

Historic planning breach amnesty is glaring omission from upcoming bill

The improvements to Ireland's planning code proposed by the recently published draft Planning and Development Bill 2022 have been widely welcomed. However, it doesn't yet offer a solution for historic planning breaches that often blight real estate transactions



Among the proposals in the upcoming Planning and Development Bill 2022 is the reform of the judicial review of planning decisions

Overview of the bill

When enacted, the bill will consolidate and reform a complex body of planning legislation. It sets out the processes of plan-making, consents, enforcement, environmental assessments and the roles of the planning bodies.

Key proposals include:

- * Ministerial guidelines and policy directives upgraded to 'National Planning Policy Statements' and 'National Planning Policy Guidance'.
- * Local Development Plans extended from six years to ten years, with a review after year five.
- * Mandatory statutory timelines applying to all consent processes and all appeals and applications, with penalties for failure to meet them.
- * A change of name: An Bord Pleanála ("ABP") will be restructured and re-named An Coimisiún Pleanála. The Planning Commissioners will be the decision-making body and a separate new Governing Executive will be responsible for the organisation's governance.
- * Reform of judicial review of planning decisions.

Judicial review

In recent years, judicial reviews of planning decisions on residential development have led to significant delays in the planning system, impacting on housing delivery. The Strategic Housing Development (“SHD”) process, established in 2017 as a fast-track planning mechanism for the delivery of larger housing projects, has become mired in judicial reviews.

Over the lifetime of SHD, judicial reviews increased exponentially to over 50 per cent of SHD permissions granted in 2021. In February 2022 Tom Phillips + Associates reported that 95 per cent of SHD judicial reviews were brought by third parties, with objectors succeeding in 93 per cent of the decided cases initiated by third parties. Decisions often fell for technical reasons regardless of materiality of the deficiency in the planning decision. A decision struck down following the judicial review could reset the dial to zero, so the developer has to restart the entire planning process.

Since October 2022, a decision quashed on judicial review shall, if requested by the applicant, be remitted back to the planning authority or ABP to be reconsidered. The draft bill builds upon this change, so remittal back to the relevant decision maker would be the default step when a decision is quashed. Alternatively the court may direct that an error in the decision-making process be corrected and the decision amended, rather than quashed.

The draft bill creates an opportunity (within set time limits) for decision makers to amend decisions outside of the judicial review process, correcting any error of law or fact. This could encourage pre-litigation communications, increase the integrity of the decision-making process and significantly reduce litigation and the planning timeline. Where proceedings have been issued, the decision maker will be able to apply for a stay on the judicial review to correct an error of fact or law in a planning decision, enabling decisions to be amended rather than struck down.

Call for planning amnesty

The omission of a planning amnesty is a glaring feature of the draft bill.

For most breaches of planning law there are time limits within which enforcement action must be taken, which vary accordingly depending on the breach. For example, where no permission was obtained, enforcement action must be commenced within seven years from the start of the development. If planning permission conditions have been breached, this period runs from the expiration of the planning permission (which usually has a five-year lifespan). Generally, after 12 years, a breach of the planning law becomes immune from enforcement, but the development remains ‘unauthorised’.

Unauthorised development results in significant legal and commercial implications, including the need for protracted due diligence on every dealing with the land, thus increasing transaction timelines and costs. Queries extending back to 1964 (when the modern planning law system was established in Ireland) can be impossible to answer, as many planning authorities have not retained records going back that far. The writers argue that requiring this level of historical lookback, with the costs and time involved, serves no obvious societal purpose.

For many years both the Law Society and the Law Reform Commission (LRC) have called for a planning amnesty. In 2004, the LRC suggested introducing a rolling planning amnesty, to take effect either 10 years after an unauthorised development has taken place or 10 years after the expiration of a planning permission which has not been complied with. More recently, the Law Society recommended a planning amnesty after seven years for residential properties, to facilitate e-conveyancing.

There is precedent for an amnesty in the Building Control Act 1990. That act provided that building bye-law approval is deemed to have been granted for works carried out prior to 13 December 1989, unless the building control authority served notice stating that the works constitute a danger to public health or safety.

While there seems to be broad support for a planning amnesty, some are concerned that a general amnesty could fall foul of EU law, especially where the development had a significant environmental impact (SEI). One approach would be grant an amnesty for development without an SEI, with a mechanism for the planning authority to adjudicate on request whether or not a development has an SEI.

Alternatively, an amnesty could be limited to a class or classes of properties; for example, individually-owned houses or apartments, or specified categories of commercial premises. A more intricate approach would be to abolish all the adverse legal consequences of a development being unauthorised when it was carried out before a set date or period of time (for example, ten years before).

The draft bill is currently undergoing Pre-Legislative Scrutiny. As one of the largest bills to be introduced in recent decades, this period of scrutiny is vital. The opportunity should now be seized to introduce a planning amnesty for historic breaches of planning law. Without damaging the interest of society, the benefits for business and for consumers dealing with houses and other developed land would be significant.

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