor to the premises does not suffer injury by reason of any danger existing on the premises.
Recreational User	A person present on premises, without charge [other than a reasonable charge for parking facilities], for the purposes of engaging in a recreational activity.	**Not to intentionally injure** the person or damage the property of the person, **nor act with 'reckless disregard'** for the person or property of the person
Trespasser	All entrants other than 'visitors' or 'recreational users'	

WHAT IS 'RECKLESS DISREGARD'?

In deciding whether a farmer/occupier has acted with reckless disregard, the courts are required to take **all** the circumstances into account, including:

- did the farmer know of the danger?
- did the farmer know of the presence of the trespasser, or recreational user?
- did the farmer know that the trespasser, or recreational user, was near the danger?
- should the farmer have protected the trespasser, or recreational user, against the danger?
- was it a straightforward, practical and at a reasonable cost for the farmer to protect the trespasser, or recreational user, against the danger?
- what was the type of premises and was it desirable to retain open access to the premises given the danger?
- did the trespasser, or recreational user, take care of himself and act responsibly given how well he knew the premises?
- what warnings were provided?
- was the trespasser, or recreational user, accompanied and, if so, what control or supervision did that other person exercise?

USE OF WARNING SIGNS

Visitors: Farmers or landowners can modify their duty towards visitors by express agreement or notice provided this is reasonable, adequate and viable. For example, a warning sign erected at normal entrances is usually sufficient to reduce the farmers' duty of care, e.g. 'No salesmen Please'.

Recreational Users and Trespassers: One of the tests for 'reckless disregard' under the new law is the nature of any warning given or posted by the farmer of dangers existing on the premises. Properly-worded warning signs, displayed prominently, may provide protection for farmers against the risk of a successful legal action by a trespasser, or recreational user.

Here are some examples of appropriate warning signs:

DANGER
Farm Machinery Present
DO NOT ENTER

PRIVATE PROPERTY
No Trespassers
KEEP OUT

DANGER
These Lands Contain Farm Animals
DO NOT APPROACH

DANGER
Working Farm Machinery
DO NOT APPROACH

THE VALUE OF INSURANCE

Despite the very welcome changes to the law introduced in the Occupier's Liability Act, 1995, unfortunately farmers may still run the risk of claims by members of the public. Accordingly, IFA continues to advise farmers and landowners that it remains essential to take out adequate public liability insurance. Public liability insurance will protect a farmer from legal claims in his normal business as a farmer and as a private individual, subject to the specific exclusions and monetary limits that exist in any public liability insurance policy. Farmers and landowners should also check, as far as is reasonably possible, to ensure that anyone coming onto their property has adequate insurance cover which is extended to protect the farmer as a joint insured.

OTHER ISSUES

The act deals with a number of other important issues including:

- Criminal activity – Occupiers will not be liable for unintentional damage or injury to an entrant who may be on the premises committing or attempting to commit an offence, unless a court decides otherwise in the interests of justice.
- Stiles, gates etc. – Structures, including stiles and gates, *primarily* for use by recreational users rather

than by the farmer, should be kept in a safe condition
- 'stranger to the contract' – A person who is not a party to a contract between an occupier of premises and another person, which restricts the liability of the occupier towards certain entrants, cannot have his or her rights as an entrant taken away by that contract
- independent contractors – An occupier who has taken reasonable care when engaging an independent contractor will not be liable for injury or damage caused to an entrant by the contractor's negligence unless the occupier knows the work has not been properly done. However, an occupier cannot delegate responsibility to an independent contractor in cases of work which is *inherently dangerous*. Examples of this type of work might include the felling of road boundary trees or demolition of a high boundary wall.

THE IFA FARMLAND CODE OF CONDUCT

Farmland is private property and access is only available with the goodwill and tolerance of farmers. While most farmers do not object to recreational users crossing their land, others do not wish to permit access. Their wishes must always be complied with.

Always remember, farmland is a working environment and all persons who enter do so at their own risk. Under the 1995 Occupier's Liability Act, there is an obligation on entrants to take all necessary steps to ensure their own safety.

Entrants are also responsible for any damage to private property, livestock and crops resulting from their actions. If crossing farmland ensure your presence is unobtrusive and does not interfere with farming activities.

- Respect farmland and the rural environment.
- Do not interfere with livestock, crops, machinery or other property which do not belong to you.
- Guard against all risks of fire.
- Leave all farm gates as you find them.
- Always keep children under close control and supervision.
- Avoid entering farmland containing livestock. Your presence can cause stress to farm livestock and even endanger your own safety.
- Do not enter farmland if you have dogs with you, even if on a leash, unless with the permission of the landowner.
- Always use gates, stiles, or other recognised access points.
- Take all your litter home.
- Take special care on country roads.
- Avoid making any unnecessary noise.
- Protect wildlife, plants and trees.
- Take heed of warning signs – they are there for your protection.
- If following a recognised walking route keep to the way-marked trail.
- Immediately report any damage caused by your actions to the farmer or landowner.
- Do not block farm entrances when parking.

People whose recreation brings them frequently onto farmland should join responsible organisations who can arrange access in a structured and controlled way. If you are a member of a sporting or recreational club, please check if you have adequate insurance cover to protect both you and the property owner.

MESSAGE FROM JOHN DONNELLY

Publication of the Occupiers' Liability Act, 1995, represents the culmination of many years campaigning by IFA to bring forward legislation which clarifies the law on occupiers' liability and protects farmers and landowners from legal claims arising from injury or damage sustained by entrants while on farmland.

IFA welcomes this new Act, which implements many of the recommendations of the Law Reform Commission on Occupiers' Liability, and I trust this Act will pave the way for continued access to the Irish countryside for responsible entrants who respect private property, crops and livestock. IFA will, of course, monitor closely the legal interpretation put on the Act by some courts over coming years to ensure its provisions deliver the protection Irish farmers require.

The IFA guide to the Occupiers' Liability Act, 1995, provides a straightforward interpretation of the main provisions of the *new* Act, including the basic duties expected of occupiers towards different classes of entrants. The guide also provides a number of suggestions on *how* farmers or landowners can reduce the risk of a successful legal claim against them, including a range of suggested warning signs for commonly encountered farming situations.

The guide also includes, for the first time, the IFA Farmland Code of Conduct which has the widespread support of all the major national sporting and recreational organisations.

I hope this guide, which has been prepared by the IFA's National Industry and Environment committee, will help explain the key features of the new Act and help farmers take the necessary steps to protect themselves from the risk of a successful legal challenge.

John Donnelly

Disclaimer: This guide is not a legal interpretation of the Occupiers' Liability Act, 1995. Anyone seeking a legal interpretation should obtain legal advice. While every effort has been made to ensure the accuracy of this information, neither the IFA nor the sponsors can accept any responsibility for loss or damage occasioned by any person acting or refraining from acting as a result of the information contained in this document.

IRISH FARMERS' ASSOCIATION, CONNEMARA

ACCESS TO THE COUNTRYSIDE

Throughout Irish history land and its ownership has been a highly emotive issue. After Irish independence landownership was radically altered. Land effectively became the property of the tenant farmers who had been working it. Landlordism was banished. A key consideration when considering land ownership reform is that unlike the rest of Europe there are few landlords here, instead the land is owned and worked by family units. Here in the west of Ireland, landlords' estates were taken over by the state and sold back to the local tenants for several hundred pounds per holding, princely sums in those days. As very few tenants had such ready cash, debt became the norm on Irish smallholdings.

In an Ireland whose economy depended almost solely on agriculture this system worked very well. Those who worked the land now had ownership and debt to encourage them to work harder and more productively, indeed anyone raised on such a smallholding will know that when we came from school we were sent straight out into the fields to work and education was often neglected.

In many cases whenever a little money became available more land was bought and indeed we own many of these fields today precisely because of savings made on things like education. Because of the scarcity of resources, deprivation of education often applied in a special way to the child that was expected to inherit the land. If today we have difficulty in protecting our property rights from a highly educated, articulate lobby, it is not because we do not have natural justice on our side.

The benefits of land ownership to the landowner have varied considerably depending on location and government policy. Land in and around large towns and cities became very valuable, the greater Dublin area being a prime example because of the policy of allowing the continued expansion of the city. On the other side of the coin, within the past few years vast tracts of land in what are popularly described as more remote areas, eg Connemara and Mayo, have been designated special areas of conservation (SACS), to protect flora and fauna that has become rare elsewhere because of development. In many cases the designated land includes enclosed improved lands and all development is effectively banned. This designation is compulsory and financial considerations and implications for the landowner are ignored. An SAC compensation scheme was promised when the restrictions were first introduced but none has yet been delivered other than a mountain de-stocking scheme to tackle overgrazing. Restriction on property use and farming practice are such that conservation of flora and fauna now takes absolute precedence over every other land use. Although it is often claimed that traditional farming practices are allowed this is not the case, affected land that has not been ploughed for ten years cannot be disturbed even though it might have often been tilled in the past, some areas that were fertilised for generations can no longer be fertilised, the use of herbicides and pesticides is banned, and in most cases all that is now allowed is light grazing to maintain the habitat.

Without doubt this is the habitat that walkers and tourism interests now primarily want a right of free access to. It is considered most interesting land because of the biodiversity it contains and its otherwise generally unspoiled condition. Free access rights for the public means the opportunity to use, to advertise and commercialise and basically reap the tourism benefits from land without needing owner permission or making any meaningful contribution to those who have spent lifetimes on its maintenance and preservation. It is no coincidence that pressure for free public access to land intensified here with the designation of SACs as this potential was recognised. The private ownership that was enjoyed heretofore has already been greatly diminished since control of the property affected has passed almost entirely to the Department of the Environment and this has all been achieved without the need to change the Constitution.

The only significant rights left to the landowner are the right to trade the property and the right to determine who has access to it, but if public access were to become a right, then much of this land would certainly cease to be a tradable commodity and without a market value it would truly become the walkers' land. Why would people want to buy private SAC land in remote locations if no right to privacy existed and day trippers could exercise practically the same rights as landowners? Surely in this situation farm families who have owned and worked the land for generations would cease to be owners and be compelled to become managers of their own land to benefit walkers and tourism interests. As has already been stated the only farming activity that is currently allowed on much of this land is light grazing or whatever is necessary to maintain and improve its habitat value. Agreement with landowners was not sought for this, instead it was imposed from the top down.

While many landowners choose not to enforce their privacy rights, nonetheless it remains essential that they have these rights to enable them retain their sense of place following what is often many generations of ownership, and exercise appropriate authority as owners when the need arises as it invariably does from time to time. When consideration is given to the reality that ownership of this land was acquired through generations of effort and hard work, and that it was acquired and used for commercial purposes, as indeed it has been used for millennia, it seems obvious that the social justice obligations of the smallholders have

already been met in full and to go further at this time would be to deny them the social justice to which they are entitled.

Designation of farmland as development land greatly increases its value because development creates wealth. Banning development has an equal and opposite effect. Farm improvement is no longer allowed and modern farming methods are banned.

This is progress as we know it in reverse, and issues of social justice arise. It impoverishes the landowner farming families involved unless they are allowed to benefit from the new tourism hill walking potential being created. No meaningful discussions have taken place with affected landowners on how this could best be achieved. In recent years it has become the practice that where specific developments in the national interest and common good are required, tax incentives are offered to help bring them about. Examples of this include, the redevelopment of the rundown inner city areas, the provision of tourist facilities in designated seaside towns, the promotion of forestry and the ongoing support for the bloodstock industry.

No assistance whatsoever is being offered to affected landowners to enable them to exploit the tourism potential of their property. It seems our civil right to opportunity, progress and free enterprise have been confiscated. It would now appear that our right to our farms, to protect our livestock and our privacy are no longer relevant. It seems that the desire of some members of the public to travel wherever they wish and even commercially exploit our private property is more important than our rights. Surely this is a violation of the basic principals of fairness and natural justice and we would ask your committee to protect our right to private ownership and social justice.

On the broader front, concerning public access to the countryside, generally it seems to us that there is adequate access available at present. In Ireland there are over 550,000 hectares of unfenced commonage land. While this land is the property of local people there is not one case of a protracted access dispute to it for responsible recreational walking of which I am aware following exhaustive enquiries. Certainly there have been problems from time to time but these are confined to issues covered in the countryside code of good practice, like climbing on boundary fencing and improper control of dogs and while this can be serious it is usually straightforward to resolve. Such difficulties in any event can never be completely eliminated and the provision of access rights will certainly not resolve these problems. In addition to this 550,000 hectares of open land there are national parks and an extensive network of way marked long distant trails and other marked paths through farmland and hundreds of miles of country lanes and roads freely available for walking.

Unfortunately there are also a small number of well-publicised access disputes. These involve access to privately controlled non commonage land. Many of them also involve a high profile walkers' lobby group made up of experienced walkers who know very well that they have no right of access in this situation, yet they seem intent on fanning the flames into land war bitterness, with no consideration for the wider good-will that they are damaging while at the same time they complain of a lack of welcome in the hills. Their attitude seems to be that they are more powerful and better educated than locals and therefore they can do what they like. No doubt they are attempting to capitalise on the genuine difficulties encountered by an increasing number of uninformed walkers, who, new to the countryside and from the clearly defined urban existence, have no idea where they can and cannot walk. Tourism interests promote walking but do not provide appropriate details of local custom and practice and access points to open hillsides, hence some walkers actually believe they have discovered a sport with no rules and proceed to walk wherever they feel like, climbing over boundary fencing in and out of private property with complete disregard for the rights and feelings of local people. This situation can lead to exploitable friction, but is hardly the responsibility of smallholders. Responsibility surely must rest with those who promote countryside access in such an unbalanced way.

The law with regard to private property and rights of way has been well established in the courts over the years, so it is difficult to avoid the conclusion that the rights of smallholders are being deliberately disregarded, even by semi-state bodies charged with the promotion of tourism. The Bord Fáilte brochure entitled *Ireland Naturally* contains clear examples of this and I quote directly from that brochure:

> In the western counties the landscape is braided with ancient dry-stone walls which shelter wrens and stoats, ferns and lichens. The fields within these walls are often tiny and quite untouched by machinery or chemical sprays. In these moist meadows, summer brings a tapestry of wildflowers and a profusion of butterflies and bumblebees. You can find hay meadows, mown with a scythe, with a flora unchanged through many generations.

When access to private enclosed land is promoted in this irresponsible way, without any consultation with landowners, social justice is denied them and it is obvious that an unsustainable situation and irate farmers are being created. Ancient dry-stone walls breach easily, and a busload of tourists in hot pursuit of butterflies are not going to rebuild them. When the inevitable does occur it is a bit ridiculous to blame the smallholder victim, yet this is what often happens. There are cries of 'no welcome in the hills', and 'change the law', but absolutely no meaningful attempt is made to cultivate a welcome.

At the root of the perceived difficulty in accessing the Irish countryside is misinformation and no information. It is the responsibility of walking interest groups to inform walkers accurately and clearly on how and

where to access the countryside. It is wholly inappropriate and unsustainable to treat or promote rural people and their rural dwellings and property as little more than quaint objects of interest.

We propose that the laws protecting private property from trespass be strengthened so as to provide an incentive to walking and tourism interests to behave in a more responsible, socially just manner.

The issue of public liability also needs to be taken into consideration. Since the recent court case in Donegal in which a woman who fell down a cliff successfully sued a landowner in the High Court for €84,000, the situation is very unsatisfactory. The court held that the landowner should have erected a warning sign to warn of the danger of the cliff. In the Irish uplands there are a variety of dangers too numerous to signpost.

In conclusion, it is in the best long-term interest of walkers, that farmers harness the sustainable recreational use of their lands. Farmers will remain absolutely essential for the management of the landscape in any event and it is wholly appropriate and desirable that they see walkers providing benefits rather than ever-increasing demands.

It is the Mountaineering Council of Ireland's environmental policy to monitor all developments in the hills. They support the construction of dwellings in or close to towns and villages but want housing in the countryside restricted. Their environmental policy document states that they want to protect remote areas from the visual intrusion of additional man-made artefacts and they want flora and fauna to be protected, especially in areas of ecological and scientific interest and no reduction in what they term the national stock of undeveloped landscape. They offer to assist affiliate clubs with expenses for objections to planning matters. In effect they want to ensure that no landowner is allowed any development in the uplands that will detract from the enjoyment of his land by their members. Instead they want his land to be conserved and protected for their enjoyment.

Clearly they must realise that maintaining one's property in a way that is most suited to them is an added expense for the landowner, and that refraining or being restrained from development is a serious loss. It is surely now time for walkers to give something in return. In their policy document they say that where the provision of recreational access involves loss or expense to landowners they consider that appropriate recompense should be allowable. It is now time they took their heads out of the sand. Demanding a free right to access is hardly making appropriate recompense.

IRISH HOME BUILDERS ASSOCIATION

EXECUTIVE SUMMARY

1 The IHBA/CIF welcomes the opportunity to make this submission to the All-Party Committee on the Constitution. As the representative body for private house builders in Ireland, we are committed to maintaining the growth in housing supply, as reflected in the eighth record year of housing output.

This submission particularly focuses on the issues of

- the zoning of land
- the price of development land
- infrastructural development
- house prices.

2 The importance and necessity of ensuring sufficient lands are zoned for residential development in accordance with the proper planning and sustainable development of their areas cannot be over emphasised.

3 We strongly advocate that a mechanism must be found to bring more zoned and serviced lands to the market as a means of preventing undue pressure that would result from a restricted supply of such lands.

4 Furthermore we would urge that local authorities identify lands in their development plans that would be reserved for social and affordable housing in particular. It has been the long held view of the IHBA, as supported by DoE&LG Guidelines on Site Selection for Social Housing, that such an approach would enable residential areas to be planned in a socially inclusive manner and would act as a control on the value of any such zoned lands. Accordingly the value of these lands would enable a greater supply of affordable housing to be brought to the market without influence from external market and competitive forces

5 The IHBA calls for measures to ensure the full servicing of lands zoned for residential use in development plans. This is essential in order to ensure the proper and timely development of such lands. We urge local authorities to consider the use of Public Private Partnership and other forms of Joint Ventures to help the speedy removal of any infrastructural deficiencies.

6 The IHBA is absolutely against the introduction of measures to artificially control land prices. This issue has been considered by each of the main reports including Kenny (1973)

> …any system of price control of land involves ultimately the fixing by an independent tribunal of a fair price or a market price for each piece of land involved. This would mean that an elaborate structure of

> tribunals would have to be established and this would be costly, cumbersome and slow. We therefore reject price control of land as such a solution.

The first Bacon Report 'An Economic Assessment of House Price Developments – 1998' also concluded

> land costs represent an increasing proportion of housing costs. However, from an economic point of view a key issue is the direction of causation between land cost and house prices. In other words, is it the supply and demand for housing that is pushing development land prices or higher land prices that are pushing housing costs? From an economic point of view the balance of probability would suggest the former channel rather than the latter. In other words it is the dynamics of supply and demand for the end product housing – that is giving rise to increasing land prices, not the other way around.

7 The IHBA believes that the best way to address the price of development land is by ensuring that the supply of zoned and serviced land matches or exceeds estimated requirements for housing and other purposes.

8 We would strongly urge that lands suitable for rezoning for residential use be identified at a much earlier stage even in advance of the rezoning itself. This would enable local authorities to arrange for the servicing of lands at a much earlier stage and would bring certainty to the planned, co-ordinated development of lands. Such a proposal would give a greater horizon to development and allow local authorities to properly plan for all services including roads, water and waste water/sewage treatment plants in a more effective and efficient manner.

9 As regards affordable housing, there is currently growing evidence of new housing supply matching demand, and of new house prices growing more slowly than the price of second hand housing. We believe that the best way to add to the supply of affordable housing lies in the joint venture approach, described in this submission.

10 The IHBA is committed to increasing the supply of affordable houses. We welcome the government's commitment to

> 'an ambitious scale of delivery of affordable housing' through a new affordable housing initiative. We acknowledge the role played by the Social Partners in supporting the initiative to increase the supply of local authority and other state owned lands in this initiative which was first called for by the IHBA in July 2002.

11 The IHBA calls on all elected members to acknowledge the importance and necessity of ensuring sufficient lands are zoned for residential development in accordance with the proper planning and sustainable development of their areas. In this regard we note with concern the comment by the Dun Laoghaire Rathdown County Manager that

> Please note that this draft development plan significantly fails to comply with the Planning and Development Act, 2002, in that insufficient land has been proposed for zoning by the elected members for residential use to comply with the draft housing strategy.

12 The IHBA fully supports and is committed to the expansion of joint ventures between local authorities and private house builders in delivering significant increases in the supply of affordable housing. Two clear examples of the success of these schemes are already available at CastleCurragh, Blanchardstown, Co. Dublin and at Cedar Brook, Cherry Orchard, Dublin.

13 We believe that similar schemes in each local authority on sites of just 3 hectares could yield an additional 8,000 affordable homes.

14 Two junior civil servants with a house costing close to €210,000 would meet the affordable criteria established in the Planning and Development Act 2000. That is to say that they could service the annual repayments on a mortgage equivalent to 90% of the price of that house with less than 35% of their net income. The IHBA calls for an updating of the loan amounts specified in the Guidelines on Part V of the Planning and Development Act 2000 (DoE&LG December 2000) to enable the people for whom Affordable Housing under Part V of the Planning & Development Act 2000 was intended to benefit from it.

15 Similarly, should local authorities target key sectors, junior to middle ranking civil servants, health board employees, nurses, teachers and gardai for affordable housing delivered on foot of Part V of the Planning and Development Act, 2000 significant pressures would be relieved from those sectors.

16 The IHBA welcomes the findings of the Third Bacon Report which confirms that 'Planning permissions granted more than 12 months that had not commenced amounted to about 4% of the potential yield'.

17 Given that the supply of private housing increased from 30,132 in 1996 to 51,932 in 2002 (a level which was greater than 25,000 housing units above that projected by leading analysts) we reject any claim of the withholding of lands to control supply.

18 The findings of the SCS Housing Study 2002 found

> The ownership of development land was raised as a major issue in all of the interviews. Without a full official public registration process, it is not possible to identify the exact ownership of all development land. However, the existence of significant land banks in major suburban areas in (sic) known and the significance in terms of housing supply delays was explored. No evidence was found of any concerted action by such interests to delay the supply on the Dublin

market and most of such land holdings, when examined, were the subject of protracted legal, planning and development procedural issues.

1 INTRODUCTION

1.1 The Irish Home Builders Association (IHBA) is the representative for private house builders in Ireland with a membership of more than 1,500 firms responsible for building approximately 80% of all private housing in Ireland. The IHBA is a constituent association of the Construction Industry Federation (CIF).

1.2 The All-Party Oireachtas Committee on the Constitution is examining the relevant Articles of the Constitution to 'ascertain the extent to which they are serving the common good of individuals and the community, with a view to deciding whether changes in them would bring about a greater balance between the two.'

1.3 The Committee has by public notice on Friday 11th April 2003 invited written submissions before 31st May 2003 on such issues as

- the right to private property
- private property and the common good
- compulsory purchase
- the zoning of land
- the price of development land
- the right to shelter
- infrastructural development
- house prices
- access to the countryside.

1.4 This is not the first time some of these issues have been considered. The Report on Building Land, otherwise known as The Kenny Report, was published in 1973. Much attention has recently been given to one of its recommendations, i.e. the designation of identified lands by the High Court and their compulsory purchase by local authorities at existing use value plus 25%. It is worth noting that both representatives from the then Department of Local Government, now the Department of the Environment, Heritage and Local Government, dissented from the majority report of Kenny and issued a minority report that did not favour the introduction of such a scheme.

1.5 Subsequently the Joint Oireachtas Report on Building Land published in 1985 also considered the recommendations of Kenny and did not favour their introduction. That Report considered in particular the principal objectives of Kenny relating to possible measures to

(a) controlling the price of land required for housing and other forms of development;
(b) ensuring that all, or a substantial part, of the increase in the value of land attributable to the decisions and operations of public authorities. …shall be secured for the benefit of the community.

The Joint Committee concluded that

> With regard to (a), which is an economic problem, the Joint Committee feels that the approach was too narrow. It was unduly concentrating on dealing with land prices, which are a symptom rather than a cause. In consequence, it did not examine the basic problems involved in the behaviour of prices. The Joint Committee feels that the Kenny Report's recommendations are inappropriate to the main problems.
>
> With regard to (b), which is an equity problem, the main issue with the approach recommended by Kenny is constitutionality. There are, in addition, problems with the practicality, scope and distributive implications of the recommendations.

1.6 More recently, the last government's commissioned reports on the housing market by Dr Peter Bacon cautioned against measures that could impact negatively on the supply of housing and house prices. Dr Bacon cautioned against an engineered across-the-board reduction in new house prices brought about by a reduction in land prices. He warned that a negative side effect of such a move would be to risk creating negative equity problems for many house buyers and new house purchasers over the past two years or so and could spill over into wider economic recessions.

1.7 This submission particularly focuses on the issues of

- house prices
- the price of development land
- the zoning of land
- infrastructural development.

And sets out the recommendations of previous reports on these issues which illustrate the comparisons between factors in the early 1970s, again in the mid 1980s and today.

It establishes the performance of the private housing market, the obstacles that need to be addressed to help supply be maximised particularly in the areas of greatest need. It also offers tried and tested solutions to the delivery of an increased supply of affordable housing. The issues considered, recommendations made and actions taken are worth noting.

2 THE ZONING OF LAND

2.1 Zoning of sufficient lands for future residential development is essential in order to deliver a consistent supply of housing to meet demands. It is vital that in those areas of greatest demands

that sufficient lands are zoned as part of the proper planning and sustainable development of those areas. While many planning authorities report that sufficient lands are zoned for residential development there is a clear problem with the absence or lack of serviced lands in some areas.

The full servicing of lands zoned for residential use in development plans is essential in order to ensure the proper and timely development of such lands. We urge local authorities to consider the use of public private partnership and other forms of joint ventures to help the speedy removal of any infrastructural deficiencies.

2.2 We strongly advocate that a mechanism must be found to bring more zoned and serviced lands to the market as a means of preventing undue pressure that would result from a restricted supply of such lands.

2.3 Furthermore we would urge that local authorities identify lands in their development plans that would be reserved for social and affordable housing in particular. It has been the long held view of the IHBA, as supported by DoE&LG 'Guidelines on Site Selection for Social Housing', that such approach would enable residential areas to be planned in a socially inclusive manner and would act as a control on the value of any such zoned lands. Accordingly the value of these lands would enable a greater supply of affordable housing to be brought to the market without influence from external market and competitive forces.

2.4 Given that it is generally accepted that the zoning of lands for residential development is an essential element in producing future housing, it is incredible that even in areas where house prices are highest that one local authority manager felt it necessary to recently put the following message on the Draft Development Plan

> Please note that this draft development plan significantly fails to comply with the Planning and Development Act, 2002, in that insufficient land has been proposed for zoning by the elected members for residential use to comply with the draft housing strategy.[1]

2.5 Much concern has been given to the issue of hoarding of lands, thus preventing lands being brought to development, especially in areas of greatest demand, i.e. the Dublin region.

Again it is worth noting the findings of the Third Bacon Report, which states

> Planning permissions granted more than 12 months that had not commenced amounted to about 4% of the potential yield.[2]

2.6 The Dublin Institute of Technology (DIT) in its Housing Study 2002 for the Society of Chartered Surveyors (SCS) noted that

> The ownership of development land was raised as a major issue in all of the interviews. Without a full official public registration process, it is not possible to identify the exact ownership of all development land. However, the existence of significant land banks in major suburban areas in (sic) known and the significance in terms of housing supply delays was explored. No evidence was found of any concerted action by such interests to delay the supply on the Dublin market and most of such land holdings, when examined, were the subject of protracted legal, planning and development procedural issues[3]

3 HOUSING SUPPLY

3.1 The Department of the Environment, Heritage and Local Government recently published (12th May 2003) the annual Housing Statistics for 2002. The Minister for Housing and Urban Renewal, Mr Noel Ahern, T.D. said in his press release 'the number of new houses and apartments built last year reached a new record level of 57,695, up 9.7% on the previous record achieved in 2001 (52,602 units). This was the eighth successive year of record house completions.'

3.2 The Minister acknowledged 'despite less favourable economic conditions last year, the housing sector still continued to perform well, boosted by government support and particularly high levels of output under the local authority and voluntary housing programmes. We are building houses at a rate of 14.7 per 1,000 population which is by far the highest rate of house building in Europe'.

3.3 Notwithstanding the increase in output from the local authority and voluntary sectors it is clear that the real growth in house building has been achieved in the private residential sector. Total housing output has increased from 33,725 in 1996 to 57,695 in 2002. This is equivalent to an increase of 71% over the 7-year period. Private housing has increased from 30,132 to 51,932 equivalent to an increase of 72%. Local authority and voluntary housing increased from 3,593 to 5,763 or by an annual level of 60% from 1996 to 2002.

3.4 However a more accurate picture is evident from the aggregate number of new homes built in the period 1996 – 2002 inclusive. During those 7 years a total of 321,537 new houses were built. Of this, private housing accounted for 294,019 or 91%. The total number of local authority and voluntary houses during the 7 years was 27,518 representing almost 9% of the

total housing supply. This is in fact below the 10.65% of total housing supply delivered by the local authority and voluntary sectors in 1996.

3.5 The private sector has been the dominant sector and has been responsible for the delivery of increased levels of housing to meet unprecedented levels of demand.

3.6 It is worth noting that the leading analysts and commentators did not anticipate the level of demand that subsequently became a reality. Chart 3 illustrates the projected levels of demands by a number of leading analysts.

Chart 1

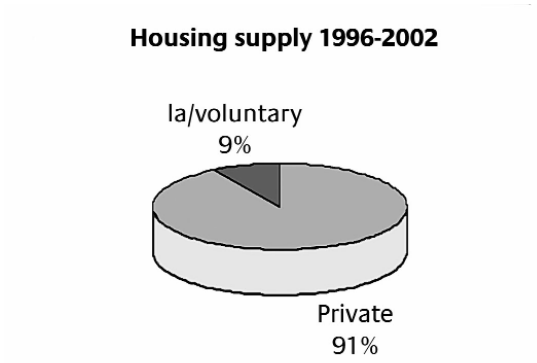


Chart 2

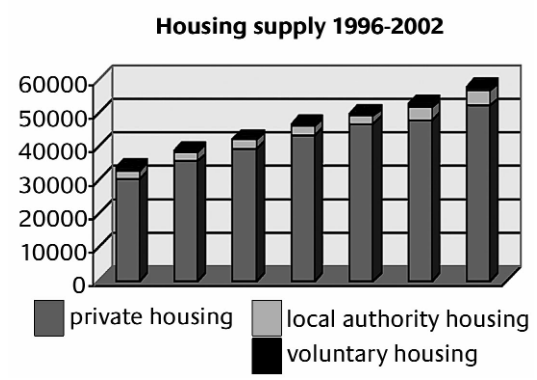
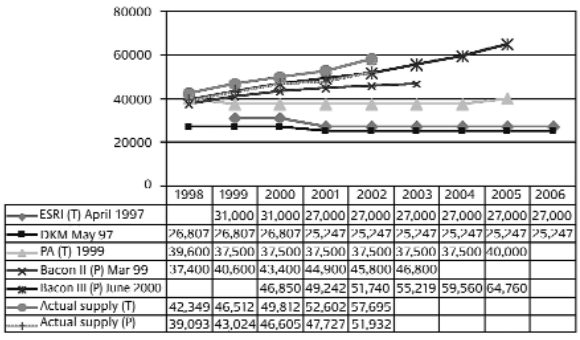


Chart 3



	1998	1999	2000	2001	2002	2003	2004	2005	2006
ESRI (T) April 1997		31,000	31,000	27,000	27,000	27,000	27,000	27,000	27,000
DKM May 97	26,807	26,807	26,807	25,247	25,247	25,247	25,247	25,247	25,247
PA (T) 1999	39,600	37,500	37,500	37,500	37,500	37,500	37,500	40,000	
Bacon II (P) Mar 99	37,400	40,600	43,400	44,900	45,800	46,800			
Bacon III (P) June 2000			46,850	49,242	51,740	55,219	59,560	64,760	
Actual supply (T)	42,349	46,512	49,812	52,602	57,695				
Actual supply (P)	39,093	43,024	46,605	47,727	51,932				

Projected New Housing Demand

3.7 To put into perspective the performance of the house building industry, the last government's second commissioned report on the housing market (March 1999) projected a demand for new private housing for the period 1999 – 2002 in the region of 174,700 units. The actual level of supply by the private sector during those years was in fact 189,288 or 8.35% above the highest projected figure by leading analysts.

3.8 Housing demand has exceeded all expectations. It is clear from these figures that the industry had a better appreciation of the demands for housing than the leading analysts were predicting. Had the industry not responded to supply by increasing supply in excess of the best available projections, the supply/demand imbalances would have been greater.

3.9 By 2002 this level of output by the private sector was 6,132 units ahead of the projection of the Second Bacon Report, 14,432 units ahead of the projection of PA Consultants in April 1999, 24,932 more than projected by the ESRI in April 1997 and 26,685 more than projected by DKM Economic Consultants in May 1997.

3.10 If house prices are to continue to moderate as accepted by all commentators and politicians including An Taoiseach and the Ministers for the Environment, Housing and Finance it is essential that the supply of housing continues at a strong level of output consistent with demands and in the areas where those demands are strongest.

3.11 As has been demonstrated, the industry is best placed to advise on the mechanisms and actions necessary to achieve these objectives and we strongly urge the committee to consider our views outlined in this submission and through the consultative process.

4 INFRASTRUCTURE DEVELOPMENTS AND THE SERVICING OF LAND

4.1 Local authorities are required to commence the review of their development plans after 4 years and to conclude the review within 6 years of the adoption of the last plan. However, it can often take a period equivalent to 2 development plans to service lands and make them capable of any development. This has been a significant factor in many areas, particularly in the Greater Dublin Area, of lands not being developed.

4.2 We would strongly urge that lands suitable for rezoning for residential use be identified at a much earlier stage even in advance of the rezoning itself. This would enable local authorities to arrange for the servicing of lands

at a much earlier stage and would bring certainty to the planned, co-ordinated development of lands. Such a proposal would give a greater horizon to development and allow local authorities to properly plan for all services including roads, water and waste water/sewage treatment plants in a more effective and efficient manner.

4.3 The previous government sought to address this with the introduction of the Serviced Land Initiative (SLI), which was to provide services to an additional 100,000 housing sites. The third Bacon Report (June 2000) noted

> the number of fully serviced sites available for commencement has not increased in the way that was envisaged previously. This is the result mainly of the fact that infrastructure constraints have not been overcome to the extent that it was estimated they would. For example, a year ago, it was estimated that the SLI schemes to commence in the Dublin Region in 1999 would provide about 24,000 additional housing units. Of these, about 8,200 were estimated to be completed in 1999, a little over half of them in the Dublin local authority areas, and the balance in the Mid-East Region. In fact, none were completed in the Dublin local authority areas.[4]

4.4 We would recommend in order to overcome these delays and enable lands identified in current development plans to be developed in accordance with proper planning and sustainable development in a time consistent with the projections made in those plans, that the servicing of zoned lands should be achieved by private investment.

Such a mechanism could help resolve a major and serious delay in bringing many zoned lands to development.

5 HOUSE PRICES

5.1 The Annual Housing Statistics 2002 (May 2003) noted 'house prices continue to moderate since the peak in 1998, particularly in Dublin. Nationally, average annual house price increases in 2002 compared to 2001, were 8.3% and 10.5% for new and second hand houses respectively. Increases in Dublin for new and second hand house prices were 5.4% and 11% respectively.'

5.2 Given that the annual output of new homes represents approximately 3% of total housing in Ireland and that less than 4 out of 10 house sales occur each year in the new homes market it is clear that the dominant sector in house prices is the second hand sector.

5.3 Any measures or interference in new house prices will impact on second hand prices and will therefore impact on a substantially greater proportion of householders.

The Second Bacon Report 'The Housing Market: An Economic Review and Assessment – March 1999' considered the suggestion of engineering an across the board reduction in new house prices. The following conclusions were made:

> Some believe that an appropriate solution to the current problem of deteriorating house price affordability is to engineer in some way, an across the board reduction in new house prices from their current levels. Most usually, it is argued that a reduction in land prices (again, engineered in some way) should be the means used to bring about this outcome. If such an outcome could indeed be brought about, affordability for first time buyers would be improved. However, a negative side effect of this approach would be to risk creating a negative equity problem for many house purchasers and most new house purchasers over the past two years or so. The likelihood is that the magnitude of the problem that would be created in this way would be as large and could be greater than the problem that would be resolved. Furthermore, experience from other markets, in which episodes of negative equity have occurred demonstrates that if this problem emerges it tends to gather its own internal dynamic as potential house purchasers postpone buying in anticipation of further price reductions. The result can be a vicious circle of downward spiralling prices, which can spill over into wider economic recession. The UK market of the late 1980s and well into the nineties provides a good example of such a negative scenario and how pervasive they can become. Therefore, it is not considered that an attempt at engineering a broad reduction in new house prices should be contemplated. Rather, the aim should be to achieve stability of the overall housing market. In addition there should be a targeted strategy focused at improving affordability for first time buyers and without negative side effects on the welfare of other homeowners.

5.4 An exercise conducted by RTE's 5 7 Live programme recently revealed that the equivalent of 38% of the price of a new house is returned to government and other state agencies in the form of taxes and contributions. Given that the DoEH&LG statistics reveal that the average new house price in the fourth quarter of 2002 was €206,829 this means that in excess of €78,500 was returned to the State by every house purchase.

5.5 At a time when Government is anxious to ensure a greater number of affordable houses are brought to the market it is a concern that all planning authorities are currently drafting new Contribution Schemes under the Planning

and Development Act 2000 that will result in significant increases in the level of contributions payable by all forms of development including housing. The impact of an increase in charges in the order of A4000 per house represents an increase of 2.3% to the price of a new house. It is very likely that the increases will far exceed this.

5.6 Other Government interventions in recent years have increased the price of housing including the increase of VAT to 13.5% and the increase by 50% of the level of stamp duty payable on land transactions.

5.7 The latest Housing Statistics from The DoEH&LG reports that house prices are increasing. However, an analysis of the figures reveals that the level of annual increase is significantly below the increases recorded in 1998.

5.8 Price increases in the second hand sector continue to rise at a faster rate than new house prices. The following chart (no. 4) gives a clear picture of the levelling off of price increases and compares the new and second hand sectors.

Charts nos. 5–11 showing Annual House Prices in Dublin, Cork, Galway and the other main urban areas are indicated at the end of this submission.

Chart 4

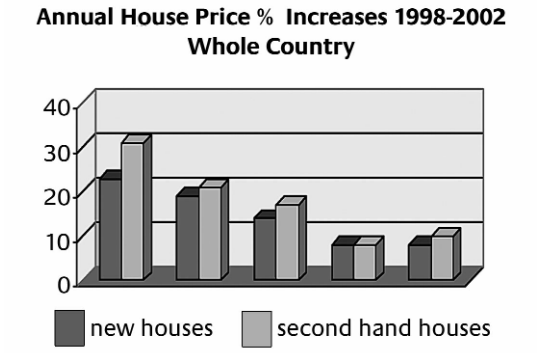


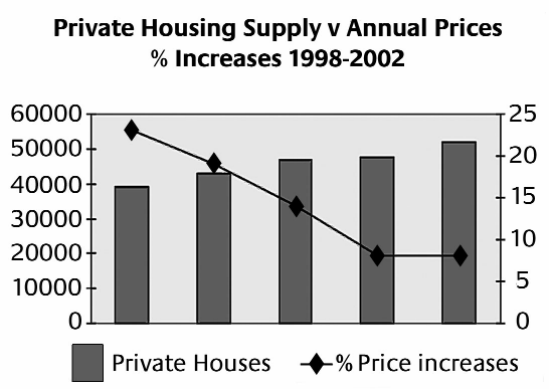
Table 1 indicates the extent to which annual new house prices have moderated.

Table 1 Annual Percentage increases

	Whole Country		Cork		Dublin		Galway		All other areas	
	New	2nd hand	New	2nd hand	New	2nd hand	New	2nd hand	New	2nd hand
1998	23%	31%	17%	25%	32%	34%	8%	26%	23%	30%
1999	19%	21%	26%	26%	20%	19%	17%	16%	17%	21%
2000	14%	17%	18%	21%	15%	17%	18%	13%	12%	17%
2001	8%	10%	5%	6%	10%	8%	4%	14%	8%	8%
2002	8%	10%	6%	11%	6%	11%	10%	9%	8%	12%

5.9 When the increase in supply is measured against the level of annual price increase in the new homes sector the following emerges

Chart 11



5.10 It is clear that a moderation in house prices has occurred consistent with the significant increase in supply since 1998. We believe that this moderation will be sustained if supply is maintained at levels consistent with demand.

5.11 This is supported by the Permanent TSB/ESRI House Price Index which noted that

> 'Over the first 6 months of the year (2002) the average price for new houses rose by 1.7% while the average prices for existing houses rose by 7.4%.'[5]

5.12 The committee should note that other costs in the industry have continued to increase. Bruce Shaw, a leading quantity surveying firm and publishers of the Annual Bruce Shaw Handbook noted in 2002 that

- Basic wage rates for a craftsman will increase by 46% between September 2000 and July 2002
- at the same time construction operatives' rates will increase by up to 56%[6]

5.13 Another major quantity surveying firm, David Langdon PKS, also publish a review and they reported

Gradual increases in the cost of building caused by EU or government regulation that have been incurred in recent years include

- planning regulation and delays
- waste and demolition charges
- universal access
- health and safety particularly scaffolding costs
- planning restrictions affecting quarrying and the consequent cost of aggregates
- insurance costs
- costs of public services – building regulations, planning etc.

David Langdon PKS concluded that 'We estimate that the increased cost of regulation may

have added 15% – 25% to the cost of building in recent years.'

5.14 It is clear from the charts that moderation in new house prices has been occurring over the last two years. House price increases in the second hand market have been consistently increasing at a faster pace than new house prices. It is also clear that increased new housing supply from 1999 onwards was matched by significant reductions and moderation of annual new house prices. Chart no 11 clearly shows that the level of annual new house price increase has fallen to approximately 8% in 2002 compared to a level of 23% in 1998.

We believe that this lower and moderate level of increase can be sustained if supply is maintained at a level consistent with demand. However, we would caution that as reported by leading independent quantity surveying firms pressure will continue as a result of regulations, delays in planning and appeal processes, increasing insurance costs and high wage inflation in the construction sector.

6 AFFORDABILITY

6.1 The Planning and Development Act 2000 introduced into planning legislation the requirement that up to 20% of houses subject to new planning applications would be made available as social and affordable housing. The Department of the Environment and Local Government in their Guidelines on Part V of the Act issued to planning authorities in December 2000 stated that 'planning authorities should seek to maximise the extent to which needs can be met by the provision of affordable housing'[7]

6.2 Houses are affordable. Clearly if this were not so, 53,000 new house sales would not have happened last year. Many houses built by private house builders are within the affordability limits as set down in the Planning and Development Act 2000. The Act states that a person is eligible for an affordable house 'whose income would not be adequate to meet the payments on a mortgage for the purchase of a house to meet his or her accommodation needs because the payments calculated over the course of a year would exceed 35% of that person's annual income net of income tax and pay related social insurance.[8]

6.3 Appendix 1 of the Guidelines of December 2000 gives examples of the incomes that would qualify for specified loan values. By updating these figures from 2000 in line with the terms of National Wage Agreements and factoring in the changes made in net income from the Budget of 2001/02 many civil service and public service groups would qualify for affordable housing, on present salary levels and rules. These groups include teachers, nurses, guards and general civil service staff officer grades. Each of these groups could, on a single salary, buy a house/apartment for in excess of €130,000, or €210,000 for two earners, while remaining below the 35% of net income repayment rule.

6.4 Some local authorities do not advertise for applications for inclusion on affordable housing lists for houses delivered on foot of agreements with builders under Part V of the Planning and Development Act 2000. As a result they do not operate from a list of eligible applicants and very often allocation of affordable housing is restricted to lower income groups and not to those intended by the legislation, i.e. middle income groups, teachers, nurses, guards, etc.

6.5 Many local authority lists of applicants for affordable housing do not include applicants from these types of income groups. Local authorities therefore often require affordable housing under Part V of the Planning Act to be sold at much reduced levels so as to meet the repayment abilities of lower income groups.

Local authorities are confusing affordable housing under Part V of the Planning & Development Act 2000 with the DoE&LG Affordable Housing Scheme which is intended for lower income groups and which can avail of substantial site subsidies. These are totally different schemes with different criteria and target groups.

6.6 There is evidence that this is already occurring and this is counter to the spirit of the Act and may cause political difficulties.

6.7 Where this occurs the 'discount' required in respect of the affordable housing is greater than intended and may lead to cross subsidis-ation as suggested in the Second Bacon Report of April 1999.

The IHBA calls for an updating of the loan amounts specified in the Guidelines on Part V of the Planning & Development Act 2000 (DoE&LG December 2000).

6.8 Local authorities also administer an Affordable Housing Scheme, which is entirely separate to the affordable houses delivered under Part V of the Planning and Development Act 2000. This other scheme relates to the sale at significantly reduced prices of houses built on council owned lands. These houses are sold with the benefit of site subsidies of up to €38,000 per house.

The Draft Guidelines issued by the DoEH&LG in April 2003 in relation to the implementation of

the Planning and Development (Amendment) Act 2002 note that

> It is essential that funding available for the existing Affordable Housing Scheme is used to target the lower income group rather than the likely eligible purchasers of the Part V Affordable units.[9]

6.9 Some local authorities, ironically where demands for affordable housing may be at their highest, are limiting affordable housing delivered as a result of Part V of the Planning and Development Acts 2000-2002 to those on incomes of less than €10,000 per annum. By so doing they are depriving the very people for whom affordable housing under Part V was intended, nurses, gardaí, teachers, junior/middle civil servants, health board officers and local authority officers.

As a result of those local authorities restricting access to affordable housing under the Act to those on incomes that otherwise would never have seen those people participate in the private housing market, a significant element of supply is not available for the higher income groups that were clearly intended to benefit from Part V of the Acts. Consequently not only have those categories been denied access to affordable housing but also the supply of private housing has been reduced by 20% causing a double hit for this vulnerable sector.

7 JOINT VENTURES

7.1 The IHBA has been promoting the use of joint ventures between local authorities and private house builders as a means of delivering significant increases in levels of affordable housing. The IHBA launched its initiative at its mid-year media briefing in July 2002. That initiative clearly showed that if every local authority brought forward from their land banks sites, either individual or bundled sites of just 3 hectares, it would be possible to build up to 8,000 additional affordable houses.

7.2 The IHBA raised the matter during several meetings of the Housing Forum, established under the Programme for Prosperity and Fairness (PPF). The following National Agreement, Sustaining Progress, includes an objective that the 'Government is committed to an ambitious scale of delivery of affordable housing for the target group through this new affordable housing initiative and the other affordable housing coming through arrangements under Part V of the Planning and Development Act 2000 as amended.'

Already examples which demonstrate the success of these schemes are in place. Developed by members of the IHBA, they clearly show the benefits of such joint ventures between local authorities and private builders.

7.3 Fingal County Council in partnership with Shannon Homes (Dublin) Ltd and Architects McCrossan O'Rourke Manning have delivered in excess of 750 houses on a site owned by the council at CastleCurragh, Blanchardstown, Dublin. The development has been completed in less than 3 years compared to the council's own estimate of 10 years were it left to develop the site in normal arrangements. Three bed houses in the scheme sold as affordable houses at €130,000

Similarly, Dublin City Council in partnership with Park Developments Ltd and John Sisk & Co. are developing a scheme of affordable houses at Cedar Brook, Cherry Orchard, Dublin. Units at this scheme start at below €120,000.

These two schemes will provide over 1,000 affordable homes. The initiatives have resulted in a return equivalent to almost 5 years supply of housing on the local authorities lands. The ultimate beneficiaries were the people who bought the houses at affordable prices.

We would strongly urge that greater use of these schemes is made by local authorities to increase supply by bringing forward lands which otherwise would not be developed for many years.

8 NEW PLANNING APPLICATIONS FOR RESIDENTIAL DEVELOPMENTS

8.1 In considering supply it is important to examine areas that create obstacles in bringing developments to construction and completion for purchase by homebuyers together with other factors which influence demand.

Serious delays occur during various stages of the planning system. These have been reported by many commentators including the Report of the Comptroller and Auditor General in 'Value for Money Examination – Planning Appeals – April 2002'.[10]

In his report the C&AG found that

> 'The percentage of appeals processed within the statutory time target of 4 months had decreased from almost 100% in 1994 to less than 50% in 2000'.

And

> 'The backlog of cases not disposed off at 31 December 2000 represented 46% of appeals lodged with the Board in 2000'

8.2 The annual report of Bord Pleanála 2001 noted that

> 'for the year 2001 to date the percentage of cases meeting the statutory four month objective has declined to 30%'[11]

Future residential developments and housing supply can be gauged from the level of planning permissions granted by planning authorities and An Bord Pleanála.

8.3 We acknowledge that the position has since improved, but the overall situation remains one of much done, more to do.

However, despite additional resources being given to it, An Bord Pleanála has also been given many additional responsibilities under the Planning and Development Act 2000. These include additional referrals under Part V in relation to the provision of social and affordable housing as well as the consideration of compulsory purchase orders made by local authorities.

We are very concerned that these new additional requirements will place the Bord's resources under increasing pressure and will impact on its ability to meet the statutory 4 month objective period for determining planning appeals. It is clear that the majority of large developments are appealed to the Bord and that significant overruns occur which mean final decisions are often delayed well beyond the objective period.

8.4 The Central Statistics Office (CSO) reports that the level of permissions in terms of residential units (houses and apartments) is falling.[12]

8.5 The fourth quarter of 2002 showed a fall in the level of housing units granted permission in the order of 15.6% on the same quarter of the previous year.

The other quarters in 2002 showed the following comparisons with 2001;

Quarter 1	fall of 27.7%
Quarter 2	fall of 2.3%
Quarter 3	increase of 1.4%

8.6 The CSO has reported in September 2002 that

- The natural increase (births less deaths) of 29,300 is the largest since 1984
- The age profile of emigrants was younger than that for immigrants. Nearly half of the emigrants (49%) were aged 15-24 years while 50% of immigrants were aged 25-44 years.
- In the year to April 2002 net immigration is estimated to have reached 28,800.
- The combined effect resulted in a population estimate of 3.897 million people in April 2002 – up 58,100 or 1.5% on the previous April.[13]

8.7 Last year (June 2002) the CSO reported that the population of the Dublin region is projected to increase by over 500,000 people in the period to 2031. The CSO also reported that

- Dublin will be the fastest growing area (+56%) followed by the Mid-East (+49.7%). These areas will grow due to natural increase and international migration and will gain population through internal migration movements from the remaining 6 regions.

Over four fifths of the projected population increase of 940,000 between 1996 and 2031 will arise in the Dublin and Mid-East regions.[14]

8.8 Information on delays in the planning system as evidenced by the CSO and others against a background of demand for current supply increases and projected population growth represents serious reading. Unless the level of permissions for houses and apartments increases and is delivered faster, further demand pressures will occur. The complexities of the planning process take time however feedback from our members around the country indicates a lack of commitment on the part of local authorities to facilitate the implementation of proactive pre planning discussions.

We are convinced that a positive approach to pre planning discussion could deliver a significant improvement in efficiency for our members and the local authority alike in the processing and timescale of planning applications.

We recommend that the need for a directive on this issue be highlighted by the committee as a priority in its report to government.

8.9 Given that the supply of private housing increased from 30,132 in 1996 to 51,932 in 2002 (a level which was greater than 25,000 housing units above that projected by leading analysts) the CIF /IHBA rejects any claim of the withholding of lands to control supply.

8.10 The findings of the SCS Housing Study 2002 found 'The ownership of development land was raised as a major issue in all of the interviews. Without a full official public registration process, it is not possible to identify the exact ownership of all development land. However, the existence of significant land banks in major suburban areas in (sic) known and the significance in terms of housing supply delays was explored. No evidence was found of any concerted action by such interests to delay the supply on the Dublin market and most of such land holdings, when examined, were the subject of protracted legal, planning and development procedural issues'

9 CONCLUSIONS AND RECOMMENDATIONS

• The full servicing of lands zoned for residential use in development pans is essential in order to ensure the proper and timely development of such lands. We urge local authorities to consider the use of Public Private Partnership and other forms of joint ventures to help the speedy removal of any infrastructural deficiencies.

• We strongly advocate that a mechanism must be found to bring more zoned and serviced lands to the market as a means of preventing undue pressure that would result from a restricted supply of such lands.

• Furthermore we would urge that local authorities identify lands in their development plans that would be reserved for social and affordable housing in particular. It has been the long held view of the IHBA, as supported by DoE& LG Guidelines on Site Selection for Social Housing, that such an approach would enable residential areas to be planned in a socially inclusive manner and would act as a control on the value of any such zoned lands. Accordingly the value of these lands would enable a greater supply of affordable housing to be brought to the market without influence from external market and competitive forces.

• The private sector has been the dominant sector and has been responsible for the delivery of increased levels of housing to meet unprecedented levels of demand.

• It is worth noting that the leading analysts and commentators did not anticipate the level of demand that subsequently became a reality. The following chart illustrates the projected levels of demands by a number of leading analysts. (See chart 3 in text)

• We would recommend in order to overcome these delays and enable lands identified in current development plans to be developed in accordance with proper planning and sustainable development in a time consistent with the projections made in those plans, that the servicing of zoned lands should be achieved by private investment.

• We would strongly urge that lands suitable for rezoning for residential use be identified at a much earlier stage even in advance of the rezoning itself. This would enable local authorities to arrange for the servicing of lands at a much earlier stage and would bring certainty to the planned, co-ordinated development of lands. Such a proposal would give a greater horizon to development and allow local authorities to properly plan for all services including roads, water and waste water/sewage treatment plants in a more effective and efficient manner.

• Such a mechanism could help resolve a major and serious delay in bringing many zoned lands to development.

• It is clear that a moderation in house prices has occurred consistent with the significant increase in supply since 1998. We believe that this moderation will be sustained if supply is maintained at levels consistent with demand.

• House price increases in the second hand market have been consistently increasing at a faster pace than new house prices. It is also clear that increased new housing supply from 1999 onwards was matched by significant reductions and moderation of annual new house prices. Chart no 11 clearly shows that the level of annual new house prices increase has fallen to approximately 8% in 2002 compared to a level of 23% in 1998.

• We believe that this lower and moderate level of increase can be sustained if supply is maintained at a level consistent with demand. However, we would caution that as reported by leading independent quantity surveying firms pressure will continue as a result of regulations, delays in planning and appeal processes, increasing insurance costs and high wage inflation in the construction sector.

• Some local authorities do not advertise for applications for inclusion on affordable housing lists for houses delivered on foot of agreements with builders under Part V of the Planning and Development Act 2000. As a result they do not operate from a list of eligible applicants and very often allocation of affordable housing is restricted to lower income groups and not to those intended by the legislation, i.e. middle income groups, teachers, nurses, guards, etc.

• Many local authority lists of applicants for affordable housing do not include applicants from these types of income groups. Local authorities therefore often require affordable housing under Part V of the Planning Act to be sold at much reduced levels so as to meet the repayment abilities of lower income groups.

• Local authorities are confusing affordable housing under Part V of the Planning and Development Act 2000 with the DoE&LG Affordable Housing Scheme which is intended for lower income groups and which can avail of substantial site subsidies. These are totally different schemes with different criteria and target groups.

• There is evidence that this is already occurring and this is counter to the spirit of the Act and may cause political difficulties.

• The IHBA has been promoting the use of joint ventures between local authorities and private house builders as a means of delivering significant increases in levels of affordable housing. The IHBA launched its initiative at its mid-year media briefing in July 2002. That initiative clearly showed that if every local authority brought forward from their land banks sites, either individual or bundled sites of just 3 hectares, it would be possible to build up to 8,000 additional affordable houses.

• However, despite additional resources being given to it, An Bord Pleanála has also been given many additional responsibilities under the Planning and Development Act 2000. These include additional referrals under Part V in relation to the provision of social

and affordable housing as well as the consideration of compulsory purchase orders made by local authorities.

• We are very concerned that these new additional requirements will place the Bord's resources under increasing pressure and will impact on its ability to meet the statutory 4 month objective period for determining planning appeals. It is clear that the majority of large developments are appealed to the Bord and that significant overruns occur that mean final decisions are often delayed well beyond the objective period.

• Information on delays in the planning system as evidenced by the CSO and others against a background of demand for current supply increases and projected population growth represents serious reading.

• Unless the level of permissions for houses and apartments increases and is delivered faster further demand pressures will occur. The complexities of the planning process take time however feedback from our members around the country indicates a lack of commitment on the part of local authorities to facilitate the implementation of proactive pre-planning discussions.

Appendix 1

10 THE KENNY REPORT (1973)

10.1 In January 1971, the Minister for Local Government appointed a committee under the chairmanship of Mr Justice Kenny. The committee comprised 2 representatives from the Department of Local Government, 1 representative from the Department of the Taoiseach, 1 representative form the Office of the Revenue Commissioners and 1 representative from the Valuations Office.

1 To consider, in the interests of the common good, possible measures for-
(a) Controlling the price of development land required for housing and other forms of development,
(b) Ensuring that all or a substantial part of the increase in the value attributable to the decisions and operations of public authorities (including, in particular, decisions and operations relating to the provision of sewerage and water schemes by local authorities) shall be secured for the benefit of the community.
2 To report on the merits and demerits of any measures considered, with particular reference to their legal and administrative practicability.
3 To advise on what changes in the present law may be required to give effect to any measures recommended.

10.2 The committee submitted a Majority Report and Minority Report to the Minister for Local Government on 7th March 1973. This arose because two members of the Committee failed to agree on the recommendations in the Majority Report. It is worth noting that the Minority Report was signed by both representatives from the Department of Local Government.

10.3 The main recommendation of the Majority Report was the introduction of a 'Designated Area Scheme'. This Scheme would enable local authorities to

> acquire all the lands in the designated area except (a) those which are the property of any religious denomination or any educational institution (Article 44 Section 2.6 of the Constitution prevents these being acquired except for necessary works of public utility), (b) existing dwellings, shops, offices and factories and (c) property used for community, recreational and sporting purposes (parks, playing fields and golf and race courses) so long as they are used for these purposes. They may not however be able to do this within the ten-year period and the Court should have power, on the application of the local authority, to extend the period within which lands in a designated area may be acquired for a further period of ten years. The power to extend the time should be limited to cases in which the local authority succeed in proving to the Court that there have been reasonable grounds for their failure to acquire within the ten year period.
>
> The right of the local authority to apply for an order designating an area should not be limited to one application within the ten-year period. The legislation should provide that the right may be exercised by any number of applications made at any time in relation to any lands. The result should be that when plans for local authority works have been prepared and approved, the local authority will apply to designate the area in which the lands will be increased in price by the works.
>
> When the lands in a designated area have been acquired by the local authority, they would be leased by them for private development or would be used by them for their own purposes. Leasing the land has the advantage that the local authority will be able to impose such covenants on the tenant as are required for orderly development and, in the case of leases to business premises, to provide such reviews at the end of each seven or ten year period.[15]

10.4 The committee considered 'The causes of the increase in the price of land.' Chapter II of the report addressed this issue. [See original Kenny Report]

10.5 Kenny also considered

- *Betterment*
  'The assessment and collection of a development levy or charge would make a new, large administration organisation necessary and would lead to much litigation. Most of the amount paid in respect of the levy or charge would ultimately be passed on to the purchaser and would in effect be to strengthen the forces which are increasing the price of land. Even if the proceeds of the levy or charge were paid to local authorities to help them with their housing programmes, the administrative costs of collecting it would be so large that the net amount which they would receive would be small'[16]
- *The purchase by local authorities of land suitable for building*
  'The acquisition of land by local authorities for resale to builders or to the ultimate purchasers can help to stabilise the price of land or, at least, to prevent it rising very rapidly. It will have this effect however only when there is a rapid and efficient disposal of the lands purchased. If this does not happen, the result of acquisitions by the local authorities is a further disproportionate increase in the price of land suitable for building.'[17]
- *A system by which the price of building land would be controlled*
  '…any system of price control of land involves ultimately the fixing by an independent tribunal of a fair price or a market price for each piece of land involved. This would mean that an elaborate structure of tribunals would have to be established and this would be costly, cumbersome and slow. We therefore reject price control of land as such a solution.'[18]
- *A betterment levy on the difference between the price realised on the disposal of land after planning permission had been granted and the market price of it based on its existing use*
  'We have already described in paragraph 45 the betterment levy system which was introduced in Britain in 1967 and which was repealed in 1970. This levy was payable when development value was realised on the disposal or other dealing in land. If the levy is assessed on the owner of the land, he will increase the price which he demands and so the immediate effect of the levy will be to increase the price of serviced and potential building land. This will cause an increase in the price of all buildings on the land.'[19]
- *An amendment of the Planning and Development Act 1963 so that planning permissions would be granted on the condition that the developer would pay the local authority the total cost of the works which have or will have to be carried out in connection with the proposed development*
  'A further objection to this proposal is that the apportioned costs which the developer would have to bear would be passed on to the ultimate purchaser. The result would be that the land owner would get the enhanced price for his lands while the ultimate purchaser would have to pay for the local authority works. This would not reduce the price of the lands and would substantially increase the price of the buildings. It would therefore not achieve either of the aims we have mentioned.'[20]

Appendix 2

11 REPORT OF THE JOINT OIREACHTAS COMMITTEE ON BUILDING LAND (1985)

11.1 The Joint Oireachtas Committee on Building Land was established in March 1983 and submitted its report in June 1985.

11.2 The terms of reference for this study differed to those of Kenny. The report of 1985 explained these as

> the latter (Kenny) was asked to address a particular issue connected with building land whilst the Joint Oireachtas Committee's orders of reference permit a wide ranging approach to all issues connected with supply and cost. This reflects the wider appreciation which has grown up over time of the range and complexity of issues connected with building land.[21]

11.3 The orders of reference to the committee were

a) To consider and make recommendations regarding possible legislative and other measures to deal, in the interests of the common good, with the supply and cost of building land (including land within and adjacent to urban areas), having regard, in particular, to;
   a. The Constitution and judgements of the Superior Courts in regard to the relevant articles thereof;
   b. The Report of the Committee on the Price of Building Land (Prl.3672) *(The Kenny Report)*
   c. Tax legislation in relation to profits or gains from dealing in, disposals of, or development of, land;
   d. The operation of the Local Government (Planning & Development) Acts 1963-1982;
   e. The Local Government (Building Land) Bill 1982 and

b) To report on the merits and demerits of any measures considered, with particular reference to;
   a. Their constitutionality;
   b. Legal and administrative practicability;
   c. Financial and economic implications;

d Likely effects on the cost of housing and on other forms of development.

The conclusions of the report of the Joint Oireachtas Committee included

- The Joint Committee feels that the Kenny Reports' recommendations (relating to controlling the price of land required for housing and other forms of development) are inappropriate to the main problem.
- There are problems with the practicality, scope and distributive implications of the recommendations.
- The economic problem is avoided, it is not resolved and inevitably must appear somewhere else in the land/housing market. Whilst the land price might be reduced this is clearly an artificial reduction and there is no suggestion that the market value of the land would also be reduced.
- A proposal to supplant the land market must recognise that its implications and effects are more far reaching than its market sector alone and have to be dealt with in a much wider context.
- The assumption of fixed supply can hinder rather than assist a full analysis of the land market. In particular, it diverts attention from the type of problem arising with regard to land availability, which this Committee feels are very important.

Appendix 3

12 AN ECONOMIC ASSESSMENT OF RECENT HOUSE PRICE DEVELOPMENTS – APRIL 1998

Peter Bacon and Associates, Fergal McCabe, Anthony Murphy

12.1 'It has been stated that land costs represent an increasing proportion of housing costs. However, from an economic point of view a key issue is the direction of causation between land cost and house prices. In other words, is it the supply and demand for housing that is pushing development land prices or higher land prices that are pushing housing costs? From an economic point of view the balance of probability would suggest the former channel rather than the latter. In other words it is the dynamics of supply and demand for the end product – housing – that is giving rise to increasing land prices, not the other way around.'[22]

12.2 Appendix 3 [see original report] includes an extract from this first 'Bacon Report' summarising his analysis of the influences on recent house prices, supplemented by opinions of a group of relevant experts.

