

Enforcement

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Introduction

- 2 topics to be discussed
 - Planning and Development (Amendment) Act 2010
 - Introduces a number of changes to the enforcement regime
 - Mandatory obligation on planning authority to take enforcement proceedings in certain circumstances
 - Changes to penalties
 - Changes to 7 year rule for quarries and peat extraction
 - Enforcement and substitute consent
 - Recent decisions on enforcement

Planning and Development (Amendment) Act 2010

Obligation to institute proceedings

- Following the issue of a Warning Letter the planning authority have to carry out an investigation (section 153(1))
- Purpose of investigation is to enable planning authority to decide whether to issue an enforcement notice or bring section 160 proceedings (section 153(2), as amended by 2010 Act)

Obligation to institute proceedings

- Upon completion of the investigation the planning authority can decide to issue an enforcement notice or section 160 proceedings (section 153(6) – inserted 2010 Act)
- In certain circumstances the planning authority are required to issue an enforcement notice or section 160 proceedings (section 153(7) – inserted 2010 Act)

Obligation to institute proceedings

“Where a planning authority establishes, following an investigation under this section 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 this section or make an application pursuant to section 160 unless there are compelling reasons for not doing so”

(Section 153(7) – inserted 2010 Act)

Obligation to institute proceedings

- Three 'out clauses' for the planning authority
 - If the unauthorised development is trivial or minor in nature
 - If the person engaged in the unauthorised development has proceeded to remedy the position
 - Cessation of unauthorised development /application for retention / restoration of lands?
 - There are compelling reasons not to issue proceedings
 - Financial / staffing resources?

Penalties

- Penalties payable upon conviction for carrying out unauthorised development increased from €1,000 to €5,000
- Penalties in respect of continuing summary offence increased from maximum daily fine of €400 to €1,500

7 year time limit

- This has not been commenced yet
- Seven year time limit for taking enforcement proceedings is not altered
- Under new provisions the operation of a quarry and extraction of peat is excluded from 7 year time limit

Substitute Consent

- These provisions have not been commenced
- If a person is required by a planning authority to make an application for substitute consent and fails to either
 - Make the application for substitute consent, or
 - Furnish additional informationthe Board shall notify the planning authority which **shall** issue an enforcement notice requiring the cessation of the activity and the taking of such steps as the planning authority considers necessary (section 1770)

Substitute Consent

- The Board when considering an application for substitute consent **may** issue a Direction requiring the Applicant to cease all or part of activity / operations
- Board must form opinion that the continuation of activity / operations is likely to cause significant adverse effects on environment or adversely effect integrity of European site
- Failure to comply with a Direction issued by the Board is a criminal offence
 - Summary conviction €5000 and / or 6 months
 - Indictment €12,600,000 and / or 2 years

Substitute Consent

- Where Board refuse application for substitute consent the development is unauthorised
- Planning authority shall issue an enforcement notice requiring cessation of activity and the taking of such steps as planning authority considers appropriate (section 1770(5))

Substitute Consent

- If Board refuses application for substitute consent, it **may** give a Direction requiring
 - Cease all or part of activities / operations
 - Take remedial measures considered necessary to
 - Restore site to a safe and environmentally sustainable condition
 - Avoid in a European site the deterioration of natural habitats and species habitats or disturbance of species for which site has been designated
 - Criminal offence not to comply
 - **ALSO** Where Direction not complied with, the planning authority must issue enforcement notice requiring compliance with Board's direction and taking of any additional steps that planning authority consider

Recent case law

Warrenford Properties Ltd. v TJX Ireland trading as TK Maxx

- Unreported, High Court, Finlay Geoghegan
30th July 2010
- Applicant – owner of a district shopping
centre at Lisduggan, Waterford
- Respondent – TK Maxx traded from
three units at another shopping centre in
Butlerstown, located just outside the town
centre

Warrenford Properties Ltd. v TJX Ireland trading as TK Maxx

- PP for Butlerstown was for a retail warehouse park
- Condition 22 of pp granted in respect of Butlerstown
 - The use of the proposed retail units shall be subject to the approval of the county council
- Waterford Co Co gave a letter to Respondents saying that the use by TK Maxx was in compliance with condition 22
- Section 5 declaration was sought by the Applicant that the proposed use by TK Maxx was development and not exempted development
- WCC – exempted. Appealed to Board

Warrenford Properties Ltd. v TJX Ireland trading as TK Maxx

- Board determined that the use of the units by TK Maxx and the amalgamation of the units was development and not exempted
- Condition 22 which required the planning authority's approval could not be construed to mean that any type of retail use would be allowed.
 - Parent permission provided for retail warehouse units
 - Specific type of retail unit, defined in Retail Planning Guidelines

Warrenford Properties Ltd. v TJX Ireland trading as TK Maxx

- The range of goods sold by TK Maxx did not come within the scope of activities of a retail warehouse contained in Retail Planning Guidelines
- Would be inconsistent with the use granted
pp

Warrenford Properties Ltd. v TJX Ireland trading as TK Maxx

- Applicant brought section 160 proceedings
 - Order prohibiting the Respondents from using the unit for the sale of comparison goods
 - Order requiring the Respondents to operate the retail warehouse in accordance with the pp granted
 - Order directing the Respondents to reinstate the units as individual units

Warrenford Properties Ltd. v TJX Ireland trading as TK Maxx

- Court considered the following
 - Public interest in securing compliance with the planning code and planning permission
 - Wider public interest by reason of the Retail Planning Guidelines and the Waterford Retail Strategy which aims to protect Waterford City centre
 - Retail trading of Respondent has, as a matter of probability, an adverse impact on the strategy

Warrenford Properties Ltd. v TJX Ireland trading as TK Maxx

- Decision
 - Granted order (i)
 - Refused order (ii) – superfluous
 - Refused order (iii) – internal works considered not be exempted as they were directly related to a use not authorised by the pp. On their own the works would be exempted under section 4(1)(h)

Meath County Council v Murray

- Unreported, High Court, Edwards J., 29 June 2010
- June 2006 respondent refused pp to construct a 3045 sq ft dormer dwelling on lands – one reason was that the land was sterilised
- February 2007 complaint made to MCC that a large house of 6229 sq ft had been built
- Subsequent retention planning application refused
- Section 160 proceedings seeking demolition of house

Meath County Council v Murray

- Numerous defences run by the Respondent
 - Argued that the decision to refuse pp was invalid – HC rejected this ground on basis that a party could only challenge the validity of a decision by way of JR. Could not question it in context of section 160 proceedings
 - Argued that the house was exempted development as it was an agricultural building. In order to farm the land you needed to live on it and that the house was a ‘critical part of the agricultural structures’. HC considered this to be a preposterous argument

Meath County Council v Murray

- Numerous defences run by the Respondent
 - Argued that an order to demolish would be disproportionate and would affect family life. Also economic argument raised in that the Respondent would not have funds to provide alternative accommodation if house demolished. All rejected by HC.
 - HC accepted that it would cause hardship but law had to be upheld
 - Stay of 24 months on order

Ombudsman

- Decision of the Ombudsman in July 2010
- Ordered Meath Co Co to pay award of compensation of €13,000 arising from failure to respond effectively and in a timely manner to complaint of unauthorised development
- Numerous complaints over years from people in relation to a shed
- Ombudsman concluded that the Council failed to use enforcement proceedings in a timely manner
- Because of inactivity the 7 year time limit expired
- Ombudsman rejected Council's submission that lack of