OPR Practice Note PN05

Planning Enforcement

October 2023

Oifig an Rialaitheora Pleanála
Office of the Planning Regulator

Table of Contents

Appendices

OPR Practice Notes provide information and guidance about specific areas of the planning system for practitioners, elected members and the public.

For the avoidance of doubt, OPR Practice Notes do not have the status of Ministerial Guidelines issued under Section 28 of the Planning and Development Act 2000, as amended.* They are issued for general information purposes only, in accordance with the OPR's statutory remit to engage in education, training and research activities. Practice Notes cannot be relied upon as containing, or as a substitute for, legal advice. Legal or other professional advice on specific issues may be required in any particular case.

This Practice Note was prepared in early 2023 when the Draft Planning and Development Bill 2022 ('the 2022 Bill') was undergoing pre-legislative scrutiny by the Joint Oireachtas Committee on Housing, Local Government and Heritage. It is acknowledged that changes relating to planning enforcement are proposed in the 2022 Bill. However, this Practice Note has been prepared against the backdrop of the 2000 Act, which is the current legislation.

We welcome comments, feedback, suggestions and relevant case studies from users of this Practice Note and these should be sent to **research@opr.ie**.

*herein referred to as the '2000 Act'.

Acronym List

AA	Appropriate Assessment
ACAs	Architectural Conservation Areas
AIE	Access to Information on the Environment
CCTV	Closed-circuit Television
CPD	Continuing Professional Development
CRO	Companies Registration Office
DHLGH	Department of Housing, Local Government and Heritage
DPP	Director of Public Prosecutions
EIA	Environmental Impact Assessment
EPA	Environmental Protection Agency
FAQ	Frequently Asked Question
FOI	Freedom of Information
GIS	Geographic Information System
IAA	Irish Aviation Authority
ICT	Information and Communication Technologies
IE	Industrial Emissions
IPC	Integrated Pollution Control Licence
MARA	Maritime Area Regulatory Authority
NHAs	Natural Heritage Areas
NIAH	National Inventory of Architectural Heritage
NMS	National Monuments Service
NOAC	National Oversight and Audit Commission
NPWS	National Parks and Wildlife Service
OO	Office of the Ombudsman
OPR	Office of the Planning Regulator
OSi	Ordnance Survey Ireland
PPE	Personal Protective Equipment
QAR	Quality Assurance Review
RPS	Record of Protected Structures
SAC	Special Area of Conservation
SPA	Special Protection Area
SPC	Strategic Policy Committee
VOCs	Volatile Organic Compounds
WWDs	Wastewater Discharge Applications

1.0 Introduction

1.1 Overview and Purpose of the Practice Note

The purpose of Ireland's planning system is to promote proper planning and sustainable development. There are three essential areas of work for planning authorities namely plan-making, which sets out the policies and proposals for the development of our cities, towns and rural areas; the development management system, which applies national, regional and local policies to the determination of planning applications; and the planning enforcement system. These three areas of planning activity are interlinked. Plan-making envisages and sets the framework for new development while development management assesses and permits this development. The enforcement function, with the appropriate administrative and legal tools, ensures that there is a process in place and sanctions available for those who do not apply for planning permission, where it is required, or who breach the conditions of a permission, where it has been granted.

While enforcement is an integral part of the Irish planning system it is seen as its *'poor relation'*. A poor-quality enforcement service can undermine a planning authority's human and financial resources and its reputation. The lack of an effective enforcement service can result in a significant backlog of unresolved cases, persistent complaints from the general public, Freedom of Information (FoI) and Access to Information on the Environment (AIE) requests and investigations. There may also be financial implications in terms of the payment of compensation to complainants adversely affected by a failure to take appropriate action and a requirement to pay legal costs.

Complaints have also been received by the Office of the Ombudsman (OO) and the Office of the Planning Regulator (OPR) by people expressing dissatisfaction with enforcement action, or inaction, by planning authorities concerning unauthorised developments.

The OPR identified in its **Strategic Planning Research Programme 2023-2025** the intention to conduct research into and prepare a practice note on *'Planning Enforcement'*. The aims of this practice note are to:

- Provide information on the legal context for planning enforcement as set out in Part VIII (Enforcement) of the 2000 Act;
- Examine some key concepts with a particular emphasis on the practical and operational issues of a day-to-day planning enforcement team;
- Provide a legal digest of selected court judgments that relate to planning enforcement; and
- Support new staff and those who have transferred from other sections of local authorities to planning enforcement sections so that they have a baseline understanding of how the planning enforcement system operates.

It is also envisaged, that this practice note will have a broader role in informing local authority elected members and senior management of the legal requirements associated with planning enforcement, the management systems and the resources necessary to ensure an effective and efficient enforcement service.

This practice note focuses on warning letters, enforcement notices, the administration and processing of enforcement up to, and including, prosecution in the District Court. High-level reference is also made to proceedings taken in the Circuit or High Courts.

This practice note does not address in detail other enforcement powers under Part IV (Architectural Heritage) of the 2000 Act.

1.2 Evolution of the Irish Planning Enforcement System

The Local Government (Planning and Development) Act, 1963 came into force on 1 October 1964 and the requirement to obtain planning permission for development applied from then. The 1963 Act introduced a system of planning enforcement. This was supplemented by additional provisions in the Local Government (Planning and Development) Act, 1976. Section 27 of the 1976 Act introduced, a mechanism whereby planning authorities or *"any other person"* could apply to the High Court for an order to prohibit a development or the continuance of a development or an unauthorised use that was being carried out without planning permission or was contrary to a permission. This is commonly known as a *'planning injunction'*.

The 2000 Act consolidated most of the existing planning legislation and introduced new provisions in an effort to rectify deficiencies that had been identified and it sought to streamline the operation of planning enforcement throughout the State.

1.3 Enforcement Tools

The 2000 Act, and subsequent amendments, enhanced the tools available to better implement enforcement by planning authorities. These are addressed in greater detail later in this practice note. Figure 1 summarises the main enforcement tools in the 2000 Act.

Warning Letter

- Planning authorities are required to issue a warning letter as soon as may be but not later than six weeks after receipt of a representation/ complaint, regarding unauthorised development which may have been, is being or may be carried out. The 2000 Act specifies who a letter should be issued to, what it should contain and that submissions may be made on the contents of the letter.
- See section 4.8 of this practice note.

Enforcement Notice

- The 2000 Act requires that it should be an objective of a planning authority to ensure that a decision on whether to issue an enforcement notice is taken within 12 weeks of the issue of a warning letter.
- In addition, enforcement notices can be served in urgent cases and planning authorities do not have to issue warning letters in these situations, prior to the service of an enforcement notice.
- If a person fails to comply with an enforcement notice they may be guilty of an offence.
- See section 4.9 of this practice note.

Prosecution

- A person who has carried out or is carrying out unauthorised development is guilty of an offence. A person can be prosecuted under Part VIII of the 2000 Act, either on indictment or summarily.
- Prosecution on indictment is carried out by the Director of Public Prosecutions (DPP). Summary prosecutions are more common and are instituted in the District Court by the planning authority.
- See section 4.9.6 of this practice note.

Injunction*

- Section 160 of the 2000 Act provides that where an unauthorised development *"has been, is being or is likely to be carried out or continued"* the High Court or the Circuit Court may, on the application of a planning authority or any other person, by order require any person to do or not to do, or to cease to do anything that the Court considers necessary.
- The main difference in seeking either a Circuit Court or High Court injunction relates to the market value of the land with matters relating to lands exceeding €3,000,000 in market value being dealt with in the High Court.
- See section 4.10 of this practice note for more information.

Development Management and Enforcement - Refusal of Planning Permission for Past Failures to Comply

- A planning authority may refuse planning permission for a development in circumstances where the applicant has previously failed to comply with a permission, has carried out a substantial unauthorised development, or has been convicted of an offence under the 2000 Act.
- See Section 35 of the 2000 Act.

Figure 1: The Main Enforcement Tools of the 2000 Act.

*For the purpose of this practice note reference to an injunction means injunction proceedings brought under Section 160 of the 2000 Act.

1.4 Nearshore, Coastal Planning and Maritime Matters

The Maritime Area Planning Act 2021, as amended by the Planning and Development, Maritime and Valuation (Amendment) Act 2022, sets out a legislative framework for the regulation of Ireland's maritime area, including development within the maritime area. It is beyond the scope of this practice note to provide an in-depth review of the implications of this legislation for development within the maritime area. However, it is worth acknowledging that the Maritime Area Planning Act 2021, as amended, amends the enforcement provisions of the 2000 Act, in a number of ways, to reflect the new regulatory framework.

One key change includes empowering the new Maritime Area Regulatory Authority (MARA) to bring summary proceedings for an offence under the 2000 Act regardless of whether or not the offence is committed in the maritime area.[1] A further noteworthy amendment clarifies the jurisdictions of the Circuit and High Courts where an application for an injunction is made in relation to unauthorised development in the maritime area.[2]

1.5 Forthcoming Changes to the 2000 Act

The Draft Planning and Development Bill 2022 was published in January 2023 and was subject to pre-legislative scrutiny by the Joint Oireachtas Committee on Housing, Local Government and Heritage at the time that this practice note was drafted. As acknowledged at the outset, this practice note has been drafted on the basis of the provisions of the 2000 Act, however, it is worth noting that if the 2022 Bill is enacted in its current form a number of changes will be introduced to the planning enforcement system including:

- The power to introduce a new regional structure, on a shared service basis across local authorities, for the enforcement of activities, such as quarries;
- Provision for revised time periods relating to warning letters and enforcement notices, including provision for extension of periods during which submissions can be made on warning letters; and
- Provision for enhanced consultation requirements with members of the public that have made complaints of unauthorised development.

[1] Section 157(1A) of the 2000 Act.

[2] Section 160 of the 2000 Act.

2.0 National Policy Context and Oversight of Planning Enforcement

The planning enforcement system operates not only within the legislative framework of the 2000 Act but also within the context of Ministerial Directives and Guidelines, and circulars and other guidance documents issued by the Department of Housing, Local Government and Heritage (DHLGH). It should also be acknowledged that the Office of the Planning Regulator (OPR), the Office of the Ombudsman (OO) and the National Oversight and Audit Commission (NOAC) have oversight, investigation and reporting roles relating to the planning enforcement system.

2.1 The Role of Guidelines, Directives and Circulars

The Minister for Housing, Local Government and Heritage may, at any time, issue guidelines[3] to planning authorities regarding any of their functions under the 2000 Act. There is a requirement for planning authorities to *have regard* to the contents of these guidelines in the performance of their functions including when taking enforcement action. Guidelines on a range of planning topics have issued over the years.

The Minister may also issue policy directives[4] to planning authorities regarding any of their functions. Planning authorities are required to *comply* with any such directives in the performance of their functions. The Minister issued a **directive on planning enforcement** in 2013.[5]

Circular letters on planning matters, issued by the DHLGH, are often used as a way of highlighting the publication of guidelines or amending legislation; providing additional information on how to interpret existing guidance or legislation; and outlining complementary guidance.

2.2 Guidelines and Policy Statements of Specific Relevance to Enforcement

A brief overview of the guidelines that are most relevant to the enforcement function is set out in the list of documents below. This list is not exhaustive. Planning authorities should continuously review any updates to legislation, guidelines and circulars, as and when they are issued, to ensure that their practices are up-to-date and management and staff are fully appraised.

[3] Section 28 of the 2000 Act.

[4] Section 29 of the 2000 Act.

[5] Planning and Development (Planning Enforcement) General Policy Directive 2013.

2.2.1 Development Management Guidelines for Planning Authorities (2007)

These guidelines address a range of development management matters such as pre-application meetings, processing of planning applications, planning appeals, Section 5 declarations etc. Chapter 10 provides advice on planning enforcement and while the guidelines date back a number of years, they remain highly relevant today.

The guidelines remind local authorities of their enforcement responsibilities and that:

> *"The introduction of a culture of enforcement is critical to ensure that the planning control system works properly and for the benefit of the whole community."*[6]

They outline the negative consequences arising from a lack of enforcement including damage to communities, the environment and our natural and built heritage and the erosion of public confidence and support in the planning system, which can lead to more widespread breaches of the law and also to substandard developments.

The paragraphs contained in Section 10.3 of the guidelines outline best practice and principles of good enforcement, and these are summarised in Table 1 below.

[6] Development Management Guidelines for Planning Authorities (2007), Section 10.1.

Development Management – Guidelines for Planning Authorities[7]
Summary of the Best Practice/Principles of Good Enforcement

1. Oversight and Resourcing:	Design organisational structures to promote/facilitate the strong input and oversight of Senior Management. Ensure adequate resources are available for the enforcement service including staff, financial and other resources to enable action in the courts.
2. Initiative:	Use all resources available within the local authority to support and complement the enforcement service. Do not rely solely on the enforcement team, other staff should contribute to reporting cases observed during routine site inspections.
3. Time Limits:	Take steps expeditiously and be particularly conscious of the seven year time limit and other time limits set out in the 2000 Act.
4. Good Information Management Systems:	Ensure that the enforcement regime is efficient and good information management systems are vital. Establish clear procedural manuals for the enforcement team, use Information and Communication Technologies (ICT) to track developments and cases and set up dedicated telephone numbers and email addresses for the public.
5. Environmentally Conscious:	Promptly address unauthorised developments that have significant adverse impacts on the environment especially developments requiring Environmental Impact Assessment (EIA) or Appropriate Assessment (AA).
6. Large-scale Breaches:	Promptly address large-scale unauthorised developments and, where necessary, prioritise these and seek to ensure a *'level playing pitch'* for all.
7. Injunctions:	Give serious consideration to the use of Section 160 injunctions in cases where: (a) there are significant adverse impacts on the environment; (b) there are significant health and safety risks; (c) reinstatement would be difficult/impossible; and/or (d) there are works to protected structures.
8. Enforcement Notices:	Issue an enforcement notice where: (a) an investigation has confirmed a development is unauthorised, unless there are compelling and defensible reasons for not doing so; or (b) when a permission to retain an unauthorised development has been refused.
9. Prosecution of Offences:	Prosecution of persons who do not comply with enforcement notices is recommended in all cases. Those that have committed substantial breaches of the law should also be prosecuted, even where they have applied for or obtained permission to retain a development.[8]
10. Retention Permission:	Developers should not be permitted by planning authorities to indefinitely postpone enforcement action through applying for retention permission. Courts can be reminded by the planning authority's legal team of Section 162(3) of the 2000 Act.
11. Transparency:	Make available as much of the enforcement file as possible, in the interest of transparency, except where this could jeopardise court action or reveal the identity of complainants.
12. Monitoring and Review:	Each planning authority should review the operation of its enforcement system annually. This should include an analysis of trends, issues, procedures, resources and ICT systems. The review should also suggest actions to improve performance.

Table 1: Summary of the Best Practice/Principles of Good Enforcement as outlined in the Development Management Guidelines for Planning Authorities (2007).

[7] Development Management Guidelines for Planning Authorities (2007), Section 10.3.

[8] In practice, it may prove difficult to persuade a court to proceed with a prosecution where a retention application has been made and has yet to be determined. See section 6.6.1 of this practice note, which references *Waterford City and County Council v Centz Retail Holdings Ltd* (No. 2) [2020] IEHC 634, paragraph 38. See also *Eircell v Bernstoff* [2000] IEHC 18, in which Mr Justice Barr states *"No court should make an order which is potentially futile"*. See Appendix B - Legal Digest for a summary of this case.

2.2.2 Planning and Development (Planning Enforcement) Policy Directive (2013)

Ministerial planning policy directives are very rare, and the powers conferred by Section 29 of the 2000 Act have seldom been used. In 2013 Minister of State, Jan O'Sullivan, issued the first policy directive in relation to planning enforcement. The directive came into operation on 9 May 2013 and continues to have effect. The three main requirements of the Directive for planning authorities are set out in Table 2 below.

	Planning Policy Directive on Planning Enforcement - 2013 Summary of the Key Directions to Planning Authorities from the Minister
1.	**Statutory Obligations:** Planning authorities are reminded of their statutory obligations under Part VIII of the 2000 Act and are **required** to ensure that: (a) sufficient and appropriate human resources are available for planning enforcement; (b) overall responsibility is assigned to a senior officer (minimum Senior Executive Officer grade); and (c) the senior officer provides regular updates to senior management.
2.	**Monitor:** Planning authorities are **required** to undertake appropriate monitoring of planning enforcement to: (a) support the collation of statistics and information; (b) provide annual reports on enforcement activities to elected members and to the Minister; (c) assist in raising public awareness about the importance of enforcement of the planning code.
3	**Prioritise:** Planning authorities are **directed** to prioritise large-scale unauthorised development and enforcement cases where: ● the development or works subject to enforcement proceedings would have required; (a) an EIA; (b) a determination as to whether EIA was required (i.e. screening for EIA); or (c) an AA under the Habitats Directive; **or** ● the works subject to enforcement proceedings are works to which Section 261 or 261A of the 2000 Act apply i.e. quarries.

Table 2: Planning Policy Directive on Enforcement (2013) – Summary.

2.2.3 Planning Policy Statement (2015)

A Government policy statement on planning was issued by the Department of Environment, Community and Local Government in 2015. The statement sets out key principles that the Government expects planning authorities and those who engage with the planning process to follow. It also outlines high-level priorities for the continued enhancement of the planning system with ten key principles to ensure the proper planning and sustainable development of urban and rural areas. Key principle number ten states that –

> *"Above all, planning will be conducted in a manner that affords a high level of confidence in the openness, fairness, professionalism and efficiency of the process, where people have the opportunity to participate at both the strategic plan making and individual planning application level with decisions always being taken in the interests of the common good and in a timely and informed fashion and where people can have confidence that appropriate enforcement action will be taken where legal requirements are not upheld"* (additional emphasis added).[9]

A key priority highlighted in the statement is to maintain high standards of public confidence in planning and to ensure the *"availability of a range of enforcement provisions when appropriate"* thereby ensuring fairness and transparency.

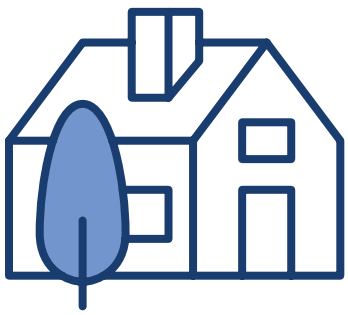
2.2.4 Guidance Note for Local Authorities for Regulating Short Term Letting (2019)

Following changes to planning legislation to regulate the short term letting sector[10] and subsequent amendments to the planning regulations[11] this guidance note was issued by the DHLGH to assist local authorities in implementing and enforcing new regulations in relation to short term letting.

The guidance note states that in order for the new provisions to achieve their objective of bringing properties back into long term letting it was essential that planning authorities utilise their planning enforcement powers to investigate unauthorised short term letting activity.[12]

Planning authorities were reminded of the enforcement powers available to them under the 2000 Act, and the importance of taking a proactive approach to enforcement and the need to prioritise the investigation of properties where it appears that they are in use primarily for the purpose of short term lettings.

Separately it should be noted that the Government plans to introduce legislation to regulate the short term tourist letting sector, through Fáilte Ireland, it is anticipated this will further assist planning authorities in the performance of their duties.



[9] DECLG (2015) Planning Policy Statement, p.2.

[10] As per the Residential Tenancies (Amendment) Act 2019.

[11] Planning and Development Act 2000 (Exempted Development) (No. 2) Regulations 2019 and Circular PL 4/2019 refer.

[12] DHLGH (2019) Guidance Note for Local Authorities for Regulating Short Term Letting, p.7.

2.2.5 Section 28: Guidelines for Planning Authorities Enforcement of Certain Planning Conditions During the Coronavirus (COVID-19) Outbreak (2020)

The DHLGH issued guidelines in March 2020 on planning enforcement during the early stages of the COVID-19 pandemic. The guidelines drew attention to the discretion accorded under the 2000 Act to planning authorities in relation to infringements of conditions which are considered *"trivial"* or *"minor"* in nature.

It was also noted that planning authorities are permitted to exercise discretion when deciding whether to issue an enforcement notice, in order to take any *"material consideration"* into account.

These guidelines were revoked on 9 November 2020.

2.2.6 Planning and Development Act (Exempted Development) Regulations 2022 and Circular Letter PL02/2022

The Planning and Development Regulations 2001, as amended, (hereafter the *'2001 Regulations'*) were further amended in 2018 to give exemptions from the requirement to obtain planning permission in respect of the change of use of certain vacant commercial premises, including vacant areas above ground floor premises, to residential use.[13] The exemptions were extended in 2022 and require the completion of works by 31 December 2025.[14]

Circular Letter PL 02/2022 dealing with the exemptions afforded by the 2022 Regulations reminded planning authorities of their statutory enforcement obligations under the 2000 Act and the importance of a proactive approach to planning enforcement generally. The Circular Letter referenced the Planning Enforcement Policy Directive 2013.

In the context of the change of use exemptions, planning authorities were advised to put monitoring and inspection arrangements in place to ensure that proposed exempted development notified to them under the 2022 Regulations fully complies with the specific requirements and standards that apply under the exemption. The letter also advised that planning authorities should put in place mechanisms to ensure a co-ordinated approach between planning inspections and inspections required for other relevant consents e.g. building regulations and fire safety.

2.2.7 Public Information Leaflets

The Department of Environment, Community and Local Government published an information leaflet on the planning enforcement system **"A Guide to Planning Enforcement in Ireland**" in 2012. This included some examples of the types of activity/development that might constitute breaches of the planning code, the roles and responsibilities of planning authorities and the procedures that they may adopt when taking enforcement action and the process by which an individual can make a complaint about an alleged breach of the planning code. This guide was supplemented in 2021 by the OPR and the DHLGH which issued "**A Guide to Planning Enforcement in Ireland – Planning Leaflet 6**" to inform the public about how planning law is enforced.

[13] Planning and Development (Amendment) (No.2) Regulations 2018 - S.I. No. 30 of 2018.

[14] Planning and Development Act (Exempted Development) Regulations 2022 - S.I. 75 of 2022.