12.3 The Second Bacon Report 'The Housing Market: An Economic Review and Assessment – March 1999' considered the suggestion of engineering an across the board reduction in new house prices. The following conclusions were made;

'Some believe that an appropriate solution to the current problem of deteriorating house price affordability is to engineer in some way, an across the board reduction in new house prices from their current levels. Most usually, it is argued that a reduction in land prices (again, engineered in some way) should be the means used to bring about this outcome. If such an outcome could indeed be brought about affordability for first time buyers would be improved. However, a negative side effect of this approach would be to risk creating negative equity problem for many house purchasers and most new house purchasers over the past two years or so. The likelihood is that the magnitude of the problem that would be created in this way would be as large and could be greater than the problem that would be resolved. Furthermore, experience from other markets, in which episodes of negative equity have occurred demonstrates that if this problem emerges it tends to gather its own internal dynamic as potential house purchasers postpone buying in anticipation of further price reductions. The result can be a vicious circle of downward spiralling prices, which can spillover into wider economic recession. The UK market of the late 1980s and well into the nineties provides a good example of such a negative scenario and how pervasive they can become. Therefore, it is not considered that an attempt at engineering a broad reduction in new house prices should be contemplated. Rather, the aim should be to achieve stability of the overall housing market. In addition there should be a targeted strategy focused at improving affordability for first time buyers and without negative side effects on the welfare of other homeowners.'[23]

Appendix 4

13 SCS HOUSING STUDY 2002 (A STUDY ON HOUSING SUPPLY AND URBAN DEVELOPMENT ISSUES IN THE GREATER DUBLIN AREA) – OCTOBER 2002

13.1 The supply of development land

Land banks are an asset in short supply and whose availability is highly restricted by the constraints of the planning and policy-making process. This ensures "ready to go" development land is at such a premium in the current development market that any benefits from its disposal are outweighed by the benefit of continued holding. Private owners, public agencies and private institutional holders are reluctant to release lands onto the market for similar economic reasons and additional administrative purposes. This occurs despite the current demand for sites by existing developers and potential entrants to the development market.

No evidence was found as to an oligopoly of development interests withholding land in the Dublin market. However, the major supply constraints create an internalised or contrived market in which the existing holders of land have no economic incentive to dispose of surplus lands due to the creation of alternative supply options.[24]

Charts and Tables

Chart 1 Housing Supply 1996-2002 [in text]

Chart 2 Housing Supply 1996-2002 [in text]

Chart 3 Projected New Housing Demand 1998-2006 [in text]

Chart 4 Annual House Price % Increases 1998-2002 –Whole Country [in text]

Chart 5 Annual House Price % Increases 1998-2002 – Dublin

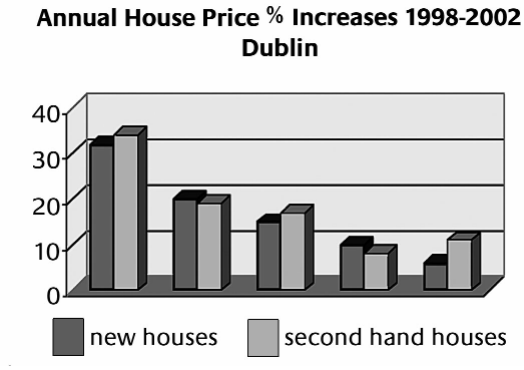


Chart 6 Annual House Price % Increases 1998-2002 – Cork

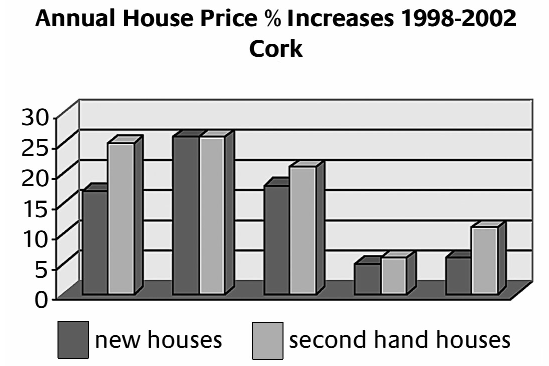


Chart 7 Annual House Price % Increases 1998 – 2002 – Galway

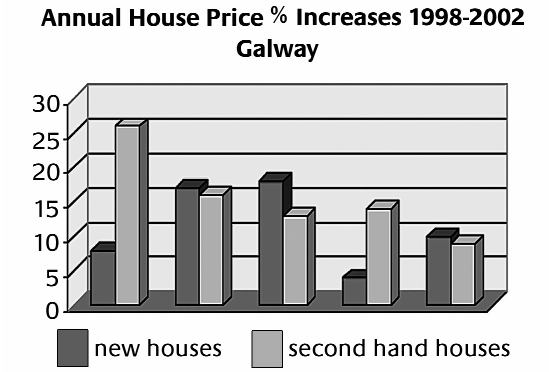


Chart 8 Annual House Price % Increases 1998-2002 – Limerick

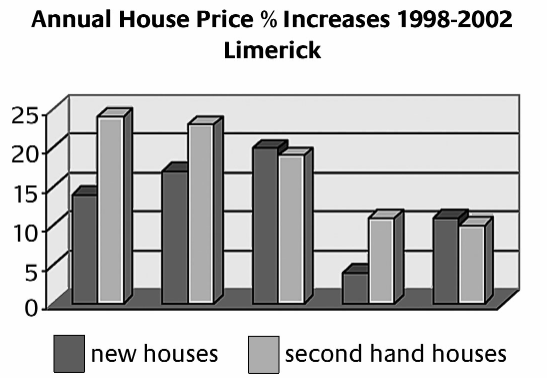


Chart 9 Annual House Price % Increases 1998-2002 – Waterford

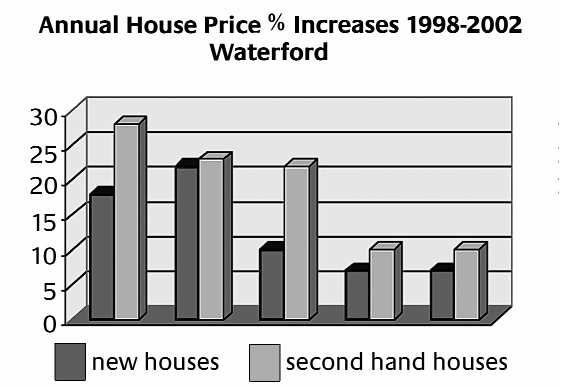


Chart 10 Annual House Price % Increases 1998-2002 – All Other Areas

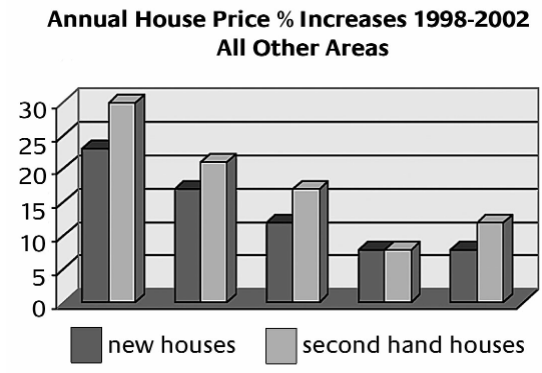


Chart 11 Private Annual Housing Supply v Annual % Price Increases [in text]

Notes

1 Draft Development Plan – Dun Laoghaire Rathdown County Council – April 2003

2 The Housing Market in Ireland – An Economic of Trends & Prospects – P Bacon June 2000

3 SCS Housing Study 2002 – A Study on Housing Supply and Urban Development Issues in the Greater Dublin Area – Prepared by the Faculty of the Built Environment, DIT October 2002

4 The Housing Market in Ireland – An Economic Evaluation of Trends & Prospects – P Bacon June 2000
5 Permanent TSB ESRI House Price Index July 2002
6 Bruce Shaw Handbook 2002
7 Part V of the Planning & Development Act 2000 – Housing Supply – Guidelines for Planning Authorities – December 2000
8 Planning & Development Act 2000 – Section 93
9 Draft Guidelines to Planning Authorities on part V of the Planning & Development Act 2000 as amended by the Planning & Development (Amendment) Act 2002 – April 2002
10 Value for Money Examination Planning Appeals – Comptroller and Auditor General April 2002
11 Chairman's Report, An Bord Pleanala Annual Report September 2001
12 CSO Quarterly Planning Permission Statistics Q1- Q4/2002
13 CSO Population and Migration Estimates April 2002 – published 5 September 2002
14 CSO Regional Population Projections 2001-2031 – published 18 June 2001
15 Kenny Report – Committee on the Price of Building Land 1973 – pages 37/38
16 Kenny Report – Committee on the Price of Building Land 1973 – page 17
17 Kenny Report – Committee on the Price of Building Land 1973 – page 25
18 Kenny Report – Committee on the Price of Building Land 1973 – page 27
19 Kenny Report – Committee on the Price of Building Land 1973 – page 30
20 Kenny Report – Committee on the Price of Building Land 1973 – page 31
21 Report of the Joint Committee on Building Land – page xxvii
22 An Economic Assessment of Recent House Prices Developments 1998 – page iv
23 The Housing Market: An Economic Review and Assessment – March 1999 – page 4
24 SCS Housing Study 2002 prepared by the Faculty of the Built Environment, DIT October 2002

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Kenny Report – Committee on the Price of Building Land 1973 –pages 37/38
Kenny Report – Committee on the Price of Building Land 1973 – page 17
Kenny Report – Committee on the Price of Building Land 1973 – page 25
Kenny Report – Committee on the Price of Building Land 1973 – page 27
Kenny Report – Committee on the Price of Building Land 1973 – page 30
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IRISH LANDOWNERS ORGANISATION LIMITED

The Irish Landowners Organisation is part of the European Landowners Organisation which is based in Brussels. We are concerned that the amendments proposed by your committee are capable of being construed in a manner which could lend itself to abuse. In particular where property rights can be qualified, restricted etc. by legislation for reasons of public policy. It could be argued that public policy can and does change with each new government.

The exigencies of the common good is a phrase which can and should be capable of objective proof where an action is taken to qualify or restrict property rights. It should also be capable of showing that there is a long term benefit to the community as a whole. However this phrase has not been adequately defined and we would strongly submit that this phrase should be so defined in such a way as to to provide a test as to whether the action in question is **necessary**. This is a particularly important safeguard where the increasing trend towards public private partnership will further

blur the distinctions as to what is really necessary when there is also a potential profit motive.

We would also submit that perhaps the best safeguard against unnecessary and profit driven interference with property rights is full and fair compensation which also takes account of the loss of viability to any enterprise that has been subject to such limitation.

We note that the European Convention on Human Rights extends protection to both natural and legal persons and we support the inclusion of this fundamental right.

We are aware of the submissions made by the Farmers and Property Owners Association which is an associate member and we are broadly supportive of the thrust of their arguments.

IRISH PLANNING INSTITUTE

1 The right to private property, private property and the common good.

The IPI wish to put forward three possible alternative systems of dealing with private property.

1.1 *Separation of ownership rights and development rights*

The right to private property as enshrined in article 40.3.2 should be altered so that the right of ownership is separate to the right to develop. This system would be similar to that in place in relation to mineral deposits. At present the right to develop minerals found under a property holder's land rests with the state and not with the landowner, and the state licenses private companies to explore for, and develop, mineral deposits.

In the same way, if the right to develop property were to be vested in the state, the state (through the planning system) could confer its rights on particular property owners to develop that property, in accordance with development plans etc. Such a separation would permit the state and its agencies, when purchasing property for infrastructural purposes in the interests of the public good, to pay the value of the property, as it stands and discounting the future potential development value of the property. This would have the effect of substantially reducing the costs of providing such infrastructure. However, the development of property, as permitted under the planning system, would not change in its major essentials.

This separation between property ownership rights and property development rights could also allow the development of a dual property system, whereby the owner of property, having obtained permission to develop it, could trade that right to develop to another person, in a similar way to the sale by a dairy farmer of a milk quota to another farmer, while retaining his property. Hence planning permission would not, as it currently does, ensure to the benefit of a particular property but could be bought and sold.

This system would also be similar to that which is operated in some states of North America whereby development rights can be purchased or traded.

1.2 *Development land tax*

Provision should be made for a development land tax applied when there is any transfer of ownership following a change in zoning. A rate of 80% would apply if the land was not developed in five years, 75% if not developed in four years and so on, on a sliding scale. The entirety of the tax would be paid not to central government but directly to the local authority in whose jurisdiction the land is located. The tax would be ring fenced for infrastructure, public transport, schools, parks, amenity provision and the compulsory purchase of roads etc.

1.3 *State ownership of newly zoned land*

An alternative approach would be for the state to be in a position to CPO all newly zoned land at agricultural values plus injurious affection (current use value plus 25%). The state would then sell off large parts at full development value to developers and use the profit to fund social and physical infrastructure for the community. This idea would be similar to that used for the post war new towns in England and also similar to the approach as outlined in the Kenny report.

2 Compulsory purchase

2.1 *Operation of CPO under a system of separation of ownership rights and development rights*

If the system outlined in one above were implemented, the system for payment of compensation for compulsory purchase of land would be altered. At present compensation is based on the value of land in an artificial world i.e. Value to be compensated is based on the land being prime development land and any planning controls on the land are disregarded.

Under a system of transferable development rights and a climate of two markets a landowner would not be compensated for the potential development value of the land as the development value would rest with the state. Only the ownership would rest with the owner. Compensation would only be given to the landowner for injurious effect – i.e. if the proposed development on the lands to be compulsory purchased would have an adverse effect on the landowner.

2.2 *CPO under a system of development land tax*
If a system existed whereby a development land tax applied, local authorities would be in a position to buy land and obtain the tax back. In instances where local authorities purchased land the 80% tax would automatically go to the local authority thus effectively ensuring that they were purchasing the land for 20% of the value allowing the remainder to benefit the community.

2.3 *CPO under state ownership of newly zoned land*
Under the system proposed in point three above the state would purchase newly zoned land at a current use value plus 25%. This figure would be below the values currently paid for such land and would vastly reduce the amount paid in the CPO process at present.

3 The zoning of land

3.1 *Process*
Zoning of land occurs through the development plan process and is governed by the Planning and Development Act 2000. Under section 10 (2) (a) a development plan must contain objectives in relation to the zoning of land. Under section 11 (4) (d) the elected members of a planning authority may issue directions to the manager of a local authority regarding the preparation of any draft development plan. Experience has shown that many of these directions relate to the zoning of land. The manager then prepares a draft plan, which is considered by the elected members. Prior to public display, this manager's draft plan may be amended and then becomes the elected members draft plan. Experience has indicated that amendments also often relate to zonings.

In accordance with section 10 (1) a development plan shall set out an overall strategy for the proper planning and sustainable development of an area. However there is no onus inferred in the Act for elected members to give any planning reason when issuing directions in relation to what to include in the draft plan or when later they may amend the plan. Experience has shown that sometimes neither the planner's advice nor the manager's advice in relation to zoning issues is taken. Yet the elected members do not have to give reasons as to why this advice is not taken.

This practice has led to serious public disquiet about the fairness of the whole planning system, and also a disrespect for elected representatives as a whole, especially at local authority level, based on the perceived failings of a minority of councilors and parliamentarians. Such a development has obvious detrimental implications for the future of our democratic institutions generally.

A number of improvements in relation to the zoning of land could ensure greater transparency and accountability, and reduce the public perception of unfairness in the system.

Firstly, directions given by elected members under section 11 (4) (d) of the Planning and Development Act 2000 which relate to what shall be included in the managers draft development plan should not be given in respect of zoning of land. At this *pre-draft* stage in the development plan preparation process neither the local authority planners nor the manager has yet recommended a strategy for the proper planning and sustainable development of the area in question. Therefore it is premature for elected members to give directions in relation to the zoning of specific landholdings. At the *draft* and *amended draft* stages of the development plan process elected members should not be permitted to give directions in relation to the zoning of particular land holdings unless the direction is in response to a submission made in respect of same. Any direction must include reasons to explain how the direction accords with the proper planning and sustainable development of the area.

Secondly, where a county plan (or indeed a local area plan) is being reviewed, and changes are sought in zoning or in policies for development, all submissions to the draft plan or amended draft plan (whether they be from landowners, builders or residents and community groups) should be heard in the first instance, in public open session, by an independent inspector. This inspector would have to have regard to the views of the local authority planners on these submissions. This inspector, who might be appointed by the department or by An Bord Pleanála, would then report to the councillors, in a written public report, on the proposed rezoning or other changes and on their acceptability from the point of view of proper planning and sustainable development. To preserve local democracy, it would still be for the councillors to make the plan, but they should be required to state their reasons for doing so, and in a public forum. If they went against this, outside objective and public advice, the electorate would be entitled to draw their own conclusions.

Thirdly, to avoid the problems which have become evident, where zoning decisions are made by a simple majority of councillors who happen to be there on the day of the vote, all rezonings – all changes in zoning in plans – would have to obtain a three-quarters majority of the council in order to pass. (This already applies to material contraventions, so members are already used to the process). It would ensure

that only those rezonings with a wide measure of political support would get through, and of course would make any future attempts to 'influence' such decisions much more difficult.

3.2 *Outcome*

The zoning of land under the present system invariably results in a windfall for the landowner with little common good accruing to the public and no benefit to those who have not been zoned (point 1 above has already outlined means of rectifying this situation by learning from the models used in North America and Holland). It is recognised that the development need actually arises from the community demand with the community receiving no gain.

One tool which could ensure community benefit could be the introduction of an additional tax in respect of profits (on capital appreciation) accrued to individuals as a result of lands being zoned for development (in particular agriculture to residential). These taxes would be paid to local government. It is hoped that this would allow planning authorities to engage in a more proactive manner in respect of CPO (being better funded). They could in effect purchase lands that were not being released quickly enough and which were inhibiting sustainable and comprehensive development of an area. The local authority could then sell it on the open market to developers.

There is sometimes a perception amongst landowners that only 'well connected' developers will be 'bestowed' with the benefit of zoning by councilors although this is now changing. A high DLT would remove much of the incentive for developers to speculate on land.

4 Access to the countryside

There is a need for legislation for landowners which would allow people enter land at their own risk – an open countryside policy which puts the responsibility on the individual thus ensuring that farmers and landowners can welcome people onto their land. Such an open countryside policy operates in Sweden where an individual can enter land provided that it is not tillage land or within 100 metres of a dwelling unit. Farmers and landowners are vindicated against injury unless there is evidence of gross negligence.

An alternative system could ensure that payment be made to farmers in respect of the maintenance and upkeep of signposted walks only. Such payment should come from the national exchequer having regard to the benefits accruing to national tourism from a comprehensive system of routes. It would be a matter for local authorities and/or regional tourism organisations to designate such routes.

IRISH SENIOR CITIZEN'S PARLIAMENT

1 INTRODUCTION

The Irish Senior Citizens Parliament in making this submission is conscious of the complex nature of the issues which affect housing provision in Ireland. While the right to property is an important right in a democracy it should not be a superior right to that of the right to adequate shelter for individuals and families. The right to private property has been exploited by speculators to the detriment of the rights of citizens to acquire accommodation to meet their housing needs, at an affordable cost. There is an urgent need to deal with this issue before the housing crisis worsens.

1.1 A solution will require an evaluation of the role of private property in society and how this right can be exercised in a way which is fair to property owners and the rights of citizens to acquire accommodation. The right to private property must be balanced by the duty of private property to the community who guarantees this right. It is an affront to our society if the guarantors who protect this are in turn exploited by property owners.

1.2 While recognising that some efforts have been made, mostly in the area of incentives, to solve the problem the Parliament believes that these measures are only short-term and will not be a long-term solution to this problem.

1.3 Every person should be enabled to have available to them an affordable dwelling of good quality, suited to their needs, in a good environment and with security of tenure.

1.4 Those who can afford to do so should provide housing for themselves with the aid of fiscal incentives and those who are unable to do so from their own resources should have access to social housing or income support to rent private housing.

1.5 Increases in Ireland's wealth resulting in higher incomes and the number of people in the age bracket 25-35, the scarcity of serviced land and low density housing, have created a serious problem in the housing market in Ireland which is being felt in all parts of the country, with Dublin faring worse than all other areas. House prices in Dublin, both new and second-hand, are significantly higher and increasing at a faster rate than in other areas, even other cities.

1.6 Another factor affecting the housing market is the higher rate of owner occupancy (around 80 per cent) which contributes to low density housing, resulting in a shortage of supply of

serviced land. Demand for housing is also affected by migration flows and with demand for housing being estimated at up to 56,000 units per annum to the year 2006 this presents a formidable challenge to our community to find a solution for what potentially can become a very serious social problem.

1.7 House prices are greatly affected by the cost of land and with serviced land being in short supply, and with delays brought about by the planning process, which is particularly a problem in Dublin where developments are generally larger, has led to a situation where young people on average earnings cannot afford a house and often find when they have put a deposit down that the agreed price has been increased and they are now unable to complete the contract.

1.8 The entry of investors into the housing market has also driven up house prices by reducing the amount of houses available to first time buyers and while these houses may be available for renting the number of units available are reduced because the amount of land needed for the building of single unit dwellings is greater than what would be required for apartment style units.

2 SOLUTIONS – PRIVATE HOUSING

The solution to the housing problem must be tackled on a number of fronts all of which are dependent on an increase in the availability of serviced land. The mix of solutions including that of owner occupation, social housing, rented accommodation and accommodation provided by co-operative groups must be given a higher priority on the government's agenda.

2.1 **Housing commission**
There is an urgent need to establish a housing commission to develop and oversee the implementation of policies which will deal with the housing problem, not only in the short term but also in the long term.

- The establishment of a housing commission is strongly recommended.

2.2 One of the functions of a housing commission should be the creation of a land bank and while it is morally unacceptable that land should be the subject of the vagaries of the free market, a fair price and compensation for loss of amenity should be paid to original land owners and speculative investors should be prevented from making profit from the need for housing. In this regard, it will be necessary to re-examine the property article in Bunreacht na hÉireann which strongly emphasises the right to private property but is totally silent on the duty of property.

2.3 The creation of a land bank will require the government to make the necessary resources available for this purpose including resources for the servicing of the land. The effect of this should be to greatly increase the availability of serviced land which can be made available to private developers and local authorities at a more reasonable cost, resulting in a reduction in the overall cost of housing.

3 SOCIAL HOUSING

As well as providing an opportunity for people to become homeowners, there is a continuing need to improve the provision of social housing. Even with an improvement in supply of serviced land there will be a continuing need to provide social housing. Low income earners will be unable to provide housing from their own resources and state intervention will still be required. The waiting list for local authority housing is growing daily, an indication of this is the waiting list figures. There is a total of 7,000 on the Dublin City Council waiting list and the total for all local authority areas is 48,313, as per the Housing Review September 2002. The Housing Completion Programme for all Local Authority housing in 2002 was only 4,440.

3.1 These figures clearly demonstrate that we are not meeting the need that exists for social housing and a substantial increase is required in the local authority's building programme to meet the needs of those whose needs cannot be met in the marketplace.

3.2 Some earners have difficulty in getting a mortgage to buy a house and more are seeking to go on the social housing lists of the local authorities. The average income earner finds they cannot meet the criteria of the mortgage lenders. The entry of investors into property markets sustains demand at a high level and keeps prices escalating. Strong demand for accommodation has led to a significant capital appreciation for housing speculators.

3.3 The income eligibility limit for social housing needs to be raised. While shared ownership has made some contribution to easing the housing problem the rental side of this scheme requires to be offered on more favourable terms to enable more people to avail of this option. Repayment of the mortgage part of shared ownership should be spread over a longer period.

4 NEW TOWNS

The creation of new towns is necessary if we are to tackle the housing crisis. While the land bank in Dublin is almost eroded, it is important that new land is found at a distance to the city that makes it possible for people to commute. Serviced land needs to be provided near railway and road links to the city, in which

a large number of people could be housed. It is also desirable that industrial development should take place along similar lines. In other words, there should be an integration between the policy to build new factories and to provide accommodation. Unless this approach is taken, the housing crisis will accelerate with its consequential effects.

5 PERSONAL AND FAMILY LIFE

Older people often live in larger housing units than they require. In partnership with local authorities older people could be given more suitable sheltered accommodation in groups of 20-40 dwellings with support services to assist them to have independent living. This could have the effect of freeing up many more houses for younger people. In order to make such a scheme attractive for older people there would have to be an improvement in the welfare facilities, with the provision of dining areas, recreation rooms, laundry rooms and other amenities that would make it attractive for older people to live in these complexes. The provision of a warden service and health services at these complexes would also make it more attractive for older people to avail of accommodation in these senior citizens complexes. If older people could be attracted to such complexes, many more houses could become available on the market and, because of the involvement of the local authority, these houses could go to those who are most in need.

6 CO-OPERATIVE HOUSING

Housing co-operatives can play a major role in assisting those on middle to low incomes to achieve suitable housing to meet their needs. The housing commission, when it is established, should provide housing co-operatives with serviced land at a reasonable price to build houses for members of the co-operatives.

6.1 With the availability of serviced land and with savings on building costs, many would be in a position to purchase houses which are now denied to them through the present market mechanisms.

7 CONCLUSION AND RECOMMENDATIONS

The Parliament believes that the housing shortage could lead to serious problems which will have long-term detrimental affects on personal and family life, and on the whole of society. There is an urgent need to develop radical solutions to this problem.

Every effort needs to be made by the state to seek a long-term solution and, as far as easing the problem in the short-term is concerned, traditional methods are not working and a more radical and imaginative approach is required.

7.1 The creation of a housing commission to oversee the development and implementation of policies to solve the problem is required. The commission would be required to have statutory powers to operate its mandate which should include:

- the securing of a land bank to have available serviced land at a reasonable price to local authorities and housing co-operatives, and developers, to provide low and middle income earners with affordable houses.
- to establish a fair system of compensation for owners whose lands are obtained for development purposes.
- the elimination of speculators from the purchase of land for development purposes.
- to develop a policy which ensures that potential house purchasers are not exploited by developers.

7.2 The Irish Constitution enshrines the right to private property. To deal with legal issues affecting the use of land for social purposes there is a need to amend the Constitution to reflect the duties of property as well as its rights and it is recommended that immediate steps are taken by government to address this issue.

IRISH SMALL AND MEDIUM ENTERPRISES ASSOCIATION

I am writing with respect to the impact of Articles 40.3.2 and 43 of the Constitution on the ongoing housing crisis as a consequence of the lack of affordable land.

Very high land costs directly affect Ireland's competitiveness in two areas. They make housing unaffordable for young workers and they delay indefinitely the prospect of closing the deficit between Ireland's transport infrastructure and that of developed competitor countries. Among companies, SMEs are the worst affected by a society in which their young workers cannot get to work on time. Vested interests – principally landowners and their financiers – strongly argue against any 'interference' which would restore competitiveness to the market for building land. Weight of money plus an opaque basic property law (Articles 43 and 40.3.2) will continue to buttress high land prices.

In order to address the issue ISME would encourage a Constitutional amendment along the lines suggested by the Whittaker's Expert Group, which would rein in private property rights when the public good demanded it. The Whittaker's Expert Group on the Constitution recommended replacing two conflicting, confused Articles with a single Article. It would affirm the right to own and transfer private property, but would also set out clearly when such property could be taken over in the interests of the common good.

IRISH TRAVELLER MOVEMENT AND PAVEE POINT

The Irish Traveller Movement and Pavee Point feel it is imperative for the views of Travellers to be recognised in any consideration of a constitutional review of property rights, and are obliged for the opportunity to submit the observations that follow below.

INTRODUCTION

As a preliminary, it is relevant to point out that, in terms of the ownership of property in the state, Travellers own a very small share of the wealth in proportion to their numbers. This means that Travellers as a group suffer from extreme economic and social disadvantage that permeates other aspects of their well being, such as physical and mental health, education, and leisure. The ownership of property is the ownership of wealth, and by extrapolation, is the means to a standard of living that enhances the well being of the person to whom it belongs.

It is an interesting aspect of Irish history that Travellers traditionally tended not to accumulate land. Up to the present day this is a side effect of their nomadic way of life; moving from place to place in mobile dwellings and availing of open spaces to fulfil their need for shelter. This way of life has a minimal impact or interference with the use and ownership of land. Travellers usually occupy marginal tracts of land not in use for any other purpose, and by definition their use of the said land is temporary. When stopping on their travels, Travellers at least historically engaged in a number of economic activities that would generate sufficient wealth for their day to day needs. However in recent years, both public and private land, has increasingly been closed off from use by the Traveller community, such that, their traditional way of life has been subordinated to the private property rights of others. Public authorities, facilitated by ever more draconian powers of eviction, have begun to treat public property as if it were 'private property' under the control of the state. Travellers now find that it is almost impossible to continue a nomadic way of life, at least on a full time basis, and therefore they are forced by necessity to step over the paradigm distinction between themselves and the settled community, that is, the need to acquire property rights over land.

However, there is an element of the vicious circle in this cycle as the ownership of property, especially in light of the huge explosion in property prices in Ireland in recent years, requires wealth, wealth that members of the Traveller community usually do not possess. Although there have been moves in recent years by the legislature to provide for the accommodation needs of Travellers, there is still much to be done.[1] Whether this is a question of political will or the need for constitutional reform is a matter for the Oireachtas Committee to determine. What the Irish Traveller Movement and Pavee Point wish to do is inform the debate around property rights and place the analysis in a Traveller context.

We have had the advantage of seeing the submissions made by Threshold, the Irish Council for Civil Liberties and CORI. The Irish Traveller Movement and Pavee Point would strongly endorse the observations and recommendations of those organisations. Rather than reiterating what has already been stated in those submissions the following will reflect the concerns of Travellers in relation to their need for appropriate accommodation.

THE RIGHT TO SHELTER

Article 11.1 of the International Covenant on Economic, Social and Cultural Rights, expressly obliges all state parties, of which Ireland is one, to ensure adequate housing for all:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions.

This is a clear and unambiguous statement of the mandatory obligations that each state party has undertaken to fulfil under the covenant.[2] Other human rights instruments recognise the right to own property, either as an individual right or in association with others. The European Convention on Human Rights expresses this right as follows:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provision shall not, however, in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

It is clear that, similar to the Irish Constitution, international human rights instruments protect the institution of private property, but always with the caveat that this is not an absolute right, and must cede to the common good where this is deemed by the state to be necessary or desirable.

Perhaps this is the nub of the dilemma that any attempt at Constitutional reform must grapple with. Where does one draw the line between the competing interests of private property and the requirements of social justice, and how can this be expressed in a legal instrument that can then be translated into concrete law by the domestic courts. The Constitution is the most fundamental expression by the people of Ireland, of the norms and standards we wish to see upheld, and

therefore reflects the kind of society we wish to live in. The Constitution should be an instrument that allows the realisation of a state where the welfare of everyone is paramount. Land is not an inexhaustible commodity but yet in one form or another the use of land is an irreducible minimum for human existence. Seen in this context, the state, charged with ensuring the well being of all those within its jurisdiction, has a very important role in ensuring the rights of those who own property are not allowed to take precedence over the needs of those who do not. In other words, excessive profits should not be allowed to arise from the fact that others do not have the means to access even a minimum of this scarce resource.

If a right to shelter is acknowledged then this should be a maximal rather than minimal concept. The right to shelter should not reinforce conditions of deprivation and segregation. Travellers have had the experience of being provided with accommodation on halting sites only to find that they enjoy a better standard of living on the side of the road. Where the state intervenes to provide or support people in the provision of accommodation, then its appropriateness should be measured against standards of habitability, services, amenity, and location.[3] It is a serious attack on the dignity of the Traveller community to be placed in large compounds with little or no regard for family unity, minimal services, cut off from their surroundings by high walls and placed in locations that are clearly unsuitable for residential accommodation, but yet the Constitution does not clearly embody a provision that would address such a situation.

SECURITY OF TENURE/EVICTIONS

Property rights can run the gamut from outright and exclusive ownership, through to mere licenses to use or rights to avail of the resources of land.[4] In a manner of speaking, nomadism exists outside the cognisance of property rights. Concepts related to interests in real property are more familiar to members of the settled community than the Traveller community. Therefore the idea of security of tenure was never part of Traveller culture.

However, as remarked above, the traditional lifestyle of Travellers has been severely curtailed over recent years. It is very unlikely that a Traveller would succeed in claiming a legally enforceable right to occupy the lands of others on a transient basis, even where they have been visiting the same sites since time immemorial. Also with the ongoing formalisation of public services, such as education, social welfare and health, there is a need to secure a fixed address to avail of such services on an ongoing basis. Thus security of tenure has become as important to the Traveller community as it is for the settled community, irrespective of whether some continue to pursue a modified form of nomadism.[5] However the laws of the state are specifically designed to outlaw nomadism, even going so far as to turn it into a criminal offence.

Section 10 of the Housing (Miscellaneous Provisions) Act, 1992 as amended by Section 32 of the Housing (Travellers Accommodation) Act 1998 and more recently Section 21 of the Housing (Miscellaneous Provisions) Act 2002, gives both local authorities and the Gardaí extensive powers to evict Travellers who are occupying public or private property within their functional area. While Section 10 and Section 32 create some kind of tenuous nexus between the obligation of local authorities under the housing legislation and the power to evict, the new Section 21 contains no such qualification, and gives the Gardaí the power to require the owner of a temporary dwelling to move it without the need to issue a Notice if the person is occupying the land without explicit consent. If a person fails to comply with the instructions of the Gardaí they may be guilty of a criminal offence and may have the 'object', more properly regarded by the perpetrator as their home, confiscated. This is an extreme form of interference with personal property.[6] While the Constitution presently protects the right to private ownership of external goods, it does not deal with the internal tension between the rights of various property owners, nor between the ownership of a home without the ownership of land. This difficulty could be addressed by constitutional recognition of the right to appropriate and adequate accommodation. Such a right would at least invalidate laws such as the Housing (Miscellaneous Provisions) Act 2002 which decouples accommodation needs from powers of eviction when they relate to Travellers.

It is relevant to point out that the Committee of Economic Social and Cultural Rights has made extensive observations regarding forced evictions, which they define as follows:

> the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection.[7]

When we consider Irish law, it is in stark contrast to this imperative. All the local authorities are required to do is provide twenty four hours notice of an eviction. Aside from any consideration of the substantive grounds on which local authorities can exercise this power, twenty four hours is a flimsy illusion of legal protection, when in fact it is almost impossible to secure legal representation in that time, or indeed to access the courts in order to challenge the validity of such an eviction notice. The Committee in its observations goes on to state that:

> Even in situations where it may be necessary to impose limitations on such a right [the right to adequate housing], full compliance with article 4 of the Covenant is required so that any limitations imposed must be 'determined by law only insofar as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society'.

This is a clear enunciation of the principle that nobody should be subjected to a forced eviction without due process of law. It also parallels the wording of Protocol 1 Article 1 of the ECHR which refers to the 'peaceful enjoyment of ..possessions'. It seems that the Constitution does not go far enough in protecting the property rights of Travellers and their particular circumstances as nomads.

CULTURAL CONTEXT OF ACCOMMODATION

The Irish Traveller Movement would urge that the discussion around the right to shelter is not one that is reduced exclusively to a consideration of housing. Accommodation in the Traveller context has a much broader meaning and encompasses tradition, culture and preservation of family ties. For Travellers these are the minimum indicia of an effective right to shelter. As already stated, an essential part of Traveller identity is nomadism. The natural tendency when discussing the right to shelter is to equate this with the need for everyone to have adequate fixed housing. However, when addressing the needs of Travellers, an approach is required that does not diminish their very identity. In this regard, recent Irish legislation has given some recognition to the fact that a variety of provisions by the state is more suitable to the Traveller Community. In drawing up Traveller accommodation programmes local authorities in conjunction with local consultative committees have considered the need for halting sites, individual housing and group housing schemes, as well as transient sites.[8] The reality of the realisation of these programmes is another issue. However, one lesson that can be taken from the experience of Travellers is that one size does not fit all, so Constitutional reform addressing the basic human right to shelter should always acknowledge that different sections of our society have different needs, and accommodation should be culturally appropriate.[9] The question of appropriateness should be judged from the perspective of the end user rather than the provider.[10]

THE ZONING OF LAND

It is submitted that the present position is unsatisfactory in that the procedures governing the granting of planning permission are inappropriate to the development of halting sites, in a number of respects.

1 The lead time involved in an application for planning permission is too long. Under the Planning and Development Act, 2000, a planning authority generally has a period of eight weeks within which to determine an application. If the matter is then appealed to An Bord Pleanála, there is a non-binding time period of eighteen weeks. The equivalent time limit under the previous legislation was only met in 29% of cases in the year 2001.[11] Thus, it can be some six months before an appli-cation for planning permission is finally decided. During this period, the Travellers concerned are on hazard as to enforcement action. It is submitted that this uncertainty is unacceptable where a person's very home is in jeopardy.

2 There is no express requirement for An Bord Pleanála or a planning authority to take into account the provisions of the Traveller accommodation programme in determining an application for planning permission.

3 The power to grant temporary planning permissions is not employed as often as it might be. It is submitted that An Bord Pleanála or a planning authority should be entitled to take into account the reality of the delays in providing halting sites, and in the interim should be prepared to grant planning permission on a temporary basis pending the provision of more suitable accommodation.

4 The present procedure is signally inappropriate for regulating transient halting sites. The nomadic culture of the Travellers dictates that a certain number of short term or transient halting sites be available. Typically, the lands involved will only be used as halting sites for a number of weeks or months a year and at other times the lands revert to their usual use. Obviously, the lead time involved in the determination of an application for planning permission is a particular issue in this context.

CONCLUSION

In summary the Irish Traveller Movement and Pavee Point would submit that Ireland is in breach of its obligations under Article 11 of the Covenant on Economic Social and Cultural rights, and could address this breach through incorporation of the substance of the said Article into domestic law by referendum. Additionally any proposals to review property rights as protection by the Constitution should take into account the following matters:

- The hierarchical structure in the Constitution where private property takes precedence over the common good should be rebalanced. The Constitution should enshrine the right of the state to step in to regulate the relationship between supply and demand in the accommodation market and where necessary to enable the state to bridge the shortfall on the supply side, where people do not have the economic means to access the market.
- Where the state does take on the role of supplier then it should be constitutionally obliged to ensure that accommodation is adequate and appropriate.
- Protection against arbitrary evictions should be put on a constitutional footing.
- Constitutional recognition that the Traveller community has a cultural right to pursue a nomadic way of life and the state should be obliged to vindicate that right in so far as possible.

- Planning laws, aside from ring fencing on behalf of the state any substantial increase in the value of land as a result of decisions to rezone, should be rethought to take into account a greater multiplicity of development that would acknowledge the unique needs of Travellers.

Notes:

1 See The Housing (Traveller Accommodation) Act 1998. There are presently 1,200 Traveller households living on the roadsides in Ireland, almost invariably without facilities.
2 Article 31 of the European Social Charter, which Ireland has ratified also contains a right to housing.
3 Affordability, habitability, accessibility, location, cultural adequacy, security of tenure, availability of services, materials, facilities and infrastructure, are all standards recognised by the Committee on Social, Economic and Cultural Rights, General Comment No.4 The Right to Adequate Housing (1991).
4 For example Rights of way, Profits a Prendre, and rights of common of pasture.
5 Many members of the Traveller community now may travel during the summer months, while schools are on holiday, while still maintaining a fixed address to return to where possible.
6 This is not with standing the fact that such legislation may be open to Constitutional challenge under the provisions of Article 40.5 which protects the inviolability of the dwelling.
7 The right to adequate housing (Art 11.1): forced evictions:. 20/5/97 CESCR General Comment 7.
8 Housing (Traveller Accommodation) Act 1998.
9 Other sections of the community that have particular needs, would be those with disabilities and the elderly amongst others.
10 Another example where property rights might need to be adjusted to the needs of a community is in the context of promoting the use of the Irish language in Gaelteacht areas. Planning restrictions have also been used in rural areas to avoid local needs being submerged by an influx of people not from the locality. This can cause an inflation in the cost of housing, put pressure on local services, without making any beneficial contribution to the community.
11 An Bord Pleanála, Annual Report, 2001

IRISH UPLANDS FORUM

The Irish Uplands Forum is a voluntary organisation promoting sustainable economic and ecological development in the uplands. Please refer to Appendix 1 for more information about the Forum.

Our membership includes farmers and other landowners, rural partnerships, recreational users, environmentalists and observers from state and semi-state bodies. This wide membership enables us to make an authoritative submission to the committee on the subject of access to the countryside

The Irish Uplands Forum has studied Article 40.3.2 and Article 43.2.1 and .2 and considers that if applied in a balanced manner these are compatible with the wider access to the countryside which we consider necessary for the recreation and health of the Irish people, and for the development of rural tourism, especially walking. However we have to point out that up to the present the provision of Article 43.2.2 for the delimit by law of property rights for the common good has rarely, if ever, been exercised by the state.

The wider access which we consider necessary is, in the main:

1 waymarked Ways, both long-distance and local
2 agreed access routes from the public road to the open hillside
3 sustainable and reasonable access for responsible walkers to the open uncultivated uplands

The wider access to be coupled, for the landowners involved, with:

- indemnity from any claims by recreational users
- compensation for damage to property by recreational users
- tax relief to compensate for the general 'wear and tear' on the land by recreational use
- payment for work done in caring for and maintaining paths across their property.

Finally, the wider access to be coupled, for user organisations, with education in the sustainable and responsible use of the countryside.

We consider that all these can be obtained by applying, in a balanced fashion, the existing provisions of the Constitution.

In a broader context, the aim of the Irish Uplands Forum is to promote Chapter 14 of Agenda 21 which deals with fragile environments such as mountains. We feel that a statement of commitment by the state to promoting sustainable development should be included in the Constitution.

Appendix 1 (abbreviated)

IRISH UPLANDS FORUM

1 AIMS AND OBJECTIVES

a) To facilitate conflict resolution in upland areas by:
   1) promoting demonstration projects concerned with a partnership approach to managing sustainable development in mountain areas
   2) organising seminars and study visits with the aim of enabling local groups to define and solve problems through a consensus approach

3) publishing the proceedings of such seminars and study visits
4) promoting and commissioning research on sustainability issues in Irish upland areas.

b) To establish a resource centre and information system on international good practice in sustainable development in mountain regions.
c) To advise statutory agencies with responsibilities for upland areas on problems and opportunities for sustainable development in Irish upland areas.
d) To establish communication and co-operation with organisations concerned with sustainable development in mountain areas in other countries.
e) To engage in any other and all activities concerned with, or supporting sustainability in Ireland's upland regions

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KEEP IRELAND OPEN

We give hereunder our submission which is limited to access to the countryside.

Our objectives are limited to ensuring reasonable access to the countryside. We are satisfied that this cannot be achieved without legislative change.

BACKGROUND

In the last ten years or so, there have been increasing problems with access to the countryside, particularly on the western seaboard. Hitherto open commonages have been divided and fenced, access has been denied to beaches, archaeological sites and other amenities. In addition, traditional walking routes, mass paths, 'green roads', etc. have been blocked by landowners. As well as affecting the rights of our citizens to have reasonable access to the countryside, it is now acknowledged by An Bord Fáilte that lack of legal access to the countryside is seriously affecting walking tourism, which they say is now a significant sector in the tourism business.

As there is no specific reference in Bunreacht na hÉireann to this issue, it can be contended that legislation to provide reasonable access to land can be enacted within the confines of the present Constitution which cites principles of social justice (43.2.1) and the exigencies of the common good (43.2.2).

We surmise that the reason for this omission is that the matter was not considered in 1937 because there was a de facto freedom to roam. We now submit that there must be a specific Article on this undoubted natural right. Accordingly we submit that a new Article should be added, perhaps on the following lines

> The State acknowledges the right of access to land, regulated by law, in a manner and at locations compatible with protection of the environment, the carrying out of agriculture and other legitimate uses of land, privacy and other appropriate considerations.

We suggest that a study of the laws/Constitutions in other countries should be undertaken. In particular, Sweden stands out as a good example. The *Allemanstratt*, a common law of access pre-dates their Constitution. It simply provides that everybody is entitled to walk across somebody else's land provided s/he does not come to close the owner's dwelling.

It would appear that our other main requirement – the amendment of the Planning and Development Act 2000 to provide for mandatory rather than optional listing of public rights-of-way in county development plans – does not require constitutional change.

In conclusion, Keep Ireland Open wishes to ensure that the necessary legislation as outlined above is not struck down by the courts as being repugnant to the Constitution and we would hope that the committee will bear this in mind in their review.

KILDARE PLANNING ALLIANCE

1 INTRODUCTION

Kildare Planning Alliance welcomes the opportunity to submit comments on what it considers to be an issue of vital national concern. Perhaps no single issue has contributed to the quality of life problems besetting modern Ireland more than this one and it is vital for the future development of the state that the conflict between private and public good is effectively addressed as soon as possible.

2 PRIVATE PROPERTY RIGHTS: THEIR ROLE IN CURRENT PROBLEMS

A strong commitment to the protection of private property is a characteristic feature of the Irish Constitution. This derives from its origins when widespread concerns existed regarding the authority of the state vis a vis the rights of individuals. It is entirely understandable that these concerns would manifest themselves in the Constitution deriving as it does from a particular historical context. However, it is now appropriate to review these issues and to examine their suitability for modern conditions.

We start from a number of premises:

2.1 The present landscape of Ireland is shaped as a result of land use decisions made either by private or public interests. This is apparent in both rural and urban areas throughout the state. Overwhelmingly private property considerations dominate. It is also the case that public intervention in the rights of private property owners to do what they wish with their properties came

later in Ireland in comparison with other similar states in Europe. The planning process is still not accepted universally throughout Ireland as a means of reconciling community and private property rights.

2.2 Land use decisions represent a long term and often irretrievable commitment of resources. Getting it wrong has potentially disastrous long-term consequences for citizens in terms of environmental quality and quality of life, natural and built heritage protection among others. Such a situation is now occurring in Ireland and is likely to deteriorate further in the absence of radical political initiatives. The committee has a responsibility both to provide leadership and also to safeguard the future social and physical landscape of Ireland. It is an opportunity which should not be squandered.

2.3 Current trends suggest a bleak future awaits residents of Ireland in many of these areas. Specifically, the lack of political will to enforce strategic planning policies is now rapidly destroying the quality of life for many residents of the Greater Dublin Area. The same inertia is also simultaneously draining the lifeblood from sparsely populated peripheral parts of rural Ireland into overblown settlement centres incubating major future social problems. The transformation of the countryside from a production role into a peri-urban dormitory function continues to exacerbate congestion and creates long term concerns re environmental and social sustainability.

2.4 Private property rights are at the root of many of these problems and it is essential that these be addressed urgently.

2.5 A major cause of the problems referred to arises from the windfall profits derived from land rezoning. This continues to subvert rational planning objectives in many areas and must be tackled by the committee in our view.

3 AVENUES OF APPROACH

Kildare Planning Alliance considers that the private property rights enshrined in the Constitution have resulted in a disproportionate influence being exercised by private property asset holders as compared to considerations of the public good. We believe that the situation requires major rebalancing. Specifically we direct your attention to the following:

3.1 Excessive windfall profits from the rezoning of private property must be removed from the planning process. The mechanism for achieving this is difficult to see clearly and it may be that international models should be studied. But we believe that reform of the existing process, even to the point of removing local authority involvement in rezoning decisions, is the most important single step the committee can undertake in its recommendations.

3.2 It is clear that capital gains tax is frequently avoided on land revaluation gains in Ireland. In any event such tax is not comparable to current general tax levels elsewhere in the economy. Recent reductions in the rate of capital gains tax to stimulate the release of residential development land have not produced the desired result. We recommend that where a local authority requires additional land resources for residential, amenity or industrial use, such lands shall be identified in development plans and the option of rezoning be offered to the landowners concerned. Rejection of the offer by the landowner concerned would be acceptable, in which case the local authority would not proceed with rezoning for the parcel concerned. Acceptance of this offer would confer upon the landowner an obligation to deposit with the Revenue Commissioners a monetary amount equivalent to a dominant proportion of the post rezoning value of the lands concerned. This value would be determined by the local authority on the basis of prevailing land values for particular uses in the vicinity. It would be incumbent on landowners wishing to avail of this option to raise such finances from their own resources or from developers interested in purchasing the land. Such a procedure would also release land zoned for development more quickly into the development process. At present this does not occur and private property rights ensure that rezoned lands may be hoarded for commercial reasons or for purposes of raising capital for other purposes. It must be stressed that no requirement on a landowner to accept a rezoning offer is required, nor shall submissions to local authorities by landowners requesting rezoning be entertained under this scheme. We would however urge the committee to investigate other models which might achieve the same objectives.

4 INFRASTRUCTURAL CONSIDERATIONS

4.1 The common good also required that essential infrastructural development not be excessively impeded by private property rights considerations. This has been extremely detrimental to the pace and delivery of infrastructural improvements in Ireland in recent years. The issues are similar to the rezoning issues described above. Once again we urge that compulsory acquisition powers be strengthened and streamlined and that compensation payments for lands acquired under compulsory purchase orders be strictly made at agricultural land use values.

5 LAND USE PLANNING/NATIONAL SPATIAL STRATEGY

5.1 The failure of the state to implement effective strategic planning guidelines is the single most damning shortfall in the present situation. We refer your committee to the comments by Justice John Quirke concerning this matter in the recent landmark case relating to Meath County Council. A political commitment to make compliance with the SPGs legally binding for local authorities in the Greater Dublin Area and to provide legislative strength for the National Spatial Strategy is imperative. Such a commitment has often been hinted at in the past but never delivered on. However recent comments by the minister and a lack of activity by the Department of the Environment, Heritage and Local Government in this matter give little cause for confidence that a serious effort to address these issues is currently a priority and without it the committee is in our view engaged in a fruitless exercise.

6 ACCESS ISSUES

6.1 Access to the countryside is increasingly important for a highly urbanised society, one in which amenity open space and recreational facilities have been excessively diminished as a result of the land/profit scramble in our towns and cities. In the view of Kildare Planning Alliance, subsidisation of rural landowners by the taxpayers of the towns and cities confers upon them certain rights. It also imposes on them certain responsibilities. Trespass on lands, where this is non destructive, should be removed as a breach of the existing law. Access to national monuments, sites of scientific interest and natural heritage areas should be legally the right of any citizen of the state and steps to ensure this are urgently required. Access to the foreshore also should fall into this category. It is suggested that any landowner in receipt of state funding through agricultural support mechanisms, heritage support subsidies or rural development subsidies shall be subject to allowing passive access through their lands for educational, recreational or scientific purposes.

KILKENNY COUNTY COUNCIL

PRICE OF DEVELOPMENT LAND

In Kilkenny City the zoning of land from agriculture to housing can change value from €8,000 an acre to €250,000 plus per acre.

In most cases infrastructural services have to be provided to service zoned lands, the cost of which largely comes from public funds. It is also increasing the price of houses and the price paid for land is reflected in the purchase price. There is a need to address the 'windfall' profits gained as a result of this zoning.

A small number of landowners can also in some cases own a substantial proportion of land surrounding an urban area and as a result can influence how an urban area is developed, especially if they are not prepared to release lands for development except in circumstances which best suit them. In many cases these lands are serviced at a seriously high cost to the state.

These types of situations are not serving the good of the community and need to be changed either by legislation and/or a constitutional change.

PRIVATE PROPERTY AND THE COMMON GOOD

Experience indicates that in many instances involving adjudications by the courts, the individual good seems to have a greater 'weighting' than the common good.

A number of examples in Kilkenny highlight how existing landlord rights still prevail and have hampered the transfer of title, development of these sites/properties/estates and resulted in dereliction problems in the county. The community has expressed serious concern about this problem of rectification of title with regard to old landlord rights.

COMPENSATION

We need to have a common policy on the amount of compensation payable. The recent Department/IFA/NRA deal regarding compensation payable for lands required for roads projects under NDP offers higher levels of compensation than payable to neighbouring properties that do not come under the NDP programme. This gives rise to inequities and leads to disputes and further arbitration is required.

INFRASTRUCTURAL DEVELOPMENT

The Department of Environment's current water pricing policy requires local authorities to pay the marginal capital cost for future non domestic developments. Apart from the financial burden this places on local authorities there is no cost implication for the developer who can delay his project to suit his own needs but at a cost to the council.

THE LABOUR PARTY

INTRODUCTION

At the outset, it is noted that the all-party committee is examining Articles 40.3.2 and 43 'to ascertain the extent

to which they are serving the good of individuals and the community, with a view to deciding whether changes in them would bring about a greater balance between the two'. In that context written submissions have been invited on issues such as –

- the right to private property
- private property and the common good
- compulsory purchase
- the zoning of land
- the price of development land
- the right to shelter
- infrastructural development
- house prices
- access to the countryside.

We believe it is important to emphasise the context in which the review of these Articles is taking place. The all-party committee is charged by its terms of reference with undertaking a full review of the Constitution 'in order to provide focus to the place and relevance of the Constitution and to establish those areas where constitutional change may be desirable or necessary', having regard, *inter* alia, to the report of the Constitution Review Group. Its primary concern must therefore be a consideration of the existing provisions with a view to deciding whether change to the text is recommended. In the nature of things, any such decision can be arrived at only by reference to previous experience, in other words, the way in which those Articles have been interpreted and applied by the courts in previous cases.

It is not, in our view, the function of the all-party committee to determine, for example, what state policy in relation to development land should be. Nor is it the committee's function to offer the government or the Oireachtas legal advice as to the restrictions, if any, placed on those forming such a policy by the present constitutional text in a case where, as here, any such advice must include a largely speculative element.

The former function belongs to the government and the houses while the latter, so far as government policy is concerned, is the responsibility of the Attorney General. There is no reason, in our view, why action on some of the more urgent items on which submissions have been invited should await the final outcome of this committee's deliberations and the publication of its report on the matter.

We outline below our interpretation of Articles 40.3.2 and 43 and describe what action we believe is permissible within their remit. We support the case for amendment made by the CRG but believe it is largely textual in nature and that it would not introduce any substantive amendment to the applicable rules of law. Both for those reasons and because we do not believe the all-party committee is the sole or even the most suitable forum for considering the merits of a development land policy, we do not think it either necessary or appropriate to postpone further action in promotion of our compulsory acquisition reform policy (spelled out below) for example, in anticipation of this committee's report.

Finally, this submission touches, to a greater or lesser extent, on all of the issues listed in the committee's notice with the exception of access to the countryside, which will be the subject of a separate submission. However, our position on the right to shelter was spelled out in our party's Twenty-First Amendment of the Constitution (No. 3) Bill 1999, which proposed to provide specific constitutional recognition for social, economic and cultural rights, including the right to adequate housing. That Bill was debated and defeated in the Dáil in October, 2000. We would argue that it makes more sense to deal with the right to shelter/housing in that context rather than within a 'private property' framework.

THE CONSTITUTION

The Constitution has acquired a reputation for paying undue deference to property and the rights of property owners. We believe this reputation is largely undeserved and has in fact been relied upon, as an excuse for doing nothing, by those who are by and large satisfied with the *status quo* in terms of legislative intervention for the regulation of property and the enjoyment of property rights.

The Constitution contains two separate provisions relating to the protection of personal property rights. First Article 40, which deals with personal rights in general, makes passing reference to property rights. Section 3, sub-sections 1 and 2 of that Article provide that the state 'guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen' and that the state 'shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the … *property* rights of every citizen'.

Second, Article 43 is headed 'Private Property' and deals at greater length exclusively with that concept. That Article provides:

> 1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
> 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

As the Constitution Review Group pointed out in their 1996 report[1], the fact that there are two separate

constitutional provisions has given rise to confusion. The report states that, broadly speaking, Article 40.3.2 protects the individual citizen's property rights while Article 43 deals with the institution of property itself. If so, then the test for the individual, in any case other than cases where the rights of ownership or transfer are in danger of abolition, is the Article 40.3.2 test: are the individual's rights being subjected to 'unjust' attack?

However Kelly[2] points out that the areas of application as between the two Articles is not that clear cut. Following swings first one way and then the other, it now appears that the two Articles mutually inform each other. 'Thus a restriction on private property will not amount to an unjust attack on property rights [within the meaning of Article 40.3.2] if such restriction is socially just and subserves the exigencies of the common good [as permitted by Article 43]'.[3] In other words, State action that is authorised by Article 43 and conforms to that Article cannot by definition be 'unjust' for the purposes of Article 40.3.2.

In the present context, it is Article 43.2 which is of greatest significance. It attaches a substantial qualification to private rights in favour of the common good.[4] Although reconciling the language of the two Articles has given rise to unnecessary complication, contemporary case law is reasonably clear. The state may regulate and interfere with property rights; but it may not do so in a manner that disproportionately interferes with those rights. Any such disproportionate interference falls to be classed as an 'unjust attack' and so unconstitutional. An interference is proportionate, however, if it has due regard to the principles of social justice and the exigencies of the common good.

Again, as the CRG points out,[5] '[t]here have been only about seven cases where a plaintiff has established an unconstitutional interference with his or her property rights and in nearly every such case the potential arbitrariness of the interference in question was fairly evident'.

Thus the provisions of the Rent Restrictions Acts operated in an arbitrary fashion and so fell to be struck down.[6] As another example, the system of levying rates on agricultural land had been based on a valu-ation carried out between 1849 and 1852 and it bore no reasonable relation to current values for the land in question. It produced results described by the High Court as 'eccentric and ludicrous' and so the use of the poor law valuation to levy local authority rates was also struck down.[7]

The important aspect of both these cases is that it was not the principle of either rent restriction or local authority rates that was called into question but rather the mechanism of application, which was arbitrary and disproportionate in both cases.

Finally, we agree with the conclusions of the CRG[8] in relation to comparisons between Articles 40.3.2 and 43, on the one hand, and Article 1 of the First Protocol to the European Convention on Human Rights and Fundamental Freedoms, on the other.

> [T]here is a great deal of overlap as far as the substance of the respective guarantees is concerned … [A]n examination of the two leading cases arising respectively under the Constitution *(Blake v Attorney General)* and the Convention *(Spörrong v Sweden (1983)* 5 EHRR 35) reveals a striking similarity in terms of judicial reasoning and general approach to the issue of what constitutes an unjustified interference with property rights … [T]here is little of substance to choose between the Constitution and the Convention, as both protect the right to property and both envisage circumstances in which such right can be restricted, qualified, etc., in the public interest, provided any such interference in the right is proportionate and required on objective grounds.

For the reasons set out in the CRG report – which are largely to do with clarity and consistency – the Labour Party endorses the recommendations of the majority of the group, which provide for a single, recasted version of the two present constitutional provisions. Specifically, we would recommend a provision along the following lines.

Private property

1 Everyone has the right to own property and to its peaceable enjoyment and possession. No person shall be deprived of his or her property, or of any rights in relation to property, save in accordance with law. The state further guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property.

2 The state recognises, however, that the exercise of these rights must in the public interest be subject to legal restriction and ought, in civil society, to be regulated by the principles of social justice. The State, accordingly, may delimit by law the exercise of these rights with a view to reconciling their exercise with the exigencies of the common good.

3 Without prejudice to the generality of sub-section 2 of this Article, any such delimitation may in particular relate to the raising of public revenues, proper land use and planning controls, protection of the environment or of the consumer and the conservation of objects of archaeological or historical importance.

We would stress, however, that we do not envisage any dramatic change in the jurisprudence of the courts arising from such an amendment, or any variation of it, as proposed by the CRG. What is envisaged is essentially a tidying-up exercise that preserves the essential thrust of the case law which has arisen both before the domestic courts and at European level.

Our proposals in relation to price controls for building land put forward below do not, therefore, in our view rely for their consideration on the prior enactment of this or any other amendment to Article 43. We

believe they are consistent with the terms of the present Constitution.

Should this not transpire to be the case, then constitutional amendment would of course be required. Such an amendment would most likely be confined simply to making it clear that, where the exigencies of the common good so require, provision may be made by law for the acquisition of land by local authorities and other public bodies, to enable the performance of public functions, at a price that is less than its open market price.

HOUSING POLICY – BASIC PRINCIPLES

In February 1999, the Labour Party appointed an independent housing commission, chaired by Professor PJ Drudy of the Department of Economics in TCD. The purpose was to assess the nature and causes of the housing problem and to offer possible solutions. Its report, *Housing: a New Approach*, was published in April 1999.

In arriving at its recommendations, that commission set out four basic principles which, in its view, should underpin housing policy in Ireland in the future. We offer them for endorsement by this committee.

1 Housing is a social good. Since housing represents one of the fundamental requirements of human beings, it should not be treated in the same way as non-essential traded commodities for speculation or investment.

2 Every person should have a right to good quality affordable housing appropriate to their particular needs. This right should be enshrined in the Constitution or in legislation.

3 In view of the particular significance of housing for society, market forces alone must not be allowed to dictate its provision and price. In accordance with the Constitution, strong intervention by the state may therefore be essential in the interests of social justice and the common good.

4 Land is one of the critical resources required for housing. For this reason, actions of the state on behalf of the community (e.g. via re-zoning, planning permission or provision of infrastructure) should not result in significant untaxed gains to landowners.

As regards the first two principles, Labour Party policy is encapsulated in our Twenty-First Amendment of the Constitution (No. 3) Bill 1999, which proposed adding the following to Article 40 of the Constitution:

> The State, bearing in mind international legal standards, recognises the economic, social and cultural rights of all persons and, in particular, recognises:
> i the right to earn a livelihood and to reasonable conditions of employment,
> ii the right to adequate health care, and
> iii the right to an adequate standard of living, comprising adequate housing and nutrition and other means necessary to a dignified existence.
>
> Where practicable, the enjoyment of these rights should in the first place be ensured by individual and family effort and initiative.
>
> Where persons or their dependants are unable adequately to exercise or enjoy any of these rights, the State guarantees, as far as practicable, by its laws to defend and vindicate these rights, in accordance with the principles of social justice."

That Bill was debated and defeated in the Dáil in October, 2000. The Labour Party remains committed to its re-introduction and its being put to the people for enactment by them.

So far as reliance on market forces in general is concerned, we believe that the price of owner-occupied housing is determined by the interaction of various factors affecting demand and supply – the so-called 'housing market'. If this market were perfect and were operating efficiently, it would have certain characteristics, including free entry of suppliers. However, the market is in fact a highly imperfect one and displays significant blockages, especially on the supply side. These include the slow release and availability of land and delays with planning permission and services. In such circumstances and with excess demand, a relatively small number of developers (who may or may not be also builders) can exert considerable control over prices in the short term and can in the process secure exceptional levels of profit – often called 'supernormal' profit in a monopoly-type situation.

A factor of considerable significance in particular is the availability of serviced land, since it is a fundamental requirement for housing. This factor has been widely recognised as being a central issue in the housing crisis. A range of measures designed to increase and service the supply of suitable land is therefore crucial.

THE KENNY REPORT

The availability of land at a reasonable price for housing, especially in the main urban centres, has been a deep cause of concern in Ireland for almost three decades. In the early 1970s, this concern resulted in the establishment of a Committee on the Price of Building Land under the chairmanship of Mr Justice Kenny.

That committee was asked to consider, in the interests of the common good, possible measures for controlling the price of land required for housing and other development and for ensuring that some or all of the increase in the value of development that was attributable to the decisions or operations of public bodies could be secured for the benefit of the community.

The main objective was to find a way to stabilise or reduce the price of building land and to ensure that the community acquired on fair terms the 'betterment' element which arises from works carried out by local authorities. The committee reported to the government in 1973. The main proposal was that local authorities should be enabled to acquire potential development

land designated by the High Court at 'existing use value' plus 25 per cent. This proposal inevitably raised objections, and in particular it was argued that it was an 'unjust attack' on property rights and was therefore contrary to the Constitution. This view was far from universal, however, on the grounds that the rights of property owners must be regulated by 'principles of social justice' and the 'common good' – also set out in the Constitution.

The Local Government (Building Land) Bill 1980 was introduced into the Dáil by Deputy Ruairi Quinn TD. It was defeated at second stage on the 11th June 1980, by 15 votes to 59, Fine Gael abstaining. The purpose of that Bill, along the lines recommended by Kenny, was to enable local authorities to designate land required for development and to enable them to acquire land at existing use value within five years of such designation. Since the defeat of that Bill, no further action has been attempted.

