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Pleanála agus Rialtais Áitiúil
Department of Housing,
Planning and Local Government

Section 28: Guidelines for Planning Authorities

Enforcement of certain planning conditions during the Coronavirus (COVID-19) outbreak

29 March 2020

Guidelines for Planning Authorities on the Enforcement of certain planning conditions during the Coronavirus (COVID-19) outbreak, issued under Section 28 of the Planning and Development Act 2000, as amended

Introduction

On Thursday 12th March 2020, the Taoiseach announced a number of significant measures designed to contain the spread of Coronavirus (COVID-19) and lessen the risk of infection in the population, especially to vulnerable groups. These measures have placed significant restrictions on the normal operation of business and society. Many accommodations have had to be made to ensure the operation of critical services during this time, including both front-line health services and other services which support the continued functioning of society and business.

Planning authorities have responded through implementation of business continuity plans and are ensuring, insofar as possible, and having regard to public health advice, that necessary provision is made to allow for the appropriate functioning of the planning service.

This is an evolving situation, which will be kept under review by the Department through engagement with the City and County Management Association (CCMA), Local Government Management Agency (LGMA), An Bord Pleanála, the Office of the Planning Regulator and other Government Departments.

This planning guidance addresses potential uncertainty which has arisen where there is an interaction between the public health measures that have been implemented, and operational restrictions imposed by planning condition, for example where essential retail operators, in an effort to ensure that food and other supplies can be delivered in a safe and timely manner, may be subject to planning conditions that restrict delivery times.

The Planning and Development Act, 2000 (as amended) allows some discretion to planning authorities in relation to the enforcement of planning conditions. The CCMA and the LGMA, have indicated that the approach to enforcement by planning authorities in this context should be pragmatic and measured.

In order to ensure clarity on this matter, and encourage a consistent approach, in as far as possible, Mr Eoghan Murphy, T.D., Minister for Housing, Planning and Local Government has issued this guidance under Section 28 of the Planning and Development Act 2000, (as amended).

The guidance stems from the need for planning authorities to exercise discretion, as provided for in the Planning and Development Act, 2000 (as amended), in the context of the current COVID-19 pandemic insofar as possible, and in a manner that takes account of the public health advice and recommended HSE measures in relation to COVID-19. This is, of course, in circumstances other than where issues arise which could seriously impact on public health and safety.

It is emphasised that these guidelines for planning authorities are issued **to address the period of the COVID-19 outbreak.**

Background

The Planning and Development Act 2000 as amended ('the Act'), operates "*to provide, in the interests of the common good, for proper planning and sustainable development*".

The exceptional danger to public health now facing Ireland arising from COVID-19 has resulted in significant changes to everyday life and civic arrangements, in the interests of the common good.

This has meant that there have been changes in how people congregate and socialise and almost all events and functions have ceased and/or been suspended. Emergency legislation has been enacted by the Oireachtas, and further legislative and regulatory as well as other measures, are being advanced by the Government. Given the serious danger to public health, these changes in activity are necessary in response to the COVID-19 pandemic.

There are also certain consequential changes in behaviour and activity applicable to the operation and administration of the planning system, especially in relation to the enforcement of planning permissions and associated conditions of planning granted under Section 34 of the Act.

Businesses and employers are altering their current work practices to ensure the safety of their staff and customers, including through facilitating social distancing, in line with HSE public health requirements. These measures have impacts on their capacity to provide full service within the restrictions, which may be reflected in planning conditions associated with their premises.

The particular categories covered by this guidance include:-

- Essential retail and wholesale outlets, including food shops, pharmacies, supermarkets, as well as critical retail supply chains;
- Restaurants and cafés;
- Childcare facilities.

The discretion accorded under the Act to planning authorities relates to infringements of conditions which are considered "trivial" or "minor" in nature. Planning authorities are also permitted to exercise discretion when deciding whether to issue an enforcement notice, in order to take any "material consideration" into account.

The paragraphs which follow suggest the types of issues which could be reasonably be considered trivial or minor, having regard to the threat posed to the health and well-being of society by COVID-19 and in the light of public health recommendations. They also serve to confirm that the changed operating environment arising from the current civil emergency is a significant material consideration.

1. Conditions Relating to the Hours of Delivery to and/or Hours of Operation of Essential Retail and Wholesale Outlets and Critical Retail Supply Chains

It is imperative to ensure that essential retail and wholesale outlets, including food shops, pharmacies, supermarkets and other retail outlets identified in Appendices 1 and 2, and critical retail supply chains, can ensure continuity of supply of essential products and respond to altered shopping patterns, in accordance with HSE social distancing guidelines, during the COVID-19 outbreak.

