

Planning Enforcement – A Legal Perspective¹

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PURPOSE OF THIS DISCUSSION:

TO HELP LOCAL AUTHORITIES SECURE CONVICTIONS
FOR PLANNING OFFENCES.

Article 38.1 of the Constitution:

“No person shall be tried on any criminal charge save in due course of law.”

Planning offences have a specific statutory regime under the Planning and Development Act 2000 (*PDA*).

- Know your powers and don't exceed them.
- Know your obligations and perform them.

Why take risks!?!

Hypothetical Prosecution:

Failure to comply with an enforcement notice contrary to section 154(8) of the PDA:

- No urgent action necessary
- Not a protected structure
- Natural person (not a company)
- Minor offence – summary prosecution (in the District Court – no jury)

What steps must the local authority take? What additional steps may it take?

What are the consequences of non-compliance with requirements?

Warning Letter

I want to focus on the importance of the warning letter.

PDA s153(5): *“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.”*

HOWEVER

Not issuing and serving a valid warning letter might result in negative consequences for a local authority’s ability to gather evidence lawfully.

Warning Letter

Purpose of a warning letter:

- Put its recipient on notice that there has been an allegation of unauthorised development
- Invite comment
- Warn the recipient that there might be an investigation including entry onto the land

Warning Letter

PDA s152(1)(a):

“Where ... a representation in writing is made to a planning authority by any person that unauthorised development may have been, is being or may be carried out, and it appears to the planning authority that the representation is not vexatious, frivolous or without substance or foundation ... the authority shall issue a warning letter to the owner ...”

PDA s152(2):

“Notwithstanding subsection (1), where the development in question is of a trivial or minor nature the planning authority may decide not to issue a warning letter.”

PDA s152(3):

“A planning authority shall issue the warning letter under subsection (1) as soon as may be but not later than 6 weeks after receipt of the representation under subsection (1).”

Service

PDA s250(1):

“Where a notice or copy of an order is required or authorised by this Act or any order or regulation made thereunder to be served on or given to a person, it shall be addressed to him or her and shall be served on or given to him or her in one of the following ways—

(a) where it is addressed to him or her by name, by delivering it to him or her;

(b) by leaving it at the address at which he or she ordinarily resides or, in a case in which an address for service has been furnished, at that address;

(c) by sending it by post in a prepaid registered letter addressed to him or her at the address at which he or she ordinarily resides or, in a case in which an address for service has been furnished, at that address;

(d) where the address at which he or she 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 land or premises, by delivering it to some person over the age of 16 years resident or employed on the land or premises or by affixing it in a conspicuous place on or near the land or premises;

(dd) where the address at which he or she 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 7 consecutive days in a national newspaper;

(e) in addition to the methods of service provided for in paragraphs (a), (b), (c) and (d), 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.

Service

PDA s250(9):

“In this section, “notice” includes a warning letter..“

Contents

PDA s152(4):

“warning letter shall refer to the land concerned and shall–

(a) state that it has come to the attention of the authority that unauthorised development may have been, is being or may be carried out,

(b) state that any person served with the letter may make submissions or observations in writing to the planning authority regarding the purported offence not later than four weeks from the date of the service of the warning letter,

(c) state that when a planning authority considers that unauthorised development has been, is being or may be carried out, an enforcement notice may be issued,

(d) state that officials of the planning authority may at all reasonable times enter on the land for the purposes of inspection,

(e) explain the possible penalties involved where there is an offence, and

(f) explain that any costs reasonably incurred by the planning authority in relation to enforcement proceedings may be recovered from a person on whom an enforcement notice is served or where court action is taken.”

Time Limits

PDA s157(4)(a):

“No warning letter or enforcement notice shall issue and no proceedings for an offence under this Part shall commence—

(i) in respect of a development where no permission has been granted, after seven years from the date of the commencement of the development,

(ii) in respect of a development for which permission has been granted ... after seven years beginning on the expiration ...”

Time Limits – Christmas Period

PDA s251:

“Where calculating any appropriate period or other time limit referred to in this Act or in any regulations made under this Act, the period between the 24th day of December and the first day of January, both days inclusive, shall be disregarded.”

Nine days must be added for every year in every period in the PDA:

- For a seven year period add 63 days (9x7) or 9 weeks

Time Limits – Covid-19 Period

PDA s251A(2):

“The period to be disregarded ... is the period beginning on the date section 9 of the Emergency Measures in the Public Interest (Covid-19) Act 2020 comes into operation and, subject to subsection (6), ending on the date that shall be specified by order under subsection (3) or that may be specified by order under subsection (4).”

- The beginning date was Sunday 29 March 2020
- The end date specified by order made under s251A(3) was 20 April 2020, extended by order made under s251A(4) 9 May 2020, and again to Saturday 23 May 2020
- Thus the Covid-19 period is 56 days or eight weeks

First Investigation

Purpose of the first investigation: to inform a decision whether to issue an enforcement notice.

PDA s153(1):

“As soon as may be after the issue of a warning letter under section 152, 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 ...”

