PLANNING ENFORCEMENT – THE SEVEN-YEAR RULE, TIMEFRAMES, BURDEN OF PROOF, AND UNAUTHORISED BUT IMMUNE

Abstract: The time limit for taking enforcement action under Part VIII of the Planning and Development Act 2000 is stated to be seven years. This Article examines how this limitation period has been extended by case law and legislation, who bears the burden of proof when the seven-year rule is invoked, and the legal and practical consequences where it is found that the statutory defence applies.

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Introduction

Section 157(4) of the Planning and Development Act 2000 ('the Act') as amended provides as follows:

> (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 under *Part III*, after seven years beginning on the expiration, as respects the permission authorising the development, of the appropriate period within the meaning of *section 40* or, as the case may be, of the period as extended under *section 42*.[1]

Section 160(6) of the Act provides that:

> (a) An application to the High Court or Circuit Court for an order under this section shall not be made—
>
> (i) in respect of a development where no permission has been granted after the expiration of a period of 7 years from the date of the commencement of the development, or

[1]Section 40 of the Planning and Development Act 2000 states that the duration of a planning permission is for a period of five years. There is a power to extend this period beyond five years under section 41 of the Act, where deemed appropriate. Section 42 permits a planning authority to extend the duration of a planning permission if necessary to enable a development to be completed. The default lifetime of a planning permission is five years, but this can be extended under section 41 and/or section 42. See further discussion below.

> (ii) in respect of a development for which permission has been granted under *Part III*, after the expiration of a period of 7 years beginning on the expiration, as respects the permission authorising the development, of the appropriate period (within the meaning of *section 40*) or, as the case may be, of the appropriate period as extended under *section 42*.

The foregoing is commonly known as the seven-year rule. It is the statutory time limitation period within which enforcement action, whether civil or criminal, can be taken pursuant to Part VIII of the Planning and Development Act 2000 as amended.

On the face of it, this seems quite clear. Put simply, the Act provides that if an unauthorised development has been in place for in excess of seven years, no enforcement action can be taken against that development, whether of a civil or criminal nature. Whilst the development is unauthorised, in that it does not comprise an exempted development, nor is there a valid grant of permission authorising same, it is what is termed immune from prosecution or, unauthorised but immune. However, the seven-year rule is not in fact seven years.

When seven years is seven years and 63 days

In *Browne v Kerry County Council*[2] Hedigan J considered the provisions of section 261 of the Act, which deals with the control of quarries and, in particular, the application of time periods under the Act to that section.[3] Section 261(1) of the Act obliged the owner of a quarry, in certain circumstances, to provide certain information to a Planning Authority not later than one year from the coming into operation of that Section.[4] Under section 261(6), the Planning Authority had the power to impose conditions on the operation of a quarry that had been in existence prior to 1 October 1964, or modify or add to conditions imposed on the operation of a quarry for which planning permission had been granted subsequent to that date. The Local Authority had two years from the date of registration within which to impose any such conditions.

In *Browne*, the Local Authority purported to impose conditions on the applicant's quarry on the precise two-year anniversary of the date of registration. Mr Browne argued that the conditions had not been imposed *within* the two-year period as set out in section 261(6)(a) of the 2000 Act and were therefore ultra vires the Council and not applicable.

Hedigan J had regard to the provisions of section 251 which deals with the calculation of time periods under the 2000 Act. Section 251 states that:

> (1) 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.

[2] [2009] IEHC 552, [2011] 3 IR 514. See Browne, *Simons on Planning Law* (3rd edn, Round Hall 2021) 690 - 691.
[3] The provisions of section 261 are now effectively defunct due to the effluxion of time.
[4] Section 261 of the Act came into operation on 28 April 2004 by virtue of the Residential Tenancies Act 2004 (Prescribed Form) Regulations 2022, SI 2022/152.

(2) *Subsection (1)* shall not apply to any time period specified in *Part II* of this Act.

Having considered the statutory provisions, the rules of statutory interpretation and the provisions of the Interpretation Act 2005, Mr Justice Hedigan concluded that section 251 extended the two-year time period in section 261 by nine days with respect to each year. This effectively provided for a total time period for the imposition of conditions of two years and 18 days in that instance. As a result, the Council in *Browne* were in fact within time.

This reasoning does not only apply to quarries and section 261. Section 251 also refers to 'any…other time limit' in the Act. It is of note that Part II of the Act is specifically excluded, whereby sub-section 2 states that sub-section 1 does not apply to that Part. Part VIII is not so excluded. Accordingly, there can be no ambiguity. The same reasoning applies to the time periods set out in sections 157 and 160 of the Act.

This position was accepted by the High Court in *Wicklow County Council v O'Reilly and others*.[5] In *O'Reilly*, Ms Justice O'Malley confirmed the position adopted by Hedigan J in *Browne*. O'Malley J also noted that since the decision in *Browne* had been handed down, the section itself had been amended, but not in a way that had any impact on the *Browne* judgment. Accordingly, O'Malley J accepted as a matter of law, that the relevant enforcement periods contained in Part VIII of the Act are also extended by nine days for each year. This has the effect that the seven-year period referred to in sections 157 and 160 of the Act is, in fact, seven years and 63 days.

Seven-Year Rule and Planning Permissions

It should be noted that both sections 157 and 160 differentiate between two different circumstances – where planning permission has been granted and where none has been granted. The seven-year and 63-day period relates to unauthorised development simpliciter, where no grant of planning permission has issued. When it comes to development where planning permission has been granted, the statutory limitation period, or the seven-year rule, is extended even further.

Section 157(4)(a)(ii) of the Act provides that with respect to a development for which planning permission has been granted, the seven-year time period commences after the planning permission has expired.[6] Section 40 of the Act deals with the lifespan or the duration of planning permissions. Section 40(3) provides that a planning permission has a lifespan of five years beginning on the date of the grant of permission or, alternatively, such further period that may be specified in the grant itself.[7]

Section 42 gives a Planning Authority the power to extend the appropriate period on application to it by a party to whom a planning permission has previously been granted. The Planning

[5] [2015] IEHC 667.

[6] Section 160(6)(a)(ii) contains a similar provision with respect to civil injunctions.

[7] Section 40(3) provides as follows:

> (3) In this section and in section 42, "the appropriate period" means—
> (*a*) in case in relation to the permission a period is specified pursuant to section 41, that period, and
> (*b*) in any other case, the period of five years beginning on the date of the grant of permission.

Authority can extend the lifetime of a particular permission by such additional period as the Authority considers appropriate, to enable the development to which the permission relates to be completed. In practice, this will be for a defined period, but for the purpose of the seven-year rule, regard would have to be taken of whether the extended period included the 24 December of any given year to the first day of January of the next year, as per section 251 of the Act. If a planning permission was extended under section 42 for a period of two years, the reality is that it is in fact extended by a period of two years and 18 days.