In particular, food shops, pharmacies, supermarkets and retail distribution centres may be subject to planning conditions which restrict night-time and/or early morning deliveries and operation. Under normal circumstances, these conditions may be necessary to ensure that the development is acceptable to local residents, who might otherwise suffer from traffic, noise and/or other amenity issues.

It is vital that deliveries of food, healthcare and other essential products can be made as quickly and safely as possible, minimising disruption to the supply chains on which communities depend, over the coming weeks. The likely pressures on driver capacity will mean additional flexibility is required, so retailers can accept deliveries throughout the day and night, where necessary.

As well as ensuring effective supply chains, there may also be pressures on retail outlets to vary opening hours. There may be increased demand for stores to be open earlier or later, allowing for social distancing and for people who are regarded as vulnerable or who are otherwise concerned over the risks of exposure to COVID-19, to shop at times that avoid more congested periods.

Under the statutory code, it is a requirement that all enforcement complaints received by planning authorities are investigated and if necessary, acted upon, in accordance with Part VIII of the Act, which relates to enforcement.

However, planning authorities have discretion in respect of determining whether to proceed with formal enforcement action following suspected breaches of planning control. In particular, Section 152 of the Act enables planning authorities to form a view on the substance or significance of an enforcement issue when considering whether to proceed by way of warning letter.

In addition, Section 153 of the Act empowers planning authorities to take any “material considerations” into account in deciding whether to take enforcement action, and Section 155 enables planning authorities to form an opinion in respect of a more urgent enforcement matter.

Given the current serious danger to public health and the resultant pressures placed on essential retailers and distributors, planning authorities should take an accommodating and

flexible approach to their engagement with essential retail and wholesale outlets and the retail supply chain, including distributors and the freight industry.

Furthermore, planning authorities should take a similarly accommodating and flexible approach in relation to ensuring that essential retail outlets, including in particular food shops, pharmacies and supermarkets, can remain open to serve the local community, at this time.

In accordance with Section 152(2) of the Planning and Development Act 2000 (as amended), and in the interests of the common good, given the materially altered circumstances described above, and the serious danger to public health posed by the COVID-19 pandemic, and as appropriate, planning authorities may therefore consider any breaches of planning condition in relation to essential retail and wholesale outlet, and critical retail supply chain delivery times or opening hours, to be “of a minor nature”, other than where issues arise which could seriously impact on public health and safety.

The purpose of this element of guidance is to ensure a proportionate response in the context of the current civil emergency, that may be applied to certain planning restrictions on essential retail and wholesale outlets and critical retail supply chains, in all planning authority areas.

2. Conditions Relating to Delivery or Take-away from Restaurants and Cafés

The dual impact of social distancing and the requirement for increased delivery of food to the homes of self-isolating and vulnerable people, has impacted on the normal operation of the restaurant and cafe sector.

Given the exceptional challenges arising from COVID-19, it is critical that support is given to restaurants and cafés to allow them to maximise opportunities to maintain a revenue stream. The provision of take-away services from these businesses, will enable members of the public to access goods and services with minimum exposure to risk of infection with COVID-19.

Amendments to Planning and Development Regulations exempt temporary changes of use from restaurant to take-away use for a specified period in the context of the current civil emergency. Many restaurants and cafés are currently precluded by a condition of their planning permission to operate a take-away service to sell food and drinks for consumption off the premises. Where such restrictions are in place as a result of a condition of planning permission, change of use exemptions may not apply.

Given the current serious danger to public health and the resultant pressures placed on the restaurant and café sector, planning authorities should take an accommodating and flexible approach to conditions restricting the provision of delivery and take-away services. This is to ensure that planning controls do not become a barrier to the provision of necessary take-

away services and the continued viability of restaurant and café businesses, during this unprecedented time.

Consequently, given the limited time period for which this will apply and in the interests of the common good, given the materially altered circumstances described above, and the serious danger to public health posed by the COVID-19 pandemic, planning authorities may therefore, as appropriate, consider any breaches of planning condition in relation to restaurants or cafés operating a delivery or take-away service to be “of a minor nature”, other than where issues arise which could seriously impact on public health and safety.

The purpose of this element of guidance is to ensure a proportionate response in the context of the current civil emergency, that may be applied to certain planning restrictions on the provision of delivery or take-away services from restaurants or café, in all planning authority areas.

It should be noted that this planning provision does not preclude the need to comply with any other regulatory requirements for food businesses, as appropriate.

