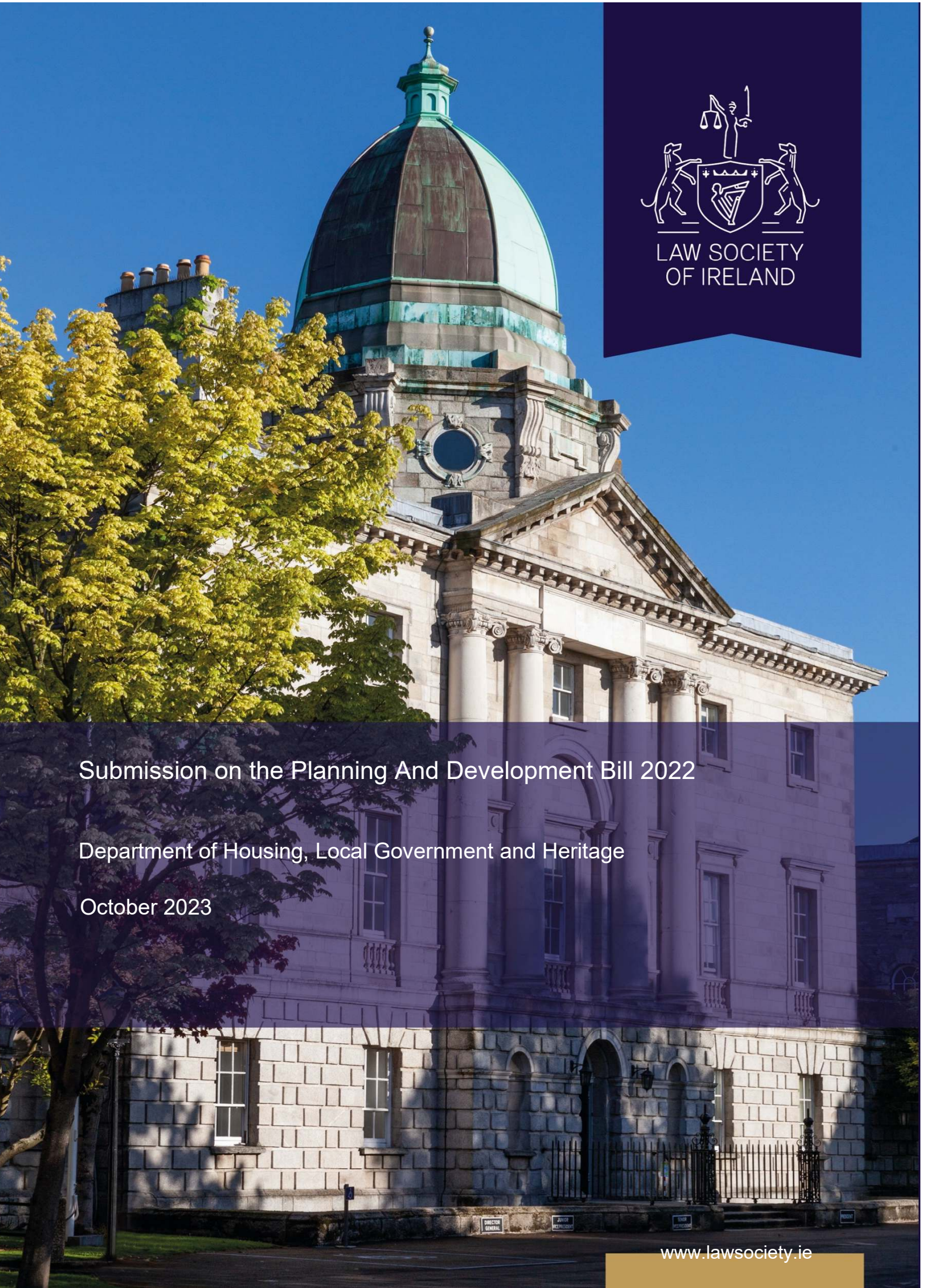

LAW SOCIETY OF IRELAND

Submission on the Planning And Development Bill 2022

Department of Housing, Local Government and Heritage

October 2023

www.lawsociety.ie

Summary

This submission is the first part of the Law Society's main Submission and relates to the Planning and Development Bill 2022 and conveyancing practice.