Our view is that any constitutional challenge to legislation along the lines proposed by Kenny would fail, for the reasons set out in the analysis of Articles 40 and 43 set out above. In the present circumstances in particular, where we face a severe housing shortage, 'social justice' and the 'common good' must surely dictate that land owners should not accrue huge gains purely as a result of land re-zoning or planning permission. Such planning permission always carries the responsibility to provide services; yet land owners may make a relatively limited contribution to this.

Every opinion the all-party committee receives on this question is, however, of necessity, speculative. The only way of finding out whether such proposals will survive constitutional scrutiny is to incorporate them into legislation and await the outcome of constitutional challenge.

If the legislation falls, then we will at least have a clearer view as to why it fell and of the nature and extent of the amendments to the Constitution required in order adequately to restore it.

The central proposal of this submission, therefore, is that legislation should provide that land being compulsorily acquired by local authorities for development purposes should be capped at existing use value plus a reasonable addition.

However, time has moved on since the publication of the Kenny Report. First, constitutional jurisprudence no longer seems to require that the delimiting of property in the manner envisaged by that committee is an exercise that could be undertaken only by the High Court. Legislative interference in property rights occurs every day of the week, without direct High Court involvement. One could instance restrictions on the use of gaming machines; limitations on land use so as to protect national monuments; the regulation and control of banking; residential property tax; the superlevy on milk production; and restrictions on casual trading. All of these were the subject of unsuccessful challenges to their constitutionality, yet none involved the direct participation of the courts, as Mr Justice Kenny considered necessary.

Second, the Kenny Report stated its main proposal as not being that a local authority should have power to acquire land anywhere at a price below its market price: 'It is that a court should be authorised to impose a form of price control *in designated areas*' (emphasis added). Yet, if one has to justify compulsory acquisition at current use value by reference to the principles of social justice and the exigencies of the common good, then surely it is the *purpose* for which the land is acquired that is of importance, rather than its *location*.

We oppose as both not constitutionally necessitated and as unduly cumbersome and restrictive the idea that acquisition at current use value should be available only within specifically designated areas of a local authority's functional area and that such designation should be undertaken by the courts. Instead, this entitlement should be enjoyed by local authorities in any circumstance where they have powers of compulsory acquisition in respect of land needed for the performance of statutory functions and which is not being exploited by its current owner to its full development potential.

There is no reason in any such case why the portion of the open market price of that land attributable to local authority works and/or economic and social forces such as planning schemes and the like should, as a matter of constitutional or any other principle, be held to belong exclusively to the land owner and to be immune from restriction or regulation under Article 43.

LOCAL AUTHORITY POWERS – THE PRESENT POSITION

It should be borne in mind that, since 1963, planning authorities have had general powers to develop or secure the development of land. In particular, under s. 212 (1) of the Planning and Development Act 2000, a planning authority has powers, *inter alia*, to:

- provide, secure or facilitate the provision of areas of convenient shape and size for development; and
- secure, facilitate or carry out the development and renewal of areas in need of physical, social or economic regeneration and provide open spaces and other public amenities.

Under sub-s. (2) of that section, a planning authority may provide or arrange for the provision of

- sites for the establishment or relocation of industries, businesses, houses, offices, shops, schools, churches, leisure facilities and other community facilities
- factory buildings, office premises, shop premises, houses, amusement parks and structures for the purpose of entertainment, caravan parks, buildings for the purpose of providing accommodation, meals and refreshments, buildings for the purpose of providing trade and professional services and advertisement structures

- transport facilities, including public and air transport facilities, and
- any ancillary services.

Further, it may maintain and manage any such site, building, premises, house, park, structure or service and may make any charges which it considers reasonable in relation to the provision, maintenance or management thereof.

Sub-section (3) enables a planning authority to make and carry out arrangements or enter into agreements with any person or body for the development or management of land, and to incorporate a company for those purposes. And sub-s. (4) makes it clear that a planning authority may use any of the powers in relation to the compulsory acquisition of land in relation to these functions 'and in particular in order to facilitate the assembly of sites for the purposes of the orderly development of land'.

By s. 4 of that Act, development undertaken by a local authority within its own functional area is exempted from the obligation to obtain planning permission, although a public notice and consultation process under Part XI may be required and material contravention of the development plan is not permitted.

Section 213 of the Act provides, more generally, that a local authority may, for the purposes of performing any of its functions (whether conferred by or under this Act, or any other enactment passed before or after the passing of this Act), *including giving effect to or facilitating the implementation of its development plan or its housing strategy under s. 94*, acquire land, permanently or temporarily, by agreement or compulsorily.

Section 94, referred to in the previous paragraph, is the section of the Planning and Development Act dealing with housing strategies. It provides that each planning authority must include in its development plan a strategy for the purpose of ensuring that the proper planning and sustainable development of the area of the development plan provides for the housing of the existing and future population of the area in the manner set out in the strategy.

In summary, there is no shortage of enabling provisions to equip local authorities to take a pro-active role in the planning and development of their areas, including the acquisition and development of land banks, either by themselves or in partnership with commercial developers, and in accordance with the provisions of a coherent overall plan rather than by considering planning applications submitted on a piecemeal basis.

The only restraining factor is cost. Local authorities cannot afford to acquire land compulsorily on such a scale and for such a purpose at open market rates.

RULES FOR THE ASSESSMENT OF COMPENSATION

The rules for assessing compensation in respect of land compulsorily acquired are set out in s. 2 of the Acquisition of Land (Assessment of Compensation) Act, 1919. Where the compensation is payable by a planning authority or other local authority, s. 69 of the Local Government (Planning and Development) Act 1963 applies and adds an additional 10 rules to the original six.

Section 265 (3) of the 2000 Act provides that s. 2 of the 1919 Act, as amended in 1963 shall, notwithstanding the repeal of the Act of 1963, continue to apply to every case (with certain exclusions not here relevant) where any compensation assessed will be payable by a planning authority or any other local authority.

Those 16 rules are appended to this submission.

Our proposal is to amend these rules further in cases where local authorities are compulsorily acquiring 'development land' in order to enable the performance by them of statutory functions. The purpose would be to equip local authorities to undertake a programme of acquiring undeveloped land at present in private hands. The land could subsequently be either built on by the authority itself or zoned, serviced and sold on, with a view to ensuring that a constant supply of such land is available, both for local authority housing and private development purposes, within the framework of a coherent and detailed plan for the area in question.

Central to the working of any legislation along these lines would be three concepts commonly used in tax law, set out below.

> **Open market value** means the amount which land, if sold in the open market by a willing seller, might be expected to realise.
>
> **Current use value** means the amount which would be the open market value of land if the open market value were calculated on the assumption that it was and would remain unlawful to carry out any development in relation to the land other than minor (i.e., exempted) development.
>
> **Development land** means land the open market value of which exceeds its current use value.

If Kenny were given effect, local authorities would be entitled to acquire development land compulsorily at its current use value plus 25%. This would require stripping out from the present compensation assessment rules references to potential for, or restrictions on, future development: current use value would be the governing criterion.

It would also require, however, special provision to be made in respect of development land that was acquired before the publication of the legislation, so as to avoid an attack based on the claim that the legislation was expropriatory in nature and so unconstitutional, due to a failure to provide compensation at least equivalent to expenditure actually incurred, plus a reasonable return on investment.

Our view in this regard is based on the fact that the courts lean against legislation affecting property rights with retrospective effect.[9] The courts also lean in favour of the view that compensation should be provided in all

cases where its provision is not inconsistent with social justice or the requirements of the common good and is 'clearly practicable'.[10] The intention, therefore, should be to cap the landowner's return on his or her investment rather than abolish it.

So, where an individual had acquired land before, say, July 2003, then compensation for its compulsory acquisition would be assessed, first, by reference to the cost of acquisition (including the cost of any loan entered into for the purpose), if that land was acquired by the claimant through a bargain at arms length. Where land was acquired otherwise than by way of an arms length transaction (i.e., by inheritance or a gift), then the cost would be the amount which would be assessed by an arbitrator applying the rules in force prior to the passing of this Act as the open market value of the land on the date of its acquisition by the claimant.

To the cost of acquisition would be added the amount, if any, assessable in respect of the cost of improvements carried out, other than work consisting only of maintenance, repairing, painting and decorating, which have added to the value of the land.

Finally, an amount would be added to represent a reasonable return on investment in the land. This might, for example, be calculated as if an amount representing the cost of acquisition and of improvements had been instead invested in securities yielding an annual rate of return 2 per cent higher than government stock.

This total figure would, again, be increased by 25% but the total would not in any circumstances exceed the open market value of the property. In other words, compulsory purchase rules would not produce a rate of compensation greater than what the market would provide.

There is of course nothing cast-iron about the figure of 25%, or of 2% over government stock as a rate of return on investment. Kenny picked 25% simply as offering a 'reasonable compromise' between the rights of the community and those of landowners[12]. Other figures may be suggested; it may also be argued that the circumstances of particular cases would require a greater degree of flexibility.

CONCLUSION

In relation to compulsory acquisition, the Kenny Report pointed out the following[12].

> A further factor which may serve to raise land prices occurs in cases in which the price of land compulsorily acquired by a local authority is determined by official arbitration. Under the Act of 1919 the Official Arbitrator must determine the price as being that which the land would make if sold on the open market by a willing seller to a purchaser who is prepared for its building potential. There is inherent in this system the likelihood of over-valuation. This tendency results from the fact that part of the compensation to the owner consists of an award for the potential development value of the land. This potential development is necessarily speculative because no one knows the precise form which future developments will take and so each owner claims that his land should be valued on the most favourable basis. Since the probability of development is not capable of precise arithmetical calculation, arbitrators find themselves faced with a range of estimates and tend to assess compensation on a basis which, in the interests of fairness, favours owners. Hence, the official arbitration system under which the rules for the assessment of compensation in the Acts of 1919 and 1963 must be applied tend to inflate land prices.

The underlying rationale for the proposal put forward by Kenny is set out succinctly on page 49, para. 93:

> [T]he proposal involves a delimitation of property rights but one which is no more restrictive than other forms of price control. We believe that this delimitation is not unjust because the landowners in question have done nothing to give the land its enhanced value and the community which has brought about this increased value should get the benefit of it.

This rationale remains valid and is adopted by us as the basis for our proposals to this committee.

And local authorities legitimately represent 'the community' in these circumstances. By Article 28A of the Constitution, the state 'recognises the role of local government in providing a forum for the democratic representation of local communities, in exercising and performing at local level powers and functions conferred by law and *in promoting by its initiatives the interests of such communities*.' (Emphasis added.) This function is given statutory expression in subsection 63 and 66 of the Local Government Act 2001, which describe the functions of a local authority as including, *inter alia*, the taking of 'such action as it considers necessary or desirable to promote the community interest', including the community interest in social inclusion and the social, economic, environmental, recreational, cultural, community and general development of the area of the local authority and of the local community.

In conclusion, therefore, we believe our proposals are justifiable by reference to the principles of social justice, since there are no moral or ethical principles by reference to which a landowner can claim any superior or indefeasible entitlement to the enhanced value of his or her landholding, attributable to development profit.

We believe they are also justified by reference to the exigencies of the common good, since a state of affairs whereby local authorities are incapable of adequately discharging their constitutional and statutory mandate on behalf of local communities must, by definition frustrate the common good.

Appendix 1

CURRENT RULES FOR THE ASSESSMENT OF COMPENSATION

1 No allowance shall be made on account of the acquisition being compulsory.

2 The value of land shall, subject as hereinafter provided, be taken to be the amount, which the land if sold in the open market by a willing seller, might be expected to realise.

3 The special suitability or adaptability of the land for any purpose shall not be taken into account if that purpose is a purpose to which it could be applied only in pursuance of statutory powers, or for which there is no market apart from the special needs of a particular purchaser or the requirements of any authority authorised or capable of being authorised under any transferred provision to acquire land compulsorily.

4 Where the value of the land is increased by reason of the use thereof or of any premises thereon in a manner which could be restrained by any court, or is contrary to law, or is detrimental to the health of the occupants of the premises or to the public health, the amount of that increase shall not be taken into account.

5 Where land is, and but for the compulsory acquisition would continue to be, devoted to a purpose of such a nature that there is no general demand or market for land for that purpose, the compensation may, where reinstatement in some other place is bona fide intended, be assessed on the basis of the reasonable cost of equivalent reinstatement.

6 The provisions of rule (2) shall not affect the assessment of compensation for disturbance or any other matter not directly based on the value of land.

7 In the case of a compulsory acquisition of buildings, the reference in Rule (5) to the reasonable cost of equivalent reinstatement shall be taken as a reference to that cost not exceeding the estimated cost of buildings such as would be capable of serving an equivalent purpose over the same period of time as the buildings compulsorily acquired would have done, having regard to any structural depreciation in those buildings.

8 The value of the land shall be calculated with due regard to any restrictive covenant entered into by the acquirer when the land is compulsorily acquired.

9 Regard shall be had to any restriction on the development of the land in respect of which compensation has been paid under the Local Government (Planning and Development) Act 1963.

10 Regard shall be had to any restriction on the development of the land which could, without conferring a right to compensation, be imposed under any Act or under any order, regulation, rule or bye-law made under any Act.

11 Regard shall not be had to any depreciation or increase in value attributable to –

(a) the land, or any land in the vicinity thereof, being reserved for any particular purpose in a development plan, or
(b) inclusion of the land in a special amenity area order.

12 No account shall be taken of any value attributable to any unauthorised structure or unauthorised use.

13 No account shall be taken of –
(a) the existence of proposals for development of the land or any other land by a local authority, or
(b) the possibility or probability of the land or other land becoming subject to a scheme of development undertaken by a local authority.

14 Regard shall be had to any contribution which a planning authority would have required as a condition precedent to the development of the land.

15 In Rules 9, 10, 11, 12, 13 and 14 'development', 'development plan', 'special amenity area order', 'unauthorised structure', 'unauthorised use', 'local authority' and 'the appointed day' have the same meanings respectively as in the Local Government (Planning and Development) Act 1963.

16 In the case of land incapable of reasonably beneficial use which is purchased by a planning authority under section 29 of the Local Government (Planning and Development) Act 1963, the compensation shall be the value of the land exclusive of any allowance for disturbance or severance.

Notes

1 *Report of the Constitution Review Group*, 1996, Pn 2632, p. 358.
2 JM Kelly, *The Irish Constitution*, 3rd ed., 1994.
3 Ibid., at p. 1076.
4 KC Wheare, *Modern Constitutions*, (2nd ed., 1966, p. 43.) contrasted the stress placed on the right of private property in sub-section 1 of the Article – "calculated to lift up the heart of the most old-fashioned capitalist" – with that placed on the principles of social justice and the exigencies of the common good in the second sub-section – "the Constitution of [former] Jugoslavia hardly goes further than this".

5 At p. 359.
6 *Blake v Attorney General* [1982] IR 117.
7 *Brennan v Attorney General* [1984] ILRM 355.
8 At p. 365.
9 See, for example, *Hamilton v Hamilton* [1982] IR 466.
10 *ESB v Gormley* [1985] IR 129.
11 At page 40, para. 68.
12 At page 13, para. 22.

LABOUR PARTY
FREEDOM TO ROAM, RIGHTS OF ACCESS AND PUBLIC RIGHTS OF WAY

INTRODUCTION

All land in Ireland – including commonage – is owned by somebody, be it an individual or group of individuals, a corporate body, a public body or the state, and, generally speaking, a landowner is under no obligation to let members of the public onto their property.

The great majority of rural landowners have for many years made access to the Irish countryside available. However access is at the discretion of the landowner, who may prohibit entry or withdraw consent without prior notice to recreational users. And, while the public is normally given access to state land, including national parks and Coillte property, there is no right of entry to these lands either. This situation contrasts with that which obtains in most other parts of Europe, where varying degrees of public access to land are formally defined.

Despite the fact that Ireland has a tourism promotion policy that invites visitors to take part in a range of activities that depend on access to the countryside (rambling, canoeing, climbing, fishing), there has been little enough interest in the issue of access to land for recreational purposes. To the extent that there is policy at all, it is on the initiative of individual local authorities.

For example, it is difficult for walkers in the Irish uplands to be confident that their entry to private land, including commonage, will not be challenged. A further difficulty is the scarcity of agreed access pathways or of public rights-of way, which is in particular contrast with the extensive network of rights-of-way in Britain. Division of commonages, intensification of agricultural use and increased private forestry development has made access to the uplands physically more difficult. The occupiers liability issue, an increase in the number of leisure users, and failure by a few recreational visitors to respect the reasonable requests of farmers have all contributed to a change in attitude on the part of a minority of landowners.

Commonage dominates Ireland's uplands and also some of the coastal zones in the west of the country. Commonage covers approximately half a million acres and involves about 12,000 farmers. In recent years demands by different users (land managers and hill walkers, local recreation users, leisure site developers and conservationists) has imposed new pressures on the resource. Conflicts have arisen over access and use rights to commonage where, rightly or wrongly, stakeholders feel they have a right to access commonage because it is perceived as a free good.

Historically, commonage has been managed for livestock production, crops and hunting. More recently, due to the environmental appeal of commonage, this interest has given rise to new demands including hill walking, mountaineering, orienteering, mountain biking (upland areas), and horse riding, walking, sports pitches, caravan/camping/picnic sites and golf courses. The recreational potential of commonage is now considered to be economically as important as livestock or crops for rural areas in Ireland.

The environmental state of commonage in many areas of Ireland has provided further cause for concern. Many commonage areas include priority habitats because of the high plant species richness. Commonage areas are threatened by overgrazing which has had a negative impact on biodiversity and on the landscape of upland commonages. Support from the Common Agricultural Policy in the form of sheep headage payments encouraged farmers to increase livestock stocking rates and may have caused damage to this grassland habitat. The commonage framework plan has recently been introduced by the government to deal with the problem of overgrazing. It requires farmers to reduce the numbers of livestock in many areas in order to protect grassland habitats.

Although non-market valuation has been applied in Ireland to other recreation resources including forests and angling, no studies investigating demand for public access to commonage in Ireland have been undertaken despite the widespread concern and enormous public interest in the resource.

There are, of course, national parks and special amenity areas. Land for national parks must be purchased outright by the state, a slow and expensive process. Special amenity areas must satisfy strict criteria relating to their importance and vulnerability.

There are interconnecting issues. One issue is whether there is, or should be, a freedom to roam, as of right, on open and uncultivated land.

A separate but associated issue is the creation and maintenance of specific and designated rights of way over land. This would involve local authorities drawing up maps of land to which the public had access, following negotiation and agreement with landowners.

A third issue is whether there should be a policy of access to specific designated areas such as woodlands, riverbanks, canal sides, mountains and so on.

RIGHTS OF WAY AND THE LAW

Generally, a right of way can be claimed by the public over land only if a particular and defined route has been 'dedicated' by the owner to the public, which

then accepts this dedication. The dedication is usually made informally and acceptance is inferred by long usage by the public. For use to raise a presumption that there is a valid right of way, it must be open, as of right and without interruption.

There is no such thing as a public right to wander over land – in other words, not keeping on a defined route from one particular place to another – arising simply through tradition of use. This is notwithstanding that people may have used land for centuries in the belief that they do so as of right. A right to use land for 'lawful sports and pastimes' may only be acquired by tradition by local inhabitants of an area, but not by the public at large.

Apart from the roads network – the public highway – there are very few officially recognised rights of way in Ireland. And the fact that the destination one is seeking to reach is an amenity open to the public – a national park or public beach, for example – does not mean that the public has a right to cross over private land to get there.

THE PLANNING ACT PROCEDURE

Section 206 of the Planning and Development Act, 2000, however, enables a planning (i.e. local) authority to enter into an agreement with any person having the necessary power in that behalf for the creation, by dedication by that person, of a public right of way over land. Such an agreement will be on agreed terms as to payment and other matters and may also provide for limitations or conditions affecting the public right of way. Where such an agreement has been made, it is the duty of the planning authority to take all necessary steps for securing that the creation of the public right of way is effected in accordance with the agreement. Particulars of these agreements must be entered in the planning register.

Under section 207 of the Act, if it appears to the planning authority that there is need for a public right of way over any land, it may, by resolution, make an order creating a public right of way over the land. The authority must serve a notice of its intention to do so on the owner and the occupier of the land, and on any other person affected, and also cause notice of the proposed order to be published in one or more newspapers. The notice must be accompanied by a map indicating the public right of way to be created and must invite submissions or observations regarding the proposed order.

The planning authority, having considered the proposal and any submissions or observations, may then by resolution make the order, with or without modifications, or refuse to make the order; any person on whom notice has been served shall be notified accordingly.

A right of way created compulsorily under this procedure may give rise to a claim for compensation. By section 200:

> If, on a claim made to the planning authority, it is shown that the value of an interest of any person in land, being land over which a public right of way has been created by an order under section 207 made by that authority, is reduced, or that any person having an interest in the land has suffered damage by being disturbed in his or her enjoyment of the land, in consequence of the creation of the public right of way, that person shall, subject to the other provisions of this Part, be entitled to be paid by the planning authority by way of compensation the amount of the reduction in value or the amount of the damage.

Any person who has been notified of the making of an order may appeal to the Planning Appeals Board, which may confirm the order, with or without modifications, or annul the order.

Again, particulars of a right of way so created must be entered in the register.

Section 208 provides that, where a public right of way is created under the planning Acts, the way shall be maintained by the planning authority. A person who damages or obstructs the way, or hinders or interferes with the exercise of the right of way is guilty of an offence and is also liable for expenses incurred in repairing the damage or removing the obstruction.

THE USEFULNESS OF THE PLANNING ACT PROCEDURE

However, the point to stress is that public rights of way created or accepted by local authorities would involve the normal type of right simply to pass and re-pass along a defined route from one place to another, rather than a right to wander.

In any event, it is questionable as a matter of policy whether local authorities should pursue the aim of creating thousands of miles of rights of way, as long distance walking routes, with no right of access by the public to the land on either side. Apart from anything else, such a policy would place a premium on route maintenance and/or map reading ability.

Creative use of the powers of local authorities regarding rights of way would be by negotiation rather than on a compulsory basis and would be on the basis of something broader than the establishment of a mere right to pass and re-pass along a route that is provided for that purpose, and for that purpose alone.

REPS

REPS (Rural Environment Protection Scheme), is a scheme designed to reward farmers for carrying out their farming activities in an environmentally friendly manner and to bring about environmental improvement on existing farms.

The objectives of the scheme are to:

- establish farming practices and production methods which reflect the increasing concern for conservation, landscape protection and wider environmental problems;

- protect wildlife habitats and endangered species of flora and fauna; and
- produce quality food in an extensive and environmentally friendly manner.

However, while under REPS 1 (1994-1999), payment could be applied for in return for facilitating public access to farmland, this possibility no longer applies under REPS 2 (2000-2006).

In any event, when the phenomenon was noticed of commonage grazing rights being leased by those who had no other farming interests, the REPS scheme was no longer applied to commonage.

Further, it seems that one of the REPS objectives, 'to maintain farm and field boundaries', may have the unintended effect of inhibiting rather than promoting access by recreational users.

In the United Kingdom, the REPS was used to facilitate access to the countryside. As adopted in Ireland, however, the scheme had little or no effect on the issue, since improved access to land was just one of a number of measures a landowner could take in order to qualify for payment and, under the scheme, only one measure was paid for, no matter how many were undertaken.

Under Countryside Access Regulations, in force in different versions in the different jurisdictions that make up the United Kingdom, there is specific provision for the payment of aid to farmers who undertake for a period of years to permit members of the public to have access to an area of set-aside land, referred to as an 'access area', for the purposes of quiet recreation, and to manage it in accordance with the requirements set out in the regulations.

Given the changes made to REPS at European level, it seems that any such payments will in future be from domestic rather than EU resources.

An amended and improved version of the REPS scheme along UK lines, organised at local authority level and in co-operation with affected landowners, would have potential for facilitating improved and guaranteed public access to land for recreational purposes. But the associated costs would be borne by the exchequer.

CONCERNS ABOUT OCCUPIERS' LIABILITY

The issue of occupiers' liability was a significant concern to the farming community and is invariably raised in any negotiations about increasing public access. However, despite talk of cases that have been settled before being heard in court, for undisclosed sums, there is no evidence that significant numbers of liability claims are – or, indeed, were ever – made against private landowners as a result of the public's use of the countryside for recreation, nor of any increase in the cost of landowner's insurance premiums to reflect their potential liability.

The apparent consensus for law reform in this area resulted in the Occupiers' Liability, 1995. That Act for the first time defined a category of visitors to a property known as a 'recreational users'. These are persons present on premises or land without charge (other than a reasonable charge for parking facilities), for the purposes of engaging in a recreational activity.

The duty of the occupier of the land towards a recreational user is not to 'intentionally injure' or act with 'reckless disregard' for the person or his or her property. This is a considerable reduction to the duty of care that is owed to visitors in general.

However, if reducing the perceived burdens on landowners was expected to improve access, it does not seem to have had the desired effect. Hill walkers say they are concerned about growing restrictions on traditional access to the countryside. It seems that recreational users' groups may have assumed there would be some form of trade-off between law reform on occupiers' liability and concessions or guarantees on access to land, which have not in fact materialised.

It also seems to be the case, although all evidence is anecdotal, that hostility to recreational users from landowners is an occasional and patchy phenomenon, rather than being a universal experience. It is pointed out, for example, that although County Wicklow would have more than a proportionate share of Ireland's hill walkers, most resistance to such groups seems to take place in the western counties. The reason for this may well be that interest groups such as the Mountaineering Council met with local landowners in Wicklow on a systematic, partnership basis and agreed a mutually beneficial solution to perceived difficulties.

AN INTEGRATED SOLUTION

There is need for an overall package of measures. Any such package must, of course, be subject to a requirement of responsible behaviour on the part of those seeking access and provision for penalties in case of misbehaviour on their part. The freedom to roam is conditional on a commitment to do no harm.

Any initiative in this regard must be founded on the goodwill of landowners, who have legitimate concerns in regard to liability issues. A national code to govern recreational access should be agreed between all stakeholders in a spirit of partnership. The role of local consultative forums should be central to the achievement of this objective.

The IFA's Farmland Code of Conduct sets out clearly and comprehensively the standards of behaviour landowners are entitled to expect from recreational users:

- respect farmland and the rural environment
- do not interfere with livestock, crops, machinery or other property
- guard against all risks of fire, especially near forests.
- leave all farm gates as you find them
- always keep children under close control and supervision
- avoid entering farmland containing livestock. Your presence can cause stress to the livestock and even endanger your own safety

- do not enter farmland if you have dogs with you, even if on a leash, unless with the permission of the landowner
- always use gates, stiles or other recognised access points and avoid damage to fences, hedges and walls
- take all your litter home
- take special care on country roads
- avoid making unnecessary noise
- protect wildlife, plants and trees
- take heed of warning signs – they are there for your protection.

An amendment to the REPS scheme would be one aspect of an integrated package for access to the countryside. It must be realised and accepted that farming is now a publicly subsidised activity and way of life. Provided the terms of payment are fairly negotiated, there is no reason in principle why access to the countryside should not be negotiated in the overall context of public payments to farmers. The development of agri-tourism is, after all, government policy in the context of rural development as a whole.

The establishment or a right to cross over open, unfenced and uncultivated uplands would be another part of the scheme. Local authorities should be empowered to negotiate reasonable restrictions and other conditions with affected landowners, rather than an unfettered right of access by the general public.

In cases where this would not be appropriate, the establishment of clearly defined rights of way through farmland, in order to access open ground, amenity areas such as woodland, coast and riverbank and national monuments should be attempted, with payment of reasonable compensation for loss of land or amenity value on the part of the landowner.

But the mere fact that recreational users walk harmlessly and responsibly over land should not of itself be held to create some form of compensatable loss, or an entitlement to payment. As section 200 of the Planning and Development Act makes clear, a landowner must show that the value of his or her interest in the land is reduced, or that he or she has suffered damage by being disturbed in his or her enjoyment of the land, before a claim for compensation can arise.

Public representatives should be slow to argue for the adoption of a policy which might encourage landowners to close off access to their lands, in the belief that compensation will soon be payable for the re-opening of access under some new system in the pipeline.

The establishment of dedicated long distance rights of way, some of which might be based on the routes of abandoned railway lines, would be another component element of the plan.

A successful policy must be local in its origin, contents and authorship. This places the onus on local authorities, in co-operation with representatives of landowners, residents and tourism and recreational interests. Under the Local Government Act, 2001, local authorities may 'take such measures, engage in such activities or do such things (including the incurring of expenditure)' as they consider necessary or desirable to promote the interests of the local community in relation to:

- general recreational and leisure activities
- sports, games and similar activities
- general environmental and heritage protection and improvement
- the public use of amenities (both natural and made or altered by human intervention), and
- the promotion of public safety.

They are thus amply equipped to engage in policy formulation and implementation in this area. The co-operation of other public bodies, such as Coillte, Dúchas, the ESB and other statutory undertakers, underpinned by government commitment, is also essential to the success of such a policy.

CONCLUSION

In summary, therefore, it seems that most if not all of the statutory equipment is in place to set about creating a comprehensive access policy. However, to the extent that it is not at present enjoyed, the question of access to the uncultivated uplands requires legislative redress, but this should not of itself operate as a bar to the initiative being taken by local authorities, with prompting from central government, to develop and put in place agreed and comprehensive access plans for their own areas.

THE LAW REFORM COMMITTEE OF THE LAW SOCIETY

Introduction

1 By public advertisement appearing, inter alia in *The Irish Times* on 11 April 2003, the All-Party Oireachtas Committee on the Constitution ('the Oireachtas Committee') invited written submissions in connection with possible reforms of the two Articles in Bunreacht na hÉireann that make provision for private property rights, namely Article 40.3.2° and Article 43.

2 The advertisement noted that '[f]ollowing the enactment of the Constitution, legislation relating to private property has been developed in line with those Articles and elucidated by the courts in a substantial body of case law.' The advertisement went on to say that '[t]he All-Party Oireachtas Committee on the Constitution, which is charged with reviewing the Constitution in its entirety, is now examining these Articles to ascertain the extent to which they are serving the good of individuals and the community, with a view to deciding whether changes in them would bring about a greater balance between the two.'

3 The advertisement indicated that the Oireachtas Committee wished to invite individuals and groups to make written submissions to it on such issues as:

- the right to private property
- private property and the common good
- compulsory purchase
- the zoning of land
- the price of development land
- the right to shelter
- infrastructural development
- house prices
- access to the countryside

4 The Law Reform Committee of the Law Society of Ireland ('the Law Reform Committee') feels that it has a valuable contribution to make to the deliberations of the Oireachtas Committee in this vitally important area. As a sub-committee of the professional body representing the great majority of practising lawyers in this jurisdiction, we feel that our views and concerns should properly be made known to the Oireachtas Committee.

5 We propose to present this submission in the following fashion:

a) We will first consider the nature of the present Articles and take a brief health check on the jurisprudence of the Irish courts on the issue of property rights;
b) Second, we will turn to consider the question of whether there is in fact a problem or problems that require resolution in the general sphere of property rights;
c) Third, we will examine whether, in any event, any such problems or perceived problems are likely to be resolved by way of constitutional change.

(A) THE PRESENT LEGAL SITUATION

6 Property rights are alluded to in the Personal Rights Article in Bunreacht na hÉireann, Article 40.3 which states as follows:

> 1° The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> 2° The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

7 The more extensive Article to consider property rights is Article 43. This Article makes the following provision:

> 1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
> 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2 1° The State recognises however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

8 Certain propositions are self-evident from an initial reading of the above. Property rights are simultaneously acknowledged and protected by the Constitution. The rights are capable of limitation, however, by the principles of 'social justice' and according to 'the exigencies of the common good.'

9 The curiousity of the part overlapping, part-separate nature of the two Articles has never been entirely resolved by the courts, but it is apparently of no great moment today in approaching the question of their interpretation. The conceptual distinction between the two Articles drawn by O'Higgins C.J. in *Blake* v. *Attorney General* [1982] IR 117 at 135[1] and by Walsh J. in *Dreher* v. *Irish Land Commission & Attorney General* [1984] ILRM 94 at 96 has been eschewed in other cases which emphasise the importance of the traditional canon of harmonious construction.[2]

10 Before going any further it might be said that perhaps unsurprisingly, given the inherent financial aspect to any case involving a claim of unconstitutional interference with property rights, the above provisions have been heavily litigated. Two excellent and detailed accounts of the evolution of the jurisprudence of the Superior Courts in this are contained in the two leading modern treatises on Irish constitutional law. The relevant excerpts, it is respectfully submitted, are worthy of the Oireachtas Committee's consideration.[3]

11 It is intended to simply extrapolate some of the critical features of the law on property rights in the main body of this submission.

12 First, the courts have demonstrated a willingness, on occasion, to intervene and strike down legislation on the basis that it constitutes an unconstitutional interference with a citizen's constitutionally protected property rights. However, the celebrity of the occasions on which it has done so – the Sinn Féin Funds case[4] and the Rent Restrictions Acts cases[5] being the most prominent examples – is indicative of a striking feature of the legal challenges – they have for the most part been unsuccessful.

13 The Sinn Féin Funds case involved an uncompensated confiscation of the property of the plaintiffs. The Rent Restrictions cases involved such draconian limitations on the rights of property owners that the legislation was said to virtually 'conscript landlords

of controlled premises into the social welfare system.'[6] Clearly, these decisions represent the extreme end of the spectrum.

14 In the main however, the challenges have been unsuccessful. Casey comments (at 677) that

> 'legislation will not constitute an unjust attack on property rights if passed to reconcile the exercise of those rights with the requirement of the common good, and if consonant with principles of social justice.'

15 The most recent important decision of the Supreme Court post-dates this comment but acts to reinforce its validity. In *Re Article 26 and the Planning and Development Bill, 1999 [2000] 2 IR 321*, the validity of Part V of that Bill was considered by the Supreme Court. The effect of the sections contained therein was summarised by the Supreme Court in the following terms (at 354):

> as a condition of obtaining a planning permission for the development of lands for residential purposes, the owner may be required to cede some part of the enhanced value of the land deriving both from its zoning for residential purposes and the grant of permission in order to meet what is considered by the Oireachtas to be a desirable social objective, namely the provision of affordable housing and housing for persons in the special categories and of integrated housing.

16 In upholding the constitutionality of the relevant part of the Bill, the Supreme Court referring to an earlier decision of Costello J. that had also been approved by the court[7], felt (at 354) that the measures set out in the Bill were

> rationally connected to an objective of sufficient importance to warrant interference with a constitutionally protected right and, given the serious social problems which they are designed to meet, they undoubtedly relate to concerns which, in a free and democratic society, should be regarded as pressing and substantial. At the same time the court is satisfied that they impair those rights as little as possible and their effects on those rights are proportionate to the objectives sought to be attained.

17 The provisions in the 1999 Bill represent perhaps the most intrusive interferences with the rights of property owners to be validated by the courts. But in so holding, the court was scarcely departing from the template established, by the text of the Constitution itself and by the seminal decision of Kenny J. in *Central Dublin Development Association* v. *Attorney General (1975) 109 ILTR 69*, where amongst the principles he deduced from the Constitution were the following:

> 5) The exercise of these rights ought to be regulated by the principles of social justice and the State accordingly may by law restrict their exercise with a view to reconciling this with the demands of the common good;
> 6) The courts have jurisdiction to inquire whether the restriction is in accordance with the principles of social justice and whether the legislation is necessary to reconcile this exercise with the demands of the common good;
> 7) If any of the rights which together constitute our conception of ownership are abolished or restricted (as distinct from the abolition of all the rights), the absence of compensation for this restriction or abolition will make the Act which does this invalid if it is an unjust attack on the property rights."[8]

18 It will be readily seen that the concepts of 'social justice', 'common good' and 'unjust attack' are all broad and flexible notions that have had the ultimate effect of leaving a broad discretion to the courts in adjudicating between property rights on the one hand, and otherwise legitimate private or governmental action on the other. It might be added that these terms supply the courts with ready-made formulations to, in many cases, uphold the constitutionality of statutory interferences with property rights.[9]

19 Thus, whilst the particular statutory schemes of rent restriction in *Blake* and the *Housing (Private Rented Dwellings) Bill, 1981* were struck down, it is perfectly plain from the judgments that more moderate forms of rent restriction would be constitutional. And indeed, the Oireachtas would have a considerable amount of discretion in striking an appropriate balance bearing in mind the presumption of constitutionality attached to all post-1937 legislation.[10]

20 This much is seen in concrete form in the decision of the Supreme Court in *Madigan* v. *Attorney General [1986] ILRM 136* to dismiss a challenge to the constitutionality of those portions of Part VI of the Finance Act 1983 that imposed a residential property tax on houses valued in excess of £65,000 provided that the family income exceeded £20,000. Here, the court offered a robust defence of the general power of the Oireachtas to levy taxes, which has the inevitable effect of interfering with property rights. This is not to say that taxation statutes are immune from constitutional review; such a statute may be an unconstitutional interference with property rights where the method of its collection is in some way unfair, arbitrary or capricious.[11]

21 The 'exigencies of the common good' formulation has been cited, 'on occasions like a mantra' (according to Kelly at 1082) to justify restrictions on the use of gaming machines[12], limitations on land use in order to protect national monuments[13], the compulsory acquisition of bogland[14], the regulation and control of banking businesses[15], the freezing of bank accounts being operated on behalf of unlawful organisations[16], the superlevy regime on milk production[17], restrictions on the granting of casual trading licences[18], statutory powers to investigate

the control of companies[19], a scheme for the provision of compensation to owners of diseased cattle[20] and the state ownership of all antiquities of importance without any known owner.[21]

22 Other cases have resulted in a finding that an impugned measure did not constitute an 'attack' on property rights[22], whilst the constitutionally permitted (but optically unattractive) result that a measure constitutes an attack, but not an unjust attack was reached in *Pine Valley Development Limited* v. *Minister for the Environment [1987] IR 23; [1987] ILRM 747*.

23 It is of particular note that the courts have not been sympathetic to cases taken challenging decisions or measures that negatively affect the financial value of an intangible aspect of a property right, such as a licence or a permit. Costello J. stated in *Hempenstall* v. *Minister for the Environment* [1994] 2 IR 20 at 28 that

> Property rights arising in licences created by law (enacted or delegated) are subject to the conditions created by law and to an implied condition that the law may change those conditions. Changes brought about by law may enhance the value of those property rights…or they may diminish them…

24 Costello J. went on say at 28 that

> …a change in the law which has the effect of reducing property values cannot in itself amount to an infringement of constitutionally protected property rights. There are many instances in which legal changes may adversely affect property values (for example, new zoning regulations in the planning code and new legislation relating to the issue of intoxicating liquor licences) and such changes cannot be impugned as being constitutionally invalid unless some invalidity can be shown to exist apart from the resulting property value diminution.[23]

25 Costello J.'s approach was followed recently by Carney J. in *Gorman* v. *Minister for the Environment [2001] 2 IR 414* – the challenge by taxi drivers to the deregulation of that industry where the interference with a property right at issue was the practical extinction of the capital value of a taxi plate that was accomplished by the Road Traffic (Public Service Vehicles) (Amendment) (No.3) Regulations, 2000. Carney J. noted that the applicants must have been aware of the risk of change inherent in the licence under which they held their plates. He stated (at 430) that the applicants had

> in the past reaped the benefits of legislative change. It is not open to them to complain about such changes in the law having a detrimental effect on the value of their licences. It follows therefore that the actions of the respondents…cannot constitute an unjust attack as this restriction is inherent in the very nature of a licence.

26 Similarly, regulations restricting the system of the leasing and selling of milk quotas in *Maher* v. *Minister for Agriculture [2001] 2 IR 139* were held by the Supreme Court to be constitutional. Denham J. approved of Costello J.'s approach and stated (at 221) that

> in domestic law the right in a licence is subject to conditions created by law. This is an inherent aspect of the right in a licence. It is a right subject to the policies implemented by provisions at national level. It is a scheme, a policy, in the general interest….The applicants have an advantage, a right, as a consequence of this policy. It is a right created in the public interest and subject to the public interest. It is a right to which the applicants know the terms and conditions and know of their variability. On this analysis, the scheme is constitutionally permissible.

27 As quoted above, Costello J. in Hempenstall specifically referred to the example of an adverse effect on property value arising from a zoning decision. A similar effect can also arise from a failure to obtain planning permission, which is non-compensatable. Compensation is not required in either of these two cases. Nor was it required where various uses of the land owned by the plaintiff in *O'Callaghan* v. *Commissioners for Public Works [1985] ILRM 364* were restricted on account of the presence there of a promontory fort, listed as a national monument under the provisions of the National Monuments Acts 1930 and 1954. Indeed it was suggested here (albeit no more than opaquely) and on at least two other occasions[24] that the compulsory acquisition process does not in every circumstance require the payment of compensation for it to be constitutional, although the Supreme Court stated quite clearly in *Re Article 26 and the Planning and Development Bill, 1999 [2000] 2 IR 321* at 352 that

> There can be no doubt that a person who is compulsorily deprived of his or her property in the interests of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property.

28 This view broadly approximates to the jurisprudence of the United States, a broadly comparable jurisdiction. The 'Taking' Clause contained in the Fifth Amendment to the Federal Constitution states that '..nor shall private property be taken for public use, without just compensation.' This clause has been held to entitle the government, federal or state, to take private property under its power of 'eminent domain', with the proviso that fair compensation must be paid irrespective of the purpose for which it is taken. Much of the law in this area concentrates on the distinction between a 'taking' and a 'regulation', the latter not attracting compensation, even if it results in a substantial diminution in the value of land.[25]

29 The Irish Supreme Court in *Re Article 26 and the Planning and Development Bill, 1999* took comfort from the decision of its U.S. counterpart in *United States* v. *Fuller 409 U.S. 488 (1972)* where Rehnquist J. (as he then was) had held that compensation payable under the 'Taking' clause need not factor in the element of value of the land arising from a grazing permit that it was within the competence of the government to withdraw.

30 The overall comment can perhaps be made at this stage in our submission that we believe the courts to have struck a generally appropriate balance between the needs of society at large and the rights of the private property owner in the canon of decided cases in this area. This end result is undoubtedly attributable in the main to the far-sighted equivalence with which the Constitution protects property rights in the first place.

(B) PERCEIVED PROBLEMS WITH PROPERTY RIGHTS AT PRESENT

31 A number of different aspects are suggested in the advertisement that precipitated this submission as being appropriate subject matter for the content of submissions to the Oireachtas Committee.

32 The right to shelter, for instance, is mentioned. This is a right of an entirely different order and magnitude in any hierarchical analysis of rights and would in fact be more properly included in a list of fundamental human rights than in the category of socio-economic rights of which property rights are more obviously a constituent part.[26] Therefore, it is not proposed here to address that right, notwithstanding its apparent fundamentality.[27]

33 Similarly, access to the countryside is a discrete issue that this submission does not purport to address. In passing, it might be thought that it is the obligations imposed on landowners by statute and the law of tort that would certainly require initial consideration here rather than the constitutional aspects of the issue.

34 However, other aspects that are mentioned: compulsory purchase, the zoning of land, the price of development land, infrastructural development and house prices are obviously thematically linked.

35 It is as apparent to us as it must be to the Oireachtas Committee that the increase in house prices, particularly in the Greater Dublin area, over the past decade in tandem with the rapid expansion of Dublin's commuter zone is one of the most profound developments to have affected our society in modern times. It goes without saying that there is widespread concern about the unaffordability of housing proximate to Dublin for many ordinary people combined with the potential social problems caused by the rapid outward expansion of the city. Infrastructural problems, heightened by the continual increase in the number of vehicles using our roads require no elaboration here.

36 What is much less apparent however, is what role the Constitution can be reasonably expected to play in the amelioration of the position. As a starting point, what and where, it might reasonably be asked, is the panacea that has to date been stymied by reason of the obduracy of the property rights provisions contained in Bunreacht na hÉireann?

37 The question is asked rhetorically as we believe that the decisions of the Superior Courts have in fact been strongly supportive of sensible and equitable policy-making in areas involving property rights and related fields such as planning law and compulsory acquisitions.

38 Unless a throwback to something as draconian as the rent restrictions regime of 20 years ago is proposed, then it is simply not apparent what limitation Bunreacht na hÉireann is imposing on policy-making in this area that would justify its amendment.

39 None of this is to say that legislation cannot have an impact in, for instance, dampening house prices. Planning law and zoning decisions have an immediate impact on the supply of available land, an immediate and proximate driver of house prices.

40 In this regard, far from any suggestion that the Constitution acts as some form of impediment to change or reform in these areas, the decision of the Supreme Court in *Re Article 26 and the Planning and Development Bill, 1999* appears to in fact pave the way for future legislative innovation to tackle the problems here alluded to. Consider the following passage (at p.348-349 of the judgment of the court).

> The objectives sought to be achieved by Part V of the Bill are clear: to enable people of relatively moderate means or suffering from some form of social or economic handicap to buy their own homes in an economic climate where housing costs and average incomes make that difficult and to encourage integrated housing development so as to avoid the creation of large scale housing developments confined to people in the lower income groups.
>
> It can scarcely be disputed that it was within the competence of the Oireachtas to decide that the achievement of these objectives would be socially just and required by the common good. It is accepted on behalf of the State that the use of planning legislation, which has traditionally been concerned with the orderly and beneficial planning and development of the physical environment, for a purely social objective of this nature is novel and even radical. The court is satisfied, however, that it is an objective which it was entirely within

the competence of the Oireachtas to decide to attain, as best it could, by the use of planning machinery.

41 It is our view, accordingly, that whilst there are evidently social difficulties and problems in the general property area, no clear case has been made to suggest that the Constitution has played its part in the onset of these, and moreover, no suggestion has been clearly articulated to the effect that a recasting of the constitutional provisions could offer any particular benefits.

(C) BENEFITS TO BE DERIVED FROM AN ALTERATION OF THE CONSTITUTIONAL PROVISIONS

42 This brings us to the general consideration that we believe must inform the forthcoming deliberations of the Oireachtas Committee: that Bunreacht na hÉireann has by and large served our state well in its 76 years of operation and a compelling case must always be made before its amendment should be contemplated.

43 There is, in light of the Supreme Court decision in *Re Article 26 and the Planning and Development Bill, 1999* no problem that requires fixing at the present time. Constitutional amendment is a legitimate and lawful response to a constitutional interpretation arrived at by the Supreme Court that a majority of both Houses of the Oireachtas and the electorate disagree with. But here, there is no proximate justification to amend the text.

44 It is of course a curiosity that the property rights contained in Bunreacht na hÉireann are divided between two Articles. But apart from engaging academic lawyers as such issues do, it is not clear what difficulty this causes today.

45 It is certainly true that a majority of the Constitution Review Group recommended in their report[28] that the property rights component of Article 40.3.2° and Article 43 as currently composed should be deleted and replaced by a single self-contained Article 43.1.1° which would read 'Every natural person shall have the right to the peaceable possession of his or her own possessions or property.' An amended version of Article 43.1.2° would also be included, providing a qualifying clause that would provide that property rights, since they carry with them duties and responsibilities, may be subject to legal restrictions, conditions and formalities, provided they are duly required in the public interest and accord with the principles of social justice.

46 It can only be suggested here that whilst this suggested wording is perhaps somewhat more modern and focused it offers not a single tangible advantage over the existing provisions.[29] This is particularly so in light of the subsequent decision in *Re Article 26 and the Planning and Development Bill, 1999* which suggests that any stronger formulation of the public interest and the principles of social justice, presumably intended to validate intrusions that would under the existing text be unconstitutional, is quite simply, unnecessary.[30] To the extent that the proposed new text would replace the 'citizen' of the present Article 40.3.2° with a 'natural person' it is to be welcomed in these more multicultural times. However, the Irish courts have already made it abundantly clear that they do not regard the constitutionally designated 'citizen' as possessing any advantages in his general rights under Bunreacht na hÉireann over a non-citizen comparator.[31]

47 Furthermore, the case for amendment that is made by the Review Group is surely diluted by the *de facto* acknowledgement that the current provisions have produced a jurisprudence that is very much in line with that of the European Court of Human Rights.[32] Again, the proposed adoption of some similar language in a new Article (although falling short of incorporation) seems more related to the felicitous wording of Article 1 of the First Protocol of the Convention than any reason of substance.

48 Similarly, the arguments for the removal of non-natural persons from the proposed new constitutional provision, proposed by a majority of the Constitution Review Group, seem less than compelling.[33] The property right contained in Article 43.1 has already been held to be incapable of invocation by non-natural persons in *Private Motorists' Provident Society* v. *Attorney General [1983] IR 339* where Carroll J. held that as the Article described the property right as a 'natural right' inherent in man, 'by virtue of his rational being', the plaintiff was debarred from relying upon it.

49 However, in *Iarnród Éireann v Ireland* [1996] 3 IR 321, Keane J. (when in the High Court) decided that the plaintiff did have *locus standi* to challenge the joint and several liability provisions of the Civil Liability Act 1961, noting that Article 40.3.2° was not defined in terms of human persons only, and accordingly deciding that the guarantee was sufficiently broad to extend to bodies corporate. Given that their financial interests will mirror those of their members, it is by no means clear that this decision is required to be overruled.

50 In any event, constitutional change in any given area has the unavoidable effect of casting the settled jurisprudence of the courts into doubt until a new range of cases fought under the amended provision(s) are decided. The interim uncertainty thereby caused is in itself a powerful consideration in favour of the status quo.

51 The best known example of a constitutional amendment designed to remedy a problem that had never in fact materialised – as appears to be the position here – is the salutary case of the Eighth Amendment, passed and inserted as Article 40.3.3° in 1983.

52 Whatever one's views on the substantive issue, it must, we believe, be accepted by all that the example underlines the need for extreme caution when tinkering with a complex, organic mechanism such as the Constitution. Moreover, the subsequent history of the Eighth Amendment illustrates just how difficult it can be to draft constitutional provisions that will cover all contingencies and that will have the desired outcome in as yet unforeseen scenarios.

53 Accordingly, the alternative approach of simply enacting legislation and allowing it to be constitutionally tested in the ordinary way, whether by way of Article 26 reference *ab initio* or by subsequent private challenge, commends itself to us. If the Supreme Court deems on some as yet unforeseen occasion, Oireachtas efforts to tackle various social problems in the field of property rights to be unconstitutional, then, rather than now, will be the appropriate time to consider whether in fact the Supreme Court was, on reflection, correct and the Constitution was fulfilling a proper purpose in providing a kind of anchor or ballast to prevent excessive short-term vacillations in our laws, or whether the decision in fact exposed an institutional weakness in our constitutional structure that in fact required remedial action.

54 For many people, the Thirteenth and Fourteenth Amendments, providing for the right to travel and right to information in the aftermath of *Attorney General* v. *X [1992]* 1 IR 1 are examples of the latter situation, although it is accepted that views will differ.

55 Quite apart from such practical pitfalls, there is another, more philosophical, consideration which counsels, we believe, against premature amendment of the Constitution in this, or indeed any other case. The High Court and Supreme Court are, by virtue of the provisions of Article 34, constitutionally endowed with the jurisdiction to inquire into the validity of laws enacted by the Oireachtas. This important feature of the separation of powers enshrined in our constitutional structure would patently be disrespected by any attempt to insulate a proposed new statutory regime from meaningful constitutional review by prior amendment of the Constitution itself. Our courts are justifiably proud of providing an independent tier of scrutiny according to the system of superior values and principles contained in Bunreacht na hÉireann that acts as an effective check on the legislative and executive branches of Government.

56 For the legislature to simultaneously contemplate legislation and a constitutional amendment designed to safeguard its constitutionality, would be, if successfully accomplished, a startling insult to the judicial branch and moreover, such a course would necessarily amount to an unsubstantiated and unreasoned rejection of the jurisprudence of our courts for over three quarters of a century on the highly nuanced issues involved in the field of property rights.

57 For the foregoing reasons, the disposition of the Law Reform Committee of the Law Society of Ireland is that the case for the amendment of the property rights provisions in Bunreacht na hÉireann has not been made out in such a way that we are convinced by its merits.

58 In any event, there are very real practical and philosophical objections to the premature amendment of the Constitution in the absence of contemporaneous decisions of the Superior Courts that appear to be frustrating the wishes of the democratically elected branches.

59 We would respectfully request the opportunity to address the All-Party Oireachtas Committee in any meetings, hearings or debates that you may hold on this important topic. Please address any correspondence to Alma Clissmann, Secretary, Law Reform Committee, Law Society of Ireland, Blackhall Place, Dublin 7.

60 If in the meantime the All-Party Committee feels we can be of any further assistance, we would be happy to hear from you.

Notes

1 The *Report of the Constitution Review Group* (Stationery Office, Dublin 1996, Pn 2632), dealing with property rights at pp.357-367 states at p.358 "*Broadly speaking, Article 40.3.2° may be said to protect the individual citizen's property rights, while Article 43 deals with the institution of property itself.*"

2 See, for example, *O'Callaghan v. Commissioners of Public Works [1985] ILRM 364* and *P.M.P.S. and Moore v. Attorney General [1983] IR 339* and more recently, *In Re Article 26 and The Planning and Development Bill, 1999 [2000] 2 IR 321.*

3 Casey, James '*Constitutional Law in Ireland*' Round Hall Sweet & Maxwell, Third Edition, 2000. Chapter 18, pages 662-684 and Kelly, John Maurice '*The Irish Constitution*' (Edited by Hogan, Gerard and Whyte, Gerry) Butterworths, Third Edition, 1994 pages 1061-1091.

4 *Buckley v. Attorney General [1950] IR 67.*

5 *Blake v. Attorney General [1982] IR 117* & *In Re Article 26 and The Housing (Private Rented Dwellings) Bill 1981 [1983] IR 181*

6 See *Casey* at 671.

7 *Heaney v. Ireland [1994] 3 IR 593.* The reliance on *Heaney* in this context is scarcely undermined by the subsequent decision of the European Court of Human Rights in *Heaney & McGuinness v. Ireland Application (dec.) no. 34720/97 21 December 2000* given the decision in *James v. United Kingdom [1986] 8 EHHR 123* which is discussed in *Re Article 26 and The Planning and Development Bill, 1999* at 355-356.

8 The earlier four principles adduced by Kenny J. were: *"(1) The right of private property is a personal right; (2) In*

virtue of his rational being, man has a natural right to individual or private ownership of worldly wealth; (3) This constitutional right consists of a bundle of rights most of which are founded in contract; (4) The State cannot pass any law which abolishes all the bundle of rights which we call ownership or the general right to transfer, bequeath and inherit property."

9 The *Constitution Review Group* at p.358 of their *Report* put the matter thus: "*both Article 40.3 and Article 43 are particularly open to subjective judicial appraisal, with phrases such as 'unjust attack', 'principles of social justice' and 'reconciling' the exercise of property rights 'with the exigencies of the common good'.*"

10 See, for instance, *Pigs Marketing Board v. Donnelly [1939] IR 413 and McDonald v. Bord na gCon (No.2) [1965] IR 21.*

11 See the successful challenge in *Brennan v. Attorney General [1984] ILRM 355.* However, two other challenges to taxation statutes were unsuccessful in *Browne v. Attorney General [1991] 2 IR 58* and *Deighan v. Hearne [1990] 1 IR 499.*

12 *Cafolla v. O'Malley [1985] IR 486.*

13 *O'Callaghan v. Commissioners of Public Works [1985] ILRM 364.*

14 *O'Brien v. Bord na Móna [1983] ILRM 314.*

15 *P.M.P.S. v. Attorney General [1983] IR 355; [1984] ILRM 88.*

16 *Clancy v. Ireland [1988] IR 326; [1989] ILRM 670.*

17 *Lawlor v. Minister for Agriculture [1990] 1 IR 356.* Note however, that more recently a milk quota has not been regarded as constituting a property right under either Irish or Community Law by the Supreme Court in *Maher v. Minister for Agriculture [2001] 2 IR 139.*

18 *Hand v. Dublin Corporation [1991] 1 IR 409.*

19 *Chestvale Properties Limited v. Glackin [1992] ILRM 221.*

20 *Rooney v. Minister for Agriculture and Food [1991] 2 IR 539.*

21 See the judgment of Walsh J. in *Webb v. Ireland [1988] IR 353; [1988] ILRM 565.*

22 See, for example, *Abbey Films Limited v. Attorney General [1988] IR 158*; *Dublin County Council v. Grealy [1990] 1 IR 77; [1990] ILRM 641*; *Kerry Co-Operative Creameries Limited v. An Bord Bainne [1991] ILRM 851*; *Shanley v. Commissioners of Public Works [1992] 2 IR 477* and *Hempenstall v. Minister for the Environment [1994] 2 IR 20; [1993] ILRM 318.*

23 Similarly, in respect of liquor licences, Carroll J. in *State (Pheasantry) v. Donnelly [1982] ILRM 512* emphasised that the licence was granted subject to certain limitations and conditions. Carroll J. stated at 516 *"[t]he licence is a privilege granted by statute and regulated for the public good…It is ab initio subject to various conditions…There is no constitutional right to a liquor licence or a renewal thereof. There are only such rights as are given by statute subject to the limitations and conditions prescribed by statute.*"

24 This suggestion is also made in *Dreher v. Irish Land Commission and The Attorney General [1984] ILRM 94* and in *E.S.B. v. Gormley [1985] IR 129.*

25 The typical case is that of a land use regulation. For a land use regulation to avoid being construed as a taking, then it must (a) substantially advance legitimate state interests and (b) it must not deny an owner economically viable use of his land. See, for example, *Penn Central Transport Co. v. New York City 438 U.S. 104 (1978).*

26 For this reason a minority of the *Constitution Review Group* were apparently of the view that property rights were not of such fundamentality as to warrant constitutional protection in the first place. See p.360-361 of the *Report*. Such a view is out of step with the international approach. See Article 17 of the United Nations Universal Declaration of Human Rights and Article 1 of the First Protocol to the European Convention on Human Rights.

27 The South African Constitutional Court's unhappy experience with the insertion of a specific constitutional right to (where the Constitution's Section 28(1)(c) right of children to shelter was construed not as granting any immediate right, but imposing a long-term obligation on the Government) may be worthy of the Committee's consideration. See: *Government of the Republic of South Africa and Others v. Grootboom and Others 2001 (1) SA 46 (CC); 2000 (11) BCLR 1169 (CC).*

28 *Report of the Constitution Review Group* (Stationery Office, Dublin 1996, Pn 2632), pp. 366-367.

29 The *Report* (at p.358) quoted Kenneth Wheare's description (in '*Modern Constitutions*', 1966, p.63) of Article 43.1's staunch protection of the right of private property: "*calculated to lift up the heart of the most old-fashioned capitalist*" with the emphasis placed on the principles of social justice and the exigencies of common good in Article 43.2 – "*the Constitution of [then Communist] Jugoslavia hardly goes further than this.*" Wheare regarded the latter Article as in all practical terms, negating the former, describing the contrast as "*a classic example of giving a right on the one hand and taking it back on the other.*" The present Chief Justice has equally criticised the "*unattractive language*" and "*tortured syntax*" of Article 43 in his article, "*Land Use, Compensation and the Community*" (1983) 18 Ir. Jur. 23.

30 It must be acknowledged that this comment is made with the hindsight of the *Re Article 26 and the Planning and Development Bill, 1999* decision which was not available to the Constitution Review Group at the time of their Report.

31 In this regard, see the decisions of Barrington J. in *Finn v. Attorney General [1983] IR 154* and in *State (McFadden) v. Governor, Mountjoy Prison [1981] ILRM 113.*

32 The Report states at p.365, "*..an examination of the two leading cases arising respectively under the Constitution (Blake v. Attorney General) and the Convention (Spörrong v. Sweden (1983) 5 EHRR 35) reveals a striking similarity in terms of judicial reasoning and general approach to the issue of what constitutes an unjustified interference with property rights.…there is little of substance to choose between the Constitution and the Convention, as both protect the right to property and both envisage circumstances in which such rights can be restricted, qualified etc in the public interest, provided any such interference in the right is proportionate and required on objective grounds.*"

33 The relevant section is contained at pp.361-364 of the *Report*. The suggestion is particularly unconvincing in light of Article 1 of the First Protocol to the European Convention on Human Rights which expressly extends the protection of property to legal as well as natural persons: *Pine Valley Developments v. Ireland (1992) 14 EHRR 319.*

MOUNTAINEERING COUNCIL OF IRELAND

INTRODUCTION

The Mountaineering Council (MCI) is the national representative body for hillwalkers, climbers and ramblers. Our membership is 8,000, comprising over a hundred clubs and 900 individual members. The total number of walkers and climbers in Ireland is estimated at 100,000. According to Bord Fáilte research, over 250,000 overseas visitors participate in hillwalking in Ireland each year. Other leisure pursuits such as bird-watching, orienteering, canoeing and cycling also require access to upland areas. In making this submission we are mainly concerned with maintaining community access to open land for recreation and the related issue of private property and the common good.

OUR OBJECTIVES

The MCI promotes the enjoyment, protection and wise and safe recreational use of the Irish uplands by our members and other visitors. We define the uplands as the five percent of our island above three hundred metres elevation. Our published policy document on access states that we need reasonable access to upland areas for responsible users. The access to which we aspire is essentially of two types:

- at lower levels, where farming is in general field-based, we seek agreed routes on which walkers may proceed from public roads, car parks etc to reach traditionally unfenced moorland areas.
- on open mountainsides and moors responsible walkers should have freedom to select routes to varied destinations.

CURRENT SITUATION

In recent years the popularity of upland recreation has greatly increased. The number of overseas visitors to Ireland who list walking as a holiday objective is larger than for cycling, angling or golf. Many hotels, B&Bs and outdoor and visitor centres, especially in western seaboard areas, advertise hillwalking as an attraction. Local communities in all parts of rural Ireland organise walking festivals. Visitors to upland areas benefit the host areas in a manner that complements existing agricultural use. Aside from economic and social benefits, the Department of Health and the Irish Heart Foundation promote regular walking for its proven health benefits. Walking requires no special equipment and is suitable for people of all ages, no matter where they live. It is truly a sport for all.

All land in Ireland is owned, mostly by private individuals. Access to land is generally by permission of the landowner. Until recent times walkers in Ireland were welcomed by almost all farmers, but unfortunately there have been increasing instances of prohibitions and fencing off of areas formerly open to access. While there are reasons for this changed situation, the absence of any clarity as to whether, and where, visitors may enter, creates difficulties.

This lack of definition places Ireland at a unique disadvantage relative to all other EU countries as a tourism destination. In the other countries there are a variety of approaches to the problem, but in all cases it is possible to refer to clear local or national rules before setting out, rather than risk refusal at each farm gate.

At present radical changes are taking place in Irish agriculture and in the economic basis of rural communities, particularly in upland areas. MCI considers that the common good of rural and urban dwellers would be served by legal access measures satisfactory to both.

We believe that the required modifications can be made without the need for transfer of ownership, and with the agreement of farmers and their representative bodies. The provision of access as outlined above should not reduce the landowners' potential to earn revenue from their land or to realise its capital value by sale. It is also compatible with the traditional agricultural use of the uplands. Where access provision involves landowners in work or expense they should be appropriately reimbursed.

ACCESS AND THE CONSTITUTION

The MCI believes that the balance between property rights and the common good is at present substantially weighted in favour of property owners by legislation and judicial precedent. Article 43 (2.1 and 2.2.) of the Constitution appears capable of supporting a more balanced approach to the common good. It should be possible to draw up legislation permitting public access, which need not conflict with the provisions of Article 40.3.2 preventing any unjust attack on property rights. However should the Oireachtas committee advise constitutional amendment to improve countryside access we would support this. This could perhaps be achieved through the addition of a fourth category to the rights listed under Article 40.6.

SUMMARY

Great improvements in national and community welfare could be attained by the provision of improved countryside access, without substantially diminishing

landowners' rights. Many of the statutes and case law on access to Irish land pre-date the Constitution and the foundation of the state. What is needed is a re-vision of these, to the benefit of both the rural and urban communities. Given adequate goodwill and sufficient political resolve, we consider that effective legislation to address this problem could be enacted under the present Constitution. In the event of a constitutional amendment being deemed necessary by the review group it should support, and not inhibit reform of the laws relating to access to the Irish uplands.

Appendix 1

ENVIRONMENTAL POLICY DOCUMENTS

The Irish upland environment is limited in physical extent and very fragile in its nature. Our upland areas are frequently subject to use and development pressures inappropriate to their character. Some protection exists for areas designated as special areas of conservation, natural heritage areas or national parks, which should be extended where feasible. To promote the protection of all Irish upland areas, the MCI has developed policies, agreed with its members, upon which to base responses and action in relation to unwelcome developments.