Given that planning permissions normally have a statutorily determined lifespan of five years under section 40, the seven-year rule is effectively 12 years from the date of the grant of permission. Of course, the five-year time period of the planning permission is also subject to the provisions of section 251, as referred to in *Browne*. A standard five-year planning permission therefore has an effective lifespan of five years and 45 days, being an extra nine days for each year. An additional nine days must be added for each of the five years of the permission and also for each of the seven years under the seven-year rule. Accordingly, where enforcement action is taken regarding a development for which planning permission has been granted, the statutory limitation period, as per *Browne,* is in fact 12 years and 108 days from the date of the final grant of permission.[8]

As stated, the statutory limitation period commences after the expiration of the lifetime of the planning permission, whether that be five years in the normal run of events as per section 40(3), or such other period of time as may be specified in the permission itself or as may be applicable if extended under section 42. Often, certain conditions of planning permissions, in particular financial conditions, provide that they must be complied with 'prior to the commencement of development.' On occasion, these conditions are not complied with before works commence. Accordingly, it is sometimes argued that unauthorised development commences on the day when works are first carried out and such conditions are non-compliant. It could be said that for the purposes of the seven-year rule, time starts on the date that work first commences in non-compliance with a 'prior to the commencement of development' condition.

However, the provisions of sections 157(4)(a)(ii) and 160(6)(a)(ii) of the Act are clear and unambiguous.[9] The date of commencement of development is only relevant where no planning permission has been granted. Where planning permission has been granted, it is clearly stated that the seven-year time period commences ***after*** it has expired. Irrespective of when the breach has actually occurred, the statutory limitation period only begins to run from the date of expiration of the relevant planning permission.

[8] In certain circumstances, permission can be granted for lesser periods or longer periods by a planning authority, for stated reasons. I have seen permissions for two and three years and also for ten years. In such circumstances, the limitation period should be extended or reduced by one year and nine days for each year difference accordingly.

[9] Section 157(4)(a)(ii) says that 'No warning letter or enforcement notice shall issue and no proceedings for an offence under this Part shall commence … in respect of a development for which permission has been granted under *Part III*, after seven years *beginning on the expiration, as respects the permission authorising the development, of the appropriate period within the meaning of section 40 or, as the case may be, of the period as extended under section 42* (emphasis added). Section 160(6)(a)(ii) contains similar provisions.

Use Conditions

It should also be noted that section 157(4)(b) of the Act provides a specific exemption from any limitation period with respect to any condition in a planning permission concerning the 'use' of the land to which the permission is subject.[10] A similar provision regarding civil matters is contained in section 160(6)(b).[11]

Accordingly, there is no limitation period on any enforcement action, civil or criminal, regarding a condition in a planning permission regulating the use of property. Section 157 of the Act commenced on 21 January 2002 and section 160 commenced on 11 March 2002.[12] Sections 157(4)(b) and 160(6)(b) of the Act do not, and cannot, operate retrospectively.[13] Accordingly, these provisions could only apply to any grant of permission subsequent to those respective dates. Any change of use from that which is permitted pursuant to a condition in a planning permission granted after these dates is actionable at any stage, irrespective of when such change of use has commenced. Some equitable issues such as acquiescence, laches or delay may come into consideration, along with the question of whether the Court should exercise its discretion to make orders. Ultimately however, there is no statute of limitations with respect to use conditions in planning permissions.

Quarries and Peat

For the sake of completeness, it should be noted that enforcement action can be commenced at any time with regard to development in the form of the operation of a quarry or the extraction of peat. This is pursuant to sections 28 and 29 of the Environment (Miscellaneous Provisions) Act 2011.[14] This relates to both instances of unauthorised development simpliciter, and also where planning permission has been granted and it is alleged that the provisions of such planning permission are being breached. Again, just as with use conditions, issues on retrospectivity and

[10]Section 157(4)(b) provides that 'Notwithstanding *paragraph (a)*, proceedings may be commenced at any time in respect of any condition concerning the use of land to which the permission is subject.'

[11]Section 160(6)(b) provides that 'Notwithstanding *paragraph (a)*, an application for an order under this section may be made at any time in respect of any condition to which the development is subject concerning the ongoing use of the land.'

[12] Both pursuant to Statutory Instrument 599/2001 – Planning & Development Act, 2000 (Commencement) (No. 3) order 2001.

[13] See Article 15 of the Irish Constitution; *Kenny v An Bord Pleanála (No.1)* [2001] 1 IR 565; *Cork County Council v Slattery Pre-Cast Concrete Limited* [2008] IEHC 291; Browne, *Simons on Planning Law* (n 2) 682, and Micheal Devoy, 'Enforcement – are the extended time limits retrospective in effect?' (2004) 11 Irish Planning and Environmental Law Journal 147.

[14]Section 28 of the 2011 Act provides that 'Subsection (4) of section 157 of the Act of 2000 is amended by inserting the following paragraphs after paragraph (*a*):

(*aa*) Notwithstanding paragraph (*a*) a warning letter or enforcement notice may issue at any time or proceedings for an offence under this Part may commence at any time in respect of unauthorised quarry development or unauthorised peat extraction development in the following circumstances:

(i) where no permission for the development has been granted under Part III and the development commenced not more than 7 years prior to the date on which this paragraph comes into operation;

(ii) where permission for the development has been granted under Part III and, as respects the permission—

(I) the appropriate period (within the meaning of section 40), or

(II) the appropriate period as extended under section 42 or 42A,

expired not more than 7 years prior to the date on which this paragraph comes into operation.'

applicability apply, with sections 28 and 29 of the 2011 Act coming into operation on 15 November 2011.[15] Indeed, sections 28 and 29 explicitly make reference to the limitation period commencing seven years prior to the coming into operation of the relevant paragraph or the planning permission expiring.

Covid-19

The final point on the extension of the enforcement time period arises in the context of the Covid-19 Pandemic that reached Ireland in March 2020 and brought about unprecedented challenges for the country on numerous levels. The seven-year rule did not escape its impact either.