The issue that the Law Society seeks to have remedied in the legislation is the requirement that practitioners examine the planning history of a property over a period of almost sixty years in order to determine whether or not there is unauthorised development.

The requirement increases due diligence checks and therefore increases costs, time and risk for a large proportion of property transactions.

As part of our ongoing work on conveyancing practice reform, we are asking that consideration be given to recognising in law an 'established non-conforming development' as a means to remedy this issue which is not presently identified by the proposed legislation.

Below, we have set out the specific circumstances in which a development could be considered to constitute an 'established non-conforming development' (as opposed to an unauthorised development) in order to considerably reduce the burdensome level of due diligence required of all involved in property transactions for real estate on which there has been historical development.

Introduction

The planning regime in Ireland has its origins in the Local Government (Planning and Development) Act 1963 which came into force on 1 October 1964. While that Act was replaced by the Planning and Development Act 2000 (the "**2000 Act**") and subsequent amendments to its text, 1 October 1964 continues to be the base date in determining whether planning permission is required for development (with development before that date not requiring permission and afterwards, unless it comprises exempted development, requiring permission).

The 1 October 1964 date remains the relevant date in determining whether development is unauthorised development which i.e.-

a. ought to have had planning permission but did not; or

b. did not comply with planning permission granted; or

c. was not completed within the life of the planning permission.

This development is referenced in the Planning Acts as 'unauthorised development'.

1. The Problem

1.1. That it is necessary to examine the history of a property over almost 60 years in order to determine whether or not there is unauthorised development causes considerable difficulty.

1.2. Section 38 of the 2000 Act requires that planning authorities have planning documents available for public inspection for a period of seven years or in perpetuity where there is an environmental impact assessment (an amendment introduced in 2018).

1.3. Planning authorities are often not in a position to produce historical information with regard to planning permissions and ancillary documentation. They do not retain historic records. In many cases planning documentation is unavailable due to filing or other clerical errors (in some cases following amalgamations or reorganisations), which makes it impossible to trace the planning history of some properties.

1.4. Part VIII of the 2000 Act sets out time limits, after which no enforcement action can be taken in respect of unauthorised development. Those timescales are generally a period of seven years where no planning permission was applied for i.e. there is no planning permission, and seven years from the date the life of the planning permission expired in cases where there is planning permission which has not been complied with.

1.5. Unfortunately however, Part VIII of the 2000 Act, while setting time limits on enforcement, did not address the status of unauthorised development in respect of which no enforcement action was taken within the statutory time limit.

1.6. This has resulted in an unsatisfactory situation where there is unauthorised development in respect of which no enforcement action can be taken, referenced as "**established non-conforming development"** in this submission. These properties are left in a suspended, uncertain position and conveyancers have had to evolve practices to cater for that.

1.7. There are many consequences for owners of established non-conforming development. A non-exhaustive list is provided at Appendix A.

1.8. Exempted Development

1.8.1. A serious consequence of having established non-conforming development is that the exempted development regulations do not apply. Article 9(1)(viii) of the Planning and Development Regulations 2001 provides that "*the extension, alteration, repair or renewal of an unauthorised structure, or a structure the use of which is an unauthorised use*" shall not be exempted development.

1.8.2. The exempted development regulations are often relied on in residential development (e.g. the addition of extensions, porches and boundaries) and, as such, conveyancers should be able to establish, insofar as it is possible to do so, whether a property being acquired contains an established non-conforming development. If it does - development which would otherwise be exempted is unauthorised, and the planning status of the property is flawed.