First Investigation

PDA s153(3):

“A planning authority, in deciding whether to issue an enforcement notice shall consider any representations made to it under section 152(1)(a) or submissions or observations made under section 152(4)(b) and any other material considerations.”

First Investigation

PDA s252(11):

“In this section and section 253 ... “authorised person” means ... a person who is appointed by a local authority ... to be an authorised person for the purposes of this section and section 253.”

First Investigation

PDA s252:

“(1) An authorised person may, subject to the other provisions of this section, enter on any land at all reasonable times between the hours of 9 a.m. and 6 p.m., or during business hours in respect of a premises which is normally open outside those hours, for any purpose connected with this Act.

(2) An authorised person entering on land under this section 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.

(3) Before an authorised person enters under this section on any land, the appropriate authority shall either obtain the consent (in the case of occupied land) of the occupier or (in the case of unoccupied land) the owner or shall give to the owner or occupier, as the case may be, not less than 14 days’ notice in writing of the intention to make the entry ...”

First Investigation

PDA s253:

“(1) Notwithstanding section 252, 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.

(2) Subject to subsection (4), an authorised person shall not, other than with the consent of the occupier, enter into a private house under subsection (1) unless he or she has given to the occupier of the house not less than 24 hours’ notice in writing of his or her intended entry.

(3) Whenever an authorised person enters a premises or on land pursuant to subsection (1), the authorised person may exercise the powers set out in section 252(2) ...”

Enforcement:

151. Offence.

152. Warning letter.

153. Decision on enforcement.

154. Enforcement notice.

155. Issue of enforcement notice in cases of urgency.

156. Penalties for offences.

157. Prosecution of offences.

158. Offences by bodies corporate.

159. Payment of fines to planning authorities.

160. Injunctions in relation to unauthorised development.

161. Costs of prosecutions and applications for injunctions.

162. Evidence of permission.

163. Permission not required for any works required under this Part.

164. Transitional arrangements for offences.

164A. Development in Dublin Docklands Area.

Reasonable Grounds for Believing

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Remember: the rights of the accused are the court's main concern. In particular the right not to have the State (an authorised person) enter onto your land carries a lot of weight, and will only be outweighed where the law clearly and expressly authorises it.

- Does the authorised person truly believe that there is unauthorised development?
- What are the grounds for that belief?
- Are those grounds reasonable?

Warning letter is easier, and will avoid the possibility of the exclusion of evidence. *Why take the risk?*

Decision to Enforce – Time Limits

PDA s153(2):

“(a) It shall be the duty of the planning authority to ensure that decisions on whether to issue an enforcement notice are taken as expeditiously as possible.

(b) Without prejudice to the generality of paragraph (a), it shall be the objective of the planning authority to ensure that the decision on whether to issue an enforcement notice shall be taken within 12 weeks of the issue of a warning letter.”

Decision to Enforce

PDA s153(7):

“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 section 154 ... unless there are compelling reasons for not doing so.”

Decision to Enforce

PDA s154(2):

“Where the planning authority decides not to issue an enforcement notice, it shall notify any person to whom the warning letter was copied under section 152 and any other person who made a representation under that section of the decision in writing within 2 weeks of the making of that decision.”

Decision to Enforce

PDA s154(1):

*“(a) Where a decision to enforce is made under section 153 ... the planning authority **shall**, as soon as may be, serve an enforcement notice under this section.*

“(b) Where an enforcement notice is served under this section, the planning authority shall notify any person who made representations under section 152(1)(a) and any other person, who in the opinion of the planning authority may be concerned with the matter to which the notice concerned relates, not being a person on whom the enforcement notice was served, of the service of the enforcement notice.”

Decision to Enforce – Register

PDA s7(2)(s):

“A planning authority shall enter in the register ... the complete decision made under section 153 on whether an enforcement notice should issue, including the date of the decision ...”

PDA s153(4):

“The decision made by the planning authority under subsection (1) including the reasons for it shall be entered by the authority in the register.”

Enforcement Notice

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Purpose of an enforcement notice: to require its recipient to take certain steps within a specified period to undo or not carry out unauthorised development.

PDA s154(5)(b) “... require such steps as may be specified in the notice to be taken within a specified period, including, where appropriate, the removal, demolition or alteration of any structure and the discontinuance of any use and, in so far as is practicable, the restoration of the land to its condition prior to the commencement of the development ...”

PDA s154(6): “... the period specified under subsection (5)(b) or within such extended period, not being more than 6 months, as the planning authority may allow ...”

Service

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PDA s250(1):

“Where a notice or copy of an order is required or authorised by this Act or any order or regulation made thereunder to be served on or given to a person, it shall be addressed to him or her and shall be served on or given to him or her in one of the following ways—

(a) where it is addressed to him or her by name, by delivering it to him or her;

(b) by leaving it at the address at which he or she ordinarily resides or, in a case in which an address for service has been furnished, at that address;

(c) by sending it by post in a prepaid registered letter addressed to him or her at the address at which he or she ordinarily resides or, in a case in which an address for service has been furnished, at that address;

(d) where the address at which he or she 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 land or premises, by delivering it to some person over the age of 16 years resident or employed on the land or premises or by affixing it in a conspicuous place on or near the land or premises;

(dd) where the address at which he or she 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 7 consecutive days in a national newspaper;

(e) in addition to the methods of service provided for in paragraphs (a), (b), (c) and (d), 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.