In recent years the number of participants in hill-walking and mountaineering activities has increased substantially. This in itself can be a source of stress to certain upland environments. Consequently, responsible use of the uplands by recreational visitors is fundamental to our policies. The other key objectives of the policy are the importance of valuing and protecting our upland landscape and ensuring sustainability of local communities. These policies are supported by the practical advice in the MCI's Good Practice Guide for Walkers and Climbers.

Scope

The scope of these policies extends to land above 300m and associated 'wilderness' or semi-wild landscapes; crags, quarries and other climbing areas; sea cliffs, hills and other areas frequented by MCI members; access to these areas. Only five percent of our island exceeds 300m in elevation and this we define as uplands. Some one-tenth of the Irish uplands are higher than 500m, in general these are the mountain areas.

Aims of these policies

- To conserve the areas within our scope and their flora, fauna, archaeology and heritage
- To ensure reasonable access for responsible recreational users
- To cooperate with reasonable, sustainable and appropriate development in these areas.

Each of the following policy sheets describes one of the principal matters of environmental concern to MCI and sets out the council's policies in relation to that issue:

- access
- footpath erosion
- organised events in the mountains
- agriculture
- forestry
- transport
- built development
- litter, waste and illegal dumping.

Policy implementation

The MCI will:

- promote the enjoyment, protection, wise and safe recreational use of the Irish uplands
- lobby for and co-operate with national policies of amenity area conservation
- consult with club committees in the relevant areas as issues arise
- encourage clubs to publicise and discuss issues
- seek to promote discussion and awareness of issues
- seek to influence public opinion on issues as appropriate
- work towards a management policy for planned areas agreed between all interested parties
- co-operate with appropriate groups in Ireland and abroad to exchange information and work for common aims.

ACCESS

All land in Ireland is owned, either by private individuals or state bodies. Recreational users do not have a legal right of entry to land. The great majority of rural landowners have for many years made access to the Irish countryside available and this welcome has been long appreciated by generations of Irish mountaineers. However access is at the discretion of the landowner, who may prohibit entry or withdraw consent without prior notice to recreational users. While the public is normally given access to state land including national parks and Coillte property there is no right of entry to these lands either. This situation contrasts with that which obtains in most other parts of Europe, where varying degrees of public access to land are formally defined.

MCI recommends prior consultation with landowners, but this is not always practical. It is thus difficult for walkers in the Irish uplands to be confident that their entry to private land including commonage will not be challenged. A further difficulty is the scarcity of agreed access pathways or of public rights-of-way, which is in particular contrast with the extensive network of rights-of-way in Britain. Division of commonages, intensification of agricultural use and increased private forestry development have made access to the uplands physically more difficult. The occupiers liability issue, an increase in the number of leisure users, and failure

by a few recreational visitors to respect the reasonable requests of farmers have all contributed to a change in attitude on the part of a minority of landowners.

MCI is working to reverse this decline in available access through agreement with landowners and rural communities and through bodies such as the Irish Uplands Forum. In Northern Ireland we anticipate improvements linked to legislation being introduced in other parts of the United Kingdom. Any initiative in this regard for the Irish Republic must be founded on the goodwill of landowners. MCI accepts that landowners have legitimate concerns in regard to liability issues and is working to clarify these issues. It is an MCI objective that a national code to govern recreational access be agreed between all stakeholders in a spirit of partnership. The role of local consultative forums should be central to the achievement of this objective.

Policies

The principal access aim of the MCI is reasonable access for responsible users.

- The MCI supports the principle that there should be access to open country for the purpose of recreation. The MCI will campaign for agreed access to mountains, crags, the coast and other areas visited by MCI members and other responsible recreational users
- When local access problems arise the MCI will, where possible, enter into discussions with the landowners/occupiers. The MCI and its members will at all times seek to develop and maintain good relations with landowners. The assistance of local affiliate Clubs is vital to the achievement of these objectives
- The MCI will co-operate with landowners and state bodies to provide access routes. We consider that expenses reasonably incurred by landowners in the provision of recreational access should be compensated
- The MCI is opposed to further unnecessary fencing of open land, as it hinders access and is obtrusive
- Where restrictions on access are required for conservation or other reasons the MCI will work to ensure that reasonable balance is achieved between access and conservation requirements
- The MCI will work to preserve existing rights of way and paths
- The MCI will maintain a database detailing reported access difficulties
- Guidebook writers should ensure that any access route they publish is acceptable to the landowners over whose property it passes.

FOOTPATH EROSION

Upland footpath erosion is caused largely, but not exclusively, by hillwalkers. The increasing use of quads, scrambling bikes and mountain bikes makes matters worse. Intensive use of upland areas, especially of peatland, can exceed the carrying capacity of the terrain and progressive deterioration occurs. Trampling – which is exacerbated by large numbers – is a primary cause of vegetation loss, the early stage of erosion. Erosion can be caused very swiftly, but may take decades to fix. Upland areas within easy reach of large urban populations are most vulnerable, but this is also a worsening problem in less popular areas.

MCI members should take responsibility for conserving upland footpaths. Active participation in voluntary repair work is strongly recommended to all members.

Policies

- Clubs are encouraged to strongly advise their members to follow the guidance of the MCI's Good Practice Guide for Walkers and Climbers *(available on the MCI website or from the MCI office)*
- Clubs and walking groups need to be aware of the excessive impact that large numbers of people can generate and should adopt a responsible approach by minimising group sizes, particularly when walking on peaty uplands. Ideally group size should be less than 10 people, but should not exceed 15
- The MCI will actively promote low impact use of the uplands, to members and other users, through appropriate communications programmes
- Walking groups are asked to avoid badly eroded routes, particularly following periods of heavy rain
- MCI will seek government support for upland trail repair and maintenance.

Recommended measures for the management of areas subject to erosion

- Use of alternative routes
  Where paths are very heavily used with resultant damage, paths could be closed for repair and alternative paths indicated
- Restoration
  MCI members and clubs are strongly encouraged to participate in low-impact remedial trail maintenance work under competent guidance and to repair erosion damage in areas which they regularly use. Active maintenance is strongly encouraged for reasons of both conservation and safety. Any work carried out should strive for minimum impact on the essentially wild character of the uplands and the quality of the walking experience
- Minimum impact
  Constructed footpaths are a last resort, though one which has been reached in certain Irish areas. The materials and route should be in keeping with the nature of the area. Techniques used should pay heed to the conservation needs of an area, be fully informed by best practice and have regard to the visual impact
- Monitoring the problem
  MCI supports ongoing monitoring of tracks and footpaths in upland areas as a means to better trail

management. The MCI will assist its members and voluntary groups such as Mountain Meitheal with path surveys and the development of a database to record findings

- Publications
  Where possible, guide book writers should omit mention of routes through eroded areas. Advice on the responsibilities of walkers to reduce their impact on vulnerable terrain should always be included.

ORGANISED EVENTS IN THE MOUNTAINS

The MCI recognises the social, community and financial value and increasing popularity of organised walks, walking festivals, charity walks and challenge events in the mountains. The MCI believes the current level of such activities is environmentally unsustainable and recommends that 'best practice' principles are adopted by event organisers.

Policies

Where MCI members or affiliated clubs organise such events or are requested to assist in a local or charitable event they should:

- examine the environmental impact – particularly erosion – of any route proposed
- take into account the level of use of the area (an area that has little activity throughout the year will recover better from the impact of one large event than an area that is subject to heavy use on a regular basis)
- where proposed routes traverse protected areas (SAC, NHA etc.) or national parks consult with park management, Duchas or the appropriate management body
- take measures to limit the number of participants in the event (e.g. by using pre-booking)
- consider alternative event formats with reduced impact on vulnerable terrain
- vary the route, e.g. arrange a number of different walks in the area; change the route from year to year
- consider scheduling the event for later in the year to avoid damage during the peak growth season
- use the event to increase awareness of environmental issues in the uplands
- promote the MCI's Good Practice Guide for Walkers and Climbers to all participants
- ensure all litter and markers are removed after the event
- afterwards examine the damage caused by the event and seek solutions to minimise this if future events are planned
- aside from environmental concerns, carefully consider all safety aspects involved in bringing participants to remote places. This is particularly important for events involving inexperienced walkers, or where there is a time pressure on participants.

AGRICULTURE

For many centuries the predominant use of Ireland's uplands and mountain valleys has been for agricultural purposes. The character of our upland landscape derives from such use. In recent times landowners in Irish upland areas have faced increasing problems in maintaining farm family income. MCI is appreciative of these current difficulties, and also of the necessity of conserving the quality of the upland environment. We consider that the traditional extensive methods of production are deserving of financial support and that community development including appropriate recreational use can be integrated in a sustainable land use policy for upland regions.

The uplands are limited in their capacity for agricultural development. For many years traditional methods of agriculture produced an environmental balance. This was rapidly lost in recent decades when stocking rates were unsustainably increased and urgent remedial actions were then required. Such problems arise when agricultural policies ignore the fragile nature of the uplands. The development of sensitive areas should respect their biological limitations.

It is considered that the creation of Upland Area Partnerships (involving agricultural, statutory, community and recreational representatives) can be the key to the optimum development of these areas. If the potential of sustainable recreation is embraced this can offset reductions in traditional agricultural income. The role of landowners as custodians of the rural heritage should continue to be compensated by measures such as the Rural Environment Protection Scheme. MCI supports reforms to such schemes to ensure the sustainability of rural communities.

Policies

- The MCI will co-operate with upland landowners, government agencies and others involved, to develop sustainable upland uses for the benefit of farmers and rural communities. These may include the provision of appropriate recreational access. Where provision of such access involves loss or expense to landowners MCI considers that appropriate recompense should be allowable. Retention of the character of sensitive landscapes should be an objective of all development. Criteria set for grants and permissions should be appropriate to the capacities of each land area involved. Necessary measures for access, land improvement and enclosure should respect traditional landforms
- MCI recognises the special value of plants, animals and cultural artefacts in certain upland areas. Where the preservation of these is important we consider that government agencies should consult with affected landowners and agree fair recompense for any loss of income arising from compliance with EU or national directives
- The MCI recognises the right of farmers to erect fences for agricultural purposes. However fencing

of traditionally open high areas of rough grazing and the fenced sub-division of private commonage seriously detracts from the quality of the upland environment and should be kept to a minimum. Fences on hill access routes should incorporate stiles to facilitate access and prevent damage
- MCI will promote the acceptance and use by all its members of the MCI Good Practice Guide for Walkers and Climbers, the IFA Farmland Code of Conduct and the Northern Ireland Countryside Code.

FORESTRY

MCI recognises the positive contribution that well-managed forests can make to the rural economy. Properly planned and landscaped forests can enhance the amenity value of the landscape and increase opportunities for recreation and access.

Ireland has little remaining natural forest. Most forests are relatively recent plantations. Forestry is set to become an ever larger component of the landscape with national objectives to increase land under trees. Forestry development cannot be based solely on commercial considerations, but must take environmental, amenity and social issues into account. MCI welcomes Coillte's achievement of Forestry Stewardship Council certification as a positive development in recognising these requirements.

Plantation forestry can be visually intrusive, detracting from the wilderness quality of the uplands. Existing wildlife habitat can be affected, and rivers and lakes may suffer acidification from conifer forests. Forestry roads have in the past been insensitively placed, making them monotonous for the walker and detracting from the wilderness nature of some areas.

State forests have traditionally been open to the public; access to private plantations is at the discretion of the landowner. Forests can provide a useful access corridor to the uplands, however trees at certain stages of growth can form impenetrable thickets, while clear felling can leave areas almost impassable for years, making access for walkers difficult. Large amounts of rubbish sometimes remain following forestry work.

Policies

- MCI supports the protection of all remaining natural and semi-natural forest, including adequate measures for the removal of invasive species
- The MCI view is that sensitive upland areas – blanket and raised bog, heather moorland – should not be planted
- Where forests already exist or are proposed in upland areas and mountain valleys, the MCI recommends a detailed forest plan should be drawn up to ensure they fit in with the surrounding landscape, increase bio-diversity and facilitate recreational use
- Forests should be managed in accordance with sustainable forest management principles
- Forestry roads should be sensitively designed, with minimal impact. Roads should be designed with due regard to vistas and views for recreational users. The MCI urges forest companies to investigate alternative extraction methods that reduce the need for extensive road networks. Forest roads should be categorised for different types of use. Where roads are no longer needed for harvesting, consideration should be given to 're-classifying' these routes for walking or cycling only, with measures taken to limit vehicular access. 4WDs, all-terrain vehicles and other off-road vehicles sometimes use forest roads to access upland areas. Effective barriers should be erected to keep out unauthorised vehicles
- Routes through forests can be a valuable means of access to higher ground. MCI acknowledges the value of such routes and is committed to working with Coillte to identify and maintain popular access routes. Where possible, walking routes through forests should avoid forest roads
- Forestry benefits from a high level of public investment, in the form of grant aid and tax breaks and therefore MCI encourages the Forest Service to make the provision of access routes a condition for grant aid to private forestry in the uplands and intervening valleys
- Felling licences should take environmental impact into account and impose conditions to minimise environmental degradation. Replanting with native species should be permitted in all felling licences
- MCI encourages forest owners to exert more control over contractors (possibly a litter bond) to ensure rubbish is removed when work is completed.

TRANSPORT

Mountaineers need transport to get to within walking distance of the hills. At present, public transport does not meet needs in remote areas, therefore walkers and climbers must rely largely on private transport. MCI recognises the negative impact of heavy car use in remote areas. Increasing traffic reduces enjoyment of remote areas and leads to pressure for more car parks and improved roads. Inconsiderate parking by recreational users can block access, causing serious inconvenience for local residents and the emergency services.

Policies

- MCI encourages members to car pool as much as possible to reduce car numbers and parking problems. Member clubs are asked to consider hiring buses as an alternative, however please note the recommendations on maximum group size contained in the footpath erosion policy
- MCI is committed to working to resolve traffic and parking problems as they arise, e.g. by liaison with landowners and local authorities
- The Irish uplands should be protected from excessive or insensitive transport developments

- All road works and car parks in upland areas should be constructed to minimise environmental impact
- Provision of better public transport in remote areas is supported
- MCI will support appropriate park and ride schemes in areas where volume of traffic and/or car parking demand exceed capacity
- MCI members are urged to follow MCI's Good Practice Guide for Walkers and Climbers with regard to parking etc.

OFF-ROAD VEHICLES

The off-road use of motorised vehicles, e.g. quads and scramblers has increased greatly. Hill and forest tracks facilitate access for vehicles, which then get used off road in inappropriate places. MCI recognises that upland farmers may use such vehicles for necessary agricultural purposes. Off-road use of vehicles damages sensitive environments, leaves scars on the landscape and worsens erosion. Local residents, recreational users and wildlife are affected by disturbance.

In Northern Ireland it is illegal to have a motorised vehicle more than 100 metres from a public road without the landowner's permission. MCI will encourage local authorities in the Republic of Ireland to introduce by-laws protecting upland areas within their jurisdiction.

Policies

- Off-road use of vehicles is severely detrimental to the upland environment. The recreational use of vehicles on open uplands should be prohibited. This is best done by use of effective barriers on hill and forest tracks, user education and appropriate by-laws
- Provision of designated reserves for quads and scramblers would take pressure off sensitive landscapes. The MCI will liaise with the relevant user groups, encouraging them to promote responsible use to their members and supporting their efforts to secure appropriate areas designated for their activities
- Tracks that facilitate vehicle access should be removed if no longer needed
- MCI supports the provision of designated trails for cyclists and will liaise with Cycling Ireland to assist with education of cyclists to minimise damage to upland terrain.

BUILT DEVELOPMENT

The MCI built development policy covers all development work in upland and relevant coastal areas requiring planning permission (other than those categories of activity specifically dealt with in other sections of this document). Development proposals which will erode the remoteness and natural beauty of our landscapes should be critically examined. The extent of wild country in Ireland is rapidly decreasing and MCI considers itself obliged to assist with its conservation.

The MCI does not oppose all development in upland areas, rather it argues that development should be located where it does not destroy the essential character of the undeveloped landscape of the upland and coast. This itself is an increasingly valuable commercial asset to local communities who can utilise tourism and recreation to replace other declining economic activities.

The MCI supports appropriate and sustainable development in or immediately adjoining existing settlement and villages.

The following list indicates the type of development which the MCI considers potentially damaging to the essential landscape qualities of our uplands and coast. Proposed developments in the categories listed should be carefully considered by MCI and its members. Where it appears that particular schemes are inappropriate MCI should oppose them through the planning process.

- Quarrying, mining and other extractive industry
- Communication masts, where these are visually or environmentally significant
- Wind farms and hydro-electric schemes, where significant adverse impact occurs
- Waste disposal by landfill or otherwise
- The construction of dwellings in upland areas
- Tourist facilities and visitor centres where environmental impact is severe and where community benefit is minimal
- Power lines if inappropriately sited
- Large agricultural or industrial buildings, mountain roads.

Developments of the types listed above can impact on the landscape in a number of ways:

- there is a reduction of the amount of wild land and land remote from human activity and roads. This is exacerbated by the requirement to have road access and services to the development
- increased noise
- impact on flora and fauna and especially on areas of special ecological or scientific interest
- pollution
- increased vehicular traffic
- landscape impact – visual intrusion of man-made artefacts on natural ecosystems.

Policies

The MCI, in consultation with local members, will determine its action on new proposals having regard for:

- the impact in terms of scale, positioning and design on the landscape in which it is proposed to site it
- the quality of that particular landscape and its ability to absorb the development
- the usage of the area by climbers, walkers and tourists
- the economic, social and environmental value of the scheme
- with regard to dwelling houses, favouring those intended for use by families engaged in agriculture

- the ecological consequences of the development both in the long term and during construction
- the reversibility of the development and its impacts
- the reduction in the national stock of undeveloped landscape.

The MCI will participate in the planning process through its constituent clubs and at national level. This will include the submission of comments in appropriate cases and the making of appeals or related submissions to An Bord Pleanála. Where issues are localised the preferable procedure is for action to be taken through locally affected member clubs and groups. The MCI executive may assist affiliated clubs with expenses related to planning matters.

LITTER, WASTE AND ILLEGAL DUMPING

Some recreational users contribute to litter in the uplands. Non-recreational users, both private individuals and commercial bodies, also use remote areas as free and convenient dumping grounds. MCI members are encouraged to share responsibility for reducing itter in the Irish uplands through personal action and reporting incidences of dumping.

Policies

- The MCI strongly encourages its members to adopt the principle of *Pack it In – Pack it Out*. Clubs are urged to promote this principle to all their members. MCI members should strive to leave no trace after a visit to the uplands
- The MCI encourages members to pick up litter when they see it (always be cautious when handling waste). MCI clubs should consider organising clean-up events
- MCI members are encouraged to report incidents of dumping, car wrecks etc in upland areas to the local authority
- The MCI will lobby government and local authorities to address waste issues, clear up illegal dumping and impose litter fines.

Appendix 2

MCI GOOD PRACTICE GUIDE FOR WALKERS AND CLIMBERS

For many of us, walking and climbing is about enjoyment, recreation and freedom from structures and regulations. These activities bring us to very special places, but our enjoyment of these areas brings with it a responsibility. We need to be aware of our impact on the environment and take responsibility for our own safety. We must respect the interests of others and act as responsible partners in the use and development of the countryside. To ensure continued enjoyment of the hills and crags, we have to accept some guidelines for our activities.

Preparation

- Be properly equipped and fit for the activity concerned
- Have the skills to cope with the chosen route
- Have an up-to-date weather forecast and know the time of dusk
- Be aware of the potential hazards and know what to do if something goes wrong
- Accept the risk that is inherent in walking and climbing and take responsibility for our own safety.

Parking and access

- Keep the number of cars used to the minimum; consider hiring a bus for group outings
- Park safely, with particular regard to allowing for entry to property. Many access problems have arisen from inconsiderate parking by recreational visitors. Remember that farmers work at weekends and that a tractor with a trailer attached needs a wide space to turn into a field or gateway
- All land is owned by somebody and we use that land with the goodwill of the owner, not with a legal right
- Avoid aggravating known problems, use approved routes in these areas
- Be friendly and courteous when we meet landowners and local residents
- Respect private property and do not interfere with machinery, crops or animals
- Make no unnecessary noise, especially when passing near houses
- Be careful not to damage fences, walls or hedges; these are livestock boundaries and expensive to repair
- Use stiles and gates where they exist, leave gates as we find them (open or closed).

Leaders should

- Be competent to lead groups and be appropriately equipped to ensure the safety of the group
- Be trained in first aid and carry a small first aid kit
- Know the route, the ability of the group members and ensure that they are all properly equipped
- Be prepared to alter the route to meet the needs and interests of the group, and the weather conditions
- Show a good example to the group, with regard to conservation issues and relations with landowners
- Ensure everybody in the group knows what to do, what not to do, and why
- Encourage group members to develop their walking and climbing skills

'Pack it in, pack it out'

- Leave no litter behind; even biodegradable items like banana skins and teabags take years to disappear
- Pick up litter when you see it (be cautious when handling waste)

- Take care not to cause any pollution. Human waste should be buried, at least 30m away from watercourses; take home, or carefully burn, used toilet paper and hygiene products.

Environmental considerations for walkers

- For environmental and safety reasons keep group numbers small. Ideally group size should be less than 10 people and should never exceed 15
- Avoid taking dogs on the hills at any time
- Walk on rock, stones or the most durable surface available, rather than on vegetation or soft ground
- Be imaginative in our route choice, taking care to avoid using eroded paths
- If we must use an eroded route, walk along the centre of the path to avoid widening the damage. If this is not possible keep at least 10m away from the eroded route
- Wearing gaiters makes it easier to follow a muddy path line
- Avoid taking short cuts on zig zag paths as this creates new lines for run-off of water and increases erosion
- The building of cairns detracts from the wild character of the hills; new cairns can mislead other walkers
- Have respect for all natural things and take care not to disturb plants, birds and animals.

Environmental considerations for climbers and scramblers

- Cliffs are a final refuge for some plants, birds and animals that have become rare, or even extinct elsewhere
- Avoid disturbing nesting birds and adhere to any climbing restrictions during the nesting season
- The removal of vegetation including mosses and lichens (gardening) should be avoided wherever possible
- It is often more pleasant to climb on dry, bare rock which normally has less botanical interest
- Damage can be caused by repeated top-roping of routes or by using a wire brush for cleaning
- Avoid any form of chipping or defacement of the rock, never carve our name in the rock etc
- Abseiling down routes can be harmful to the rock, damage vegetation and inhibit other climbers
- Where abseiling from trees is necessary, use a rope protector, even then our activity could kill the tree
- Climbing on frozen turf, or thin ice, can cause a lot of damage to vegetation.

Fixed equipment for climbing

- For all established climbing areas in Ireland, bolting is not permitted. Bolts have been used in a few new climbing areas only (details of these crags can be obtained from the Irish Rock Climbing Committee – IRCC)
- Anyone considering placing new fixed equipment or replacing existing equipment should take careful account of local climbing ethics, the environmental sensitivity of the area, potential liability and public safety factors. The use of cliff-top belay stakes should be kept to a minimum, especially in popular or scenic areas where walkers have access to cliff tops.

Advice for climbers developing new crags / doing new routes

- New routing, cleaning and developing new crags can be a sensitive issue with landowners
- Ask other climbers why the crag not been developed, find out if there is a local access problem, etc.
- Is there a nature protection designation on the area; would climbing be harmful?
- Get the landowner's permission to climb there
- Minimise damage to plants and trees and leave as few traces of your climbing as possible
- Be careful about publicising a crag; can it take large numbers or could there be problems with access?

Guidelines for wild camping

- Where possible seek the landowner's permission before wild camping
- To avoid Mountain Rescue being called out unnecessarily inform a nearby resident or the Gardaí/PSNI if you are leaving a car overnight
- Choose unobtrusive sites at least 500m away from roads and buildings
- Keep the group as small and discreet as possible
- Use a stove for cooking; campfires leave their mark and fires in the countryside can be very destructive
- Bury human waste; latrines should be dug at least 30m away from watercourses
- Wash at least 15m away from watercourses; minimise the use of soaps and detergents
- To prevent damage to vegetation, tents should not be left on the same spot for more than two nights
- Leave no litter behind – 'pack it in, pack it out!'
- Ensure that you leave the site as you found it.

Putting something back

We use the land of the local communities where we walk and climb, in return we should make a conscious effort to contribute to that community. When locals see some benefit from our activities, we will be more welcome. This also shows that we care for the area. Consider

- using the local shops and filling stations
- eating in a local restaurant, or staying overnight in the area
- stopping for refreshments in a local café or pub after our activities (bearing in mind the drink-driving restrictions if we are driving home afterwards)
- using facilities that have been developed for walkers – eg car parks
- supporting local events and charities, eg tidy towns committees

- always asking ourselves 'If I lived here, how would I feel?'

We can also put something back on another level. Walkers and climbers contribute to erosion; consider spending a day repairing this damage. Organisations like Mountain Meitheal are doing this work and need more volunteers.

This document is not exhaustive. Please adopt the spirit of these guidelines and apply it to your own activities.

WK NOWLAN FSCS, FRICS, MIPI

I am a Chartered Surveyor, Town Planner and Management Consultant who advises property developers and landowners on the economic and financial aspects of development of their property. I have over 30 years experience in the property development business and have been involved in many very large development schemes in an advisory or managerial capacity. Up to recently I was visiting Professor at University of Ulster and also visiting lecturer at the planning school at UCD. I was a member of the Ministerial Advisory Committee on Urban Renewal and I am a currently a member of the Valuation Tribunal.

I know that you will have many submissions arguing the issues of the relationship between the cost of land and the cost of houses and other buildings. I do not intend to add to the volume of words that you will receive on this subject. However so that you will know my position, I fully endorse the view that house prices are set by the competitive market process, which regulates supply and demand of completed new buildings, and not by the simple cost of land or by the cost of any other input.

I would add that in my view the limitations in supply brought about by the slow delivery of planning decisions and the slow supply of infrastructure by local authorities has inhibited the ability of the development industry to respond to the demand for new houses and buildings and that the ensuing scarcity has forced up the price of houses. A 'Kenny' type solution controlling the price that farmers or others receive for land will not reduce the price of houses but would probably increase them due to the ensuing market paralyses.

The reason for writing this note to you is to suggest that in your examination of the issues relating to the price and supply of development land that you do not confine your examination to the issue of land for housing or commercial development at the local level but that you take an overview of the costs and values created by and imposed on the overall community by a given development scheme.

To date the local authority approach has been to charge development levies related to the cost of direct infrastructure supplied by them to service the relevant land. Whilst I agree with this approach, it does not go far enough in that there are many costs imposed on the community arising from new development that are not borne by the local authority and are not the subject of development levies. These costs include the extra demand for schools, hospitals, transportation and other social services.

The levy system needs to be reviewed so that a comprehensive financial balance sheet is prepared showing the complete financial impact of a given development scheme on the receiving community.

I would like to draw to your attention to the provisions in the Planning Act that require the preparation of an Environmental Impact Statement (EIS) for larger schemes by the developer indicating the likely environmental impact of a proposed scheme of development. However under the legislation this EIS is not required to deal with the financial costs imposed on the receiving community. I would recommend that the planning legislation be amended so that an EIS must include the estimated financial consequences on the receiving community of the proposed development.

If the financial costs arising were quantified and made a charge on the development, in the same way as local services levies, this would do much to balance the development equation in favour of the community. It would also create a pool of funds from which to provide the necessary non local authority infrastructure such as schools, hospitals, transportation and other like infrastructure.

The pricing in of the cost of *all* social infrastructure is not a novel concept. For example if one looks at the commercial new towns that have been developed in the USA one will find that the developers of those new towns automatically paid for all infrastructure associated with their comprehensive developments and not just for the piped infrastructure which is traditionally provided by Irish local authorities.

I believe that if a levy scheme were introduced that took into account the downstream demand and cost of additional schools, hospitals, transport etc this would result in a significant element of the windfall gain or betterment, now being enjoyed by individual landowners, being available for investment in the required facilities.

If the committee would like me to prepare a model balance sheet showing the full cost and values associated with a comprehensive development in Ireland and taking into account the non local authority costs I would be happy to do this work.

Finally I would comment that this committee must be very careful in arriving at its recommendations that any changes proposed do not damage the delicate supply chain for development land that is current bringing forward sufficient land for over 60,000 houses per year. The committee will be aware that the British Government introduced legislation in the mid 1970s the impact of which was directly the opposite to that desired and this resulted in the price of property

escalating due to the ensuing shortages of land for development.

Appendix

PROPOSAL TO BALANCE THE IMPACT OF NEW DEVELOPMENT ON THE DEMANDS FOR LOCAL COMMUNITY SERVICES

When a housing scheme is finished and the last keys are handed over to the last new house owner, the work of the builder/developer is regarded as completed. He or she has arranged the planning permission, provided the local roads and the local piped infrastructure in cooperation with the planning authority and has built the houses.

Whilst at this stage the developer's job may be done, the process of building a community or grafting it onto an existing community is only beginning. The new residents in their new houses will be seeking schools, medical and religious services, support from the Gardaí and emergency services and expecting recreational facilities to be available. In most cases they will be disappointed because the resources will not be there to provide a satisfactory level of such services. The existing community services will have been swamped. Neither the existing residents nor the new residents will be happy with that situation. If left unaided, as happens in most cases, then it will take many years with much hardship and huge sacrifice by individuals to achieve normality. This cannot be good planning.

Planning is not just about building the houses, the pipes and roads. Good planning must extend into the lives of the inhabitants of those new homes and also meet a responsibility to the old community that lived in the location before the new building took place.

What are missing are resources to provide the required 'social infrastructure' in parallel with the new development. Where are those resources to come from? The easy answer is to say that they will come from central taxation via the local planning authority. But we all know that this does not and will not happen in an effective and speedy way. The money needs to be found locally and spent locally.

It is submitted that the way to find this money is to evolve a process whereby the gain in land value or betterment, which generally accrues as a windfall gain generally to farmers and to speculators, is partially diverted to provide a fund to provide the local social infrastructure. The betterment gain in land values in most cases is vastly more than is necessary to persuade the landowners to sell their land for development. This would not be a capital gains tax which some have advocated, that would go to central funds and never be seen again at a local level, but a ring-fenced fund which would be used locally and if not used would be returned to the original landowner.

The way to create such a fund would be for the planning authority to determine, at the same time as a piece of land was rezoned, that there would be a community charge to provide social infrastructure to the new house owners at a pre-determined rate of say €8,000 per dwelling or similar unit. This charge would be levied as planning permissions were granted.

In terms of practical property economics, the effect of this would be for prospective developers to build into their development calculations the fact that this charge would have to be paid. Those developers would then reduce the price that they would bid for the land by the amount of the levies and in effect the land would become less valuable. The vendor of the land, farmer or speculator, would accordingly, be paying the community levies without really seeing it happen.

Some spokesperson from the development industry may argue that this would put up the price of houses. This is a fallacious argument. Although regularly put forward by the development industry the argument is incorrect and unsupported by simple logic and basic economics. Simple logic and experience shows that every house seller, be he or she a seller of a single semi-detached or a developer selling many units, will seek to get the best price that he or she can for the asset. He or she will not sell a house for €300,000 if €350,000 can be got from the market. All property owners will always sell at the highest price that they can get. Developers are no exception.

The fact that a developer has to pay a community levy, probably in addition to a levy for the necessary piped services and roads, will not impact one whit on the price of the completed house. To argue this would is like arguing that a house built ten years ago should be sold at the same price that it was then bought.

HOW DOES ONE QUANTIFY THE LEVEL OF THE LOCAL COMMUNITY LEVY?

I believe the way to do so is for either the developer or the local authority to be required to prepare a 'Social and Fiscal Impact Statement' as part of the planning application. This would be a similar document to an Environmental Impact Statement which is currently required in most large planning applications.

This Social and Fiscal Impact Statement would detail the quantity and quality of new social infrastructure required as a result of a given development. This statement would include an estimate of the cost and requirement resulting from the proposed development of the following services:

- schools/education
- medical
- religious
- recreational and cultural
- transportation
- emergency
- administration/coordination.

The requirements and the costs would be totalled and allocated to the new development on a unit basis.

MODEL COMMUNITY DEVELOPMENT FUND

Social and fiscal impact statement for say a 1000 house residential extension to a community which already has 1000 houses

			NOTES ON POSSIBLE IMPLEMENTATION
1.	***Schools/Education*** One new junior school (or extension) with say 4 classrooms.	€1,750,000	Land and grant to Department of Education?
2.	***Medical*** One new clinic at	€1,500,000	Land and grant to health board?
3.	***Religious/social*** One new meeting place to accommodate 200 persons	€1,500,000	Building and land
4.	***Recreational and cultural*** 5 acres of playing field and hall. Small community hall with meeting rooms.	€2,000,000	Land and buildings handed to local GAA/soccer clubs?
5.	***Transportation*** Mini bus service – 2 buses	€200,000	Contact with local bus company
6.	***Emergency services*** Extra fire engine and extra ambulance and 2 Garda patrol cars	€500,000	Fire/emergency services
7.	***Administration/co-ordination*** Secretarial/managerial supports for local volunteers for say 5 years	€250,000	Local manager administrator/ temporary
	TOTAL	**€7,700,000**	
	TOTAL SAY	**€8,000,000**	

For 1,000 houses is €8,000 per house

This is not a new concept. Section 48 of the Planning Act currently provides that a planning authority should prepare a scheme estimating the costs of piped and similar infrastructure serving a given locality. The estimated cost of the new infrastructure is then levied on each benefiting development on a unit by unit basis. This system, whilst a source of complaint by many developers, is generally regarded as satisfactory and necessary. It is accepted that someone has to pay for the pipes and the roads etc that service a new scheme. Of course, provided that the costs are known in advance, the landowner effectively pays for these levies because developers automatically deduct the cost of these services from the price they are prepared to pay for the land. Sometimes this logic is hard to understand but it is the way the market works in every country that has a free property market.

Under the proposed social levy scheme, the costs of the new social facilities would be established prior to development and agreed with the planning office. Then a local ring-fenced scheme would be established in respect of a partial community. As planning permission was granted for given sections of the given 'Community' (this will require precise determination with a map attached), developers would pay the levy into a fund controlled by the planning authority.

A new community levy scheme based on a Social and Fiscal Impact Statement would work in the same way as the infrastructure schemes currently operate although they would probably require new legislation and probably could not be operated under Section 48 or Section 49 of the existing 2000 Planning Act. This would need to be confirmed by legal advice.

At the end of this document I have illustrated how the possible levy might apply in a 'model community development fund'.

The key to the success of the approach would be that local people would quickly become involved and become 'hands on' in the provision of local facilities.

This source of funding should not be a substitution for resources that would have come in any event from the local authority or from central taxation. The ring-fencing and local application of the fund would be key features. To ensure that the fund was applied expeditiously the money would be returned to the original landowners if not applied in say five or seven years. Developers would also be empowered to pay the levy through land grants as well as cash so that sites might be available for schools, clinics etc.

Why is this necessary now? What is different than in the past? Well in the past one of two things happened – either the catholic church or other religious stepped

in and attempted to fill the gap by the use of their own physical resources or by pressurising the developers or the state/local authorities or, alternatively nothing got done and the new communities struggled with the problem for generations.

Finally I have not dealt with the issue of the annual cost of providing or running local services to the new community or indeed the old community. In all European countries bar Ireland there are local rates or taxes to pay for these costs. The fact that Ireland, for better or for worse, has chosen to pay for local services out of national taxation is not a relevant issue to this discussion because we are talking about capital costs and not revenue costs.

OFFICE OF THE OMBUDSMAN

In view of the role of the Ombudsman in examining the complaints from the public over a period of eighteen years, this office is well placed to give an informed and objective view in relation to certain areas where it appears to us that a balance has not to date been achieved. Our submissions are concerned with the right to private property (Submission 1) and private property and the common good (submission 2)

SUBMISSION 1: THE RIGHT TO PRIVATE PROPERTY

The Constitution

Article 40.3.2 of the Constitution of Ireland provided that

> The State shall, in particular by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen.

Article 43 of the Constitution provides that

> 1.1 The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
>
> 1.2 The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2.1 The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society to be regulated by the principles of social justice.
>
> 2.2 The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

Background

We are still fortunate in this country in that relatively little restraint is placed on access, by walkers and other outdoor pursuit groups, to the countryside. This is not the case in some other countries and the increasing number of visitors who come to this country every year probably appreciate this freedom more than we do ourselves. It is important therefore that landowners' rights are respected if walkers are to maintain the existing good relations with them. In addition, it is equally important that landowners respect the rights of walkers and other such groups when exercising their legitimate freedom to pass over lands on which there exists a public right of way.

There are a number of important natural resources that cater for the leisure requirements of the population in general. These include, the mountain areas, the coastline, regional parks and designated walkways, such as the Wicklow Way, the Mid Clare Way, the Slieve Bloom Way etc. There are also a number of areas which have been designated as areas of natural conservation value (SPA, SAC, NHA, and SAAO) together with many archaeological and historical features of heritage value, some of international importance.

Nevertheless, in these modern times, there is a problem of land use which cannot be ignored. With the increased trend towards urbanisation, some areas of the countryside are coming under increasing pressure from these expanding urban centres. That is the view of many hillwalker groups. On the other hand some farmers/landowners would tend to the view that many areas of the countryside are coming under severe pressure from hillwalkers. Access to the countryside by many city dwellers is primarily achieved through long established and traditional public rights of way. The Ombudsman's submission to the committee is based on his experience of complaints which he has received from members of the public about the alleged violation of public access to designated public rights of way.

Rights of way

In England, the term 'highway' means a way over which a public right of way exists. A public right of way is different in nature, and not merely in degree, from a private right of way. A right of way is a right to traverse land belonging to another person. A private right of way is a right to use land (part of a servient tenement) as a means of access to or egress from other land (the dominant tenement) for some purpose connected with the enjoyment of the dominant tenement. It is an 'easement' and the occupation of the land remains with the servient tenement.

A public right of way is a right of way common to all: occupation of the surface of the land passes to the public for the purpose of passing and re-passing. A public right of way can be enjoyed by any member of the public. It is established

- by showing use from time immemorial,

- by relying on creation by statute or
- by proving express or implied dedication to the public right of way by the owners of the underlying soil and an acceptance of such use by the public.

Some types of right of way developed terms by which the right involved was commonly understood, such as footway, horseway, bridleway and cartways.

Qualities of public right of way

Public and private rights of way may exist over the same road. The extinguishment of the public right of way does not necessarily involve the extinguishment of the private right. An example of the private right of way which affects public roads is a person's right of access to his premises; this right of access is subject to the rights of the public in relation to the public road, and the public right is also subject to the private right.

A public right of way may be subject to limitations; for instance, it may be available only to specified classes of traffic (e.g. foot passengers) or it may be subject to interruptions by the occasional opening of a swing bridge. But generally a public right of way has qualities of permanence and unlimited application.

Creation of a public right of way

A public right of way is an essential feature of, but does not necessarily constitute, a public road. Public rights of way may be created under statutory powers or by 'dedication and acceptance'. Dedication and acceptance is where the owner of land dedicates, to the public, a right of passage over it and the public accepts the right thus offered to them.

In practice, positive evidence rarely exists of dedication by the owner of the land in the form of a deed. Dedication is normally proved by use by the public and use by the public is evidence of their acceptance of the dedication. Repair and maintenance by the road authority is also evidence of the dedication and acceptance of the road. The other method of creating a public road is by statute – namely Section 11 of the Roads Act, 1993.

Relevant statutory provisions

Section 73(10) of the Roads Act, 1993 provides that

> A person who obstructs, impedes or otherwise interferes with a public right of way or who destroys or damages a public right of way save as is provided for in law shall be guilty of an offence

Section 73(11) of the Roads Act, 1993 provides that

> It shall be the function of a local authority to protect the right of the public to use public rights of way in its administrative area.

Section 206 of the Planning and Development Act, 2000 provides that

> A planning authority may enter into an agreement with any person having the necessary power in that behalf for the creation, by dedication by that person, of a public right of way over land

Section 207 of the Planning and Development act, 2000 provides that

> If it appears to the planning authority that there is need for a public right of way over any land, the planning authority may, by resolution, make an order creating a public right of way over the land.

Role of the Ombudsman

The role of the Ombudsman may be summarised as:

- protecting the rights of individuals in their dealings with those entrusted with the exercise of public power;
- providing redress where it is found that these rights have been infringed causing adverse effect;
- promoting high standards of public administration generally;
- acting independently in support of parliamentary control of the executive in the interests of fair and sound administration.

As outlined above, there is a vast range of legislative weapons available to local authorities to protect public access to established public rights of way. In the circumstances it is rare that a council official can complain that the legislature has not provided an appropriate statutory remedy for a particular problem with which he may be confronted. However, over the years, the Office of the Ombudsman has received a number of complaints against planning authorities from people who believe that the planning authority has failed to protect public rights of way and the public's statutory entitlement to use them.

An example: Uggool Beach, County Mayo

In the case of Mayo County Council access to Uggool Beach in County Mayo was effectively closed in 1989 with the erection of fencing by a local landowner. The county council received complaints that the fencing was an unauthorised development and it was asked to ensure that access to the beach was restored to the public. The complainants believed there was a public right of way to the beach. The landowner, on the other hand, claimed that there never had been such a right of way. Complaints were eventually made to the Ombudsman that the county council had not taken action to resolve the situation.

Under the Planning Acts local authorities have discretion in deciding whether to take enforcement action in cases of alleged breaches of planning legislation. In deciding whether or not to take enforcement action, they take into account the extent of the breach as well as the likelihood of success in going to court. To date, the courts have emphasised that councils enjoy a very wide discretion under the Planning Acts to exercise their discretion. It appears that the weight which a

court will attach to any particular factor will vary with the circumstances of each individual case.

At the end of the day, the court is engaged in a balancing process, attempting to balance the rights and interests of each of the three parties to the planning process, namely the developer/ landowner, the planning authority and the public. It appears that a court will consider the following factors, among others, in exercising its discretion in considering the action to be taken in respect of a reported breach of the planning code:

1 technicality or triviality of the breach
2 impact of the unauthorised development on the applicant
3 hardship to the developer/landowner
4 conduct of the applicant
5 conduct of the developer/landowner
6 public interest
7 the attitude of the planning authority.

In the Mayo case, the council contended there would be difficulties in obtaining a successful resolution through the courts. Enforcement action of this kind must be taken within five years of the event and, by the time the Uggool issue was raised with the Ombudsman, this five year period had passed. This meant that Mayo County Council was already legally precluded from taking enforcement action. However, the Ombudsman was not happy with the council's handling of the issue and, accordingly, he decided to pursue the matter.

The council was aware of the fencing of the beach in 1989 and an examination of its files showed that it received over 25 complaints on the matter from individuals and organisations, including semi-state bodies. The fencing is of such an extensive nature, continuing at certain points on to the foreshore and beach, that it was difficult to see it solely as a means of protection of agricultural land. The conclusion that the fencing was intended to prevent access to the beach was unavoidable – nor did the council dispute this conclusion. The landowner was contacted by the council on a number of occasions since 1989. In 1992 the council sought legal advice on the case; however, no action was taken either then or in the following years.

Following detailed contacts with this office over a period, Mayo County Council gave the Ombudsman an assurance in 1999 that it was finally determined to ensure safe public access to the beach. The council said that it intended to do this either by a compulsory purchase order (CPO) or by the compulsory creation of a public right of way. The Ombudsman welcomed this development. However, he was disturbed that it had taken ten years to reach this point and he was greatly concerned that this delay on the council's part resulted in the loss of access rights for members of the public over a ten year period.

Since that time, the complainant has had occasion to complain again to the Ombudsman about the length of time it was taking the council to resolve issues locally. The Ombudsman took up the case again in 2002. Following this recent complaint, the council has identified three possible accesses to Uggool Beach. From an examination of these options the Council came to the conclusion that there is no easy solution to this situation without a major infringement on the landowner and an enormous expense to Mayo County Council. In addition, having considered the situation in detail Mayo County Council did not feel that the earlier option of a CPO was a reasonable solution in light of the above and in particular the prohibitive costings associated with such a course of action.

The council has recently informed the Ombudsman that it is currently in negotiations with the landowner and Dúchas with a view to remedying this situation. In saying this, the council confirms that Uggool Beach is currently inaccessible. However, the council states that it hopes to progress this situation through partnership with all the stakeholders, i.e. the landowner, Dúchas, the complainant and his organisation. Finally, the council says that it is aware that Section 207 of the Planning and Development Act 2000, can be used as an enforcement tool if the partnership route is not successful.

At the end of the day, the council finds itself in a difficult position. On the one hand it has a landowner who is intent on denying public access to a legitimate public right of way and , on the other hand, it has a number of organisations insisting that it preserve the existing public right of way.

This simple case highlights how difficult it can be for the general public to insist on their rights to move freely and uninterupted across established, remote public rights of way. Local planning authorities have a major role to play to ensure that such rights of way are not interfered with, are not obstructed or damaged. It also has a statutory duty to protect the right of the public to use public rights of way. The experience of this Office, to date, is that, while they have legislative powers, many local authorities do not have the resources or, in some cases, the will to ensure that these rights are protected.

In the circumstances, the Ombudsman would suggest that the committee consider the issue of public right of way to ensure that there is a more streamlined process available to the general public to protect its rights to access in the countryside.

SUBMISSION 2: PRIVATE PROPERTY AND THE COMMON GOOD

Introduction

The Ombudsman was established under the Ombudsman Act 1980 to:

> '…investigate any action taken by or on behalf of a Department of State or other person specified in Part I of the First Schedule to this Act (being an action taken in the performance of administrative functions) where, upon having carried out a preliminary examination of the matter, it appears to the Ombudsman

a) that the action has or may have adversely affected a person (other than a Department of State or other person specified in the First or Second Schedule to this Act), and
b) that the action was or may have been
   i taken without proper authority
   ii taken on irrelevant grounds
   iii the result of negligence or carelessness
   iv based on erroneous or incomplete information
   v) improperly discriminatory
   vi based on an undesirable administrative practice, or
   vii otherwise contrary to fair or sound administration

In 1985 his jurisdiction was extended to include local authorities. One of the functions of local authorities is to enforce the planning code and the Ombudsman has, since 1985, dealt with complaints from the general public about the failure of local authorities to enforce the code of planning effectively. Observations of the Ombudsman in this regard are based on 18 years experience of dealing with complaints. He felt compelled to comment publicly on the matter in his annual report of 1999 when he described the system as 'a system in a state of collapse'. On that occasion he was speaking mainly about the failure of local authorities to take effective enforcement measures against developers who break the planning code. Developers break the code by:

- not adhering to the conditions attaching to the grant of permission
- engaging in development for which no permission has been obtained.

Legal position

The planning Acts 1963 and 1976 contained a multiplicity of enforcement mechanisms for local authorities including legal action. In practice the emphasis was on rectifying a planning difficulty by forcing developers into the permission process, without penalty. The Planning and Development Act, 2000 has reduced the number of enforcement mechanisms to three with an emphasis on securing compliance with planning controls, including penalties for breaches. While the current statute gives local authorities greater powers with regard to enforcement and they seem determined to use these powers, they have expressed scepticism to the Ombudsman that their efforts to secure convictions against developers will be supported by the courts. Their scepticism is based on past experience of the exercise of the discretion of the courts in favour of developers who, despite proven infringements, are seen as the 'victims' of the oppressive local authority rather than the law breakers. As a consequence of such court experiences local authorities have advised the Ombudsman that they have been reluctant to proceed with prosecutions against developers for non-compliance with the planning code.

Background

It seems to the Ombudsman that the background to the perspective of the courts may arise from the Irish Constitution which protects the property rights of landowners (Article 43). It seems the traditional view has been to regard the requirement to obtain planning permission as an interference with or a restriction of a person's property rights. In contrast, local authorities and indeed the general public would take the view nowadays that the requirement to obtain planning permission is in the common good and that the grant of planning permission is usually an enhancement of the property rights, in some cases enhancing the value of the property by several factors and providing the developer of the land with the potential for significant financial gain. In many cases such gain for the developer can be at cost/loss to the common good in loss or reduced visual amenity, increase in traffic, noise, pollution and environmental damage etc. In these circumstances the common good has a right to the comfort that observance of the planning code is on an equal footing with the right of the individual to protect his property rights, as envisaged by Article 43. It seems to us that arising from the provisions of Article 43 and its interpretation by the courts as evidenced by local authorities, the public does not enjoy that comfort and therefore, local authorities may, despite their increased powers under the Planning and Development Act, 2000, continue to hesitate to pursue planning infringements through the courts, for the reasons explained above.

Suggestion

In the circumstances perhaps the provisions of Article 43 would be examined with a view to providing for a balance between individual property rights and the common good particularly where the state has a legal obligation to ensure compliance with the law in the interests of the common good.

THE RAILWAY PROCUREMENT AGENCY AND THE NATIONAL ROADS AUTHORITY

INTRODUCTION

1 The following summary is made without prejudice to such further and additional submissions that may be made at the hearings of the Committee.

2 Generally speaking, Article 40.3.2 of the Constitution makes provision for the protection of the individual citizen's property rights, whereas Article 43 of the Constitution deals with the institution of property itself and importantly recognises that property rights are to be regulated by the principles of social

justice and provides for their delimitation by law. Therefore it is submitted that the analysis to be carried out in relation to property rights by the Committee should be seen in the context of the legislation that has been enacted in relation to *inter alia* land use planning, compulsory purchase and infrastructural development and such further legislation that may be contemplated in this regard.

3 We would endorse the findings of the Report of the Constitution Review Group 1996 (the Whitaker Report) that the provisions of Article 40.3.2 and Article 43 of the Constitution, including phrases such as 'unjust attack', 'principles of social justice' and 'reconciling' should be recast in a manner which provides for a more structured and objective method of interpretation. As with paragraph 2 above, we would respectfully submit that the committee should have regard to the complex jurisprudence that has evolved over the years in trying to reconcile the property rights provisions.

4 Insofar as Article 43.2.1 provides that the state recognises that the exercise of property rights ought to be regulated by reference to the principles of 'social justice' and Article 43.2.2 provides that the state may delimit the exercise of these rights by law (legislation) in the interests of the common good, it is submitted that this regulation/ delimitation is an absolute requirement in terms of compulsory purchase, infrastructural development and land use development.

5 Current judicial attitudes to the interpretation of Article 40.3.2 and Article 43 would seem to suggest that the regulation/delimitation and/or interference with property rights are subject to a test of 'proportionality.' Furthermore, in applying Article 40.3.2 and Article 43, the courts have tended to strike down provisions which restrict the property rights of one group of citizens for the benefit of another group where this is done without compensation and without regard to the financial capacity or the financial needs of either group.

REPORT OF THE COMMITTEE ON THE PRICE OF BUILDING LAND (MARCH 1973)

6 The Kenny Report, dated March 1973, suggests how the balance between rights of the private ownership of land and the common good might be achieved in the acquisition of land by public authorities. The terms of reference for the committee which prepared the report were as follows:

1) to consider, in the interest of the common good, possible measures for
   a) controlling the price of land required for housing and other forms of development;
   b) ensuring that all or a substantial part of the increase in the value of land attributable to the decisions and operations of public authorities (including in particular, decisions and operations relating to the provision of sewerage and water schemes by local authorities) shall be secured for the benefit of the community;
2) to report on the merits and demerits of any measures considered, with particular reference to their legal and administrative practicability, and
3) to advise on what changes in the present law may be required to give effect to any measures recommended.

7 The committee concluded that any legislation introduced to deal with the matters in the terms of reference must have two aims; the reduction or, at least, the stabilisation of the price of serviced and potential building land and the acquisition by the community on fair terms of the betterment element which arises from the execution of works by local authorities. The committee noted that these aims do not necessarily coincide: legislation, which provided for the acquisition of the betterment element by any form of levy or taxation, will usually increase the price of all land.

8 The majority in the Kenny Report suggested a designated area scheme under which the High Court would have power to declare that certain areas may be used during a ten-year period for development and would be increased in value by works carried out by local authorities; local authorities would be entitled to acquire land in such areas compulsorily at its existing use value, with an addition of 25%, but without regard to its developmental potential; in this example compensation would be payable for the refusal of planning permission in such areas. When an area had been designated by the court, the local authority would have power to acquire all or any part of the land within it within ten years after it had been so designated at its existing use value at the date when the application to assess the compensation was made, plus some percentage of that value, together with compensation for reasonable costs of removal but without regard to its development potential. If agreement as to the amount of the compensation had not been reached when the local authority, having decided to purchase the lands, applied to have the price fixed, it would be assessed by a High Court judge sitting with the two assessors. Until the local authority made this application to the court, the owners of land in a designated area would retain their rights as owners and could sell or lease the lands, but all development would require planning permission.

9 The relationship between the designated area scheme and planning legislation was also considered by the committee. The majority of Kenny

recommended that the legislation should provide that a planning authority, or the minister on appeal (now An Bord Pleanála), may refuse to grant planning permission for any development of lands in a designated area on the grounds that the land to which the application relates is in a designated area and that the local authority intends to acquire the lands within the ten year period. Crucially they recommended that the decision of the planning authority on a planning application in relation to land in a designated area should be an executive function of the planning authority performable by the city or county manager and that his/her decision should not be subject to a direction by the elected members of the planning authority under Section 4 of the City and County Management (Amendment) Act 1955 (repealed and replaced by the Local Government Act 2001). If planning permission is refused on this ground and if the refusal is confirmed on appeal, the owner of the land should be entitled to apply to the High Court to compel the local authority to purchase the land at existing use value plus a recommended percentage of it, but the court should have a discretion to refuse the application if it thought it just to do so.

10 If refusal of planning permission in relation to lands in a designated area gave rise to a liability to pay compensation under planning legislation, the financial burden on local authorities would be intolerable. The majority of Kenny therefore recommended that if planning permission is refused by the planning authority, or on appeal, for development of land in a designated area, there should be no right to compensation.

11 In contrast, the minority in the Kenny Report recommended a scheme which combined a right of pre-emption for local authorities, with a levy on disposals and developments.

12 Criticism or concern over the designated area scheme has heretofore centred on the possible constitutional frailty of any proposed statutory restriction on the free market price, i.e. the possible constitutional infirmity of radically departing from the usual method of assessing compensation for expropriation based on market value, having regard to Article 40.3.2 and Article 43 of the Constitution and arguments that such provisions are unjust, arbitrary and discriminatory.

13 We would therefore broadly support the recommendation set out in the majority report of Kenny, but would further submit that the required changes to the Constitution should be examined as a matter of urgency.

CONCLUSION

14 Our fundamental submission is that the committee should act on the Kenny Report (Report of the Committee on the Price of Building Land, March 1973) and by so doing the Oireachtas can enact legislative measures which can provide for *inter alia* compulsory purchase, infrastructural development and land use development which will have a new, clear and unambiguous constitutional underpinning.

15 The amended constitutional provisions (which will require a referendum) would have the effect of informing the subsequent legislative measures. The constitutional reformulation of a right to property should therefore be clearly and unambiguously qualified by a formula of words which restricts the right in certain circumstances. The Whitaker Report (1996) suggested the following:

> ……a new qualifying clause which would provide that such property rights, since they carry with them duties and responsibilities, may be subject to legal restrictions, conditions and formalities, provided these are duly required in the public interest and accord with the principles of social justice. Such restrictions, conditions and formalities may, in particular, but not exclusively, relate to the raising of taxation and revenue, proper land use and planning controls, protection of the environment, consumer protection and the conservation of objects of archaeological and historical importance…..

16 Importantly, this qualifying clause should perhaps be expanded in order to include, or at least contemplate, further legislative measures which deal with the associated problems of land acquisition and infrastructural development at every stage of the process, including but not limited to the following: referencing (for example leasehold interests and sub-strata); the anachronistic and complex statutory compensation code; public inquiries and costs of same; arbitrations, the costs of same, the nature of the evidence (for example valuation evidence) adduced and the technical rules which apply; legal challenges and the costs of same; the relationship between public bodies/utilities which may have common or competing interests. The aforementioned is simply a non-exhaustive list of the issues which arise and we reserve the right to expand on this part of our submission at the Committee's hearings. It appears that similar issues may be addressed in the proposed Critical Infrastructure Bill.

17 Indeed the difficulties associated with the interpretation of the property rights provisions as currently set out in Articles 40.3.2 and 43 are apparent when one considers that in one case the courts have found that certain legislation constituted an unjust attack on a person's property rights where the effective reduction of the value of the landlord's interest was achieved arbitrarily and without compensation and in another case the courts have suggested that the common good might justify legislation divesting a person of his title to antiquities of importance in favour of the state subject to the

payment of compensation, if in the circumstances justice required the payment of compensation.

18 One example of the associated difficulties which now present themselves when land is being acquired for road or rail development is the cost of such development, which we would respectfully submit is disproportionate, and therefore offends against the very principle of 'proportionality' which now informs the interpretation of Articles 40.3.2 and 43.

19 For example, the cost of acquiring land for road schemes is considerable; in 2002 the National Roads Authority land acquisition costs were approximately €150 million and these costs can account for between 12% and 50% of the overall cost of a roads project; the land costs represent a higher proportion of the overall cost in areas where the land can be categoried as 'development land' or land with 'hope value.'

20 The cost of the lands to be acquired for the LUAS lines, from the city centre to Tallaght and Sandyford will be €100million approximately.

21 Where negotiations between valuers acting on behalf of the claimants and valuers acting on behalf of the acquiring authority are not successful, the matter is referred to a property arbitrator appointed by a reference committee which compromises the Chief Justice, the President of the High Court and the chairman of the Society of Chartered Surveyors in the Republic of Ireland.

22 As stated above, it is submitted that the present rules of compensation and the arbitration process require to be radically and urgently amended; the current code results in compensation being paid for land which does not reflect the current provision in Article 43.2.1 of the Constitution which states that the rights of private ownership of property ought to be regulated by the principles of social justice. Sufficient weight is not given either in the current assessment of compensation to the capacity of the state under Article 43.2.2 to delimit by law the exercise of private property rights with a view to reconciling their exercise with the exigencies of the common good.

23 Costs associated with land acquisition add significantly to the overall expenditure. Currently an arbitrator will award a valuer $2^1/_2$% of the arbitration award with no threshold applying. Legal advisers are often awarded an amount for preparation and submission of a claim even through the valuer is paid for this work in his/her fee. Legal advisers are then paid separately for the transfer of title at a rate of 1% of the compensation total, again with no threshold applying.

24 The matter of costs needs to be addressed also in the context of unconditional offers. Section 5(1) of the 1919 Act *inter alia* provides that where the acquiring authority has made an unconditional offer in writing of any sum as compensation to any claimant and the sum awarded by a property arbitrator to that claimant does not exceed the sum offered, the property arbitrator shall, unless for special reasons he thinks proper not to do so, order the claimant bear his own costs and to pay the costs of the acquiring authority so far as such costs were incurred after the offer was made. In practice, very often claimants challenge the validity of an unconditional offer and the offer has not proven to be particularly robust in the light of this challenge. Accordingly it is recommended that this issue be examined in any review of legislation.

25 The achievement of more reasonable costs can be catered for by legislation, and by way of example we would request that the committee consider this matter in addition to the other items referred to in paragraph 16 above in the context of the underlying constitutional principles.

ROYAL INSTITUTE OF ARCHITECTS OF IRELAND

INTRODUCTION

The RIAI is the representative body for architects in Ireland and has 2,300 members and 415 registered practices. It represents architects dealing with building development projects both in private consultancy and in state, local government and state-sponsored agencies. This gives its members considerable experience of the impact of building land costs, of property ownership patterns, and of the property market generally, on the effectiveness of housing and planning construction policies.

1 THE CONSTITUTIONAL BACKGROUND

1.1 Constitutional necessities

In making this submission to the All-Party Committee on the Consitution (APCOC), the RIAI is conscious that :

- The RIAI is not expert in constitutional law; and that
- The RIAI is therefore uncertain as to which (if any) of its concerns for improvement in how the state intervenes to affect the property market would require amendment to the constitution, and specifically Articles 40.3.2 and 43 which vindicate the property rights of every citizen, while requiring those rights to be regulated by the principles of social justice.

The RIAI has therefore included in this submission an overall view on operation of the development land market, aware that much can

be done by legislation alone. The judgement of Mr Justice Ronan Keane in relation to Part V of the Planning and Development Act 2000 illustrates this. He held that the legislative objectives of Part V are in accordance with the Constitution, notwithstanding that they require expropriation of land for social and affordable housing by (or on behalf of) the local authority at less than the open market value otherwise achievable.

This indicates that there is wide latitude for legislation to regulate the right to private property in order to balance it with the common good. Part V indeed regulates several of the aspects referred to in the list of issues advertised for submission by the APCOC, including compulsory purchase, zoning of land, the price of development land and house prices.

1.2 The wider constitutional agenda

Nonetheless, the RIAI has many concerns about the way in which land-related factors limit the effectiveness and public benefit of state and local government intervention in development land. These concerns relate to the systems of planning, design, construction and estate management, where state and local government act in several roles: as regulator of development activity, as champion of the building industry, as client body and as landlord/ manager or tenant.

The fact that most (if not all) of these concerns can be addressed without altering the constitution is perhaps not the only constitutional issue. After all, the country might benefit by a change in the constitution which, while not absolutely necessary from a lawyer's point of view, could nonetheless copper-fasten some key principles of land policy. For example, one could envisage objectives related to sustainability, infrastructure provision or good environmental quality.

1.3 Relevance of Bunreacht na hÉireann to this submission

This response to the invitation for submissions to the All-Party Committee, therefore addresses issues and difficulties in areas of public and professional concern without regard to whether the changes needed can be achieved through legislation only, or also need (or would benefit from) amendment of the constitution.

In either case, changes which affect the value of properties owned by various individuals and interest groups are likely to evoke strong and even emotional responses from those who see their interests threatened by those changes. Whether debate in the context of a constitutional referendum would help or hinder improvement in legislation is a matter for political opinion.

2 THE BUILDING LAND MARKET, DEVELOPMENT POLICIES AND LAND LAW

2.1 A recent consensus

The rise in land and property prices threatens people's ability to house themselves, restricts the effective range of tenure choices open to householders (especially first time buyers), and distorts infrastructure construction costs to an unsustainable extent. This is a consensus which has, in the past few years, led to the Bacon Reports (1,2 and 3) and to Part V of the 2000 Planning Act which introduced the first Irish legislation requiring private developers to provide social and affordable housing and

2.2 A history of reviews

These are the latest efforts in a long history of reviews and proposals relating to building land, and of government efforts to cope with problems of land and house price escalation.

The Kenny Report, which is the 1973 *Report of the Committee on the Price of Building Land* whose Chairman was the Hon. Mr. Justice John Kenny, is perhaps the best known of these efforts, although the 1985 *Report of the Joint Committee on Building Land* is just as important and useful. It is striking that the price of land was seen as a problem in 1973 and 1985, notwithstanding that development land prices in those times were lower than now even in real terms adjusted for inflation.

The Joint Committee noted in its report that

> There is no policy area directly concerned with the operation of the land market, which is largely left to its own devices.

That remains the case today. Consensus that there is a problem has not led to political consensus or an overall strategy on how to remedy that problem. Recent World Bank research on land policy is reviewed at 2.5 below, and may help in this regard.

2.3 Changes in the context for policy

A contemporary review of land policy needs to take account of changes in policy (and in the context for policy) which have occurred since 1985, notably in the area of sustainability. These changes include:

- Ireland's failure to operate within the limits on greenhouse gas emissions set in the Kyoto protocol, and the need for drastic changes in order to meet our commitments, in which land use policy and regulation have a significant part to play;
- The move towards a 'polluter pays' and 'resource user pays' principle in relation to what were traditionally regarded as free services and resources such as domestic water supply, refuse collection to landfill etc.

The announcement in 2002 of a carbon tax for Ireland is another example of this.

- The British government has set (and achieved) an objective for 60% of new housing to be built on 'brownfield' sites, so as to reduce the depletion of greenfield resources. While no such objective has yet been set in Ireland, it is implicit in existing government policies for residential density and transport infrastructure provision. The focus in the Kenny Report on greenfield housing land needs therefore to be broadened.
- Social segregation appears to be becoming cemented into our cities, towns and villages. Part V of the Planning and Development Act 2000 includes an objective to mitigate this. Yet the Planning and Development (Amendment) Act 2002 seems to have responded to pressure from private housing developers and estate agents to remove whatever teeth the 2000 Act had to achieve this objective, and the exemption of unzoned land exempts rural Ireland from Part V altogether.

