# PLANNING INJUNCTION: SECTION 160

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## I. INTRODUCTION

The Planning and Development Act, 2000 has introduced a number of important changes to planning law. Perhaps the one which will prove the most significant in terms of the practice and procedure of the Circuit Court is that in relation to the planning injunction.

## II. OVERVIEW OF SECTION 160

Section 160 of the Planning and Development Act, 2000 provides a procedure whereby an application may be made to either the High Court or the Circuit Court for orders in respect of unauthorised development. The section is widely drafted and a variety of orders may be made; for example, orders may be made requiring the discontinuance of unauthorised development, or the restoration of any land so far as practicable to its condition prior to the commencement of any unauthorised development. The side note to the section refers to an "injunction" in relation to unauthorised development: this is somewhat misleading given the breadth of the orders which may be made.[1] The most notable feature of the procedure is that there is no *locus standi* or standing requirement: it is expressly provided under section 160(1) that an application may be made by the planning authority or any other person, whether or not the person has an interest in the land. For this reason, the courts had indicated that the grant of relief under the equivalent section of the previous legislation was discretionary.[2]

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[1] See comments of Barrington J. in *Stafford v. Roadstone Ltd.* [1980] 1 I.L.R.M. 1 at 19 (H.C.): "While the word 'injunction' is not used in this section it is clear that the section confers on the High Court jurisdiction to issue both restraining and mandatory injunctions". See also *Avenue Properties Ltd. v. Farrell Homes Ltd.* [1982] I.L.R.M. 21 at 26 (H.C.).

[2] See generally Simons, G., "Judicial Enforcement of Planning Control" (2002) 9 I.P.E.L.J. 143.

## III. PREVIOUS LEGISLATION

Section 160 is the successor of section 27 of the Local Government (Planning and Development) Act, 1976 (as amended by section 19 of the Local Government (Planning and Development) Act, 1992). A number of significant amendments have been made, however. First, the procedure has been streamlined: under the previous legislation, a distinction was drawn between development in breach of planning permission, and unauthorised development *i.e.* development without the benefit of any planning permission.[3] Secondly, *quia timet* or anticipatory relief is now available; thus the lacuna identified in the Lansdowne Road case[4] has been legislated for. Thirdly, the jurisdiction of the Circuit Court has been limited to cases where the rateable valuation of the land the subject-matter of the application does not exceed I.R. £200. Fourthly, the time limit with respect to the taking of enforcement proceedings has been increased from five years to seven years. Finally, it is now expressly provided that planning permission shall not be required in respect of development required by an order under section 160.[5]

## IV. CRITICISMS OF SECTION 160

Although most of the amendments introduced under the new procedure under section 160 are welcome, it has to be said that there are a number of aspects of same which are open to criticism. In particular, the new section is silent on several key issues. The most obvious of these is in relation to the change in the limitation period from five years to seven years. No provision is made for what is to happen in respect of those unauthorised developments of the vintage five to seven years. To elaborate: there will be a bracket of unauthorised development which had achieved immunity under the previous legislation (by virtue of having been commenced more than five years previously) prior to the 11 March 2002 (commencement date), but which was still shy of the seven years stipulated under the Planning and Development Act, 2000. Is the prospect of enforcement action to be revived in respect of such development? The Act is silent on this point. Although the argument might be made that to revive

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[3] One consequence of this is that a breach of the terms or conditions of a planning permission may not now be actionable *per se*.

[4] *Mahon v. Butler* [1997] 3 I.R. 369 (S.C.) cited with approval in *Birmingham v. Birr U.D.C.* [1998] 2 I.L.R.M. 136 (H.C.); *Westport U.D.C. v. Golden* [2002] 1 I.L.R.M. 439 (H.C.); and *O'Connell v. Dungarvan Energy Ltd*., High Court, unreported, Finnegan J., 27 February 2001.

[5] Section 163.

the possibility of enforcement action would in some way represent a form of retrospective legislation, the better view would seem to be that no "rights" had been acquired on the expiration of the five year limitation period, rather the unauthorised development retained a status as unlawful but immune.[6]

A second criticism is this. The basis for the division of function between the Circuit Court and the High Court is not made clear. Under the previous legislation, the jurisdiction of the Circuit Court and the High Court was co-extensive. Under section 160 conversely, it seems that the Circuit Court's jurisdiction is confined to cases where the rateable valuation of the land the subject-matter of the application does not exceed I.R. £200.[7] Thus in cases involving lands with a greater rateable valuation, the proceedings may only be brought in the High Court. The question which remains unanswered by the legislation, however, is as to whether an applicant may choose to proceed in the High Court even in those cases where the Circuit Court would have jurisdiction. Further, if the applicant does choose to proceed in the High Court, should he or she be limited in terms of any costs award to Circuit Court costs? In the absence of any express provision in this regard, it would seem that an applicant will in certain cases have a choice as to court, but will be on hazard as to costs pursuant to the provisions of section 17 of the Courts Act, 1981.