1.8.3. Theoretically, if an otherwise exempted development was carried out within the enforcement period on land containing an established non-conforming development, the landowner could become the subject of enforcement action.

1.8.4. Any infraction, material or otherwise, of planning laws at any time in the last 59 years can result in an established non-conforming development. The planning status of a property can then be further compromised by carrying out works, irrespective of how minor in nature (including repairs) which are then themselves unauthorised and could lead to enforcement action.

1.8.5. It is important to bear in mind that enforcement action can be taken, not only by planning authorities, but also by individuals.

1.9. Residential Zoned Land Tax

1.9.1. The provisions of the Finance Acts 2021 and 2022 relating to Residential Zoned Land Tax (**RZLT**) refer to unauthorised development, which can become a determining factor in whether or not RZLT is due e.g. in the definition of "vacant or idle land" unauthorised development must be disregarded.

1.9.2. Taking that example, if an office building in respect of which there has been any infraction of planning laws at any time since 1 October 1964 (which could be as minor as having been completed within days following the expiration of the life of the planning permission or a condition of a planning permission granted 30 years previously with regard to the use which was not fully complied with), land which in reality is "required for, or integral to, the operation of a trade or profession" being carried out in that office, will be treated as "vacant or idle land" i.e. available for development.

1.9.3. The consequences are that RZLT may be payable in respect of land by reason of the fact that there is an established non-conforming development, even where that development was carried out decades previously, and without objection from the planning authority or any other party.

1.9.4. Fiscal provisions without clarity and certainty are susceptible to legal challenge. The level of uncertainty, and the impossibility of establishing certainty, as regards what is/not unauthorised development, is of concern.

2. Law Reform Commission and Law Society

2.1. For many years, both the Law Society and the Law Reform Commission (**LRC**) have called for a planning amnesty.

2.2. In 2004, the LRC suggested introducing a rolling planning amnesty, to take effect either 10 years after an unauthorised development had taken place or 10 years after the expiration of a planning permission which has not been complied with.

2.3. More recently, the Law Society recommended a planning amnesty after seven years for residential properties, as an integral component in facilitating e-Conveyancing.

3. Concerns regarding emerging trends

3.1. Insurance policies

3.1.1. Some insurance companies have recently begun to make provision in the small print of policies to the effect that any unauthorised development will not be covered in buildings insurance. This is of significant concern as it allows insurers to avoid paying claims where they can identify an unauthorised development and provides them with an incentive to do so.

3.1.2. In circumstances where there is a very considerable degree of uncertainty around what may/may not be established non-conforming development, this is a matter of concern for both consumers and lenders given that a homeowner who may have paid insurance over many years could find themselves homeless in circumstances where an insurer can avoid paying out on a claim.

3.2. Lender due diligence

3.2.1. Conveyancers are seeing lenders to purchasers of residential property requiring more detailed investigation of the planning status of properties.

3.2.2. While we have no objection in principle to a lender ensuring planning compliance (which is in the interests of all parties), given the unsatisfactory state of the law, and the near impossibility of establishing conclusively whether or not there is established non-conforming development, this approach can lead to increased delays and costs in the conveyancing process and, in extreme cases, to lenders refusing to advance funds to facilitate a purchase.

4. Issues to be considered

4.1. Lawbreaker's Charter

4.1.1. It has been suggested that to address this issue, and to recognise unauthorised development as authorised, would amount to a lawbreaker's charter, or support for wrongdoing.

4.1.2. While we share sensitivities on this point, it is not a practical concern in relation to established non-conforming development.

4.1.3. The likelihood is that, in respect of development carried out many years previously, the offender will no longer be the owner of the property. The planning authority will have had the opportunity to take enforcement action within the prescribed number of years in respect of any breach of planning requirements. Further, breach of planning requirements is an offence leaving the offender liable to criminal prosecution.