2.3 Oversight of Planning Enforcement

2.3.1 The Office of the Planning Regulator

The Office of the Planning Regulator (OPR) fulfils an important oversight and monitoring role regarding the delivery of proper planning and sustainable development outcomes by the planning system. Assessing the systems and procedures used by local authorities in the performance of their statutory planning functions through the reviews process is a central part of this oversight. In addition, the OPR provides an independent means through which members of the public may submit complaints related to the planning services delivered by local authorities.[15]

Through this work, the OPR strives to make improvements to the planning system, by sharing insights and highlighting practice improvements across the local authorities. In this regard, the OPR carefully considers the correspondence received from the public to identify recurrent themes and to understand the planning issues that concern them.

Through the OPR's reviews of the systems and procedures used by local authorities in performing their planning functions, challenges in delivering enforcement functions have been identified as a recurring issue.

Since the OPR was established in 2019 enforcement matters have also emerged as a prominent theme in complaints received. In 2022 18% of the total cases examined by the OPR related to enforcement matters, up from 12% in 2020 and 10% in 2021.

The main issues identified by the OPR relating to enforcement matters include:

- Delays in enforcement action being progressed;
- Increasing numbers of enforcement complaints received by local authorities with lack of corresponding investment in technologies and resources;
- Frustration with the length of time the enforcement process can take, for those who lodge an enforcement complaint, and for the local authority when significant resources are required to complete the process, particularly in complex cases;
- Penalties which do not support a culture of compliance;
- Absence of dedicated staffing to manage planning enforcement functions;
- Limited expertise/knowledge and training opportunities on planning enforcement matters;
- Limited surveillance systems aimed at actively seeking to pick up unauthorised development before they become the matter of complaints; and
- Lack of dedicated enforcement systems to facilitate the tracking of all stages in the process, recording of documents associated with a case as well as mapping to a Geographic Information System (GIS) for internal use e.g. GIS recording of complaints, follow-up checks linking commencement notices to planning condition compliance.

Under the 2000 Act, the OPR can only examine complaints about local authorities that relate to the overall organisation of the local authority and the systems and procedures it uses when carrying out its planning functions. The OPR does not consider complaints relating to the decision making of planning authorities in individual cases concerning enforcement matters, where a case is subject to legal proceedings, or is already under consideration by another appropriate body such as the Office of the Ombudsman.

[15] Section 31AU of the 2000 Act.

2.3.2 The Office of the Ombudsman

The Office of the Ombudsman (OO) may investigate complaints from people who feel they have been unfairly treated by a public sector provider, which includes local authorities. The Ombudsman can examine complaints about how local authorities carry out their everyday executive and administrative activities.[16] In relation to planning enforcement, the OO may examine whether a planning authority has used its discretionary powers in a reasonable manner in relation to a decision not to pursue enforcement action or whether there has been an unreasonable delay in progressing enforcement action.

Some 66% of complaints on planning matters to the OO in 2020 related to planning enforcement. Complaints concerned delays by planning authorities in pursuing enforcement action, planning authorities not being clear with complainants on their reasons for not pursuing enforcement action on cases and the failure of planning authorities to provide reasonable substantive updates to complainants on the progress of enforcement action.

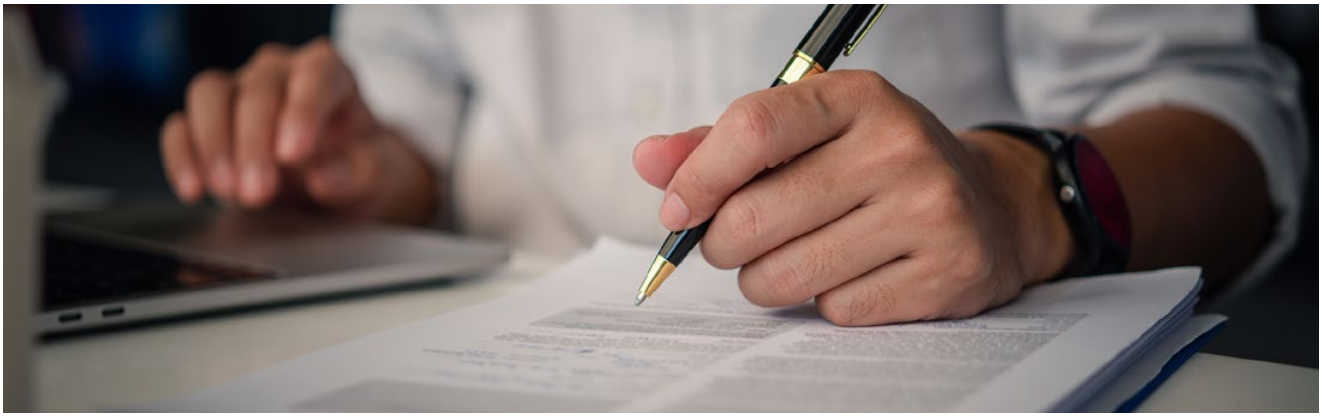
2.3.3 The National Oversight and Audit Commission

The National Oversight and Audit Commission (NOAC) is the national oversight body for the local government sector in Ireland. NOAC's functions are wide ranging, covering all local authority activities and involving the scrutiny of performance generally and financial performance specifically. In its **Local Authority Performance Indicator Report for 2022** NOAC reported on 44 indicators and one of the indicators for planning was the percentage of planning enforcement cases, which were closed and classified as being resolved.

The NOAC report for 2022 states that the number of enforcement cases being investigated by planning authorities increased by almost 32% between 2014 and 2022, from 15,951 cases in 2014 to 20,974 in 2022. On average almost 6,000 cases per year referred to or initiated by planning authorities for enforcement action were closed. The percentage of cases closed due to enforcement proceedings fluctuated between 39% and 49%, between 2014-2022, and was on average 44% over that nine-year period.

Cases are closed for a variety of reasons including:

- being dismissed as trivial, minor or without foundation;[17]
- because they were statute barred;
- the development was considered to be an exempted development; or
- the cases were resolved to a planning authority's satisfaction through negotiations.



[16] See link to the Ombudsman information factsheet on complaints about local authorities.

[17] Section 152(2) of the 2000 Act.

3.0 Key Concepts

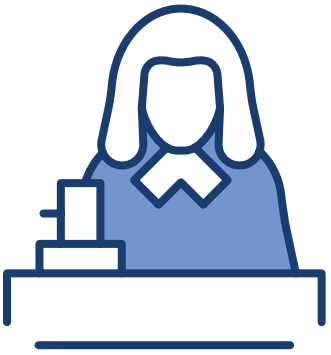
3.1 The Function of Enforcement

The effectiveness of planning legislation to plan for and manage the development of urban and rural areas is dependent on an enforcement system that can enforce breaches of planning control speedily and efficiently. Planning enforcement should seek:

- that planning permissions and any conditions attached to the permissions are complied with;
- that, insofar as is practicable, any land is restored to its condition prior to any unauthorised development having taken place; and
- to address breaches of planning control which would have an unacceptable impact on the amenities of an area.

Effective enforcement is important in maintaining the integrity of the planning system.

The essence of planning enforcement has been captured in judgments made in some prominent court cases. Extracts from some of these judgments are included hereunder.



Supreme Court in its judgment on *Meath County Council v Murray*.[18]

"From the Act as a whole, which includes the enforcement provisions from sections 151 to 163, inclusive, it seems clear that the policy aspiration is one of legislative compliance so that orderly development takes place in a regulated and coherent manner, consistent with an adopted Development Plan, either at area or local level, or both, and having regard to any coordinated policies with neighbours, all under the general direction of national policies. In effect, the armoury as given is to ensure that the environmental and ecological rights/ amenities of the public are preserved and enhanced and that the integrity and efficacy of planning control is maintained. In addition, at the individual level…no person should have to suffer a diminution of his rights, including the enjoyment of his property rights, unless such interference can lawfully be justified".

The High Court *Wicklow County Council v Kinsella*.[19]

"in one sense the reason is obvious: without effective planning laws and adequate enforcement procedures to ensure compliance with them, anarchy would rule the roost with regard to all sorts of developments. Dangerous, unsuitable and haphazard developments would be likely, some of which might be constructed or established in locations where a single citizen could inconvenience neighbours, destroy areas of natural beauty, disrupt traffic and even undermine the capacity of the community to engage in normal social function and activities. In short, there would be nothing to stop a 'free for all' development culture from running riot…. The Planning Acts 1963-2000 provide the law which bind all citizens in this regard. It might be more accurate to say the legislation binds developments, as planning conditions enure for the benefit of the land and society generally, rather than the individual. It is the responsibility of the individual developer to conform, to obtain planning permission when required to do so and to comply with conditions attaching to any permission."

[18] *Meath County Council v Murray* [2017] IESC 25 – See also Appendix B – Legal Digest for a summary of this case.
[19] *Wicklow County Council v Kinsella*, Judgment of Kearns P., [2015] IEHC 229.

3.2 Development and Unauthorised Development

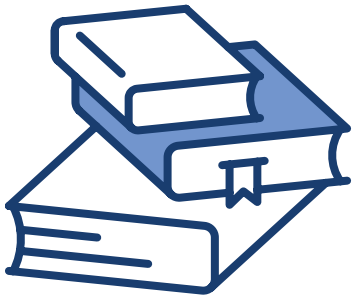
3.2.1 Development and the Need for Planning Permission

Planning permission is required in respect of any development of land, which is not exempted development under the 2000 Act or under the 2001 Regulations.[20] In the case of development that is unauthorised, permission is required for the retention of the unauthorised development in order to make the development lawful.[21]

A person cannot carry out any development, which would require planning permission and which is not exempted development, unless they have received a grant of planning permission for the development.[22]

3.2.2 The Concept of Development

Following the receipt of a complaint, it is necessary for a planning authority to ascertain whether unauthorised development has taken place in order to determine whether enforcement action should be pursued. The first stage in this process will be to assess whether the matter under investigation constitutes development, then the second is to decide if it is unauthorised development. Some of the key definitions outlined in Sections 2 and 3 of the 2000 Act, are set out overleaf:



[20] Section 32(1)(a) of the 2000 Act.

[21] Section 32(1)(b) of the 2000 Act.

[22] Section 32(2) of the 2000 Act.

Definitions from Sections 2 and 3 of the 2000 Act

...Except where the context otherwise requires, ***"development"*** means—

(a) the carrying out of any works in, on, over or under land, or the making of any material change in the use of any land or structures situated on land, or

(b) development within the meaning of Part XXI (inserted by section 171 of the Maritime Area Planning Act 2021).

"works" includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal and, in relation to a protected structure or proposed protected structure, includes any act or operation involving the application or removal of plaster, paint, wallpaper, tiles or other material to or from the surfaces of the interior or exterior of a structure.

"use", in relation to land, does not include the use of the land by the carrying out of any works thereon.

"land" includes any structure and any land covered with water (whether inland or coastal).

"structure" means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and—

(a) where the context so admits, includes the land on, in or under which the structure is situate, and

(b) in relation to a protected structure or proposed protected structure, includes—

(i) the interior of the structure,

(ii) the land lying within the curtilage of the structure,

(iii) any other structures lying within that curtilage and their interiors, and

(iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in subparagraph (i) or (iii).

"alteration" includes—

(a) plastering or painting or the removal of plaster or stucco, or

(b) the replacement of a door, window or roof, that materially alters the external appearance of a structure so as to render the appearance inconsistent with the character of the structure or neighbouring structures.

Definitions from Sections 2 and 3 of the 2000 Act - continued

"unauthorised development" means, in relation to land, the carrying out of any unauthorised works (including the construction, erection or making of any unauthorised structure) or the making of any unauthorised use;

"unauthorised structure" means a structure other than—

(a) a structure which was in existence on 1 October 1964, or

(b) a structure, the construction, erection or making of which was the subject of a permission for development granted under Part IV of the Act of 1963 or deemed to be such under section 92 of that Act or under section 34, 37G or 37N or 293 of the 2000 Act, being a permission which has not been revoked, or which exists as a result of the carrying out of exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of the 2000 Act).

"unauthorised use" means, in relation to land, use commenced on or after 1 October 1964, being a use which is a material change in use of any structure or other land and being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of the 2000 Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G, 37N or 293 of the 2000 Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject.

"unauthorised works" means any works on, in, over or under land commenced on or after 1 October 1964, being development other than—

(a) exempted development (within the meaning of section 4 of the Act of 1963 or section 4 of the 2000 Act), or

(b) development which is the subject of a permission granted under Part IV of the Act of 1963 or under section 34, 37G, 37N or 293 of the 2000 Act, being a permission which has not been revoked, and which is carried out in compliance with that permission or any condition to which that permission is subject.

There are a number of factors that should be considered when determining whether or not development requires planning permission. Some of these are described in more detail later in this section. The legislation governing planning enforcement is complex and this is reflected in judgments made by the courts, particularly the Higher Courts, regarding these matters. The 2000 Act and the 2001 Regulations should be relied upon in the first instance when considering matters relating to planning enforcement. Thereafter there is a wealth of literature, journals and articles on planning law, or aspects of it, available for more in-depth analysis. Legal advice should always be sought on matters of particular concern.

Table 3 below outlines some key questions for the case officer in the planning authority's enforcement team to consider when investigating a complaint:

Key Questions for a Case Officer to Consider When Investigating a Complaint:	
The concept of development:	Does the matter under investigation constitute development as defined in Section 3 of the 2000 Act? Have works been carried out? Has a change of use occurred?
Development – works:	Were the works carried out exempted development under Section 4 of the 2000 Act or the 2001 Regulations, or other relevant non-planning legislation? Has a Section 5 declaration issued in respect of the development on the site? Are there other Section 5 declarations issued by the planning authority or An Bord Pleanála that are instructive in assisting with the assessment of the case? [Precedents established in court judgments may also be of assistance.]
	In cases where permission was granted on the lands, is the development consistent with the provisions of that planning permission or does it represent an *'immaterial deviation'* from the development granted permission? (See section 3.2.2.1 below).
Development – change of use:	Is the change of use a material change of use under Section 3 of the 2000 Act?
	Is the change of use exempted development under the 2000 Act having regard to any restrictions on exemption? Is the change of use exempted development under the 2001 Regulations having regard to any restrictions on exemption?
	Is the change of use a material change of use for some other reason? Factors that might be considered include: ● Whether the character of the new use is different to that of the previous use; ● The impact the change of use has or is likely to have having regard to the proper planning and sustainable development of the area; ● Whether an intensification of use has occurred; ● Whether the planning unit has changed (for example, has an ancillary use become the primary use?); ● Whether the new use is a transient use; ● Whether the use represents an intensification of use; ● Whether the current change of use comprises the resumption of a previously abandoned or extinguished use; ● Whether planning permission been granted for the change of use.

Table 3: Questions for a Case Officer to Consider When Investigating a Complaint.

3.2.2.1 Development Consisting of Works

Where works constitute development, these works will require planning permission unless they fall within the definition of exempted development under Section 4 of the 2000 Act or under the 2001 Regulations.

Case law indicates that there is a certain amount of flexibility in how the permitted development is carried out. While the concept of *'immaterial deviation'* is not defined in legislation, permission may not be required for a minor difference between a constructed development and what was granted under the planning permission.[23] There are situations in enforcement cases where planning authorities have to decide whether or not a deviation from a permission is minor or trivial. The considerations and reasons for making such a decision should be carefully documented and conveyed to the relevant parties, including the complainant, at the appropriate time.

3.2.2.2 Development Consisting of a Material Change of Use

Section 2 of the 2000 Act defines an *'unauthorised use'* as a material change of use of any structure or land, commenced after 1st October 1964, which is not exempted development or the subject of a planning permission.[24] Section 3 provides that a change of use to any of the following uses shall be considered a material change of use:

- the use of any structure, land, tree or other object for the exhibition of advertisements;
- the placing or keeping of any vans, tents or other objects for the purpose of caravanning or camping or habitation or the sale of goods;
- the storage of caravans or tents;
- the deposit of vehicles whether or not usable for the purpose for which they were constructed or last used, old metal, mining or industrial waste, builders' waste, rubbish or debris; and
- the use of a single dwelling as two or more dwellings.

However, the 2000 Act does not define what constitutes a *'material change of use'* in the same way that it outlines what constitutes *'works'*. Through case law, the courts have considered at length the principles that can be applied to determine whether a material change of use has taken place. Where complex issues arise, it will be essential for the enforcement team to examine relevant case law precedents and to seek appropriate legal advice.

In broad terms, the case law precedent could be summarised as stating that it is not sufficient for there to be a change of use, that change must also be *'material'*. In *Westmeath County Council v Quirke & Sons*,[25] Mr Justice Budd outlined *that*:

> *"Many alterations in the activities carried out on land constitute a change of use; however, not all alterations will be material … Consideration of the materiality of a change in use means assessing not only the use itself but also its effects."*

In determining whether a material change of use has occurred, local authorities should, therefore, consider how the change affects the proper planning and sustainable development of the area. Other considerations include (but are not limited to):

[23] See, for example, *Cork County Council v Cliftonhall Ltd* [2001] IEHC 85. This case is summarised in the Legal Digest included at Appendix B.

[24] Section 2 of the 2000 Act clarifies that *"use"* in relation to land, does not include the use of the land by the carrying out of any works on those lands.

[25] Unreported Budd J., 23 May 1996.

The planning unit: Has the planning unit changed as a result of the change of use?[26] For example, has a restaurant with an ancillary take-away changed so that the take-away is now the primary use? Has an ancillary use expanded so much that it is now an independent use? Has a new use commenced that is not ancillary to the primary use?

Transient uses: If a use is short-lived or transient, it may not represent a material change of use (e.g. holding an event which may require other forms of consent).[27]

Intensification: This concept suggests that the scale of operations of a development have grown to such an extent that a material change of use requiring planning permission has occurred.

Case law[28] has established five principles that may be considered in determining whether a material change of use by way of intensification has occurred, these can be summarised as follows:

1. The object of the operation has changed to the extent that an unauthorised intensification of use may have occurred;
2. If a change in the method of production occurs so that a production that was quite low level was increased to an industrial scale, this could indicate that an unauthorised intensification of use has taken place;
3. The court may find that an unauthorised intensification of use has taken place where the scale of operations, at the time of initiation of injunction proceedings, as compared to the prior scale of operations (e.g. the pre-1964 or the use for which planning permission was granted) reveals an excessive level of growth beyond the level of change that would typically be expected to occur with any business;
4. In circumstances where the use of land results in planning or environmental effects relevant to the proper planning and sustainable development of the area (such as a considerable increase in heavy vehicle traffic), this could result in a material change of use through intensification;
5. In assessing whether an unauthorised intensification of use has occurred, planning permission must be construed objectively with regard to the application documents: *"The question is: what is permitted by law on this site?"*. A similar approach will apply to assessment of a pre-1964 use with reference to relevant evidence, such as Ordnance Survey photography and testimony from those in the area.

Abandonment: Abandonment can occur in relation to either development consisting of works or the operation of a use. Abandonment may occur where the development has ceased for a considerable period of time with no intention of resuming it.[29] Unless it is exempt from the requirement to obtain planning permission for other reasons, the resumption of an abandoned development is likely to represent a material change of use.

[26] See, for example, *Rehabilitation Institute v Dublin Corporation*, unreported, High Court, Barron J., 14 January 1988. This case is summarised in the Legal Digest included at Appendix B.

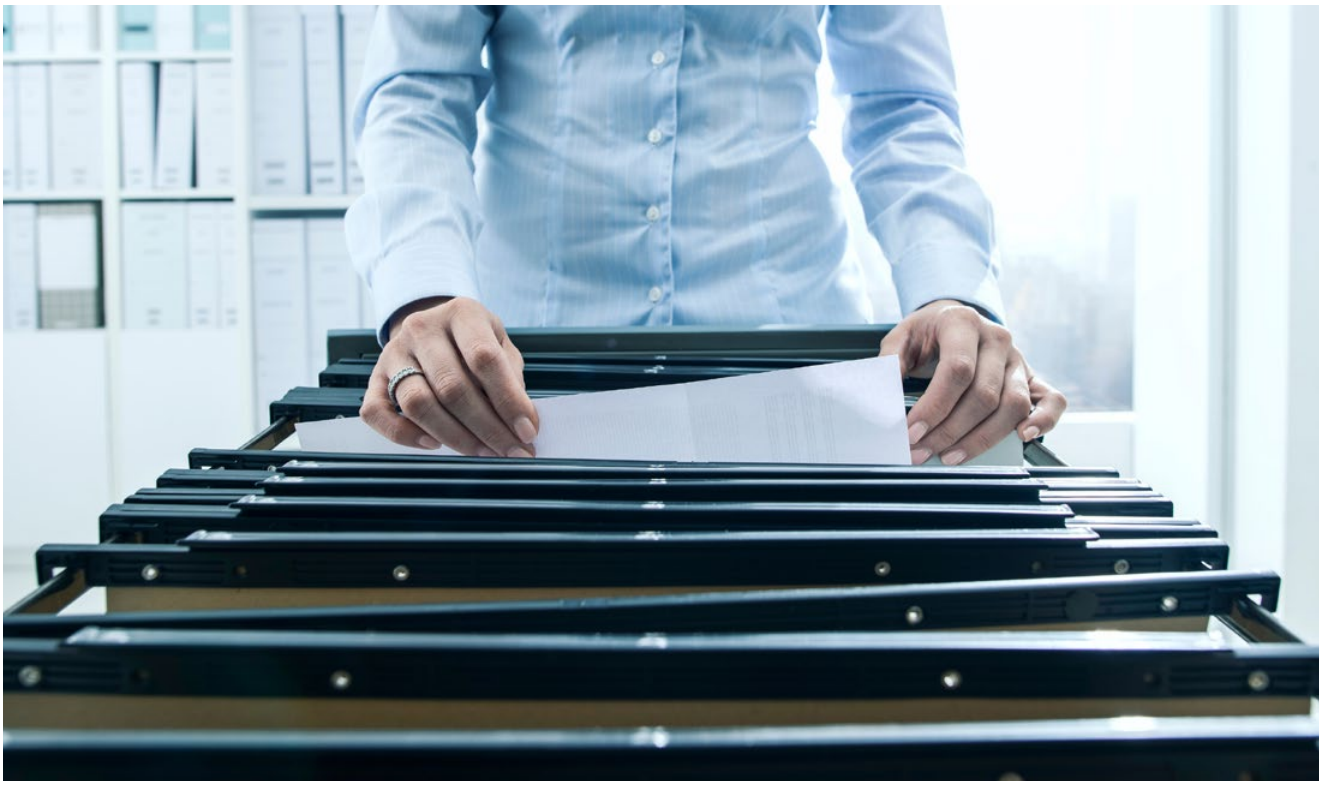
[27] For example, see *Butler v Dublin Corporation* [1999] 1 I.R. 565. This case is summarised in the Legal Digest included at Appendix B.