## V. PROCEDURE

Proceedings under section 160 are instituted by way of originating notice of motion.[8] The procedure under section 160 is thus a summary procedure, and although both the Rules of the Superior Courts, and the Circuit Court Rules, appear to envisage the possibility of oral evidence, the better view would appear to be that the matter should generally proceed by way of affidavit evidence only.[9] Indeed, the procedural limitations of the equivalent provision of the previous legislation had been emphasised in a number of

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[6] *Dublin Corporation v. Mulligan*, High Court, unreported, Finlay P., 6 May 1980.
[7] Section 160(5).
[8] Section 160(3). See also Ord. 103, R.S.C., 1986; Ord. 56, Circuit Court Rules, 2001.
[9] *Cf. Cork Corporation v. O'Connell* [1982] I.L.R.M. 505 (S.C.); *Galway Corporation v. Lackagh Rock Ltd.* [1985] I.R. 120 (H.C.); *Monaghan County Council v. Brogan* [1987] I.R. 333 (S.C.); *Dublin County Council v. Tallaght Block Company Ltd.* [1982] I.L.R.M. 534 (H.C.) and Supreme Court, unreported, 17 May 1983; *Furlong v. A.F. & G.W. McConnell Ltd.* [1990] I.L.R.M. 48 (H.C.); *Dublin Corporation v. Moore* [1984] I.L.R.M. 339 (S.C.).

decisions. In particular, the Supreme Court had indicated in its decisions in *Mahon v. Butler*[10] and *Waterford County Council v. John A. Wood Ltd.*[11] that summary proceedings under the (then) section 27 of the Local Government (Planning and Development) Act, 1976 were not appropriate where novel questions of law and complex questions of fact were involved. Subsequently, in *Dublin Corporation v. Lowe*[12] Morris P. had indicated, *obiter*, that proceedings under the (then) section 27 would have been inappropriate where there was an issue to be tried as to a pre-1964 use of lands: this issue could only be tried on full plenary hearing. In *Dublin Corporation v. Garland*[13] Finlay P. relied, *inter alia*, on the summary nature of the procedure in holding that the court had no function, on an application for a planning injunction, in any way to review, alter or set aside a decision of the planning authority with regard to the granting or withholding of permission.

## VI. NO EXCHANGE OF PLEADINGS

There is no provision made under section 160 for the exchange of pleadings between the parties:[14] the only formal pleading is the originating notice of motion. Two consequences follow from this. First, the absence of pleadings serves to emphasise the summary nature of the procedure, and indicates that the procedure is not appropriate where novel questions of law and complex questions of fact are involved.[15] Secondly, it would seem that a respondent should disclose the nature of any defence on which he or she proposes to rely in any replying affidavits filed.[16] A respondent may not be entitled to raise at the hearing of the motion a point by way of defence not raised on affidavit.[17]

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[10] [1997] 3 I.R. 369 (S.C.).
[11] [1999] 1 I.R. 556 (S.C.)
[12] High Court, unreported, Morris P., 4 February 2000. On appeal to the Supreme Court, the matter was remitted for other reasons, on consent, to the High Court for rehearing.
[13] [1982] I.L.R.M. 104 at 106 (H.C.).
[14] *Cf. Drogheda Corporation v. Gantley*, High Court, unreported, Gannon J., 28 July 1983, at p. 7 of the unreported judgment.
[15] *Mahon v. Butler* [1997] 3 I.R. 369 (S.C.)
[16] See *South Dublin County Council v. Balfe*, High Court, unreported, Costello J., 3 November 1995. See also *Kildare County Council v. Goode*, High Court, unreported, Morris J., 13 June 1997, at p. 13 of the unreported judgment, (applicant planning authority permitted to adduce further evidence in circumstances where counsel for respondent had failed to identify, at the commencement of the case, the alleged absence of a managerial order as an issue in the case).
[17] *South Dublin County Council v. Balfe*, High Court, unreported, Costello J., 3 November 1995.

## VII. PARTIES TO APPLICATION

### *A. Applicants*

Section 160(1) provides that an application may be brought by the planning authority or any other person, whether or not that person has an interest in the land. Thus, there is no *locus standi* or standing requirement. It is not a precondition to the bringing of an application that the applicant should have suffered or anticipated any loss peculiar to himself.[18] It has to be said, however, that the courts have been alive to the risk of vexatious or meddlesome litigants and, for this reason, have retained a discretion to refuse relief on this ground.[19] It is also the case that the courts have recognised the special position of the planning authority (described as its "watch dog role"), and for this reason attach significant weight to its attitude to the development complained of, even in proceedings in which it is not joined as a party.[20]

Although there is no express provision for same in either the Rules of the Superior Courts, or the Circuit Court Rules, the possibility of joining co-applicants after proceedings have been issued has been recognised.[21]

### *B. Respondents*

The wording of section 160(1) is very wide and provides for the making of an order requiring "any person" to do or not to do, or to cease to do, as the case may be, anything that the court considers necessary and specifies for the purposes prescribed in the section. In the ordinary course, any person against whom orders are sought should be joined in the proceedings as a respondent, served with the proceedings and afforded an opportunity to be heard on the

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[18] *Avenue Properties Ltd. v. Farrell Homes Ltd.* [1982] I.L.R.M. 21 at 26 (H.C.). See also *O'Connor v. Frank Hetherington Ltd.*, High Court, unreported, Barr J., 28 May 1987, at p. 12 of the unreported judgment.

[19] See especially *Stafford v. Roadstone Ltd.* [1980] 1 I.L.R.M. 1 at 19 (H.C.).

[20] *Mahon v. Butler* [1997] 3 I.R. 369 (S.C.). See also *Grimes v. Punchestown Developments Company Ltd.* [2002] 1 I.L.R.M. 409 (H.C.). In *Cavan County Council v. Eircell Ltd.*, High Court, unreported, Geoghegan J., 10 March 1999, the High Court had indicated that a court should be slow to adjourn such enforcement proceedings pending an application for retention planning permission if such an adjournment is opposed by the planning authority vested with the important statutory function to enforce the planning legislation. *Cf. Avenue Properties Ltd. v. Farrell Homes Ltd.* [1982] I.L.R.M. 21 at 26 (H.C.): "The section does not distinguish on its face between an application by a planning authority and an application by 'any other person'".