The Emergency Measures in the Public Interest (Covid-19) Act 2020 ('the 2020 Act') gave the Minister for Housing, Planning and Local Government certain powers arising from the Pandemic. Section 9 of the Act dealt with the calculation of time limits during the emergency with regard to Planning and Development. These were stated to be once off legislative provisions introduced during a period of lockdown of the Country which it was not envisaged would be applied again. Specifically, section 9 amended the Planning and Development Act 2000 for present purposes, by introducing a new section 251(a). Section 251(a) as inserted, specified that a certain time period be disregarded when calculating any appropriate period under the Planning and Development Act 2000. Section 251(a) was brought into force by way of statutory instrument[16] and effectively commenced a freeze on time periods in the Planning Acts on the 29 March 2020. This initially lasted until 20 April 2020 and was subsequently extended until 9 May 2020 and again until 23 May 2020. Ultimately, a time period of eight weeks or 56 days from 29 March 2020 to 23 May 2020 inclusive was excluded, for the purpose of calculating time periods under the Act. The time periods extended by *Browne* have been extended even further as a result of the Covid-19 related legislation.

In all of the circumstances, the seven-year rule is no longer seven years due to *Browne v Kerry County Council* and section 9 of the 2020 Act. The seven-year rule for development where no planning permission exists is now the seven-year and 119-day rule. The seven-year rule for development where a standard five-year planning permission has been granted, is now 12 years and 164 days from the date of the final grant of planning permission.

The Burden of Proof

There are various mechanisms of enforcement available under Part VIII of the Act, from service of a warning letter under section 152, to criminal proceedings under section 151 or 154, or a civil injunction under section 160.[17] The protection and immunity afforded by sections 157(4) and 160(6) of the Act can be claimed at any stage of the enforcement process.

[15] Statutory Instrument 583/2011 – Environment (Miscellaneous Provisions) Act 2011 (Commencement) (Part 5) (No. 2) Order 2011.
[16] Emergency Measures in the Public Interest (Covid 19) Act 2020 (Part 3) (Commencement) Order 2020 SI 2020/100.
[17] See Browne, *Simons on Planning Law* (n 2) ch 11.

In general, the enforcement process will commence with the service of a warning letter under section 152 of the Act, prior to the service of an enforcement notice under section 154, or the issue of any proceedings, whether criminal or civil. Any person served with a warning letter may make representations to the Planning Authority in accordance with section 152(4).[18] It is open to the recipient of a warning letter at this stage to claim the protection of the seven-year rule if the development has been in place for the appropriate period, whether for unauthorised development simpliciter, or where planning permission has been granted.

Usually, a planning authority will require proof from a party seeking to claim the statutory defence in the form of documentary evidence. For practical reasons the defence might not be raised at this stage but if it is, such proof can take the form of, *inter alia*, electricity bills, gas bills, insurance policies, contracts, photographs, aerial images, Google Earth images, receipts for work, affidavits from occupants, builders or others with specific familiarity with the lands in question, or other similar documentation evidencing how long the development in question has been in place. If a prosecution is taken under section 151, the seven-year defence can of course be raised at the hearing of any trial. The seven-year defence may also be raised in a prosecution for non-compliance with an enforcement notice under section 154(8).[19] If proceedings issue under section 160, any such assertions regarding the seven-year rule are put on affidavit and any supporting documentation exhibited thereto. Where proceedings, either criminal or civil, do issue under Part VIII, the general rule regarding the burden of proof remains with the planning authority or applicant to prove its case.[20] However, within the context of those proceedings, the burden of proof shifts to the respondent in certain respects.

There are specific statutory provisions regarding the burden of proof in the Planning Acts. When it comes to planning permissions under section 162, sub-s (1) provides that 'In any proceedings for an offence under this Act, the onus of proving the existence of any permission granted under *Part III* shall be on the defendant.' In *Waterford City and County Council v Centz Retail Holdings Ltd (No. 2),*[21] Simons J said that it is at least arguable that once an applicant in any section 160 proceedings has established that development is being carried out, the onus then shifts to the Respondent to show that such development comes within the terms of any planning permission sought to be relied upon.

Similarly, and by way of particular reference to the seven-year rule, section 157(4)(c) provides that 'It shall be presumed until the contrary is proved that proceedings were commenced within the appropriate period.' This statutory provision is the starting point when considering who

[18] Section 152(4) states that 'A warning letter shall refer to the land concerned and shall - … (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.'

[19] It is arguable that this defence cannot be raised in such a prosecution before the District Court or the Circuit Court. See s 50(2) of the Planning and Development Act 2000 as amended, *Clare County Council v Floyd* [2007] 2 IR 671, Charleton J and Browne, *Simons, Planning and Development Law in Ireland* (n 2) 706. In reality and in practice, it is unlikely that such a defence would not be permitted to be advanced in such a criminal prosecution given the consequences that could follow.

[20] See *Pierson v Keegan Quarries Ltd (No. 2)* [2010] IEHC 404 (Irvine J); *The Right Honourable the Lord Mayor and Aldermen and Burgesses of Dublin v Sullivan* (HC. 21 December, 1984) (Finlay P).

[21] [2020] IEHC 634.

bears the burden of proof in relation to the seven-year rule, but the matter has also been considered through case law. There are similar parallels with exempted development which has been considered in detail by the Courts and which provides considerable guidance for these purposes.

Burden of Proof – Exempted Development

If it is claimed that a particular development sought to be impugned is an exempted development, the burden of proof rests with the defendant to show that the development is exempt.[22] Whilst the courts have long shown judicial deference to expert planning authorities and bodies when it comes to matters such as whether a particular development is an exempted development or not,[23] in the absence of a decision by a planning authority or An Bord Pleanála on the issue, it is up to a respondent to show that the development is an exempted development and the respondent bears the burden of proof on that front.

Section 5 of the Act allows for an application to be made to a planning authority or to An Bord Pleanála for a determination as to whether or not a particular development is an exempted development. Accordingly, it is important to distinguish between instances where a section 5 declaration has previously issued from a planning authority or the Board, and circumstances where no such Declaration has been made. It is clear from the Supreme Court decision in *Grianan An Aileach Interpretative Centre v Donegal County Council (No.2)*[24] that the Courts do not have jurisdiction to determine whether or not a particular development is exempted development or otherwise. This function is peculiarly within the remit of a planning authority or An Bord Pleanála under section 5 of the Act. However, it is also important to note that the decision in *Grianan An Aileach* does not preclude the High Court from deciding the question of whether a particular activity constitutes a development requiring permission or is exempted in any circumstances. Indeed, it is expressly envisaged that this issue may very well have to be determined in the context of enforcement proceedings.

As a corollary, a planning authority or An Bord Pleanála has no jurisdiction within the context of a section 5 declaration to determine whether a development is unauthorised or not.[25] Having said that, the reality is that a determination that works or a change of use is development and not exempted development will mean that in the absence of a grant of planning permission, such works or use must be unauthorised development. Similarly, if it is contended before the Courts that a particular development comprises an exempted development, in the absence of a section 5 declaration on the point, the Court in deciding whether or not the development is within the parameters of the exemption sought will effectively be deciding the issue as well.