There have been changes too in the range of measures being used by central and local government to implement objectives in the areas of housing and infrastructure. The Department of Finance recently noted the two affordable housing schemes at Cherry Orchard and Mulhuddart as examples of pilot projects in the Dublin area which help to meet the major milestones set out for PPPs in the National Development Plan. Both of these projects were based on disposals of land by local authorities to consortia of developers and architects chosen through an architectural and quality-based competition process.

While the problems and challenges for land policy have therefore widened since 1985, that policy can take advantage of experience gained in such innovations. The architectural profession – both in the local authority and state sectors and in private consultancy – is a resource in this regard. Neither the Kenny Report nor the 1985 Joint Committee got to grips with the mechanics for successful land disposal by local authorities, which are perhaps even more challenging and important for the public good than the mechanics for successful land acquisition by those authorities.

2.4 The Kenny Report : land price inflation and public investment

The 1973 Kenny Report begins by setting out its terms of reference, which were :

1. To consider, in the interests of the common good, possible measures for –
   (a) controlling the price of land required for housing and other forms of development,
   (b) ensuring that all or a substantial part of the increase in the value of land attributable to the decisions and operations of public authorities (including, in particular, decisions and operations relating to the provision of sewerage and water schemes by local authorities) shall be secured for the benefit of the community.
2. To report on the merits and demerits of any measures considered, with particular reference to their legal and administrative practicability.
3. To advise on what changes in the present law may be required to give effect to any measures recommended.

Item (1) identifies and separates two key considerations in relation to land costs:

(a) Firstly, that uncontrolled inflation in land costs threatens the country's ability to provide housing and other forms of development, or at best diverts resources to an undue extent from other needed investments.

(b) Social and economic justice requires that public investment in infrastructure and the zoning of land by planning authorities, insofar as it increases the value of building land, should result in public benefits in terms of monetary value and/or by achieving public planning objectives. The Kenny and Joint Committee Reports emphasised monetary value, but the need to recognise objectives for quality of planning, urban design and the built environment generally is perhaps clearer in the current policy context.

The first of these considerations is already discussed in the introduction to this submission, and the second issue of public benefits is discussed at 3.0 below.

2.5 Land policy and the World Bank view

The ownership of private property is fundamental to economic life in Ireland, as in western societies generally. Private ownership raises special issues in the area of land and real property for a variety of reasons:

- land is a finite resource, whose productive (or less productive) use has external impacts on other land users and on the landless
- the external effects of private land use, and of how private use is controlled, can cause problems for the social and economic fabric at several levels; from society's ability to provide transport and water infrastructure, to climate change exacerbated by excessive use of private transport.

The World Bank in May 2003 co-published with the Oxford University Press a Policy Research

Report entitled *Land Policies for Growth and Poverty Reduction* by Klaus Deininger. The Foreword written by the bank's chief economist says:

> Land policies are of fundamental importance to sustainable growth, good governance, and the well-being of and the economic opportunities open to rural and urban dwellers – particularly poor people. … Discussions on land policies are often characterized by preconceived notions and ideological viewpoints rather than by careful analysis of the potential contribution of land policies to broader development.
>
> . . . Nonmarket mechanisms for transferring land, such as inheritance, award of public and state lands, and expropriation of land by the state for the broader public good, have historically played a major public role in either facilitating or obstructing broad land access and effective land use and …. policymakers should take careful account of these processes.
>
> . . . Appropriate incentives for sustainable land use are also required to avoid negative externalities and irreversible degradation of nonrenewable natural and cultural resources.

2.6 Land policy and economic potential

While the focus of the World Bank is mainly on developing countries, the principles they discuss are relevant to issues of shelter, economic disadvantage and economic potential in all countries. For example, they say

> . . . Appropriate institutional innovations can lead to a virtuous cycle of increasing population and successively greater investment in land, economic growth and increased welfare. At the same time, failure of the institutions administering land rights to respond to these demands can lead to land grabbing, conflict and resource dissipation that in extreme circumstances can undermine societies' productive and economic potential.
>
> . . . In Latin America and parts of Asia, highly unequal land ownership and access to assets have made it difficult to establish inclusive patterns of growth. As a consequence, there is concern that in many of these countries economic growth may widen pre-existing inequalities and tensions rather than reduce them. Despite such shortcomings, socially suboptimal and economically inefficient property rights have often remained in place for long periods of time…
>
> . . . Broad and egalitarian asset ownership strengthens the voice of the poor, who are otherwise often excluded from political processes, allowing them greater participation that can not only increase the transparency of institutions, but can also shift the balance of public goods provision, especially at local level.

These quotations mirror concern in Ireland about resource dissipation in traffic congestion, over-expensive infrastructure and over-costly housing; and about the effects of these on Ireland's productive capacity. These problems challenge our ability to deliver on the long-standing political aspiration (so evident in Part V of the 2000 Planning Act) to facilitate affordable home-ownership, as well as on wider national objectives such as those in the National Development Plan.

2.7 Private tenure rights, group rights and the rental market

Within this pragmatic view, centred on economic effectiveness, the World Bank compares the appropriateness of individual and group property rights :

> Whether it is more appropriate to give property rights to individuals or to a group will depend largely on the nature of the resource and on existing social arrangements. Group rights will be more appropriate in situations characterized by economies of scale in resource management or if externalities exist that can be managed at the level of the group but not the individual.

The report then offers an interesting empirical analysis of land transactions, and particularly of rental transactions within systems where the ultimate lessor is the state. (Even in Ireland, apartment block management companies are an example of group rights.) Rental systems are noted by the Report as having low transaction costs and low requirements for initial capital outlay by a building owner. The report concludes that

> . . . rental is a more flexible and versatile means of transferring land from less to more productive producers than sales. Renting is thus more likely to improve overall productivity and, in addition, can provide a stepping stone for tenants to accumulate experience and possibly make the transition to land ownership at a later stage.

The Irish aspiration to owner occupancy, aversion to ground rents and landlordism, and our history of land reform, all point in a very different direction.

Perhaps rental systems are more consistent with Roman and Napoleonic constitutional codes, in which all rights (including land rights) are seen as emanating from the State, than with common law constitutional codes which prevail in the English-speaking world (including Ireland) and which focus more on individual rights. Whatever the reason for our aversion to ground rents and to landlordism, the World Bank report indicates that Irish society may pay a price in inflexibility, and in lower productivity, for our aspirations and our aversions.

2.8 Rented tenure, discrimination and the public interest

The World Bank Report contrasts its new thinking with that of its earlier 1975 *Land Reform Policy Paper* in a number of respects. It comments :

> [An] area where the policy recommendations of the earlier paper need to be corrected is the uncritical emphasis on land sales, without being aware of the high transaction costs and the many obstacles that might impede the functioning of sales markets, especially for the poor. . . Rental markets, whose outcomes in terms of equity, productivity, and long-term investment are more beneficial than had been assumed, can address nearly all productivity concerns. Eliminating remaining restrictions on the functioning of these markets is a high priority.

The Private Residential Tenancies Bill, 2003, is a welcome recognition of rental market issues; for example as regards the housing of key workers such as nurses. Clearly the changes to be made by this law will allow the Government to enhance the legal status of private residential tenants. The RIAI considers it desirable that, in further enhancement of that status, such tenants should have a right of attendance at management committee meetings in privately managed housing estates and apartment buildings. Such measures to give tenants a sense of belonging and of empowerment in the areas where they live would do nothing but good.

The objectives for social integration in owner-occupied housing under Part V of the 2000 Planning Act, by contrast, seem difficult to achieve. The RIAI has repeatedly argued that the exclusion of rented housing from the definition of 'affordable' housing under Part V is illogical and counter-productive, and the World Bank Report seems to vindicate that view. In Canada and many European countries, whose approach to recovering zoning 'betterment' is discussed at 3.1 below, social integration of tenure classes in housing is greatly assisted by the fact that a high proportion of dwellings are rented, and that rental subsidy is the most discreet way of integrating households in a mixed income area.

The World Bank report shows that security of tenure and access to credit can be provided through long-term rental contracts on land and buildings. It recognises that

> in many countries the current land ownership distribution has its origins in discriminatory policies rather than in market forces and has long provided a justification for adopting policies aimed at land reform. The record of such policies is mixed.

Our land legislation still bears the mark of a reform which sought to balance the rights of tenants against landlords, and of Irish against British, during the periods of conflict and reform between the Act of Union in 1800 and Irish independence in 1921. Perhaps Irish legislation affecting land should be viewed as a reaction against discriminatory policies, which mixes anti-discriminatory policy with new forms of discrimination.

The abolition of rates on domestic and agricultural property, while retaining it on commercial property, is an example of such discrimination which serves no clear social or economic purpose. The lack of reform in our system of property taxation is the result of political reluctance to take on politically influential groups who benefit from current forms of discrimination.

It is noteworthy that the preamble to the Constitution says that the people of Ireland seek to promote the common good, with due observance of prudence, justice and charity; so that dignity and freedom of the individual may be assured and true social order attained. It is therefore submitted that the law as it affects land needs to be systematically rid of arbitary discrimination so as to strengthen local government in serving the common good, and so protect the dignity and freedom of people who are otherwise disadvantaged by the property market, and also so that the law can be seen accordingly as socially just.

2.9 Public rights over private property

The value, use and enjoyment of private land derives from its relationship to the community, and from facilities which that community has bestowed on the land in the form of services, infrastructure and community uses.

The fundamental difference in value between a piece of land in Dublin City and a piece of land in the Bog of Allen is locational, and does not mainly result from work done by the respective private owners. The land benefits from the investment by the surrounding population and community in roads, infrastructure, services, electricity, telecommunication systems, policing, public buildings and public transport.

Therefore an absolute right to private property would fail to acknowledge the contribution to all private property of the public domain. The question which arises therefore is how the 'added value' brought to a piece of privately owned land by the actions and efforts of the community ought to revert to that community, or ought to be recoverable by that community in some other way.

2.10 Expropriation and disposal of land by state and local government

The Kenny Report proposed an answer to that question in proposals for acquisition of development land by local authorities at its existing use value, akin to what local authorities now do on a much smaller scale for Part V housing. The World Bank report takes a pragmatic view, based on the economic effectiveness of expropriation and disposal; and not on an *a priori* argument for the right of compulsory purchase on the lines of 2.9 above.

The World Bank report aims to balance the protection of the public and collective good with the reality of what government control of land may mean in practice :

> Limiting the scope for [the] uncontrolled exercise of bureaucratic power is a precondition for transparent decentralisation and improved tenure security in many peri-urban areas.
>
> The state, especially in developing countries, often lacks the capacity needed to manage land and bring it to its best use. Nevertheless, surprisingly large tracts of land continue to be under state ownership and management. In peri-urban areas, this can imply that unoccupied land of high potential lies idle while investment is held up by bureaucratic red tape and nontransparent processes of decisionmaking that can attract corruption. Experience demonstrates that transferring effective control of such land to the private sector could benefit local governments, increase investment, and improve equity. . .

Ireland's experience of 'planning blight' in the 1970s provided vivid examples of failed policies on land acquisition by local authorities for road-widening and urban renewal projects, which often had no set timetable for completion, and for which land lay idle in urban areas of high potential. The 1986 Urban Renewal Act focused on many such areas in Irish cities and towns, and signalled a welcome shift from sanctions to incentives for private development in blighted urban renewal areas.

The government in early July 2003 signalled that land in Dublin's Inchicore and North Circular Road, no longer needed by Government departments which own them, will be made available for private house construction at controlled prices. It sounds as though these projects may be modelled on the Cherry Orchard and Mulhuddart projects referred to at 2.3 above, although reports of slow house sales in those projects – despite the attractive below-market prices – should be investigated.

It is said that one reason for slow sales is purchasers' resistance to the clawback arrangements for affordable houses, in these projects and under Part V generally. Purchasers of affordable houses benefit from the local authority passing on to them the benefit of a cheaper house by not charging the full market value of the land. However, it seems that these householders do not wish to have to recipocate when they sell on the house; i.e. they do not want to have to share the profit from that sale with the local authority. Once having acquired an affordable house, a householder has a vested interest in making its resale value as unaffordable as possible to any subsequent purchaser! In any case, it is clear that 'trading up' from an affordable home under Part V is more expensive in a rising market than it would be to trade up from a private house where the full increase in the value of that house, say 5 or 10 years after its purchase, can be used to leverage purchase of a much dearer house.

However, to allow resales in Mulhuddart and Cherry Orchard without a clawback would exacerbate existing affordability problems. In Dun Laoghaire, for example, the sale at high prices of local authority housing bought under tenant purchase schemes has left the Council in difficulty in trying to provide social housing at a reasonable cost to the exchequer.

2.11 Land policy objectives

The World Bank's analysis, however remote it may seem from Ireland in some of its concerns, is useful to put alongside changes in the policy context outlined at 2.3 above, and alongside the issues of community benefit explored in the Kenny Report. Since the fall of the Berlin Wall, the need for well-functioning markets in all types of goods and services (including land) has become more evident, as eastern European governments have sought to de-collectivise and privatise the ownership of land and enterprises. This market reform has shown how challenging it can be to look after the disadvantaged and vulnerable, many of whom were better off and better protected under the discredited 'command economies' of former times.

What the World Bank report helps us do is to recognise that we can respond to change, in land law as elsewhere, either actively or passively. Passivity is encouraged by the feeling that Irish hands are tied by our choice of private property over collective ownership, or by the parameters of Part V of the 2000 Planning Act as approved by the Supreme Court. The World Bank report shows that nations much worse off than Ireland can be courageous about reform, and can learn from the experiences of other societies, in order to work towards attainable objectives for land reform, in clearer knowledge of who will gain

and who will lose from achievement of those objectives.

3 THE ZONING OF LAND, PRACTICABILITY AND THE PUBLIC GOOD

3.1 The zoning of land and betterment

There appear to be two possible ways of retaining for the public good the betterment achieved by the zoning of land. One, as noted at 2.9 and 2.10 above, is to follow the Kenny Report proposals and give local authorities the powers to acquire any land they zone at existing use value.

The second alternative is some form of betterment levy, for example a considerably higher tax on capital gains (CGT) and trading profits attributable to building land as well as development levies under Sections 48 and 49 of the 2000 Planning Act, discussed at 3.2 below. We return to the issue of CGT in 3.3 below. In order to counter the disincentive to sale of land due to such an increased tax, it would need to be combined with a development land tax; for example an escalating annual tax on zoned land, if it remains un-developed after a certain period. That period would need to be measured as appropriate in relation to the time taken for processes of area and urban design, provision of infrastructure, preparation and processing of planning applications etc.

The first type of measure has been used in Canada for many years, and in several countries in Europe. It requires substantial resources, and professional and political judgement by the local authorities, to prepare suitable planning schemes; and to organise bids from private developers to include elements of social and affordable housing, along the lines now being employed by the Dublin Docklands Development Authority (DDDA). As may be seen in Chapter 2 above, there are many pitfalls in devising and implementing such a proposal at national level, but the DDDA experience will be helpful in avoiding these.

3.2 Practicability: infrastructure, stamp duty, density, Part V and development levies

Items 2 and 3 in the quotation at 2.4 above from the Kenny report of its terms of reference concern legal and administrative practicability. Practicability can be considered not only by reference to legal and administrative criteria, but in terms also of the effectiveness of incentives in the quality and quantity of affordable housing and other developments it delivers, and in the demands which it makes of physical infrastructure.

Today the environment and the priorities brought to bear on it are significantly different from those of the 1970s. In 1971 the CIF made a submission to the Kenny Committee stating that: 'failure to provide adequate capital for sanitary works has been a major factor in the inflation of the price of serviced land'. Today the dynamics of land development are fundamentally different, and movement of people and transportation networks, in particular, are a higher priority in the urban and rural environments.

Thirty years after the Kenny Report, the government seems to set a higher priority on delivery of housing supply and infrastructure than on reducing land price inflation, or on the social and economic justice of our land system. An example of government induced inflation in housing costs is the heavier stamp duty for investors in residential property introduced after the first Bacon Report in 1998, then rescinded and then introduced again.

The priority seems to be to build housing in increasing quantity (as is being done) to meet pent-up demand – even at a price which stretches peoples' pockets more than before – and particularly to provide housing in places and at densities which minimise the need for new roads, sewers, watermains, schools etc. in line with the 1999 Department of Environment and Local Government (DoELG) *Residential densities: Guidelines to Planning Authorities*. There should be consequent long-term savings in public expenditure and public services which may partly balance whatever windfall gains may accrue to private landowners from exploitation of existing infrastructure.

In any case, Part V of the 2000 Planning Act requires up to 20% social and affordable housing to be provided by developers. A failing of Part V as seen by local authority architects is that the local authority role in relation to planning applications is too reactive and passive. The law requires the private developer to put forward a proposal for social and affordable housing as part of a planning application for housing, and the local authority must take account of this proposal in agreeing terms for that provision. Local authority architects frequently find that housing and planning officials make such agreements without taking advice from their own architect colleagues on aspects of layout, quality of design, and/or arrangements for inspection of construction on housing to be paid for by the local authority.

In fact it seems very difficult to obtain information on what is happening in relation to funding of Part V agreements for social and affordable housing on foot of recent planning permissions for housing. DoE/H/LG circulars require local authorities to submit requests to the department for capital allocations for housing (including acquisition of housing land) under Part V in exactly the same way as for

normal local authority housing projects. However, the department does not seem to have published any statistics on what funding allocations have been requested or made in relation to Part V. As housing output continues at a high level, the drain on the exchequer to fund Part V agreements – even at discounted land prices – will be considerable.

Another area of difficulty arises in relation to Part V objectives for social integration. There appears to be little consistency in how different local authorities tackle this objective, if at all. In urban areas, the apparent continuing trend towards gated residential communities is contrary to this objective. The DoE/H/LG recommends 'peppering' of social and affordable tenants throughout private residential projects, in dwellings which are not recognisably different from their neighbours. Such recommendations appear to be thwarted in many projects by housing management considerations and by the actual or anticipated prejudices of private house purchasers, pushing the social and affordable units into a defined part of the site. The ultimate recourse of those wanting a new house, but prejudiced against proximity to social and affordable housing, is the one-off house, which is exempt from any obligation whatever under Part V. The forces ranged against social integration among developers, house purchasers and (perhaps unwittingly) even among local authority housing managers are therefore very pervasive, and there is no coherent strategy yet in existence to respond to this growing problem. It may indeed be important enough to be reviewed in conjunction with the current preparation by the DoE/H/LG of guidelines on implementation of the National Spatial Strategy.

Sections 48 and 49 of the 2000 Act also require planning authorities to publish schedules of financial contributions to be paid by developers for publicly provided infrastructure. Zoning decisions may still benefit fortunate landowners and give them the benefit of long-established infrastructure, but a reinforced system of financial contributions under those sections of the Planning and Development Act 2000 at least ought to recover more effectively the new outlays on public infrastructure which benefit those lands. Dun Laoghaire Rathdown County Council has recently adopted a Supplementary Development Contribution Scheme in relation to the proposed extension of Luas Line B from Sandyford to Cherrywood near Loughlinstown. The levels of contribution are substantial: €.25 million per hectare for residential development and more than twice that for commercial development.

3.3 Practicability: the market v social justice and taxation

Since the late 1990s, pent-up demand for housing has led to serious concern about delays in developing land best suited to meet housing need. The political priority was to have it 'released' for development – released by the zoning and planning application system; released by provision of infrastructure in terms of roads, drainage, watermains and public transport; and released by developers. There have been repeated allegations about land being hoarded by landowners and developers, and there have been efforts to provide incentives for its release for development – not least by the halving of capital gains tax (CGT) rates during the 1990s.

The CGT incentive has (somewhat inexplicably) been diminished by the recent restoration of Bacon 1 levels of stamp duty on large land transactions, where the 9% rate is large by comparison with 20% CGT rates. It is difficult to reconcile the stamp duty rates for purchasers with the reductions in CGT for vendors either on grounds of equity (hitting purchasers rather than landowners) or market efficiency (deterring developers from buying zoned land). As noted at 3.1 above, some commentators argue that an annual land tax on undeveloped zoned land would be more effective, and (as regards current stamp duty rates) there is evidence from the World Bank that increasing transaction costs damage efficient operation of the market generally and afflict the poor in particular.

In the Irish context, there is disagreement on the extent to which delays in development (especially of housing) are attributable to worthwhile planning, consultation and design processes or to delays by planning authorities, or to a developer cartel withholding land from development from commercial motives. There is also concern at the unregistered acquisition by land dealers of options to acquire unzoned land subject to rezoning. The lack of any statutory requirement for registration or publication of such options means that planning authorities can be misled as to the true beneficiaries of zoning decisions. This is contrary (for example) to scrutiny of planning applicants in accordance with Section 35 of the 2000 Act where past failures to comply with the Planning Acts may disqualify certain people from getting planning permission.

While governments may not have disregarded the social justice aspects of profits from land dealing and development altogether, there seems to be more political willingness to concentrate on policies for better quality development, incentivised by the capital gains taxation

regime, as a means to maximise the public benefit from development land.

Under the tax reforms of the late 1990s, there was a change away from tax-driven development, and for good reason, However, there is still potential for systems such as that operated through the Temple Bar renewal tax incentive system, rather than the much wider incentives under the Urban Renewal Act of 1986. Temple Bar renewal projects were approved for tax incentives not only by the Revenue but by a board which included planning and architectural interests, who checked compliance of applicant projects with detailed Framework Plans for the area. (Contrast this with the Part V situation noted at 3.2 above.) The general policy of eradicating tax breaks in the interests of the credibility of the tax system should not blind us to how (as in the case of stamp duty) that system willy nilly impinges on property investment.

4 COMPULSORY PURCHASE

4.1 The Kenny Minority Report and compulsory purchase

The Kenny Committee famously presented a Minority Report attached to the main report. The Minority Report was drafted by the two representatives of the Department of Local Government, whose Minister had commissioned the Report.

The Minority Report begins as follows:

> 1.1 We regret that we are unable to agree with the principal recommendation in the majority report, which is that local authorities should be empowered to acquire compulsorily land required for housing and other development in areas designated by the High Court, on the application of the local authorities concerned, and that the compensation to be paid for such land should be based on existing use value.
>
> 1.2 Otherwise we agree generally with the findings and recommendations of the Committee.

Leaving aside the issues of price and of potential involvement of the High Court, the power for local authorities referred to in 1.1 of this quotation *to acquire compulsorily land required for housing development* dates from the 19th century, long before the 1963 Planning Act. Local authorities had powers and procedures to acquire land compulsorily from private owners in order to provide key physical and social infrastructure; including roads, sewers, water mains and social housing.

In preparing the 1963 legislation, the Irish Government and the United Nations commissioned a report by the U.S. planner Charles Abrams, who examined problems of dereliction in Dublin and Limerick. On Mr. Abrams' recommendations, the 1963 Planning Act expanded the powers of compulsory acquisition, and the discretion of planning authorities to acquire land for urban renewal. At that time, consolidation of land ownership was seen as a key measure for urban renewal, both in terms of amalgamating plots and amalgamating complex layers of intermediate leases on a single piece of property. That has changed.

What was learned from experience after the 1963 Act was introduced, is that success in local authorities' acquisition of land was limited (both by lack of funds and lack of in-house professional experience and resources), but that success in disposal of local authorities' compulsorily acquired land was even harder to find. There have, however, been considerable achievements through local area plans and the trend towards these has been reinforced in the 2000 Planning Act. There is increasing recognition of the urban design, social and heritage value of protecting existing patterns of ownership in layout and use terms. Many Integrated Area Plans analyse, exploit and reinforce those patterns, in more careful area-specific policies as recommended by the World Bank review, quoted in 2.5 above.

After looking at some more CPO history in 4.2 below, this submission returns to the potential of such plans to achieve their objectives with little recourse to CPOs.

4.2 CPOs: compulsion and compensation

The Keane judgement on Part V reminds us that the issue of compulsion can be dealt with separately from that of compensation in terms of legislation and of procedure. The 1963 Act's provisions regarding compensation for land acquired for urban renewal provided that compensation would be paid in accordance with the Compulsory Purchase (Assessment of Compensation) Act of 1919. That Act requires payment for expropriated land at the open market value of the land plus compensation under various headings such as severance etc. Since before 1963 any property owner served with a compulsory purchase order (CPO) has the right to seek an oral hearing on the appropriateness of the CPO by an inspector appointed by the Minister for the Environment. If the CPO is confirmed by the minister, the owner also has a right to arbitration on the amount of compensation payable.

Legislation has since been introduced relating to infrastructure projects which allows the CPO, once confirmed by the minister, to proceed in some instances while the amount of compensation is being determined.

The acquisition by local authorities of land for urban expansion and urban renewal was

pursued in the 1960s and 1970s, both through CPOs and by voluntary agreement. The Kenny Report contained the first authoritative suggestion by an Irish government-sponsored inquiry that, in the case of CPOs for urban expansion, the level of compensation payable should be separated as an issue from the issue of expropriation, whose ambit of use had already been greatly expanded by the 1963 Act.

During those decades of the 1960s and 1970s, the government made changes in legislation which have implications for the potential to implement the Kenny proposals. For example, the government responded to pressure from suburban residents paying ground rents in new housing estates, by granting them a statutory right to require their landlord to sell the right to ground rents based on a set price formula. The government also abolished rates on domestic property, greatly reducing the financial resources available to local authorities for acquisition of land, as for many other purposes.

The Keane judgement on Part V, referred to previously at 1.1 above, shows that – as Kenny argued and as the ground rents decision showed – the levels of compensation can be set through statute by the Oireachtas at any level (and through any mechanism) provided there is a clear legislative objective. The negotiations between the Irish Farmers Association and the government on compensation for infrastructure projects under the National Development Plan (NDP) indicate that the levels of compensation can, at the will of the Oireachtas, be lower or higher than those in the 1919 Act. In this context the rezoning, servicing and compulsory purchase of land have become great wealth creators in contemporary Ireland.

4.3 CPOs and other measures in the development land market

The lack of resources for local authorities to acquire land have meant that local authorities have had to resort to measures other than land acquisition in order to secure development which they want in their areas. It is worth noting that the entire redevelopment of the downtown commercial centre of Philadelphia in the U.S. in the 1960s was achieved without any use of eminent domain (as CPO is described in U.S. parlance), partly because CPO existed as a threat in the event that negotiation failed.

It may be argued that local authority area plans are more effective than CPOs as a way of achieving urban renewal. In the 1960s and 1970s, the widening of the Liffey Quays in Dublin was a significant roads objective of Dublin Corporation. This led to planning blight and a general deterioration of buildings and of environmental quality along those quays. The designation of much of the Liffey quayside in the 1986 Urban Renewal Act was the first clear signal given to developers that it was government policy to conserve and redevelop that quayside.

In fact, there was a public perception that inefficiencies in the development control system in Dublin Corporation hampered or slowed achievement of the objectives of the 1986 Act, by comparison with Limerick and other cities. This prompts a question as to whether the objectives of the 1986 Act for the Liffey quaysides could have been achieved as effectively (and more cheaply for the taxpayer) by a decisive declaration by Dublin Corporation that the road-widening proposals were abandoned forever, and by a truly facilitative area planning and development control system for the Liffey Quays area, irrespective of tax incentives.

Increasingly, therefore, the use and effectiveness of CPOs needs to be measured in the context of local authority area plans, and the ability of planning authorities to achieve the objectives of those plans without use of CPOs. As previously noted at 3.2 above, this raises a concern in relation to Part V of the 2000 Planning Act, where agreements for provision of social and affordable housing are sometimes concluded by local authorities' housing departments without a decisive input by either their architects' departments or planning departments, resulting in poor planning and design in some instances.

Local authority architects and planners should also be involved in urban design projects for the derelict or residual lands left (and still being left) along newly built and rebuilt roads. The objective should be to recover the civic quality which our main thoroughfares had until fifty years ago, and which is so sadly absent from our non-access distributor roads, with their quality of abandonment and hostility to pedestrians, children and the elderly.

Finally, in reviewing the role of local authorities in the development land market, it should be borne in mind that many local authorities have held (and some still do hold) significant amounts of land, much of it acquired for urban expansion between the 1960s and 1980s. It would be useful to explore the extent to which, and the basis on which, these landbanks have been sold off and/or developed. The fear must be that local authorities' decisions to buy and sell land may be influenced less by strategic considerations than by fiscal stringency, and it would be useful for research to be done in that regard.

4.4 CPO as an important last resort

So that any planning or administrative authority can carry out meaningful physical planning

over a period of time, compulsory purchase needs to continue, as in the 1963 and 2000 Planning Acts, to be an integral part of the physical planning system. Small local CPOs work well also as a way of clarifying ownership where un-registered title creates uncertainty or conflict.

5 PROPERTY OWNERSHIP, PLANNING AND QUALITY OF LIFE

5.1 Impact of planning legislation on property ownership

The 1963 Planning Act was the first to decree that Irish people need planning permission before they may develop most types of land for new buildings and uses. The initial approach to development control under the Act was a veto: i.e. the private owner could do as they wished unless their proposed development infringed legal and planning stipulations. This approach notably changed after the introduction of Environmental Impact Assessment in the 1970s under EU legislation: applicants for major development had to prepare an Environmental Impact Statement (EIS).

The EIS and the subsequent assessment by the planning authority must review both positive and negative impacts of a development, putting the onus on experts appointed by the applicant to justify the development. In less than a generation, we therefore moved from:

- an untramelled right pre-1963 for private owners to develop their land as they wished;
- to allowing the local planning authority under the 1963 Act to veto a development proposal provided it can justify the refusal of a planning application; and
- ultimately to putting the burden of proof on the planning applicant to give enough evidence to the planning authority to justify the granting of a planning permission.

5.2 Land ownership patterns and architectural character

The physical pattern or land ownership, while not immutable, clearly has a long-term physical and architectural character. The presumption of Abrams, in line with post-war and 1960s thinking on urban development was in favour of 'rationalising' (i.e. enlarging) plot size. That outlook was compounded by an approach to segregating land uses through development plan zonings (e.g. segregating home from work, noisy activity from housing areas) whose basis in 19th century municipal and sanitary engineering ultimately negates civil society as understood in the 18th century and again in the 21st century.

'Light industrial' uses under the planning regulations are ironically required to be compatible with residential use, while development plans consign these uses to soulless mono-functional suburban industrial estates, often remote from housing, and inaccessible to workers who most need, and are most willing, to work there. This preference for segregation over integration of uses has since been balanced not only by multi-use phenomena like home-working based on electronic networks, and 'enterprise uses' which recognise that industrial and office premises are often (e.g. in software manufacture) not distinguishable; and by public objectives to maintain the physical pattern of small-scale plots as part of the architectural and archaeological heritage. Under the 1999 DoELG Guidelines to planning authorities, higher density housing often has a strong if small element of mixed development in the form of shops, creches and cafes.

5.3 Ireland's heritage of anti-colonial attitudes to property ownership

Late 19th century attitudes to agricultural land reform seem to overwhelm development control and spatial strategic policies in rural areas of Ireland, and appear to obstruct the application to rural housing of development controls applicable elsewhere in Ireland. The abolition of suburban ground rents in the 1960s and 1970s equally reflected (and reinforced) a common Irish view that the right to private property is ideally achieved not only through owner-occupation as the ideal form of tenure, but in full freehold ownership.

There is a contradiction between these post-colonial attitudes which reflected an antipathy to landlordism under British rule on the one hand, and a willingness on the other hand to regard British models of planning as the natural legislative order of things, however poorly our enforcement systems are resourced by comparison.

By contrast, the great cities of Europe were mostly built against a background of constitutional law founded on Roman law and the Code Napoleon, where land rights emanate ultimately from the state, as noted previously at 2.7 above. This is frequently reflected in a leasehold arrangement which, at its weakest, may be what is called in Ireland a 'flying freehold' (U.S.A. 'condiminium'); i.e. a property (such as an apartment) held under a long non-reversionary lease in conjunction with a share in the management company or co-operative. That company maintains (and often secures) common areas (corridors, lift lobbies, car parking, landscaped areas etc.) of the development. In continental Europe, such leases last at least a

lifetime, and the ultimate lessor is often a state agency. This contrasts with British and Irish common law traditions where government intervention is constitutionally the exception (e.g. through the planning and CPO systems) rather than the rule.

Ireland's heritage of anti-colonial attitudes to residential lettings continues to be constrained by an oscillating attitude to private rented residential tenure, and public objectives for landlord and tenant law were often determined in some measure by court decisions. The political priority (as the Part V definition of 'affordable housing' shows) is the owner-occupier, and in particular the first-time buyer. The new Private Rental Tenancies Bill, 2003 introduces a welcome balance in that pattern, however cautious it has been in implementing the recommendations of the Commission on Rented Housing. The RIAI hopes that this heralds continued attention to what seems to be regarded in legislative terms as a secondary form of housing tenure.

5.4 Architecture objectives and land policies

The processes of urban expansion, site assembly and development control have been considerably changed by the 1999 DoELG *Residential Density Guidelines for Planning Authorities*, which express a clearer policy than before on the relationship between private development and the economics of public infrastructure.

These *Guidelines* recognise better the architectural realities of how urban spaces, buildings and physical and community infrastructure are provided. The enduring quality of plot sizes and property holdings means that property development has an effect across decades into the future, as a constraint on society's capacity to accommodate various activities and on the interaction between them.

The fear when the Guidelines were introduced was that they might substitute mediocrity in a high density housing environment for mediocrity in a low density environment. However, the standard achieved in housing generally has exceeded expectations, as the RIAI 2002 publication *The New Housing* serves to illustrate.

6 HOUSE PRICES, HOUSING FINANCE AND PROPERTY APPRECIATION

6.1 House prices

The discussion of house prices is emotive, complex and susceptible to conflicting interests and agendas. The agenda of the RIAI as the representative body of architects in Ireland is to facilitate in whatever way possible a system of planning, and of delivering housing and other accommodation, which is efficient, user friendly and conducive to creation of a better physical environment for all.

The Kenny Report and the World Bank Report at 2 above show how planning can be a 'win-win' situation, but that the current system is not operating in this way. In the last 15 to 20 years the price of housing has risen for a variety of reasons, significant among which is the price of land itself. An equitable and workable system of planning, including affordable housing, demands that the increased values of land are distributed in a more equitable way.

6.2 Mortgages and housing finance

The purchase of property with mortgage finance is a major constraint on political flexibility in dealing with development land. The practical consideration for the building society or bank which lends against a piece of property is whether the borrower has the capacity to repay the loan from income, be it rents or salary-type earnings independent of the property. However, the security for the loan is the ability of the lender in the event of default to recover the property in order to sell it on the open market.

The financial instutution's sense of what constitutes ability to sell on the open market is the key consideration. The slowness of sales to house purchasers of affordable houses in schemes co-promoted with developers by Dublin City Council and by Fingal County Council may reflect 'consumer resistance' to the restrictions on right and on the proceeds of resale. The borrowing by farmers against 'house sites' on rural farms is thought to be a significant source of urban-generated rural housing in unsuitable or unsustainable locations.

6.3 Appreciation in value

The recent appreciation in house values clearly raises the question of who benefits and who loses by such appreciation.

If Part V provisions for affordable housing would allow rented housing as well as (or instead of) owner-occupied housing, such rented accommodation could be held in (or transferred into) a not-for-profit entity at its initial cost of construction plus the discounted land value. Such a non-profit company (as in the HLM system in France) could rent the housing on a lifetime tenancy, where there would not be a speculative element of upward pressure on rents. There is no obvious reason why the investor rather than the tenant (or the developer) of private rented accommodation should be the sole beneficiary of an increase in rental values after the initial purchase and letting.

7 CONCLUSIONS

The RIAI believes the work of the All Party Committee (APCOC) is of considerable importance. Since its terms of reference pertain mainly to the Constitution, we recommend that a parallel expert group on property law be set up in order to report within a set time on the wider and more complex land-related issues raised above.

In summary we recommend that the following issues should be investigated either through the work of the All Party Committee or the above expert group:

i) Re-examination of the contents and recommendations of the Kenny Report and the 1985 Joint Oireachtas Committee Report in order to update their recommendations in relation to subsequent experience and the current market.

ii) Possible alterations to the Constitution necessary or desirable so as to address the issues raised above. These need to be formulated so as to reflect the primacy of the common good where this conflicts with the rights of private ownership in regard to land, and also to recognise issues of sustainability, area planning etc.

iii) A co-ordinated alternative treatment through the taxation system of stamp duty, capital gains taxation, annual land tax, carbon tax (including its relationship to Kyoto and EU obligations), rented tenure etc. The timescale for introduction of alternative measures should be considered so as to prevent any sudden or disruptive changes in property values.

iv) How monies raised by such taxes are best used for the common good, including for example devolution to local authority level, participatory democracy particularly in planning and initiatives for improved local services.

v) The role of local authorities in the development land market generally; what land local authorities hold or have held for urban expansion and otherwise; the extent to which, and the basis on which, this land has been sold off and/or developed; and the extent to which local authorities' decisions to buy and sell land are/were influenced by strategic planning and estate management considerations, by clear objectives and proposals for high quality urban design, and/or by fiscal stringency.

vi) A co-ordinated approach to promoting social integration in housing through a concerted challenge to existing or assumed prejudices, through existing or amended mechanisms under Part V of the 2000 Planning Act including DoE/H/LG processing of capital allocations, through possible establishment of a non-profit company (possibly modelled on the French HLM system) for rental housing under Part V, through housing management measures generally, and through DoE/H/LG guidelines for implementation of the National Spatial Strategy.

vii) What legislation is needed to assist progress in the above areas, within the lifetime of the current Dáil.

SCHOOL OF PHILOSOPHY AND ECONOMIC SCIENCE

INTRODUCTION

The School of Philosophy and Economic Science, a registered charity, has through the work of its economics department, taken a keen interest in the specific topics you wish to address. Part of the work of the school is to come to an understanding of the natural laws at work in society, including the realms of law and economics. The school aims to base this submission squarely on the principles of justice and the common good. In 1991 the School made a submission to the Commission on Taxation. After a number of meetings the commission commended our submission for not representing any particular vested interest group. We hope to continue that tradition.

This submission attempts to reflect the fine sentiments of the final paragraph to the Preamble in the Constitution in ..

> .....seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured, true social order attained, the unity of our country restored, and concord established with other nations…

This paper endeavours to offer a practical proposal which reflects these qualities thus contributing to a more harmonious, sustainable and progressive society. It is our understanding where true principle is not acknowledged in crafting our economic and legal systems the result is a greater tendency and regular recurrence towards political corruption, social injustice and difficult economic problems. We hope to, for example, demonstrate that the lengthy and costly tribunals, called to investigate the manipulation of the legal and economic systems, happened because, as a society, we fail to acknowledge the authentic relationship between three factors. The first factor is land as a natural resource, the space and material on which and with which we work. The next two factors are the work done by each individual and of the community as a whole.

In preparing this paper we have had recourse to a number of helpful texts we wish to acknowledge.

Bunreacht na hÉireann – The Constitution of Ireland

Kelly on the Constitution, – 3rd edition. A lucid and comprehensive commentary on the Constitution.

The '*Kenny Report*' – The Committee on the Price of Building Land Report to the Minister for Local Government, March 1973. It is a comprehensive, yet

simple analysis of many of the issues raised by this review. We use this report as a source of common reference and authority and quote extracts to illustrate issues.

The '*Bacon Reports*' on the housing market, in particular the initial April 1998 report with its helpful 'delphi' survey highlighting the role of land in the housing market.

'Land Value Taxation'- includes essays by William Vickery, Nobel laureate for Economics 1996 and Professor of Economics, Columbia University.

The first section of this submission attempts to set out our understanding of the fundamental principle governing the tripartite relationship between –

the land, as a pre-existing, natural resource;

the individual citizen, who has an absolute need for land on which to work and who is acknowledged as the essential cause of all wealth creation rather than cost; and,

the added value to land arising from the work and need of the community in general.

The second section looks at how best to give practical application, in the realm of law and economics, to this principle in the form of property and taxation law. The advantages to the individual and society are considered. The next section considers some transition difficulties which can emerge when change from a problematic to improved system is taking place.

The final section addresses the issue of the Constitution and how it may need to be changed in order to avoid restrictions, and indeed, to positively encourage moves which allow this fundamental principle function more fully for the common good in our legal and economic systems.

THE FUNDAMENTAL PRINCIPLE

This section sets out our understanding of the fundamental principle governing the tripartite relationship between-

the land, as a pre-existing, natural resource;

the individual citizen, who has an absolute need for land on which to work

the added value to land arising from the work of society at large.

The aim is to remain true to a principled approach when forming legal and economic structures in the state. This in itself should contribute to the development of sustainable social justice in the community.

Basic economics tells us two essential elements are needed to create wealth and well-being – land and labour.

Land is all the natural resources which pre-exist people. It includes the earth, water, air, light and space. All these basic elements are essential for each person to live. In most cases the elements are commonly held for the common good so that no individual holds a monopoly at cost to the common good. Land also includes the many natural combinations of these elements that give us the resources which at this time are especially valuable to our lifestyle, e.g. oil and coal. However in this constitutional review we are particularly concerned with land as it is commonly understood; the basic, yet absolutely essential, space on which we live and work.

Labour, in basic economic terms, is all human effort which provides services and products. The only item absolutely required for labour to work is land. It is the essential base on which work, quite literally, takes place and which labour employs to provide goods and services.

Once these two essentials, land and labour, combine to produce something of use to society we get added value. A critical question then needs to be answered: what is the basis for an individual's and the community's just entitlement to a fair share of added value? What guideline can we use to shape the property and taxation laws that direct our legal and economic systems. What precept will have universal acceptance, be fair to individuals and yet serve the common good? Simply put, justice consists in rendering to each and everyone their due. In economic terms this principle emerges as two principles:

That all people have equal rights to the use and enjoyment of the elements provided by nature

That all have a right to the use and enjoyment of what is earned or produced by one's own effort

In order to honour this principle and approach to social justice in the Constitution, a guiding principle of property rights is required. A general guiding principle is suggested – each individual or group to share in wealth (added value) commensurate to the value of work done. Individuals and groups acquire a just entitlement to a commodity to the extent they have worked to earn it. To the extent they have made some contribution or sacrifice to the product or service so they share in this added value[1]. In general terms, nett income accounts for the proportion of the added value going to all who have expended effort. Taxation goes to government/community through PAYE/PRSI, VAT, Stamp Duties, etc. to cover government services and infrastructure. Other contributors receive interest and profit for their respective contributions. The question arises, who contributes to the increasing value of land and therefore has fair entitlement to that increased value?

The Kenny Report has useful analysis to illustrate this critical issue. Chapter Two 'The Causes of the Increases in the Price of Land', presents a helpful overview on the ever increasing price of land, including land for house building:

> …since the amount of land available, is for all practical purposes, fixed, the influences on prices must stem predominately from the demand side. One demand

> factor of importance is population. An increase in population will require more land both to supply an increase of the amount of food and raw materials and to cater for extra housing and other needs (S 12)[2]
>
> …it is the combination of an increasing population and rising income that provides the basic mechanism for the continuing upward trend for the price of land for development purposes. Other factors can operate to accelerate or slow-down the pace of such a price increase but it is unlikely that they can arrest it completely (S 15)

These universal factors are as relevant today as when written thirty years ago. They will still be applicable in one hundred and thirty years time. This analysis serves to emphasise the unique and indispensable nature of land to each individual and to the community as a whole.

Kenny, having identified the indispensable and therefore unique role of land as space on which to develop the means to live and work, proceeds to further consider the factors contributing to land price increases under an analysis of the concept of 'betterment'.

> …'betterment', an ambiguous terms because it is sometimes used to describe the increase in the price caused by works, sometimes to describe the price brought about by all economic and social forces including planning schemes and sometimes to describe the part of the increase which ought to be recoverable from the owner. (S 27)

Here Kenny indirectly helps identify three factors which increase land prices and which therefore should share accordingly in the increased value of land.

(1) Here 'works' – are described as …

> …when a local authority carries out schemes for sanitary services or builds a road or does other improvements. The land which benefits from these will get a higher price when sold.

This is work external to the land or site. Sanitary services and roads are specifically noted. However all community infrastructural development and localised community services will have the same positive impact on land prices in the locality, whether or not they are vacant sites or already build upon. Luas, Dart, schools, libraries, roads, swimming pools, policing, post, universities, hospitals etc.; all are provided by the community. All have the effect of enhancing the prices of sites situated in the locality.

(2) *'economic and social forces including planning schemes'* –

Kenny specifically identifies 'planning schemes' and permissions, given by the local authority or central planning agencies as distinct factors contributing directly to land price increase. Essentially they release the real value of land which the community has created as described at (1) above.

(3) The increase in the price of land 'recoverable by the owner' is distinct from the first two factors. They clearly relate to work done by the community at large. On the other hand, examples of work done by the landholder which increases value of the land would be drainage works or the fertilising of the soil on the site itself. These are capital investments which should earn a fair return in profit based on competitive rates of profitability. All other increases in land value are generally due to community contribution.

Clear distinction is needed between value of the land and the value of the development on the land. A well located 'derelict site', with planning permission, will continue to increase in value by virtue of the on-going efforts of the surrounding community. Nothing need be done directly to the site. Indeed any buildings thereon, not for renovation, are a diminishment to the value.

In reality the owner of the site can do very little to improve the value of the site *per se*. Clearing up the dereliction, putting in drainage etc., will save building development cost and be rewarded accordingly. The remainder is attributable to the development of the community.

Kenny considers two other factors causing land prices to increase.

> …speculators will be attracted to land as an appreciating asset which can be acquired and held at little risk and cost. (S 16)

The absolutely indispensable and unique aspect of land as distinct from any other factor in our economic system points to inevitable financial speculation in trading this singular commodity. The interaction between the naturally limited supply of land and the naturally ever increasing need for the community to use this natural resource drives and maintains the price. Unlike all other commodities this essential commodity cannot be reproduced.

Kenny cites the following observation

> Even land for which drainage is not available at present has been purchased in the belief that when drainage becomes available the price of land will remain sufficiently high to ensure a profit to the speculator who believes that he will eventually obtain at public expense free main drainage and water facilities. These speculators feel that once they have bought the land at any price that that must be the minimum price they will get for it. The result has been that the price of underdeveloped land has been inflated entirely out of its real value and the local authorities have had to pay exorbitant prices, even for land for the housing of working classes…. We think that this was and still is a correct assessment of the situation (P 23)

In addition to the speculative factor driving prices the fact that land can be *'held at little risk and cost'* out of use and idle, yet still appreciate, is another indicator of

the uniqueness of land as an economic factor as distinct from nearly all man made assets. By simply denying the use of this unique natural resource it absorbs the value of all the surrounding work of the community.

Kenny goes on to state (and note this was said over thirty years ago);

> We believe that many of the causes which produced the upward trend of the past decade will continue… the price of building land will continue to move in an upward direction. (S 24)

THE APPLICATION OF PRINCIPLE

The practical application of justice in our legal and economic systems is best served by the simplicity of adhering to true principle in day-to-day practical situations. This might be appreciated as the practice of prudence so eloquently commended to us in the preamble to Bunreacht na hÉireann. In prudence we act in a practical way while maintaining care and charity for all concerned. Prudence is not prudence if truth or justice are ignored to give unfair advantage to one individual or group of individuals.

The combined creative skill of good and practical politicians and legislators is needed to craft and carry property and taxation laws that are based on justice and have the backing of the community. The effect of the law in the realm of economics should be to give all their fair share. The system should encourage productive creative work, utilising all the resources of the community to provide for the individual and community needs. It should be open and transparent. It should be efficient and effective.

In attempting to change anything, even when done with the best of intentions, human nature presents difficulties. Old habit and vested interest, fear and greed, can cloud good judgement and influence action. Clarity and courage in thought and action continue to be essential to good politics.

What is the fairest and most efficient way to ensure the increase in value of land due to the community returns to the community? How does a society avoid monopoly power in land being used at cost to the common good? How can we reduce the price of accommodation? The following proposition aims to address these issues. Constitutional change may be needed to give effect to its application.

Our proposal is based on changing the incidence of taxation so that it is more efficient and effective in dealing with the issues the committee wish to addresses – zoning, house price increases, the efficacy of grants and subsidies, compensation and CPOs and other land and law based issues.

The proposal is to reduce the level of taxation on productive effort and trade, e.g. PAYE/PRSI – both employer and employee, stamp duty, rates, etc., and to obtain the required revenue by collecting the increase in land values, created by the community, as a replacement source of funding for government spending which by definition is for the common good. How can this be achieved?

The market value of any land, valued exclusive of any building or development, is a close reflection of the value placed on the site by the community. By placing a Site Value Tax (SVT) on the unimproved value of land, calculated as a percentage of the estimated market value, the community retrieves much of the value of the increase to land created by its own investment in infrastructure, amenities, services and permissions. For example, land and house valued at, say, €220,000 has house valued at €120,000 and land at €100,000. An SVT of, say, 2.5% per year generates a yield of €2,500 pa. The general government revenue is increased by €2,500. Taxes levied on employment and/or trade is reduced a similar amount. This is the essential proposal.

The closer the actual implementation of such a system is to achieving the transfer of the differential land value back to the community, the greater the possibility to achieve in a practical and sustainable way the objectives of justice, prudence and charity in the economic and legal affairs of the state. To the extent that preferment of vested interest, for selfish purposes, dilutes the implementation so the sustainability and efficiency is reduced.

The value of land is of course influenced by such purely natural factors as the soil type, climate, and minerals. It is, though, the presence and activity of the population as a whole which actually confer differential values on sites. Land value is determined by the demand for living and working space. It measures the advantages of a particular piece of land over that of the poorest land in use.

Land values are affected by the provision of services such as water, gas, and electricity. They are protected by the Gardaí, fire and hospital services, and flood control and drainage systems. Communications (including road, rail, seaports and airports) are especially significant, and every improvement to the infrastructure will result in higher land values overall in the areas affected. Individual sites will not benefit equally, and a few may even lose value in the short run which would be reflected in a lower tax level.

At national level the growth of service industries at the expense of much 'heavy' industry has resulted in the redistribution of jobs and of people; whilst at a local level, we see how one-way streets, parking regulations, and moving a pedestrian crossing can affect the relative attractiveness of competing shop sites.

The individual landowner, in his capacity as owner of land, clearly is powerless to create his own land value, although if he were also to exert labour or provide capital he would, in those distinctly different roles, play his small part as a member of the larger community. The landowner as such, though, performs no significant function. His sole contribution to the process of wealth creation is to charge labour and capital for access to what nature has already provided free, at a price which reflects the extent of past,

current, and anticipated future levels of economic activity. Values which ought rightfully to be public, have to be 'bought back' from landowners before anything new can be done.

Before proceeding it may be a source of some encouragement to consider a selection of comments from Noble prize winning economists on the efficacy of land value taxation. Interestingly they represent the full spectrum of political ideology from left to right.

Paul Samuelson: 'Pure land rent is in the nature of a 'surplus', which can be taxed heavily without distorting production incentives or efficiency.' A site value tax can be called 'the useful tax on measured land surplus.'

Franco Modigilani: 'It is important that the rent of land be retained as a source of government revenue. Some persons who could make excellent use of land would be unable to raise money for the purchase price. Collecting rent annually provides access to land for persons with limited access to credit.'

Robert Solow: 'Users of land should not be allowed to acquire rights of indefinite duration for single payments. For efficiency, for adequate revenue and for justice, every user of land should be required to make an annual payment to the local government equal to the current rental value of the land that he or she prevents others from using.'

William Vickery, 'It guarantees that no one dispossesses fellow citizens by obtaining a disproportionate share of what nature provides for humanity.'

Milton Friedman: 'I share your view that taxes would be best placed on the land, and not on improvements.'

James Buchanan: 'The landowner who withdraws land from productive use to a purely private use should be required to pay higher, not lower, taxes.'

BENEFITS OF LAND VALUE TAXATION

1 A more equitable means of raising government revenue

The benefits created by the direct investment of the community – roads, rail, schools, universities, Gardaí, defence forces, parks, theatres, sports and leisure facilities, hospitals, etc., are returned to the community in direct relation to the increase in value they bestow to each location in their vicinity. The more desirable any particular location, for residential or business purposes, caused by community development and/or natural advantage, the greater the desire to use the location. This creates a greater market value for the location/site on which the related annual contribution, in the form of Site Value Taxation is returned to community. This in turn provides funds for further development.

SVT is as close as we can get to collecting the value of the common effort for the common good.

2 Land is used productively rather than left idle or derelict

Because there is an annual charge on every site, regardless of development, or lack of development, this acts as a strong encouragement to utilise the resource rather than keeping such an essential resource out of use. The level of tax is based on best use of the site and this encourages active development.

3 Improved productivity of labour

Reduction in PAYE/PRSI gives each employee more net pay. This encourages greater individual effort and business enterprise. The present marginal rate of PAYE/PRSI for many employees is over 50%. This is effectively a 120% levy on productive labour. In reality each employee works for their net salary. This became very apparent when we consider the role PAYE/ PRSI reduction played in recent national wage agreements. The net salary is the true wage. If we allow, say, 10% employer PRSI, in addition to income tax, the PAYE/PRSI payable on an additional €50 net payment is €60, an effective levy of 120% on productive work. This has a number of serious economic consequences which may not be immediately apparent. These aspects are considered below. Ireland would gain a significant competitive advantage by reducing our exposure to the drawbacks of this debilitating approach to tax collection. A move towards a site value taxation solution would help to improve Ireland's international competitive advantage.

4 Improved industrial relations by reducing the tax wedge

Example at 3 above demonstrates an inherently divisive situation. The employee is working for €50, the net wage. The employer needs productivity of €110, i.e. allowing for additional payroll related tax, €60. The employer pays the real net wage to the employee each week or month and then on a monthly basis pays the payroll related taxes to the Collector General. This acts as an obvious wedge between employer and employee with differing expectations based on differing financial impacts. SVT would help to move from a divisive and counter-productive incidence of taxation to a more reasonable and productive tax basis.

5 Encourages employment and reduces unemployment

Reduced labour related costs makes Ireland a more attractive location for domestic and inward investment. This is particularly true where we now directly compete for 'knowledge based' jobs with the Indian subcontinent and the new emerging EU countries of eastern Europe.

6 Improved productivity of investment

A Site Value Tax is levied in relation to the value of

each site regardless of development on the site. This creates a positive incentive to fully utilise land because the productive development does not incur additional tax. SVT suits the active and consumer conscious developer. With the same tax being due for similar sites, regardless that one lies idle and the other is dense with well-planned accommodation, the go ahead developer will be well rewarded with good profits. This general incentive to bring all sites into suitable productive use gives a social and financial uplift to urban areas. This would normally cause land prices to lurch forward undermining the social gain, however SVT has a neutralising influence to stabilise land prices over the long run.

7 Site value tax, unlike other taxes, is not shifted to the consumer

It is a well accepted precept in economics that when the same rate of tax is applied, regardless of use, relative profitability is unchanged. The landholder is therefore not inclined to change its existing use. Land will not be forced out of use because if it has minimal value it will have minimal SVT. This means there will be no change in the supply of goods and services produced involving the land/location. Therefore there will be no change in price. The tax falls fully on the landholder; the net rents received by the landholder fall by the full amount of the tax, and land values fall accordingly.

As far as the user of land is concerned, in practice there would be no difference between land value tax and rents paid for the use of a site. The rental value of a site is determined by its productive capacity over that of a similar size site at the margin. Marginal sites are those that are on the verge of going out of business because of their position or natural resources. The rent that can be commanded by the owner of the site is this differential productive capacity (over the marginal site), paid periodically.

Under a SVT system, part of the rent would be reclaimed as public revenue. It is sometimes argued that the landlord would simply put up the rent to cover this tax. This could not succeed for the reasons developed by examining the following examples.

Suppose a producer on a high value site put up prices in an attempt to recoup the amount paid as SVT. If the effect of his increased prices could be sustained, then other producers would quickly follow suit and raise their own prices until they were at the new higher level throughout the market for those products. The producer at the marginal site, paying no tax, would find a 'windfall' return from these higher prices and his site would no longer be marginal. Thus, if the higher prices persisted, the value of all the sites would rise by that cumulative increase in prices and the result would be higher land values and higher rents and SVT.

But it is more likely that the marginal producer would keep his original prices and take a larger market share. Thus the turnover on the higher value sites would decrease, and the attempt to pass on the tax would fail. In either case the intention to pass on the tax to the consumer would be defeated by normal market forces.

If the tax is paid by a landlord who then tries to pass this levy on to a tenant, again the attempt would be negated. Assuming that, as commonly applies, landlords have pressed their claim to the maximum that the rental market will bear, they will simply force the tenants to find alternative sites from which to operate. Because the tenant is already paying the maximum rent that the site can sustain, any attempt to increase it beyond this point would put the business in jeopardy; the tenant would either have to take less in wages, salary or profit, or find a more viable site.

Since, under SVT many more sites would become available, the threat of the tenant to vacate would leave the landlord with a hard choice: either to attempt to find a tenant who was prepared to take a lesser return – to work for less, or to risk having to pay the SVT on the unused site, which would still bear the full tax. Thus the landholders's attempt to offset the SVT would fail.

In summary SVT is not passed to consumer because:

- market forces determine the differential site values in the first place,
- market forces determine that occupiers pay the maximum rent (or equivalent sale price or mortgage) that the site will bear,
- market forces ensure that product prices are kept competitive, i.e. absence of monopoly,
- alternative sites will be available to tenants because vacant and unused sites will become more available by the operation of SVT.

8 SVT makes a permanent contribution to a reduction in the rate of inflation

We are constantly reminded that increased wage costs are a significant contributor to increasing inflation. Increasing inflation is a significant contributor to the need to increase wage rates. A vicious circle.

By reducing the level of employment based tax and collecting a similar amount through an annual SVT there is less inflationary pressure on the cost of production. Taxes based on labour costs will always feed through to inflation. Point 7, above indicates SVT has less impact on consumer prices and inflation rates.

9 Reduction in house purchase and rental costs

The relationship between house prices and land prices is first considered. Supply and demand governs prices. However where land as a vital factor in

house provision is allowed to be held out of use, by what is effectively a subsidy financed by the community, the artificially high costs associated with a monopoly prevails.

The question is – 'Do land prices impact on house prices?' Kenny and Bacon consider this. Kenny introduces some key components of house price for consideration.

> We do not propose to discuss the controversial question whether the price of land or high wages or unduly large profits are the main cause of high prices which are being asked for new houses. Those connected with the building industry maintain that the price of land is the main cause, while others make charges of excessive profits. The high cost of land certainly contributed to the increase in the price of new houses (S 26)

Bacon addresses the relationship between land prices and house prices as an economist.

> Is it the supply and demand for housing that is pushing development land prices or higher land prices that are pushing housing costs? From an economists point of view the balance of probability would suggest the former channel rather than the latter (April 1998, S 9, p iv)

Bacon was helpful in giving the details of the 'Delphi' survey conducted among a range of experts in the building and property sectors (April 1998, p 42). The one factor that emerges time and time again, in response to questions 'posed in connection with house price determination' is the critical impact of land supply and cost. In addressing this issue Bacon reiterates the quote above, but goes on to say

> Indeed, the submission made by the Irish Home Builders Association goes to considerable lengths to demonstrate that land costs represent an increasing proportion of the housing costs. (April 1998, p 50)

Bacon did note in the second report (March 1999, S 17 p 4) the possibility of reduced house prices arising from a reduction in land prices.

SVT would act as a holding charge, and land hoarding and holding of property vacant would be discouraged, as owners would have to bring sites forward for development and into occupation in order to pay their tax liabilities. The imposition of site value taxation would, for the first time, create competition between landholders, since the option of leaving property empty would be far more costly than it is at present. This competition would bring about a reduction in rents and house prices, together with an improvement in standards. The tax would be a move towards equality of treatment between owners and tenants, reducing the relatively privileged position of the former. Landholders would no longer be negotiating from a position of strength but would be in the same position as any other trades people in respect of their customers. By altering the balance of market conditions to create a plentiful supply of low cost accommodation, site value taxation should make it possible to abolish rent control. There would be no need for rent control because landlords would take care not to ask their tenants to pay more than they could afford; if the tenants went, then the landlord would pick up the land value tax bill.

10 SVT lessens the incentive to engage in political and planning corruption

One of the fundamental principles of economic activity is that we tend to satisfy needs and wants with the least possible effort. This accounts for the variety of occupations as each of us attempts to match 'chosen profession' and our means of 'earning a living'. It also accounts for intelligent and creative efficiencies in all aspects of life and work. It is also the basis for the desirability of a Lotto win and other 'something-for-nothing' schemes.

The present laws fail to adequately recognise the way land naturally captures the added value created by the community. This creates situations where many small and sometimes very large opportunities to 'get something for nothing' are created. By maintaining a system whereby the granting of a planning permission can abruptly cause a piece of land to capture the pent-up actual and speculative value of the surrounding community investment has many of the attributes and attractions of gambling. Millions of euro may be at stake if the right package of permissions and tax incentives can be enacted for a particular plot.

The efforts of many highly intelligent and well paid operators are directed at political lobbying and financial finessing rather than straight forward work to serve the consumer. This ironically named 'public relations' work, often conducted far from the public view, easily stoops to bribery and corruption as politicians and planners with influence are given advances from future 'windfalls'! to help make a 'killing' in the property market. It appears to be something for nothing, however the value has in fact been created by the combined effort of the community.

Much of the projected hundreds of millions of euro and all that otherwise productive time wasted on tribunals directly relate to the fact that we have simply failed to put a fair mechanism in place to relate land values with community investment.

11 SVT removes the need for indiscriminate and politically favoured tax relief.

Employment taxes and rates hit hardest those industries which are employment intensive and those located in marginal areas in the country; the very businesses needed to uplift disadvantaged areas. A cursory review of the way economically marginal locations such as Temple Bar, Smithfield and the IFSC in Dublin and other areas in the

country have prospered illustrates this. These tax breaks, however successful in particular cases, are fairly crude and arbitrary attempts to encourage development which has been suppressed in the first place by crude and indiscriminate taxes on productivity regardless of taxable productive capacity.

SVT obviates this additional complex layer of tax manoeuvring which is open to unfair political manipulation. A shift to land-value taxation would offer an non-discriminatory escape from this predicament.

12 Significantly improves the processing of and compensating for compulsory purchase orders

Land values will reduce because SVT annually transfers community created added value in land back to the community. The inordinate CPO compensation payments incurred by infrastructure development programmes will be reduced because the value of the land will have been reduced. The invidious situation will be avoided whereby the community, having made significant investment in a locality, has to then compensate a landholder for value that the community itself created in the first place.

CPO payments are often very significant 'windfall' gains to the landholder because holding the resource out of economic activity for lengthy periods only adds to the eventual gain. Landholders therefore tend to fight to the last for these super profits. When unjustified gains are removed from the equation a more reasonable planning and compensation process will emerge.

13 SVT removes the source of speculation in land values

The human being is essentially a land based creature. As land is a resource that is absolutely essential for all economic and social activity, speculation is not necessary to establish a market in land. Speculation simply serves as a form of gambling, where the player with deep pockets has real advantage and easily captures the added value created by the community.

Speculators, large and small, are simply playing the game society has set in play. In a sense every house owner has a vested interest in the inflated land values, which account for inflated house prices and which in reality are illusory and only serve to deflect and detract from product effort.

14 Reduces the 'sump effect' on grants, allowances and subsidies

Numerous grants, allowances and subsidies have attempted to reduce the impact of high house prices on 'first time buyers'. However the real economic effect is to increase the cost of land and therefore houses. This happens because the purchaser tends to have an amount available to put towards a house and any grant etc., will increase that buying power. House developers recognise this and duly increase the price of the house by the amount of the grant. Since there tends to be reasonable competition in building labour and supplies markets at regional or national level, the increase soaks through to increase the building land values further exacerbating the problem. SVT has the valuable consequence of at least reclaiming such unwitting contributions to landholders made at the expense of the general community.

In devising government programmes to give first time buyers an opportunity to acquire 'affordable housing', cognisance needs to be taken at the nature of land values.

Under new proposals, the government is to give local authorities land for 'free'. Local authorities will organise the house building and sell to selected purchaser at the cost of building. The full land value now becomes a direct subsidy to the new owner. Unless provision is taken to protect the land value on behalf of the community the government could just as well have sold the land and given a direct cash payment to each 'first time buyer' of say €100,000 each, or whatever the site value happens to be.