3. Conditions Relating to the Hours of Operation of Childcare Facilities

The Government announcement on 12 March 2020 outlining necessary measures to contain the spread of COVID-19 and lessen the risk of infection in the population, especially to vulnerable groups, included the closure of creches and childcare facilities. However, with the continuance of the civil emergency, some facilities may be permitted to re-open to provide appropriate support to health sector or other essential service workers, initially to provide a childcare service for the children of front-line HSE staff, in particular. This may also require changes to the opening hours of such facilities to accommodate the shift pattern of these workers.

Given current social distancing requirements and staff ratios that already apply to childcare provision, any childcare facility that re-opens for the reasons and purpose described above will have significantly reduced capacity and will provide a childcare service for fewer children than under normal circumstances. It will be a critical service in ensuring that a potential lack of childcare facilities does not impact on the availability of healthcare or other essential service workers.

However, many childcare facilities are located in residential areas and their hours of operation are restricted by planning condition. Given the current civil emergency, there is a need to ensure that childcare facilities can operate to support essential service workers, particularly those in the health sector.

Consequently, given the limited time period for which this will apply, and in the interests of the common good given the materially altered circumstances described above, and the serious danger to public health posed by the COVID-19 pandemic, planning authorities may

therefore, as appropriate, consider any breaches of planning conditions in relation to hours of operation of childcare facilities to be “of a minor nature”, other than where issues arise which could seriously impact on public health and safety

The purpose of this element of guidance is to ensure a proportionate response in the context of the current civil emergency, that may be applied to certain planning restrictions on the hours of operation of childcare facilities, in all planning authority areas.

Section 160 Injunctions

Section 160 of the Planning and Development Act provides that the High Court or the Circuit Court can make an order, in the case of unauthorised development that has happened, is underway or is about to happen, on the application of a planning authority or any other party.

While planning authorities may exercise discretion as to whether to bring an application for an injunction in such cases, the jurisdiction to grant a Section 160 order is a matter reserved to the relevant Courts. In this regard, it is noted that the Court has a discretion under Section 161 of the Act to take “special and substantial reasons” into account when seised with an application under section 160.

Conclusion

The current civil emergency caused by the COVID-19 pandemic necessitates a proportionate response in relation to certain planning restrictions as outlined above and it is recommended that, given the exceptional circumstances, an appropriate level of flexibility is required in respect of conditions of planning permission that:-

- Govern the hours of operation of and delivery to essential retail and wholesale outlets including food shops, pharmacies, supermarkets and critical retail supply chains;
- Restrict delivery and take-away activities in relation to restaurants and cafés, and
- Specify the hours of operation of childcare facilities.

These guidelines are intended to address the abovementioned issues which arise as a consequence of the current civil emergency to facilitate compliance with public health recommendations and guidance issued by the Department of Health and the HSE, and shall remain applicable until such time as they are revoked by the Minister, in accordance with Section 28(4) of the Act. In this regard, the Minister shall revoke these guidelines no later than the 9th day of November 2020, unless a resolution approving of the continuation of Part 3 of the of Health (Preservation and Protection and other Emergency Measures in the Public Interest) Act 2020 (No. 1 of 2020) has been passed by both Houses of the Oireachtas.

Appendix 1: Essential Retail Outlets

The following considered **essential retail** outlets:

1. Retail and wholesale sale of food, beverages and newspapers in non-specialised and specialised stores
2. Retail sale of household consumer products necessary to maintain the safety and sanitation of residences and businesses
3. Pharmacies/Chemists and retailers providing pharmaceuticals, pharmaceutical or dispensing services
4. Retail sale of selling medical and orthopaedic goods in specialised stores
5. Fuel stations and heating fuel providers
6. Retail sale of essential items for the health and welfare of animals, including animal feed and medicines, animal food, pet food and animal supplies including bedding
7. Laundries and Drycleaners
8. Banks, Post Offices and Credit Unions
9. Retail sale of safety supply stores (work clothes, Personal Protective Equipment, for example

Appendix 2: Businesses that can only offer emergency call-out or delivery services

It is recognised that there may be emergency needs arising in a number of areas, the following retailers who can offer an emergency call-out or delivery service can continue to operate on that basis ONLY:

- opticians/optometrists
- retailers involved in the repair of motor vehicles, motorcycles and bicycle repair and related facilities (tyre sales and repairs for example)
- hardware stores, builder's merchants and stores that provide hardware products necessary for home and business maintenance, sanitation and farm equipment, supplies and tools essential for gardening/farming/agriculture
- retail sale of office products and services for individuals working from home and for businesses
- retailers providing electrical, IT and phone sales, repair and maintenance services for home