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[22] It should be noted that in the context of a development where it is alleged that the development has been carried out before 1964, the burden of proof rests with the Applicant to show that the particular development is unauthorised, see *The Right Honourable the Lord Mayor and Aldermen and Burgesses of Dublin v Sullivan* (n 20) and *Pierson v Keegan Quarries Ltd* (n 20).

[23] See *Meadows v Minister for Justice, Equality and Law Reform* [2010] IESC 3, [2010] 2 IR 701 (Denham J) and *O'Keeffe v An Bord Pleanála* [1993] I IR 39 (Finlay J).

[24] [2004] 2 IR 625.

[25] See *Ógalas (t/a Homestore and More) v An Bord Pleanála and Others* [2014] IEHC 487 (Baker J); Browne, *Simons on Planning Law* (n 2) 195 [2-317], [2-321].

In *Wicklow County Council v Fortune (No. 3)*,[26] Hogan J considered whether the High Court had, in the context of section 160 proceedings, jurisdiction to determine whether a particular development was exempted development in circumstances where a section 5 declaration had already been sought and determined. Having considered the decision in *Grianan An Aileach* and noting that a contradictory declaration by the High Court would mean that there could be in existence two differing official determinations of the same question, Hogan J concluded that it was not open to him to decide the issue and go behind the extant decision of the planning authority.

This view was accepted and endorsed by O'Malley J in *Wicklow County Council v O'Reilly and others*[27] to the effect that a Court cannot look behind a section 5 determination. In *Killross Properties Ltd. v An Bord Pleanala,*[28] Hogan J revisited the issue in the Court of Appeal and having reviewed the relevant authorities, stated that:

> In my view, it is clear both from a consideration of these authorities and an examination of this question from first principles that the High Court cannot go behind a determination in a s.5 reference in the course of a s. 160 application.[29]

In circumstances where there is no planning decision or section 5 declaration on the point in question, different considerations arise. If it is alleged that a development comprises exempted development, the Court by necessity is asked and is therefore required to determine the issue as to whether or not development is exempted development. In *Lambert v Lewis,*[30] Gannon J had to consider whether or not a particular development was exempted in the context of an application under section 27 of the Local Government (Planning and Development) Act 1976, the statutory pre-cursor to section 160. Gannon J was of the view that '[t]he onus of establishing exemption falls on the Respondents.' In the particular circumstances of that case, the Judge found that the Respondents had '… failed to show that the subject premises are not being put to an unauthorised use' and therefore found for the Applicant.

Similarly, in *Fingal County Council v Crean and Signway Holdings Limited*[31] O'Caoimh J said that he was '…satisfied that the onus rests upon the respondents to satisfy this Court that the exemption contended for is one to which they are entitled.' He went on to say that 'I am satisfied that insofar as any conflict is concerned that the onus would rest upon the respondent to satisfy this Court that the work carried out was an exempted development.' He similarly found that the respondents had failed to satisfy the Court that the development complained of constituted an

[26] [2013] IEHC 397.
[27] [2015] IEHC 667.
[28] [2016] IECA 207.
[29] See also *Narconon Trust v An Bord Pleanála* [2021] IECA 307 where Costello J considered the position where a s 5 declaration had been issued and a subsequent declaration was sought which was in effect the same in substance as the initial declaration. He concluded that 'The Board was precluded from determining a section 5 referral in circumstances where a planning authority has previously determined the same, or substantially the same, question in respect of the same land where there is no evidence that there has been a change in the planning facts and circumstances since the planning authority's determination.'
[30] *Lambert v Lewis* (HC, 24 November 1982).
[31] [2001] IEHC 148.

exempted development under the Act or the Regulations and granted the applicant the reliefs sought.

These views were heavily endorsed in *South Dublin County Council v Fallowvale Limited,*[32] where the issue was considered in detail. After reviewing the various authorities, McKechnie J concluded that:

> In my opinion the stage presently reached is that there is clear preponderance of authority in favour of the proposition that when the development complained of is sought to be excused under cover of either s. 4 of the Act of 2000 or under the exempted developments provisions in the Regulations then the onus of establishing this point is upon he who asserts.[33]

More recently, in *Kerry County Council v McElligott*[34] Ms Justice Hyland confirmed the position somewhat more forcefully. Whilst confirming that the onus of proof in general is on a moving party in a section 160 injunction, she was clear that proving the applicability of an exemption was a matter for the respondent. Ms. Justice Hyland said that this was:

> …an uncontroversial proposition. It does not in my view establish that a plaintiff who has shown that (a) there is no planning permission for works requiring planning; and (b) that the works contravene a condition of a permission, is required to exclude the application of every possible exemption in the planning code. The import of the defendant's approach is that the onus is on the plaintiff to address every potential exemption under the planning code (of which there are very many) and explain why none of these are applicable to the works. No authority has been cited for that remarkable proposition. This is not a case where there is a dispute about whether a particular exemption applies, and the court is required to decide whom the onus rests upon to establish the applicability of the exemption. Here, strikingly, the defendant has not identified any applicable exemption or other exception which would displace the evidence before me, i.e., the lack of permission for the works and the incompatibility of the works with condition 12. In those circumstances, applying first principles, I consider that the onus lies on the defendant to prove the proposition he is asserting in abstracto i.e., that the development benefits from an exemption.

Arising from the foregoing, it is clear that in the absence of a section 5 declaration to the effect that a particular development is exempt, where a respondent proposes to rely on any exemption, he or she must prove its applicability to the development being impugned.

[32] [2005] IEHC 408.
[33] The position was relatively recently affirmed in *Diamrem Limited v Cliffs of Moher Centre Limited and Clare County Council* [2018] IEHC 654 where Faherty J said that she was '… satisfied that the onus is on the respondents to establish that the development is exempted development.'
[34] [2021] IEHC 542.

Burden of Proof – The Seven-Year Rule

Consideration of the foregoing is important in the context of the burden of proof with reference to the seven-year rule and similar principles apply. The general rule is that he or she who alleges the seven-year rule must prove its application. It should be noted that the authorities establish that the applicability or otherwise of the time bar is a matter of defence. The seven-year rule does not go to jurisdiction but rather, creates a full defence to a respondent who pleads it and can show the relevant time period to the satisfaction of the Court.[35] Just as with a respondent who seeks to allege that a particular development comprises exempted development, a similar onus rests on a respondent to show that the development in question has been in place for in excess of the statutory time period in sections 157(4) or 160(6).