[21] *Irish Wildbird Conservancy v. Clonakilty Golf & Country Club Ltd.*, High Court, unreported, Costello P., 23 July 1996.

application. Special provision had been made under the previous rules for the making of orders against persons whose identity was unknown.[22]

Generally, it would seem that the appropriate respondents to an application should be the owner and occupier of the relevant lands. This would seem to stem from the fact that compliance with any order under the section will require control over the relevant lands, or at least a right of entry thereon. This would also be consistent with the provisions with respect to enforcement notices,[23] which indicate that an enforcement notice should be served on the person carrying out the development and, where the planning authority considers it necessary, the owner or the occupier of the land, or any other person who, in the opinion of the planning authority, may be concerned with the matters to which the notice relates.

Difficulties can arise where the breach of planning control alleged is historic, as opposed to an on-going unauthorised use. It may be that neither the (present) owner nor occupier of the lands was the author of the unauthorised development. For example, the present owner may have purchased the lands with an unauthorised structure already erected thereon. The present owner may wish to argue that it would be unconscionable to require him to make good the default of the previous owner.[24] It is submitted, however, that the better view is that the objective of section 160 is remedial rather than regulatory, and accordingly the issue of fault is not directly relevant: this is more properly an issue for any criminal prosecution. The former owner might equally well argue that without a legal right of entry or access to the relevant lands, his ability to comply with the order would be entirely dependent on the co-operation of the present owner.[25] As to the position as between lessor and lessee, see *Patterson v. Murphy*.[26]

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[22] Rules of the Superior Courts, 1996 (S.I. No. 5 of 1996); Ord. 56 r. 3, Circuit Court Rules, 2001 (S.I. 510 of 2001).
[23] Section 154.
[24] See for example *Dublin Corporation v. McGowan* [1993] 1 I.R. 405 (H.C.).
[25] See *Dublin Corporation v. Browne*, High Court, unreported, Gannon J., 10 October 1987. Gannon J. appears to have accepted an argument to this effect by counsel for the respondent developer (at p. 18).
[26] [1978] I.L.R.M. 85 at 94 (H.C.) *et seq*.

### *C. Third party procedure*

It would seem to follow, by analogy, from the decision in *Wicklow County Council v. Fenton (No. 2)*[27] that the third party procedure under the Civil Liability Act, 1961, is not available in the context of an application under section 160. This would seem to stem from the following considerations: the summary nature of the procedure under section 160 is intended as a fast track procedure to provide urgent relief; there is no provision for the exchange of pleadings as between the parties; and the definition of a "wrong" under the Civil Liability Act, 1961 does not seem apt to capture the statutory relief under section 160.

### *D. Personal liability of directors*

A number of decisions in relation to the previous legislation indicated that the wording was sufficiently wide to allow orders to be made against the directors of development companies personally.[28] It is questionable as to whether these cases remain good law under section 160, especially in circumstances where the opportunity was not taken under section 158 to extend personal liability of officers of a company to include other than criminal liability. Barrington J. had suggested in *Dublin County Council v. Elton Homes Ltd.*[29] that, particularly in the case of small companies, the most effective way of ensuring that the (solvent) company complies with its obligations would be to make an order against the directors as well as the company itself.[30] In order to pierce the corporate veil, however, it appears necessary to establish some evidence of impropriety (such as, for example, by way of fraud, or the siphoning off of large sums of money out of the company).[31] The fact that the affairs of the company had been carried out with scant regard to the formalities of, or the requirements of, the companies legislation is not *per se* a good ground for visiting on the directors of a company a liability to conform with a planning permission at their

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[27] [2002] 2 I.L.R.M. 469 (H.C.). *Cf. County Meath V.E.C. v. Joyce* [1997] 3 I.R. 402 (H.C.). See also *Drogheda Corporation v. Gantley*, High Court, unreported, Gannon J., 28 July 1983.
[28] *Dublin County Council v. Elton Homes Ltd.* [1984] I.L.R.M. 297 (H.C.); *Dublin County Council v. O'Riordan* [1985] I.R. 159 (H.C.); *Dun Laoghaire Corporation v. Parkhill Developments Ltd.* [1989] I.R. 447 (H.C.); *Coffey v. Hebron Homes Ltd.*, High Court, unreported, O'Hanlon J., 27 July 1984; *Sligo County Council v. Cartron Bay Construction Ltd.*, High Court, unreported, Ó Caoimh J., 25 May 2001.
[29] [1984] I.L.R.M. 297 at 300 (H.C.).
[30] See also *Coffey v. Hebron Homes Ltd.*, High Court, unreported, O'Hanlon J., 27 July 1984 (respondents fairly joined to ensure any order against company carried into effect).
[31] *Dublin County Council v. Elton Homes Ltd.* [1984] I.L.R.M. 297 (H.C.).

own expense.[32] Nor is the fact that an application for planning permission was made in the personal name of a director.[33]

Again, the summary nature of the proceedings may tell against the making of such orders, however. Murphy J. in *Dublin County Council v. O'Riordan*[34] stated as follows.