Enforcement Notice - Content

PDA s154(5):

*“An enforcement notice **shall** refer to the land concerned and shall—*

(a) (i) in respect of a development where no permission has been granted, require that development to cease or not to commence, as appropriate,

(ii) in respect of a development for which permission has been granted ... require that the development will proceed in conformity with the permission, or with any condition to which the permission is subject ..

*(b) **require such steps as may be specified in the notice to be taken within a specified period**, including, where appropriate, the removal, demolition or alteration of any structure and the discontinuance of any use and, in so far as is practicable, the restoration of the land to its condition prior to the commencement of the development,*

(c) warn the person or persons served with the enforcement notice that, if within the period specified under paragraph (b) or within such extended period (not being more than 6 months) as the planning authority may allow, the steps specified in the notice to be taken are not taken, the planning authority may enter on the land and take such steps, including the removal, demolition or alteration of any structure, and may recover any expenses reasonably incurred by them in that behalf,

(d) require the person or persons served with the notice to refund to the planning authority the costs and expenses reasonably incurred by the authority in relation to the investigation, detection and issue of the enforcement notice concerned and any warning letter under section 152, including costs incurred in respect of the remuneration and other expenses of employees, consultants and advisers, and the planning authority may recover these costs and expenses incurred by it in that behalf, and

(e) warn the person or persons served with the enforcement notice that if within the period specified by the notice or such extended period, not being more than 6 months, as the planning authority may allow, the steps specified in the notice to be taken are not taken, the person or persons may be guilty of an offence.”

Time Limits

PDA s157(4)(a):

“No warning letter or enforcement notice shall issue and no proceedings for an offence under this Part shall commence—

(i) in respect of a development where no permission has been granted, after seven years from the date of the commencement of the development,

(ii) in respect of a development for which permission has been granted ... after seven years beginning on the expiration ...”

Enforcement Notice - Lifespan

PDA s154(4):

“An enforcement notice shall take effect on the date of the service thereof.”

PDA s154(12):

“An enforcement notice shall cease to have effect 10 years from the date of service of the notice under subsection (1) or, if a notice is served under subsection (3)(b), 10 years from the date of service of the notice under that subsection.”

Enforcement Notice – Register

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PDA s7(2)(t):

“A planning authority shall enter in the register ... 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 ...”

PDA s154(10):

“Particulars of an enforcement notice shall be entered in the register.”

Second Investigation

Purpose of the second investigation: to enable the local authority decide whether the enforcement notice's recipient has complied with its requirements.

Registers

- Register of Chief Executive Orders (LGA s151(3))
- Planning Register (PDA s7(1))

Evidence – Documents

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- *John's letter (?);*
- **The warning letter (PDA s7(2)(r));**
- *The receipt from the registered post (?);*
- **Pat's first report and his digital images (PDA s7(2)(s) and s153(4));**
- **The local authority's decision to enforce (PDA s7(2)(s) and s153(4));**
- **The enforcement notice (PDA s7(2)(t) and s154(10));**
- *Nora's note (?);*
- *Pat's second report and his digital images (?);*
- *The decision that Mary has not complied with the enforcement notice (?);*
and
- *The decision to prosecute Mary (?).*

Evidence - Orders

- The order to issue the warning letter
- The order to deliver the warning letter;
- The order to carry out the first investigation;
- The order appointing Pat as an authorised person;
- The order making the decision to enforce;
- The order to issue the enforcement notice;
- The order to deliver the enforcement notice;
- The order to carry out the second investigation;
- The order making the decision that Mary did not comply with the enforcement notice;
- The order making the decision to prosecute Mary; and
- All delegation orders where any of the above orders were not made by the chief executive.

Conclusion

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- PDA section 7 Planning register
- PDA section 152 Warning letter
- PDA section 153 Decision on enforcement
- PDA section 154 Enforcement notice
- PDA section 157 Prosecution of offences
- PDA section 250 Service of notices, etc
- PDA section 251 Calculate of appropriate period and other time limits over holidays
- PDA section 251A Calculation of time limits during emergency
- PDA section 252 Power of authorised person to enter on land
- PDA section 253 Powers of entry in relation to enforcement
- LGA section 151 Manager (chief executive) acting by signed order

Key Messages

- If the facts are with you, focus on the evidence.
- The *raison d'être* of your investigation is gathering evidence that you can use to enforce, if necessary. You need it to be admissible.
- Your conduct determines the admissibility of evidence.
- Your misconduct will probably make evidence inadmissible.
- Insufficient admissible evidence will result in an acquittal, irrespective as to the lawfulness of a development.
- Know your powers and don't exceed them.
- Know your obligations and perform them.
- Always put the rights of the people you deal with first: e.g., ask for consent before entering land, but ask nothing about the substance of the development in question.
- Learn how to gather, secure, store, disclose, and present evidence lawfully and you will be in a position to help the local authority secure a conviction.