[28] *Weston Ltd v An Bord Pleanála* [2010] IEHC 255. This case is summarised in the Legal Digest included at Appendix B.

[29] See, for example, *Dublin County Council v Tallaght Block Co Ltd* [1982] ILRM 535. This case is summarised in the Legal Digest included at Appendix B.

Extinguishment: If planning permission for a new different use is implemented, the previous established use will be extinguished.[30] Extinguishment does not occur if the planning permission which permitted the development for a limited period[31] as an established or authorised development can be resumed at the end of the limited period without a requirement for planning permission. A use permitted under planning permission will be extinguished if the land or structure used for the permitted purpose is destroyed (for example, in a fire).[32]

The statutory time limits for enforcement proceedings are discussed further in section 3.5 and in particular, the time limits for enforcing conditions in respect of use are outlined in section 3.5.3.



[30] For example, please refer to *Donegal County Council v P Bonar Plant Hire Ltd T/A Bonar's Quarry* [2021] IEHC 342. This case is summarised in the Legal Digest included at Appendix B.

[31] Section 39(3) of the 2000 Act.

[32] See, for example, *Galway County Council v Connacht Proteins Ltd*, unreported, High Court, Barrington J., 28 March 1980. This case is summarised in the Legal Digest included at Appendix B.

3.3 Exempted Development

Section 32 of the 2000 Act states that planning permission is required in respect of any development of land which is not exempted development under the 2000 Act or the 2001 Regulations. Section 4 of the 2000 Act specifies a range of developments that are exempt for the purposes of the 2000 Act including development by a local authority in its functional area. In addition, the 2000 Act allows the Minister to create further classes of exempted development. The 2001 Regulations identify a range of such exempted developments.[33]

It is important that developers stay within these terms if they are to claim that their development is exempt. Failure to do so could mean that the development is unauthorised and leaves the developer open to enforcement procedures under the 2000 Act.

Restrictions on the general exemptions for developments are identified in Articles 6 and 9 of the 2001 Regulations. Article 9 of the 2001 Regulations restricts the availability of exempted development under Article 6 in certain circumstances, including inter alia, where a development would:

- contravene a condition attached to a planning permission;
- endanger public safety by reason of traffic hazard or obstruction of road users or by reason of hazardous glint and/or glare for the operation of airports, aerodromes or aircraft;
- consist of the further development of an unauthorised structure or a structure in which an unauthorised use is being carried out.

It is important to note that development that requires an AA, due to a likely significant effect on the integrity of a European site[34] or which requires an EIA,[35] cannot be deemed exempted development.

Where a developer wishes to rely in court on his development being an exempted development the onus is normally on the developer to prove this. In a case where the onus of proof regarding Section 4(1)(h) in the 2000 Act and exempted development Classes 32 and 39 in the 2001 Regulations was examined the court stated that:

> *"in my opinion the stage presently reached is that there is clear preponderance of authority in favour of the proposition that when the development complained of is sought to be excused under cover of either s. 4 of the Act of 2000 or under the exempted developments provisions in the Regulations then the onus of establishing this point is upon he who asserts. In this context I cannot see any difference between the section and the Regulations."*[36]

This conclusion has been supported in subsequent judgments of the superior courts.

[33] Articles 6 and 10, and Schedule 2 Parts 1-4 of the 2001 Regulations.

[34] Article 9(1)(viiB) of the 2001 Regulations.

[35] Article 9(1)(c) of the 2001 Regulations.

[36] *South Dublin County Council v Fallowvale Ltd and Weston Ltd* [2005] IEHC 408, para. 70.

3.3.1 Exempted Development and Section 5

Any person may request in writing from a planning authority a declaration on whether a development is or is not development, or is or is not exempted development.[37] If the person is dissatisfied with a declaration issued by the planning authority they can refer the matter to An Bord Pleanála to review the declaration and to make its own decision on the matter.

A planning authority can also refer any question on what is or is not development or is or is not exempted development to An Bord Pleanála for a decision.

Where the planning authority comes to the opinion that unauthorised development has likely taken place, the next step will be to determine whether enforcement action can be taken with reference to statutory time limits set out in the 2000 Act.

3.4 Pre-1964 Development

The requirement to obtain planning permission was first introduced nationally on 1 October 1964 with the coming into force of the development management provisions of the Local Government (Planning and Development) Act, 1963. Planning permission is not required:

> *"in the case of land which, on 1 October, 1964, was normally used for one purpose and was also used on occasions, whether at regular intervals or not, for any other purpose, for the use of the land for that other purpose on similar occasions after 1 October, 1964."*[38]

Quarries are an exception to this rule, and there has been extensive case law[39] in relation to quarry developments since the 1963 Act. Enforcement cases relating to quarries, where the developer is claiming pre-1964 status, require bespoke legal advice.

There remain some situations where the status of development erected or in use prior to 1 October 1964 could be an issue in relation to planning enforcement, however, with the passage of time since October 1964, the issue of pre-1964 developments is becoming less of a feature in enforcement cases.

3.5 Statutory Time Limits for Enforcement Proceedings

The 2000 Act sets out statutory time limits for bringing enforcement proceedings. Planning authorities may not institute enforcement proceedings regarding an unauthorised development after seven years from the date of the commencement of the development.[40] Notwithstanding this restriction, it is important to understand that even where the time limit has passed, this does not result in an unauthorised development becoming authorised instead it becomes immune from enforcement and prosecution by the planning authority and enforcement is in effect statute barred.

This time limit must be recognised as a risk factor for planning authorities in relation to their role in ensuring proper planning and sustainable development. Accordingly, it is very important that planning authorities pay close attention to enforcement cases that are approaching the time limit for being statute barred and, in as far as is possible, prioritise progressing action in such circumstances.

[37] Section 5 of the 2000 Act.

[38] Section 39(4) of the 2000 Act.

[39] *Hehir v An Bord Pleanála and Another* [2016] IEHC 104, at paras 37-38.

[40] Section 157 of the 2000 Act.

The 2000 Act needs to be carefully examined in relation to what is commonly referred to as the *'7-year'* limit as additional time must be applied to the *'7-year'* period and the length of the additional time will vary (see section 3.5.1 below). It is also important to note that in the case of certain specified developments, there are no time limits for bringing enforcement proceedings. This is discussed in more detail in the sections below. It should be noted that this practice note refers to the statutory time limit as the *'7-year'* limit for ease of reference.

3.5.1 Calculating the Appropriate Period

Where calculating any appropriate period or other time limit referred to in the 2000 Act the period between the 24th day of December and the first day of January, both days inclusive, is disregarded.[41] This has the effect of extending the 7-year periods specified by nine days per year.[42] Therefore, for a development carried out without planning permission the 7-year period for taking action becomes seven years and 63 days. For a development carried out with a planning permission with a standard five year lifespan, but contrary to the terms of the permission, the period for taking enforcement action becomes seven years and 108 days.

These periods have been further added to by the emergency measures taken by the Government in relation to COVID-19. The Minister made Orders, which resulted in an extension of time for a range of specified/appropriate periods and timelines under the 2000 Act. These periods included those in relation to planning enforcement and were for a total period of eight weeks (56 days) between 29 March and 24 May 2020.[43] Where a planning permission was granted and still in force before 29 March 2020 and where that planning permission had the default life span of five years under Section 40 of the 2000 Act, the Section 251A Order operated to automatically extend the duration of that existing permission by an eight-week (56 days) period. Where a planning permission specified the life of that permission, the Section 251A Order does not apply and will not operate to extend the duration of such a permission.

The issue of the 7-year time limit for taking action with the additional days allowed for Christmas breaks and the COVID-19 emergency of 2020 demonstrate the complexities associated with the 7-year limit and emphasise the importance of acting swiftly on enforcement matters as outlined in the Best Practice/Principles of Good Enforcement set out in the Development Management Guidelines for Planning Authorities (DEHLG) (2007) and outlined in Table 1 above.

3.5.2 Warning Letters, Enforcement Notices and Legal Proceedings

For both warning letters and enforcement notices the 7-year limit runs either from:

- the date of commencement of development (for development without a planning permission); or
- for seven years following the expiration of the planning permission.[44]

Care should be taken when examining the date of the expiration of the planning permission, in certain circumstances the period may be defined in the permission and/or an extension of duration of permission may have been obtained for the development.[45]

[41] Section 251 of the 2000 Act.

[42] See *Browne v Kerry County Council* [2009] IEHC 552.

[43] DHLGH (2020) Frequently Asked Questions - Resumption of Statutory Planning timelines further to the expiry, on 23rd May 2020, of Orders made under Section 251A of the Planning and Development Act 2000 (as amended).

[44] Section 157(4)(a)(i) and (ii) of the 2000 Act.

[45] Under Section 41 of the 2000 Act the planning authority may vary the appropriate period and under Section 42 of the 2000 Act the planning authority may extend the appropriate period of a planning permission.

3.5.3 Conditions Relating to Use on a Permission

Notwithstanding the 7-year limit discussed above, planning authorities should remain cognisant that enforcement proceedings may be commenced at any time in respect of a breach of any condition concerning the use of land to which the permission is subject.[46]

It is noteworthy that this flexibility applies only to conditions that relate to the use of land. For example, it would not apply to a condition relating to the external finishes or materials of a structure. In such cases, the planning authority would need to identify the breach at an earlier stage in order to take action.

This section would be relevant to a case where, for example, a building that was granted permission over 40 years ago with a condition of the permission to restrict the use of the building to use as a warehouse or store. In this hypothetical example, the building is constructed fully in accordance with plans, and it is used for a period of three years as a warehouse for storage of materials. In year four the owner starts a manufacturing operation within the building. However, the planning authority only becomes aware of this fact decades later, perhaps during a conveyance of the property. Notwithstanding the fact that a manufacturing use has been operating in the warehouse building for the intervening decades, under the 2000 Act, it is open to the planning authority to commence proceedings.

When taking enforcement action outside of the 7-year limit on a condition concerning the use of land, such as the example above, the 2000 Act stipulates that *'proceedings'* may be commenced at any time. This excludes the issue of a warning letter or enforcement notice. This means that in such cases the relevant action is to instigate court proceedings i.e. a Section 160 injunction, as provided for in the 2000 Act.

For a variety of reasons, these cases are likely to be rare and in the majority of cases, a change of use is likely to come to the attention of a planning authority within the normal 7-year limit. Nonetheless, it is important to acknowledge the enforcement powers available to the planning authority should this scenario arise.

3.5.4 Injunctions

The 7-year limit also applies to injunctions sought under Section 160 of the 2000 Act, with the exception of injunctions on a condition concerning the use of land, as discussed above in section 3.5.3. An application to the High or to the Circuit Court cannot be sought against developments,[47] where:

(a) the development has no permission and where it has been seven years since the commencement of development,

or

(b) permission has been granted for the development and seven years has expired following the expiration of the permission.

[46] Section 157(4)(b) of the 2000 Act.

[47] Section 160(6)(a)(i) and (ii) of the 2000 Act.

3.5.5 Exceptions for Quarry Development and Peat Extraction

The 7-year time limits for issuing a warning letter, serving an enforcement notice or instituting legal proceedings do not apply in relation to unauthorised quarry development or peat extraction.[48] Likewise an application to the High Court or Circuit Court may be made at any time for an order to cease unauthorised quarry development or unauthorised peat extraction development.[49]

3.5.6 Works and Use

When dealing with time limits while a structure may be beyond the scope of the 2000 Act for taking enforcement action due to the 7-year limit, the actual use of the structure may not have commenced until sometime after the development of the structure. It may therefore be possible to take enforcement action against the unauthorised use.[50]

3.5.7 Time Limits and Prosecutions

As noted above it is an offence to carry out unauthorised development, persons can be prosecuted either on indictment or summarily.[51] Where summary prosecutions are instituted in the District Court by the planning authority the time limits set out in the 2000 Act[52] must be strictly adhered to. This provides that summary proceedings may be commenced within six months of the offence being committed or within six months of sufficient evidence being available to justify proceedings, whichever is later.[53]

The planning authority's legal team and the court will require evidence of the date or dates on which the planning authority became aware of and investigated the alleged unauthorised development.

While six months can appear to be an adequate period for initiating proceedings the best way to avoid arguments in court is to bring proceedings well within the six month limit of the planning authority becoming aware of non-compliance with the requirements of an enforcement notice.

[48] Section 157(4)(ab) of the 2000 Act.

[49] Section 160(6)(ab) of the 2000 Act.

[50] *Cork County Council v Slattery Pre-Cast Concrete Limited*, IEHC 291.

[51] Section 156 of the 2000 Act.

[52] Section 157 of the 2000 Act.

[53] Section 157(2) of the 2000 Act.

3.6 Freedom of Information and the Availability of Documents/Information

The **Development Management Guidelines for Planning Authorities** (June 2007) recommend, in the interest of transparency, that all documentation relating to enforcement actions (correspondence, planners' reports and recommendations, Chief Executive's decisions, representations made under Section 152 of the 2000 Act, warning letters, enforcement notices, notes on site visits, etc.) should be readily available to all parties directly involved and to the general public.[54]

The Guidelines outline that exceptions to this advice would be where this availability could prejudice a possible court action or where it would reveal the identity of complainants (possibly leading to intimidation).

Unlike planning applications where complete planning files (except sensitive personal data) are open to scrutiny and are available online, many planning authorities retain the majority of the enforcement file as private documents. The inability to access information can in some instances unnecessarily frustrate those engaging with planning enforcement sections including complainants, elected members and those parties that may be the subject of the enforcement action. The documents, as set out in the Development Management Guidelines, should be readily available to view with sensitive data retained as private by the planning authority. However, details which could reveal the identity of a person who has given information in confidence should not be disclosed.[55]

The need for complaints about enforcement practice to either the OO or the OPR could be minimised if the parties in an enforcement case understood the procedures followed by the planning authority in dealing with an enforcement file. It is therefore recommended, in section 7 of this practice note, that planning authorities should prepare, adopt and publish formal planning enforcement policy and practice documents.

3.7 Seriousness and Urgency (vis-à-vis assessing which steps to take)

A representation from a person regarding an unauthorised development should be filtered or reviewed to determine if it appears *"vexatious, frivolous or without substance or foundation"*.[56]

Following the service of a warning letter or an inspection by enforcement staff where it is apparent that the complaint is vexatious, frivolous or without substance or foundation the file should be closed and the person who made the complaint should be informed. The complaint should be retained by the planning authority for record purposes.

Alternatively, if following the initial review of a representation, it appears that the development falls under any of the types of development mentioned by the Minister in the 2013 Policy Directive then urgent attention needs to be given to the development.[57] The Directive requires planning authorities to prioritise large-scale unauthorised development and enforcement cases where:

[54] Development Management Guidelines for Planning Authorities (2007) page 98 Section 10.3.11.

[55] See Section 42 of the Freedom of Information Act 2014 where *"this Act does not apply to...(m) a record relating to information whose disclosure could reasonably be expected to reveal, or lead to the revelation of — (i) the identity of a person who has provided information in confidence in relation to the enforcement or administration of the law to an FOI body, or where such information is otherwise in its possession, or (ii) any other source of such information provided in confidence to an FOI body, or where such information is otherwise in its possession".*

[56] Section 152(1)(a) of the 2000 Act.

[57] Planning and Development (Planning Enforcement) Policy Directive (2013).

- the development or works subject to enforcement proceedings would have required EIA; a determination as to whether EIA was required (i.e. screening for EIA); or an AA under the Habitats Directive; or
- the works subject to enforcement proceedings are works to which Sections 261 or 261A of the 2000 Act apply i.e. quarries.

Other types of development requiring prioritisation would include developments with public health or safety implications, peat extraction, damage to designated natural heritage areas, damage to/demolition of protected structures or, where the planning authority is aware of previous unauthorised developments by the same developer.

Some complaints may not be contrary to planning legislation but may be of concern to other departments of a local authority such as its fire service or veterinary section or may be the responsibility of another public service organisation e.g., the EPA. In such instances, the case should be referred to these departments/bodies for investigation and possible action under other codes.

3.8 Discretion of the Planning Authority

The 2000 Act sought to bring a more rigorous and streamlined approach to the practice of planning enforcement than had existed heretofore. However, there are a number of situations in the enforcement regime where matters are at the discretion of the planning authority. These are summarised in Table 4.

Summary of the Areas Where the Planning Authority may Exercise Discretion When Undertaking its Enforcement Function in Accordance With the 2000 Act:		
a)	**Trivial or minor cases:** The decision not to issue a warning letter where the planning authority considers the development in question is of a trivial or minor nature.	Section 152(2)
b)	**Scale of the investigations:** The extent of investigations that a planning authority *"considers necessary to enable it to make a decision on whether to issue an enforcement notice or make an application under section 160"*.	Section 153(1)
c)	**Serve an enforcement notice without first issuing a warning letter:** The planning authority may decide to escalate a case and serve an enforcement notice without having issued a warning letter in cases of urgency. A planning authority can serve an enforcement notice if it forms an opinion that: *"due to the nature of an unauthorised development and to any other material considerations, it is necessary to take urgent action with regard to the unauthorised development"*.	Sections 154 and 155
d)	**Decide not to issue an enforcement notice:** A planning authority can also decide, despite having issued a warning letter, not to issue an enforcement notice.	Section 154(2)
e)	**Decide to pursue two enforcement procedures:** The planning authority may decide to issue an enforcement notice and also to make an application for an injunction under Section 160.	Section 153(8)
f)	**Who to serve a notice on:** A planning authority having served an enforcement notice may decide to serve notices on additional persons. [Note: the time for complying with the new notices should be extended.]	Section 154(3)(b)
g)	**Utilising the planning authority's powers to undertake works:** If the steps in the enforcement notice are not undertaken within the timeframe specified in the notice, the planning authority may enter on to the land and take the steps specified in the enforcement notice and may recover the costs incurred.	Section 154(6)
h)	**Mechanism for securing costs:** A planning authority may decide the mechanism by which to recover any expenses reasonably incurred by the planning authority in carrying out its enforcement functions in relation to a development.	Section 154(7)
i)	**Withdrawal of an enforcement notice:** A planning authority may *"for stated reasons"* withdraw an enforcement notice.	Section 154(11)
j)	**Type of prosecution:** The planning authority may, following investigation, pursue a case through summary proceedings in the District Court or request the Director of Public Prosecutions (DPP) to decide whether the case should be prosecuted by the DPP on indictment in the courts.	Section 156 and Section 157

Table 4: Discretion When Undertaking Enforcement Functions - Summary.

3.8.1 Importance of Documenting Reasons and Considerations

Best practice in the discretionary situations outlined above would be for the planning authority to set out the reasons for its course of action e.g. where it decides, despite having issued a warning letter, not subsequently to serve an enforcement notice (Section 154(2)). These decisions should be formally reported on file and approved by the appropriate senior officer. A person may wish to interrogate a planning authority's decision by seeking to ascertain information from the authority itself, by making a complaint to the OO or by way of judicial review. Planning authority reports and recommendations that led to decisions by a decision maker are *"...necessary so as to not frustrate that person in invoking the supervisory jurisdiction of the High Court by way of an application for judicial review"*.[58]

In the context of development management, the *Mulholland v An Bord Pleanála* case outlines the obligation of a planning authority to state the considerations on which a decision is based. These should be sufficient to:

> *"(1) give to an applicant such information as may be necessary and appropriate for him to consider whether he has a reasonable chance of succeeding in appealing or judicially reviewing the decision,*
>
> *(2) arm himself for such hearing or review,*
>
> *(3) know if the decision maker has directed its mind adequately to the issues which it has considered or is obliged to consider, and*
>
> *(4) enable the courts to review the decision"*.[59]

These factors should also be considered in the context of decision making relating to enforcement matters. In enforcement cases as there is no appeal route to An Bord Pleanála; a remedy is to seek a judicial review of a planning authority's decision e.g. to serve/not serve an enforcement notice.

[58] Browne, D. (2021) Simons on Planning Law, Third Edition, p.1196.

[59] *Mulholland v An Bord Pleanála* (No 2) [2006] 1 IR 453, para. 42.

4.0 The Enforcement Process

Enforcement cases are inherently sensitive, adversarial, time-bound and involve several parties, including legal agents and the courts, therefore, protocols developed by the enforcement sections of planning authorities should allow for precise and careful case management and reporting.

The opening of an unauthorised development investigation can be triggered by the planning authority's own observations/findings that unauthorised development may have been, is being or may be carried out. A planning authority's role should include proactively monitoring their areas and commencing enforcement action based on their own site inspections.

Planning authorities need to be proactive in relation to unauthorised development and their enforcement service should not be solely based on complaints received. It is recognised that in practice, due to current resource constraints, most unauthorised development investigations are carried out on foot of complaints received by planning authorities from the general public or from interested bodies e.g. environmental and community organisations or other public bodies.

4.1 Receipt of Complaint and Opening of Enforcement File

Where a person makes a complaint in writing to a planning authority that unauthorised development *"may have been, is being or may be carried out"*, and it appears that the complaint is not vexatious, frivolous or without substance the planning authority must issue a warning letter to the owner, the occupier or any other person carrying out the development.[60]

The 2000 Act requires that any such representation or complaint to the planning authority must be made in writing.[61] The 2000 Act does not set out any other requirements for complaints, with the exception of the complaint being in writing and *"not vexatious, frivolous or without substance or foundation"*. The 2000 Act requires the planning authority to notify any person that made a complaint of its decision to serve an enforcement notice. This means that any person who makes a complaint should provide their name and address to the planning authority so that they can be notified of the decision to serve an enforcement notice. However, the courts have indicated that the 2000 Act does not prohibit planning authorities from investigating anonymous complaints.[62] Complaints can also be made on behalf of a third party, for example, by an agent or by a public representative on behalf of constituents.