> Similarly, where the application turns upon the relationship between a director or shareholder and a company in which he is interested I would anticipate that in most cases it would be necessary that the relationship be investigated in the first instance by a liquidator in accordance with procedures provided in the Companies Act for that purpose rather than seeking to establish all of the relevant facts on proceedings designed to be heard on affidavit.[35]

For a recent example of a case where personal liability was imposed on the directors, reference is made to the decision in *Sligo County Council v. Cartron Bay Construction Ltd.*.[36] There had been a failure by a company to comply with the terms of an order made by the High Court under the (then) section 27 of the Local Government (Planning and Development) Act, 1976 (as amended). Ó Caoimh J. held that insofar as the affairs of the respondent company were inextricably linked to the actions of the two director respondents, if the company had been in wilful default it had been through the medium of the actions of the directors. Insofar as a company can have a will, it must be by those in control of the company. In this connection, Ó Caoimh J. held that whereas the default of a corporate entity will not necessarily give rise to a conclusion of wilful default on its part or on the part of its directors, on the facts, the directors were guilty of a substantial wilful failure to account to the company in respect of rent.

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[32] *Dublin County Council v. O'Riordan* [1985] I.R. 159 (H.C.). See also *Dun Laoghaire Corporation v. Parkhill Developments Ltd.* [1989] I.R. 447 (H.C.).
[33] *Ellis v. Nolan*, High Court, unreported, McWilliam J., 6 May 1983.
[34] [1985] I.R. 159 (H.C.)
[35] [1985] I.R. 159 at 166 (H.C.). See also *Ellis v. Nolan*, High Court, unreported, McWilliam J., 6 May 1983. Ó Caoimh J. distinguished *Dublin County Council v. O'Riordan* in *Sligo County Council v. Cartron Bay Construction Ltd.*, High Court, unreported, Ó Caoimh J., 25 May 2001.
[36] High Court, unreported, Ó Caoimh J., 25 May 2001.

## VIII. ONUS OF PROOF

It is submitted that the applicant under section 160 bears the onus of establishing that the matter complained of constitutes development, and, further, is not exempted development. This would seem to stem from the wording of the section which is predicated on unauthorised development. Unauthorised development is defined under section 2 in terms which exclude, *inter alia*, development commenced prior to 1 October 1964; development which is the subject of planning permission; and exempted development.[37] Further support for this proposition is to be derived from the fact that it is only in the case of (criminal) proceedings for an offence that express provision is made to the effect that the onus of proving the existence of a planning permission is on the defendant. Reference is also made to the statement in *Dublin Corporation v. Sullivan*[38] to the effect that in the absence of an express provision to the contrary, the onus of proof rests with the applicant to prove the case which he is making.[39]

Reference is also made to the decision in *Fingal County Council v. R.F.S. Ltd.*[40] Morris P. found that there were a variety of issues of a factual nature which remained to be resolved as to a pre-1964 use, and that given that the onus of proof rested with the applicant to establish facts from which the High Court could raise a probable inference that the premises had been used at and immediately prior to the 1 October 1964 otherwise than in the manner in which they were now used, the applicant had failed to discharge the onus.

### *A. Hearsay*

There are no grounds for admitting hearsay evidence in support of an application for final orders, such as would be appropriate in the exercise of a discretion as to whether or not to grant an interlocutory application.[41] One of the exceptions to the rule against hearsay is in respect of declarations against interest. Accordingly, a

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[37] As a result of the elision of the former concepts of unauthorised development and development in breach of planning permission, it may be that under section 160 breach of the terms and conditions of a planning permission is not actionable *per se*.

[38] High Court, unreported, Finlay P., 21 December 1984.

[39] *Furlong v. A.F. & G.W. McConnell Ltd.* [1990] I.L.R.M. 48 at 52 (H.C.).

[40] High Court, unreported, Morris P., 6 February 2000.

[41] *Dublin Corporation v. Sullivan*, High Court, unreported, Finlay P., 21 December 1984, at p. 3 of the unreported judgment.

special condition in the contract for sale of lands which disclosed the existence of unauthorised development was held to be admissible as evidence of the fact that certain structures had not, in fact, been erected prior to 1 October 1964.[42]

## IX. UNDERTAKING AS TO DAMAGES

It is submitted that (save with the possible exception of circumstances where interim or interlocutory orders are sought) there is no requirement on an applicant for relief under section 160 to provide an undertaking as to damages.[43] The purpose of an undertaking as to damages in plenary proceedings is to allow the court to make interlocutory orders safely, on the basis of the limited information then before the court, by ensuring that the other side will be compensated if it subsequently transpires that an order was made which the moving party was not entitled to. In the case of section 160, conversely, the court generally will have made a *final* determination on the issues, in advance of the making of any order, and the question of an undertaking as to damages will thus not normally arise.

Some confusion had arisen as to whether or not an undertaking as to damages was required under the equivalent provision of the previous legislation.[44] It is submitted that the confusion had arisen from the fact that the application proceeded by way of originating notice of motion, grounded on affidavit. Accordingly, the application partook of some of the characteristics of an application for an interlocutory injunction in plenary proceedings. This might suggest that, as in the case of an interlocutory application, an undertaking as to damages should be a *quid pro quo* for the granting of an injunction. This would, of course, be to miss the vital distinction between such a summary application and plenary proceedings. As is the position under section 160, final orders were made under the previous legislation on the basis of the originating notice of motion and the affidavit evidence; generally, there would be

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[42] *South Dublin County Council v. Balfe*, High Court, unreported, Costello J., 3 November 1995.

[43] *Cf.* Walsh, E.M., *Planning and Development Law* (2nd ed., Incorporated Law Society of Ireland, Dublin, 1984.), para. 12.46.