4.1.4. As such, we believe that addressing the status of established non-conforming development will not encourage future breaches of the law, or provide comfort or protection to those who done so in the past.

4.2. Environmental Laws

4.2.1. Concern also arises in the context of European laws for the protection of the environment, in particular the requirement for prior consent for developments which are likely to significantly impact the environment for the purposes of the Environmental Impact Assessment Directive (the "**EIA Directive"**) or European sites for the purposes of the Habitats Directive. These developments require an Environmental Impact Assessment under the EIA Directive (**EIA**) or Appropriate Assessment under the Habitats Directive (**AA**) before the competent authority can grant consent.

4.2.2. In *Stadt Wiener* in November 2016, the CJEU held that EU law prohibited national laws that deemed projects to be "*purely and simply deemed to be lawfully authorised as regards the obligation to assess their effects on the environment*" after the expiry of a time limit. However, the court went on to observe that procedural rules around the consequences of breach and enforcement were a matter for national rules.

4.2.3. Any legislative intervention could reduce the risk of challenge in this regard by qualifying any legislative intervention to exclude established non-conforming developments that required an EIA under the EIA Directive or AA under the Habitats Directive.

4.2.4. There were no developments in Ireland which required an EIA before 3 July 1988 (i.e. the transposition date for the EIA Directive). As such, the State can safely establish an absolute planning amnesty for development carried out before that date.

4.2.5. For development carried out after that date, but before the cut-off for established non-conforming development, there could be a statutory presumption that they did not require an EIA or AA.

4.2.6. Where the presumption is challenged, planning authorities and An Bord Pleanála have the competence to determine whether or not the development required an EIA or AA – they make these determinations on a daily basis.

5. Rationale for addressing the issue

5.1. Certainty

5.1.1. A well-established principle of law is that there is certainty, even at the cost of depriving people of the ability to enforce rights that they would otherwise enjoy – the best known example being the Statute of Limitations (which prevents the pursuit of legal remedies after certain time periods).

5.1.2. The lack of certainty around an established non-conforming development, when coupled with the impossibility of establishing conclusively whether a development is/not authorised, makes a compelling case for legislative change.

5.1.3. With the passage of time and as more historical public records become unavailable, the challenge of establishing whether or not there has been unauthorised development increases, and the case for legislative intervention strengthens.

5.2. Conveyancing Practice, Real Estate Leasing, Secured Lending and Related Transactions

5.2.1. Conveyancers are required to consider whether or not there is unauthorised development when acting in the acquisition of, or granting security over, property. This involves a consideration of development on the property from the date it was first carried out, or back to 1 October 1964.

5.2.2. In circumstances where planning authorities frequently do not have records available, in some cases not before the year 2000, and where other information sources may not exist, there is a limit to what conveyancers, consumers and others dealing with land can do.

5.2.3. While the Law Society revised its General Conditions of Sale in 2017 to address the balance of risk (between vendor and purchaser) in respect of any unauthorised development that might become apparent, it is not possible to deal with the problem effectively through contractual terms. If a previously unknown circumstance emerges which provides evidence of an established non-conforming development, then the landowner will have difficulties, not of their making.

5.2.4. This, of course, creates significant delays in conveyancing transactions, as parties seek to establish the planning status of a property. It also increases costs for the vendor and/or purchaser, lender and/or borrower or landlord/tenant, as a result of additional work and time expended.

5.3. Residential Lending Certificate of Title System

5.3.1. A practical difficulty exists around the operation of the Residential Mortgage Lending Certificate of Title system which has been designed and operated by the Society's Conveyancing Committee in conjunction with residential mortgage lenders.

5.3.2. This system replaced the tripartite system whereby the vendor, purchaser and lender financing the purchase were all represented by their own solicitors.

5.3.3. The old system often lead to delays, additional costs for the purchaser, and the potential for difficulties where a purchaser's solicitor could not satisfy a lender's solicitor's requirements.