[60] Section 152(1) of the 2000 Act.

[61] The Interpretation Act 2005 defines *"writing"* to include *"printing, typewriting, lithography, photography, and other modes of representing or reproducing words in visible form and any information kept in a non-legible form, whether stored electronically or otherwise, which is capable by any means of being reproduced in a legible form"*.

[62] *Taaffe v Louth County Council* [2013] IEHC 314.

Most planning authorities have standard complaint form templates available at their public counters and on their websites to assist complainants and to ensure that key information is provided to assist a planning authority's investigations. Having regard to the minimal requirements set out in the 2000 Act and to the importance of facilitating public participation in planning enforcement it is essential that enforcement complaint templates do not create barriers to the making of representations by members of the public on potential unauthorised development. There is no legal obligation to use the planning authority's complaint form when lodging a complaint about unauthorised development. The only requirement under the 2000 Act is that the compliant is in writing and it is not vexatious, frivolous or without substance or foundation.

A sample complaint form is included in Appendix A of this practice note.

4.2 Investigation by the Planning Authority and Inspections

Timeliness is essential for carrying out enforcement functions and site inspections should be carried out by the planning authority as speedily as possible. Prior to carrying out an inspection, desktop background research should be carried out by the planning authority's case officers using the appropriate IT systems which should be linked to the local authority's GIS. Some areas that should be considered as part of a preliminary desktop review are outlined in Figure 2 below.

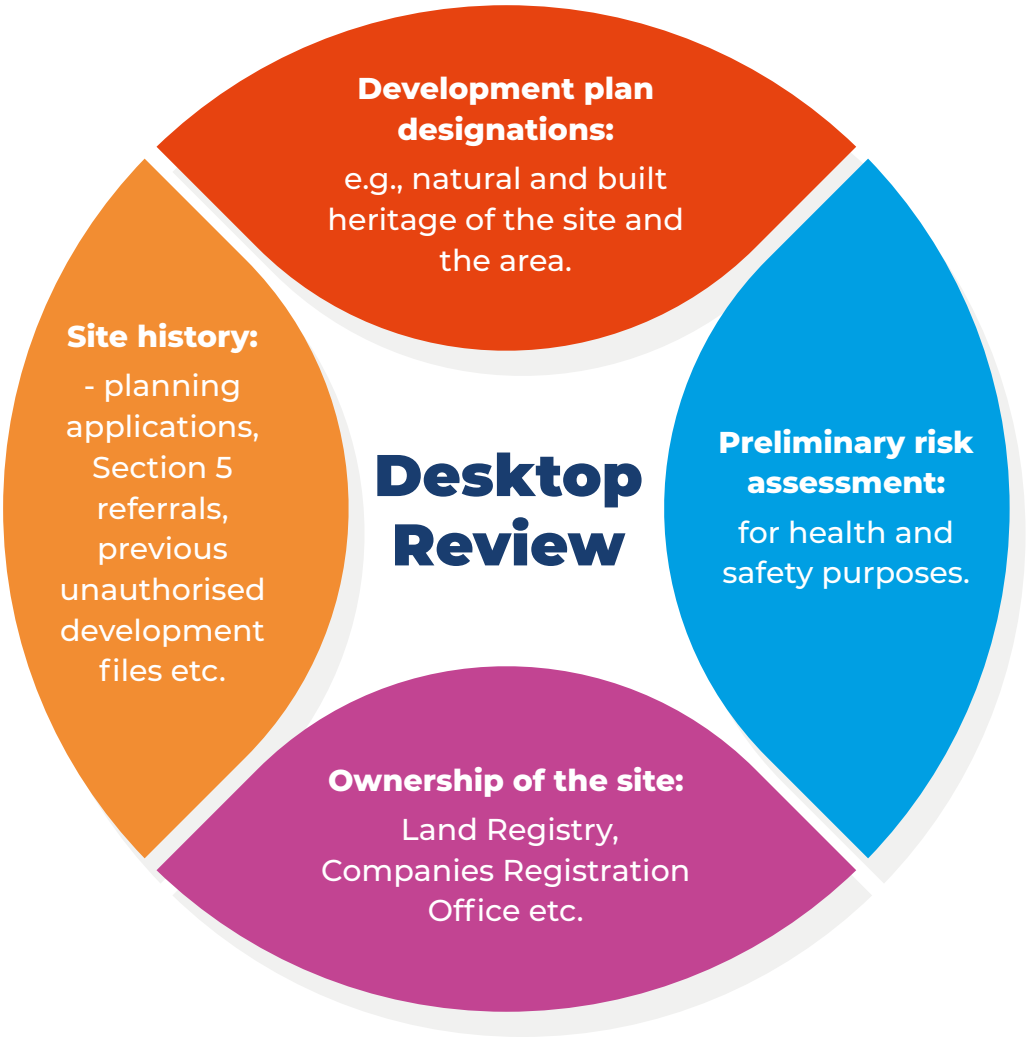


Figure 2: Pre-inspection Desktop Review.

Site inspections can:

(i) Establish the facts on the ground and assist the planning authority in coming to a conclusion that the complaint is or is not vexatious, frivolous or without substance or foundation;

(ii) Reveal information about the development – its extent etc. – which will form an integral part of the case officer's report on the case being investigated;

(iii) Allow the planning authority's case officer to engage with the developers and their agents and put them on verbal notice regarding their responsibilities in relation to the development; and

(iv) Send out a signal to the complainants that the planning authority is addressing their concerns and to the broader community that it is actively following up on enforcement matters (which may have the effect of encouraging other potential transgressors *'to stay onside'* regarding planning law).

Follow-up inspections are required during the progress of an investigation relating to an unauthorised development including:

- To monitor the nature and extent of any on-going activity;
- To confirm whether or not an enforcement notice has been complied with;
- To confirm the up-to-date condition of a site prior to attendance at court; and
- To confirm whether or not a court order has been complied with.

4.3 Powers of Entry and Authorised Person

The 2000 Act provides for the entry of an authorised person on to land. An *'authorised person'* is defined in Section 252 as:

> *"a member of the Board or a person who is appointed by a local authority, the Minister or the Board to be an authorised person for the purposes of this section and section 253."*[63]

4.3.1 General Power of Entry by the Planning Authority

An authorised person may enter on to lands for any purpose connected with the 2000 Act between 9am and 6pm (or during business hours outside of those hours) subject to a number of conditions. The authorised person may:

> *"do all things reasonably necessary for the purpose for which the entry is made and, in particular, may survey, carry out inspections, make plans, take photographs, take levels, make excavations, and examine the depth and nature of the subsoil."*[64]

The planning authority must either obtain consent from the occupier of the land or from the owner of the occupied land or must give 14 days' notice of the planning authority's intention to enter on to the land. The person who receives this notice may apply to the District Court for an order prohibiting entry on to the land or specifying conditions that must be observed during the entry on to the land. Where the occupier or landowner prevents entry on to the land, the planning authority may apply to the District Court, on notice to the occupier or landowner as appropriate, to approve the entry.

[63] Section 252(11) of the 2000 Act.

[64] Section 252(2) of the 2000 Act.

Where the authorised person believes that entry to the land might be obstructed, the authorised person may request to be accompanied by a member of An Garda Síochána.[65]

The 2000 Act requires that every authorised person shall be furnished with a certificate reflecting the appointment as an authorised person that shall be produced, if requested, when entering on to the site.[66]

4.3.2 Powers of Entry by a Planning Authority for Enforcement

The powers of entry on to land for any purpose connected with enforcement[67] are broader than the general powers discussed above:

> *"an authorised person may, for any purpose connected with Part VIII, at all reasonable times, or at any time if he or she has reasonable grounds for believing that an unauthorised development has been, is being or is likely to be carried out, enter a premises or on land and bring thereon such other persons (including members of the Garda Síochána) or equipment as he or she may consider necessary for the purpose".*

The authorised person must have consent from the occupier or give 24 hours' notice before entering a residential premises under Section 253. In addition to the general powers of entry and investigation discussed above at section 4.3.1, the authorised person may require any person on the site to produce information or require the production of records or documents, from which copies or extracts may be taken, if necessary. The District Court judge has powers to issue a warrant in circumstances where an authorised person furnishes sworn information that he or she has been prevented from accessing the site or has reasonable grounds for believing that evidence of a suspected offence may be removed or destroyed or that any particular structure may be damaged or destroyed.

Planning authorities should ensure that the relevant staff are appointed as authorised persons for the purposes of the 2000 Act. This includes issuing the appropriate certificate of appointment to them so that it can be produced by staff, if requested to do so. It is also worth stating at this point that all other officers in enforcement sections or senior members of management who have responsibilities for enforcement e.g. signing Chief Executive's Orders, approving the taking of court proceedings including in the superior courts, should have proof of their appointments, delegations orders etc., as they may be required in court cases.

4.4 Health and Safety

All local authorities should have up-to-date health and safety protocols in place including Health and Safety training, Safe Pass cards for staff, lone working and *'person-down'* procedures and on-site safety protocols. Given the potentially adversarial nature of planning enforcement it is important that management and staff implement good health and safety practices in accordance with established protocols. Case officers should carry out a preliminary risk assessment before going on site. If the officer considers that a situation is unsafe, the officer can return to a site with a colleague at a later date/time or the planning authority can request the assistance of the Gardaí to accompany the officer in carrying out the inspection. In all cases staff should, as a minimum, have the appropriate Personal Protective Equipment (PPE) attire and ensure their Safe Pass card is up-to-date.

[65] Section 252(8) of the 2000 Act.

[66] Section 252(10) of the 2000 Act.

[67] Section 253 of the 2000 Act.

There may be rare situations where different methods are required to carry out an inspection e.g. the use of drones to view a development or through the use of inspectors from outside the planning authority area (and who have been duly authorised to carry out enforcement functions).

4.5 Site Inspections

A site inspection by planning authority staff is the principal source of the planning authority's own information about possible unauthorised development. As discussed at section 4.2 above, some basic research of the site should be carried out before carrying out the first inspection e.g. planning and enforcement history, development plan or other designations etc. Measurements and photographs of structures on the site should be taken. Notes taken on site should be written up as soon as possible afterwards, in a report, by the case officer. The notes taken on site should be retained as they will be required by the case officer when giving evidence at any subsequent court hearing. While the site is being inspected any people present (e.g. builders, designer, owner etc.) may be spoken to and any relevant information should be requested and gathered from them regarding the development which is being investigated. Additional site inspections will be required as the case progresses e.g. to confirm whether or not an enforcement notice has been complied with, prior to attendance at court in the event of prosecution for non-compliance with a notice etc.

Section 4.6 Planning Report and Recommendation

Reports on unauthorised developments should be prepared as soon as possible following site inspections. Reports need to be accurate, factual and free of personal observations on extraneous matters. Reports can be required for a number of reasons:

- The initial report of a case officer on a development, following the receipt of a complaint, will form the basis on which a decision is made by the planning authority on whether or not to take action and what form that action should take;
- They can be needed to form the basis for Circuit or High Court affidavits;
- They can be required to update the court on a matter e.g. continuing non-compliance with a court order etc.

Depending on circumstances, reports can deal with matters as set out in Table 5 below.

Key Elements of the Case Officer's Planning Enforcement Report	
Desktop Research:	A review of information and details from such sources as: • The original complaint(s) and any attached documentation; • Development Plan Designations – protected structures, views etc.; • Land Registry – identification of landownership details; • Companies Registration Office – names of company directors; • National Parks and Wildlife Service (NPWS) – information regarding European and national designated natural heritage sites; and • Ordnance Survey maps.
Site History:	A detailed review of the planning history of the site including: • An examination of planning permissions and any relevant deviations from these; • Any Section 5 declarations; • Any photographs on historical files or aerial photos and images from Google Earth; • Google Street View; and • Reports and/or information from other departments or public bodies.
Site Inspection:	An overview and summary of: • The findings of site inspection(s); • Any encounters with persons on site during an inspection; and • The background to any photographs taken by the case officer or other planning authority staff.
Consideration of Planning Law:	A detailed review of the planning law and regulations relevant to the case with particular reference to the key concepts (as discussed in section 3.0): • Relevant exempted development provisions of the 2000 Act and 2001 Regulations; • Any relevant development plan or heritage designations; • Any possible pre-1964 issues; and • The effect, if any, of the 7-year time limit.
Assessment & Recommendation:	• Assessment of the alleged unauthorised development; • The recommendation of the case officer on the course of possible action the planning authority may take; • Screening for EIA and AA where enforcement is being recommended; and • The draft wording of a warning letter or an enforcement notice, where required by the planning authority.
The report should be comprehensive and accurate so that there is adequate information to frame a warning letter or enforcement notice and to assist a decision-maker in coming to a decision on the course of action the planning authority should take.	

Table 5: Key Elements of the Case Officer's Planning Enforcement Report.

4.7 Sources of Information

Investigations by the planning authority, are crucial to making determinations required by the 2000 Act during the course of an alleged unauthorised development and, can vary in detail and extent depending on circumstances. Section 153(1) of the 2000 Act states that as soon as may be after the issue of a warning letter the planning authority *"shall make such investigation as it considers necessary to enable it to make a decision on whether to issue an enforcement notice or make an application under section 160"*. Most planning authorities carry out, at least preliminary, investigations prior to the issue of a warning letter.

4.7.1 Internal Sources of Information

The planning authority's own records and files, either in the planning department or in other departments, will assist in the investigation of an alleged unauthorised development. These are summarised below:

Sources of Information - Internal	
Planning Register and Datasets:	• The planning register contains the planning history of the lands under investigation and of the general area – planning applications/decisions, Section 5 referrals, quarry registrations etc. The planning files relevant to the site should be reviewed. They may disclose that the complained of development has in fact a planning permission; • Other unauthorised development files. There may have been a previous complaint about the site together with investigations, reports and notices in the planning authority's records; and • Development Plan/Local Area Plan – these should be reviewed e.g. for designations that may assist and impact on the preparation of a report and recommendation e.g. evidence that a structure is on the Record of Protected Structures (RPS), that a site is in a designated area e.g. Special Area of Conservation (SAC) etc. A planning authority's in-house GIS can be interrogated to gather all relevant planning site history, as above. Many older planning files will also be digitally scanned, making this information more readily accessible.
Other Local Authority Registers and Datasets:	• Electoral Register - this may indicate the names of the occupiers of a structure. • Rates Register - this can be researched in relation to properties which are the subject of commercial rates. • Other sections of the local authority for example environment, roads/ transportation, building control, can also hold records which can assist the case officer in the researching and reporting on an alleged unauthorised development. Environment departments can hold files e.g. in relation to agricultural and industrial developments while building control sections would have information in relation to housing schemes that are under construction or have been completed. Many of the above datasets and registers will be available through the planning authority's GIS mapping. It is important that the planning enforcement section has access to the relevant GIS layers.

Table 6: Sources of Information – Internal.

4.7.2 External Sources of Information

Sources of information outside the planning authority, over and above what has been received from any complainant, can also be used to research the facts surrounding a development. These are summarised as follows:

Sources of Information - External	
Tailte Éireann – Land Registry	Tailte Éireann - Land Registry maintains a computerised record of all registered digitised land parcels. The registered land in each county is divided into folios with a map, one for each individual ownership or title. The folio is evidence of title to property and any rights or burdens on the land. For a prescribed fee local authorities can obtain all available data on a landholding (name and address of owners, mortgage details, along with maps outlining the holding).
Companies Registration Office (CRO)	The CRO is the central location where public statutory information on Irish companies is available. The CRO deals with the registration of new companies and the registration and making available for inspection of a range of statutory documents and the statutory receipt of mortgages and charges. The CRO is also responsible for the registration of business names. Almost all of the information filed with the CRO is available for public inspection, usually for a small fee. Certain vital information, such as a company name and registered office address, may be checked free of charge on a web search facility. A more detailed synopsis of a company is available by ordering a company printout or a copy of any document filed. This again can be obtained using the web search facility and a charge applies. Details of business names are also available using the search facility.
Aerial Photographs/ Ordnance Survey Maps	Tailte Éireann – National Mapping Division formerly known as Ordnance Survey Ireland (OSi) produces high resolution aerial photographs covering the State and can be used as a source of information on the progress of developments over the years e.g. quarries. Aerial photos are date stamped which indicate when and by who the images were taken and can be used in evidence in court.
Google Earth and Street View	More recently images from Google Earth/Street View can also be used to assist planning authorities in researching cases e.g. to ascertain information on when a development might have occurred. While Google Earth images can be used to corroborate a planning authority's case they cannot be used in evidence given that they were taken by satellite and are an edited image taken over a period of time.
Environmental Protection Agency (EPA)	Many of the EPA's licensing files are available for public inspection. Files available on the EPA website include Industrial Emissions (IE) and Integrated Pollution Control (IPC) applications, Waste applications, Volatile Organic Compounds (VOCs) applications, Wastewater Discharge applications (WWDs), Historic Landfill applications and related documents and the Extractive Industries Register including an inventory of closed extractive waste facilities. In most cases documentation includes the relevant application, an inspector's report and the approved licence.

National Inventory of Architectural Heritage (NIAH)	The purpose of the NIAH is to identify, record, and evaluate the post-1700 architectural heritage of Ireland as an aid in the protection and conservation of the built heritage. NIAH surveys provide the basis for the recommendations of the Minister for Housing, Local Government and Heritage to planning authorities for the inclusion of particular structures in their Record of Protected Structures (RPS). The published surveys with written descriptions, photographs and maps are a significant source of information on the selected structures for planning authorities.
Archaeology	The National Monuments Service (NMS) of the Department of Housing, Local Government and Heritage maintains a national baseline database of known archaeological sites and monuments (the Sites and Monuments Record) which is available on the **Monument Map Viewer**. It also regulates archaeological excavations, the use of detection devices for archaeological purposes and diving on historic wrecks and other underwater archaeological sites. The Service provides advice to planning authorities on developments, which might have an impact on archaeology.
Natural Heritage	The National Parks and Wildlife Service (NPWS) section of the Department of Housing, Local Government and Heritage manages the State's nature conservation responsibilities under national and European law. A particular responsibility of the NPWS is the designation and protection of SACs, Special Protection Areas (SPAs) and Natural Heritage Areas (NHAs). The NPWS has many national datasets for download including maps of national and European designated sites.

Table 7: Sources of Information – External.

4.8 Issue of Warning Letter

A planning authority shall issue a warning letter[68] as soon as possible but not later than six weeks after the receipt of a written complaint or representation. The warning letter should be issued to the owner, the occupier or any other relevant person. A summary of the information that should be included in a warning letter is set out in Table 8 below.

Warning Letter – Checklist **Does the Warning Letter:**	
Refer to the land concerned?	✔
State that it has come to the attention of the authority that unauthorised development may have been, is being or may be carried out?	✔
State that any person served with the letter may make written submissions to the planning authority not later than four weeks from the date of service of the warning letter?	✔
State that when the planning authority considers that unauthorised development has been, is being or may be carried out, an enforcement notice may be issued?	✔
State that officials of the planning authority may at all reasonable times enter on the land for the purposes of inspection?	✔
Explain the possible penalties involved where there is an offence?	✔
Explain that any costs reasonably incurred by the planning authority in relation to enforcement proceedings may be recovered?	✔

Table 8: Contents of Warning Letter.[69]

A warning letter is a notification in writing regarding alleged unauthorised development. All planning authorities should have standard templates for warning letters. Templates, which can be amended to suit the planning authority, can be obtained from legal publications, other local authorities or can be drafted by the planning authority's own legal advisors. Templates should be reviewed periodically to ensure they are in accordance with the legislation and are up-to-date.

The effect of the warning letter might be to bring an actual or potential unauthorised development to a halt. In the event of the alleged unauthorised development continuing the issuing of the warning letter will demonstrate to the courts that the recipients of the letter had been *'put on notice'* of the risks they were running in relation to carrying out the development.

Research for this practice note indicates that at least one planning authority carries out site inspections after the four-week consultation period following the issue of a warning letter. Following this, decisions are made on whether or not to take enforcement action and the type of action to be taken by the planning authority. A warning letter is *"a statutory notice"* (and) *"no investigation or inspection is required because of the role of the warning letter in the statutory enforcement framework"*.[70] This is the procedure envisaged by the 2000 Act referenced in the Development Management Guidelines for Planning Authorities (2007).[71]

[68] Section 152(3) of the 2000 Act.

[69] Section 152(4) of the 2000 Act.

[70] Grist, B. (2012) An Introduction to Irish Planning Law, Second Edition, p.98.

[71] Section 10.2 of the Development Management Guidelines for Planning Authorities (2007).

However, from the research undertaken for this practice note it must also be acknowledged that custom and practice in most planning authorities includes a level of investigation and a site inspection prior to the issue of a warning letter. These planning authorities seek to front-load the preliminary site inspection, where following the receipt of a complaint a file is opened and referred to a case officer for an inspection and report. The case officer may recommend a warning letter, other enforcement procedures under the 2000 Act or not to pursue action on the complaint for stated reasons. This approach is not strictly precluded by Section 152 of the 2000 Act.

Carrying out some level of investigation and/or site inspection prior to issuing a warning letter can allow frivolous or vexatious complaints or trivial cases to be eliminated early on and thus leading to no further action. It can also lead to the issue of a warning letter by the planning authority with a level of confidence that there was substance to the written complaint it received. The planning authority needs to come to a preliminary conclusion that the representation made to it in writing by a complainant *"is not vexatious, frivolous or without substance or foundation"* before it serves a warning letter.[72]

However, while *"failure to issue a warning letter under section 152 shall not prejudice the issue of an enforcement notice or any other proceedings that may be initiated by the planning authority"*,[73] front-loading of the investigation phase of the enforcement process can have unintended consequences. For example, where there is a backlog of enforcement files and staff resources are limited, inspections may not be carried out until late in the six-week period for issuing a warning letter or possibly outside the six-week period. Issuing a warning letter outside the six-week period could mean that the developers (who may be ignorant of their responsibilities under planning law) commence, continue, or even complete and operate an unauthorised development. A more advanced or complete unauthorised development could result in greater impacts on the surrounding area than an unauthorised development that is halted by a developer at an early stage, after receipt of a warning letter. Therefore the unauthorised development will be more difficult to remove or regularise. In addition, the lack of any discernible action by the planning authority after the six-week period has elapsed is likely to lead to queries and complaints to the planning authority from the complainant or other affected parties. The overall effect could undermine public confidence in the planning system.