[44] See for example, the judgment of the High Court in *Grimes v. Punchestown Developments Company Ltd.* [2002] 1 I.L.R.M. 409 (H.C.) which suggests that, in an appropriate case, the court could require an undertaking as to damages under section 27 of the Local Government (Planning and Development) Act, 1976.

no plenary hearing.[45] Thus the court would have determined the issues between the parties definitively on the basis of affidavit evidence. This is to be contrasted with the grant of an interlocutory injunction where the court will only have made a preliminary finding that there is a serious issue to be tried: the final resolution of the issues must await the full hearing.

Matters are slightly complicated by the fact that there is the possibility (under section 160(3)) of obtaining interim or interlocutory relief in the context of section 160 proceedings *i.e.* a holding order can be made even before the section 160 proceedings are finally determined. It is submitted that relief of this type would require the giving of an undertaking as to damages, for the same reasons as an undertaking as to damages is required in any interim or interlocutory injunction.

## X. PENDING APPLICATION FOR RETENTION PLANNING PERMISSION

Under the equivalent provisions of the previous legislation, a respondent would very often seek an adjournment in order to allow an application for retention planning permission to be adjudicated upon. Factors to be taken into account in this regard included the attitude of the planning authority[46] and the culpability of the developer. For example, in *Dublin Corporation v. Maiden Poster Sites*[47] a stay was refused in that the court would not facilitate the respondents in continuing to derive a substantial income from an unauthorised development: it was indicated, however, that if an appeal to An Bord Pleanála was successful, the injunction should be lifted.

The discretion of the court in this regard seems to have been cut down by section 162(3). This subsection provides, in brief, that no enforcement action, including an application under section 160, shall be "stayed" or "withdrawn" by reason of an application for retention planning permission, or the grant of that permission. It is not at all clear as to what the effect of this subsection is. For

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[45] *Mahon v. Butler* [1997] 3 I.R. 369 (S.C.).
[46] *Cavan County Council v. Eircell Ltd.*, High Court, unreported, Geoghegan J., 10 March 1999; *O'Connor v. Frank Hetherington Ltd.*, High Court, unreported, Barr J., 28 May 1987.
[47] [1983] I.L.R.M. 48 (H.C.).

example, does the Circuit Court retain discretion to adjourn proceedings pending the determination of a retention application? A judge might well think that there is little benefit in forcing on proceedings in circumstances where planning permission might well be granted.

Of even greater concern is the fact that the legislation seems to suggest that enforcement proceedings cannot be "stayed" even in circumstances where retention planning permission has actually been granted before the proceedings have been heard and determined. This is most unsatisfactory: the effect of an actual grant of planning permission must be that there is thereafter no on-going unauthorised development, nor will any remedial orders be required.[48]

## XI. POTENTIAL DEFENCES TO SECTION 160 PROCEEDINGS

### *A. No development*

The most effective defence to a section 160 application would be to demonstrate that no development had, in fact, occurred. The onus is on the applicant to establish that development has occurred. Generally, this will be a relatively straightforward matter. This is especially so where the alleged development is development by way of works. The concept of "works" is broadly defined under section 3 of the Planning and Development Act, 2000. It includes any act or operation of construction, excavation, demolition, extension, alteration, repair or renewal. "Alteration" is defined as including any plastering or painting or the removal of plaster or stucco or the replacement of a door or window which materially alters the external appears of a structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures. The concept of "works" enjoys an extended meaning in the context of a protected structure or a proposed protected structure: in that context, it includes any act or operation involving the application or removal of plaster, paint, wall paper, tiles or other materials to or from the surfaces of the interior or exterior of a structure.

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[48] *Cf. Marray v. Connaughton*, High Court, unreported, O'Hanlon J., 25 January 1984, at p. 5 of the unreported judgment (retention planning permission intended to relate to the houses as they have been erected and is effective to remove the taint of illegality from the development as it has actually been carried out).

Matters are slightly more complicated, however, where the alleged development is by way of material change in use. It is proposed to consider briefly what is involved in the concept of a "material change" in the use of any structures or other land, before considering briefly the particular difficulties which can arise in the case of (i) an existing planning permission; and (ii) an alleged established use.

In order to determine whether or not there has been a material change in use, it is necessary to identify both the antecedent and subsequent uses of the land. The development is the change from use A to use B. The change must be material before the definition is triggered. There appear to be two aspects to materiality. First, the external effects of the change on the amenities of the area must be considered. Thus, for example, if the change would result in an increase in noise, traffic or odours, the change is probably material. In *Galway County Council v. Lackagh Rock Ltd.*[49] Barron J. suggested a test in the following terms: the court should look at the matters which a planning authority would take into account in the event of an application being made for planning permission for either the antecedent or subsequent use: if the matters are materially different, then the nature of the use must equally be materially different.[50]

The second aspect of the test seems to suggest that even in the absence of external effects arising from the change, there may nevertheless be development. The second test requires a consideration of the character of the antecedent and subsequent uses of the land. Thus the High Court suggested *obiter* that a change from use as a dentist's practice to use as a solicitor's office would involve a material change in use: in this regard, the court concentrated on the character of the two uses, stating that the professions were completely different in their training, in their skills and in their general nature, and did not appear to regard the fact that there might be similarities in terms of the external effects to be relevant.[51] Reference is also made to the more recent decision in *Glancré Teoranta v. Cafferkey*[52] where the High Court attached significance

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[49] [1985] I.R. 120 (H.C.).
[50] See more recently *Glancré Teoranta v. Cafferkey*, High Court, unreported, Laffoy J., 26 April 2004.
[51] *Cusack v. Minister for Local Government*, High Court, unreported, 20 November 1980.
[52] High Court, unreported, Laffoy J., 26 April 2004.

to the fact that the change of use involved a fundamental difference in purpose: the proposed activity was primarily directed to waste disposal, although it produced a by-product in the form of a granulated fertilizer; the former activity was directed to the manufacture of a fuel product.