In *Wicklow County Council v Fortune (No. 1)*[36] Hogan J considered this issue in detail. After reviewing the law on the burden of proof for exempted development, Hogan J concluded that in the light of *Fallonvale*, the onus or burden of proof rested with he or she who asserts, in this instance the respondent. He said that it would be "unreal and unduly burdensome" on an applicant for relief if such applicant had to show as a matter of evidence when the development in question commenced.[37] He also made reference to the peculiar knowledge rule which represented a practical recognition of the reality that matters largely personal and private to another party could be extremely difficult to prove. The actual reality is that the issue of when the development commenced would be within the peculiar knowledge of the person who carried out such development.

This was accepted in the subsequent case of *County Council of Wicklow v Whelan* where Heneghan J held that it was 'now well established by the case law that the seven-year limitation period was a matter of defence and the onus of proof lies with the party asserting it.'[38]

This statement of the law was also accepted by Noonan J in *Wicklow County Council v Lee and Tompkins*.[39] The only issue in that case was whether the council was precluded from taking the proceedings by virtue of the lapse of time under section 160(6) of the Act, i.e., was the matter statute barred. Having considered the affidavits of both parties, Noonan J noted that there was no evidence as to what precise works were done by the respondents or when they were done. He said that 'The only persons who can establish these facts are the respondents who have chosen not to do so.' Accordingly, having concluded that the respondents had failed to discharge the onus which rested upon them to establish that the development in question was in place for the requisite time period, Noonan J found for the applicant authority and granted the council the reliefs sought.

The limitation point was also considered by Ms Justice Hyland in *Kerry County Council v McElligott*.[40] Here, it was specifically alleged by the respondent that section 160(6)(a) had been

[35] See *O'Domhnaill v Merrick* [1984] IR 151, 158 (Henchy J), in the context of limitation periods generally.
[36] [2012] IEHC 406.
[37] ibid [22].
[38] [2017] IEHC 480 [73].
[39] [2019] IEHC 19.
[40] *McElligott* (n 34).

breached and that there was a positive obligation on the applicant to show that the proceedings had been issued within time. Regarding the submission of the defendant 'that the burden of proof lies on the plaintiff to establish that it comes within s. 160(6)(a)', Ms Justice Hyland noted that 'No case law is cited in respect of that proposition.' Having referred to the decision of Heneghan J in *Whelan,* Hyland J went on to state that:

> I am satisfied that established jurisprudence as referred to by Heneghan J., including the case of Pierson v. Keegan Quarries Ltd. [2010] IEHC 404, requires that if a defendant wishes to raise a defence of delay and argue that s. 160(6)(a) does not apply, he or she bears the burden of so doing. This is because the date upon which the development was commenced is a matter within the peculiar knowledge of the defendant. In this case, the defendant has made no averments at all on affidavit as to when he erected the gates or when he says time begins to run. He has not explained why he says that the plaintiff is out of time. The defendant has failed to make out a case in this respect.

It is clear that the legal obligation and burden of proof where the seven-year rule is claimed rests with a respondent. This is in both civil and criminal enforcement cases. This has clearly been established by case law and jurisprudence. However, issues can sometimes arise in endeavouring to ascertain the various points in time relevant for such purposes, and it can be important to establish from when the relevant time period or periods should be computed.

When Does Time Stop?

Time only stops when proceedings are issued in civil matters, or when an application is made for a summons in a criminal prosecution. A planning authority cannot rely on the previous service of either a warning letter or an enforcement notice when calculating whether or not criminal or civil proceedings are in time.[41] You work back seven years and 119 days from the date of issue or application for summons (12 years and 164 days if dealing with development for which planning permission exists), and if a respondent can show that the unauthorised development was in place at that stage, the statutory defence has been proven and the development is immune from enforcement.

Similarly, a respondent cannot rely on the purported commencement of works which were not continuous to establish an earlier commencement date for the purpose of sections 157(4) or 160(6). Obviously, ascertaining the date when works were commenced is of crucial importance

[41] Although see s 154(8) of the Planning and Development Act 2000 as amended which provides that 'Any person on whom an enforcement notice is served under *subsection (1)* who fails to comply with the requirements of the notice (other than a notice which has been withdrawn under *subsection (11)(a)* or which has ceased to have effect) within the specified period or within such extended period as the planning authority may allow, not exceeding six months, shall be guilty of an offence.' Technically speaking, an enforcement notice could issue one day before the statutory period under s 157(4) expires. The notice may allow a period within which certain steps are to be taken. The offence under s154(8) will only have been committed after this time period has expired. A planning authority will have a further six months from that time within which to issue proceedings under s 157(2). If done within this time period, any Summons will be within time, despite the fact that at the date of application for the Summons to the District Court for non-compliance with the Enforcement notice, the time period under the seven-year rule was well and truly up.

when the protection afforded by the Act is sought. However, you cannot lay a brick or build a wall, stop works or carry them out intermittently, and then seven years later start further works to complete a house and say that the development commenced years ago when the first brick was laid. The nature of the works must be substantial and continuous.

In *Dublin County Council South v Balfe Ltd*[42] Costello P considered the position under section 27 of the Local Government (Planning and Development) Act 1976 (the statutory predecessor to the 2000 Act), where there had been an interruption in development works. Whether there is such an interruption, cessation or abandonment of the development for any period will be a matter of evidence and degree in each particular case. In *Balfe*, Costello P stated that:

> In my opinion when a use has been abandoned and then recommenced nearly four years later an occupant 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 notice had been served and then recommence after several years when a limitation period based on the discontinued unauthorised user had expired, and I consider that the section cannot be so construed.

This view was endorsed in *Kildare County Council v Goode*[43] and *Pierson v Keegan Quarries Ltd (No. 2)*.[44] In *Goode*, the Court was dealing with a sand and gravel pit whereby the respondents sought to rely on the seven-year rule. Morris P stated that:

> If the Respondents were correct in their submissions it would mean that the performance of an act of mining or taking sand by the Respondents for however a limited period of time, would be sufficient to cause the limitation period to start and, not withstanding the fact that the Respondents might have, in response to a warning notice discontinued the activity, would still continue to run. In my view, this cannot be correct. On the correct interpretation of this subsection, it appears to me when applied to mining and quarrying cases that the limitation period must be defined as commencing upon the date upon which an unauthorised development of the land occurs and that period will continue to run unless there is a manifest interruption or abandonment of the said development. If it were otherwise, then warning notices would be meaningless and a local authority would be required to ignore the fact that a person engaged in an unauthorised development of removing sand, gravel, rock etc., had responded to the notice, but would be required to move in Court.
>
> Accordingly, a manifest interruption or abandonment of the development is in my view sufficient to stop the time provided for in subsection (sic), running and this time will only commence to run upon the re-commencement of the

[42] HC, 3 November 1995 Costello P.
[43] *Kildare County Council v Goode* (HC, 13 June 1997); and Supreme Court [1999] 2 IR 495, [2000] 1 ILRM 346.
[44] [2010] IEHC 404.