[72] Section 152(1)(a) of the 2000 Act

[73] Section 153(5) of the 2000 Act.

4.9 Enforcement Notice Stage

4.9.1 Decision on Enforcement

As soon as may be after the issue of a warning letter the planning authority shall make such investigations as it considers necessary to enable it to make a decision on whether to take enforcement action. Where the planning authority establishes, following an investigation that unauthorised development (other than development that is of a trivial or minor nature) has been or is being carried out and the person who has carried out or is carrying out the development has not proceeded to remedy the position:

> *"...then the authority shall issue an enforcement notice under section 154 or make an application pursuant to section 160, or shall both issue such a notice and make such an application, unless there are compelling reasons for not doing so".*[74]

While this appears to make it mandatory to issue an enforcement notice or seek an injunction (or both), the 2000 Act requires the planning authority to consider any representations made to it by the complainant or submissions or observations made from those issued with a warning letter and *"any other material considerations"* (see section 4.9.2 below). These factors could lead a planning authority to make a decision not to serve an enforcement notice e.g. where the development is of a trivial or minor nature or where the developer is taking steps to remedy the alleged unauthorised development for example by ceasing development or removing structures. As discussed in section 3.8.1 these decisions should be formally reported on file and approved by the appropriate senior officer.

Where a planning authority decides to serve an enforcement notice it is required to do so *"as soon as may be"* and to inform the complainant of this. The 2000 Act states that it is a *"duty of the planning authority to ensure that decisions on whether to issue an enforcement notice are taken as expeditiously as possible"*[75] and imposes a statutory objective that this decision should be made within 12 weeks of the issue of a warning letter. Figure 3 below sets out the steps involved in the enforcement process.

[74] Section 153(7) of the 2000 Act.

[75] Section 153(2)(a) of the 2000 Act.

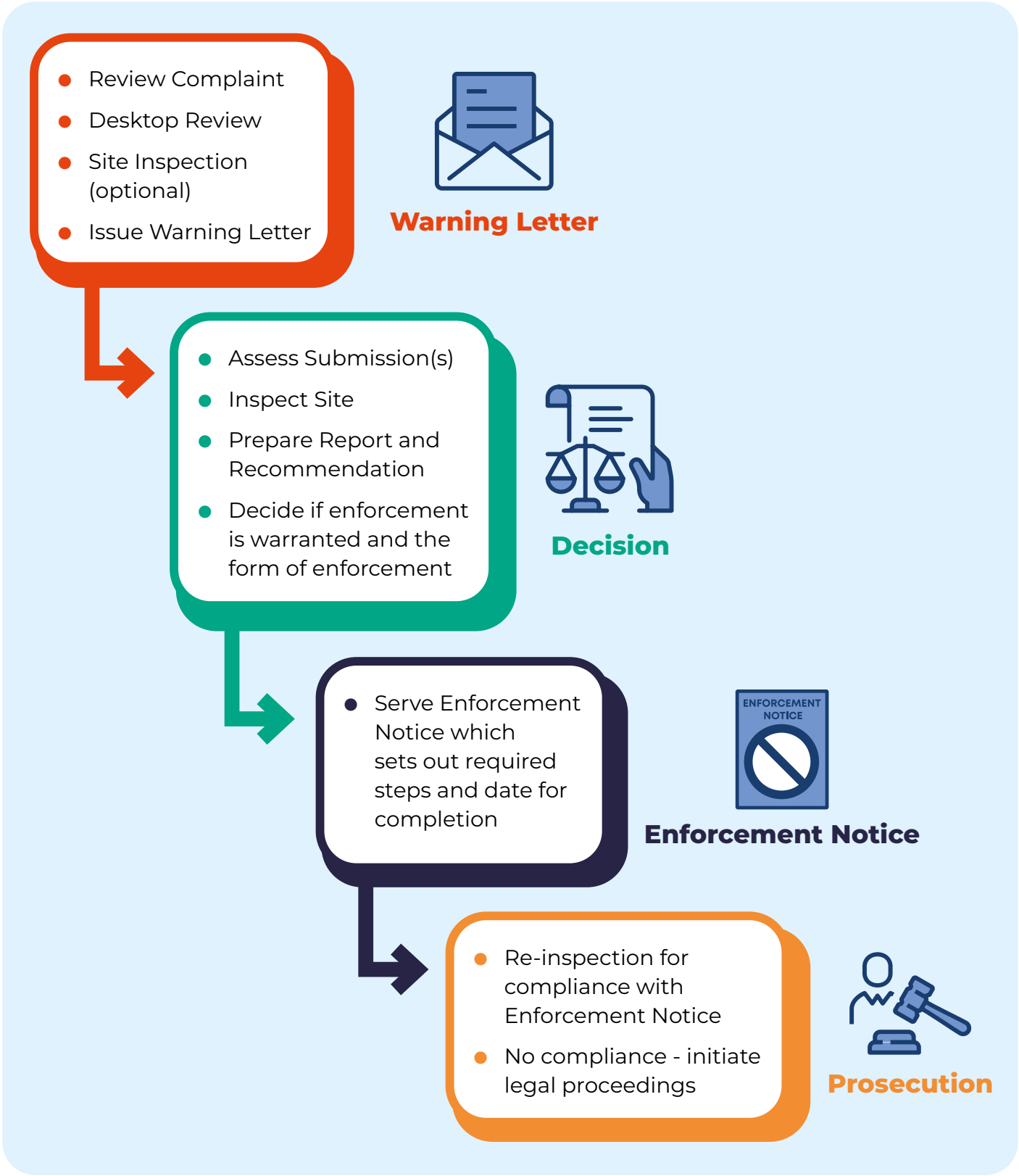


Figure 3: Enforcement Notice – Pathway.

4.9.2 Material Considerations

'Other material considerations' are not expressly defined in the legislation. Based on planning guidelines, policies and circulars as discussed in section 2 and case law, these considerations could be that:

- the development is of a type identified in the Ministerial Directive 2013;
- the development is objectionable in planning terms e.g. it is contrary to the provisions of the development plan, it has a detrimental impact on the environment and amenities of an area or for public safety/health reasons;
- an application to carry out the development has been refused planning permission or a decision on a Section 5 referral is pending;
- there is a high level of public disquiet as evidenced by representations to the planning authority by members of the public and/or their elected representatives; or
- *"the desirability of developers being treated equally and the need to secure increased compliance with planning law"*.[76]

4.9.3 Decision to Serve a Notice

Where a decision is made to serve an enforcement notice a planning authority should serve it as *"soon as may be"*.[77] It shall serve the notice on the person carrying out the development and, where necessary, the owner and occupier and other person who the planning authority considers would be concerned with the matter.[78] The notice should be copied to the person who made the complaint and others who may be concerned with the development. Table 9 sets out a checklist of the requirements for an enforcement notice.

[76] Development Management Guidelines for Planning Authorities (2007), Section 10.3.8.

[77] Section 154(1)(a) of the 2000 Act.

[78] Section 154(3)(a) of the 2000 Act.

Enforcement Notice – Checklist	
Does the enforcement notice refer to the land concerned? [Care should be taken to ensure the correct townland, Eircode and address details are used.]	✔
Where development has no permission, does the enforcement notice require the development to cease or not commence?	✔
Where the development has permission – does the enforcement notice require that the development proceed in accordance with the permission and comply with any conditions attached?	✔
Does the enforcement notice clearly and precisely set out the steps required to be taken to regularise the situation? In addition, are these steps relevant to the development?	✔
Does the enforcement notice set out that the specified steps should be carried out within a certain period(s) and that start and end dates are given for the specified period(s)?	✔
Does the enforcement notice warn that the planning authority can enter on the lands and take those steps specified in the notice if they are not taken by those on whom it was served and to recover the planning authority's costs for doing this?	✔
Has the enforcement notice clearly indicated that the person or persons served with the notice will be required to refund the overall costs for the investigation, detection and issue of the notice and any warning letter to the planning authority?	✔
Does the enforcement notice state that if the notice is not complied with the persons served with the notice shall be guilty of an offence?	✔

Table 9: Enforcement Notice – Checklist.

As with warning letters, planning authorities should have template enforcement notices. Templates, which can be amended to suit the planning authority, can be obtained from legal publications, other local authorities or can be drafted by the planning authority's own legal advisors. Templates should be reviewed periodically to ensure they are in accordance with the legislation and are up-to-date.

4.9.4 Works Required by an Enforcement Notice

Enforcement notices must define precisely the actions a developer must take, and the time specified to comply with a notice. These matters were considered in *Dundalk Town Council v Lawlor*.[79] The Court held that in drafting an enforcement notice *"a strict construction is required"* and that a notice should *"with clarity and precision set out the steps that are required to be taken in the specified period."* The use of the term *'immediately'* in the enforcement notice was found not to be precise and/or reasonable. While a start date was given no end date was specified thus the *"period"* for carrying out the required steps and complying with the enforcement notice could not be determined.

[79] *Dundalk Town Council v Bill Lawlor* [2005] 2 ILRM 106 see Appendix B – the Legal Digest for the case summary.

In *Dublin City Council v Benqueues Ltd.* the planning authority had issued an enforcement notice regarding a breach of a planning condition. The Court concluded that someone cannot be prosecuted for failing to take certain specified steps, if those steps are not necessary to remedy the alleged breach of planning permission.[80]

Notwithstanding other Sections of the 2000 Act, planning permission is not required in respect of steps to regularise a development and which are required by an enforcement notice or a Court order/injunction. This being said EIA and AA obligations still need to be considered in serving an enforcement notice or seeking a Court order/injunction (see section 4.9.5).

4.9.5 EIA and AA Considerations

The 2000 Act is very explicit on the requirements for AA for plan-making and for screening for both EIA and AA in relation to the processing of planning applications and other consents. While the 2000 Act is not explicit on the screening requirements for enforcement notices nevertheless the wider provisions of the European Communities (Birds and Natural Habitats) Regulations 2011 (SI No. 477/2011) are relevant and likewise the requirements of the EIA Directive (Directive 2014/52/EU) must be given due consideration by planning authorities in the performance of their duties. Where a planning authority is serving an enforcement notice, it has to specify the steps it requires the person on whom the notice is served to take and the period within which the person must carry out these steps.

In most cases, due to the location and scale of a development, EIA and AA matters may not arise. However, there will be situations where EIA/AA may become an issue due to the scale, location and type of an unauthorised development e.g. in or in the vicinity of a Natura 2000 site or where the unauthorised development may require an EIA. To this end many planning authorities are already operating best practice by incorporating AA and EIA screening into their enforcement procedures including screening templates in their procedures manuals.[81]

In most cases this screening may not raise issues. However, there will be unauthorised developments that could be problematic for a planning authority to address, e.g. a development in or in the vicinity of a SAC or a SPA, and the service of an enforcement notice may not be the appropriate tool for tackling the development. As has been noted above an enforcement notice is required to specify the steps to be taken with clarity and precision by the developer and the timeframe for these steps to be carried out. In complex cases where there are EIA and/or AA issues, it will be essential to closely work with the legal team. In such instances, it may be more appropriate therefore to seek an injunction/ institute Section 160 proceedings in the High or Circuit Courts where the planning authority and the developer could engage with each other on appropriate works and the timeframe to carry out those works all under the supervision of the court.

[80] *Dublin City Council v Benqueues Ltd.* [2016] IEHC 427, para.18.

[81] Note OPR Practice Notes PN01 and PN02 provide information for planning authorities in respect of AA and EIA Screening.

4.9.6 Non-compliance with Enforcement Notice and Penalties

One of the principal legal cases dealing with enforcement notices is *Clare County Council v Derek Floyd*. The court considered that in prosecuting for non-compliance with an enforcement notice the planning authority needs to establish that:

- There was an unauthorised development;
- An enforcement notice issued;
- The notice was served on the accused; and
- The notice was not complied with.[82]

Any person who fails to comply with the requirements of an enforcement notice or any person who knowingly assists or permits the failure by another to comply with an enforcement notice shall be guilty of an offence.

There are a range of penalties where a person is found guilty of an offence for not complying with an enforcement notice. Convictions can be on indictment or summarily. Most planning enforcement cases are heard in the District Court where on summary conviction a fine can be up to €5,000 or up to six months imprisonment. As a planning authority is seeking to resolve a breach of planning legislation the securing of an order is more beneficial so that:

> *"the Court in addition to imposing a penalty…may order the person so convicted to take all or any steps specified in the relevant enforcement notice within such period as the Court considers appropriate"*.[83]

An enforcement notice shall cease to have effect ten years from the date of service of the notice.

4.9.7 Withdrawal of Notice

A planning authority may, for stated reasons, withdraw an enforcement notice and inform those served with the notice or others issued with copies of the notice.[84] Where an enforcement notice is withdrawn or where an enforcement notice has been complied with the fact that the enforcement notice was withdrawn, and the reasons for the withdrawal, or that it was complied with should be recorded in the planning register.[85]

[82] *Clare County Council v Derek Floyd,* [2007] IEHC 48, see Appendix B – Legal Digest for a summary of the case.

[83] Section 156(8) of the 2000 Act.

[84] Section 154(11)(a) of the 2000 Act.

[85] Section 154(11)(b) of the 2000 Act.

4.10 Application for an Injunction

As outlined at the outset injunctions are not the focus of this practice note and pursuing this type of action in any given case will require close engagement with the planning authority's legal team. Planning injunctions are one of the tools available to enforcement teams and where an unauthorised development *"has been, is being or is likely to be carried out or continued"* a planning authority or any other person may apply to the High or Circuit Courts for an injunction.[86] The 2000 Act provides the courts with considerable discretion and extensive powers to make orders to ensure that:

- unauthorised development is not carried out or continued;
- land is restored to its previous condition prior to the commencement of unauthorised development; and
- any development is carried out in conformity with a planning permission and its conditions.

The planning authority's legal advisors play a key role on advising senior management and the enforcement team on whether to seek a Section 160 injunction including weighing up its effectiveness against pursuing a case in the District Court i.e. by serving an enforcement notice and subsequently prosecuting for non-compliance with the notice. There are also increased legal costs for taking cases in the higher courts.

The benefits of seeking a Section 160 injunction can be that:

- Significant breaches of planning legislation can be dealt with more speedily by obtaining an injunction in the High or Circuit Courts rather than following the standard route of service of an enforcement notice and prosecution for non-compliance in the District Court;
- In complex cases, such as where a protected structure was demolished without planning permission, an application for an injunction may be more suitable as the courts can make orders for the restoration of the land to its previous condition; and
- An application for an injunction is largely based on affidavits and the case must be proved on the balance of probabilities (i.e. not beyond a reasonable doubt, as is required for a criminal prosecution). Nevertheless, it must be remembered the courts will construe Section 160 strictly, as any action of the courts can have significant financial and social implications.

The court has a discretion in deciding to grant or refuse the order sought by the planning authority or by *"any person."* The Supreme Court in *Meath County Council v Murray* set out factors to be considered when exercising the court's discretion.[87] While the court stated the list of factors was not exhaustive it is a good indication of the criteria a court will consider in hearing an application for an injunction (See Table 10 below for more details).

[86] Under Section 160 of the 2000 Act.

[87] *Meath County Council v Murray,* [2017] IESC 25, Judgment of Mr. Justice William M. McKechnie, see Appendix B – Legal Digest for a summary of the case.

Discretion of the Court - Factors for Consideration in Section 160 Proceedings Learnings from Case Law

In *Meath County Council v Murray*, Mr. Justice McKechnie outlined a number of factors that the court will consider in determining how to exercise its discretion in planning injunction proceedings (e.g. whether to grant or refuse an injunction; what the scope of an injunction might be):

(i) The nature of the unauthorised development: a breach of the Planning Acts can range from being small and inconsequential to major, material and significant;

(ii) The behaviour of the person who has carried out the unauthorised development (*'the developer'*), including attitude to planning control and the level of engagement with that process. The courts will look favourably on a developer who has acted in good faith, although it will not necessarily prevent an injunction from being granted. If the developer has acted in bad faith, there is a presumption that an injunction will be granted;

(iii) The reason for the infringement: For example, was the unauthorised development a genuine mistake? Did the developer carry out the development without bothering to check whether the development was in compliance with planning laws or not? Was the development carried out in the knowledge that it would be unauthorised?;

(iv) The attitude of the planning authority is an important factor for the court determining injunction proceedings, but it will not necessarily be decisive;

(v) Public interest in upholding the integrity of the planning and development system;

(vi) Other public interest matters, such as whether the making of an injunction would affect employment or the operation of key infrastructure;

(vii) The conduct and, if appropriate, the personal circumstances of the person seeking the injunction;

(viii) Issue of delay, even within the statutory period, and of acquiescence (e.g. even if the proceedings were brought during the seven year period, was there a long delay before the injunction was sought?);

(ix) The personal circumstances of the developer; and

(x) The consequences that an injunction order might have.

Table 10: Discretion of the Court - Factors for Consideration in Section 160 Proceedings – Learnings from Case Law.

4.11 Planning Register

Section 7 of the 2000 Act requires planning authorities to maintain a planning register. The register should incorporate a map to enable a person to trace any entry in the register. Details contained in the register should include particulars of any planning applications for permission for development and for retention of development submitted to a planning authority and declarations made by the authority under Section 5 or any decision made by An Bord Pleanála on a referral. Matters pertaining to enforcement should also be entered in the register. These include:

- particulars of any warning letter issued under Section 152, including the date of issue of the letter and the fact of its withdrawal, where appropriate;
- the complete decision made under Section 153 on whether an enforcement notice should issue, including the date of the decision;
- particulars of any enforcement notice issued under Section 154, including the date of the notice and the fact of its withdrawal or that it has been complied with, if appropriate; and
- particulars of any enforcement notice issued under Section 177O[88] relating to substitute consent.

The planning authority should ensure that the register is kept up-to-date and entries are made as soon as possible following the making of any decision or agreement or the issue of any letter, notice or statement, as appropriate.

It is not a requirement to enter a planning injunction order on the register but it would represent good practice to do so. This would ensure a complete planning and enforcement record of a site.

4.12 Closure of the Enforcement File

An enforcement file can be closed for a variety of reasons including:

- The complaint is trivial or minor in nature;
- The development the subject of the complaint is not a planning matter and should be directed to another section of the planning authority, to another public body e.g. NPWS or is a private law matters between parties;
- The alleged unauthorised development has a planning permission or is deemed to be exempted development;
- Planning permission has been granted to retain the development;
- The developer complies with the requirements of a warning letter, enforcement notice or court order e.g. ceases an unauthorised use, demolishes an unauthorised structure etc.;
- The development is statute barred (refer to section 3.5 above).

In all cases where a file is being closed, a report and recommendation should be prepared, and approved by the appropriate senior officer.

As noted in section 2.3.3 one of the annual performance indicators for the planning service of local authorities is the percentage of planning enforcement cases that were closed during the year.

[88] The matter of substitute consent Part XA of the 2000 Act is not the focus of this practice note, nonetheless it is worth acknowledging that the planning register is required to record enforcement notices arising from these consents.

5.0 Common Issues

5.1 General Issues:

5.1.1 Formality

There should be a level of formality in reporting on unauthorised development, entering onto sites, making recommendations and decisions on warning letters and enforcement notices and the issuing or serving of letters or notices. This is important as any person who has carried out or is carrying out unauthorised development shall be guilty of an offence and persons found guilty can be subject to court orders, fines and possibly imprisonment.

5.1.2 Service of Notices

There are a number of methods for the serving of notices and copies of orders[89] (notices in this context also include warning letters). These are:

- by delivering it to the person;
- by leaving it at the address at which a person ordinarily resides or, in a case in which an address for service has been furnished, at that address;
- by sending it by post in a prepaid registered letter addressed to a person at the address at which he or she ordinarily resides. An Post provides an online tracking system for registered post which can establish a date of service;
- where the address cannot be ascertained by reasonable inquiry:
  - by delivering it to some person over the age of 16 years on the land or premises or
  - by affixing it in a conspicuous place on or near the land or premises;
- where the address at which a person ordinarily resides cannot be ascertained by reasonable inquiry and the notice or copy is so required or authorised to be given or served in respect of any maritime site, by publishing the notice or copy on seven consecutive days in a national newspaper;
- in addition to the methods of service provided above:
  - by delivering it (in the case of an enforcement notice) to some person over the age of 16 years who is employed, or otherwise engaged, in connection with the carrying out of the development to which the notice relates, or
  - by affixing it in a conspicuous place on the land or premises concerned;
- where a notice or order has been affixed to a site the planning authority should also publish the full notice within two weeks in a newspaper circulating in the area where the person concerned is last known to have resided.

[89] Section 250 of the 2000 Act.

Where it is difficult to trace a person for the purpose of serving a notice, consideration could be given to the use of private investigators/process servers to investigate a person's current place of residence and/or to serve the notice. Where a notice is affixed to the site, photographs should be taken of the notice for possible future court action and the notice should be re-inspected to ensure that it has not been removed. Where a notice has been affixed to a site, the planning authority should also publish the full notice within two weeks in a newspaper circulating in the area where the person concerned is last known to have resided.[90] Alternative ways may be required to prove that the person addressed in the notice received it e.g. by noting a phone call where the notice was discussed or by receiving an email where the notice is referenced.