### *B. Existing planning permission*

The procedure for determining whether or not there has been an unauthorised material change in use is somewhat more complicated in the context of an existing planning permission. The matter is best approached in two stages. First, the usual comparison needs to be made between the antecedent and subsequent uses of land in order to determine whether or not the change is material. Secondly, in the event that the change in use is material, one then has to consider the terms of the planning permission in order to decide whether or not this fresh act of development might not also be authorised by the planning permission. In other words, the range of development permitted under the planning permission might be broad enough to encompass a (later) material change in the use of the lands. This exercise requires a consideration of the nature and extent of development permitted under the planning permission. In this regard, section 39(2) provides that a planning permission may specify the purpose for which a structure may or may not be used. Under the previous legislation, if no use was specified, the structure could be used for the purpose for which it was designed. In this context "designed" was to be interpreted as meaning the purpose for which the structure was intended.[53]

### *C. Established use of lands*

The requirement to obtain planning permission in its modern form was first introduced on 1 October 1964. Planning permission was not required for the continuation of development commenced before this date. The phrase "established use" is sometimes, inaccurately, used to describe this situation. When faced with enforcement proceedings, a respondent will often seek to argue that

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[53] See *Glancré Teoranta v. Cafferkey*, High Court, unreported, Laffoy J., 26 April 2004.

the activity being complained of is simply a continuation of a pre-1964 use. In this regard, it is important to note the following qualifications on the availability of such an argument. First, an established use will be lost if it has been interrupted for any significant period of time. If the use has been discontinued, then it can be said to have been abandoned, with the result that the resumption subsequently of the use will constitute a material change in use and require planning permission. Abandonment can occur not only where there has been a period of non-use, but also where the established use has been replaced by another use. Secondly, planning permission will be required where there has been an intensification of use. The concept of a material change in use is sufficiently flexible so as to capture an intensification of an existing use: in other words, more of the same can amount to a material change in use. This principle is illustrated by a number of cases in relation to quarries, where there was a change in the production methods and scale of activities resulting in adverse external effects on the amenity of the area.

### *D. Exempted development*

Certain development (usually minor development) is exempted from the requirement to obtain planning permission. The principal exemptions are provided for under section 4 of the Planning and Development Act, 2000. Further exemptions are provided under the Planning and Development Regulations, 2001. The most common exemption asserted is that provided for under section 4(1)(h) of the 2000 Act, as follows.

> Development consisting of the carrying out of works for the maintenance, improvement or other alteration of any structure, being works which affect only the interior of the structure or which do not materially affect the external appearance of the structure so as to render the appearance inconsistent with the character of the structure or of neighbouring structures.

This exemption is not available in the case of a protected

structure or a proposed protected structure.[54] The Supreme Court has indicated in *Cairnduff v. O'Connell*[55] that the character of the structure must relate to matters such as the shape, colour, design, ornamental features or layout of the structure concerned. Turning now to the Planning and Development Regulations, 2001, it is important to note that there are a number of qualifications on the availability of the benefit of exempted development. These exceptions are principally provided for under Articles 6, 9 and 10. Amongst the more important of the exceptions are the following. The development must not be of a class subject to environmental impact assessment. The development must not contravene a condition attached to an existing planning permission or be inconsistent with any use specified in a planning permission. The development must not consist of or comprise the extension, alteration, repair or renewal of an unauthorised structure or a structure the use of which is an unauthorised use.

Somewhat surprisingly, it seems that the onus in demonstrating that the development is exempted is on the respondent, and not on the applicant. In this connection, the Supreme Court has indicated that exempted development represents a privilege.[56]

## XII. TIME LIMITS

As indicated previously, a general seven-year time limit now applies with respect to the taking of enforcement proceedings.[57] This represents an increase on the five-year time limit applicable under the previous legislation. The manner in which the time limits are reckoned has been simplified. In the case of development without planning permission, the seven years runs from the date of the commencement of the development. In the case of development for which planning permission has been granted, the seven years runs from the date of the expiration of the "life" of the planning permission (to include any extension of the life). There is no time limit on the taking of enforcement proceedings in respect of any condition attached to a planning permission concerning the use of land.[58]

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[54] Section 57 of the Planning and Development Act, 2000.
[55] [1986] I.R. 73 (S.C.).
[56] *Dillon v. Irish Cement Ltd.*, Supreme Court, unreported, 26 November 1984.
[57] Section 157(4), and Section 160(6).
[58] Section 157(4)(b), and Section 160(6)(b).

In the case of a warning letter or enforcement notice, same must issue within the seven years; this might suggest that it may not be necessary to effect service within the seven years. In the case of proceedings for an offence, same must commence within the seven years. However, in the case of the planning injunction, it is the application which must be made within the seven-year period. It is submitted, by analogy with the previous case-law in relation to judicial review[59] and in the interests of legal certainty, that section 160 proceedings should be both issued and served within the seven years.