> unauthorised development. It appears to me that each case must be determined on its own facts and it is for a Court to decide if there has been an abandonment or a discontinuance of the development so as to interrupt the time running. In the present case, I am satisfied that the conduct of the Respondents in discontinuing their activities upon the service of the warning notice…satisfies me that there was a sufficient abandonment or discontinuance of the activity to defeat the defence based on this sub-section.

In *Pierson*, Irvine J had to consider whether an application concerning quarry activities was statute barred where it was alleged that quarrying activities had been carried out for a significant period of time. The Court found that on the facts, that any such activities had been abandoned on two occasions, firstly where a planning permission for an alternative use had been granted and implemented, and secondly, just as had been found by Morris J in *Goode,* where the use had also ceased after service of a warning letter.

The matter was also considered in *Wicklow County Council v Lee and Tompkins*.[45] Noonan J considered and accepted the previous case law and reiterated who bears the onus of proof, stating that in his view:

> …the concept of "commencement of the development" involves a reasonably continuous, but temporary, unitary process leading to a completion of the development in issue. Something which is done sporadically and piecemeal with intervening significant periods of inactivity and abandonment, cannot in my opinion amount to a "commencement of the development" within the meaning of s.160. Seen in that light, it seems probable that the development here which led to the completion or substantial completion of the shed/workshop can only be viewed as having commenced in or around 2010. However, it is not for the Council to prove that.

Accordingly, if a respondent seeks to claim the immunity afforded by the seven-year rule, he or she bears the burden of proof. Similarly, if in the context of such an assertion an issue arises regarding a possible cessation, abandonment or interruption, a respondent bears the burden of proof in that regard as well. If a developer can show the existence of the development for the required period of time, the developer is entitled to the benefit of the statutory protection afforded by the limitation period.

However, it should be noted that if a developer has proven the position to the satisfaction of the planning authority or Court so that no adverse orders can be made, the development is still unauthorised. It is not authorised or legal and there are various consequences that flow therefrom. Such consequences can be quite restrictive as we can see below.

[45] [2019] IEHC 19.

Practical Implications for Unauthorised but Immune Developments

Successfully arguing the seven-year rule can stop enforcement action in its tracks. It can be a silver bullet and, if found to be applicable, any enforcement action or proceedings are at an end with respect to the unauthorised development identified at that time. However, this does not regularise the development in question. The development is termed unlawful but immune, or unauthorised but immune. Availing of the immunity provided by the seven-year rule is not a grant of planning permission and neither is it equivalent to a grant of planning permission.[46] Whilst no enforcement action can be taken and the development cannot be knocked, removed, or enforced against, there are a number of practical consequences for a development that has the status of being unauthorised but immune.

Such a position can arise in one of two ways. Firstly, a development can attain such status by operation of law under the seven-year rule through the passage of time. If it can be shown that a development in question has been in existence for the relevant period prior to the commencement of enforcement action, the immunity applies. Again, these periods are seven years and 119 days for unauthorised development simpliciter and 12 years and 164 days where a standard five-year planning permission has been granted but not complied with. The second instance is where a Court might find in the context of a section 160 action that a particular development is unauthorised, whether action was taken within the time period specified or not but decides to exercise its discretion not to order the demolition, removal, or cessation of the development.[47]

The term 'unauthorised development' is defined in section 2 of the Act. In simple terms, it refers to works or uses that have been carried out or commenced after the coming into operation of the Local Government (Planning and Development) Act 1963 on 1 October 1964, which do not comprise exempted development and require planning permission which has not been obtained.

Accordingly, there are three possible scenarios where a development could be unauthorised but immune. Firstly, works where planning permission was required but not sought; secondly, a change of use where planning permission was required but not sought; or thirdly, works where planning permission was sought but one or more of the conditions attaching to the planning permission have not been complied with.[48] In these scenarios, if the appropriate time period has passed and a respondent can show this to the satisfaction of the local authority or Court, no adverse orders can be made. However, the benefits that normally attach or accrue to an authorised development do not apply here. Whilst the development cannot be stopped or removed, there are practical consequences of a finding of unauthorised development which is immune from enforcement action. These include the following:

[46] See *Dublin Corporation v Mulligan* (HC, 6 May 1980) Finlay P.
[47] Regarding discretion generally see *Morris v Garvey* [1983] IR 319; *Leen v Aer Rianta CPT* [2003] 4 IR 394; *Wicklow County Council v Fortune (No. 1)* [2012] IEHC 406; *Wicklow County Council v Fortune (No. 2)* [2013] IEHC 255; *Wicklow County Council v Kinsella* [2015] IEHC 229; and *Meath County Council v Murray* [2018] 1 IR 189.
[48] It is worth pointing out again that use conditions in planning permissions are actionable at any time as per ss 157(4)(b) and 160(6)(b) of the Act.

(i) An unauthorised development is not entitled to benefit from the range of exempted development provisions contained in the Planning and Development Regulations 2001 as amended.[49] Part 1 of schedule 2 to the Regulations sets out numerous developments for which planning permission is not required, together with any conditions and limitations attaching thereto. However, article 9 sets out certain restrictions on such exemptions. One of those restrictions specifically relates to unauthorised structures. No distinction is made between unauthorised structures that can claim the benefit of the immunity under the seven-year rule and those that cannot. Article 9(1)(a)(viii) provides that:

> Development to which article 6 relates shall not be exempted development for the purposes of the Act - (a) if the carrying out of such development would …(viii) 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.

A practical example of this is a standard extension to the rear of a house, which does not exceed 40 square metres and complies with the other conditions and limitations attaching to Class 1 of Part 1 of schedule 2 of the Regulations. In the normal run of events, such an extension comprises exempted development and no planning consent is required. However, if such an extension is to an unauthorised dwellinghouse, the extension itself is unauthorised and liable to enforcement under Part VIII of the Act. The extension would not have the benefit of the seven-year rule immunity attaching to the initial structure, and time would run from the date of commencement of the extension. The exempted development benefits for an extension of this size are lost when the initial development is unauthorised.

It should be noted that this restriction applies where no planning permission exists for the structure but also, where planning permission exists but has not been complied with either in full or in part. Take the example of a permission for a one-off house where substantial enough conditions have not been complied with, or perhaps financial contributions have not been paid in compliance with a condition attaching to the permission. Having regard to substantial compliance, de minimis rules, and proportionality, a normally exempt extension could be deemed unauthorised, depending on the extent of the non-compliant conditions. To make the extension planning compliant would require the outstanding conditions to be complied with, including payment of the financial contributions under the parent permission, which had initially become immune from payment due to the effluxion of time.