5.1.3 Anonymous Complaints

Planning authorities require that those submitting complaints on an alleged unauthorised development identify themselves on their standard complaints forms, where available, or to submit the complaint in writing. There may be a reluctance in planning authorities to follow up anonymous complaints as evidenced by some of the research conducted for this practice note. However, it would appear from at least one court judgment that where the complaint is a valid one, even if the complainant was anonymous, it should be pursued by the planning authority, e.g. by sending warning letters to the developer and other relevant parties.

> *"There is no statutory basis that prevents a planning authority from acting on foot of anonymous complaints. Indeed, the statutory obligation is to investigate written complaints as distinct from an obligation to investigate signed written complaints."*[91]

Anonymous complaints raise issues for the planning authority, as it is required by the 2000 Act to keep complainants informed of the progress of its investigations at certain stages of the process e.g. the service of an enforcement notice.[92]

It may be more problematic in cases where a planning authority needs to supplement its own investigations, and fill the possible gaps in its information on the development. This knowledge may be solely in the hands of the complainant. If the complainant remains anonymous to the planning authority, then pursuing a case to a satisfactory conclusion may be made more difficult.

It is the practice of some planning authorities to inform people on their standard complaints forms, FAQs sheets, on their websites and in correspondence that the planning authority may need the assistance of complainants in pursuing a case. While this is understandable in the context of staffing shortages or to minimise vexatious or trivial complaints, it nevertheless should be noted *"any person"* is entitled by law to make a written representation on an unauthorised development. It is then the responsibility of the planning authority to decide on whether or not to take action on the matter.[93]

5.1.4 No Landowner Identifiable

There will be situations where the name of a landowner is difficult to trace and is not available on Land Registry. It may be that the landowner is bankrupt, living outside the State, or deliberately seeking to conceal their identity from the planning authority. The planning authority and its legal advisors may need to engage specialist law firms/investigators to ascertain who are the beneficial owners of the lands under investigation.

[90] Section 250(4) of the 2000 Act.

[91] *Taafe v Louth County Council* [2013] IEHC 314, para 13.

[92] Section 154(1)(b) of the 2000 Act.

[93] Section 152(1) of the 2000 Act.

5.1.5 Cross Departmental and Complex Cases

Where a development involves breaches of several codes (e.g., planning, building control, public health, environment, health and safety) the senior management of a local authority will need to consider how best to manage the case. The planning authority's legal advisors should also be involved with the objective of evaluating and advising on which legislation will most likely ensure that the situation is resolved. Likewise, where a development involving breaches of environment and planning law is involved, e.g. waste deposition which constitutes a change of use in planning law, decisions will need to be made on which legislation to rely on. It may be that planning has a lead role in the enforcement process or has a supporting role to the environment department or in assisting the EPA in using its powers.

5.1.6 Engagement with An Garda Síochána

It represents good practice for local authorities to establish and maintain good relationships with An Garda Síochána to assist them in carrying out some of their planning enforcement functions. Joint Policing Committees are forums that offer an opportunity to develop greater consultation, cooperation and accountability between An Garda Síochána, local authorities and elected members, with the participation of the community and voluntary sector, on the management of policing and crime issues. The Gardaí may be called on by the local authority to assist in planning enforcement cases where there are known or perceived public safety issues facing staff e.g. through accompanying staff on their site inspections. Arrangements will need to be made at senior levels in both the local authority and An Garda Síochána for the attendance of Gardaí during a site inspection.

5.2 Monitoring Systems

5.2.1 CCTV

The use of Closed-circuit Television (CCTV) has generally not been a feature of planning enforcement as most cases relate to physical development that can be readily worked out from site inspections, photographs etc. CCTV is used by local authorities in the performance of some of its other duties and codes. Given the complexities, costs and procedural requirements of using CCTV its role is unlikely to be necessary in the majority of planning enforcement cases.

5.2.2 Drones

Some local authorities use drones to assist in researching unauthorised development cases. They are helpful where up-to-date images are required, where sites are extensive and difficult to access or where there may be health and safety concerns. However, local authorities should consider whether using a drone is the best and most effective way of carrying out an inspection.

If planning authorities own/operate their own drones, Pilot Competency Certificates and Safety Operating Procedures are required by the Irish Aviation Authority (IAA). All drones need to be registered with the IAA. The use of drones gives rise to data protection issues. For example, Dublin City Council, Our Public Service and Smart Dublin have produced a guide on data protection issues associated with drone use entitled **'Data Protection: Drone User Handbook'**.

Caution should further be exercised to ensure that all applicable rules in relation to entry on to land are observed in collecting drone footage (see section 4.3).

5.3 Non-compliance with a Permission and its Conditions

5.3.1 General

A planning authority may decide to grant permission for development, with or without conditions.[94]

Where conditions are attached to a permission *"the wording of a planning condition should be clear and precise so that any potential breach of that condition may be easily identified and appropriate enforcement action may be taken by the planning authority"*.[95] Lack of clarity in the wording of conditions can lead to confusion by developers, third parties and even planning authorities themselves and may eventually only be resolved by the courts.

The OPR's Practice Note on Planning Conditions (**OPR Practice Note PN03**) seeks to ensure greater consistency in the conditions imposed by planning authorities and *"to promote the application of conditions that are fair, reasonable and practicable"*.[96]

For a variety of reasons, including organisational structures, there can be a disconnection between the development management and enforcement teams in planning authorities. This can lead to situations where conditions attached to permissions are difficult or impossible to enforce. It is recommended that there should be regular formal interactions between the enforcement and development management teams so that, for example, the experience of enforcement staff in investigating and prosecuting unauthorised development and dealing with developers and aggrieved parties living/working in the vicinity of a development can feed back into development management practices including the wording of planning conditions.

[94] Section 34(1) of the 2000 Act.

[95] OPR Practice Note PN03 Planning Conditions (2022), p.12.

[96] OPR Practice Note PN03 Planning Conditions (2022), p. 5.

5.3.2 Compliance Conditions

Conditions that relate to *'matters to be agreed'* following a decision to grant permission are commonly referred to as *'compliance conditions'*. Often these conditions commence with the phrase *"prior to the commencement of development…"* and require developers to submit points of detail to be agreed between the developer and the planning authority e.g. a finalised landscaping plan, details of materials to be used etc. This can give rise to complaints and has led to court cases where third parties claim that an entire development is unauthorised as details for the compliance conditions have not been submitted or have not obtained the agreement of the planning authority.

Planning authorities in issuing warning letters and serving enforcement notices are required to identify which breach of a planning permission is being pursued – in this situation the non-fulfilment of *'prior to the commencement of development'* compliance condition(s). However planning authorities should be aware that in certain cases[97] the courts *"have taken a pragmatic view when dealing with the agreement of points of detail"*.[98]

[97] *Eircell v Bernstoff* [2000] IEHC 18. See Appendix B - Legal Digest for a summary of this case.

[98] OPR Practice Note PN03 Planning Conditions (2022), p.12.

6.0 Court-related Matters

This section seeks to address some common areas or vulnerabilities where a case proceeds to the courts system. Such issues may be avoided or minimised through better management systems and good practice in the earlier stages of the enforcement investigation. At the same time, it is acknowledged that court matters are very case specific and enforcement teams should discuss these matters with their legal advisors.

6.1 Arrangements and Documenting Site Access and Inspections

Some commonplace issues that arise in relation to the production of documentary evidence during court proceedings include the following:

6.1.1 Authorised Persons

Planning authorities should ensure that the relevant staff are properly appointed as authorised persons for the purposes of the 2000 Act. This includes issuing the appropriate certificate of appointment so that staff, if requested, to do so can produce it (see section 4.3 above).

The Local Government Act 2001, as amended, empowers the chief executive to delegate functions to local authority employees. All officers in enforcement sections or senior members of management who have responsibilities in relation to enforcement (for example, signing Chief Executive's Orders, approving the taking of court proceedings including in the superior courts) should have proof of their appointments, delegations orders, etc. as documentary evidence of this may be required in court cases.

6.1.2 Entry on to Land

It is important that all documents relevant to a planning authority's power to enter on to land have been correctly executed and can be produced in court to ensure that any evidence collected during on-site investigation is admissible.

If relying on their general powers of entry (see section 4.3.1 above) the planning authority is likely to have to produce evidence of consent to enter on to the land and/or evidence of the 14-day notice of intention to enter on to the land.

Where the planning authority has entered the lands expressly for enforcement related purposes (see section 4.3.2 above) evidence that the enforcement process had commenced prior to entry on to the lands may be required by the court during proceedings. For example, where the planning authority entered on to land under Section 253, and the planning authority wishes to rely on evidence gathered during that on-site investigation, it may be required to produce proof that a warning letter or enforcement notice was issued.

To avoid issues with the admissibility of evidence gathered during site investigations, best practice would suggest that the planning authority should seek consent from the landowner or occupier in all cases, where possible.

6.2 Site Inspections

As close as possible to a court date the case officer (and other planning authority staff, if necessary) should carry out at an updated site inspection to ascertain the current situation on site. The case officer should be in a position to report to the planning authority's legal team and to the court on the findings of the inspection and the up-to-date position with regard to the relevant development.

6.3 Administration

All paperwork should be double-checked for correct details on notices e.g. names, dates etc. Additional copies of relevant notices, letters etc. should be made for circulation to the judge and the defendant's legal team, if required.

6.4 Training

Planning enforcement requires particular skills and knowledge. All staff, especially those who are new to the planning authority or who may have been deployed from other areas within a planning department or from other departments in the local authority, will require specialist training and Continuing Professional Development (CPD). This training could be in planning and environmental law, in appropriate investigating techniques and in preparing for court and giving evidence in court. Failure to provide adequate and targeted training may lead to cases being prolonged or lost, give rise to unnecessary stress on staff and ultimately cost the planning authority financially. (See also section 7.)

6.5 Costs

As the investigation of an unauthorised development progresses local authority staff should keep a record of the time spent on the various activities related to the progress of the investigation. This will allow the planning authority to calculate the costs involved in the case. This will be necessary for the recovery of its costs, either in court or in negotiated resolutions to a prosecution, where the unauthorised development is removed/ceased, the planning authority's costs discharged, and the prosecution struck out.

For example, records should be kept of:

- The on-site inspection(s) e.g. staff time/costs, travel expenses;
- The reports prepared and issued for warning letters and enforcement notices;
- Any advisors engaged and any assistance received on the case e.g. specialist consultants, process servers;
- Searches in Land Registry, Companies Registration Office etc.; and
- Legal advice, court preparation and attendance – solicitors' and barristers' fees and costs.

6.6 Enforcement - Retention Applications and Section 5 Declaration Applications

6.6.1 The Effect of Retention Applications and Retention Permissions on Enforcement Proceedings

The 2000 Act clearly states that the lodgement of a planning application for retention permission or a grant of permission for retention is not a defence to an enforcement prosecution.[99]

The 2000 Act further provides that enforcement action (including the issuing of a warning letter, enforcement notice or injunction) shall not be stayed or withdrawn as a result of an application for or grant of retention permission.[100]

That said, there are circumstances in which the courts have sought to defer decisions. In proceedings related to a Section 160 planning injunction, this is discussed by Mr Justice Garrett Simons in *Waterford City and County Council v Centz Retail Holdings Ltd* (No. 2) as follows:

> *"... a court may, in the exercise of its discretion, defer orders pending the outcome of a retention application. This will normally only ever be done where there is some discretionary factor—over and above the fact that a retention application has been made—in favour of withholding relief. For example, if as on the facts of Krikke, the court finds that a developer had acted bona fide and there is an arguable case that the alleged breach actually comes within the envelope of an existing planning permission, then a court may modify its order. The High Court in Krikke made an immediate order requiring cessation of activity, but envisaged that this might be modified if leave to apply for substitute consent were to be granted."*[101]

6.6.2 Effect of Section 5 Declaration Applications on Enforcement Proceedings

The 2000 Act does not restrict the court from staying or withdrawing enforcement proceedings in circumstances where a Section 5 declaration application (see section 3.3.1 above) has been made or a decision on such an application has been issued at any point since the planning authority has taken enforcement action. The courts have clearly indicated that planning authorities and An Bord Pleanála have the primary role in adjudicating on what is or what is not development or exempted development and have repeatedly indicated a reluctance to interfere with that role. It is not unusual for proceedings to be adjourned pending the outcome of a Section 5 declaration application. In circumstances where a determination has been made on a Section 5 declaration or referral, the courts are unlikely to overrule that determination, save in exceptional circumstances.

Best practice would suggest that an enforcement notice should be withdrawn and enforcement proceedings discontinued in circumstances where a Section 5 declaration determines a development to be exempt from the requirement for planning permission.[102]

Conversely, where a Section 5 declaration determines a development not to be exempt, the planning authority should reactivate the file and/or re-instigate proceedings as recommended in the Development Management Guidelines for Planning Authorities (DECLG) (2007) (See section 2.2.1, Table 1 above).

---

[99] Section 162(2) of the 2000 Act.

[100] Section 162(3) of the 2000 Act

[101] *Waterford City and County Council v Centz Retail Holdings Ltd* (No. 2) [2020] IEHC 634, paragraph 38. The Krikke case referenced in this judgment is *Krikke v Barranafaddock Sustainability Electricity Ltd* [2020] IESC 42.

[102] *Devil's Glen Equestrian Centre Ltd v Wicklow County Council* [2010] IEHC 356.

6.7 Prosecution - Proofs

In addition to any proofs that may be required to allow for the admissibility of evidence, the key proofs[103] that the planning authority, as prosecution, must produce are:

- Evidence of service of the enforcement notice; and
- Evidence of an unauthorised development.

Given the *'beyond reasonable doubt'* standard that is employed by a judge in deciding whether to convict an accused, all the elements of the enforcement notice proofs must pass this high standard.

6.8 Prosecution – Continuing Offence

It may be that a planning authority is unsuccessful in bringing a prosecution against an unauthorised development due to a technical reason (e.g. the address is not correctly stated on the enforcement notice), but that the unauthorised development continues after the developer is acquitted. It may also be that the developer is convicted of an offence, but still continues the unauthorised development after the conviction.

Unauthorised development is a continuing offence, which occurs on every day that the development continues. Given this, it is open to a planning authority, following an acquittal or conviction and subject to statutory time limits, to serve a new enforcement notice for an ongoing unauthorised development on a subsequent date and bring proceedings seeking conviction for failure to comply with that subsequent notice.[104]

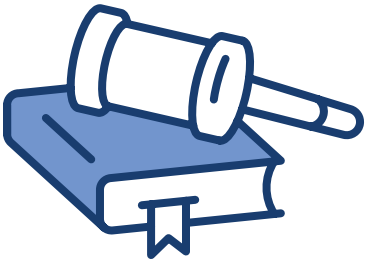
6.9 Follow-up Action After a Court Decision

Following the securing of a court order or conviction, planning authorities should have practices and procedures in place to ensure appropriate follow-up action on a court decision e.g. compliance with the terms of an enforcement notice. This is to ensure the requirements of the court are upheld and will enable the case to be fully closed.

Procedures should provide for follow-up site inspections to ensure that an unauthorised development has ceased or been removed, or that a development has been made compliant with the conditions of a permission. The planning authority should also ensure that the costs awarded to it by the courts are paid by/recovered from the developer.

On occasion, it may be necessary for a planning authority to return to court where, for example, a court order has not been complied with.

In situations where a planning authority has not been successful in enforcement proceedings, the planning authority, in conjunction with its legal advisors, should review its enforcement practices and procedures to determine if they need to be amended/updated.



[103] *Clare County Council v Floyd,* [2007] IEHC 48. This case is summarised in the Legal Digest at Appendix B.

[104] *Clare County Council v Floyd,* [2007] IEHC 48. This case is summarised in the Legal Digest at Appendix B.

7.0 Key Messages and Learnings

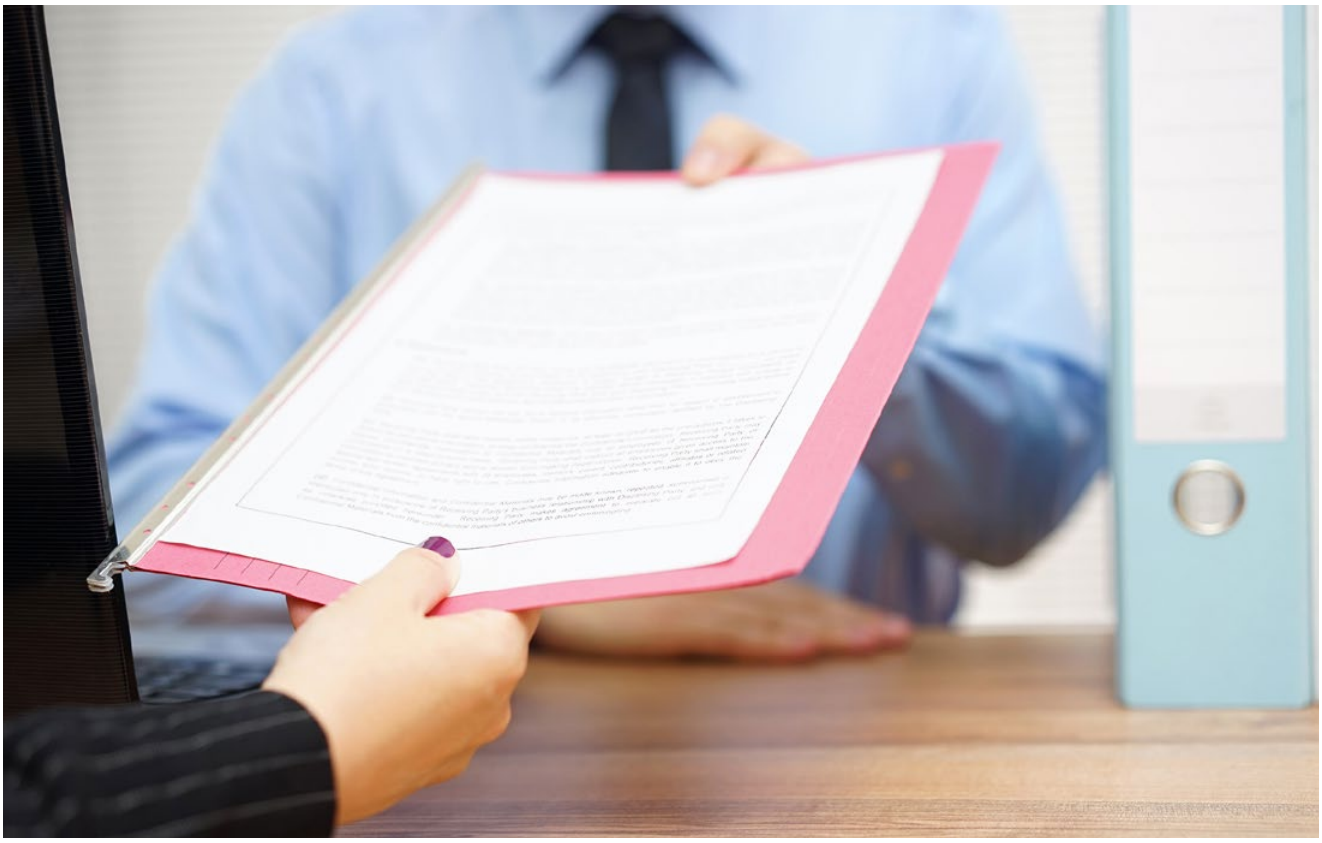
7.1 The Importance of Planning Enforcement

A culture of enforcement in planning authorities is critical to ensure that the planning system works properly and for the benefit of the whole community. There are recognised negative consequences arising from a lack of enforcement including the damage to communities, the environment and our natural and built heritage and the erosion of public confidence and support in the planning system.

> *"Visible tolerance by planning authorities of breaches of the law in such cases, as indeed in all cases, undermines the whole planning code and brings it into disrepute".*[105]

This can lead to more widespread breaches of the law and to substandard developments.

From our engagement with planning authorities in the preparation of this practice note the importance of embedding a culture of enforcement in each tier of the planning authority (i.e. organisational level, enforcement team level and at case officer level) is essential to an effective enforcement service. This practice note identifies common issues and best practice systems and procedures to respond to cases as speedily and as efficiently as possible. From these learnings a number of key messages were identified for each tier as follows:



[105] DEHLG (2007) Development Management – Guidelines for Planning Authorities, Section 10.3.5.

7.2 Organisation Level - Planning Enforcement and Senior Management

The Government and the Minister have reminded senior management of planning authorities on a number of occasions of the statutory obligations on planning authorities to enforce planning law. Part VIII of the 2000 Act established a more streamlined approach to planning enforcement, which required planning authorities to carry out their enforcement functions in a focused and time-bound manner. The 2000 Act was followed by a number of ministerial interventions stressing the importance of enforcement including the Development Management Guidelines for Planning Authorities (2007), the Planning Enforcement Policy Directive (2013) and the Government's Planning Policy Statement (2015). These are supplemented by the indicators for local authority services published by NOAC annually, the investigation by the Ombudsman of complaints made to his office, many of which relate to planning enforcement, and the review by the OPR of the systems and procedures used by planning authorities.

7.2.1 Development of a Planning Enforcement Policy and Practice Statement

It is recommended that senior management should consider the development of a formal planning enforcement policy and practice statement. This would clearly set out the planning authority's decision-making framework in relation to alleged breaches of planning control and explain its enforcement procedures and practices. The document would include the planning authority's standard templates for the notices and letters that it would normally issue/serve as part of an enforcement case. The policy and practice statement should assist individuals and interest groups concerned about possible unauthorised development, and those who have carried out (perhaps unwittingly) such development, in understanding the enforcement system and its operation. The policy and practice statement could be discussed and approved/noted by an appropriate committee of a planning authority e.g. the Planning Strategic Policy Committee (SPC) and published on the planning authority's website.[106]

Table 11 below identifies some key themes that may be addressed in a planning authority's enforcement policy and practice statement.

[106] Local authorities address planning enforcement in annual reports and in corporate, customer care and team plans and many have technical and administrative procedural manuals and template forms etc. dealing with enforcement. However, these documents are mostly internal to an organisation (apart from publicly available annual reports, complaint forms and FAQs sheets), are held in disparate locations and are difficult for the elected members, citizens and other interested parties to access.