5.3.4. The Certificate of Title system requires the purchaser's solicitor to certify to the lender that the title is in order.

5.3.5. Where there is an issue with regard to the title, the solicitor for the purchaser must agree a qualification to the Certificate of Title with the lender prior to completion of the transaction.

5.3.6. If the lender does not agree, the funds to facilitate the purchase will not be forthcoming.

5.3.7. One of the most common qualifications sought by purchaser/borrower's solicitors to a Certificate of Title relates to historical planning matters.

5.3.8. If the question of long established non-conforming development was addressed, many of the delays and uncertainties which arise in the conveyancing process would be removed, to the ultimate benefit of the consumer.

5.3.9. It is Government policy to seek to streamline conveyancing, to facilitate a cheaper, quicker, process. This is reflected in our January 2022 submission to the Legal Services Regulatory Authority which is available here and details the history of the conveyancing process and the importance of providing a "cost effective, speedy and reliable system of buying and selling property".

5.4. eConveyancing

5.4.1. It is Government policy to promote eConveyancing. Dealing with long established non-conforming development in a way that means conveyancers would not be required to investigate matters back to 1 October 1964 would be a significant step in moving towards eConveyancing.

5.5. Consistency

5.5.1. Under the Land and Conveyancing Law Reform Act 2009, the root of title is 15 years.

5.5.2. It is therefore incongruous that a conveyancer, when considering who the true owner of a property is, need only investigate matters over a period of 15 years as against the almost 60 years (and counting) they are required to consider in the context of a property's planning status.

5.6. Precedent

5.6.1. The Building Control Act 1990 introduced an amnesty in respect of breaches of building bye-laws. It provided that approval was deemed to have been granted for all works carried out prior to 13 December 1989 unless the building control authority served notice that the works constituted a danger to public health or safety.

5.6.2. This provision, which was very much welcomed by conveyancing practitioners, provided certainty and clarity as to the status of works with regard to building bye-laws.

5.6.3. We are not aware of a single instance where difficulties arose by reason of the introduction of this provision (notwithstanding that it addressed matters of health and safety i.e. of more immediate concern than planning compliance).

6. Solution

6.1. There is a readily available solution which would be of considerable benefit to consumers, legal practitioners, the State and its various agencies (including Revenue) and will not prejudice any party to a conveyancing transaction.

6.2. It lies in legal recognition of a third class of development (together with to authorised development and unauthorised development).

6.3. It is that - where unauthorised development was carried out:

i. without planning permission, and has not been the subject of enforcement action, then after a period of 15 years that development would be deemed for all legal purposes to be an 'established non-conforming development'. This classification would not retroactively render in law an established non-conforming development as being permitted, authorised or compliant but would rather deem it to be a different type of development in planning terms;
ii. in circumstances where planning permission had been granted but was not complied with, and there has not been enforcement action, then after a period of 10 years from the expiration of the "appropriate period" pursuant to section 40 of the 2000 Act (or such extended period as may be granted pursuant to section 42 of the 2000 Act) (i.e. the life of the planning permission) that development would be deemed to be an established non-conforming development; or
iii. Where unauthorised development was carried out in circumstances where planning permission had been granted but the development was not completed within the life of the planning permission, and there has not been enforcement action, then after a period of 10 years from the date the development was completed that development would be deemed to be an established non-conforming development.

6.4. Although some potential unfairness for owners of properties built after 3 July 1988 (if they had to prove that the development of their property did not require EIA or AA at the time of its construction) could remain, it could be addressed by a statutory presumption that those developments did not have a significant environmental impact or require EIA or AA. That statutory presumption could be provided in the Bill, but should apply to any situation in which the status of development is a relevant factor (e.g. RZLT).

6.5. The definition of Unauthorised Development in section 2 of the 2000 Act could be amended to exclude an established non-conforming development and corresponding changes made to definitions of Unauthorised Structure, Unauthorised Works and Unauthorised Use (all of which reference 1 October 1964 as the base date) as necessary.