A full site value scheme obviates such contrivance by ensuring that land value is not captured unfairly. In the absence of SVT, some method to retain land value for the community is needed under such a scheme in order to avoid further distortion in the land and property market. The principle of this should be that no individual, whether a multi-millionaire property developer or someone in need of affordable housing, should capture unfairly wealth created by the community. One possible scheme would be to have any profits made on the sale or transfer revert to the state. To have it otherwise is to simply exacerbate the problem by contributing to the high cost of land and consequently the high cost of housing.

15 Agricultural grants could be distributed in more meaningful way

Recent changes in the EU system for delivery of subsidy for agriculture is, in general terms, to 'decouple' from subsidising production and relate the subsidy more to the land itself. If Ireland were in position to do it, a system of subsidies directly related to market values of land, (a form of reverse taxation) would maintain to a greater extent the free market in land and product, while giving subsidies where most needed. While there is a debate in the agricultural community about whether to 'decouple' or not, farmers, upon reflection, should be more inclined to the more market based system as this allows them to farm crops and animals rather than paper forms.

16 Improved transparency in dealing with a key national natural resource

SVT calculation is based on an agreed method of land valuation being applied to all land. SVT

necessitates an open and transparent approach to letting the public know who owns the land in the state. The land values and related taxes are published allowing full public appraisal of how this natural resource is utilised in the community.

Tax due in relation to land cannot be avoided, the land cannot be hidden or put 'off shore'. The site exists, the value and rates of tax are published.

17 Urban Sprawl is reduced

Land value taxation tends to reduce urban sprawl, increasing densities towards the centre, and usually diminishing them at the periphery. Of course, this tendency needs fast and effective zoning and planning administration to counter the effects of this strong force favouring maximum economic efficiency in land use.

18 Reduces boom – slump cycle

Land value taxation would also reduce the intensity of boom-slump cycles. This is because a rising land market acts as a bandwagon as people rush to buy, thinking either to make a profit or fearful that prices will rise so high that they will not be able to afford to purchase. In effect, we have what in a physical system would be described as 'positive feedback'; prices are subject to runaway growth, the growth phase ending when purchasers are no longer forthcoming at the bloated prices. The market then stalls and falls back, leading to sluggish trading conditions. Land value taxation would provide a measure of 'negative feedback', thereby stabilising the market, because rising values would be reflected in rising assessments and rising tax liabilities for land holding. As long as the rate of land value taxation was sufficiently high, no-one would purchase or hold more land then they required for their immediate purposes, thereby eliminating the element of speculative froth from land pricing.

19 Clearer analysis of the use of economic resources

With SVT a clear picture emerges of how land is applied in the country. Some of the most inefficient uses of land are currently maintained by government itself. Significant under utilisation of this key natural resource is promoted because as a nation we have ignored the real source and nature of land value.

Local and national governments use, or under use, of land will become clear as every site is valued and these values are published. The so called 'notional' cost of this resource will be properly costed and conscious choices made as to efficient application. The same transparency will apply to institutions and agencies that have held this productive natural resource out of productive use up to now by a form of unrecognised subsidy.

This approach need not necessarily be used to apply the full economically justified levels of SVT to institutions which have enjoined relief up to now. We may as a community decide to allow certain individuals, groups or sectors hold on to the value they derive from the efforts of the community as a whole. However where this is done, the full measure of the concession allowed will be known to the community at large.

20 Public transport investment

Starting from the present inefficient situation and, taking it that labour and capital are fully mobile in the long run so that returns to labour and to capital are determined by nationwide or region wide conditions, any gains from an improvement in efficiency would return to the owners of the fixed factor, land. Essentially a broadly based application of land tax in a region will increase overall efficiency and this will be reflected in land values.

If the landholders in Dublin City, or any other city know what is in their best interest they would vote enthusiastically for additional taxes on site value to be devoted to the lowering of the public service travel fares, especially for off peak or shorter trips, and improving the frequency and quality of the service. Assuming that the subsidy would be used efficiently and not frittered away on administrative overheads, aborted or put to grandiose construction projects or over generous fringe benefits, this would increase the value Dubliners get for their outlays on the bus service, increase the attractiveness of the city and in the long run raising site rents.

IMPLEMENTING CHANGE

Having advocated the advantages of Site Value Taxation, consideration is now given to solutions to possible difficulties that may present related to implementation of such a system. As with any change which sets out to make improvements to what has previously proceeded in a problematic direction for some time, difficulties do present. A clear distinction between transition issues and the basic justice and efficacy of the proposal is needed. Careful observation often shows that the difficulties that may arise can be expected when one ceases an unnatural and ineffective way of action to establish a more natural and effective method. The problems are not indicative of the efficacy and justice of the system itself. These can often be based on mistakes in understanding or, indeed, deliberate misrepresentation in argument to maintain old vested interests.

Is it difficult to agree land valuations?

It may be argued that it is difficult to value property accurately, in particular to distinguish land from buildings. However, this is done on a daily basis by professional valuers without any fuss. When assessing

values in family law matters such as divorce, separation, probate, gift tax etc., property values are readily agreed. In the commercial property market property values are regularly subject to capital and rent valuations by agreement or at arbitration. Property insurance requires a distinction between developments on a site which are subject to fire and flood damage and the pure site value itself.

For SVT purposes it is essential to distinguish between basic land value of sites as if undeveloped, and the additional value of any buildings or other development on that site.

SVT, in a number of forms, is practised successfully in some countries including Canada, USA, New Zealand, South Africa. It tends to be used as a property tax with a greater level of tax levied on the land value element of a property as distinct from the buildings and improvements thereon. Vickery refers to this…

> A property tax is, economically speaking, a combination of one of the worst taxes – the part that is assessed on real estate improvements and in some cases to a limited extent on personalty; and one of the best taxes – the tax on land or site value. A vast improvement in city finances would result from shifting from a property tax to a land value-tax. A tax on land, properly assessed independently of the use made of the lot, is virtually free of distortionary effects and 'excess burden' while the tax on improvements imposes serious burdens on construction. (L-VT p 17)

Land is valued at its most efficient use suitable for the site and the LVT applied. This has the result of encouraging the best service for the common good by encouraging best economic use to be made of this natural resource, subject to zoning and planning permissions designed to serve the common good.

It is important to remember that the neutrality of a land tax does not require that assessments be accurate, but only that they be not related to actual development on the site: as long as the tax is less than, or equal to the rent of unimproved land.

Kenneth Back, Finance Officer, Government of the District of Columbia, who presented a paper to the Eighth Annual TRED Conference on 'Land value taxation in light of current assessment theory and practice' presented the following at the start of his paper.

> I take the position that from a technical point of view, land values can be established and maintained with reasonable accuracy provided that the assessor is not asked to calibrate his crystal ball so finely as to directly force a desired market objective in the valuation process. It is one thing to project a potential use and market value based upon legal effective zoning but quite another to disregard the forces of supply and demand and project a use and market value in accordance with someone's social or economic objectives. 'It is feasible, in other words, to expect that assessors with good training, hard work and ample resources would be able to determine reasonably good approximations of market value for land. Market values incorporate some weighted average set of expectations about the course of development and the uses to which land could and will be permitted to be put. To go beyond this and specify values consonant with some particular scheme of development would pose extremely difficult problems for the assessor both in estimating land values and in justifying them to the taxpayer.

How best do we calculate tax rates ?

The rate of SVT applicable to the value of land should in the long run reflect an annual market rent for that site.

A transition period of a number of years would facilitate a steady incremental increase in the rate of tax levied on the market value of land, gradually moving towards a rate which would retain the full value created by the community for the community.

Land value increase is not the only capital increase! Why select 'economic rent' of land as a source of taxation?

Few can deny the equity of the SVT but some argue against it on the basis that there are other sources of unearned increment e.g. unique works of art. However, land, in whatever form, is unique. It is a necessity for everyone. This is not so with other sources of 'economic rent'.

Exceptional individual skill and the application of creative work produce great value in unique works of art. This does not apply to increased land values which derive from the work of the surrounding community, not the product of any identifiable individual.

Also, the simple point that failure to retrieve some unearned increments is no reason not to retrieve others applies.

Some taxes already recapture some of the value created by the community!

Taxes such as capital gains tax only operate on transfer and tend to be negated by long holding. The wild swings in rates of CGT over recent years, with unclear prospects as to future rates, play into the hands of those with gambling mentality rather than people skilled in development expertise. With SVT, consumer directed development skills and services would become the bases of competitive advantage rather than the present situation where the black arts of tax finessing and zoning finagling win the day and magically appear to create fortunes out of nothing. Of course the facts show community has created the value and CGT fails to deal with this in any meaningful way.

Some people and businesses will have difficulty paying

At the outset it needs saying that what is difficult for a pressed landholder is a chance for the frustrated buyer.

The role of government should help to create a situation where the best overall use of the natural resource of the community is maintained while reconciling justice, charity and prudence in doing so.

There is no need for SVT to impose hardship on individuals or businesses during a transition period from the current tax regime. The objective of SVT is to ensure the best use of this natural resource for the common good with due regard to the individual.

A business or individual may occupy an under utilised site, as valued by the community reflected in the market value. In a transition stage, charity and indeed justice and prudence, require these hardship cases be treated fairly. It is essentially a liquidity problem.

The community can make an arrangement to defer the payment of the SVT to a later date, subject to a fair rate of interest to maintain equity. The community would have a lien or mortgage charge against the property based on the accumulating unpaid SVT plus accruing interest. At the time ownership transfers, or on death, the accumulated tax liability would then revert to the community deducted from the value of the total property.

It is necessary to minimise the level of derogation from the main principle. Where exceptions become prolific and given randomly, not driven by real need, the economic benefits of SVT would be nullified. It is the property that has to have the ability to pay, not the current occupant of the property.

It is a mistake to look at a property on the basis of who and how it is currently being occupied in terms of its ability to pay. It is the land's value, which is a known quantity, that counts. The current use, which may include a building or not, is almost irrelevant. The SVT tax is based on the ability of the location to pay and not on its income.

Farming and forestry will not be unfairly treated. The tendency will be for the most appropriate land to be used for such production. Where special support needs to be given to land holders by way of forgoing some or all of the SVT due to the community this can be done with a clear measure as to the subsidy value.

The impact of SVT on regional development

The community creates land value. Location is the biggest factor in land value. The difference in house prices, travel costs etc. are reflected in differential SVT. Where these differentials are neutralised by SVT, regional differences in land costs are significantly reduced.

Geographical advantage is reflected in land values, which are higher in prosperous areas than those less favoured. Land value taxation would thus be directly related to geographical advantage, and in general, the replacement of existing taxes by land value taxation would work to the benefit of those in marginal areas who would be relieved of a burden of taxation that is frequently insupportable. The present system of regional grants and subsidies tacitly acknowledges this state of affairs already. Land value taxation would reduce the need for grants and subsidies by not removing resources from marginal parts of the country in the first place. In effect, LVT creates tax havens precisely where they are most needed. In the long term, this would help to regenerate the economies of the less prosperous regions, stemming the migration of population and reducing the pressure for housing.

CONSTITUTIONAL ISSUES

The Preamble to Bunreacht na hÉireann expresses the people of Ireland as seeking to promote the common good, with due observance of Prudence, Justice and Charity, so that the dignity and freedom of the individual may be assured and true social order attained. The Constitution recognises the common good as being prerequisite and essential to the attainment and protection of the dignity and freedom of the individual and to true social order. We whole-heartedly endorse these principles. It is of first importance therefore, that our laws provide for the promotion of the common good, over and above any vested or partial interest, no matter how powerful that interest may be.

The Constitution pledges that the state shall, by its laws protect as best it may from unjust attack, and in the case of injustice done, vindicate the property rights of every citizen. The Constitution acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods. It guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.

For the attainment of true social order, for the encouragement of human effort and for the promotion of excellence in all legitimate fields of endeavour, this pledge and acknowledgement are necessary. Credit for the enormous development in the economic activity of the state over the last decade is due in no small part to the fundamental principle inherent in our laws that a man may reap what he sows.

In recent times however, it has become apparent that the operation of certain property rights have subverted the common good, while at the same time greatly enriching some individuals. This phenomenon is not unique to Ireland or to our time. History reveals that with the growth of community, land associated with that community increases in value. This increase in value is as a direct result of the effort and intelligence of the community itself and not of any individual effort or genius. As all economic activity and indeed human existence itself is spatially dependent so it is that humanity will pay any price demanded to have access to the earth. As this natural demand increases, the value of land increases. If access comes at an inordinate price it begins to stifle the community.

To strike a balance between, on the one hand the requirement that persons enjoy rights to private property, and on the other, to protect the common

good, it is necessary to distinguish between the types of property over which ownership can be claimed. The school submits that the property rights acknowledged and protected in the Constitution should include all property with acknowledgement as to the communal nature of land value increases. It would therefore be necessary to amend the Constitution to include a provision relating to private ownership of the increase in land values, not directly influenced by the landholder. This should facilitate legislation to return that wealth which has accrued not on account of the efforts of the landowner but as a result of the existence and activity of the community, to the benefit of the community.

This principle was recognised by Kenny.

> In that sense the proposal involves a delimitation of property rights but one which is no more restrictive than other forms of price control. We believe that this delimitation is not unjust because the landowners in question have done nothing to give the land its enhanced value and the community which has brought about this increased value [by provision of services nearby] should get the benefit of it.

Legal opinion however, suggests that legislation, which seeks to transfer the added value of land from the individual owner back to the benefit of the community, would be constitutionally fragile. *(Kelly p1086)*

It may be arguable that the proposals herein amount to an unjust attack on property rights, in the context of the present constitutional provisions it is probable that legislation designed to reclaim the added value in land could be held to be repugnant to the provisions of Article 43. This concern arises from the fact that such legislation would alter, in a fundamental way, the right to private ownership of land, and could therefore fall foul of the more general provision provided for in Article 43.1.2. as expropriation of added value in land from the individual owner to the community, without payment of market value compensation, may to some extent at least, be construed to dilute the right to private ownership of land.

In this regard our submission recommends that a form of words amending Article 43. 2.1 along the line set out below be submitted for referendum.

> The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice. In particular, the State recognises that the common good requires that private ownership of land be regulated by the principles of social justice and must therefore be subject to that common good and to social order.

CONCLUSION

In economic terms, wealth is the result of the deliberate and systematic meeting of human effort with the natural resources of the earth. From the agrarian to the technological, all wealth arises when human effort, both physical and intellectual, is brought to bear on the natural resources of the planet. In a more primitive community the fertility of the soil may be paramount; in the modern western city location is of the essence. Of the natural resources, land is primary for obvious reasons. However, unlike land, no person or group of persons are permitted to hold a monopoly on any other resource. Water and air are freely available as is the heat and light of the sun; land on the other hand, though essential for human life, can become the property of the individual.

As a community grows, whether that growth is in terms of population or in terms of wealth, the value of the land occupied by that community must increase. It is an observable phenomenon, that as the economic activity of this country increased, so too did land values. This increase was greatest in areas where the activity was most intense or where the population sought most to congregate or live. The essential proposition is however, that the increase in the value of the land was not the result of any action of the individual landowner. It was the community itself that gave rise to the increase in the value and it is therefore not illogical to say that the increase belongs naturally to that community. Many landowners will have increased the value of their property by some renovation or other, but the greatest share of increased land values in Ireland during the period after 1990 was due to the efforts of the community.

Unless the state, by its laws, can render back this value to the benefit of the community, then it must happen that the price of land increases and will continue to increase to a point where social order is frustrated. In Ireland today, increased land values have resulted in the price of housing being prohibitive; levels of borrowing are unacceptably high; enterprise is restricted; public projects and in particular the development of infrastructure are frustrated; there is corruption associated with the planning process; in short, vast resources are being spent in the purchase or rent of land to persons and bodies whose only claim to such resources is that they hold the land. It is the submission of the school that it ought to be open to the government of the day to legislate to rebalance this situation. The Constitution ought not be allowed protect a vested interest when that interest is contrary to the interest of the community at large.

Notes:

1 Of course gifts are given, family is cared for and all in need are properly supported. This honours the perquisite of Charity (Love) which our Constitution has at it very foundation.

SIMON COMMUNITIES OF IRELAND

THE RIGHT TO HOUSING AND THE HOMELESSNESS CRISIS

1 INTRODUCTION

The Simon Communities of Ireland welcome this opportunity to make a submission to the All Party Oireachtas Committee on the Constitution. We do so from the perspective of over thirty years experience in working and campaigning with people who are experiencing homelessness. We believe that as the social housing and homelessness crisis escalates, an examination of the balancing of property rights with the principles of social justice is extremely timely. We particularly welcome the inclusion by the committee of the right to shelter within this debate. We would however like to raise a critical point of concern in the choice of language at this point. Ireland's obligations under no fewer than five international covenants, which have the status of legally binding treaties, refer to the **right to housing**. While the right to shelter has been defined as encompassing all those elements which a right to housing entails,[1] we would be concerned that its use in this context could be viewed as an invitation to in someway limit the application of the right to housing. Thus, throughout our submission we will refer to the right to housing.

There are currently at least[2] 4,176 adults and 1,405 children experiencing homelessness as per the statutory definition. While the Irish Constitution makes provision for the right to property, Article 43.1.1 and the right to the inviolability of the privacy of one's home, Article 40.5, a constitutional right to adequate housing does not currently exist. Thus while the rights of both property owners and home owners are explicitly named, those without access to housing have no complimentary statement of their rights.

The Simon Communities of Ireland believe that the current homelessness and social housing crisis represents a flagrant breach of Ireland's stated legal obligations under international covenants in particular the International Covenant on Economic, Social and Cultural Rights (Article 11.1) which was ratified by Ireland in 1989.

Further we hold that the current crisis, which has among its contributory factors the unavailability of sufficient building land, is contrary to the provisions of Article 43.2.1 and 43.2.2 which balance the right to private property with the 'principles of social justice', and the 'exigencies of the common good'.

The arguments which have been propagated to justify Ireland's failure to incorporate economic and social rights in the Constitution namely:

- that current legislation is sufficient to protect the housing rights of vulnerable groups
- that economic and social rights should emerge through the democratic process into the political policy process

simply do not hold up when examined against the context of the current social housing and homelessness crisis.

Legislation that provides for social housing is at the discretion both of financial prioritisation and political pressure. Specifically in relation to homelessness, the Housing Act, 1988 provides a definition of homelessness and requires local authorities to assess the number of people falling within this definition, but it does not put a legal duty on local authorities directly to house those identified. While the Act did allow the local authorities to fund other mechanisms of housing provision for people who are homeless, these provisions, like the overall allocation to social housing spend are not predicated on need but on political budgetary prioritisation. Less than half of all people who are homeless apply directly to the local authorities for housing, as the chances of being housed for those who are single and childless are minimal. The inadequacies of the current homelessness legislation and policy measures are discussed in more detail below.

All human rights, be they civil and political or economic and social, are indivisible. The Irish Government reiterated its commitment to this principle at the UN Conference on Human Rights in Vienna in 1993. This is further reiterated in official publications by the Department of Foreign Affairs, which states 'Ireland is firmly committed to the principles that all human rights are universal, indivisible, interdependent and interrelated.'[3]

The right to adequate housing is one of the clearest examples of the indivisibility and interdependence of all rights. It has been identified by the UN as 'one of the fundamental elements for human dignity, physical and mental health and overall quality of life, which enable one's development…(and which has) received a wide recognition as a fundamental human right in a number of international instruments and declarations, regional instruments and national laws.' Several UN human rights bodies recognise that the right to: human dignity; freedom from discrimination; an adequate standard of living; freedom of association and expression; security of person; non interference with one's privacy, family, home or correspondence is dependent on to right to adequate housing[4]. The enjoyment of core civil and political rights such as the right to vote are fundamentally undermined if the right to housing is not respected.

Analysis of the physical and mental health needs of people who are experiencing homelessness in Ireland, their exceptionally low life expectancy, their susceptibility to physical and sexual assault, their risk of developing addiction problems all indicate that the very basics of human dignity and security are seriously undermined by the lack of adequate housing.

The argument that the weight of these people's political preferences at election time is the most appropriate way to influence state policy, rings very hollow for those whose very situation – the lack of a home – undermines one of their most fundamental civil and political rights, the right to vote.

2 THE EXPERIENCE OF HOMELESSNESS IN IRELAND

Homelessness is usually caused by the experience of some form of personal crisis – such as a relationship breakdown or bereavement, physical or sexual violence in the home combined with the experience of poverty. Young people leaving care, people leaving prison and other institutional settings, in particular mental health institutions are also particularly vulnerable to becoming homeless. The age and gender profile of people who are becoming homeless has substantially altered in recent years, with more women and young people seeking services. The numbers of two parent families experiencing homelessness has also grown indicating that the direct structural effect of the price of accommodation on homelessness is increasing.

People experiencing homelessness make up a growing vulnerable population that has an unacceptably high risk for preventable disease, progressive morbidity and premature death. Homeless people experience much higher levels of Hepatitis-C, HIV, TB, poor nutrition, drug and alcohol addiction and mental health difficulties than the general population.

The Eastern Health Board[5] has tabulated the incidence of general health problems among people experiencing homelessness. It found that they have a much higher prevalence of chronic physical disease, mental ill health and a lower life expectancy than those of comparable age in the general population.

According to research from Crisis in the UK[6], the average age of death of a homeless person sleeping rough is 42 years. From our experience of working with street homeless in Cork, Dublin, Dundalk and Galway the mortality rates of rough sleepers in Ireland are along similar lines.

3 CURRENT LEGISLATIVE AND NON-LEGISLATIVE MEASURES TO TACKLE HOMELESSNESS

3.1 The Housing Act 1988

This act provided a statutory definition of homelessness[7], required local authorities to assess the numbers experiencing homelessness on a regular basis (every three years), specified the local authorities as the appropriate body responsible for the needs of people experiencing homelessness, specified that schemes of local authority allocation priorities be revised so as to ensure that people who are homeless were made a priority, conferred additional powers on local authorities to respond to homelessness by directly arranging and funding emergency accommodation, making arrangements with a health board or voluntary body for the provision of emergency accommodation and/or making contributions to voluntary bodies towards the running costs of accommodation provided by them (the Department of the Environment was empowered to reimburse local authorities in respect of their expenditure in this area.)

Crucially the Act did not require local authorities to house people who are homeless. The minister of the day argued that it would place an unfair legal burden on housing authorities and disrupt the orderly allocation of new houses to people in need. While the Act outlined new responsibilities for local authorities that could be discharged through either housing allocation, or through part funding of voluntary or cooperative housing providers, no sanctions were outlined for use against local authorities that did not take any appropriate action.

3.2 Homelessness – An Integrated Strategy

This strategy was launched by government in May 2000 as a response to the substantial increase in the official homelessness figures, which the government acknowledged represented a crisis. The strategy was welcomed in the main.

Critically it clarified that the local authorities are responsible for people's housing needs whereas the health boards should be responsible for the care needs of people in homeless services. Additionally the onus was put on each local authority to develop a local homeless action plan, which would assess the needs of people homeless in their area and plan housing and other service provision to meet those needs within three years.

Among the key difficulties which have substantially stymied the capacity of this strategy to make a meaningful difference are: the lack of any monitoring or implementation mechanisms in the plan, the absence of any NGO involvement in the roll out of the plan at a national level, substantial funding problems including gross underestimation of necessary funding, the failure of government to deliver on three year multi annual funding, the freezing of funding lines resulting in the under funding of local plans. Additionally, as the homeless action plans are not on a statutory basis, as outlined below, there are no guarantees that housing targets named will be delivered. (The strategy is due for review before the end of this year, and Simon have submitted detailed terms of reference to inform this process.)

4 THE CONTINUED DENIAL OF HOUSING TO THOSE EXPERIENCING HOMELESSNESS

4.1 Measuring homelessness

Since the first assessment in 1989, the official homelessness figures have increased by 374%.

Year	Total Numbers Assessed
1989	1,491
1991	2,371
1993	2,172
1996	2,501
1999	5,234
2002	5,581

Some of this increase can be attributed to better practice at a local authority level in terms of assessment mechanisms. However it is worth noting that a substantial data deficit still exists. This was thrown into sharp relief with the production of the 2002 figures (which were not published until 14 months after the official count).

In the period between the 1999 figures and the 2002 figures each local authority was mandated under the government's homelessness strategy, 'Homelessness – An Integrated Strategy' to assess and meet the needs of those experiencing homelessness in their area and to do so in conjunction with the voluntary service providers. (This strategy, while extremely welcome, highlights the inadequacies of the 1988 legislation). While the methodologies employed in the creation of local homeless action plans are different to those in the official assessment, the anomalies between the two sets of data display an even more extreme homelessness crisis than the official figures document. Among these anomalies is the number of local authorities that recorded a complete elimination of homelessness in their official figures in 2002, yet their action plans identify the need for substantial services. In one case a local authority that reported nobody homeless in their official 2002 figures, welcomed the Minister for Environment and Local Government to open a substantial new hostel that same week.

The official data continues to provide merely a head count, giving no estimation of the type of housing needs required by those counted. (There is no formal analysis in terms of age, gender, dependant children, physical/psychological disability etc on which to assess the type of housing services required.)

The official data on homelessness is not only qualitatively insufficient but is also more than likely fundamentally quantitavely flawed. The true extent of the homelessness crisis is undoubtedly much more extreme than the current limited data portrays.

4.2 Provision of housing directly by local authorities

Less than half of all those included as homeless in the official needs assessment apply to the local authority for housing. In the main local authorities do not prioritize those who do not have children whether male or female. This could be addressed by putting the local homeless action plans on a statutory basis, thus where local assessments by the authorities in conjunction with the voluntary service providers have actually identified the housing needs of those experiencing homelessness, this could be mainstreamed into standard local authority housing provision. We have suggested this measure on a number of occasions and through various policy forums. It is worth noting that the unavailability of local authority housing to single homeless adults may warrant investigation of discrimination under the 'family status' aspect of the equality legislation.

4.3 Other mechanisms to fund housing for those experiencing homelessness

While government spending on homeless service provisions had undeniably increased substantially under 'Homelessness – An Integrated Strategy', this funding is subject to political prioritisation. The commitment to provide funding on a three-year multi annual basis in order to allow the proper development and planning of homeless services has never been met. Almost half the national spend by the Department of Environment and Local Government is on emergency B&B provision, while the funding available to projects agreed under the strategy has been subject to cutbacks and substantial under allocations. The current expenditure levels (approximately €43m spent on homeless services by the Department of Environment and Local Government in 2002) must also be assessed against a lack of statutory funding for homeless services for over thirty years.

4.3 Strain on local authority waiting lists

There are currently 48,000 households on the local authority housing waiting lists, of whom 85% have an income of less than €15,000 per annum[8], and thus clearly are never likely to be in a position to access housing on the open market. This substantial increase (23% over three years) has happened against a backdrop of government failure to meet the targets set on social housing output in the National Development Plan and repeated in the National Anti Poverty Strategy. This immense pressure on the system makes it even less likely that those in dire housing need who do access the local authority waiting list will be housed.

Thus it is blatantly clear that neither the legislative or non-legislative measures to meet the housing needs of people experiencing homelessness have been effective. They do not serve to meet Ireland's obligation to a right to adequate housing.

5 IRELAND'S INTERNATIONAL OBLIGATIONS ON THE RIGHT TO HOUSING

5.1 The International Convention on Economic, Social and Cultural Rights

The Universal Declaration of Human Rights, which was adopted by all UN members in 1948, outlines a series of civil, political, economic and social rights. This Declaration was formulated against the backdrop of the atrocities of World War II in an attempt to build a new world order with respect for individual human dignity at its core.

Subsequently the ideals of the Declaration found legal effect in what are known as the twin covenants; The International Covenant on Civil and Political Rights, and The International Covenant on Economic, Social and Cultural Rights.

Article 11.1 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) contains 'perhaps the most significant foundation of the right to housing found in the entire body of legal principles which comprise international human rights law'[9]. It states:

> The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Ireland ratified the International Covenant on Economic, Social and Cultural Rights on the 8th of December 1989. States compliance with the Convention is monitored by the UN Committee on Economic, Social and Cultural Rights (hereafter referred to as 'the Committee').

The practical application of the right to adequate housing has been clearly defined over the past decade through comprehensive revision by the Committee of the guidelines for States reports under Articles 16 and 17[10] of the Covenant and the adoption of General Comment Number 4[11] on the right to housing. The extent of the States parties responsibilities under the Covenant are outlined in Article 2 of the Covenant. Guidelines on each of these areas are appended and some of the key obligations are discussed below. Together with the Committee's concluding observations on Ireland's reports under the ICESCR a comprehensive picture of what a right to housing would mean, and how the current position in Ireland falls far short of those requirements, can be established.

5.1.1 Concluding observations on Ireland

The concluding observations of the Committee on Ireland in 2002 and 1999 give an insight into the areas where the Committee observes that housing rights are particularly vulnerable. In its 2002 recommendations the Committee makes specific reference to those unable to secure adequate and affordable housing, Traveller accommodation and the transfer of persons with mental disabilities who are not suffering from serious psychiatric illness to more appropriate care settings.[12] The 1999 comments of the Committee were less specific but again referred to marginalised groups 'the Traveller community and the disabled are still discriminated against in various respects, such as employment, education and housing.' The issue of forced evictions has received high-level condemnation and should this practice continue against members of the travelling community it is likely to continue to be a focus of attention for the Committee. The Committee 'considers that instances of forced evictions are prima facie incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances'[13] a position echoed by the Commission on Human Rights 'the practice of forced evictions constitutes a gross violation of human rights, in particular, the right to adequate housing'[14].

Aside from the failure to actually incorporate the right to housing in domestic legislation and in the Constitution (discussed below), the Irish Government has not adopted a 'rights based' approach to social policy development. The Committee notes this in particular in relation to the recent health strategy, the proposed Disabilities Bill, and the National Anti Poverty Strategy.[15]

5.1.2 Articles 16 and 17 of the ICESCR

These guidelines form the basis of the reporting structure by states parties to the Committee, and offer an insight into the policy and legislative measures which have been identified as contributing to the realisation of the right to housing. The full list of guidelines are listed in Appendix 1, those of particular note include:

> (Please provide detailed information about those groups within your society that are vulnerable and disadvantaged with regard to housing. Indicate, in particular:)

The number of individuals and families currently inadequately housed and without ready access to basic amenities such as water, heating (if necessary), waste disposal, sanitation facilities, electricity, postal services, etc. (in so far as you consider these amenities relevant in your country). Include the number of people living in overcrowded, damp, structurally unsafe housing or other conditions, which affect health;

The number of persons currently classified as living in 'illegal' settlements or housing;

The number of persons evicted within the last five years and the number of persons currently lacking legal protection against arbitrary eviction or any other kind of eviction;

The number of persons whose housing expenses are above any government-set limit of affordability, based upon ability to pay or as a ratio of income;

The number of persons on waiting lists for obtaining accommodation, the average length of waiting time and measures taken to decrease such lists, as well as to assist those on such lists in finding temporary housing;

The number of persons in different types of housing tenure by: social or public housing; private rental sector; owner-occupiers; "illegal" sector; and others.

Please provide information on the existence of any laws affecting the realization of the right to housing, including:

Legislation which gives substance to the right to housing in terms of defining the content of this right;

Legislation such as housing acts, homeless person acts, municipal corporation acts, etc.;

Legislation relevant to land use, land distribution, land allocation, land zoning, land ceilings, expropriations including provisions for compensation, land planning including procedures for community participation;

Legislation concerning the rights of tenants to security of tenure, to protection from eviction, to housing finance and rent control (or subsidy), housing affordability, etc.;

Legislation prohibiting any and all forms of discrimination in the housing sector, including against groups not traditionally protected;

Legislation prohibiting any form of eviction;

Any legislative appeal or reform of existing laws, which detracts from the fulfilment of the right to housing;

Legislation restricting speculation on housing or property, particularly when such speculation has a negative impact on the fulfilment of housing rights for all sectors of society;

Measures taken by the State to build housing units and to increase other construction of affordable rental housing;

Measures taken to release unutilized, underutilized or misutilized land;

Financial measures taken by the State, including details of the budget of the Ministry of Housing or other relevant Ministry as a percentage of the national budget;

5.1.3 General Comment Number 4

This comment produced by the Committee, and attached in Appendix 2, offers very clear guidelines on the definition of adequacy, (which extends to adequate shelter) and includes detailed guidelines on: legal security of tenure; availability of services, material, facilities and infrastructure; affordability; habitability; accessibility; location; cultural adequacy.

It also provides specific commentary on: due priority given to those social groups living in unfavourable conditions; the adoption of a national housing strategy; the obligation to demonstrate that, in aggregate, the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the maximum of available resources; the role of formal legislative and administrative measures.

Further, this document makes it clear that the right to housing is justiciable, and outlines six areas where such provisions would apply, three of which – ' (b) Legal procedures seeking compensation following an illegal eviction; …(d) allegations of any form of discrimination in the allocation and availability of access to housing;(f) Class action suits in situations involving significantly increased levels of homelessness.' – are arguably particularly applicable to the current Irish policy position.

5.1.4 States obligations under Article 2

Article 2 of the International Covenant on Economic, Social and Cultural rights is of central importance for determining governments' duties in order to ensure the full enjoyment of the rights outlined in the Covenant, it states:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Three phrases in this article are particularly important for understanding the obligations of governments to realise fully the rights recognised

in the Covenant, including the right to adequate housing: (a) 'undertakes to take steps . . . by all appropriate means'; (b) 'to the maximum of its available resources'; and (c) 'to achieve progressively'.

The first of these implies immediacy – states must take action directly upon ratification not only to establish what the current situation is but how it should be addressed. The Committee has noted that 'all appropriate means' refers not only to legislative procedures but also to judicial, administrative, economic, social and educational steps must also be taken**.** Particularly in relation to the right to housing this includes developing a national housing strategy, identifying and allocation resources and engaging in meaningful consultation on this process with all social sectors, including those experiencing homelessness and their representatives and organisations.

The second important phrase, ' to the maximum of its available resources' means that even in times of severe economic contraction the rights of vulnerable members of society must be protected. The states' obligation is to demonstrate that in aggregate the measures being taken are sufficient to realise the right to adequate housing for every individual in the shortest possible time using the maximum available resources.

The obligation to 'achieve progressively' highlights states' duties to move as quickly and effectively as possible towards the full realisation of the rights within the treaty. Ensuring that these rights are made real cannot be indefinitely postponed, and any deliberately retrogressive measures could constitute a breach of the Covenant. The obligation of progressive realisation exists independently of any increase in resources.

5.2 Other International conventions/treaties signed by Ireland

A number of international covenants that Ireland has ratified have explicitly named the right to housing within their articles. Our failure to make real the right to housing constitutes a breach of our obligations under the ICESCR and also the treaties listed below.

- Article 5 (e.iii) of the *International Convention on the Elimination of All Forms of Racial Discrimination*. Ireland ratified this Convention, which is monitored by the Committee on the Elimination of Racial Discrimination, on the 29th of December 2000.
- Article 14.2 (h) of CEDAW. (This Article refers to the rights of rural women, and their right to housing within that context). Ireland acceded to this Convention, which is monitored by the Committee on the Elimination of Discrimination against Women, on the 23rd of December 1985.
- Article 27.3 of the *Convention on the Rights of the Child*. Ireland ratified this Convention, which is monitored by the Committee on the Rights of the Child, on the 28th of September 1992.
- Article 21 of the *1951 Convention relating to the Status of Refugees*. Ireland accessed to this Convention on the 29th of November, 1956.

5.3 Incorporation

In the 2002 Concluding Observations on Ireland, the Committee on Economic, Social and Cultural Rights strongly recommended, as they did in the 1999 report, 'that the State party incorporate economic, social and cultural rights in the proposed amendment to the Constitution, as well as the other domestic legislation.'[16] Of particular note when contrasting this position to that articulated by the Irish Government is the Committee's affirmation 'that all economic, social and cultural rights are justiciable', and further that 'irrespective of the system through which international law is incorporated into the domestic legal order (monism or dualism), following ratification of an international instrument, the State party is under an obligation to comply with it and to give it full effect in the domestic legal order'[17].

The position of the Irish Government as articulated in the first national report under the Convention, and repeated in the second national report is that as Ireland has a dualist[18] legal system, and thus 'international agreements to which Ireland becomes a party are not automatically incorporated into domestic law'[19]. Further, it is argued that Article 29.6 of the Constitution[20], 'precludes the Irish courts from giving effect to an international agreement, such as the European Convention on Human Rights, if it is contrary to domestic law or grants rights or imposes obligations additional to those of domestic law.'[21] These arguments have been rehearsed among a policy elite, and have not been the subject of broad public debate, thus denying citizens the opportunity to articulate their views on our stated international obligations.

6 THE CURRENT CONTEXT OF THE DEBATE

6.1 National Anti Poverty Strategy

In the revised National Anti Poverty Strategy (NAPS) the Government stated that

> Citzenship rights encompass not only the core civil and political rights and obligations but also

> social, economic and cultural rights and obligations that underpin equality of opportunity and policies on access to education, employment, health, housing and social services.
>
> A wide range of social rights is specifically provided for in the Irish Constitution and in international conventions ratified by Ireland.[22]

The strategy goes on to note the creation of a number of new bodies including the Human Rights Commission, and commits to set 'detailed standards in relation to access to services' in accordance with the National Anti Poverty Strategy. While this acknowledgement is welcome, the framing of economic and social rights in terms of access to services rings very hollow for those who are on the extreme margins of service provision. In order to meaningfully progress the National Anti Poverty Strategy, the critical *denial* of rights must be addressed as a priority.

6.2 The Human Rights Commissions North and South

Simon very much welcomes the statement by the Irish Human Rights Commission in the recently launched strategic plan that:

> Through international and constitutional obligations, Ireland is committed to ensuring a comprehensive range of substantial rights including… the right to adequate accommodation. The Human Rights Commission is concerned about the ways in which the State upholds its obligations with regard to these rights…the Commission seeks to advance an understanding of the nature of these rights and to focus on appropriate means of giving them practical effect. This will necessarily involve an examination of whether legal means of enforcement are required under international law and would make a meaningful difference in Ireland.[23]

The Northern Ireland Human Rights Commission has already proposed the inclusion of a right to adequate housing in the Northern Ireland Bill of Rights, stating that they rely heavily on the broad and detailed definition of adequacy issued by the Committee on Economic, Social and Cultural Rights. In fact, the definition they offer exactly mirrors that of Article 31 of the Revised European Social Charter above. This commitment will give further impetus to the full examination of the right to housing in the Republic of Ireland. Should this proposed Bill become law it must be replicated by parallel legislation in the Republic of Ireland.

6.3 Political opposition

We welcome the official position of the Department of Foreign Affairs, which states 'Ireland is firmly committed to the principles that all human rights are universal, indivisible, interdependent and interrelated.'[24] However, there has been much resistance at a senior political level to the incorporation of economic and social rights into the Irish Constitution. Some valid questions about the justiciablity of these rights have been raised, however this has as yet to be meaningfully addressed at a political level in a progressive fashion. The UN Committee on Economic, Social and Cultural Rights has repeatedly strongly disagreed with both Ireland's position (albeit informally stated) on justiciablity and on the perceived legal difficulties with the incorporation of the Covenant. The opinion has also been expressed by some senior political leaders that economic and social rights are the preserve of political policy and not appropriate for statements of national ideals that would be conferred on them by a constitutional expression. This raises the serious question of the democratic deficit that exists whereby ordinary citizens are not enabled to participate in the decisions on whether or not Ireland abides by its international obligations. Further, as noted previously, for as long as the right to housing remains an issue of political party policy, rather than a fundamental guarantee for human dignity, the democratic deficit whereby those who cannot vote to influence political policies because they do not have a roof over their head continues in a vicious circle.

6.4 Developments in Europe

The current administration's opposition to the incorporation of social and economic rights can be seen from Ireland's reservation to the Revised European Social Charter, 1996, which came into force in 1999. It contains a specific Article on the right to housing.

> Article 31- The Right to Housing
>
> With a view to ensuring the effective exercise of the right to housing, the Parties undertake to take measures designed:
> to promote access to housing of an adequate standard:
> to prevent and reduce homelessness with a view to its gradual elimination:
> to make the price of housing accessible to those without adequate resources.[25]

To date seventeen countries have made declarations in respect of their ratification of the Revised Charter. Ireland, along with Moldova and Romania has failed to accept the provisions of Article 31. The statement from the Permanent Representative of Ireland in relation to Article 31 reads 'In view of the general wording of Article 31 of the Charter, Ireland is not in a position to accept the provisions of this article at

this time. However, Ireland will follow closely the interpretation to be given to the provisions of Article 31 by the Council of Europe with a view to their acceptance by Ireland at a later date.[26] Additional information released by the Department of Environment and Local Government on the decision to enter a reservation against Article 31 again points to the reticence towards economic and social rights becoming statements of shared ideals, as opposed to their 'proper' preserve within the political priorities process.

6.5 Critique of the position of the Constitutional Review Group 1996

In the report of this group arguments were put forward under the section 'Arguments against including in the Constitution a personal right to freedom from poverty or specific economic rights'.[27] These have been extensively critiqued, and we would respectfully refer the members of the All Party Oireachtas Committee on the Constitution to the Irish Commission for Justice and Peaces' publication *Re–Righting the Constitution – The Case for New Social and Economic Rights: Housing, Health, Nutrition, Adequate Standard of Living*.

As the Report of the Constitution Review Group is citied in the terms of reference for this investigation into property rights, it is worth reviewing here each of the arguments in brief.

Firstly the report states that economic and social rights are 'essentially political matters which, in a democracy, (it) should be the responsibility of the elected representatives of the people to address and determine'.[28] As discussed earlier, the democratic process has not served the needs of those forced to live on the streets; in fact the homelessness crisis continues to grow. As also noted the very denial of housing rights denies many people the opportunity to engage in the democratic process. The report argues that a constitutional standing for economic and social rights would create a 'distortion of democracy'. It is clear that the democratic process is already distorted at the cost of the health and lives of some of our citizens.

Secondly the report argues that constitutional enshrinement would result in 'Government and Oireachtas (having) no discretion as to what amount of revenue could, or should be raised from the public to fund the remedial requirement'.[29] This argument ignores that civil and political rights also come at a cost, and that the right to education, a key social right is already enshrined in the constitution and has not resulted in the usurpation of the role of the government and Oireachtas on educational services spending. Additionally, as Fabre, cited in Steiner and Alston, points out, the role of the judiciary in adjudicating on social and economic rights does not necessarily have to be a directive one, it can and has been characterised by reminding government of its duties, and ruling on clear breaches of the duties, but not advising government on how to fulfil this duty[30]. Examples exist within other EU jurisdictions where the constitutional right to housing has been successfully supplemented by administrative and resource allocation legislation, and it is this model that we propose in Section 7.

The report addresses the issue of availability of resources, however, as identified above our commitments under the ICESCR include the progressive realisation of the right to housing, and call on Ireland to make the best use of existing resources to make economic and social rights a reality. Ireland has never adopted the position that core civil and political rights can be derogated in a time of economic decline, core economic and social rights must be subject to the same prioritisation.

The report also raises concerns about how the realisation of rights could be measured. However, as explored above and in the appendix, extensive guidelines on the practical application of a right to housing already exists, and further that the model of reporting on this right has already been adopted by the Irish Government.

The report then argues that certain balancing of rights already exists in the Constitution and cites the example of the curtailment of property rights in accordance with the principles of social justice and the common good. As the current brief of the All Party Oireachtas Committee on the Constitution, and the extensive acknowledgement of the unavailability of building land as a prime contributor to the current housing crisis testifies, this has not proved to be effective.

Finally the report argues that the right to life and right to bodily integrity already enshrined in the Constitution provide sufficient protection against the denial of such rights as the right to housing. While this has not as yet been tested in the Irish courts, any one of the many thousands of vulnerable people whose health and indeed very lives have been put at risk by the absence of access to adequate housing could arguably take a case. This would indeed be a damning indictment of the level of protection offered by the Irish Constitution to its citizens.

7 PROPOSALS FROM THE SIMON COMMUNITIES OF IRELAND

We firmly believe that the right to housing should be enshrined in the Irish Constitution. We believe that a constitutional right to housing would:

- acknowledge in a meaningful way Ireland's commitment to the ICESR
- establish an explicit statement of our society's values and concerns
- balance existing rights, and enhance the commitment to the exigencies of the common good and the principles of social justice
- establish the accountability of government to citizens and public bodies.

While the exact phrasing of this constitutional amendment requires further discussion key elements of the amendment must include:

- that the right to housing is justiciable, that is where social policy or legislative measures fail the right to housing should be specified in such a way as to be arbitrated, determined and enforced by the courts
- that the right to housing make real our international legal obligations
- that the primary responsibility of the individual to meet their housing needs from their own resources is enshrined, ensuring the targeting of state intervention for those most in dire need.

We also seek supporting legislation to strengthen local authorities' obligation to house people experiencing homelessness; to give those who are homeless meaningful access to appropriate housing and to outline the standards and services, which embody housing rights.

This legislation would have the dual effect of making the right to housing meaningful in the short term, and overcoming the difficulties of the judiciary guiding the legislature on the protection of rights in the absence of clear policy.

Current legislative measures, which have existed for over fifteen years, have failed to have a meaningful impact on the homelessness crisis. It is the firm conviction of the Simon Communities of Ireland that both a constitutional amendment and supporting legislation could be effectively used to reduce and ultimately eliminate homelessness.

Appendix 1

FROM UN FACT SHEET 21 ON THE RIGHT TO HOUSING

Revised guidelines regarding the form and contents of States reports to be submitted by States parties under Articles 16 and 17 of the Covenant on Economic, Social and Cultural Rights

The right to adequate housing

Please furnish detailed statistical information about the housing situation in your country.

Please provide detailed information about those groups within your society that are vulnerable and disadvantaged with regard to housing. Indicate, in particular:

• The number of homeless individuals and families;

• The number of individuals and families currently inadequately housed and without ready access to basic amenities such as water, heating (if necessary), waste disposal, sanitation facilities, electricity, postal services, etc. (in so far as you consider these amenities relevant in your country). Include the number of people living in overcrowded, damp, structurally unsafe housing or other conditions, which affect health;

• The number of persons currently classified as living in 'illegal' settlements or housing;

• The number of persons evicted within the last five years and the number of persons currently lacking legal protection against arbitrary eviction or any other kind of eviction;

• The number of persons whose housing expenses are above any government-set limit of affordability, based upon ability to pay or as a ratio of income;

• The number of persons on waiting lists for obtaining accommodation, the average length of waiting time and measures taken to decrease such lists, as well as to assist those on such lists in finding temporary housing;

• The number of persons in different types of housing tenure by: social or public housing; private rental sector; owner-occupiers; 'illegal' sector; and others.

Please provide information on the existence of any laws affecting the realisation of the right to housing, including:

• Legislation which gives substance to the right to housing in terms of defining the content of this right;

• Legislation such as housing acts, homeless person acts, municipal corporation acts, etc.;

• Legislation relevant to land use, land distribution, land allocation, land zoning, land ceilings, expropriations including provisions for compensation, land planning including procedures for community participation;

• Legislation concerning the rights of tenants to security of tenure, to protection from eviction, to housing finance and rent control (or subsidy), housing affordability, etc.;

• Legislation concerning building codes, building regulations and standards and the provision of infrastructure;

• Legislation prohibiting any and all forms of discrimination in the housing sector, including against groups not traditionally protected;

• Legislation prohibiting any form of eviction;

• Any legislative appeal or reform of existing laws, which detracts from the fulfilment of the right to housing;

• Legislation restricting speculation on housing or property, particularly when such speculation has a negative impact on the fulfilment of housing rights for all sectors of society;

• Legislative measures conferring legal title to those living in the 'illegal' sector;

• Legislation concerning environmental planning and health in housing and human settlements.

Please provide information on all other measures taken to fulfil the right to housing, including:

• Measures taken to encourage 'enabling strategies' whereby local community-based organizations and the 'informal sector' can build housing and related services. Are such organizations free to operate? Do they receive government funding?;

• Measures taken by the state to build housing units and to increase other construction of affordable rental housing;

• Measures taken to release unutilised, underutilised or misutilised land;

• Financial measures taken by the state, including details of the budget of the Ministry of Housing or other relevant Ministry as a percentage of the national budget;

• Measures taken to ensure that international assistance for housing and human settlements is used to fulfil the needs of the most disadvantaged groups;

• Measures taken to encourage the development of small and intermediate urban centres, especially at the rural level;

• Measures taken during, *inter-alia,* urban renewal programmes, redevelopment projects, site upgrading, preparation for international events (Olympics, World Fairs, conferences, etc.), "beautiful city" campaigns, etc., which guarantee protection from eviction or guarantee rehousing based on mutual agreement, by any persons living on or near to affected sites.

During the reporting period, have there been any changes in the national policies, laws and practices negatively affecting the right to adequate housing? If so, please describe the changes and evaluate their impact.

Appendix 2

1 Pursuant to article 11 (1) of the Covenant, States parties 'recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions'. The human right to adequate housing, which is thus derived from the right to an adequate standard of living, is of central importance for the enjoyment of all economic, social and cultural rights.

2 The Committee has been able to accumulate a large amount of information pertaining to this right. Since 1979, the Committee and its predecessors have examined 75 reports dealing with the right to adequate housing. The Committee has also devoted a day of general discussion to the issue at each of its third (see E/1989/22, para. 312) and fourth sessions (E/1990/23, paras. 281-285). In addition, the Committee has taken careful note of information generated by the International Year of Shelter for the Homeless (1987) including the Global Strategy for Shelter to the Year 2000 adopted by the General Assembly in its resolution 42/191 of 11 December 1987.[1] The Committee has also reviewed relevant reports and other documentation of the Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities.[2]

3 Although a wide variety of international instruments address the different dimensions of the right to adequate housing[3] article 11 (1) of the Covenant is the most comprehensive and perhaps the most important of the relevant provisions

4 Despite the fact that the international community has frequently reaffirmed the importance of full respect for the right to adequate housing, there remains a disturbingly large gap between the standards set in article 11 (1) of the Covenant and the situation prevailing in many parts of the world. While the problems are often particularly acute in some developing countries which confront major resource and other constraints, the Committee observes that significant problems of homelessness and inadequate housing also exist in some of the most economically developed societies. The United Nations estimates that there are over 100 million persons homeless worldwide and over 1 billion inadequately housed.[4] There is no indication that this number is decreasing. It seems clear that no state party is free of significant problems of one kind or another in relation to the right to housing.

5 In some instances, the reports of states parties examined by the Committee have acknowledged and described difficulties in ensuring the right to adequate housing. For the most part, however, the information provided has been insufficient to enable the Committee to obtain an adequate picture of the situation prevailing in the state concerned. This General Comment thus aims to identify some of the principal issues which the Committee considers to be important in relation to this right.

6 The right to adequate housing applies to everyone. While the reference to 'himself and his family' reflects assumptions as to gender roles and economic activity patterns commonly accepted in 1966 when the Covenant was adopted, the phrase cannot be read today as implying any limitations upon the applicability of the right to individuals or to female-headed households or other such groups. Thus, the concept of 'family' must be understood in a wide sense. Further, individuals, as well as families, are entitled to adequate housing regardless of age, economic status, group or other affiliation or status and other such factors. In particular, enjoyment of this right must, in accordance with article

2 (2) of the Covenant, not be subject to any form of discrimination.

7 In the Committee's view, the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity. This is appropriate for at least two reasons. In the first place, the right to housing is integrally linked to other human rights and to the fundamental principles upon which the Covenant is premised. This 'the inherent dignity of the human person' from which the rights in the Covenant are said to derive requires that the term 'housing' be interpreted so as to take account of a variety of other considerations, most importantly that the right to housing should be ensured to all persons irrespective of income or access to economic resources. Secondly, the reference in article 11 (1) must be read as referring not just to housing but to adequate housing. As both the Commission on Human Settlements and the Global Strategy for Shelter to the Year 2000 have stated: Adequate shelter means ... adequate privacy, adequate space, adequate security, adequate lighting and ventilation, adequate basic infrastructure and adequate location with regard to work and basic facilities – all at a reasonable cost.

8 Thus the concept of adequacy is particularly significant in relation to the right to housing since it serves to underline a number of factors which must be taken into account in determining whether particular forms of shelter can be considered to constitute 'adequate housing' for the purposes of the Covenant. While adequacy is determined in part by social, economic, cultural, climatic, ecological and other factors, the Committee believes that it is nevertheless possible to identify certain aspects of the right that must be taken into account for this purpose in any particular context. They include the following:

(a) *Legal security of tenure* Tenure takes a variety of forms, including rental (public and private) accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements, including occupation of land or property. Notwithstanding the type of tenure, all persons should possess a degree of security of tenure which guarantees legal protection against forced eviction, harassment and other threats. States parties should consequently take immediate measures aimed at conferring legal security of tenure upon those persons and households currently lacking such protection, in genuine consultation with affected persons and groups;

(b) Availability of services, materials, facilities and infrastructure An adequate house must contain certain facilities essential for health, security, comfort and nutrition. All beneficiaries of the right to adequate housing should have sustainable access to natural and common resources, safe drinking water, energy for cooking, heating and lighting, sanitation and washing facilities, means of food storage, refuse disposal, site drainage and emergency services;

(c) *Affordability* Personal or household financial costs associated with housing should be at such a level that the attainment and satisfaction of other basic needs are not threatened or compromised. Steps should be taken by states parties to ensure that the percentage of housing-related costs is, in general, commensurate with income levels. States parties should establish housing subsidies for those unable to obtain affordable housing, as well as forms and levels of housing finance which adequately reflect housing needs. In accordance with the principle of affordability, tenants should be protected by appropriate means against unreasonable rent levels or rent increases. In societies where natural materials constitute the chief sources of building materials for housing, steps should be taken by States parties to ensure the availability of such materials;

(d*) Habitability* Adequate housing must be habitable, in terms of providing the inhabitants with adequate space and protecting them from cold, damp, heat, rain, wind or other threats to health, structural hazards, and disease vectors. The physical safety of occupants must be guaranteed as well. The Committee encourages states parties to comprehensively apply the Health Principles of Housing[5] prepared by WHO which view housing as the environmental factor most frequently associated with conditions for disease in epidemiological analyses; i.e. inadequate and deficient housing and living conditions are invariably associated with higher mortality and morbidity rates;

(e) *Accessibility* Adequate housing must be accessible to those entitled to it. Disadvantaged groups must be accorded full and sustainable access to adequate housing resources. Thus, such disadvantaged groups as the elderly, children, the physically disabled, the terminally ill, HIV-positive individuals, persons with persistent medical problems, the mentally ill, victims of natural disasters, people living in disaster-prone areas and other groups should be ensured some degree of priority consideration in the housing sphere. Both housing law and policy should take fully into account the special housing needs of these groups. Within many states parties increasing access to land by landless or impoverished segments of the society should constitute a central policy goal. Discernible governmental obligations need to be developed aiming to substantiate the right of all to a secure place to live in peace and dignity, including access to land as an entitlement;

(f) *Location* Adequate housing must be in a location which allows access to employment options, health-

care services, schools, child-care centres and other social facilities. This is true both in large cities and in rural areas where the temporal and financial costs of getting to and from the place of work can place excessive demands upon the budgets of poor households. Similarly, housing should not be built on polluted sites nor in immediate proximity to pollution sources that threaten the right to health of the inhabitants;

(g) *Cultural adequacy* The way housing is constructed, the building materials used and the policies supporting these must appropriately enable the expression of cultural identity and diversity of housing. Activities geared towards development or modernization in the housing sphere should ensure that the cultural dimensions of housing are not sacrificed, and that, *inter alia*, modern technological facilities, as appropriate are also ensured.

9 As noted above, the right to adequate housing cannot be viewed in isolation from other human rights contained in the two International Covenants and other applicable international instruments. Reference has already been made in this regard to the concept of human dignity and the principle of non-discrimination. In addition, the full enjoyment of other rights – such as the right to freedom of expression, the right to freedom of association (such as for tenants and other community-based groups), the right to freedom of residence and the right to participate in public decision-making – is indispensable if the right to adequate housing is to be realised and maintained by all groups in society. Similarly, the right not to be subjected to arbitrary or unlawful interference with one's privacy, family, home or correspondence constitutes a very important dimension in defining the right to adequate housing.

10 Regardless of the state of development of any country, there are certain steps which must be taken immediately. As recognised in the Global Strategy for Shelter and in other international analyses, many of the measures required to promote the right to housing would only require the abstention by the Government from certain practices and a commitment to facilitating 'self-help' by affected groups. To the extent that any such steps are considered to be beyond the maximum resources available to a state party, it is appropriate that a request be made as soon as possible for international cooperation in accordance with articles 11 (1), 22 and 23 of the Covenant, and that the Committee be informed thereof.

11 States parties must give due priority to those social groups living in unfavourable conditions by giving them particular consideration. Policies and legislation should correspondingly not be designed to benefit already advantaged social groups at the expense of others. The Committee is aware that external factors can affect the right to a continuous improvement of living conditions, and that in many States parties overall living conditions declined during the 1980s. However, as noted by the Committee in its General Comment 2 (1990) (E/1990/23, annex III), despite externally caused problems, the obligations under the Covenant continue to apply and are perhaps even more pertinent during times of economic contraction. It would thus appear to the Committee that a general decline in living and housing conditions, directly attributable to policy and legislative decisions by States parties, and in the absence of accompanying compensatory measures, would be inconsistent with the obligations under the Covenant.

12 While the most appropriate means of achieving the full realisation of the right to adequate housing will inevitably vary significantly from one state party to another, the Covenant clearly requires that each state party take whatever steps are necessary for that purpose. This will almost invariably require the adoption of a national housing strategy which, as stated in paragraph 32 of the Global Strategy for Shelter, 'defines the objectives for the development of shelter conditions, identifies the resources available to meet these goals and the most cost-effective way of using them and sets out the responsibilities and time-frame for the implementation of the necessary measures'. Both for reasons of relevance and effectiveness, as well as in order to ensure respect for other human rights, such a strategy should reflect extensive genuine consultation with, and participation by, all of those affected, including the homeless, the inadequately housed and their representatives. Furthermore, steps should be taken to ensure coordination between ministries and regional and local authorities in order to reconcile related policies (economics, agriculture, environment, energy, etc.) with the obligations under article 11 of the Covenant.

13 Effective monitoring of the situation with respect to housing is another obligation of immediate effect. For a state party to satisfy its obligations under article 11 (1) it must demonstrate, inter alia, that it has taken whatever steps are necessary, either alone or on the basis of international cooperation, to ascertain the full extent of homelessness and inadequate housing within its jurisdiction. In this regard, the revised general guidelines regarding the form and contents of reports adopted by the Committee (E/C.12/1991/1) emphasise the need to 'provide detailed information about those groups within ... society that are vulnerable and disadvantaged with regard to housing'. They include, in particular, homeless persons and families, those inadequately housed and without ready access to basic amenities, those living in 'illegal' settlements, those subject to forced evictions and low-income groups.

14 Measures designed to satisfy a state party's obligations in respect of the right to adequate housing may reflect whatever mix of public and private sector measures considered appropriate. While in some states public financing of housing might most usefully be spent on direct construction of new housing, in most cases, experience has shown the inability of governments to

fully satisfy housing deficits with publicly built housing. The promotion by states parties of 'enabling strategies', combined with a full commitment to obligations under the right to adequate housing, should thus be encouraged. In essence, the obligation is to demonstrate that, in aggregate, the measures being taken are sufficient to realise the right for every individual in the shortest possible time in accordance with the maximum of available resources.

15 Many of the measures that will be required will involve resource allocations and policy initiatives of a general kind. Nevertheless, the role of formal legislative and administrative measures should not be underestimated in this context. The Global Strategy for Shelter (paras. 66-67) has drawn attention to the types of measures that might be taken in this regard and to their importance.

16 In some states, the right to adequate housing is constitutionally entrenched. In such cases the Committee is particularly interested in learning of the legal and practical significance of such an approach. Details of specific cases and of other ways in which entrenchment has proved helpful should thus be provided.

17 The Committee views many component elements of the right to adequate housing as being at least consistent with the provision of domestic legal remedies. Depending on the legal system, such areas might include, but are not limited to: (a) legal appeals aimed at preventing planned evictions or demolitions through the issuance of court-ordered injunctions; (b) legal procedures seeking compensation following an illegal eviction; (c) complaints against illegal actions carried out or supported by landlords (whether public or private) in relation to rent levels, dwelling maintenance, and racial or other forms of discrimination; (d) allegations of any form of discrimination in the allocation and availability of access to housing; and (e) complaints against landlords concerning unhealthy or inadequate housing conditions. In some legal systems it would also be appropriate to explore the possibility of facilitating class action suits in situations involving significantly increased levels of homelessness.

18 In this regard, the Committee considers that instances of forced eviction are *prima facie* incompatible with the requirements of the Covenant and can only be justified in the most exceptional circumstances, and in accordance with the relevant principles of international law.

19 Finally, article 11 (1) concludes with the obligation of states parties to recognise 'the essential importance of international cooperation based on free consent'. Traditionally, less than 5 per cent of all international assistance has been directed towards housing or human settlements, and often the manner by which such funding is provided does little to address the housing needs of disadvantaged groups. States parties, both recipients and providers, should ensure that a substantial proportion of financing is devoted to creating conditions leading to a higher number of persons being adequately housed. International financial institutions promoting measures of structural adjustment should ensure that such measures do not compromise the enjoyment of the right to adequate housing. States parties should, when contemplating international financial cooperation, seek to indicate areas relevant to the right to adequate housing where external financing would have the most effect. Such requests should take full account of the needs and views of the affected groups.

Appendix 3

FROM UN FACT SHEET NUMBER 21 ON THE RIGHT TO HOUSING

CLARIFYING GOVERNMENTAL OBLIGATIONS

The widespread legal recognition of the right to adequate housing is of the utmost importance. In practical terms, however, it is necessary to spell out the specific steps which governments should take to turn these legal rights into concrete realities for the people who are entitled to them. It is sometimes mistakenly thought that rights such as the right to housing simply require governments to provide sufficient public funds towards this end and that the subsequent allocation of monetary resources is all that is needed for obligations surrounding this right to be satisfied. However, the right to housing and, indeed, all economic, social and cultural rights confer a much more lengthy and complex series of obligations on states. The Committee on Economic, Social and Cultural Rights has helped to clarify the various governmental obligations arising from recognition of the right to adequate housing. It has done this through a number of initiatives. These include: (a) holding a 'general discussion' on this right; (b) comprehensively revising the guidelines for States' reports under articles 16 and 17 of the Covenant on Economic, Social and Cultural Rights (Annex II); (c) adopting its General Comment No. 4 on the Right to Adequate Housing (Annex III); and (d) including in its concluding observations on some states parties' reports remarks to the effect that the state in question was infringing the right to adequate housing owing to the practice of forced eviction.

These steps, and of course the norms of the Covenant and other legal sources of the right to housing outlined above, give rise to various levels of governmental obligations towards the realisation of this right.

The legal obligations of governments concerning the right to housing consist of i) the duties found in article 2.1 of the Covenant; and ii) the more specific obligations to recognise, respect, protect and fulfil this and other rights.

Article 2.1 of the Covenant is of central importance for determining what governments must do and what they should refrain from doing in the process leading to the society-wide enjoyment of the rights found in the Covenant. This article reads as follows:

> Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

Three phrases in this article are particularly important for understanding the obligations of Governments to realise fully the rights recognised in the Covenant, including the right to adequate housing: a) 'undertakes to take steps . . . by all appropriate means'; b) 'to the maximum of its available resources'; and c) 'to achieve progressively'.

a) 'undertakes to take steps . . . by all appropriate means'

This obligation is immediate. Steps must be undertaken by states directly upon ratification of the Covenant. One of the first of these appropriate steps should be for the state party to undertake a comprehensive review of all relevant legislation with a view to making national laws fully compatible with international legal obligations.

The Committee on Economic, Social and Cultural Rights has recognised that in many instances legislation is highly desirable, and in some cases, indispensable, for the fulfilment of each of the rights found in the Covenant. At the same time, however, the Committee has emphasised that the adoption of legislative measures alone, or the existence of legislative compatibility is not enough for a state party to fulfil its obligations under the Covenant.

The term 'by all appropriate means' has been broadly interpreted. In addition to legislative measures, administrative, judicial, economic, social and educational steps must also be taken.

In general terms, governments must also take steps which are deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognised in the Covenant. Consequently, rapid steps are required to diagnose the existing situation of the rights found in the Covenant.