Key Themes	The Planning Authority's Enforcement Policy and Practice Statement Should:
Ownership and Responsibility	• Ensure overall responsibility is assigned to a senior officer and this officer provides regular updates to management.
	• Identify who will decide which department should be the lead department in enforcing complex multi-faceted cases. For example will it be decided by the Senior Management Team, a special enforcement sub-group or a delegated Director (See section 7.3.3).
Reviewing and Monitoring	• Establish a system for periodically reviewing the operation of the planning enforcement service taking into account factors such as: - the number and type of complaints being made to the planning authority; - reviews carried out of the planning authority (and other planning authorities) by the OPR; - planning indicators published by NOAC; - findings of the OO on complaints made to his office; - learnings from relevant court cases; - consultations with staff; and - feedback from users of the service e.g. complainants, elected members and the planning authority's legal advisors.
	• Identify measures to ensure that backlogs of cases are addressed in a systematic and prioritised manner.
	• Develop a system for monitoring to support the collation of statistics and information to assist in the assessment of outcomes and to benchmark the planning authority's work in relation to national and other indicators.
	• Enable the ongoing monitoring of the service provided by the planning authority's in-house or external legal advisors.
Resources	• Identify the appropriate human and financial resources required for planning enforcement. • Identify the investment necessary in quality GIS and ICT systems to assist in managing the workload of planning enforcement.
Communication	• Identify systems for regularly briefing the elected members, relevant SPCs and the public on enforcement activities and any legislative and policy changes.
	• Identify mechanisms for developing and maintaining lines of communication with the senior management levels of other stakeholders e.g. An Garda Síochána and the EPA.
	• Put in place reciprocal arrangements between planning authorities so that staff that carried out site inspections and reports, and who have left a planning authority, are available to return and give evidence in court.

Table 11: Key Themes for Planning Authority's Enforcement Policy and Practice Statement.

7.3 Enforcement Team Level

A strong, multi-disciplinary enforcement team is essential to deliver an effective enforcement service, the core values of an effective team are illustrated in Figure 4 and discussed below.

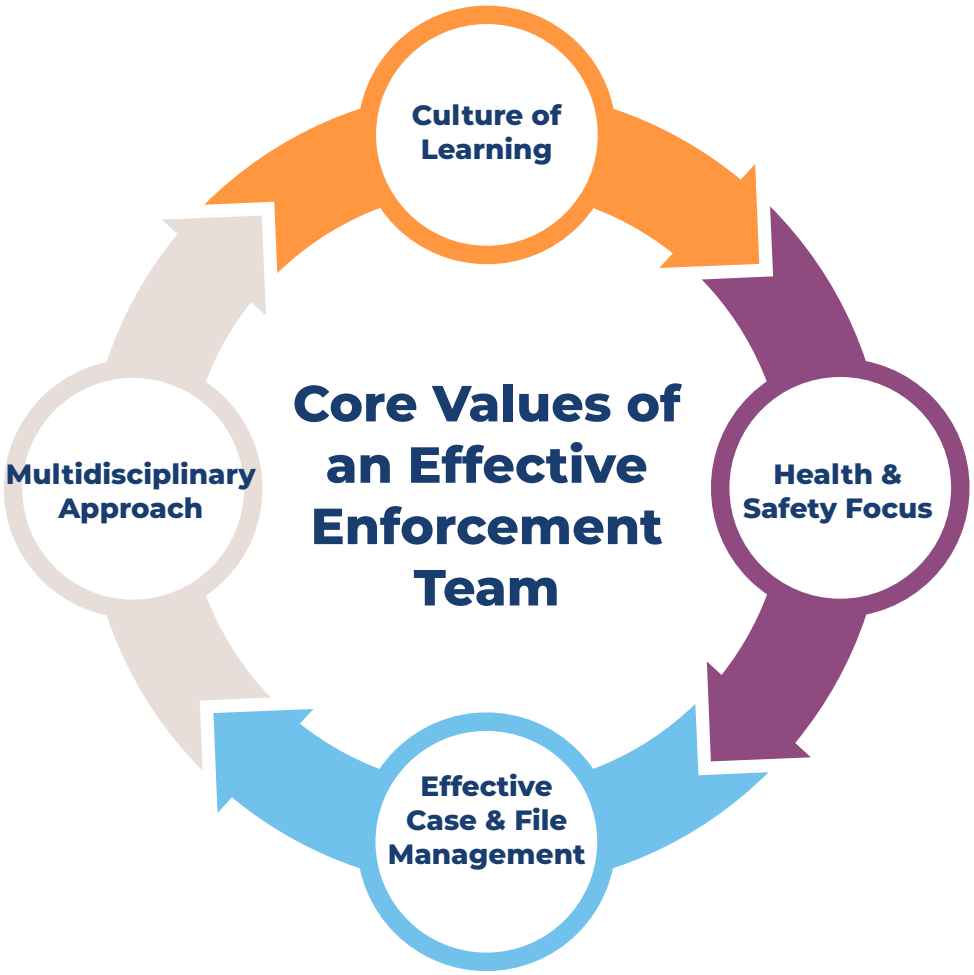


Figure 4: Core Values of an Effective Enforcement Team.

7.3.1 Learning and Development

Planners, technical officers and administrative staff should be provided with training that prepares them for and allows them to develop their role in planning enforcement. This is especially true for those from a non-planning background. Planners, who have training in planning and environmental law, also need continuing professional development.

- Areas where staff should have training would include customer care, managing aggressive behaviour, ICT and GIS skills and report writing.
- Staff representing the planning authority in court should have initial and continuing training in preparing for and giving evidence in court.
- Non-planners should be given an introduction to planning and environmental law while refresher courses in planning and environmental law should be available for planners and other appropriate staff given the changing nature of this area of the law.

- The planning authority's Law Department and/or its legal advisors should update the Planning Enforcement Section on relevant decisions of the courts that affect an authority's practices, engage with the Enforcement Section regarding any process changes that need to be made in the light of experience in bringing cases to court and assist staff in court preparation.

7.3.2 Health and Safety

As discussed in section 4.4 above, all planning authorities should ensure they have health and safety protocols in place for their enforcement functions including, for example, health and safety training and Safe Pass, lone working and *'person-down'* procedures and on-site safety protocols.

Given the potentially adversarial nature of planning enforcement, it is important that management and staff implement good health and safety practices in accordance with set protocols. Appropriate identification i.e. *'authorised person'* certificates and warrants should be carried by staff when carrying out site inspections.

7.3.3 Effective Case and File Management

7.3.3.1 Complex Cases

The Enforcement Section may need to liaise with other sections of the planning authority in relation to cases where the enforcement aspects of other legislation are relevant e.g. environmental, building control, fire safety. The enforcement team should actively engage with senior management on case organisation and the allocation of staff resources from different sections of the local authority where cases require multi-disciplinary inputs.

7.3.3.2 Prioritising Cases

The enforcement team should develop and/or review the planning authority's process whereby large-scale unauthorised development and enforcement cases are prioritised. The Ministerial Policy Directive 2013 highlights the need to investigate and follow up on development or works, as a starting point, which would have required EIA; a determination as to whether EIA was required (i.e. screening for EIA); or an AA under the Habitats Directive (see section 4.9.5).

7.3.3.3 Documentation and File Management

Good file management and procedures are essential in enforcement. This involves the use of effective ICT systems. Paper based systems and practices that depend heavily on diaries and manual inputting by staff are prone to error or loss of information. Good ICT systems designed for planning enforcement can:

- support management in monitoring and analysing trends and in allocating resources;
- assist managing the progress of a case including dealing with complainants, developers, legal advisors and public representatives;
- highlight critical dates and milestones to administrative and technical staff; and
- link with other planning authority systems to support the work of the Enforcement Section.

7.3.4 Multidisciplinary Team Approach

Senior management in the planning department need to ensure that different sections of the department do not operate in silos and that there is clear communication between enforcement and development management sections in relation to:

- Section 5 declarations;
- Pre-application consultations;
- Planning applications for retention;
- Consideration of possible exercise of powers to refuse permission for past failures to comply (under Section 35 of the 2000 Act); and
- Review of the drafting of conditions on planning permissions.

Other sections within the planning authority, for example transport and environment, and/or other Government bodies or agencies may also be of assistance in the resolution of enforcement cases.

7.4 Case Level

7.4.1 Procedural Manuals

Given the complexity of planning enforcement legislation and practice, planning authorities should develop procedural manuals with technical and administrative staff in the Enforcement Section. These should include templates of forms, reports, letters and notices. Templates should be reviewed and updated with the team e.g. following changes in legislation and where a court decision may impact on the practices of the planning authority.

7.4.2 Case Officers

Case officers should actively engage in available training and undertake necessary professional development to support their role in the delivery of an effective planning enforcement service to the public. Senior officers should also guide and mentor more junior members of the team. All officers should have a good understanding of, and competencies in:

- the basics of planning law;
- how to research the planning history of a site, land ownership etc. and the implications of that research on an enforcement investigation;
- report writing skills and making recommendations on a case based on the evidence;
- carrying out and documenting site inspections;
- dealing with developers, complainants, members of the public and elected representatives; and
- preparing for, attending and giving evidence in court.

7.5 The Public - Complainants, Developers and Interest Groups

All planning authorities should review and update the information on planning enforcement that is available to the general public including the complainant and those who are being investigated by the planning authority for alleged unauthorised development. Information and forms relating to enforcement should be available in hard copy form at the planning authority's offices and easily accessible on its website. The OPR, in conjunction with the DHLGH, has published a planning leaflet dealing with planning enforcement which aims to explain how planning law is enforced in Ireland.[107]

Planning authorities should also publish information in their enforcement policy and practice statement (section 7.2.1) on their planning enforcement functions, to complement national guidance. This could be in the form of FAQs, outlining:

- what procedures the planning authority undertakes in carrying out its enforcement functions;
- what a person, either as a complainant or as a developer, can expect from the planning authority;
- what are the relevant contact phone numbers/email addresses for the planning enforcement section;
- what is not dealt with by the planning enforcement team and should be directed to other codes (environmental, building control etc.) or for other bodies (the EPA or NPWS etc.). In addition, FAQs should assist members of the public by seeking to distinguish between planning law and private law matters e.g. property boundary disputes that are for the parties themselves;
- what other publicly accessible resources are available e.g. the planning authority's own planning register, its development plan and maps and the resources of other public bodies that can be consulted e.g. EPA, NPWS and NIAH; and
- the link to a complaints form.

[107] OPR and DHLGH (2021) "A Guide to Planning Enforcement in Ireland – Planning Leaflet 6".

Appendix A

Insert: **Planning Authority Name/Logo**

Planning Enforcement Complaint Form

(1) Nature of the alleged unauthorised development:

(In your own words, please outline why you consider the development is unauthorised. Please attach any supplementary material you consider may be of assistance to the planning authority in investigating your complaint e.g. photographs, drawings, maps.)

If this complaint is accompanied by additional documents please indicate:	Yes ☐ No ☐

(2) Location of alleged unauthorised development:

Address/townland:	
Eircode (if known)	
If this complaint is accompanied by a map/ sketch indicating location please indicate:	Yes ☐ No ☐

Important Note:
The planning authority is precluded from pursuing any complaint/representation that is vexatious, frivolous or without substance or foundation.

Contact Details of Complainant:

The planning authority may wish to clarify elements of your complaint and/or get advice on locating the development or the specifics of the case.

In order for the planning authority to keep you advised as to the course of action that may be taken following investigation, it is important that the planning authority has your contact details. If you do not furnish contact details this may inhibit the planning authority's investigation and progress on the case.

Furthermore, if you do not provide appropriate contact details, the planning authority will not be able to notify you or furnish you with any decision in writing in relation to the course of action that may be taken in the case.

Name:	
Address:	
Telephone Contact:	
Email Address:	
Signature:	
Date:	

This information will be kept confidential.

Data held by this planning authority is subject to Freedom of Information and Data Protection Legislation.

Supplementary Complaint Information Sheet:

In order for the planning authority to open an enforcement file, it is not essential to provide responses to the questions below. Nonetheless, in the interest of efficiency the planning authority would appreciate if you would share any information that may be relevant. The sharing of key information may minimise lengthy investigations and matters may be resolved sooner.

Location:	
Is the development visible from the public road?	
Is it to the front, side or rear of the property?	
Does it relate to the internal use of a property?	
Reasons for complaint:	
Is there any aspect of the development that you consider warrants particular focus? *E.g. visual amenity, environmental/ public health considerations.*	
Details, if known, of the land owner(s), occupiers, developer or person with an interest in the subject development:	
The name and address of person(s) carrying out the alleged unauthorised development.	
The name and address of the landowner(s) and/or landlord(s).	
The name and address of the occupier(s) of the lands/buildings.	
In cases where an alleged unauthorised change of use has taken place:	
What was the former use of the buildings/lands?	
What is the new alleged unauthorised use?	
When, to your knowledge, did this change of use occur?	

In cases where an alleged unauthorised structure(s) is being or has been constructed or erected:	
When, to your knowledge, did works commence on building this structure?	
Alleged unauthorised development on a site that has planning permission:	
What is the planning register reference number?	
Is there a specific condition of the permission that you consider has been breached?	
Is there a specific drawing or detail in relation to the subject development that you consider has not been complied with?	
Court proceedings:	
In the event that court proceedings are considered necessary, please indicate if you would be willing to make a statement and/or give evidence to support the planning authority's case. *[Please note this situation seldom arises and that you are not bound by your response, however, in certain circumstances where there is lack of evidence an independent witness can greatly assist the planning authority in achieving a successful outcome to enforcement proceedings.]*	**Please tick as appropriate.** Yes ☐ No ☐ Uncertain ☐

Appendix B

Legal Digest
Summary of Relevant Case Law

The following legal cases were identified as significant judgments relating to planning enforcement. A brief summary of the key issues of relevance to this practice note has been set out for each case.

As indicated at the outset, this practice note cannot be relied upon as containing, or as a substitute for, legal advice.

No.	Case Title:
1.	*Butler v. Dublin Corporation* [1999] 1 IR 565
2.	*Clare County Council v. Floyd* [2007] IEHC 48 [2007] 2 IR 671
3.	*Cork County Council v. Cliftonhall Ltd* [2001] IEHC 85
4.	*Dublin County Council v. Tallaght Block Company Ltd* [1982] ILRM 534
5.	*Donegal County Council v. P Bonar Plant Hire Ltd T/A Bonar's Quarry* [2021] IEHC 342
6.	*Dublin City Council v. Benqueues Ltd.* [2016] IEHC 427
7.	*Dundalk Town Council v. Lawlor* [2005] 2 ILRM 106
8.	*Eircell Limited v. Bernstoff* [2000] IEHC 18
9.	*Galway County Council v. Connacht Proteins Ltd.* 1980 WJSC-HC 1025
10.	*Meath County Council v. Murray* [2017] IESC 25
11.	*O'Neill v. Kerry County Council* [2015] IEHC 827
12.	*Rehabilitation Institute v. Dublin Corporation* 1988 WJSC-HC 626 [1988] 1 JIC 1401
13.	*Weston Ltd v. An Bord Pleanála* [2010] IEHC 255

Please note that cases are listed in alphabetical order.

1. *Butler v. Dublin Corporation* [1999] 1 IR 565

On 30 June 1997, Dublin Corporation issued a warning notice in respect of alleged unauthorised development (a material change of use) comprising the holding of two pop concerts by U2 at the rugby grounds at Lansdowne Road stadium. Preparations for the concerts were at an advanced stage, so they went ahead by agreement on a *"without prejudice"* basis and the Trustees of the Irish Rugby Football Union sought certain declaratory reliefs regarding the planning status of the stadium.

Section 40(b) of the 1963 Act (the pre-cursor to Section 39(4) of the *Planning and Development Act, 2000*) provided that planning permission is not required for the occasional use of land (i.e. a use different to its normal use), if that occasional or temporary use had also occurred on the land prior to the appointed day under the 1963 Act, 1 October 1964. In this case, there was evidence that, prior to 1 October 1964, the Lansdowne Road rugby grounds had occasionally hosted a variety of events and activities other than rugby, including musical performances. The Supreme Court, in a judgment delivered by O'Flaherty J., held that having regard to section 40(b) of the 1963 Act, the temporary use of the Lansdowne Road Stadium for pop concerts did not constitute development requiring permission. Whether the occasional use had taken place at regular intervals or not was irrelevant.

Mr Justice O'Flaherty stated that this case was concerned purely with *"the single, solitary question of how the planning code impinges on the holding of such events as pop concerts in this particular ground"* at Lansdowne Road, which had a capacity of approximately 40,000 people. His judgment emphasised that it had *"nothing to say"* about the transient use of smaller sporting venues for similar events.

The judgment of Mr Justice Keane agreed with the conclusion of Mr Justice O'Flaherty regarding the application of section 40(b), but went on to add some observations on whether transient uses might require planning permission. Having pointed out that the legislation did not expressly limit the requirement for permission to developments, which are permanent in their nature, he stated: *"it is clear, in my view, that the radical controls imposed by the legislation were not intended to apply to changes in use which were so fleeting in their nature that they could properly be regarded as not material in planning terms"*. Whether such a transient use could be considered material will depend on the factual context in each case.

2. *Clare County Council v. Floyd* [2007] IEHC 48 [2007] 2 IR 671

This case concerned enforcement proceedings brought by Clare County Council in relation to a quarry development at Ballybran, Ogonnelloe, Co. Clare. In October 2002, an enforcement notice was served on the owner of the quarry, Mr Derek Floyd, and a summons was issued when he failed to comply with its requirements. The summons was dismissed at Tulla District Court on 19 June 2003 because the judge accepted what the High Court subsequently referred to as *"an inventive argument"* by Mr Floyd's solicitor that the planning authority had to show, as part of their proofs, that a complaint had been received from a member of the public. This dismissal meant Mr Floyd was acquitted.

A new enforcement notice was issued in February 2004 and the matter came before Killaloe District Court in May. The accused claimed that the District Court had no jurisdiction to hear the case because he had already been acquitted on the first summons (legal principle of *autrefois acquit* or double jeopardy).

Judge Mangan, by way of consultative case stated, sought the advice of the High Court regarding whether:

1. In circumstances where the planning authority had previously brought enforcement proceedings in relation to the quarry development and the defendant had been acquitted, was Clare County Council entitled to bring an enforcement prosecution against the defendant for failure to comply with a subsequent enforcement notice?
2. In these circumstances, does the District Court have jurisdiction to hear and determine proceedings brought in relation to the defendant's alleged failure to comply with the subsequent enforcement notice given that the District Court had previously dismissed proceedings brought in relation to the same development?

Mr Justice Charleton stated that the offences under Part VIII of the *Planning and Development Act 2000*, as amended, are continuing offences. He held: *"It follows that once a conviction occurs a prosecution may be brought on each and every day on which the unauthorised development continues in existence. An unauthorised development therefore is a continuing offence in itself. It happens every day the accused opens for business, in a change of use case, or every day the development continues, in the case of buildings or land."* If a developer has been acquitted for offences related to an unauthorised development, but the planning authority issues an enforcement notice for an ongoing unauthorised development on a subsequent date and then commences proceedings for failure to comply with that subsequent notice, the proceedings would relate to a separate offence. The evidence required to prove that second offence would be different. As such, Clare County Council was entitled to issue a new enforcement notice in relation to the quarry development at Ballybran and to then bring enforcement proceedings in relation to failure to comply with the requirements of that subsequent notice.

Mr Justice Charleton further did not agree with the defendant's previous argument that a planning authority is required to produce proof that a complaint had been made by a member of the public against the alleged unauthorised development. In outlining the evidence required to prove that the defendant was guilty of an offence, he stated: *"The proofs required by the prosecution encompass the service of the enforcement notice and evidence of an unauthorised development or one not in accordance with a planning permission."* Whether a planning authority makes a decision of its own motion, or on foot of a complaint, and whether it issues a warning letter before issuing an enforcement notice, are administrative matters and do not constitute elements of the offence.

Judge Charleton answered both questions raised in the case stated in the positive as follows:

1. Clare County Council is entitled to bring a prosecution against the accused in relation to an alleged failure by him on 25 March, 2004, to comply with the requirements of an enforcement notice of 18 February, 2004.
2. The learned district judge has jurisdiction to hear and determine the said offence and it is not part of the elements of the offence, in that regard, to show that the existence of a complaint, or an investigation of any kind, leading to a warning letter, or a warning letter in itself, prior to the issue of an enforcement notice under section 154 of the *Planning and Development Act 2000*.

3. Cork County Council v. Cliftonhall Ltd [2001] IEHC 85

In April 1999, Cork County Council granted permission for twenty-six dwellings in six blocks at Castle Point, Camden Road, Crosshaven, Co. Cork. When works were underway, the planning authority identified that Cliftonhall Ltd had not complied with the planning permission in five matters and sought an injunction under section 27 of the *Local Government (Planning and Development) Act 1976* (the pre-cursor to section 160 of the *Planning and Development Act 2000*). The unauthorised windows at third floor level were removed by agreement, leaving four outstanding issues.

Key among these issues was that the ridge height of one of the blocks exceeded that indicated on the application drawings to such an extent that Cork County Council considered the difference to be material. Noting that the application drawings stated that *"levels may vary a little subject to ground conditions"*, Judge Finnegan held that the *"Respondents in view of this are entitled to some latitude in relation to levels"*. In determining whether the deviation in ridge height was material, he considered the deviation in height as a proportion of the overall height of the relevant block; photographs of the development; the potential visual impact on the area, including on residents of neighbouring houses; and the potential cumulative effect of the deviation in building footprint in combination with the deviation in ridge height. Judge Finnegan held that the increased ridge height of the relevant block constituted an immaterial deviation in the context of the development as a whole. The Judge deemed that the increased ridge height would not result in a material non-compliance with the planning permission.

The Judge so held *"with some reluctance"* as he was critical of the Respondents' *"cavalier disregard for the planning process"*. He noted that the Respondents, *"by lodging inaccurate plans, were the authors of this problem"* and that if they had promptly complied with the condition of the planning permission requiring the submission of drawings showing existing and proposed ground levels and finished floor levels, the problem could have been avoided.