6.6. The effect would be that, in most instances, there would be a 15 year period, beyond which a development would be deemed to be an established non-conforming

development and, as such, it would not be necessary, for conveyancing, tax, planning, compensation or other reasons to look beyond that period.

6.7. It would follow that no development carried out prior to 3 July 1988 (transposition date for the EIA Directive) would be Unauthorised Development.

6.8. This approach would benefit both the consumer and business, it would enhance efficiencies in the conveyancing system and all related activities concerning real estate (e.g. lending and leasing) without undermining any societal need or in any way encouraging breach of planning and environmental laws.

7. Retention of Records

7.1. If the proposed solution is considered not to be acceptable, legislative change is required to ensure that planning authorities and An Bord Pleanála retain all planning documents (including all historic documents) in perpetuity and make these available for inspection by the public both in physical and digital copy.

7.2. There should be a clear timeline for the collation and publication of the relevant planning documents to be completed and clear penalties for breach of this obligation. The absence of this requisite information deprives the consumer and others of orderly access to the information necessary to make informed decisions about whether to deal with the land having regard to its planning status, without incurring unreasonable expense and delay.

7.3. The planning documents to be retained should include all planning decisions and:

- the full planning application;
- all compliance submissions;
- all correspondence between the developer and the planning authority;
- all details concerning development contributions and receipts;
- all details concerning compliance with bonds and other security for satisfactory completion of development; and
- all ancillary correspondence, information and documentation relating to all development within each planning authority's jurisdiction.

7.4. In addition, all information contained on the planning register pursuant to section 7 of the 2000 Act, including in particular all decisions and accompanying applications under sections 5 and 57 of the 2000 Act should be retained.

7.5. If the proposal is considered to be acceptable, there should also be a legislative requirement for the retention of the planning records for a period of 20 years (subject to European Law requirements regarding retention of records in perpetuity).

8. Joint Committee on Housing Local Government and Heritage Report on the Pre-Legislative Scrutiny of the Draft Planning and Development Bill 2022 April 2023

8.1. From our review of the PLS Report, we do not consider that the Joint Committee has made any recommendations which are contrary to our proposal.

8.2. The recommendation that most closely connects with our proposal is set out below:

5. The Committee recommends that, under section 296 of the Draft Bill, enforcement actions are allowed to proceed for unauthorised development, even after 7 years, where it is considered that there have been significant impacts on the environment or that significant impacts on the environment are ongoing as a result of unauthorised development.

8.3. The recommendation and our proposal are consistent in that we are not proposing that historical developments would be deemed an established non-conforming development where there has been (or continues to be) a significant environmental impact.

Conclusion

We hope that our recommendations will assist in your consideration of these issues and would welcome the opportunity to engage further on the matter.

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Appendix A

Some Consequences of Established Non-Conforming Development

1. As unauthorised development is not cured by the passage of time even after the enforcement period expires, it remains a blight on the title.

2. Established non-conforming developments can affect the marketability of property and prevent the owner or purchaser from accessing funding.

3. Works to property which would otherwise be exempt development (such as certain extensions, alterations, repair or renewal) may not be exempt from the requirement for planning permission.

4. The right to compensation may be lost or reduced in compulsory acquisition.

5. It may be difficult to obtain permission for further development of the property.

6. Potential for imposition of onerous conditions in any subsequent planning application.

7. A local authority could refuse permission to reinstate a building damaged or destroyed by fire or other event.

8. Applications for renewal of liquor licences require evidence of planning compliance.

9. Insurers may seek to refuse to pay out on fire (or similar risk) policies on buildings on account of there being an Established Non-Conforming Development.

10. The provisions of the Finance Acts 2021 and 2022 regarding Residential Zoned Land Tax and in particular the definition of vacant or idle land.

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