The issue of a warning letter does not stop time running for the purpose of the seven-year limitation period for example, the fact that a warning letter may have been issued within the seven years cannot be relied upon to ground the subsequent issue of injunction proceedings.[60]

Generally, the application of the seven-year time limit should be relatively straightforward. Difficulties can arise, however, where there has been a break in the continuity of an unauthorised use, and a respondent seeks to link a chain of dates in order to achieve seven years. Under the previous legislation, the High Court had held a manifest interruption or abandonment of the development to be sufficient to stop the time running. It is a question of fact and degree as to whether or not an interruption represents a mere temporary suspension (which does not stop time running), or a manifest interruption or abandonment. Relevant factors include the length in time of the interruption, and the intention of the parties. It may also be relevant to consider whether or not any facilitating works have been retained. The fact that the interruption is in response to the threat of, or the taking of, enforcement action would appear to stop time running.[61] Reference is made to the following passage from the judgment in *South Dublin County Council v. Balfe*:[62]

> In my opinion when a use has been abandoned and then recommenced nearly four years later an occupant

[59] See especially *K.S.K. Enterprises Ltd. v. An Bord Pleanála* [1994] 2 I.R. 128 (S.C.).
[60] The time limits under section 157(4) are not reckoned by reference to the date of the issue of a warning letter.
[61] *Kildare County Council v. Goode*, High Court, unreported, Morris P., 13 June 1997, at p. 12 of the unreported judgment; disposed of on other grounds by the Supreme Court [1999] 2 I.R. 495 (S.C.); *South Dublin County Council v. Balfe*, High Court, unreported, Costello P., 3 November 1995.
[62] High Court, unreported, Costello P., 3 November 1995.

> cannot rely on an earlier use to support a claim that the limitation period in the section should run from the earlier date and not from the date of recommencement. If construed in the way urged by the respondents it would be a simple matter to drive a coach and four through the section by discontinuing an unauthorised use after a warning letter had been served and then recommencing again after several years when a limitation period based on the discontinued unauthorised user had expired, and I consider that the section should not be so construed.
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> Secondly, when a wrongful continuous act (such as an unauthorised user of land) has been discontinued and abandoned then the wrong has ceased. When it is recommenced a new wrongful act occurs, and it is from the date of the recommencement that the time limit in the section begins to run in respect of this new unauthorised use. [63]

## XIII. DISCRETIONARY FACTORS

### *A. Conduct of Applicant*

Given the absence of a *locus standi* or standing requirement, the courts in the exercise of their discretion will have regard to the effect of the development complained of on the applicant. For example, the fact that the applicant may not be resident in the area and would not in any way suffer any injury from the events complained of may well be relevant, especially in circumstances where there was no evidence of any concern by persons closely connected with the area.[64] This is not to say that a remedy will not be granted to selfishly motivated applicants. Remedies have been granted to applicants seeking to protect the privacy of a dwelling house[65] and trade competitors of a respondent.[66] Similarly, the fact that an applicant is himself in breach of planning control does not *per se* disentitle him to relief, at least in

[63] High Court, unreported, Costello P., 3 November 1995, at p. 7 of the unreported judgment.
[64] *Grimes v. Punchestown Developments Company Ltd.* [2002] 1 I.L.R.M. 409 (H.C.).
[65] *Cairnduff v. O'Connell* [1986] I.R. 73 (S.C.).
[66] See for example *National Federation of Drapers and Allied Trades Ltd. v. Allied Wholesale Warehouses*, *The Irish Times*, 29 November 29 1979 cited in Scannell, Y., "Planning Control: Twenty Years On - Part II" (1983) *5 Dublin University Law Journal*, 225 at 242.

circumstances where the applicant has placed this fact fairly before the court.[67]

### *B. Conduct of Respondent*

The state of a respondent's knowledge as to the existence of a breach of planning control may be a relevant factor. Keane J. stated in *Dublin Corporation v. McGowan*[68] that it would be manifestly unjust to have the draconian machinery brought into force against a person who behaved in good faith throughout. If the respondent acted in a *bona fide* belief that the development was authorised (for example, in a mistaken assumption that same constituted exempted development or did not otherwise require planning permission), this may be a factor in favour of withholding relief.[69] Conversely, if a respondent proceeded with actual knowledge of the breach of planning control, or with a reckless disregard as to whether or not planning permission was required, then he can expect little sympathy from the court.[70] The fact that unauthorised development had been carried out with a view to deriving a profit is also relevant.[71]

The court should not exercise its discretion in favour of the respondent when to do so would lend support to uncooperative conduct.[72] In this connection, it would seem that the court is entitled

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[67] *Fusco v. Aprile*, High Court, unreported, Morris P., 6 June 1997.

[68] [1993] 1 I.R. 405 at 412 (H.C.).

[69] *Dublin Corporation v. McGowan* [1993] 1 I.R. 405 (H.C.) (respondent unaware of planning permission affecting lands as a result of inaccurate planning searches held to have acted in good faith); *Grimes v. Punchestown Developments Company Ltd.* [2002] 1 I.L.R.M. 409 (H.C.) (*bona fide* belief that planning permission not required); *Stafford v. Roadstone Ltd.* [1980] 1 I.L.R.M. 1 (H.C.) (material change in use by intensification); *Dublin County Council v. Sellwood Quarries Ltd.* [1981] I.L.R.M. 23 (H.C.) (*bona fide* belief that planning permission not required); *Leech v. O'Reilly*, High Court, unreported, O'Hanlon J., 26 April 1983 (rebuilding of previously existing workshop); *O'Connor v. Frank Hetherington Ltd.*, High Court, unreported, Barr J., 28 May 1987 (reliance on representation by planning authority that planning permission not required).