As the deviations from the planning permission were found to be immaterial, Judge Finnegan refused the orders sought by Cork County Council directing the Respondent to perform certain actions in order to comply with the planning permission.

4. Dublin County Council v. Tallaght Block Company Ltd [1982] ILRM 534

Dublin County Council sought an injunction under section 27 of the *Local Government (Planning and Development) Act 1976* (the pre-cursor to section 160 of the *Planning and Development Act 2000*) requiring Tallaght Block Company Ltd to cease an alleged unauthorised concrete block manufacturing operation on lands in the Dodder Valley, an area of high amenity.

While Tallaght Block Company Ltd argued, *inter alia*, that the use was an established use in operation since before 1964, Mr Justice Costello noted that the manufacturing of concrete blocks on different parts of the site had ceased at various points prior to the commencement of the current operation on the site in 1973. He held that the manufacture of concrete blocks on part of the site by Dublin Concrete Blocks Limited had ceased by 1960. Moreover, although a different part of the site had been operated by Firhouse Concrete Block Company Limited for the manufacture of concrete blocks in 1964, that company had gone into liquidation and all manufacturing on that part of the site had been *"abandoned"* by mid-1965. The judgment outlined that, while the director of the Tallaght Block Company Ltd had purchased some equipment from the Firhouse Concrete Block Company Limited, he:

> *"had no intention then of acquiring this site as he was carrying on business elsewhere and the evidence establishes that the manufacture of concrete blocks on this site ceased. Some time later the owner of the site granted an option over it to John Sisk and Co. Limited for the purpose of erecting a large factory to manufacture pre-cast concrete units for the construction of multi-storey buildings but nothing came of this proposal".*

Mr Justice Costello referred to the principle laid down in *Hartley v. Minister for Housing and Local Government* (1970) 1 QB 413, which is summarised in the head note as follows:

> *"Where a previous use of land had been not merely suspended for a temporary and determined period but had ceased for a considerable time with no evinced intention of resuming it at any particular time, the tribunal of fact was entitled to find that the previous use had been abandoned, so that when it was resumed the resumption constituted a material change of use".*

Applying this principle and with reference to the fact that manufacturing of concrete blocks on the site was abandoned during the 1960s, the court held that the use of the site for concrete block manufacturing during the 1970s was a material change of use and, therefore, unauthorised development.

The injunction sought was granted.

5. Donegal County Council v. P Bonar Plant Hire Ltd T/A Bonar's Quarry [2021] IEHC 342

In June 2020, Donegal County Council sought an injunction under section 160 of the 2000 Planning Act restraining Mr Bonar from carrying out any quarrying or related activities at a quarry at Calhame (also known as Fallard), Letterkenny, Co. Donegal, and requiring him to carry out restoration works.

It was accepted by the planning authority that quarrying operations had taken place on the site since the 1930s (i.e. long prior to the inception of the planning code on 1 October 1964).

Planning permission for retention of certain works and extension of quarrying operations was granted by An Bord Pleanála in 2008, subject to conditions, including conditions stating that the permission would last for five years and that the quarry operator must, on expiry of the permission, landscape and restore the site. The duration of this permission was extended until June 2018. After it expired, Mr Bonar continued quarrying operations on what he referred to as *"the existing"* (the pre-64) part of the site, on the basis that this was a continuation of the works reasonably contemplated when the quarry commenced prior to 1 October 1964 and did not require planning permission.

In rejecting that argument, Judge Barrett made a number of interesting and significant rulings in the context of enforcement against quarrying activities.

He stated that, by virtue of implementing the 2008 permission for the extension of the existing quarry, the operator created a single, enlarged quarry on the site, *"which, in planning terms, is a single planning unit."* He made reference to the fact that the red line site boundary of the site which received permission incorporated the then existing quarry and the proposed extension area.

Judge Barrett held that Mr Bonar's suggestion he could somehow revert to quarrying on part of the site on an alleged pre-1964 user basis without any environmental controls, restrictions or conditions, was completely artificial and incorrect as a matter of law. In coming to this conclusion regarding artificiality, the judge was assisted in particular by a series of aerial photographs which showed *"the development of the quarry, and the enlargement and deepening of extraction, over time."* He concluded that the photographs showed the quarry had developed as a single quarrying operation, therefore *"it is not possible to 'turn back the clock' so as to treat one part of the quarry as a separate pre-'1964' unit"*.

Having quoted from a 1981 judgement of the House of Lords, *Newbury District Council v. Secretary of State for the Environment* [1981] A.C. 578, on the loss of existing use rights when a new planning unit is created, Judge Barrett concluded:

"the implementation of the 2008 planning permission created a new planning unit, with any entitlement to rely upon or revert to the pre-1964 user thereby being extinguished... The 2008 planning permission is indivisible: the respondent cannot avail of that permission to its benefit and then disavow an element of the permission of which one has just availed of. The whole purpose of planning permission is that one gets permission to do something subject to certain conditions: one cannot then do the something and ignore a condition. One might as well have no planning law at all if that was possible."

The reliefs sought by Donegal County Council were granted.

6. *Dublin City Council v. Benqueues Ltd.* [2016] IEHC 427

On 16 December 2013, Dublin City Council granted permission to retain interior works to a long established café and restaurant premises known as the Bad Ass Café in Temple Bar, which was owned by Benqueues Ltd. The works included installation of new bars and counters to both the ground and the first floors. Condition 2(b) stated: *"Any use of the bar areas for the sale and consumption of alcohol shall be strictly ancillary to the principal use of the premises as a restaurant."*

A local authority Enforcement Officer attended the restaurant and found that it was possible to order an alcoholic beverage without ordering a meal and observed customers in the restaurant at that time, who were drinking and not eating. On 24 July 2014, Dublin City Council issued an enforcement notice requiring Benqueues to cease the sale of alcohol other than in conjunction with or ancillary to a meal being consumed on the premises, on the grounds that *"the sale of alcohol for consumption, other than in conjunction with or ancillary to a meal consumed on the premises is in breach of Condition 2(b) of the planning permission..."*. This language was also used in the summons seeking to prosecute Benqueues Ltd for failure to comply with the enforcement notice.

District Judge John O'Neill, by way of case stated, asked the High Court whether a direction to acquit Benqueues Ltd should be granted.

In his judgment, Mr Justice Twomey of the High Court outlined that, if the planning authority believed that Condition 2(b) of the planning permission had been breached, the enforcement notice should have said that the bar area was not being used as ancillary to the permitted restaurant use. It was not correct for the enforcement notice to say that selling alcohol other than with a meal was a breach of Condition 2(b), as, there are circumstances in which alcohol could be sold without the customer eating a meal, where the bar continues to operate correctly as ancillary to the principal use of restaurant. As such, banning all sales of alcohol unless accompanied by food would not have remedied a breach of Condition 2(b). Mr Justice Twomey stated that:

> *"The core of this case is that someone cannot be prosecuted for failing to take certain specified steps, if those steps are not necessary to remedy the alleged breach of planning."*

The High Court found that the Enforcement Notice and the Summons were flawed and that the prosecution based on them should not proceed and gave a direction to acquit.

7. *Dundalk Town Council v. Lawlor* [2005] 2 ILRM 106

On 21 October 2003, Dundalk Town Council served an enforcement notice on Mr Bill Lawlor requiring him to *"cease all excavation site clearance works and return site to its previous condition."* The site in question was a disused and overgrown shipyard at Soldier's Point, Dundalk. A summons was issued against Mr Lawlor for failure to comply with the requirements of the enforcement notice.

The matter came before Dundalk District Court in March 2004. In a case stated, District Judge Flann Brennan sought the opinion of the High Court on two questions:

- Whether it was correct in law to find that an enforcement notice specifying that action should be taken *"within a period of immediately, commencing on the date of service of this notice"* satisfies the requirement to identify a *"specified period"* (set out in section 154(5)(b) of the 2000 Planning Act); and
- Whether it was correct in law to find that the requirement in the enforcement notice to *"return site to its previous condition"* is an adequate compliance with the statutory requirement that an enforcement notice specify what steps must be taken to remedy unauthorised development (set out in section 154(5)(b) of the 2000 Planning Act).

With regard to specifying a time period during which action must be taken, Mr Justice O'Neill outlined that a period of time is defined by a start point and an end point. Given that failure to comply with an enforcement notice is a criminal offence, it is particularly important that the period of time specified in the notice is clear and precise. While the enforcement notice which was the subject of this case set out a clearly defined start point by use of the word immediately, it did not indicate the end point. As such, Mr Justice O'Neill held that the notice did not specify a period of time and, therefore, did not meet the requirements for enforcement notices set out in section 154 of the 2000 Act.

With regard to specifying what exactly had to be done in order to comply with the notice, it was held that it is not adequate for an enforcement notice to quote the wording of section 154(5)(b) of the 2000 Act. Mr Justice O'Neill said *"If the steps required are not set out with precision and clarity, a person served with a notice may find themselves having to guess or speculate as to what they must do to achieve compliance."* The enforcement notice must outline in appropriate detail the precise actions that have to be taken to remedy unauthorised development on the site. As such, Mr Justice O'Neill found that it was not sufficient for the enforcement notice to require the person served with the notice to *"return site to its previous condition"* as it was unclear from this what actions were required to satisfy this requirement. For example: *"... the unauthorised development complained of was the removal of top soil and the stripping off of sod. Does the notice require that top soil be restored, and that the sod be restored or merely that the top soil be reseeded?"*

Judge O'Neill found the enforcement notice was invalid and answered both questions raised in the case stated in the negative.

8. *Eircell Limited v. Bernstoff* [2000] IEHC 18

In January 1999, a five year permission was granted by An Bord Pleanala to Eircell for a telecommunications mast and ancillary buildings in Berkeley, New Ross, Co. Wexford. Condition no. 6 required details of the colour scheme for the structures to be agreed in writing with the planning authority. Condition no. 7 required lodgement of security for the satisfactory reinstatement of the site at the end of the five year period. In both instances, the requirements were to be met prior to the commencement of development.

While Eircell Ltd complied with the requirement to submit details of the colour of the proposed mast, ancillary structures and palisade fencing to the planning authority for agreement, the planning authority's written approval was not received until approximately two days after the development commenced. There was also a short delay in the fulfilment of condition no. 7; the requisite bond was not received by the planning authority until a few days after commencement of development.

Mrs Bernstoff and a group of local residents, who contended that the development was contrary to the planning permission because of these delays, secured an interim injunction on 20 October 1999 barring Eircell Ltd from carrying out any further works to erect the mast, but later the same day Eircell was successful in an application to discharge that interim injunction on the grounds that the minor delay in complying with the relevant planning conditions could not have resulted in any harm to anyone.

Separate proceedings were brought by the group under the then relevant provision, section 27 of the *Local Government (Planning and Development) Act, 1963* (the pre-cursor to section 160 of the *Planning and Development Act 2000*), in which they sought an injunction prohibiting Eircell from carrying out works, or further works, at Berkeley and a declaration that any works carried out not in conformity with the planning permission constituted an unauthorised development.

It was argued on behalf of the applicants that, as the requirements in question were conditions precedent to the commencement of development, they should be strictly interpreted and subsequent compliance does not render legal what was already an unlawful development.

In deciding the section 27 injunction application, Judge Barr in the High Court followed the earlier decision of Judge McCracken discharging the interim injunction on the grounds that Eircell had complied with the conditions. Judge Barr went on to state that:

> *"No court should make an order which is potentially futile. If the mast were declared to be an unlawful development, no doubt application would be made to the planning authority for a retention order and in the circumstances that would be granted for the asking."* [Emphasis added.]

The section 27 injunction sought by Mrs Bernstoff and the group of local residents against Eircell was refused.

9. *Galway County Council v. Connacht Proteins Ltd.* 1980 WJSC-HC 1025

In August 1966, Galway County Council granted permission for alterations to a disused corn and storage mill so that it could be used as an animal by-product processing plant. The former mill building was destroyed by fire in 1968. No permission was obtained to rebuild the mill and it was not rebuilt.

Some outbuildings apparently remained and Connacht Proteins built an entirely new factory on the site. Eventually, they applied for its retention in June 1975. Retention permission was refused on appeal in December 1977. Connacht Proteins continued their offal rendering business in the variety of buildings on the site.

In 1979, Galway County Council sought an injunction under section 27 of the *Local Government (Planning and Development*) Act 1976 (the pre-cursor to section 160 of the *Planning and Development Act 2000*) requiring Connacht Proteins Ltd to cease alleged unauthorised use of lands at Ochilmore, Co. Galway. In the High Court, Mr Justice Barrington held:

> *"It appears to me that when the mill perished, the Permission to use those premises for a specific purpose perished also. It could be argued that the Permission to use the mill for a specific purpose implied a Permission to use out-buildings for ancillary purposes. But when the mill itself perished, it appears to me one could not imply a Permission to use the out-buildings for the principal business."*

The planning authority was granted an injunction prohibiting use or continued use of the lands and premises at Ochilmore for the purpose of cooking or rendering animal offal, or the extraction of oils from same, or for the manufacture of meat or bonemeal or for the storing of animal waste.

10. *Meath County Council v. Murray* [2017] IESC 25

In 2006, Michael Murray and Rose Murray constructed a large house at Faughan Hill, Bohermeen, Navan, Co. Meath subsequent to planning permission having been refused for the development of a smaller house on the site. In June 2007, the planning authority commenced enforcement action against the development of the house. Retention permission for the constructed dwelling and permission for a smaller dwelling were refused by the planning authority and by An Bord Pleanála on several occasions. In response to proceedings brought by the planning authority, the High Court granted a planning injunction under section 160 of the 2000 Act in 2010, ordering, amongst other things, the demolition of the dwelling and the restoration of the lands to their pre-development condition of agricultural land. The owners of the land then appealed that decision to the Supreme Court on multiple grounds.

While this is a lengthy case considering a wide range of factors, the decision of the Supreme Court is particularly significant in that it provides a concise summary of the factors that the court should consider in coming to a decision on an injunction application as follows:

(i) the nature of the breach of planning laws (on a scale from minor to gross);

(ii) the conduct of the infringer (acting in good or bad faith);

(iii) the reason for the infringement (ranging from general mistake up to culpable disregard);

(iv) the attitude of the planning authority (important but not decisive);

(v) the public interest in upholding the integrity of the planning and development system;

(vi) the public interest (impact on those beyond the transgressors);

(vii) the conduct and personal circumstances of the applicant;

(viii) delay and acquiescence;

(ix) personal circumstances of the respondent; and

(x) the consequences of the order (including hardship on the respondent and third parties).

In this case, the Supreme Court also reviewed the implications of constitutional rights related to the dwelling (e.g. the inviolability of the dwelling under Article 40.5) on the discretion of the court to grant orders under section 160 of the 2000 Act. While constitutional rights related to the dwelling are an important factor that should be considered in deciding an injunction application, the Supreme Court held that the use of an unauthorised structure as a family home is not a factor that would necessarily prevent the court from exercising its discretion to order demolition of the structure. A key factor that would be relevant in these circumstances would be where the construction of the unauthorised dwelling was *"a deliberate and flagrant breach of the planning laws"*.

It is to be noted that the Supreme Court's analysis of the constitutional protection of the dwelling in the context of unauthorised development has overruled the approach taken in the judgments of Hogan J. in the Fortune cases – *Wicklow County Council v Fortune* [2012] IEHC 406 and [2013] IEHC 255.

11. *O'Neill v. Kerry County Council* [2015] IEHC 827

The development of a large housing estate at Kilcummin, Killarney, which started in 2004, remained unfinished some 10 years later. Kerry County Council received complaints regarding an unauthorised change of use of the site from residential to commercial, involving the placement of truck trailers or containers on site. On 22 July 2015, the planning authority issued warning letters to Barth O'Neill, Dunboy Greener Homes Limited and Dunboy Construction and Property Developers Limited. Having regard to the attitude of Mr O'Neill and his associates in their response to the warning letters, Kerry County Council issued enforcement notices on 22 October, 2015, requiring the applicants to cease the use of the site for a commercial business related to insulation or any similar use by 30 October, 2015, and to remove all materials, machinery, containers and other identified items from the site by 23 December, 2015.

Mr O'Neill and his associates sought, by way of judicial review proceedings in the High Court, to quash the enforcement notices. Judicial review was sought on a large number of procedural grounds, including an allegation that the planning authority had failed to give adequate reasons for the decision to issue enforcement notices. The court held that the extent of the obligation to give reasons will depend on the context of the decision. In some instances, the duty could be minimal, while other circumstances might demand the provision of substantial reasons. Mr Justice Humphreys determined that:

> *"there are clear reasons set out in the recitals to the enforcement notice. That notice contains a finding that an unauthorised range of use has been carried out at the site, that this development is not exempted development and that no permission for the development has been applied for or granted by the council in respect of the development. The council therefore issued a notice under s. 154 of the 2000 Act. The notice itself contains all of the essential reasons for its issue and no further reasons are required."*

Mr Justice Humphreys continued on to analyse judicial review of enforcement notices. He pointed out that there is no right of appeal against an enforcement notice under section 154 of the 2000 Planning Act, which would suggest that such a notice can in principle be challenged by way of judicial review. He noted that the effect of unsuccessfully seeking leave to apply for judicial review of an enforcement notice is that, in any subsequent proceedings (such as a prosecution for failure to comply with the notice), a challenge to the validity of the enforcement order on any ground that was raised, or could have been raised, in the judicial review application cannot be relied on.

Leave to apply for judicial review was refused.

12. *Rehabilitation Institute v. Dublin Corporation* 1988 WJSC-HC 626 [1988] 1 JIC 1401

In spring 1964, the Rehabilitation Institute purchased a premises which was originally constructed as a house at No. 1 Northbrook Road in Dublin 6. From spring 1964 until 1983, the Institute carried out operations in this building, including the assessment, training and placement of persons with disabilities. It was accepted that on 1st October 1964, No. 1 Northbrook Road was used as follows: *"the use of the premises on the ground floor was as administrative offices for the raising of funds for the Institute together with a kitchen and canteen. On the first floor there was an administrative office and two other rooms which were used for secretarial training. The top floor contained the offices of the placement officers."*

In 1983, the Rehabilitation Institute sought to sell the premises as having an established office use prior to the appointed day for the planning code (1 October 1964). Dublin Corporation objected to this interpretation on the basis that, after the secretarial training area had been moved to the top floor, the first floor was used as a workshop and training area for clock and watch repair which was a light industrial use.

The 1963 Planning Act, as amended by the 1976 Act, provided that questions regarding exempted development were to be referred to and decided by An Bord Pleanála, with a right of appeal from the Board's decision to the High Court. As the Rehabilitation Institute and Dublin Corporation held contrary opinions regarding whether the use of the premises as offices was development requiring planning permission, it was agreed to refer the issue to An Bord Pleanála under section 5 of the 1963 Act, as amended. The Board found that use of the first floor as offices would constitute a material change of use. On appeal, Mr Justice Barron in the High Court found that it was not correct to split the building into separate planning units as this was not the way in which the building had been used by the Rehabilitation Institute. He said:

> *"While different aspects of the Institute's affairs were carried out in different parts of the building, there was no overall plan which required any one of these aspects to be carried out in any specific room or rooms. The Institute used the entire of the building in a manner which it found convenient."*

In his judgment, Mr Justice Barron noted that, where lands are used for more than one purpose and where one of those primary uses ceases, this can amount to a material change of use. However, where an ancillary use ceases and the primary use continues, a material change of use does not occur.

In this case, the Court found that, as the primary use of No. 1 Northbrook Road on 1 October 1964 was general administrative use, the use of the building for office purposes after 1983 did not constitute a material change of use.

13. *Weston Ltd v. An Bord Pleanála* [2010] IEHC 255

On 20 March 2009, An Bord Pleanála refused planning permission for the development of aircraft hangars at Weston Aerodrome, then known as Weston Executive Airport, on the grounds that the proposed development would result in a significant intensification of the existing use, which would be contrary to the proper planning and development of the area. Weston Ltd then sought judicial review of An Bord Pleanála's decision by the High Court, *inter alia*, on the grounds that by refusing permission on the grounds of intensification, An Bord Pleanála was effectively anticipating unauthorised development and had, therefore, acted outside its authority by straying into the realm of enforcement. This argument was unsuccessful. Judge Charleton followed the judgment in an earlier case, *Kelly v An Bord Pleanala* (Unreported, High Court, Flood J., 19 November 1993), and held that it is valid *"to refuse planning permission on the basis that the development proposed is consistent with a more extensive use of an existing facility such as that which would amount to an intensification of use."*

The case is significant as Mr Justice Charleton provides a concise summary of case law precedent on intensification of use to identify *"five principles by reference to which a material change of use through the intensification of, ostensibly authorised, activity may be found to exist"*. These five principles can be summarised as follows:

1. The object of the operation can change to the extent that an unauthorised intensification of use may have occurred (for example, if a different product is being produced);
2. If a change in the method of production occurs so that a low level of production is geared into an industrial scale, this could indicate that an unauthorised intensification of use has taken place;
3. The court may find that an unauthorised intensification of use has taken place where comparison of the scale of operations at the time of initiation of injunction proceedings to the prior scale of operations (e.g. the pre-1964 or the use for which planning permission was granted) reveals an excessive level of growth beyond the level of change that would typically be expected to occur with any business;
4. Where changes in the use of land have an impact in terms of planning or environmental considerations (such as a considerable increase in heavy vehicle traffic, changes in visual amenity or noise), this could result in a material change of use through intensification;
5. In assessing whether an unauthorised intensification of use has occurred, planning permission must be construed objectively with regard to the application documents: *"The question is: what is permitted by law on this site?"*. A similar approach will apply to assessment of a pre-1964 use with reference to relevant evidence, such as Ordnance Survey photography and testimony from those in the area.

All other grounds advanced by Weston Ltd were also unsuccessful and the judicial review application was dismissed.

Office of the Planning Regulator
Fourth Floor (West Wing), Park House, Grangegorman,
191-193A North Circular Road, Dublin 7, D07 EWV4
opr.ie.|.info@opr.ie.|.01 854 6700

Oifig an
Rialaitheora Pleanála
Office of the
Planning Regulator