(ii) Whilst article 9 of the Regulations deals with works, article 10 deals with changes of use. Article 10(1) of the Regulations provides that:

[49] Section 4(2) of the Planning and Development Act 2000 permits for the making of Regulations setting out classes of development which are exempted development. Article 6(1) of the Planning and Development Regulations as amended states that 'Subject to article 9, development of a class specified in column 1 of Part 1 of Schedule 2 shall be exempted development for the purposes of the Act, provided that such development complies with the conditions and limitations specified in column 2 of the said Part 1 opposite the mention of that class in the said column 1.'

> Development which consists of a change of use within any one of the classes of use specified in Part 4 of Schedule 2, shall be exempted development for the purposes of the Act, provided that the development, if carried out would not—
>
> (i) involve the carrying out of any works other than works which are exempted development,
> (ii) contravene a condition attached to a permission under the Act,
> (iii) be inconsistent with any use specified or included in such a permission, or
> (iv) be a development where the existing use is an unauthorised use, save where such change of use consists of the resumption of a use which is not unauthorised and which has not been abandoned.[50]

Article 10 permits for the change of use *within* the classes as set out in Part 4 of schedule 2 of the Regulations. Change of use *between* or *from* one scheduled class to another is not exempt, it is a change of use *within* each class, as such class of development may be defined under the Act or Regulations. The practical effect of article 10 is that where an unauthorised use is being carried out as set out in Part 4 of schedule 2, it is not permitted to change use to an otherwise exempted use under Part 4. An example of this would be a change of use from one shop use to another shop use which does not contravene a condition in a planning permission and otherwise complies with the Regulations. A change of use from a hairdresser or post office to a shop for the retail sale of goods is classified as exempt under article 10 and Part 4 of Schedule. However, if the hairdresser or post office use is unauthorised in the first instance, even though enforcement against such use may be statute barred, the normally exempted change of use is not permitted.

(iii) It is also unlikely that an unauthorised developer will be permitted to carry out any repairs or maintenance to an unauthorised structure. The law is somewhat conflicting on the point. but having regard to the relevant case law and legal principles, it is my view that repairs or works for the maintenance, improvement or alteration of an unauthorised structure would not be permitted and would require planning permission.

Development in the form of repairs and maintenance is dealt with in the 2000 Act itself. In addition to the Planning and Development Regulations, the Act sets out certain developments that comprise an exempted development. These are set out in section 4 of the 2000 Act.[51] Section 4(1)(h) provides that:

> The following shall be exempted developments for the purposes of this Act…

[50] It should also be noted that Class 14 of Part 1 of Schedule 2 of the Regulations deals with development consisting of a change of use of certain specified uses. Certain temporary uses are also set out in Part 1 of Schedule 2. Why these uses are not specified in Part 4 of Schedule 2 is unclear, but these particular uses are subject to the provisions of Articles 6 and 9 of the Regulations and not Article 10.

[51] For example, s 4(1)(a) deals with agricultural use of land and other sub-sections deal with development by Local Authorities.

> 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.

Unlike the Regulations, the Act is silent as to any limitations on such exemptions, or whether there are any circumstances which might lead to any of the exemptions in section 4(1) being de-exempted.[52] Accordingly, it could be argued that in the absence of such legislative provision, the Oireachtas did not intend for there to be any such limitations. No reference is made in the Act to section 4 not applying to unauthorised structures. However, this would not accord with the legal, legislative and factual indicators which support the proposition that an unauthorised structure cannot avail of the statutory exemption under section 4(1)(h).

The case of *Michael Cronin (Readymix Limited) v An Bord Pleanála*,[53] is of assistance when considering unauthorised structures and section 4(1)(h). In *Cronin*, the Supreme Court had to consider whether or not an 'extension' constituted 'the carrying out of works for the maintenance, improvement or other alteration of any structure'. In the High Court, Ryan J referred to the definition of works in section 2 of the Act which includes extensions. He found that an extension was envisaged in the works referred to in section 4(1)(h) and could therefore be exempt from the requirement to obtain planning permission. However, this was overturned on appeal by the Supreme Court. O'Malley J was of the view that the plain intention of the Oireachtas was never to render exempt a range of developments far in excess of those intended. Whilst the ratio of *Cronin* is to the effect that an extension cannot be regarded as maintenance, improvement or other alteration of any structure to benefit of the section 4(1)(h) exemption, it is of note that *Cronin* was decided in the context of works at a quarry which An Bord Pleanála had determined were unauthorised.

In *Sligo County Council v Martin*,[54] the respondent was engaging in development which was accepted by all concerned was unauthorised, but which the respondent maintained was immune from enforcement. Such development was initially in the form of the erection and use of a mobile home for over 30 years. When Mr Martin replaced the mobile home with a larger version and a more permanent concrete base, enforcement proceedings were successfully taken. The larger mobile home and concrete base were removed by Mr Martin, who then sought to revert to what he had prior to replacing the initial mobile home with the larger version. Effectively, he sought to revert to the position which was

[52] However, it should be noted that s 4(1)(h) is superseded and effectively de-exempted with respect to protected structures in certain circumstances as per s 57(1) of the 2000 Act, see *Coras Iompair Eireann and another v An Bord Pleanála* [2008] IEHC 295. For completeness, see also s 82(1) of the Act by reference to s 4(1)(h) and development in architectural conservation areas.
[53] [2017] 2 IR 658.
[54] [2007] IEHC 178.

unauthorised but immune by putting back a mobile home identical in size and dimension to the one that had been there since the early 1970s, with the original gravel surface in place.

Whilst the case was not decided by particular reference to section 4(1)(h) and whether the replacement was exempted development (Mr Justice O'Neill concluded that the placement of this further mobile home on the lands was an act of fresh development which required planning permission), it is noteworthy in that the net effect of the decision is that the replacement (which no doubt could be regarded as maintenance, improvement or alteration) of an unauthorised but immune development was not permitted.[55]

The specific question as to whether or not the section 4(1)(h) exemption can be claimed with respect to an unauthorised structure was addressed in *Fingal County Council v Crean and Signways Holdings Limited*.[56] In that case, the Applicant Council sought Orders with regard to unauthorised advertising hoardings/signs. Such hoardings/signs had been on the lands in question for a number of years until their replacement or repair approximately 17 years later. There was a dispute on the evidence as to whether or not the hoardings in question had been replaced in full or repaired at that time and the applicability of the Act and Regulations. Having reviewed the evidence and the submissions of each party, O'Caoimh J referred to section 4(1)(g) of the Local Government (Planning and Development) Act 1963[57] Act wherein he concluded as follows:

> I am satisfied on the evidence before me that at least a portion of the structure which was erected in 1998 is not in any way a replacement of or repair of a pre-existing structure and this cannot be authorised. I am further satisfied that insofar as the structures the subject matter of these proceedings fall to be construed as unauthorised structures within the definition of same appearing in Section 3 to the Act of 1963 that the exemption contended for under Section 4(1)(g) does not apply.