States parties are also obliged to develop policies and set priorities consistent with the Covenant, based upon the prevailing status of the rights in question. They are also required to evaluate the progress of such measures and to provide effective legal or other remedies for violations.

With specific reference to the right to adequate housing, states parties are required to adopt a national housing strategy. This strategy should define the objectives for the development of shelter conditions, identify the resources available to meet these goals, as well as the most cost-effective way of using them, and set out the responsibilities and time-frame for the implementation of the necessary measures.

Such strategies should reflect extensive genuine consultation with, and participation by, all social sectors, including the homeless and the inadequately housed and their representatives and organisations.

Additional steps are required to ensure effective coordination between relevant national ministries and regional and local authorities in order to reconcile related policies (economic, agriculture, environment, energy and so forth) with the obligations arising from article II of the Covenant.

b) 'to the maximum of its available resources'

This means that both the resources within a state and those provided by other states or the international community must be utilised for the fulfilment of each of the rights found in the Covenant. Even when 'available resources' are demonstrably inadequate, states parties must still strive to ensure the widest possible enjoyment of the relevant rights under the prevailing circumstances.

Importantly, this principle requires an equitable and effective use of and access to the resources available. Although the alleged lack of resources is often used to justify non-fulfilment of certain rights, the Committee on Economic, Social and Cultural Rights has emphasised that even in times of severe economic contraction and the undertaking of measures of structural adjustment within a state, vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes.

If a state claims that it is unable to meet even its minimum obligations because of a lack of resources, it must at least be able to demonstrate that every effort has been made to use all resources that are at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. However, lack of resources can never be used to justify failure of a state to fulfil its obligation to monitor non-enjoyment of the rights found in the Covenant.

In essence, the obligation of states is to demonstrate that, in aggregate, the measures being taken are sufficient to realise the right to adequate housing for every individual in the shortest possible time using the maximum available resources.

c) 'to achieve progressively'

This imposes an obligation on states to move as quickly and effectively as possible towards the goal of realising fully each of the rights found in the Covenant. Put simply, states cannot indefinitely postpone efforts to ensure their full realisation. However, not all rights under this text are subject to progressive implementation. Both the adoption of legislation relating to the non-discrimination clauses of the Covenant and monitoring of the status of realisation of the rights in question must occur immediately following ratification.

This obligation 'to achieve progressively' must be read in the light of article 11.1 of the Covenant, in

particular the reference to the right to the 'continuous improvement of living conditions'. Any deliberately retrogressive measures in that regard would require the most careful consideration and would need to be fully justified by reference to the totality of the rights provided for in the Covenant and in the context of the full use of the maximum available resources.

The obligation of progressive realisation, moreover, exists independently of any increase in resources. Above all, it requires effective use of resources available.

d) 'A minimum core obligation'
Under the Covenant on Economic, Social and Cultural Rights, each state party, notwithstanding its level of economic development, is under a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights found in this instrument. Under the same Covenants, a state party in which any significant number of individuals is deprived of basic shelter and housing is, prima facie, failing to perform its obligations under the Covenant. Beyond this core requirement are four levels of additional governmental obligations relating to the right to adequate housing.

e) 'To Recognise'
The obligation of states to recognise the right to housing manifests itself in several key areas. First, all countries must recognise the human rights dimensions of housing, and ensure that no measures of any kind are taken with the intention of eroding the legal status of this right.

Second, legislative measures, coupled with appropriate policies geared towards the progressive realisation of housing rights, form part of the obligation 'to recognise'. Any existing legislation or policy which clearly detracts from the legal entitlement to adequate housing would require repeal or amendment. Policies and legislation should not be designed to benefit already advantaged social groups at the expense of those in greater need.

Another dimension of the duty to recognise this right can be expressed in terms of policy. Specifically, housing rights issues should be incorporated into the overall development objectives of states. In addition, a national strategy aimed at progressively realising the right to housing for all through the establishment of specific targets should be adopted.

Third, the recognition of the right to housing means that measures must be undertaken by states to assess the degree to which this right is already enjoyed by the population at the time of ratification. Even more importantly, a genuine attempt must be made by states to determine the degree to which this right is not in place, and to target housing policies and laws towards attaining this right for everyone in the shortest possible time. In this respect, states must give due priority to those social groups living in unfavourable conditions by according them particular consideration.

f) 'To Respect'
The duty to respect the right to adequate housing means that governments should refrain from any action which prevents people from satisfying this right themselves when they are able to do so. Respecting this right will often only require abstention by the government from certain practices and a commitment to facilitate the 'self-help' initiatives of affected groups. In this context, states should desist from restricting the full enjoyment of the right to popular participation by the beneficiaries of housing rights, and respect the fundamental right to organise and assemble.

In particular, the responsibility of respecting the right to adequate housing means that states must abstain from carrying out or otherwise advocating the forced or arbitrary eviction of persons and groups. States must respect people's rights to build their own dwellings and order their environments in a manner which most effectively suits their culture, skills, needs and wishes. Honouring the right to equality of treatment, the right to privacy of the home and other relevant rights also form part of the state's duty to respect housing rights.

g) 'To Protect'
To protect effectively the housing rights of a population, governments must ensure that any possible violations of these rights by 'third parties' such as landlords or property developers are prevented. Where such infringements do occur, the relevant public authorities should act to prevent any further deprivations and guarantee to affected persons access to legal remedies of redress for any infringement caused.

In order to protect the rights of citizens from acts such as forced evictions, governments should take immediate measures aimed at conferring legal security of tenure upon all persons and households in society who currently lack such protection. In addition, residents should be protected, by legislation and other effective measures, from discrimination, harassment, withdrawal of services or other threats.

Steps should be taken by states to ensure that housing-related costs for individuals, families and households are commensurate with income levels. A system of housing subsidies should be established for sectors of society unable to afford adequate housing, as well as for the protection of tenants against unreasonable or sporadic rent increases.

States should ensure the creation of judicial, quasi-judicial, administrative or political enforcement mechanisms capable of providing redress to alleged victims of any infringement of the right to adequate housing.

h) To Fulfil'

In comparison with the duties to recognise, to respect and to protect, the obligation of a state to *fulfil* the right to adequate housing is both positive and interventionary. It is in this category, in particular, that issues of public expenditure, government regulation of the economy and land market, the provision of public services and related infrastructure, the redistribution of income and other positive obligations emerge.

The Committee on Economic, Social and Cultural Rights has asserted that identifiable governmental strategies aimed at securing the right of all persons to live in peace and dignity should be developed. Access to land as an entitlement should be included in such strategies. The Committee has stated further that many of the measures required to satisfy the right to housing will involve resource allocations and that, in some cases, public funds allocated to housing might most usefully be spent on direct construction of new housing.

Generally, on the issue of housing finance, states must establish forms and levels of expenditure which adequately reflect society's housing needs, and which are consistent with the obligations arising from the Covenant and other legal sources.

As proclaimed in the Limburg Principles on the Implementation of the Covenant on Economic, Social and Cultural Rights, and reiterated subsequently by the Committee, due priority shall be given, in the use of all available resources, to the realisation of rights recognised in the Covenant, mindful of the need to assure to everyone the satisfaction of subsistence requirements, as well as the provision of essential services.

Appendix 4

HEALTH STATUS, HEALTH SERVICE UTILISATION AND BARRIERS TO HEALTH SERVICE UTILISATION AMONG THE ADULT HOMELESS POPULATION OF DUBLIN, HOLOHAN, 1997

Chronic physical illness	
Diabetes	2.5%
Hypertension	12.7%
Arthritis	13.7%
Heart disease	5.1%
Epilepsy	5.3%
Tuberculosis	2.7%
Respiratory disease	15.8%
Peptic ulcer	13.7%

Chronic psychiatric problems	
Depression	32.5%
Anxiety disorder	27.6%

Other problems	
Dental problems	37.1%
Skin problems	16.0%
Foot problems	21.3%

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1 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland. 17/05/2002 E/C. 12/1/Add.77

2 Connolly, J 1998, Re-righting the Constitution: The Case for New Social and Economic Rights: Housing, Health, Nutrition, Adequate Standard of Living, Genprint, Dublin.

3 Department of An Taoiseach , 2002 'Building an Inclusive Society'

4 Department of Environment and Local Government, Housing Bulletin, November 2002

5 Department of Foreign Affairs, International Covenant on Economic, Social and Cultural Rights, First National Report of Ireland, The Stationary Office, Dublin 2.

6 Holohan, 1997,Health Status, Health Service Utilisation and Barriers to Health Service Utilisation among the Adult Homeless Population of Dublin,

7 Irish Human Rights Commission, 2002 'Strategic Plan' Steiner,HJ and Alston, P, 2000, International Human Rights in Context (2nd ed.), OUP, Oxford.

8 Report of the Constitution Review Group 1996 Dublin, Stationery Office van Dijk and van Hoot 'Theories and practice of the European Convention on Human Rights', 3rd ed. Kluver Law International, The Hague, 1998

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Council of Europe: www.coe.int

Irish Council for Civil Liberties: www.iccl.ie

Notes:

1 See General Comment Number 4, (Appendix 2)

2 Data on homelessness in Ireland is extremely weak, with the official data providing a substantial underestimation of the extent of the problem; this is discussed in further detail below.

3 Official Statement of the Permanent Mission of Ireland to the United Nations http://www.un.int/ireland/ie_hr.htm

4 United Nations High Commissioner for Human Rights, Fact-sheet -Number 21 pg. 5 http://www.unhchr.ch/housing/fs21

5 Health Status, Health Service Utilisation and Barriers to Health Service Utilisation among the Adult Homeless Population of Dublin, Holohan, 1997 (see Appendix 4 page 34)

6 Crisis Annual Report 1999-2000

7 *Statutory Definition of Homelessness*
Homelessness is defined in Section 2 of the Housing Act, 1988 as follows: -

"A person shall be regarded by a housing authority as being homeless for the purposes of this Act if
(a) there is no accommodation available which, in the opinion of the authority, he, together with any other person who normally resides with him or who might reasonably be expected to reside with him, can reasonably occupy or remain in occupation of, or
(b) he is living in a hospital, county home, night shelter or other such institution, and is so living because he has no accommodation of the kind referred to in paragraph (a)".

This definition includes: -

- people living in temporary insecure accommodation,
- people living in emergency bed and breakfast accommodation and hostels/health board accommodation because they have nowhere else available to them,
- rough sleepers,
- victims of family violence.

8 Department of Environment and Local Government, Housing Bulletin, November 2002

9 United Nations High Commissioner for Human Rights, Fact-sheet -Number 21 pg. 5 http://www.unhchr.ch/housing/fs21

10 Appendix 1

11 Appendix 2

12 20. The Committee is concerned that; (a) many new households cannot secure adequate and affordable housing; and (b) some 1,2000 families of the traveller community are living in roadside encampments without access to water and adequate sanitary facilities, and are liable to be forcibly evicted.

21. The Committee notes with regret that a large number of persons with mental disabilities, whose state of health would allow them to live in the community, is still accommodated in psychiatric hospitals together with persons suffering from psychiatric illnesses or problems, despite efforts by the State party to transfer them to more appropriate care settings."

13 United Nations High Commissioner for Human Rights, Fact-sheet -Number 21 pg. 20 http://www.unhchr.ch/housing/fs21

14 Ibid

15 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland. 17/05/2002 E/C. 12/1/Add.77

16 Concluding Observations of the Committee on Economic, Social and Cultural Rights: Ireland. 17/05/2002 E/C. 12/1/Add.77

17 Ibid

18 See van Dijk and van Hoot 'Theories and practice of the European Convention on Human Rights', 3rd ed. Pg 16/17, Kluver Law International, The Hague, 1998

'In the so-called dualistic view the international and national legal system form two separate legal spheres, and internal law has effect within the national legal system only after it has been 'transformed' into national law vie the required procedure. The legal subjects depend on this transformation for the protection of the rights laid down in international law; their rights and duties exist only under national law'.

'In the so called monistic view… the various domestic legal systems are viewed as elements of the all-embracing international legal system, within which the national authorities are bound by international law in their relations with individuals as well, regardless of whether or not their rules of international law have been transformed into national law. In this view the individual derives the rights and duties directly from international law, which must be applied by the national courts and to which the latter must give priority over any national law conflicting with it.

19 International Covenant on Economic, Social and Cultural Rights, First National Report of Ireland, pg 19 Department of Foreign Affairs, The Stationary Office, Dublin 2.

20 (No international agreement shall be part of the domestic law of the State save as may be determined by the Oireachtas), as interpreted in the Norris case, (O Laigheas (1960) I.R. 93, Norris v Attoney General (1984) I.R.36)

21 Ibid pg 20

22 'Building An Inclusive Society', March 2002

23 The Human Rights Commission, Strategic Plan, 2003-2006

24 Official Statement of the Permanent Mission of Ireland to the United Nations http://www.un.int/ireland/ie_hr.htm

25 Council of Europe website http://conventions.coe.int/Treaty/en/Treaties/Htlm/163.htm

26 Council of Europe website http://conventions.coe.int/Treaty/EN/DeclareList.asp

27 Report of the Constitution Review Group 1996 Dublin, Stationery Office pp 235-236

28 Ibid p235

29 Ibid

30 Steiner,HJ and Alston, P, 2000, International Human Rights in Context (2nd ed.), p277,OUP, Oxford.

Notes from Appendix 2:

* Contained in document E/1992/23.

1 Official Records of the General Assembly, Forty-third Session, Supplement No. 8, addendum (A/43/8/Add.1).

2 Commission on Human Rights resolutions 1986/36 and 1987/22; reports by Mr. Danilo Türk, Special Rapporteur of the Sub-Commission (E/CN.4/Sub.2/ 1990/19, paras. 108-120; E/CN.4/Sub.2/1991/17, paras. 137-139); see also Sub-Commission resolution 1991/26.

3 See, for example, article 25 (1) of the Universal Declaration on Human Rights, article 5 (e) (iii) of the International Convention on the Elimination of All Forms of Racial Discrimination, article 14 (2) of the Convention on the Elimination of All Forms of Discrimination against Women, article 27 (3) of the Convention on the Rights of the Child, article 10 of the Declaration on Social Progress and Development, section III (8) of the Vancouver Declaration on Human Settlements, 1976 (Report of Habitat: United Nations Conference on Human Settlements (United Nations publication, Sales No. E.76.IV.7 and corrigendum), chap. I), article 8 (1) of the Declaration on the Right to Development and the ILO Recommendation Concerning Workers' Housing, 1961 (No. 115).

4 See footnote 1

5 Geneva, World Health Organization, 1990.

SINN FÉIN

'We reaffirm that all right to private property must be subordinated to the public right and welfare.'

The Democratic Programme of the First Dáil

INTRODUCTION

Sinn Féin believes that the right to housing is a fundamental right and must be enshrined in the constitution. It is also our assertion that the constitution must be amended so as to clarify the Articles which deal with the rights of private property. Property rights should be dealt with in a single self-contained Article. Social justice must be given pre-eminence to the rights of private property.

The recurrent theme in looking at how various issues are affected by the Articles in the constitution which deal with private property is that, in practice, the 'social justice' component has been subordinated to the needs of private property, especially that of commercial private property.

The privileged position which has been accorded to rights of private property in the Constitution of 1937 is unfortunate and regressive for a people with a history and a tradition dating from Brehon law to the Democratic Programme of the First Dáil, which placed the common good above the rights of private property.

The protection given to private property in the 1937 Constitution and the contradictions in the relevant Articles have acted as a barrier to introducing a right to housing and to controlling the price of land. Sinn Féin believes that too broad a discretion has been given to the courts in relation to the limitation of property rights. The negative affect of the prevailing interpretation of this element of the Constitution is increasingly obvious in the housing crisis and the escalating cost of building land which has frustrated the social housing programmes of local authorities.

Successive governments have hidden behind the excuse of constitutional problems when justifying their failure to bring forward legislation, in the common good, to tackle land prices, and to abolish ground rents. We believe that the Oireachtas All Party Committee on the Constitution would be in a far better position to make recommendations on whether it is necessary to amend the Constitution if such legislation had been brought forward and tested legally as was done with Section V of the Planning and Development Act 2000.

Ultimately the land of Ireland belongs to the people of Ireland and that is the underlining theme on which our submission is based. Sinn Féin believes that the constitutional balance must be in favour of the common good over and above the rights of private property.

THE RIGHT TO PRIVATE PROPERTY?

Sinn Féin agrees with a right to private property but believes that it is necessary, for the common good, to place limitations on the rights of private property.

Private property has been and remains an instrument of oppression of people the world over. A tool of oppression, it has been used by the landlord against the tenant, monarch against subject, man against woman. Domination of one person over another has been facilitated by the existence of private property.

James Connolly wrote that 'The enemy of our race is private property' and it is true that the Irish people have historically been oppressed by private property. We believe that they continue to be oppressed by the exagerated rights accorded to private property in the Constitution.

Irish people have a complex relationship with private property which is deeply influenced by our colonial past. Those who would advocate ever-greater protection to the rights of private property exploit an emotional attachment which Irish people, who fought in a long struggle for land rights, have to the idea of land ownership. Limiting the rights of private property, in the common good, should not in any way be feared by ordinary home owners and farmers who will, along with all the citizens of this state, benefit from the right to social justice and equality being given priority over the rights of private property.

COMPULSORY PURCHASE ORDERS

One of the few practical limitations to private property is the compulsory purchase order.

Many national infrastructure projects would not be possible without compulsory purchase orders. These powers have been used in the past for the building of roadways, railways and canals. The first CPOs used in Ireland allowed for the formation of the Wide Streets Commission and the subsequent construction of streets such as College Street, D'Olier Street, Westmoreland Street, Capel Street and Dorset Street in Dublin.

Currently this power is usually used in road building and where the outcome is not simply in the common good – it is beneficial to economic and commercial development.

The most pertinent issue which needs to be addressed in relation to CPO is what barriers exist to using compulsory purchase orders to procure land for housing. Why should compulsory acquisition of land be permitted to allow public infrastructure to proceed for the greater and common good and yet this same instrument is not used to procure land or buildings for social housing at a time of a severe housing crisis?

We must also examine whether there is a necessity for full compensation in all cases where CPO is used.

Sinn Féin believes that it is not in the common good for it to be necessary, in every case, to pay compensation equal to the market value. Local authorities are impeded from using CPO to procure land for the provision of social housing by prohibitive compensation. Local authorities should have the power to acquire land at a price below the market price where this is necessary for the common good.

Case law tends to support the contention that it is necessary to pay compensation:

In *Central Dublin Development Authority* V. The *Attorney General* (1975) Kenny J. found:

> 'the absence of compensation for this restriction or abolition of rights will make the Act which does this invalid if it is an unjust attack on the property rights'

However, In *O'Callaghan v. Commissioners for Public Works* it was suggested that the compulsory acquisition process does not in every circumstance require the payment of compensation for it to be constitutional. The suggestion was also made in *Dreher v. Irish Land Commission and the Attorney General (1984)* and in *ESB v. Gormley* (1985)

Nevertheless the Supreme Court stated in Re Article 26 and the Planning and Development Bill 1999 (2000):

> There can be no doubt that a person who is compulsorily deprived of his or her property in the interest of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired property.

The courts have tended to support the idea that you cannot CPO without just compensation. But if, in reference to what constitutes just compensation, we refer back to *Dreher v. Irish Land Commission* we may ascertain that changes in compensation regime would be possible.

In *Dreher V. Irish Land Commission*, Walsh J stated

> It does not necessarily follow that the market value of lands at any given time is the equivalent of just compensation as there may be circumstances where it could be considerably less than just compensation and others where it might in fact be greater than just compensation

Sinn Féin asserts that compensation should, where compensation is necessary, be based on existing use value or existing use value plus a stipulated percentage as outlined in the Kenny Report as it is not in the common good for local authorities to be faced with paying the full market value for land which derives much of its value from the actions and decisions of that local authority, e.g. zoning decisions and infrastructural development.

The finding by Costello J. in *Hempenstall v. Minister for the Environment (1994)* supports the view that for compensation to be based on existing use value or existing use value plus a stipulated percentage as outlined in the Kenny Report is constitutional:

> a change in the law which has the effect of reducing property values cannot in itself amount to infringement of constitutionally protected property rights.

- Sinn Féin believes that there are instances where compensation is not merited. The Constitution should allow for this.
- Sinn Féin supports exploiting the positive economic potential of development and brings to the attention of the Oireachtas All-Party Committee on the Constitution, for its consideration current proposals being brought before the British Parliament by the Deputy Prime Minister John Prescott, whereby land owners would pay the levy (land tax) on the value added to their land by government infrastructure projects.
- Sinn Féin asserts that, where compensation is necessary, compensation should be based on existing use value or existing use value plus a stipulated percentage as outlined in the Kenny Report
- Sinn Féin also supports the use of Compulsory Purchase Orders against speculators sitting on land banks and derelict properties.

HOUSE PRICES AND THE HOUSING CRISIS

In a state where home ownership is seen as the norm, the ability to buy one's own home is set to become the sole preserve of the wealthy. Rising house prices have made the option of owning their own home unaffordable to many people on average and below average incomes. Those who cannot afford their own home have neither the safety net of social housing nor the protection of tenancy legislation. Successive governments have failed to address the housing crisis.

In this State the Celtic Tiger boom has come and gone but the housing crisis is still here and worse than ever. In every decade of the last century there has been an unmet housing need which successive administrations have failed to resolve. Despite three expert reports from Bacon, a new Planning Act and a Commission on the Private Rented Sector there are still huge problems in the housing sector. These include rising house prices, rising rents, evictions, increasing homelessness and a record 54,000 households waiting for social or public sector housing. Demographic, social and economic factors are bringing at least another 8,200 households onto the waiting list each year. Current government strategy if actually implemented will mean at least 14 years waiting before the lists are cleared under the best possible circumstances.

In the last 18 months house prices have continued to increase as investors returned to the market driving up prices and pushing already expensive homes out of the reach of first time buyers.

It is notable that the increases in construction costs have not been anything as pronounced as the increase in house prices.

The average cost of a house in Dublin is now €300,000. The average price of a house in the 26

counties as a whole is over €220,000.

- Sinn Féin believes that government intervention is necessary to deal with rising house prices through taking measures to control the price of building land.

REZONING AND PLANNING

Zoning of land, granting of planning permission and public works, the provision of infrastructure and services all make a significant contribution towards increasing the value of land. This has been termed 'betterment' in the Kenny Report and elsewhere. Sinn Féin is of the view that the state is entitled to some compensation for this betterment.

The current situation whereby the state is forced to pay open market prices for land which derives much of its value from this betterment is not reasonable. It is not morally acceptable that developers/speculators should be making huge profits at the cost of the community which is then unable to house its own members. A code of practice should be implemented to ensure that developers/speculators are not profiting from the development of state funded infrastructure by local and/or central government.

Zoning, which has been embroiled in controversy and corruption should be used as a positive mechanism to ensure that an adequate amount of land is made available for social housing.

Recent figures published by the Department of the Environment and Local Government show that there were over 12,177 hectares of zoned land available for residential housing which could accommodate 327,784 housing units.

The state must have the ability to tackle the problem of landowners whose land has been rezoned for housing but who retain their land as a long term investment. Landowners must not be allowed to profit from decisions which were intended to benefit society and address a severe housing crisis. Local authorities should not be put in the position that they are then forced into paying these same landowners outrageous sums of compensation for hoarded land.

Currently the only provision for penalising or encouraging those speculators who are sitting on land to release that land for development is the Derelict Sites Act. It is significant for our consideration of how to deal with land speculators within the constraints of the Constitution that this Act has not been declared unconstitutional

- Sinn Féin believes there are a number of possible mechanisms for tacking the problems, which arise from zoning of land.
- Consideration should be given to affording local authorities pre-emptive rights to acquire land zoned for residential use.
- Compulsory purchase orders should be used against speculators sitting on land banks and derelict properties. In the same way as the Derelict Sites Act allows for a derelict sites levy, legislation must be enacted to impose a levy on those speculators/developers who are hoarding land.
- Sinn Féin believes there is an onus on the government to monitor the cost of building land with specific reference to the gap between the cost of building houses and house prices.

PRICE OF DEVELOPMENT LAND

There is evidence of the hoarding of development land by developers, speculators and builders for the purpose of benefiting from house price increases. The hoarding of building land by a small number of developers has helped to maintain the high price of development land, which has resulted in the current unaffordable house prices.

The high price of development land resulting from the hoarding of this land in and around urban centres has led to unsustainable urban sprawl as people are forced out to commuter belt towns in search of affordable housing.

Local authorities and voluntary housing associations are forced to compete with private developers for land.

There is no sign that the housing market and the price of building land is about to decrease or stabilise without government intervention. It is in the interest of the common good that the state has the power to redress this inequitable situation.

- Sinn Féin supports the control of land prices, with a statutory ceiling on the price of land zoned for housing to stop speculation and reduce soaring house prices.
- Sinn Féin asks the Oireachtas All-Party Committee on the Constitution to remember that unlike those involved in drawing up the Kenny Report, it is not restricted by constitutional limitations in what proposals it can make to control the price of building land.
- Sinn Féin asks the Oireachtas All-Party Committee on the Constitution to use its resources to examine how the issue of controlling the price of building land has been addressed in other jurisdictions.

SECTION V OF THE PLANNING AND DEVELOPMENT ACT 2000

At the end of 2002 the government introduced legislation to repeal Section V of the Planning and Development Act 2000, illustrating to the people of this state that there was no commitment from the coalition government to the provision of social housing.

The deletion of the 20% rule means that developers can offer local authorities either other sites or money for not having to have social housing on their developments.

Prior to the deletion of the 20% rule no serious efforts had been made by the coalition to ensure that this vital element of the act was implemented.

Developers are opposed to social integration and will in future manoeuvre to buy off or side line their social housing commitment to unattractive locations thereby segregating those who avail of social and affordable housing into ghettos.

It is significant that the recent *Economist* property survey showed that house prices dipped in the one year that anti speculation measures were in force.

By giving in to the developers' demands the government has dealt a severe blow to their the delivery of social and affordable housing in integrated and sustainable communities.

- Sinn Féin believes that housing should be integrated and is strongly opposed to the view put forward by some that the introduction of the Social and Affordable Housing Provisions have generated impediments to supply and thereby unintentionally increased rather than stabilised house prices.

ACCESS TO THE COUNTRYSIDE

There is no legal right of way to walk pathways that have been used from time immemorial which traverse private land in the 26 counties. This is in contrast to long standing traditional 'right of way' with which most Irish people are familiar, though many may not be aware that they have no legal standing. The EU has commented that there should be a presumption to allow access to the countryside unless there are compelling reasons to do otherwise. Ireland is one of the countries in the EU with the most restrictive access to the countryside.

A case which clearly illustrates the failings in the current law is the dispute which arose in relation to the Old Head of Kinsale. Local people who have walked on the Old Head of Kinsale since time immemorial can no longer do so. The land at the Old Head of Kinsale was bought from Cork County Council by developers who were given permission to develop a golf course on the condition that public access to the land would not be restricted. However it became clear that the developers had no intention of allowing the public access to the land.

On the 10th March the Supreme Court issued a judgement which will mean that there will be no public access to the Old Head of Kinsale. The court held that a condition imposed by An Bord Pleanála granting public access was outside the powers of the Bord and void. The judgement found that there was no lawful public access to the Old Head of Kinsale before the golf club building was built and the purpose for which they were developed was unrelated to the question of public access to the Old Head, and ruled that the condition of public access imposed by the Bord was outside their powers.

There is an obvious flaw within the Constitution if the common good element of the private property Articles is unable to protect the public's right to access a traditional walkway such as the Old Head of Kinsale.

- Sinn Féin believes that the legislative mechanism available to local authorities to deal with this issue have been shown to be overly cumbersome and has not served the people of this State well.
- Sinn Féin believes that land owners should not be held legally responsible for compensation claims arising from the use of these pathways by members of the public.

DIFFERENTIATING BETWEEN PERSONAL PRIVATE PROPERTY AND COMMERCIAL PRIVATE PROPERTY

Ownership of a house is promoted in this state not only as a home but as an investment encouraged by various government incentives.

While many homeowners benefit from mortgage interest rate relief, shared ownership schemes and other tax provisions, there is a need to re-evaluate the role of government in subsidising or defraying housing costs.

- Sinn Féin believes capital gains tax should be restored to its 1997 level of 40 per cent. There should be an increase in capital gains tax on speculative owners of multiple dwellings. Such a tax would be introduced on a phased basis over two years.
- Sinn Féin opposes the extension of property rights to bodies corporate, trusts, partnerships, limited companies etc. Sinn Féin does not agree with the fact that Article 1 of the First Protocol to the European Convention of Human Rights expressly extends the protection of property to legal as well as natural persons. Sinn Féin agrees with the argument that if legal persons were accorded constitutional rights, including the constitutional right to the protection of property, it would mean that corporate resources and financial power could be employed to challenge the constitutionality of legislation. We believe this would have a very negative effect on the rights of natural persons.
- We do not believe that the Constitution should be worded in such as way as to prevent the nationalisation or expropriation of foreign or indigenous owned assets.

HOUSING AS A RIGHT

It is appropriate at this time to outline Sinn Féin's strongly held belief that housing as a right for all should be enshrined in the Constitution. It is a fundamental human right as stated in the Universal Declaration of Human Rights:

> Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Unlike the 26 counties, many European countries have adopted the principle of a right to housing.

The International Covenant on Economic, Social and Cultural Rights addressed the right to housing in Article II:

> The States parties to the present Covenant recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The state parties will take appropriate steps to ensure the realisation of this right, recognizing to this effect the essential importance of international co-operation based of free consent

Under the above article this State is obliged to take steps to achieve, using the maximum of its potential resources, the rights outlined in the Covenant, including the right to adequate housing.

It is notable that Ireland is among a very small number of countries who have failed to accept the provisions of Article 31 of the Revised European Social Charter (1996) which came into force in 1999 and which states:

> With a view to ensuring the effective exercise of the right to housing, the parties undertake measures designed:
>
> To promote access to housing of an adequate standard:
> To prevent and reduce homelessness with a view to its gradual elimination
> To make the price of housing accessible to those without adequate resources

Under the Good Friday Agreement there must now be an equivalent level of protection of human rights between the two parts of Ireland, and this means that the provisions of the Covenant, as already in force in the North under the British Human Rights Act 1998 must be brought in to the 26 counties.

Internationally Ireland has been criticised for our failure to include a right to housing in domestic legislation law and the UN has strongly recommend that the state incorporates economic, social and cultural rights in the proposed amendment to the Constitution as well as other domestic legislation

- Sinn Féin believes that the right to housing is a fundamental right and must be enshrined in the Constitution. We believe that this state has, in failing to amend the Constitution to include the right to housing, failed to fulfil its international commitments.

GROUND RENTS

Sinn Féin is strongly in favour of the abolition of ground rents but does not believe that it is necessary to amend the Constitution to do this. We do not agree that ground rent landlords should be compensated. A legacy of colonialism, ground rents have been unjust from the start, to compensate is to legitimise.

Constitutional difficulties in respect of legislation abolishing ground rents have never been tested in a court of law.

There are 250,000 ground leases in the 26-County state. The state itself pays ground rents in many cases to English ground landlords. Many ground leases are held in the name of solicitors and other native Irish landlords and interests. The government pays ground rent on many government offices in Dublin and around the state.

The majority of ground leases are of course on private households. People think they own their house, and so they do, but they don't own the land upon which the house is built.

Ground rents are a feudal hangover tax from the days of British colonial rule and their abolition must be facilitated. It is scandalous that this has not been dealt with since the coming into existence of the 26 county state. Ground rents represent an ongoing injustice against hundreds and thousands of Irish people who have suffered at the hands of land speculators, both native and foreign, avaricious builders and many opportunists in the legal profession since the foundation of the state.

Ground rent is an annual rent paid to a ground landlord, in return for no service whatsoever. The majority of ground rents are charged on foot of leases which are sometime in perpetuity. Other land leases go well into the next century. Others are quite recent in origin, such as those created by builders like McInerneys, who bought tracts of land, built houses which they then sold, but set up a ground leasehold which they retained, upon which the householder may continue to pay an annual rent. Many of the more recent ground leases, which were for 35 or 100 years, are starting to come to an end. When the ground lease is up, people who believed when they bought their houses that they owned them face an appalling choice. If a lease expires, the householder can choose to buy a freehold on their house for one eighth of its value, or sign a new lease for a drastically increased rent. With the value of houses going up and up, people whose leases are due to expire are justifiably angry and concerned. Ground landlords are set to make a financial killing.

At present under the Landlord and Tenants (Ground Rents) Acts, 1967 to 1984, the landlord has a statutory entitlement to one eighth of the value of the house on expiry of the lease. Alternatively, the householder is entitled to renew the ground rent lease for a further 99 years. Local Irish builders have not only set up ground leases, but they have been amongst the most voracious in demanding the annual rents.

In 1992, McInerneys, under the name of Henry Hunt, (a wholly owned subsidiary company set up to handle McInerneys' ground leases) sold their ground rent portfolio of 3,290 household ground rents to an English property dealer, Ellard Lipson, for £32,000, around £10 per house. (return to English landlord). But even worse was the situation with Irish Life, a

government-owned company which, in the early 1980s, facilitated the reinstatement of rack renting landlords by selling 9,000 ground rents in Ireland to a Philip Frederick, a London property dealer, who now trades under the name of Dublin Land Securities.

- Sinn Féin calls for the immediate abolition of unjust ground rents. Ground rent landlords are not entitled to compensation.

OTHER

- Re: Article 44.2.6 which states:

  > The property of any religious denomination or any educational institution shall not be diverted save for necessary public utility and on the payment of compensation."

  This article is open to being used by individuals intent on undermining the public good through land speculation. Sinn Féin believes that the property of religious denominations and educational institutions should not be treated separately to other property. Sinn Féin calls for the deletion of Article 44.2.6.
- Sinn Féin asks the Oireachtas All-Party Committee on the Constitution to look into the option of re-establishing the Land Commission.

THE SOCIETY OF CHARTERED SURVEYORS

EXECUTIVE SUMMARY

The Society of Chartered Surveyors recognises the growing imbalance between the dictates of social justice and the constitutional right to private property, and the need to recover profits for the community from the zoning and servicing of land. However the society does not advocate nor see the need for constitutional change.

The society advocates a combination of development levies to reflect the true added value of such zoning and servicing, combined with an imperative to bring land suitable for development to the open market so as to bring equilibrium, as far as is possible, between supply and demand for development land and for housing.

The society is of the view that there is a valuable fund of statutory and common law jurisprudence in the area of compulsory purchase and does not advocate changes in this area. However, it recognises reluctance on the part of acquiring authorities to refer to the Property Arbitrator and proposes mechanisms to encourage more such referrals.

1 INTRODUCTION

The Society of Chartered Surveyors is pleased to respond to the invitation for written submissions from the All-Party Oireachtas Committee on the Constitution, with regard to Property Rights.

The Society of Chartered Surveyors is an independent professional organisation, whose members are involved in all aspects of the management and development of urban and rural land in Ireland. All Society members are also members of the RICS, Royal Institution of Chartered Surveyors, the world's leading professional body concerned with land, property, construction and the environment.

The constitutional articles under examination are as follows:

Article 40.3.2°

> The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen.

Article 43

> 1 1° The State acknowledges that man, in virtue of his rational being, has the natural right, antecedent to positive law, to the private ownership of external goods.
> 2° The State accordingly guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath, and inherit property.
>
> 2 1° The State recognises, however, that the exercise of the rights mentioned in the foregoing provisions of this Article ought, in civil society, to be regulated by the principles of social justice.
> 2° The State, accordingly, may as occasion requires delimit by law the exercise of the said rights with a view to reconciling their exercise with the exigencies of the common good.

The content of this submission is focused on five primary issues, of which the Society has specialised professional knowledge and experience, as follows: infrastructural development; the price of development land; house prices; the zoning of land and compulsory purchase.

The Society has, on two previous occasions, made submissions in these matters. Much of what is outlined herein was contained in the response to the Minister of Local Government on the Kenny Report in 1974, when the Society supported the minority report, and again in 1983 to the Oireachtas Committee on Building Land. For copies of these documents, please contact the Society of Chartered Surveyors. We have also attached a copy of the SCS Housing Study 2002, prepared by Dr. Brendan Williams, Chartered Surveyor, which the SCS was delighted to fund. [For copies of these documents, please contact the Society of Chartered Surveyors].

The society acknowledges a growing imbalance between the needs of social justice and the constitutional right to private property, in the area of property prices generally and particularly in the areas of house prices and development land 'windfall' capital gains. However, the society is of the view that addressing

these matters does not require an amendment to the Constitution, but rather revised approaches to recovering gains for the community at large. These are complex matters with multi faceted causes and solutions and we provide a synopsis of what we see as the main factors.

By way of context, it must be realised that recent dramatically increasing house prices and development land prices, are equally a consequence of the country's economic success and demographic changes, which together have fuelled demand. It must be realised that such dramatic changes may not reoccur in their present form for some time, but rather time will bring a differing set of conditions and problems. The legislative and other changes now proposed will, of themselves, have a long term unanticipated effect and must not only address current issues, but provide for future needs and circumstances. Without careful study, it is more than possible that solutions to present problems may exacerbate future problems.

We would like to take this opportunity to state that, while we will be focusing our initial comments on the areas outlined above, we would be happy to amplify and clarify any points at issue.

2 INFRASTRUCTURAL DEVELOPMENT

The value of a location, and the land within it, is socially and economically created. Infrastructure, broadly defined, is a major component of that enhancement and historically has been paid for by the taxpayer. Therefore, the society recognises the vital and valuable contributions of publicly provided services to the developments process, and acknowledges that this increased value should be recovered for the community at large.

However, we are of the view that taxation has it limitations and tends to inhibit the supply of land coming to the open market and encourages ever more complex tax avoidance schemes.

We have long been of the view that the recovery of the true added value of infrastructural schemes is the best, most efficient and fairest, by means of statutory levies, way of recovering that gain for the community.

The society endorses the powers and duties on planning authorities to prepare, publish and adopt a Development Contribution Scheme for their area under Part III (Section 48) of the Planning and Development Act 2000 and expect they will take the opportunity to fully value both historic and contingent infrastructural investments.

We trust that the introduction of more meaningful development levies will allow local authorities to ease the burden of rates on commercial occupiers.

In practical terms, planning authorities are the only bodies in a position to provide the bulk of infrastructural services. For many reasons, not least of which is lack of resources, it has to be said that they have historically failed to anticipate and meet the need for such services. This failure has left a backlog of lack of supply and must be acknowledged as one of the main components in the more recent price crises.

The society dissents from the widely held view that increased levies will add to the 'cost' of development land. We take the view that the nature of private enterprise is such that house and other developments are generally at the maximum price which the purchasers supplied can afford. Whilst it is acknowledged that increased levies will add to the cost of development of land-banks, it is submitted that such increased cost will quickly be absorbed by reduced land prices by the Society's further recommendations herein.

However, it is axiomatic that when the demand and supply of development land are in balance and the price of land has therefore stabilised, such levies will remain as an added cost in the production of a house.

It should be noted that part of that 'gain' has been recovered for the community under Part V of the Planning and Development Act 2000, where up to 20% of the development land in any new planning applications, must be set aside for social and affordable housing (at construction cost and existing use value of the land) should be acknowledged as one step in recovering some added value for the community.

We are of the view that the market for development land has largely accommodated the requirements of Part V of the Planning and Development Act 2000 and that this has not been a factor in recent increased house prices.

Members of the society have noted, with concern the tendency of planning authorities to adopt apparently ad hoc and arbitrary 'planning gain' for the community in comprehensive developments and it is submitted that this practice should cease when Development Contribution Schemes are adopted.

The Society regrets that planning authorities do not, as a matter of course, publish within their statutory development plans, end-dated programmes for the roll-out of infrastructure and thereby allow the market to plan accordingly. It is appreciated that limited financial resources are one of the explanations but it is hoped that increased levies will allow them to publish such plans.

3 THE PRICE OF DEVELOPMENT LAND

The society is of the opinion that there is an under-supply of serviced and zoned land coming to the market.

The society contends that were there a sufficient supply of zoned and serviced land coming to the market, it would lead to reduced land prices and in turn reduced purchase prices to the end-user.

The price of development land is a 'residual' or contingent function of the ultimate value or revenue from the scheme of development, which it will support. The competitive land market of recent years with strong demand from both commercial and residential developers resulted in a continual upward pressure on the under-supplied land market. Where zoned and serviced land is in short supply, it will tend to be dedicated to

satisfying the needs of the most financially powerful end-users and the land will be priced accordingly.

The shortage of serviced and zoned land is not necessarily a lack of such land, but rather that such land is not released on the open market. There is a need for a scheme to encourage the sale of zoned and serviced land on the open market. One approach could be to empower planning authorities to issue certificates of suitability for development, such that within for example five or seven years, if the land is not developed it will be subject to increased taxation.

The society would caution that increased levies will not work without some mechanism to force serviced and zoned lands onto the market, with a view to increasing the supply and introducing real competition into land purchase costs.

Whilst local authorities have the power generally to acquire zoned and serviced lands, the Society is of the view that private enterprise will do a more efficient job. However, there is a case to be made that local authorities continue to be resourced to acquire land banks years in advance of zoning and servicing and to release those lands according to the needs of the market.

4 HOUSE PRICES

House prices are fundamentally a function of the balance between supply and demand and the economic capacity of purchasers, coupled with market expectation on interest rate predictions.

The cost of producing a house includes the construction cost, the cost of the land together with developer's overheads and risk margins. In this regard, the society is broadly of the view that construction costs are essentially competitive and dramatic short-term reductions are unlikely. The cost of land is determined by the available supply of zoned and serviced land at any point in time relative to demand.

However, while the society is of the view that the construction industry is essentially competitive, the overall capacity of the industry is a factor. When the economy is booming, the demand for construction across all sectors of the industry is such that housing construction must compete for limited resources and costs will escalate. Developers may not be able to recover or absorb those increases and the number of house completions must fall short of requirements.

The demand for houses is complex and multi-faceted. Demographics play a big part – an increased number of persons of both childbearing and economically active age, combined with a continuing decline in household sizes, means that high demand levels are likely to continue. However, it should not be assumed that the demographics will remain consistent or that identified trends will continue. Householders must be facilitated in living in housing appropriate to their needs. In particular 'trading down' and single or two-person accommodation must be a component in any solution.

The society takes this opportunity to once again condemn the punitive 9% stamp duty on house purchases and trust that with the relative reduction or increased affordability of housing, the rate can be brought down to nominal levels. The high rate of stamp duty inhibits essential mobility within the housing market, such that it is all too common to find single occupiers in family houses.

The society supports the continuing subsidisation of the first time buyer but regrets that the historic approach to such subsidies, in times of severe under-supply, often did no more that facilitate increased house prices.

5 THE ZONING OF LAND

Zoning or rezoning is a vital part of our expanding urban population, but there is widely acknowledged public disquiet that it is open to abuse. Whilst acknowledging the importance of public participation in such matters, the society is of the view that the promotion of such zonings and re-zonings should only be at the instigation of professional planners, subject to the overriding confirmation of elected representatives.

It is evident that zoned land in itself is insufficient to promote development without adequate infrastructure.

6 COMPULSORY PURCHASE

The society is of the view that there is a valuable fund of statutory and common law jurisprudence in the area of compulsory purchase and the committee should be very slow to recommend interference.

Whilst the society values the fund of jurisprudence, it acknowledges the apparently cumbersome public consultation and procurement process but cautions that change in these areas should not undermine the fundamental principals of compulsory purchase compensation.

The society notes a marked reluctance to refer disputes regarding compensation to arbitration by the Property Arbitrators. While claimants make an assessment as to whether they can reasonably expect increased compensation from the Property Arbitrator, the reluctance of the acquiring authority is more complex. Experience shows that the acquiring authority is likely in any case, to be fixed with costs on both sides, which can be significant and occasionally seriously disproportionate to the level of compensation. The society advocates more use of sealed offers and interim awards as a matter of routine, such that the claimant can thereby be equally at risk of being liable for costs. The society questions the need for legal representation above the cost of a solicitor, where there are no substantive legal issues but rather disagreement centres around divergent opinions of value. The Property Arbitrator is entitled to state whether the matter before him was 'fit for counsel'. There is a case to be made that the Property Arbitrator or an independent adjudicator should approve all proposed settlements above a certain sum and that claims not settled within a defined period of lodging the claim

should automatically be referred to the Property Arbitrator.

The society notes that there is significant expertise and specialist management time involved in promoting a compulsory purchase scheme and it should not be assumed that those smaller or single project acquiring authorities have the necessary management and professional expertise in-house. There is a need for a standing central task force to be available to such authorities. Given the adversarial nature of compulsory purchase claims, a lack of expertise on the part an acquiring authority is of special concern.

The trend towards Design and Build procurements has consequences in compulsory purchase cases. Without full details of the proposed scheme, it is impossible for the claimant to draft a final claim. In those circumstances the society recommends the suspension of the legal requirement to lodge the claim for compensation within 30 days of a Notice to Treat. Further, it is suggested that acquiring authorities be required to pay on account an independent preliminary assessment of compensation payable with the option for the claimant to lodge a considered claim on completion of the scheme and to refer this to the Property Arbitrator in the established way.

We note some acquiring authorities publish a Code of Practice or Claimants Charter, including contact numbers and names for compulsory acquisition schemes.

The society is of the view that many widely publicised, apparently excessive compensation payments, are the result of repeatedly delayed infrastructural schemes delivered long after the need for the scheme is identified such that zoning and urban expansions have long anticipated the scheme. Were schemes implemented on time they would involve the acquisition of un-zoned and otherwise un-serviced lands at a considerably lower cost.

Furthermore it should be noted that the land compensation element of a compensation settlement is often but a small part of the total figure payable. Other heads of claim such as Disturbance and Injurious Affection are often significant and arise because the acquisition is compulsory.

7 SUMMARY OF RECOMMENDATIONS

- The Society of Chartered Surveyors does not advocate a change in the Constitution regarding property rights, nor does it believe such changes are necessary.
- We recognise the growing imbalance between the needs of social justice and the constitutional right to private property, and the need to recover profits from the zoning and servicing of lands for the community at large.
- We are of the opinion that taxation-based solutions are of limited benefit and advocate minimum intervention in the operation of the open market. We consider that the most efficient and fairest way to recover 'gain' for the community is by means of levies on developments. However, increased levies will not work, without some mechanism to force serviced and zoned lands onto the market, with a view to increasing the supply and introducing real competition into land purchase costs.
- House prices are a function of supply and demand and the lack of competition in the market place is fundamental to house prices.
- We acknowledge that demographic and economic trends are a contributing factor to the current land value crisis.
- We recommend that the zoning or rezoning of land be instigated solely by planning professionals.
- We are of the view that there is a valuable fund of statutory and common law jurisprudence in the area of compulsory purchase and the committee should be very slow to recommend changes in this area.

THRESHOLD

BACKGROUND

Threshold engages with issues surrounding social inequality and housing disadvantage, as well as the related need to develop policies to promote housing rights, access and sustainability. This arises out of its concern with the everyday problems facing many people in their struggle to find secure, appropriate and affordable housing and the reality of exclusion, poor quality, overcrowding and vulnerability. In its analysis of these issues, Threshold has become increasingly conscious of the critical importance of the land question, particularly with regard to housing access for low-income groups and the ability to deliver in a sustainable manner good quality, affordable housing, whether private, social or other non-profit rental or ownership. For these reasons, Threshold would urge the committee to consider the following points in their deliberations on the articles relating to private property in the Constitution.

HOUSING: A FUNDAMENTAL HUMAN RIGHT?

Perhaps the most important remaining task facing the All-Party Oireachtas Committee on the Constitution relates to fundamental rights. This is a critical area encompassing a whole range of interconnected social, economic and cultural issues, which have generated much attention internationally, particularly through the language and practice of human rights. This raises many thorny debates regarding the rights of the individual and the good of the community, or the common good, more generally.

More specifically, the Committee is giving particular attention to the issues of property and disability within Articles 40-44 (the relevant articles with regard to rights), and this is most welcome. The critical question in the case of property relates to what extent and under what circumstances should the state's protection of the private property rights of individuals be regulated by the principles of social justice. These questions and concepts raise complex legal, political and philosophical considerations, which may be difficult to resolve, yet these issues deserve urgent attention due to the serious social and environmental implications. This is perhaps most evident in relation to the housing question, and, in particular, the housing inequalities that exist across a spectrum between those who do very well from dealing in private property and those who struggle to access even the most basic accommodation.

In this context, it is welcome that the Committee's remit for its property rights enquiry allows that the common good, which is protected under the Constitution, encompasses matters such as the right to shelter. Threshold submits that the Constitution should explicitly recognise the substance of this common good.

The UN Covenant on Economic, Social and Cultural Rights and the Committee responsible for monitoring implementation of the Covenant explain

> …the right to housing should not be interpreted in a narrow or restrictive sense which equates it with, for example, the shelter provided by merely having a roof over one's head or views shelter exclusively as a commodity. Rather it should be seen as the right to live somewhere in security, peace and dignity.

The Committee interpreted adequate housing as incorporating the following:

- legal security of tenure
- availability of services, materials, facilities and infrastructure
- affordability
- habitability
- accessibility
- location
- cultural adequacy.[1]

The common good implies general acceptance of solidarity, that economic progress and material gains should be to some degree jointly held. This in turn justifies some redistribution of income and wealth accretion through taxation and other levies.

Given that DOE&LG reported 48,000 households on local authority waiting lists in 2002 and many social housing tenants are not obtaining fully adequate quality housing and related services, obstacles obviously exist in Ireland to protecting the common good with respect to housing and accommodation.

Threshold considers that the balance between the common good and private property interests as interpreted presently fails to recognise sufficiently the rights and responsibilities of society at large. Redressing this balance presents a critical challenge, one that must be a central consideration for the committee.

The imbalance becomes particularly clear (and problematic) when issues of residential development, planning and urban change are considered.

PLANNING AND THE PRICE OF DEVELOPMENT LAND

The cost and availability of land are key determinants in the ability to deliver affordable housing and to implement social housing programmes in an efficient and equitable manner. Unlike other commodities, the land market is also immediately complicated by the problem of monopoly: every site is (geographically) unique, and this creates the potential for considerable speculative gain under certain circumstances on the part of individual private owners. In particular, consider the following situations.

When social change, urbanisation and development result in particular parcels of land gaining value due to the increasing need for housing and services including transport, society at large has a claim on that increased value, in so far as the change is largely due to social development rather than to productive actions taken by the land owner.

When society through elected government invests in services and infrastructure such as waste management, water and transport as well as schools etc., the price of land in the vicinity can also increase considerably, largely due to the availability of socially provided services, again generating considerable gains for private individuals.

Planning regulations, whereby development is contained to promote sustainable development, also give a windfall gain to some landowners as well as protecting the common interest.

In short, the problem of betterment has not been faced up to in the Irish housing system, arguably because of the overwhelming emphasis afforded to the protection of private property interests (based on a particular reading of the Constitution, which places such interests over and above the principles of social justice and the common good). The concept of 'betterment' refers to any increase in the value of land attributable to the decisions and operations of public authorities, such as servicing land for development. There is also the related problem of rezoning, which in effect reflects the community's willingness to allow development at a particular (and unique) geographic location. These public actions can result in considerable windfall profits for well-placed private owners. These are unearned gains in the sense that they do not derive in the main from actions on the part of the owner. A parcel of land that is publicly serviced and zoned for development is more valuable than one that is not. Under the present system, most or all of this increase in value is being privately accumulated in the form of higher land prices. Expectation of returns of

this kind (the 'hope' value) can also breed considerable speculative interest.

The requirement that up to 20% of eligible private residential and mixed developments be allocated to 'affordable' housing, as stipulated under Part V of the Planning and Development Act 2000 (as amended), is a step towards recognising the conditional nature of the private property protection. However, the limitations of property rights need to be addressed more generally in the development context, particularly from the perspective of protecting the common good and the rights of all to adequate housing.

CONCLUSION

It cannot be appropriate for private property rights to be so absolute that they capture the values inherent in a monopoly situation in the context of general development in the manner outlined above.

If the increases in land values not attributable to actions by the owners were available to society, this would facilitate better provision of subsidised housing and services for those unable to pay for it themselves. By ensuring an adequate base for vulnerable people, opportunities for them and their children to participate in society and contribute to the common good are greatly enhanced.

Threshold is not in a position to propose wording in the Constitution to enable government to ensure gains from increased land values are appropriately distributed and that land is available to protect and promote the common good. However we would recommend that the committee consider how this can be accomplished.

Notes:

1 General Comment No.4: *The right to adequate housing* (1991)

TREASURY HOLDINGS LIMITED

Our submission relates to compulsory purchase orders, as implemented pursuant to the Planning and Development Act 2000 (the 'Act').

It is the view of Treasury Holdings Limited that the manner in which compensation is payable pursuant to this Act does not adequately vindicate the property rights of citizens under article 40.3.2, and that this system cannot be justified by reference to the principles of social justice as elucidated in article 43.

As an asset, land is unique in that it is subject to being compulsorily acquired from a citizen by the organs of the state. When this happens, it does not seem to us to be consistent with a citizen's constitutional rights that he is liable not to be paid its market value in certain circumstances.

The rules governing compensation for compulsory acquisitions, which are set out in the Second Schedule of the Act contain one particularly invidious provision. This is clause 2(b)(iv) of that schedule, which provides that regard shall not be had to any increase in value of lands attributable to the land being reserved for any particular purpose in a development plan. A reservation for a particular purpose, or 'zoning', as it is commonly known, can have the effect of conferring a significantly increased value on land. The effect of the provision in question is that this increase is disregarded when compensating a citizen landowner whose land is compulsorily acquired.

The reservation of a part of land for a particular purpose, such as residential development, would normally have the effect of increasing the value of that land in an open market purchase. It is quite wrong that this legislation, despite purporting as a general rule to compensate a landowner by reference to the open market value of land, expressly includes a provision which will significantly reduce the compensation available in instances such as this.

While one price would be available on the open market for such lands, a greatly reduced price would be payable if the same lands were subject to a compulsory purchase order. It cannot be right that a citizen is forced to take less for his land depending on the identity of the purchaser.

That there is no countervailing right of social justice can be seen from the case of *ESB V Gormley [1985] ILRM 494*. The practice of the ESB in paying compensation to a landowner affected by the taking of his land for electricity purposes was held to be repugnant to the Constitution because it did not recognise the landowner's right to be paid adequate compensation. As a result, the relevant provisions of the Electrical (Supply) Act 1927 were held to be invalid, having regard to the provisions of the Constitution. The court found that there was no requirement of social justice pursuant to article 43 which excused the absence of a statutory right to compensation. A citizen's right to receive market compensation can be seen from the decision of the Supreme Court in In Re. Article 26 and in the Manner of Part (V) of the Planning and Development Bill 1999 where the court held that 'there can be no doubt that a person who is compulsorily deprived of his or her property in the interest of the common good should normally be fully compensated at a level equivalent to at least the market value of the acquired land'.

It is very difficult to see how this provision, which disregards an inherent feature of the land and discriminates against a landowner by paying him less than he would be able to obtain for his land on the market, can be justified on any grounds, or by reference to principles of social justice. It is highly relevant that the legislation, the subject of the last-cited case, already has the effect, in the case of land used for residential purposes, of taking up to 20% of such land for social and, or affordable housing, thus materially decreasing

the value of those lands. While that legislation was found constitutionally valid by the Supreme Court, there can be no doubt that the disregarding of market value in the case of residential lands compulsorily acquired will have a significantly detrimental effect on the value of those lands and thus cannot but amount to a failure to vindicate the property rights of the citizen landowner.

Consequently, any amendment to the Constitution to implant a provision such as this in the Constitution would not be in keeping with the principle of property rights as currently enshrined in the Constitution, as has been so forcefully stated by the courts and therefore would be unjust, wrong and contrary to the concept of property rights enshrined in Irish law.

Treasury Holdings would be happy to provide its views in more detail should the Committee so wish.

PROFESSOR GERRY WHYTE

THE RIGHT TO SHELTER

INTRODUCTION

One of the most important developing debates in relation to the Irish Constitution is to what extent it should protect socio-economic rights. A significant preliminary point to note is that the Constitution already expressly protects at least two socio-economic rights – the right to free primary education (Article 42.4) and the right of children neglected by their parents to be cared for by the state (Article 42.5).

In the course of the current debate, no one has suggested that either of these two rights should be repealed and so the debate is about *the extent* to which socio-economic rights should be constitutionally protected rather than whether they should be protected at all.

In July 1995, I made a submission to the Constitution Review Group in which I outlined the case for strengthening the commitment within the Constitution to social inclusion. As part of that submission, I suggested that the right to shelter should be afforded explicit constitutional recognition. I believe that the argument I developed at that time retains its validity and I attach my submission as an appendix hereto.

However in recent times, a number of arguments have been adduced in opposition to the inclusion of additional socio-economic rights, including the right to shelter, in the Constitution. The purpose of this brief submission is to respond to those concerns.

CONCERNS EXPRESSED BY SUPREME COURT

Until relatively recently, the most controversial aspect of the current debate about the inclusion of socio-economic rights within the Constitution was whether the courts should play any role in recognising such rights. That issue was decisively resolved by the Supreme Court in 2001 when the court held in two cases, *Sinnott v. Minister for Education* and *T.D. v. Minister for Education*, that judges are precluded by the doctrine of separation of powers from becoming involved in issues of distributive justice, i.e., issues involving the allocation of public resources. The court also expressed concern about the spectre of an unelected judiciary usurping the function of a democratically accountable parliament and executive; about the lack of expertise that judges have when it comes to socio-economic issues; and about the unsuitability of existing court practices and procedures for dealing with issues of policy.

In my opinion, all of these objections to judicial recognition of implied socio-economic rights can be countered. A conscious decision by the people to insert additional socio-economic rights into the Constitution would nullify the argument based on the doctrine of separation of powers which argument, in any event, rests, I contend, on a disputed understanding of all rights as negative immunities protecting the individual from a powerful state rather than, in some cases, as positive entitlements to state assistance. The understandable concern about what is perceived as an anti-democratic role for the courts is arguably based on the American experience which, in my opinion, does not fit the Irish situation in which judicial decisions based on national law, including the Constitution, are always susceptible to reversal by the people and/or the Oireachtas.[1] It follows that judicial enforcement of socio-economic rights in our legal system can never pre-empt a political determination of the existence and extent of socio-economic rights. Finally, comparative experience in South Africa and India (and, indeed, here in Ireland prior to the Supreme Court decisions) shows that courts can engage with socio-economic issues, and that rules of practice and procedure can be developed for dealing with policy issues.

CONCERNS EXPRESSED IN RECENT POLITICAL DEBATE

In recent political debate, three additional objections to the creation of justiciable socio-economic rights have also been voiced. First, it is suggested that socio-economic rights cannot be compared to civil and political rights, which are justiciable, on the ground that the exercise of the former has resource implications. However, while it is the case that the exercise of many civil and political rights does not involve public expenditure, that is not always the case. If the state wishes to vindicate effectively the right to liberty, it has to fund the criminal court system to ensure that innocent people are not wrongly convicted of criminal charges. Even the exercise of the right to vote requires the state to fund the collection and counting of votes.

Thus one cannot rely on the fact that the exercise of a right may involve public expenditure as a basis for excluding such a right from the remit of the courts.

A second objection to the creation of justiciable socio-economic rights is that such a step will inevitably result in increased public expenditure with possible adverse consequences for the economy. However, it seems to me at least arguable that investment in socio-economic rights may not necessarily result in an overall increase in public expenditure. When one factors in the direct benefits of such investment, such as having more people in the labour force and fewer people dependent on social welfare, together with possible indirect benefits in falling crime rates and improved general health, it must surely be at least arguable that improved protection for socio-economic rights is not a zero sum game in terms of public expenditure (though it may be in terms of social status).

Finally, it has also been suggested that the creation of justiciable socio-economic rights will undermine the spirit of individual initiative, creating a culture of dependency. While recognising the legitimacy of this concern, I believe that it fails to acknowledge the extent to which certain sections of our society are incapable of improving their social and economic situation without assistance from the state. It is surely fanciful to imagine that the dozens of young children, many of them suffering from personality disorders and coming from dysfunctional families, in some cases with a history of sexual abuse, who took legal proceedings to secure proper accommodation were ever going to be able to achieve this objective unaided. Thus a desire to promote individual initiative may be a relevant factor in determining *the extent* to which society provides for justiciable socio-economic rights but it cannot be cited in argument as a reason for refusing to recognise such rights at all.

CONCLUSION

To conclude on a more positive note, I believe that the case for enforceable socio-economic rights follows from the premises that each individual has an intrinsic worth, that the majority of people are capable of realising their full potential in society and that some individuals and groups, for a variety of reasons, require state assistance in realising that potential. It is questionable to what extent democratic politics as currently practised in Ireland is capable of promoting social inclusion, given the manner in which political decisions are influenced by sectional interests. The creation of justiciable socio-economic rights, such as a right to shelter, will not necessarily transform this situation, given that, in the last analysis, our legal system is always susceptible to change dictated by politics. However, in my opinion, the creation of such rights would act as a spur to our political system to attend to the needs of all of our citizens and not just those who have a vested interest in maintaining the *status quo*.

Notes:

1 In comparison to the U.S., it is relatively easy to nullify decisions of the High or Supreme Court based on the Constitution. All that is required is a simple majority of both Houses of the Oireachtas and a simple majority of the electorate voting in the subsequent referendum. In contrast, in order to amend the U.S. Constitution, a constitutional convention must first be convened by two-thirds of the members of both Houses of Congress or two-thirds of the States and any proposal for constitutional change resulting therefrom must be ratified by three-quarters of the States.

Appendix 1:

INTRODUCTION

One of the most pressing problems facing contemporary Irish society is that of the social and economic exclusion of a significant section of our population. According to the most recent research available on this issue, the 1989 *ESRI Report on Poverty, Income and Welfare in Ireland,* between 31 and 33.5% of the population survived on less than 60% of the average disposable equivalent household income, with between 8 and 13% of the population having income levels below the state's own minimum income level, set by the Supplementary Welfare Allowance scheme. One of the major contributory causes of this level of poverty is unemployment which directly affects 180,000 workers and their families. Households with children are also significantly at risk from poverty – such households constitute more than 60% of the households below the state's own minimum income level.

The primary function of a Constitution is to enunciate the values and rules in accordance with which our society should be organised. Therefore, if one accepts, as I do, that poverty is caused more by social factors than by personal characteristics, it seems appropriate that our Constitution should address itself to this problem. A further reason for taking this approach is that our understanding of human rights has broadened since 1937 to include economic and social rights, in addition to civil and political rights. I would argue that there is a need to update the constitutional listing of human rights to take this development into account.

I am not so naïve as to believe that amending the Constitution is all that is required to abolish poverty. However I do believe, for reasons which I advance below, that appropriate amendments may assist those engaged in tackling the deleterious effects of poverty and accordingly I wish to advance three different proposals in relation to this issue. First, I believe that the Constitution should contain a statement committing our society to the elimination of poverty and to the attainment of equality of opportunity. Second, a number of specific rights directly relevant to certain aspects of poverty should be added to the fundamental rights provisions. Third, the procedural rules on standing shoud be amended so as to facilitate disadvantaged groups and individuals who seek protection of their interests through the courts.

COMMITMENT TO THE ELIMINATION OF POVERTY

My first proposal is that the Preamble and Article 45 of the Constitution on the Directive Principles of Social Policy should be amended to include statements committing our society to the elimination of poverty and to the attainment of equality of opportunity. The primary value of such statements would be to affirm, in a political, more so than a legal, context, the activities of those individuals and groups who struggle on a daily basis with poverty and inequality. One should not underestimate the value of such political affirmation in this context. For example, Mary Robinson may have done more as President of Ireland to assist disadvantaged groups and communities than she was ever able to do as a senior counsel. Of course, it is also possible that, notwithstanding their location in the Preamble and in Article 45, the statements envisaged here might give rise to legally enforceable rights if the judiciary used such statements to identify implied constitutional rights. (Later in my submission, I attempt to defend such judicial activism in the context of my last proposal.)

In drafting such statements, regard might be had to the Universal Declaration of Human Rights, para. 5 of the Preamble which states that the peoples of the United Nations reaffirm 'their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.' Inspiration may also be obtained from Articles 22 and 25(1) of the Declaration which read as follows:

> Art. 22 – Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indespensible for his dignity and the free development of his personality.
>
> Art. 25 – 1 Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment sickness, disabilty, widowhood, old age or other lack of livelihood in circumstances beyond his control.