[70] *Dublin Corporation v. Maiden Poster Sites Ltd.* [1983] I.L.R.M. 48 at 49 (H.C.) (respondents assumed to have known or ought to have known of the need to obtain a planning permission); *Dublin Corporation v. O'Dwyer Brothers (Mount Street) Ltd.*, High Court, unreported, Kelly J., 2 May 1997 (respondent held to be fully alert to the need to apply for retention planning permission); *Curley v. Galway Corporation*, High Court, unreported, Kelly J., 16 December 1998 (deliberate and conscious violation of terms of planning permission); *Mahon v. Butler*, High Court, unreported, Costello P., 28 July 1997 (reversed by the Supreme Court on jurisdictional grounds: [1997] 3 I.R. 369 (S.C) (respondent aware of significant risk of challenge); *Cavan County Council v. Eircell Ltd.*, High Court, unreported, Geoghegan J., 10 March 1999 (would have been reckless to proceed without legal advice on planning implications).

[71] *Dublin Corporation v. Maiden Poster Sites Ltd.* [1983] I.L.R.M. 48 (H.C.); *Dublin Corporation v. O'Dwyer Brothers (Mount Street) Ltd.*, High Court, unreported, Kelly J., 2 May 1997, at p. 11 of the unreported judgment.

[72] *Westport v. Golden U.D.C.* [2002] 1 I.L.R.M. 439 (H.C.) *per* Morris P.

to have regard to the conduct of the respondent both prior to, and during the course of, the legal proceedings. Thus, the High Court declined to exercise its discretion in circumstances where the respondent deliberately set out to disregard the planning procedures and had sought to avoid the service of a warning letter;[73] and in a case where an unauthorised use continued up to the day of the hearing.[74] It would also seem that the fact that a respondent fully contests proceedings, and succeeds in delaying same, would tell against a respondent.[75] A respondent's record in relation to planning matters may also be considered relevant.[76]

### *C. Prejudice and Hardship to Respondent*

It has been accepted that relief may be withheld where an order would cause gross or disproportionate hardship to the respondent.[77] Hardship will carry little weight, however, if it is brought about as the result of a deliberate and conscious breach of planning control.[78]

### *D. Delay*

In *Grimes v. Punchestown Developments Company Ltd.*[79] Herbert J. (in the context of an application to enjoin the holding of a pop concert) had regard in the exercise of his discretion to evidence to the effect that the event sought be to enjoined had been widely publicised for a very considerable period, and that the applicant did not take any steps to institute proceedings (or to notify the promoters) until shortly before the event was to take place. The facts of this case were somewhat unusual in that the primary finding was

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[73] *Westport v. Golden U.D.C.* [2002] 1 I.L.R.M. 439 (H.C.)
[74] *Galway County Council v. Connacht Proteins Ltd.*, High Court, unreported, Barrington J., 28 March 1980.
[75] *Dublin Corporation v. O'Dwyer Brothers (Mount Street) Ltd.*, High Court, unreported, Kelly J., 2 May 1997 at p. 9 *et seq.* of the unreported judgment.
[76] *Galway County Council v. Connacht Proteins Ltd.*, High Court, unreported, Barrington J., 28 March 1980.
[77] *Avenue Properties Ltd. v. Farrell Homes Ltd.* [1982] I.L.R.M. 21 (S.C.); *Dublin County Council v. Sellwood Quarries Ltd.* [1981] I.L.R.M. 23 (H.C.).
[78] See for example *Curley v. Galway Corporation*, High Court, unreported, Kelly J., 16 December 1998, at p. 10 of the unreported judgment; *Mahon v. Butler*, High Court, unreported, Costello P., 28 July 1997.
[79] [2002] 1 I.L.R.M. 409 (H.C.).

that a transient event of this type did not require the grant of planning permission.[80]

### *E. Trivial or technical breach*

A court enjoys a discretion to withhold relief where the unauthorised development involves a trivial or technical breach.[81] It appears from the decisions in *O'Connell v. Dungarvan Energy Ltd.*[82] and *Cork County Council v. Cliftonhall Ltd.*[83] that the nature of the breach of a planning permission may also be relevant to the question as to whether there has, in fact, been any unauthorised development at all, in that it seems that planning permissions are to be interpreted flexibly so as to allow for a tolerance in respect of what had been described as "immaterial deviations".

### *F. Public Interest*

In exercising its discretion under the section, it would seem that the court is entitled to look not only at the convenience of the parties, but also at the convenience of the public and the public interest.[84] Thus the court is entitled to have regard to fact that the respondent is operating an important factory, or to the interests of employees.[85] In *Leen v. Aer Rianta cpt*. the High Court in the exercise of its discretion refused to make an order against Shannon Airport.[86]

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[80] Events of this type are now subject to special control under Part XVI of the Planning and Development Act, 2000.
[81] *Morris v. Garvey* [1983] I.R. 319 (S.C.). See also *Dublin County Council v. Matra Investments Ltd.* 114 (1980) I.L.T.R. 102 (H.C.).
[82] High Court, unreported, Finnegan J., 27 February 2001.
[83] High Court, unreported, Finnegan J., 6 April 2001.
[84] *Stafford v. Roadstone Ltd.* [1980] 1 I.L.R.M. 1 (H.C.).
[85] *Stafford v. Roadstone Ltd.* [1980] 1 I.L.R.M. 1 (H.C.). See also *Dublin County Council v. Sellwood Quarries Ltd.* [1981] I.L.R.M. 23 (H.C.) (very damaging consequences for the respondents and for those in their employment and for those to whom they are bound in contracts).
[86] High Court, unreported, McKechnie J., 1 August 2003.