Some national constitutions may also be helpful. For example, the recently adopted provisional Constitution of the Republic of South Africa contains the following interesting provisions which, significantly, create rights enforceable in the courts:

> Art. 10 – Every person shall have the right to respect for and protection of his or her dignity.
>
> Art. 29 – Every person shall have the right to an environment which is not detrimental to his or her health or well-being.
>
> Art. 30(1)(c) – Every child shall have the right…to security, basic nutrition and basic health and social services.

Finally, in this context, I wish to draw attention to certain provisions in the Indian Constitution of 1949. The Indians borrowed from our Constitution in drafting their Directive Principles of Social Policy and perhaps the time has come to repay the compliment. I refer, in particular, to the following provisions:

> Art.38 -(1) The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
> (This is a replication of Art.45, para. 1 of our own Constitution with some slight, but significant, amendment)
>
> (2) The state shall, in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.
> (This provision was introduced in 1978, taking effect on 20/6/1979.)
>
> Art.39a – The State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
> (This provision was introduced in 1976, taking effect on 3/1/1977.)

RECOGNITION OF CERTAIN SPECIFIC SOCIAL AND ECONOMIC RIGHTS

The recognition of certain specific social and economic rights, enforceable by the courts, could be of great assistance in tackling particular aspects of poverty. In particular, a constitutional guarantee of the basic right to shelter could alleviate the worst aspects of homelessness. It is worth noting that a right to shelter is even more basic than a right to housing and would be adequately vindicated by the establishment of state-funded hostels offering homeless people an alternative to having to sleep rough. Official figures indicate that in 1993, some 2,667 were homeless (though this is arguably an underestimate of the extent of the problem.) The experience with the most recent legislation in this area – the Housing Act 1998 – reveals 'weakness in planning, organisation and inadequate allocation of resources.' (Harvey, 1995, Vol. 43, *Administraion*, 76 at 84). The same author continues, '[T]he experience of the legislation in practice reveals a lack of government preparedness to check what targets were met, to

monitor progress, to evaluate, to train personnel, or to plan the allocation of appropriate and carefully measured resources. These are serious flaws in public administration, political leadership and planning which must be addressed.' In my opinion, one way of remedying such flaws lies in the recognition of the basic right to shelter to which homeless people and their supporters could have recourse when confronted by political or administrative inertia.

Other potential candidates for inclusion in this list of rights are a right to civil legal aid, which for underprivilidged people can be indispensible for the protection of their other substantive rights, and an extension of the existing constitutional right to free primary education to encompass second level education in recognition of the importance of adequate education in securing an economically productive role in society. Some heed might also be taken, in this context, of those provisions of the new South African Constitution which I have listed in the previous section.

FACILITATING CONSTITUTIONAL LITIGATION

Finally, I would like to suggest that the rules on standing in constitutional litigation be amended to facilitate those disadvantaged individuals and groups who look to the courts for protection of their interests. While this reform is relatively straightforward, the underlying premise, that judges can appropriately be involved in determining social policy, especially where this has implications for public expenditure, is more contraversial among those who care about such matters. Accordingly, I would like to defend briefly this premise, before turning to the matter of standing.

In a characteristically lucid judgement in *O'Reilly* v. *Limerick Corporation* [1989], Costello J. dismissed a claim by Travellers that they had a constitutionally protected right to be provided by the State with certain physical resources and services specifically serviced halting sites, on the ground that recognition of any such right was a matter for the Oireachtas rather than the courts. This conclusion he based on his understanding of the doctrine of separation of powers endorsed by the Constitution. This approach carries with it certain values – in particular it constitutes a very strong affirmation of the value of ensuring that policy-making is electorally accountable and not entrusted to unelected, unrepresentative members of the community, namely judges.

I accept, obviously, that there is merit in ensuring that policy-making should be electorally accountable. I also accept that not every type of social issue can be effectively tackled by the courts. Moreover I also believe that, for strategic reasons quite apart from issues of principle, reforms secured through the political process are likely to be more effective than reforms won in the courts.

However on the basis of what I have seen over the past fifteen years or so in relation to campaign for Travellers' rights, the rights of the homeless, campaigns for legal aid, I also believe that our political system is not very responsive to demands placed on it by marginal groups. I would agree with what I understand to be Galbraith's thesis in his *Culture of Contentment* that western society permits the dominant two-thirds of society effectively to ignore the interests of the marginalised one-third. In that context, the value of electorally accountable policy-making can work serious injustice on disadvantaged minorities. To return to Judge Costello, it appears to me that his version of democracy is premised on the view that the value of electorally accountable policy-making should be paramount in the political-legal culture. However that premise can be disputed by those who subscribe to an alternative version of democracy, one rooted in principles of social solidarity and in which electorally accountable policy-making is valued, but not necessarily regarded as paramount. According to this vision of society, the courts may legitimately play an active part in promoting social justice and, *pace* Judge Costello, I do not agree that such a role is precluded by the Constitution.

That is not to say that I regard constitutional litigation as a panacea for all our ills and I re-affirm my preference, for tactical reasons, for securing change through the Oireachtas. Nonetheless I still believe that, in appropriate cases, disadvantaged groups may legitimately seek help from the courts where the political process has failed them. In that context, I wish to suggest that the rules on standing in constitutional adjudication be amended to allow for public interest litigation. Among the reasons why marginalised groups and individuals do not make greater use of the courts to defend their interests are that they are unaware of their legal rights and that they are intimidated by the legal process. Relaxing the rules on standing to allow for *amici curiae* or, even, to permit individuals or groups (as currently happens in India) would help to overcome these difficulties. In this context, I wish to draw attention to Art.7(4) of the new South African Constitution which the Review Group may find of interest. It reads:

> (a) When an infringement of or threat to any right entrenched in this Chapter is alleged, any person referred to in paragraph (b) shall be entitled to apply to a competent court of law for appropriate relief, which may include a declaration of rights.
>
> (b) The relief referred to in paragraph (a) may be sought by –
>
> i) a person acting in his or her own interest;
>
> ii) an association acting in the interest of its members;
>
> iii) a person acting on behalf of another person who is not in a position to seek such relief in his or her own name;
>
> iv) a person acting as a member of or in the interest of a group or class of persons; or
>
> v) a person acting in the public interest.

To conclude, while I realise that the Review Group will have a very full agenda of issues to address, I hope that they will find some time to consider the impact of the Constitution on poverty and social inequality. In that context, I also hope that the present submission will be of some assistance to the group as it sets about its task.

APPENDIX 4

APPENDIX 4

Extract from the Kenny Report

[Ireland, Kenny J. (chairman), *Committee on the Price of Building Land: Report to the Minister for Local Government* (1973), Stationery Office, 1974, PRL 3632]

The designated area scheme

This is a scheme under which a new jurisdiction would be conferred on the High Court to designate areas in which in the opinion of that Court the lands will probably be used during the following ten years for the purpose of providing sites for houses or factories or for the purposes of expansion or development and in which the land or a substantial part of it has been or will probably be increased in market price by works carried out by a local authority which were commenced not earlier than the first day of August, 1962 or which are to be carried out by a local authority. The first day of August, 1962 was the date on which the Planning Act, 1963 was published as a Bill. It is also the date fixed by Section 26 (2) (g) of that Act for determining whether payment of a contribution in respect of works carried out by a local authority may be made a condition of granting planning permission. The High Court judge would be obliged to sit with two assessors one of whom would have valuation experience and the other would have town planning qualifications. The function of the assessors would be to advise and assist the judge but the ultimate decision for which written reasons would have to be given would be his. When an area had been designated by the Court, the local authority would have power to acquire all or any part of the land within it within ten years after it had been so designated at its existing use value at the date when the application to assess the compensation was made plus some percentage of that value together with compensation for reasonable costs of removal but without regard to its development potential. If agreement as to the amount of the compensation had not been reached when the local authority, having decided to purchase the lands, applied to have the price fixed, it would be assessed by the High Court judge sitting with the two assessors. Until the local authority made this application to the Court, the owners of land in a designated area would retain their rights as owners and could sell or lease the lands but all development would require planning permission.

Section 26 subsection (1) of the Planning Act, 1963 provides that where application is made to a planning authority for permission for the development of lands, they may grant it subject to or without conditions or they may refuse it. The subsection then reads: "and in dealing with any such application the planning authority shall be restricted to considering the proper planning and development of the area of the authority (including the preservation and improvement of the amenities thereof), regard being had to the provisions of the development plan…" If this restriction on the powers of a planning authority to refuse applications for planning permission continued to apply to lands in a designated area, one of the main aims of the scheme would be defeated. We envisage that the local authority will acquire most of the lands which are in designated areas and which have not been developed at the date of the order designating the area. But local authorities could not immediately acquire all the land in such areas after the orders designating them had been made and so it is essential that development in these areas should continue and that planning permission should be granted in appropriate cases. Most of the new dwelling units in the major urban centres are now being built in what will probably be designated areas. If planning permissions could not be granted in respect of lands in designated areas, all private development in these areas would cease and the price of existing houses would be immediately increased. If however the planning authorities could not refuse to grant planning permission on the ground that the land is in a designated area and that they intend to acquire the land within the ten year period, they will be compelled to grant planning permissions for most of the lands in designated areas before they have acquired them and it is unlikely that they will acquire developed lands. The relationship between the designated area scheme and the Planning Act is one of the most difficult problems we have had to consider.

After much debate we have decided to recommend that Section 26 subsection (1) of the Planning Act should be amended to provide that a planning authority or the Minister on appeal may refuse to grant planning permission for any development of lands in a designated area on the ground that the land to which the application relates is in a designated area and that the local authority intends to acquire the lands within the ten year period. We also recommend that the decision of the planning authority on a planning application in relation to land in a designated area should be an executive function of the planning authority performable by the City or County Manager and that his decision should not be subject to a direction by the elected members of the planning authority under Section 4 of the City and County Management (Amendment) Act,

1955. If, however, planning permission is refused on this ground and if the Minister on appeal confirms the refusal, the owner of the land should be entitled to apply to the High Court to compel the local authority to purchase his land at existing use value plus the percentage of it which we recommend in a later part of this Report but the Court should have a discretion to refuse the application if it thought it just to do so.

If refusal of planning permission in relation to lands in a designated area gave rise to a liability to pay compensation under Part VI of the Planning Act, the financial burden on local authorities would be so heavy that the scheme would be unworkable. The amounts awarded for the compensation for refusals of planning permission have recently been so large that planning authorities have been reluctant to refuse permissions. We accordingly recommend that the Planning Act should be amended to provide that when planning permission is refused by the planning authority or the Minister on appeal for development of land in a designated area, there should be no right to compensation under Part VI of the Planning Act.

We envisage that the designated areas may include some built up areas which the local authorities would not, in most cases, acquire. Their aim should be to acquire in all the lands in the designated areas except (a) those which are the property of any religious denomination or any educational institution (Article 44 Section 2.6° of the Constitution prevents these being acquired except for necessary works of public utility), (b) existing dwellings, shops, offices and factories and (c) property used for community, recreational and sporting purposes (parks, playing fields, and golf and race courses) so long as they are used for these purposes. They may not however be able to do this within the ten year period and the Court should have power, on the application of the local authority, to extend the period within which lands in a designated area may be acquired for a further period of ten years. This power to extend the time should be limited to cases in which the local authority succeed in proving to the Court that there have been reasonable grounds for their failure to acquire the lands within the ten year period.

The right of the local authority to apply for an order designating an area should not be limited to one application within the ten year period. The legislation should provide that the right may be exercised by any number of applications made at any time in relation to any lands. The result should be that when plans for local authority works have been prepared and approved, the local authority will apply to designate the area in which the lands will be increased in price by the works. The application should be made before the works are carried out though at the beginning of the operation of the scheme, applications will be made in respect of works carried out since the first of August, 1962.

When the lands in a designated area have been acquired by the local authority, they would be leased by them for private development or would be used by them for their own purposes. Leasing the land has the advantages that the local authority will be able to impose such covenants on the tenant as are required for orderly development and, in the cases of leases of business premises, to provide for the rent reviews at the end of each seven or ten year period. But if the Landlord and Tenant (Ground Rents) Act, 1967 applied to these leases, the tenant could escape from the covenants by purchasing the interest of the local authority under the lease and thus defeat one of the main aims of the scheme. The Landlord and Tenant (Ground Rents) Act, 1967 should therefore be amended by providing that it does not apply to local authorities.

An appeal on a question of law but not on one of fact from all decisions of the High Court when exercising the new jurisdiction to the Supreme Court should be given.

The foundation in principle of this scheme is that the community is entitled to acquire land at existing use value plus some percentage of it when it can be established by evidence that works carried out by the local authority have increased the price of the lands. This price however is also increased by the decisions of the planning authorities in their development plans as to the future use of the lands. Zoning may add a considerable amount to the price. We do not think that an increase in price caused solely by decisions of a planning authority as to the zoning can be classified as betterment. Legislation which provided that a local authority could acquire lands at existing use value plus some percentage of it when their price has been increased not by local authority works but by planning decisions only would, in our view, be unjust and probably repugnant to the Constitution. We therefore do not recommend that the designated area scheme should apply to lands in relation to which the sole cause of the increase in price is the decision of the planning authority as to their future use.

Provision should also be made in the legislation that any owner of an interest in land in a designated area who enters into a written or oral contract (whether legally enforceable or not) for the sale or lease of any interest in the land should notify the local authority of the area where the lands are situate that he has entered into the transaction and the total consideration which he has agreed to accept. The owner should be obliged to furnish to the local authority any document relating to the transaction which they request him to give to them. Failure to notify the local authority that such a contract has been made or to give such documents should be a criminal offence which may be tried summarily and conviction of which would carry a penalty of £100.

Arguments for the designated area scheme

We think that the community is entitled to the whole of the increase in price in undeveloped land which is attributable to works carried out by local authorities. The amount of this increase can however never be precisely quantified. It is possible to prove that an increase in price of undeveloped land has or will occur as a result of works undertaken by a local authority; it is not possible to isolate the amount of the increase caused by them. If therefore the principle that the community has a valid claim to the whole of the increase in price in undeveloped land which is attributable to works carried out by a local authority is accepted, the only way in which this can be made effective is by giving local authorities the right to acquire at existing use value all the undeveloped land which will be increased in price by the works which they carry out. AS the price of such land has been increased in part by general economic influences which are not included in the concept of betterment, the owners of it have a valid claim to something more than existing use value. We recommend that they should be given 25% of the existing use value as an addition. Payment to landowners of existing use value at the date of acquisition plus 25% of it is in our opinion a reasonable compromise between the rights of the community and those of the landowners. We have already referred in paragraph 38 to the recoupment method of recovering for the community the increase in the price of land caused by local authority works. We agree with the view of the Uthwatt Committee that purchase for recoupment is the most effective of the methods available by which public authorities may secure for the community the increases in the price of property which their works have created.

If a further disproportionate rise in the price of serviced and potential building land is to be avoided, it thus becomes a choice between taking all the increase – caused by betterment and by general economic influences – by applying the principle of recoupment and therefore giving local authorities the right to purchase at existing use value plus 25% of it or taking none of it and leaving the existing position unchanged.

The first and main argument for a designated area scheme then is that it will give the community most of the betterment element in the price of serviced and potential building land which is acquired by the local authority. The local authority have, in our view, a legitimate claim to this: the works carried out by them have created it. All schemes which give part of it to the Central Government or to a State Agency or to local authorities have failed either because the taxes were avoided or because the levies were ultimately paid by the purchasers. A scheme under which a large amount of taxation would be payable but which would cause a corresponding increase in the prices of the buildings on the land, would, in our view, have failed to achieve its principal social aim.

The second argument is that the scheme will have the result that it is unlikely that anyone will pay more than the existing use value plus 25% of it for serviced and potential building land near cities and towns. The local authority will be able to acquire the land at this price and so no one will pay more than this for it. If our proposals are accepted, there is a reasonable prospect that the disproportionate increase in the price of serviced and potential building land will cease and the scheme will, we think, end speculation in this type of land. The owner of the land will know the existing use value and if the local authority can acquire the land at a price equivalent to 125% of this, there will be no room for a speculative profit.

The third argument is that the scheme will enable the price of land for selected uses to be reduced. We would expect local authorities when leasing land to seek the highest price or rent for commercial developments such as offices or factories but for social purposes, such as housing or schools, we would expect land to be made available on terms which covered costs only.

The fourth argument is that it will make it possible for local authorities which have acquired land to impose conditions as to the type of building to be erected and its ultimate price to the purchaser. When the local authority decide to dispose of land within a designated area for building purposes, we think it desirable that they should do so by making agreements with builders to grant leases to them or their nominees when the buildings have been completed and that these should impose stipulations as to the type of building and its price. The local authority can then refuse to grant a lease if the conditions in the agreement have not been observed. The scheme will strengthen the powers of local authorities and will, we think, enable them to introduce some element of price control of new houses. The leases of industrial and commercial sites should be granted for premiums or fines and an annual rent or at rents which may be reviewed at intervals of 7 years. A clause permitting such a review has become a common commercial practice and there is no reason why it should not be adopted by local authorities. If however the Landlord and Tenant (Ground Rents) Act, 1967 continued to apply to leases granted by local authorities, the tenant could in some cases get a release from all the covenants in the lease in relation to use by purchasing the local authority interest. This would defeat one of the main advantages of the scheme. This is why we have recommended that the Landlord and Tenant (Ground Rents) Act, 1967 should be amended so that it will not apply to any leases granted by local authorities.

As the local authorities will be entitled to purchase lands in a designated area within 10 years after the order is made, it will be possible for them to have an acquisition programme which has regard to the capital available and the pace at which development is proceeding in their area.

Another advantage of the scheme is that it will increase the annual revenue of some local authorities

because of the profits made from commercial and business lettings.

We are hopeful that the scheme we propose will end the disproportionate rise in the price of undeveloped land suitable for building. This is undesirable because it increases the prices of houses and factories, makes development expensive and gives indefensible profits which are earned not by risk-taking but which flow from the services provided by the local authorities. The speculator in land near cities and towns cannot lose and so the public regard such profit as unearned and unjustified. These profits which have received wide publicity make the achievement of restraint in money incomes, particularly those of employees, difficult.

Arguments against the designated area scheme

The first and main objection to the scheme is that it is said to be repugnant to the Constitution. This is of such importance that we deal with it separately in a subsequent chapter. We are convinced that the scheme is not unconstitutional provided that the legislation stipulates that the compulsory power of acquisition under it may not be exercised in respect of the property of any religious denomination or of any educational institution (see Article 44 Section 2.6° of the Constitution).

Our colleagues who do not agree with our proposals have also urged that the scheme will have the result that there will be two different codes of law dealing with compulsory acquisition of land by local authorities. One will apply to land which is outside the designated areas where the price payable will be the full market price and where compensation under the Planning Act, 1963 will be payable for refusal for permission to develop. The other will apply to land within the designated areas where a different and lower measure of compensation for acquisition will be the rule. It is true that there will be two codes of law in relation to compulsory acquisition by local authorities but this is not necessarily an argument against the scheme. If the two categories of land were comparable, then it would be unjust to single out one for harsher treatment but they are not. The whole point of the designated area system which we propose is that it seeks to identify the land which is enhanced in price by local authority works and to treat it differently to land in general. There is nothing unjust in having two codes of law in relation to compulsory acquisition.

A further argument is that the scheme will not normally apply to built-up areas in cities and towns where large profits are being made in land transactions connected with redevelopment. But in most built-up areas the works designed to provide the services were carried out many years ago and the increases in prices during the past decade in property in these areas are not necessarily the result of anything done by the local authorities but are primarily a reflection of the prosperity of the community and of urbanisation. Increases in price caused by these influences cannot be regarded as being included in betterment. When the increase in the price of land can be attributed in part to works carried out by local authorities, the community has a legitimate claim to part of the increase in price and this claim can be made effective only by giving the local authority the right to acquire the lands at existing use value plus a percentage of it. When however the increase in price is not wholly or partly the result of works carried out by the local authority, the community has a right to acquire at market price only and not at a lower sum. Legislation which authorised the acquisition of property at a price under the market price when it could not be established that works carried out by a local authority had contributed in whole or in part to that price would probably be held by the Courts to be repugnant to the Constitution. Our proposals are just because they take for the community the increases in price which the local authorities have created and because they give the owners of the lands the existing use value plus 25% of it. Thus they get the price which they would have got on a sale if the local authority works and not been or were not likely to be carried out.

Another argument against the designated area scheme is that it is unjust to acquire serviced and potential building land at existing use value plus 25% of it because, it is said, this deprives the owner of most of the development profit. In paragraph 131 we recommend that the legislation should provide that in any case where the price paid or agreed to be paid for land before the date of publication of this Report is higher than the existing use value plus 25%, the compensation should be the higher price and the appropriate interest thereon. If this safeguard is adopted, we do not see anything unjust in our proposals. They are in our view the logical culmination of the trend visible in legislation since the Public Health (Ireland) Act, 1878 away from the individualistic view of property towards one which, while preserving private property in land as an institution, recognises that the exercise of the rights which it confers must be limited in the interests of the common good. No rational individual regarded price control of essential commodities during the Second World War as being unjust: the goods whose prices were controlled were necessary for life as people knew it and, as the supply was limited, it was necessary to have control.

Another argument which may be advanced against our proposals is that land will not be acquired by local authorities when it should be an that when it is decided to do so, the delays in connection with the acquisition and disposal of it will have the result that fewer dwelling units will be built than would have been if the existing system had been allowed to continue. The slow rate at which the Dublin Corporation have released the lands acquired by them since 1967 gives some support to this argument. But the large number of housing units which local authorities have provided since 1922 (161,000 out of a total of 355,000) and the immense volume of work created by the Planning Act, 1963 which has been successfully undertaken by them

shows what they can do. We feel confident that the local authorities will rise to the challenge presented by the powers which we suggest should be conferred on them.

Thirty years ago the Uthwatt Committee reported that the high cost of land and the fear of large awards of compensation for refusals of planning permission were the main obstacles to planned development of cities and towns. All experience in Ireland and Britain since then shows that their views were correct. We think that the principle that a landowner whose land are being acquired by a local authority should be paid the full market price for them should be modified when it conflicts with the common good which requires that the price of serviced and potential building land near cities and towns should be limited by reference to its existing use value.

We have considered whether the establishment of a Central Land Board to acquire land suitable for building throughout the State would be advisable. We do not recommend this. Such a Board would have to function in the area of each local authority and its activities would overlap those of local authorities and competition and rivalry between them would follow. Some local authorities already own considerable amounts of land and some of their staff have experience in managing it. The creation of a Central Land Board would mean another State body. There is no justification for this when there are organisations in existence which can do the work.

The effect of our proposals on planning permissions already granted in respect of land in designated areas and other transitional issues give rise to problems of some complexity. These are discussed in the more detailed statement of our proposals in Chapter X. We have thought it advisable to discuss the constitutional aspects of the scheme before we deal with the modern legislation in Italy and Northern Ireland which shows that the concept of an owner of land being entitled to the full market price for it when it is acquired by a local authority has been substantially modified.

The pre-emption and levy scheme [alternative scheme proposed in the minority report]

The main features of this scheme are (i) the local planning authority would have power to designate the land required for urban expansion in their area during the following ten years having regard to current development plans, (ii) the decision as to the boundaries of the designated areas would be an executive function of the local authority performable by the City or County Manager and there would not be a right to object or appeal against it to any superior authority or to a court, (iii) any owner of land in a designated area who wished to dispose of a substantial interest in it would be bound, before he did so, to offer that interest to the local planning authority and could dispose of it only if the authority declined to purchase it. Acceptance of the offer by the authority would have the consequence that the sale would be treated as if it were a compulsory acquisition under the Housing Acts and so the rules for assessment of compensation in the Act of 1919 and in the Planning Act, 1963 would apply, (iv) there would be a special stamp duty payable by the vendor on all sales of land in a designated area and the net proceeds of this would be paid by the Revenue Commissioners to the local authority in whose area the land was and would be applied by them for capital purposes, (v) the right of the local authority to collect a contribution towards the expenses of providing the services as a condition of giving planning permission would be revoked and, in its place, there would be a levy on development in certain limited cases such as the development of land on which the special stamp duty referred to in (iv) had not been paid on a disposal of the land within the preceding five years, (vi) compensation for refusal of planning permission in connection with land in the designated area would be liable to a levy equivalent to the stamp duty referred to at (iv).

This proposal has been put forward by our colleagues Mr. Murphy and Mr. O'Meara. The first objection to it is that it gives the City and County Managers power to designate areas and thereby to decide that levies are to be paid on some dealings in land and not on others; their decisions will therefore determine finally whether some owners of land in the state and not others will be liable to the heavy levies which are proposed. A tax of this kind might be held to be repugnant to the Constitution because taxes must be imposed by general rules applicable to all those who reside in the state and not by decisions of officials. Moreover we think it undesirable that any official should have such responsibility imposed on him. When dealing with suggestion F, we stated the objections and weaknesses of the pre-emption scheme. The local authority would have to pay the full market price for any lands which they purchased. The levies which are proposed would be payable by the vendor but they would probably be passed on to the purchaser and they would therefore increase the price of serviced and potential building land. An owner who wished to sell his lands would take the levy into account when fixing the price at which he would dispose of them and as the supply of land near cities and towns is limited, most of the levy would ultimately be borne by the purchasers of the buildings on the land. The history of the levies and taxes in Britain since 1947 shows that all types of levies and development charges invariably increase the price of land. Lastly, methods of avoiding payment of the levy would be discovered: tax lawyers and accountants are very ingenious and they would quickly discover ways of carrying out the transaction so that the heavy levies would not be payable. The whole sorry story of the 25% stamp duty on the transfer of lands would be repeated.

We give one example of a method of avoiding payment of the levy which would have to be dealt with

but which would require the most complex legislation. If an owner of land wished to develop it and transferred it to a family company for a nominal consideration and if the company then made contracts with builders to develop the lands and agreed to grant leases to the ultimate purchasers of the buildings, the owner would get his profit by selling the shares in the company which owned the ground rents. Therefore the levy, if it was to be effective, would have to be extended to the sale of shares. This would necessarily involve that it would be payable on the sale of some shares and not on others and the definition of the cases in which it would be payable on transfers of shares would be extremely difficult. How is the levy to be collected if the shares in the company which owns the land are owned by another company incorporated in the Channel Islands or in the Isle of Man?

We have decided that we cannot recommend the scheme put forward by our colleagues. We believe that though it might moderate the rises in the prices of serviced and potential building land, it would not stop the disproportionate increases in them nor would it capture any substantial part of the increased prices for the community.

Arguments for and against alternative scheme

[see Chapter 5: the Kenny Report]

5.1 The scheme we have described in Chapter IV is open to criticism in a number of respects and we accept that, if adopted, it may need to be very considerably refined and elaborated.

5.2 In the majority report, the scheme is objected to on the following grounds: – (a) that it would confer too great a responsibility on City and County Managers by empowering them to designate the lands to which the scheme would apply; (b) that the pre-emption element of the scheme would not work; (c) that the levies proposed to be exacted on the disposal of land in designated areas and, in certain cases, on the development of land in those areas, would add to the cost of land and development, and (d) that ways of evading the proposed levy on disposals would be found.

5.3 As regards the first objection raised by our colleagues, we took the view that as the land required for urban expansion is already indicated in the development plans made by the planning authorities, and as the scheme we propose would be directly linked with these plans, there should be no greater need to make the Managers' orders subject to review by a higher authority than there was in relation to the development plans themselves.

We do not accept the majority opinion that the pre-emption element of the scheme would not work. A pre-emption right to purchase any land coming on the market in areas required for urban expansion would be a very valuable new power for local authorities. It is notorious that in some such areas at present people intervene in transactions between the local authorities and landowners and make higher offers for the lands concerned in the belief that if the local authorities are interested in acquisition the lands are likely to be serviced in the near future and there is therefore a chance to make considerable profit if the lands can be acquired over the heads of the local authorities. Transactions of this kind have even taken place where the lands affected were the subject of Compulsory Purchase Orders which had been submitted to the Minister for confirmation. We consider that it is undesirable and contrary to the interests of the community that local authorities should be forced to compete with private persons in order to secure land required for orderly urban expansion or that such persons should be able to engage in transactions real or contrived, in order to try to increase the local authority's compensation liability. The grant of pre-emptive rights to the local authorities, as proposed, would put an end to practices of the type we have described and place local authorities in a position to exercise great influence on the land market. A pre-emption law similar to the one we propose, though somewhat less drastic in scope, has been in operation in Denmark since 1969.

5.4 The third objection raised by our colleagues is that the levy proposed would be passed on and that its ultimate effect would be dearer houses and other buildings. We accept that this could occur, but the problem is that if the open market value principle in the determination of compensation for land acquired compulsorily has to be retained, as we believe it must be, and if the private market in building land is to be allowed to continue, some form of levy or taxation would have to be imposed if any part of the profits realised in land transaction is to be obtained for the benefit of the community. Moreover, we envisage that the additional powers proposed by us would enable local authorities to intervene more effectively in the land market and to build up reserves of land in key areas more quickly; the release of such land as demand required at prices based on acquisition costs, with appropriate additions to cover the cost of any services provided and administrative costs, should have a very significant influence on prices obtainable in the open market, so that any effects the proposed levy might have on the cost of development might not be significant.

5.5 The final objection – that means of evading the proposed levy on the disposal of land in designated areas will be found – is no doubt true, although we are not clear what would be gained eventually by contrived transactions of the kind

described by our colleagues. We propose that if levy has not been paid on a disposal, it would be payable on development, so that the land would eventually be caught. In any event, the fear of possible means of evasion being discovered would not be sufficient reason for rejection of the scheme, if it were otherwise considered feasible.

5.6 A more serious objection to the scheme we propose is one not mentioned in the majority report, although it was raised at some of our discussions. This is that the methods suggested for the assessment of levy on the disposal of land in designated areas and (in certain cases) on development of land in those areas, are too crude. We agree that this is a serious weakness in the scheme we propose. A more elaborate system could be devised. The provisions of the (British) Land Commission Act, 1967, which deal with the assessment of betterment levy provide a guide to the type of legislation that would be required if a really comprehensive measure is to be applied. Legislation along these lines, however, would be extraordinarily complex and its operation would necessitate the establishment of a large and costly administrative machine. We do not consider that it would be possible to operate such a system in this country, and it was primarily for this reason that we put forward proposals for a simpler and admittedly cruder system.

5.7 Another objection to our scheme is that the levy on development proposed in certain cases would constitute a "tax on development". This is true, and the wide range of exemptions proposed was framed with it in mind. It was, however, clear that some provision for a levy on development in certain cases would have to be made; otherwise, there would be an obvious loophole in relation to the proposed levy on disposals. The Committee have had abundant evidence that development value is most frequently realised on disposals and it is on this aspect that we felt most attention should be concentrated. Experience in Britain has shown that it is most often the vendors of building land, and not the actual developers, who realise its development value, or most of it, e.g. in 1967-68, betterment levy charged by the Land Commission on disposals amounted to £1.47 million (89% of the total charged), compared with £0.18 million on the development of land; in 1968-69, the figures were £13.73 million (92%), compared with £1.21 million and in 1969-70 they were £28.77 million (93%), compared with £2.12 million.

The present position in this country is that the developer is usually obliged to pay the owner of building land a price which reflects its full development value and may then in some areas (eg. in County Dublin) have to pay the planning authority an additional amount as a contribution towards the cost of public services which facilitate the development of the land. Under the system we propose, this situation would gradually disappear; there is also the factor that no levy on development would be payable where the land is provided by a local authority, and this should encourage the creation of a much greater degree of co-operation between developers and the local authorities in the land acquisition sector than has hitherto been in evidence.

5.8 It can be argued in favour of our proposals that the proposed granting of pre-emptive rights to local authorities in respect of land in designated areas would be of great benefit in enabling them to pursue much more active and effective land policies than are possible under existing circumstances. The proposed levy on disposals would ensure that a substantial part of the amounts realised in land transactions in areas intended for urban expansion would be recouped for the benefit of the local authorities for these areas and could be applied by them for desirable capital purposes. Developers acquiring land in such areas would not have to pay levy provided development is undertaken within a reasonable time and the scheme should provide an incentive for developers and local authorities to co-operate more effectively in securing the progressive and orderly development of expanding areas.

5.9 If the levy system we propose is unacceptable, then we consider other action will have to be taken to ensure that part of the amounts realised in dealings in building land is secured for the community. The possibility of a capital gains tax on such profits is discussed and rejected in the majority report. We think, however, that if no other more effective way of dealing with the problem can be found, a special tax on capital gains related to dealings in building land would be justified; alternatively, the existing provisions of the Finance Acts, 1965 and 1968, under which profits arising from the disposal of land by way of trade were made subject to income tax should be considerably widened in scope in order to catch all land transactions where development value is realised.

5.10 Irrespective of what form of levy or taxation system may eventually be decided upon, we consider that the powers of pre-emption which we propose should be conferred on the local authorities. These powers should be supplemented by changes in the compulsory acquisition and compensation codes. We deal with these in Chapter VI.

APPENDIX 5

APPENDIX 5

Legislation and reports in Britain
Extract from the Kenny Report

Legislation and reports in Britain

[see Chapter 4: the Kenny Report]

Many of the suggested 'solutions' to the problem of increasing land prices have been tried in Britain and the history of their experience with many of the suggested changes in the law is of considerable assistance. We wish to emphasise that many of the changes suggested to us, while attractive in general principle, involve such complicated legislative and administrative detail that they are unworkable. What follows is an outline of the British legislation which is extremely complex. The Town and Country Planning Act, 1947, contains 120 sections and 11 schedules and was amended in 1951, 1953, 1954 and 1959. All the legislation on the matter was then consolidated in the Town and Country Planning Act, 1962, and this was drastically amended in 1968. All the legislation was again consolidated in 1971.

The first attempt to tax the increase in the value of land was made in the celebrated Finance (1909-10) Act, 1910. This was a duty of £1 for each £5 of increment value (it was therefore called 'increment value duty') and was payable (a) on any sale of any interest in land or on the grant of any lease for a period of more than 14 years, (b) on the death of any person when the land was liable to death duties and (c) in the case of land held by a corporate or unincorporated body so that death duties were not payable, in 1914 and in every subsequent fifth year. It was payable on all increment value accruing after the 30th April, 1909. Increment value was defined as the amount by which the site value of the land on the occasion on which increment value duty was to be collected exceeded the original site value of the land ascertained in accordance with the provisions of the Act of 1910. All the provisions of the Act which dealt with this topic were immensely complicated. A valuation of all land in the country and four different values of each parcel of land had to be made for the purpose of the assessment of the duty. From the beginning it was clear that the entire scheme was too complex for the public service as it was then organised and a number of legal decisions made it completely unworkable. The increment value duty was repealed in 1920 but the obligation to get the stamp showing that particulars for its assessment had been delivered was retained in Ireland.

A number of schemes for the recovery by local authorities of some part of the increase in the price of land caused by betterment were submitted to the Commission on the Distribution of Industrial Population ('The Barlow Commission') which recommended[1] that an expert committee should be appointed to consider compensation, betterment and development. Such a committee was established in January 1941, under the chairmanship of Mr Justice Uthwatt. Its terms of reference were to 'make an objective analysis on the subject of the payment of compensation and recovery of betterment in respect of public control of the use of land: to advise as a matter of urgency, what steps should be taken now or before the end of the War to prevent the work of reconstruction thereafter being prejudiced and in this connection to consider (a) possible means of stabilising the value of land required for development or redevelopment and (b) any extension of modification of powers to enable such land to be acquired for the public on an equitable basis'.

The report of the Uthwatt Committee includes a masterly examination of the subject of betterment. They dealt with the methods, some of which had been used and some others which had been suggested, for the recovery of betterment for the community.

One of the suggestions which they considered was giving local authorities the right to acquire compulsorily land which had been or would be improved by local authority works at a price determined by reference to its use value before the works were carried out. Compensation assessed on this basis would not therefore include anything for the development potential which the works carried out by the local authority have created. In this way the increase in price caused by local authority works would accrue to the local authority which would get the benefit of it by selling the lands at their full market price or by letting them at the economic rent. This method is usually called recoupment because the local authority are recouped for some part of the gross cost of the work which they have carried out by the profit which they make on the sale or letting. Recoupment as a principle had not been adopted at all in Ireland and in Britain, when the Uthwatt Committee reported; it had been restricted to cases where roads, streets and bridges had been constructed or widened. In Ireland our laws about compulsory acquisition were, until 1946, based on the assumption that the only property which a local authority should be authorised to acquire compulsorily was that needed immediately for the works which they wished to do. By the Local Government Act, 1946 a power conferred on a local authority to acquire land for a particular purpose was to be deemed to include a power to acquire land which

the local authority did not require immediately for that purpose but which in their opinion they would require for that purpose in the future. The members of the Scott Committee were opposed to the adoption of the principle of recoupment because they thought it undesirable that local authorities should be encouraged to engage in what they called 'land speculation'. They thought that betterment could be recovered by direct charge and that acceptance of the principle of recoupment was unnecessary. This assumption that betterment could be recovered by direct charge does not appear to have been borne out by subsequent experience: schemes for the recovery of betterment by direct charge or levy appear to have failed.

The Scott Committee reported in 1919. The change in view between that date and 1942 is shown by the recommendation of the Uthwatt Committee: 'In our view purchase for recoupment is a sound principle and the most effective of the existing methods by which a public authority may secure increases in value of property which their activities have created'.

The principal recommendations of the Uthwatt Committee were that the development rights in all land outside built-up areas should, on payment of fair compensation, become vested in the state and that there should be a prohibition against development of such land without the consent of a Central Planning Authority. The undeveloped land, deprived of its right of development, was to remain the property of its owners who could use it as they wished but they could not develop it. When lands were required for public purposes or for approved private development, the owner's interest would be purchased by the Central Planning Authority under compulsory powers and as the development value would already have been paid for, the price was to be fixed on the basis that the development potential was to be ignored. The result of this, the committee thought, would be that the Central Planning Authority would be able to purchase land outside built-up areas at the existing use value. The committee regarded this as one of their most important recommendations; in their view the high price which local authorities had to pay for land was the main reason why many desirable development works were not carried out. When land was required for private development, it would be acquired by the Central Planning Authority and then leased (and not sold) to the developer for a term of years at the full market rent. The committee recommended that in the case of developed land, there should be a valuation of the annual site value made each five years (when the valuations for rating purposes are revised in England) and that an annual levy should be made on the amount by which the new annual site value exceeded the original one assessed when the first annual site value was ascertained. This recommendation for an annual levy was not adopted by the British Government.

The recommendation that all development rights in undeveloped land should vest in the state was accepted by the government but was 'improved' (the fate of the recommendations of many expert committees) by extending it to all land, developed and undeveloped, by the Town and Country Planning Act, 1947. This Act, which introduced a new planning code, had, as its basis in principle, the concept that an owner of land had no right to develop it or to change its use and so all development rights were nationalised. The Act set up a Central Land Board which was to levy development charges. The development rights in all land in Britain were valued at £300 million which was to be distributed among the owners of the rights and a development charge of 100% on the increase in the value of the land caused by the grant of planning permission become payable when the land was developed. The Central Land Board could also compulsorily acquire land for resale and so compel the owner to part with his land for permitted development at existing use prices. The power of the Central Land Board to acquire land compulsorily for the purpose of resale for development was discussed and its existence affirmed in three courts (The High Court, the Court of Appeal and the House of Lords) in *The Earl of Fitzwilliam Wentworth Estates Co. v the Minister for Housing and Local Government* (1952) A.C. 32. A new basis of compensation for compulsory acquisition was established under which the land was to be valued on the basis that planning permission for most forms of development would be refused. Compensation for compulsory acquisition was thus to be assessed on the 'existing use' principle and development potential was to be ignored.

The system of development charges created by the Act of 1947 was very attractive in principle but did not work well. If land had a value of £1,000 on the basis of its existing use and £5,000 when considered as building land, the owner should have been willing to accept £1,000 for it and to look to the £300 million fund for the remaining £4,000. The purchaser faced with the development charge of £4,000 should have been unwilling to pay more than £1,000 for the land. In practice, however, because land owners were unwilling to sell their land at existing use value, the lands were sold for a price greatly in excess of £1,000 and the purchaser then had to increase the price of the buildings to recover the development charge and the price which he had paid for the land. One of the effects of the Act was thus to increase the price of buildings. The British experience establishes that development charges and betterment levies are invariably passed on to the purchasers who have to pay them in the form of increased prices. Also, the assessment of the amount on which the development charge was to be levied created considerable difficulties as there were and always will be differences of expert opinion as to valuations and there was no appeal from the official assessment.

The system of development charges met with such widespread opposition and resulted in such large

increases in the prices of new buildings that it was ended by the Town and Country Planning Act, 1953, which also suspended the distribution of the £300 million fund. There has been much inconclusive discussion as to whether the cause of the failure of this ambitious scheme was that the development charge of 100% was too high or that the scheme was defective in principle. It is significant that no attempt has been made to revive development charges in their original form since they were repealed in 1953.

Between 1953 and 1959 there were two systems in Britain for determining the price of undeveloped land. On a sale to a private person, the owner got the full market value while on a compulsory acquisition, a public authority could pay only the existing use value plus the 1947 development value. The Town and Country Planning Act, 1959, abolished the dual system and provided for the payment of the full market value in all cases.

In 1962 a short-term capital gains tax was introduced in Britain. In 1965 a general capital gains tax was brought in and the two were merged with effect from 1971-72. In addition the Land Commission Act, 1967, introduced a betterment levy payable when development value was realised on the sale or development of land. This levy which was at the rate of 40% was payable on the difference between the market value (MV) and the base value (BV) and the difference, which was known a net development value (NDV), was liable to the levy. BV was 110% of the current use value so small profits made on the sale of houses did not attract the levy. The gains tax was linked to the betterment levy so that gains tax paid was a permissible allowance against the levy. The Act also established a Land Commission which was to assess and collect the betterment levy and to buy land for resale. During its short period of operation the Land Commission bought only 2,200 acres of land and disposed of 318 of these for development. It was wound up in June, 1970, when betterment levy was abolished.

Paragraphs 41 to 44 of this Report are based on the legislation, on Heap's *An Outline of Planning Law* and on Megarry and Wade's *The Law of Real Property*. The committee thank the Hon Mr Justice Robert Megarry of the High Court in England for his prompt reply to a request for information.

The British legislation was again consolidated in the enormous Town and Country Planning Act, 1971, which has already been amended by the Town and Country Planning (Amendment) Act, 1972.

Note:
[1] Cmd. 6153 of 1940

APPENDIX 6

APPENDIX 6

Extract from
Report of the Constitution Review Group
[Ireland, Whitaker, T.K. (chairman), *Report of the Constitution Review Group* (1996), Stationery Office, PRL 2632]

OWNERSHIP OF PROPERTY IN IRELAND

Most people in Ireland (89%) own some form of property or assets apart from personal goods and artefacts (some of which are of no major wealth significance, but some of which are, for example yachts, jewellery, works of art, cars). The most common form of wealth ownership is home ownership with almost 80% of households being owner-occupiers. Wealth held in this form accounts for between 53% and 66% of all wealth held by 90% of wealth holders with the exception of the wealthiest 10%. Just over one in ten households however, own no wealth of any kind.

Farm land is the next most important form of wealth holding and 15% of households own some farm land. While just over half of all households have some financial assets in the form of deposits and/or government savings, only 4% possess financial assets in the form of equities and less than 2% in the form of gilts.

Although most people in Ireland own some wealth the greater part of productive wealth (land and capital in all forms) is concentrated in a small proportion of the population. Just 1% of households own 60% of all private, non-farming, business, while the wealthiest 5% of all households own 66% of all net wealth in the form of farm land (Nolan, B, *The Wealth of Irish Households,* Combat Poverty Agency, Dublin 1991).

No gender breakdown is available on the distribution of productive wealth across all sectors of the economy, but the limited data available indicate that not only are the ownership and control of productive wealth concentrated in small groups but within such groups men predominate. *The Census of Agriculture Survey 1991* (CSO 1994) shows, for example, that 90% of farm holders/owners are men.

Personal legal entitlements, for example pensions, benefits in the areas of health, education, social welfare and housing, would fall to be considered for inclusion in a comprehensive assessment of wealth and its distribution.

Provisions protecting private property in the fundamental rights section of the Constitution not only protect rights to the ownership of basic personal possessions, such as homes and personal goods, but may also, in the view of some members of the Review Group, tend (subject, of course, to the will of the Oireachtas) to protect major differentials in the ownership of productive wealth within Irish society. This underlines the importance of the constitutional qualification that property rights must be subject to regulation in accordance with the principles of social justice.

GUARANTEE OF THE RIGHT TO PRIVATE PROPERTY

The right to property is guaranteed by two separate provisions of the Constitution – Article 40.3.2 and Article 43. Broadly speaking, Article 40.3.2° may be said to protect the individual citizen's property rights, while Article 43 deals with the institution of property itself: see *Blake v Attorney General* [1982] IR 117. These have been criticised in a number of respects:

i) the fact that there are two separate constitutional provisions dealing with property rights has itself given rise to much confusion

ii) the language of Article 43 in particular is unhappy. Several commentators have drawn attention to the contrast between Article 43.1 and Article 43.2. In a famous dictum, Wheare contrasted the stress placed on the right of private property in Article 43.1 – 'calculated to lift up the heart of the most old-fashioned capitalist' – with that placed on the principles of social justice and the exigencies of common good in Article 43.2 – 'the Constitution of [former] Jugoslavia hardly goes further than this'. It was, he said, 'a classic example of giving a right on the one hand and taking it back on the other': see *Modern Constitutions,* Oxford, 1966, p 63. In addition, Mr Justice Keane has spoken of the 'unattractive language' and 'tortured syntax' of Article 43: see 'Land Use, Compensation and the Community' (1983), 18 *Irish Jurist* 23

iii) both Article 40.3 and Article 43 are particularly open to subjective judicial appraisal, with phrases such as 'unjust attack', 'principles of social justice' and 'reconciling' the exercise of property rights 'with the exigencies of the common good'.

The Review Group recognises that, whatever formulation might be devised to replace Article 40.3.2° and Article 43, it could probably not avoid entrusting a degree (even a high degree) of subjective appraisal to the judiciary. However, the Review Group considers that, for reasons examined below, it would be preferable to recast these provisions in a manner which

provided for a more structured and objective method of judicial analysis.

ANALYSIS

'natural right'

Article 43.1.1° contains an acknowledgment that man, by 'virtue of his rational being' has the natural right to private ownership 'of external goods'. Irrespective of whether this constitutional assertion is correct, it seems to the Review Group that this elaborate statement as to the origins of the right to property does not greatly assist either the Oireachtas or the courts in their attempts to protect the substance of the right.

Article 43.1.2° provides that, by reason of the existence of the foregoing natural right to property, the State 'accordingly' guarantees to pass no law abolishing the general right of private ownership or the general right to transfer and bequeath property. This subsection contains – in contrast with Article 43.1.1° – a set of coherent principles which might usefully be retained in any recasting of Article 43.

social justice

Article 43.2.1° provides that the State recognises that the exercise of these rights ought to be regulated by reference to the principles of social justice. Article 43.2.2° provides that the State may delimit the exercise of these rights by law (although the Irish text simply refers to 'teorainn a chur') with a view to regulating their exercise so as to meet the exigencies of the common good.

In the opinion of the Review Group, few would argue with the principle underlying these provisions. If the State is to function, property rights must yield to a wide variety of countervailing interests, among them the redistribution of wealth, the protection of the environment, the necessity for consumer protection. This in turn means that the State must have extensive taxation powers, powers of compulsory acquisition and a general capacity to regulate (and even in some cases to extinguish) property rights.

difficulties

The language of Article 40.3.2° and Article 43 has given rise to difficult questions of interpretation, although it seems that some of these difficulties have been clarified by the contemporary case law. Contemporary judicial thinking seems to stress that, while the State may regulate and interfere with property rights, it may not do so in a manner which disproportionately interferes with such rights. As Costello P said in *Daly v Revenue Commissioners* [1996] 1 ILRM 122:

> But legislative interference in property rights occurs every day of the week and no constitutional impropriety is involved. When, as in this case, an applicant claims that his constitutionally protected property rights referred to in Article 40.3.2° have been infringed and that the State has failed in the obligation imposed on it by that Article to protect his property rights he has to show that those rights have been subjected to an 'unjust attack'. He can do this by showing that the law which has restricted the exercise of his rights or otherwise infringed them has failed to pass a proportionality test...

There have been only about seven cases where a plaintiff has established an unconstitutional interference with his or her property rights and in nearly every such case the potential arbitrariness of the interference in question was fairly evident.

Thus, in the leading case of *Blake v Attorney General* [1982] IR 117, the Supreme Court invalidated the provisions of the Rent Restrictions Act 1946 because it was evident that such legislation operated in a palpably arbitrary fashion. The properties to which the legislation applied were selected on a haphazard basis; the rents for such properties were fixed by reference to either 1914 or, in some instances, 1941 monetary values and severely inhibited the right of landlords to recover possession of such controlled dwellings. In the opinion of the Supreme Court these provisions restricted:

> ...the property rights of one group of citizens for the benefit of another group. This is done without compensation and without regard to the financial capacity or the financial needs of either group, in legislation which provides no limitation on the period of restriction, gives no opportunity for review and allows for no modification of the operation of the restriction. It is, therefore, both unfair and arbitrary.

Despite the fact that the meaning of Articles 40.3.2° and 43 has, to some extent at least, been clarified by judicial decision and that, contrary to some fears, the courts have refrained from endorsing an absolutist attitude to property rights, the Review Group does not consider that Article 40.3.2° and Article 43 are satisfactory in their present form.

ISSUES

1 whether the Constitution should provide for the protection of property rights

While it is true that the Constitution of the Irish Free State did not expressly provide for the protection of property rights, a majority of the Review Group is nonetheless of the opinion that the Constitution should contain such a protection. There are two principal reasons for this opinion:

i) while the State has legitimate reasons to control and regulate the exercise of property rights, it is necessary and desirable to provide protection against the risk of arbitrary or disproportionate deprivation or interference by the State. The prosperity of the State depends

in substantial measure on property – whether land, building, equity or any other form of wealth – being available as a source of, or security for investment

ii) the right to property is one that has received international acknowledgment: see, for example, Article 17 of the United Nations Universal Declaration of Human Rights and Article 1 of the First Protocol to the European Convention on Human Rights.

However, some members of the Review Group do not favour the constitutional protection of property rights. In their view, the assertion of property rights has historically been associated with the protection of commercial and business interests and is not designed to ensure to everyone the material prerequisites for a life of dignity. They consider, therefore, that it has no place among the fundamental rights provisions of a constitution. Moreover, in their view, the constitutional protection of property rights may endorse major differentials in the ownership of productive wealth existing at the time of the adoption of the text.

Of course, the mere fact that the right to property is constitutionally acknowledged and protected does not mean that this right cannot be qualified, restricted or even (in certain special cases) extinguished by law, provided always that the qualification, restriction, etc is proportionate and not arbitrary. Therefore, in line with recommendations in other areas of fundamental rights (see the recommendations in respect of Article 38.1 and Article 40.3.1°), a majority of the Review Group recommends that any new formulation of the protection of property rights should be accompanied by a clause which would allow the Oireachtas to qualify the exercise of such rights in the public interest and for reasons of social justice in cases where there are clear objective reasons for doing so and where the legislation is proportionate to the aim sought to be achieved. What the form of the new provision should be is outlined in the discussion of Issue 6 below.

Recommendations

1 The Constitution should expressly protect the right to property (majority view).
2 The Constitution should expressly provide that such property rights can be qualified, restricted etc by legislation where there are clear social justice or other public policy reasons for doing so.

2 whether the Constitution should provide for a 'dual protection' of property rights such as Article 40.3.2° and Article 43 provide

The textbooks attest to the tangled history of the interaction between the two clauses and the lack of clarity which attends them: see Kelly, *The Irish Constitution,* Dublin 1994, at pp 1061-1091; Casey, *Constitutional Law in Ireland,* 1992, at pp 531-551. This uncertainty remains despite some twenty or so major decisions where the courts have sought to grapple with the language of the provisions. In addition, the courts have found it more or less impossible to adhere to a strict categorisation of Article 40.3.2° in contrast with Article 43 property rights. Even if the utility of differentiating between the institution of property and the protection of individual property rights were clear, a majority of the Review Group believes it would be preferable to deal with property rights in a single self-contained Article.

Recommendation

Amend the Constitution so that the provisions dealing with property rights are in a single self-contained Article.

3 whether the protection of property rights should extend to legal persons, such as limited companies

Prior to the decision of Keane J in *Iarnród Éireann v Ireland* [1995] 2 ILRM 161 there was uncertainty as to whether the protections of Article 40.3.2° (which refers to 'citizen[s]') and Article 43 (which refers to 'man, in virtue of his rational being') extended to corporate entities. Indeed, the earlier case law might be thought to have inclined to the view that they did not enjoy such protection. Thus, in the High Court in *Private Motorists' Protection Society v Attorney General* [1983] IR 339 Carroll J expressly held that legal persons could not invoke the protections of Articles 40.3 and 43, although the Supreme Court reserved its position on this question. The issue has been circumvented to some extent inasmuch as the Supreme Court held in that case that shareholders in the company were considered to have property rights protected by Article 40.3 and Article 43 against unjust attack. This stratagem was not readily available in *Iarnród Éireann* inasmuch as there were no shareholders beneficially entitled to dividends etc from the company. In that case Keane J agreed that such legal persons might not enjoy protection if the Constitution was read literally and concluded that a broader interpretation is required:

> Undoubtedly, some at least of the rights enumerated in Article 40.3.2° – the rights to life and liberty – are of no relevance to corporate bodies and other artificial legal entities. Property rights are, however, in a different legal category. Not only are corporate bodies themselves capable in law of owning property, whether moveable or immovable, tangible or

> intangible. The 'property' referred to clearly includes shares in companies formed under the relevant companies' legislation which was already a settled feature of the legal and commercial life of this country at the time of enactment of the Constitution. There would accordingly be a spectacular deficiency in the guarantee to *every* citizen that his or her property rights will be protected against 'unjust attack' if such bodies were incapable in law of being regarded as 'citizens', at least for the purposes of this Article, and if it was essential for the shareholders to abandon the protection of limited liability to which they are entitled by law in order to protect, not merely their own rights as shareholders, but also the property rights of the corporate entity itself, which are in law distinct from the rights of its members.

This judgment is under appeal. Having regard to the diversity of judicial views previously expressed on this issue, it may not represent the last word on the subject.

The Review Group also notes that Article 1 of the First Protocol to the European Convention on Human Rights expressly extends the protection of property to legal as well as natural persons. In *Pine Valley Developments v Ireland* (1992) 14 EHRR 319 (a case with admittedly very special facts) the European Court of Human Rights held that Ireland was in breach of Article 14 (non-discrimination) of the Convention and Article 1 of the First Protocol (property) in failing to extend to the company the benefit of a particular planning permission.

Arguments for extending the guarantee of property rights to legal persons

1 although the fundamental rights clauses are generally designed to protect individual human rights against unfair, disproportionate or arbitrary State action, it would be strange if this protection were not available for the property which corporate bodies are legally entitled to own
2 much transnational and national investment now depends on the security of property rights for the legal persons making the investment. Without that security much of that investment might not take place. Constitutional protection would be stronger than legislative protection
3 if legal persons do not enjoy constitutional protection in respect of their property rights, this will affect – either directly or indirectly – the property rights of natural persons who either own, control or have shareholdings in a corporate entity
4 irrespective of the decision in *Iarnród Éireann,* legal persons, in practice, have hitherto been permitted to rely on the property rights provisions, inasmuch as shareholder actions invoking these provisions have previously been entertained by the courts. The fact that such actions have been permitted does not appear to have had any material impact on the power of the Oireachtas to regulate, control or even extinguish the property rights of corporate bodies
5 the shareholder action is not a satisfactory substitute for according constitutional rights to legal persons in cases where there may be no shareholders, for example universities, trade unions and companies limited by guarantee
6 the right of legal persons is already protected by Article 1 of the First Protocol of the European Convention on Human Rights, so that it would be appropriate that the Constitution, rather than legislation, should accord a similar degree of protection.

Arguments against

1 the rights protected by the Fundamental Rights provisions of the Constitution are clearly intended to relate to the individual as a human person. It would be wrong to extend any of these provisions to legal persons
2 legal persons enjoy the privilege of limited liability and the other benefits of incorporation. They must, however, also accept some of the disadvantages of incorporation, among them the absence of any constitutional rights
3 if legal persons were accorded constitutional rights, including the constitutional right to the protection of property, it might mean that corporate resources and financial power could be employed to challenge the constitutionality of legislation, something which might have unwelcome legal, financial and social consequences
4 in any event, the use of the derivative action by shareholders provides adequate protection for the rights of individuals which may be indirectly affected by legislation impacting on the company
5 since legal persons are the creation of statute, the protection of the rights and interests of legal persons is a matter for the Oireachtas alone
6 there is no need to go further in order to emulate the provisions of Article 1 of the First Protocol of the European Convention on Human Rights.

Conclusion

A majority of the Review Group opposes affording constitutional protection of private property to legal persons

4 whether Article 40.3.2° (in so far as it concerns property rights) and Article 43 should remain unamended

The Review Group recognises that some of the difficulties of interpretation to which these provisions have given rise have now been clarified by case law. It further observes that some of the possible fears about an absolutist interpretation of these

provisions, which would severely handicap the Oireachtas in areas such as planning law, have not been realised. Serious consideration was given to the suggestion that these provisions – for all their drafting imperfections – should be left unamended, largely because the law has been, to some extent at least, clarified through the case law. As already indicated, this suggestion was rejected because the present provisions were regarded as unsatisfactory. The Review Group is of the opinion that it ought to be possible to re-draft these provisions so that a more direct, self-contained clause would clearly set out the extent of the State's powers to regulate, control or even extinguish property rights. Any such re-draft might contain elements of the present provisions of Article 40.3.2° and Article 43, including those provisions which expressly subordinate the exercise of property rights to the requirements of social justice.

Recommendation

A majority of the Review Group considers that the property provisions should not remain in their present form. They favour the deletion of Article 43 and of the words 'and property rights' from Article 40.3.2°. They would replace these by a single self-contained Article dealing with property.

5 whether the text of Article 40.3.2° (in so far as it concerns property rights) and Article 43 should be replaced by the provisions of Article 1 of the First Protocol to the European Convention on Human Rights

The Review Group has already rejected the wholesale incorporation into the Constitution of international human rights conventions. It has decided it would be preferable to draw on these conventions where:

i) the right is not protected by the Constitution
ii) the standard of protection of such rights is superior to those guaranteed by the Constitution
iii) the wording of the clause in the Constitution protecting such a right might be improved.

Article 1 of the First Protocol to the European Convention on Human Rights provides that:

> Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.
>
> The preceding provisions shall not, however, in any way impair the right of a state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.

Following a review of the case law on the provisions of both Article 40.3.2° and Article 43 on the one hand and Article 1 of the First Protocol on the other, the Review Group is of the view that there is a great deal of overlap as far as the substance of the respective guarantees is concerned (although a majority of the Review Group does not favour cover being extended to legal persons). While a detailed review of the respective case law would be unnecessary in the present context, an examination of the two leading cases arising respectively under the Constitution (*Blake v Attorney General*) and the Convention (*Spörrong v Sweden* (1983) 5 EHRR 35) reveals a striking similarity in terms of judicial reasoning and general approach to the issue of what constitutes an unjustified interference with property rights. Applying, therefore, the first two principles already mentioned, there is little of substance to choose between the Constitution and the Convention, as both protect the right to property and both envisage circumstances in which such rights can be restricted, qualified etc in the public interest, provided any such interference in the right is proportionate and required on objective grounds.

In terms of the third principle – clarity of language – the Convention scores heavily as compared with Article 43. The language of the Convention is simple and direct and rests on coherent principles. There is a single, self-contained guarantee in which the extent of the State's power to qualify, restrict, etc the exercise of property rights is made plain. There are, however, features of the wording of the Protocol which, in the opinion of the Review Group, render it inappropriate for automatic inclusion in the text of the Constitution. For example, the first paragraph guarantees that 'no one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'. The reference in this context to the general principles of international law indicates that the clause is designed essentially to prevent the nationalisation or expropriation of foreign-owned assets without the payment of fair compensation. A clause of this nature would, accordingly, be inappropriate to a Constitution principally designed to regulate the actions of the State vis-à-vis its own citizens.

Another difficulty concerns the wording of the second paragraph of the Protocol. This wording appears designed to ensure that the enforcement of both planning and fiscal legislation cannot be challenged on the grounds that it contravenes the Convention. If this wording were transposed into the Constitution, there might be a danger that this proviso would be interpreted as meaning that such

legislation could not be impugned on the ground that it infringed an individual's property rights.

It should be noted that the European Court of Human Rights has ruled that while this part of Article 1 of the First Protocol 'explicitly reserves the right of Contracting States to pass such laws as they may deem necessary to secure payment of taxes', such fiscal legislation cannot grant powers of 'arbitrary confiscation' and must also satisfy the proportionality test contained in the first sentence of Article 1: see *Gasus Dosier – und Fördertechnik GmbH v The Netherlands* (1995) 20 EHRR 403.

Conclusion

The Review Group cannot recommend the straightforward replacement of Articles 40.3.2° and 43 by the language of the First Protocol. As will be seen from a consideration of the next issue, there are aspects of Article 1 of the First Protocol which might, however, provide useful models for any re-wording of the constitutional protections.

6 what the elements of a new Article should be

A new self-contained Article on property might contain the following elements:

i) a statement that every natural person is entitled to the peaceable enjoyment of his or her own possessions and property
ii) a guarantee that no one shall be deprived of his or her possessions and property save in the manner envisaged by the new qualifying clause
iii) a guarantee that the State shall not pass any law attempting to abolish the general right of private ownership or the general right to transfer, bequeath, and inherit property
iv) a new qualifying clause which would provide that such property rights, since they carry with them duties and responsibilities, may be subject to legal restrictions, conditions and formalities, provided these are duly required in the public interest and accord with the principles of social justice. Such restrictions, conditions and formalities may, in particular, but not exclusively, relate to the raising of taxation and revenue, proper land use and planning controls, protection of the environment, consumer protection and the conservation of objects of archaeological and historical importance.

i) and ii) are based on the first paragraph of Article 1 of the First Protocol. iii) is a slightly amended version of Article 43.2.1° of the Constitution. iv) the new qualifying clause is loosely based on, and adapted from, the qualifying clause contained in the free speech provision in Article 10.2 of the European Convention on Human Rights. While this clause would give the Oireachtas extensive rights to regulate and control the exercise of property rights, it would also provide a safeguard against the risks of disproportionate or arbitrary interference with such rights by the State, and would enable the courts to take into account the effect of the interference with the property rights of the individual in determining whether such interference was constitutionally valid or not in particular situations. Such a clause would indicate explicitly but in a non-exclusive manner the many kinds of circumstances in which property rights can be regulated by the State. Another possibility is to retain the present wording in Article 43.2.1° and 43.2.2° which also allows for the regulation of property rights by the State by virtue of the broad references it contains to the principles of social justice and the exigencies of the common good.

Recommendations

A majority of the Review Group favours the following:

1 Article 40.3.2° (in so far as it concerns property rights) and Article 43 should be deleted and replaced by a single self-contained Article dealing with property rights.
2 Article 1 of the First Protocol to the European Convention on Human Rights should not be directly transposed into the Constitution. However, a slightly recast version of the opening sentence of Article 1 of the First Protocol might usefully replace the existing Article 43.1.1° as follows:

> Every natural person shall have the right to the peaceable possession of his or her own possessions or property.

3 A slightly altered version of Article 43.1.2° should be included. This might provide:

> The State guarantees to pass no law attempting to abolish the right of private ownership or the general right to transfer, bequeath and inherit property.

(Some members of the Review Group felt a general right to 'bequeath and inherit' property should not be consolidated in the Constitution because of its potential effect of increasing wealth differentials in society. The majority, however, considered that legislative fiscal freedom and the constitutional provision that property rights may be regulated by reference to the principles of social justice were adequate qualifications.)

4 A new qualifying clause should be included on the lines of iv) above.

A minority of the Review Group favours the retention of Articles 43.2.1° and 43.2.2° in their present form.

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Note: This is an index to the report only: it does not cover the appendices.