Whilst exemptions under both the Regulations and Act were considered by the Court, O'Caoimh J clearly stated that an unauthorised structure cannot avail of the statutory exemption regarding maintenance, improvement or alteration.

Subsequently, in *Cork County Council v Slattery Pre-Cast Concrete Limited*,[58] Clarke J stated that the fact that an unauthorised structure may be immune from enforcement does not

[55] This position was accepted by Hogan J in *Wicklow County Council v Fortune (No. 3)* [2013] IEHC 397.
[56] [2001] IEHC 148.
[57] Section 4(1)(g) of the 1963 act was the Statutory predecessor to section 4(1)(h) and effectively its sister provision in similar terms. Section 4(1)(g) provided that '4.—(1) The following shall be exempted developments for the purposes of this Act: … (*g*) 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 such appearance inconsistent with the character of the structure or of neighbouring structures.'
[58] [2008] IEHC 291.

prevent action being taken against the expansion of that structure or the business associated with it. This is another clear statement from the Courts that an illegal development cannot be used as a base for normally lawful development, saying that:

> Likewise an unauthorised development in place before the commencement of the relevant limitation period may not be amenable to enforcement but it remains unauthorised and cannot be used on a legitimate base for further expansion.

The foregoing cases indicate that again, a normally exempt development is not permitted where the initial development is unauthorised. However, there is case law which would appear to contradict this position. In *Dublin Corporation v Arnold Lowe and Signway Holdings Limited*[59] Morris P stated as follows:

> I believe that there must, in planning terms, be a significant difference between a temporary removal for repair and maintenance with the intention of the original or repaired structure being reinstated after such repair and the removal of such a structure with no intention of its reinstatement by its owner but the replacement of a different albeit (or be it similar) structure by a third party. I am of the view that it is irrelevant that the new structure corresponded in all respects with the original structure. The removal of the original hoarding by David Allen Holdings Limited without the intention of replacing it must be regarded as an abandonment of any rights which might have been acquired up to that time. (See *Dublin County Council v Tallaght Block Company Limited* [1985] I.L.R.M. 512).

On appeal, McCracken J stated that:

> The Appellant also referred to *Dublin Corporation v Regan Advertising Ltd & Ors*, which dealt with a situation where there had initially been advertising material painted on the exterior of a wall, which advertised the business of the occupiers of the premises, but subsequently this was changed into advertising material fixed to the wall which did not relate to the occupiers' business. The Appellant also relied on *Fingal County Council v Crean & Anor* (Unreported O'Caoimh J 19 October 2001), which concerned the replacement of and addition to freestanding advertising hoardings which did not form part of any other structure. I do not think that either of these cases are particularly helpful, as the former case was concerned primarily with change of use and the latter case did not deal with advertising as a part of a building, nor did it consider the question of whether there might have been an alteration within the meaning of s.4(1)(g).[60]

[59] *Dublin Corporation v Arnold Lowe and Singway Holdings Limited* (HC, 4 February, 2000).
[60] *The Right Honourable the Lord Mayor Aldermen and Burgesses of Dublin v Arnold Lowe and Signways Limited* [2004] IESC 106.

It would seem that *Lowe* can be distinguished from *Crean* in that O'Caoimh J was dealing with repair/replacement in *Crean* whereas it was accepted in *Lowe* that the Court was dealing with an alteration and not maintenance or improvement.[61] There were separate factual matrices at play. However, in *Wicklow County Council v Fortune (No. 3)*[62] Hogan J appeared to suggest that repairs to an unauthorised mobile home could be permitted when he said:

> It follows, therefore, that the onus rests on the party alleging that a particular mobile home or caravan enjoys the benefit of the limitation period to show that the mobile home or caravan has rested on the same location for the last seven years immediately preceding the commencement of these proceeding, save where any movement of the caravan or mobile home was either purely de minimis or for the purposes of temporary repair and alteration (cf. on this latter point the comments of Morris P. in *Dublin Corporation v Lowe* [2000] IEHC 161 and those of O'Neill J in *Martin)*…
>
> Having regard in particular to the analysis to be found in the judgment of O'Neill J in Martin, a party wishing to assert that the seven year limitation period found in s. 160(6)(a)(i) has expired in the case of either a mobile home or caravan must demonstrate that the mobile home or caravan has rested on the same location for the last seven years immediately preceding the commencement of these proceedings, save where any movement of the caravan or mobile home was either purely de minimis or for the purposes of temporary repair and alteration.[63]

As can be seen, Hogan J expressly and clearly envisages repairs and alteration of an unauthorised mobile home. It is not unreasonable to conclude that Hogan J is referring here to the exemption available under section 4(1)(h) and these comments, whilst obiter in nature, clearly contradict previous case law and in particular *Crean*.

It is arguable that a mobile home is not a structure having regard to the definition of structure in section 2 of the 2000 Act[64] and also having regard to the definition of 'development' in section 3 of the Act, and in particular section 3(2)(b).[65] It is likely that

[61] See also Browne, *Simons on Planning Law* (n 2) 687 paras 11-105.
[62] [2013] IEHC 397.
[63] Underlining added.
[64] Section 2 dealing with interpretation provides that:

> "structure" means any building, structure, excavation, or other thing constructed or made on, in or under any land, or any part of a structure so defined, and—
> *(a)* where the context so admits, includes the land on, in or under which the structure is situate, and
> *(b)* in relation to a protected structure or proposed protected structure, includes—
> (i) the interior of the structure,
> (ii) the land lying within the curtilage of the structure,
> (iii) any other structures lying within that curtilage and their interiors, and
> (iv) all fixtures and features which form part of the interior or exterior of any structure or structures referred to in *subparagraph (i)* or *(iii)*.

[65] Section 3(2)(b)(i) provides that:

a mobile home falls under the 'other objects' in section 3(2)(b)(i), as it is moveable in nature and in the normal run of events used for habitation. Contrary to the beliefs of some, the temporary nature is irrelevant from a planning point of view. However, it would seem clear that both O'Neill J in *Martin* and Hogan J in *Fortune (No. 3)* regarded the mobile homes as structures. Section 4(1)(h) only applies to structures. Irrespective of whether a mobile home falls within this definition or not, the analysis in *Fortune (No. 3)* relates to structures and again, Hogan J is of the view that repairs can be carried out to a structure that is unauthorised.

The comments of Hogan J regarding repair are obiter and clearly, this particular view, coupled with the fact that the legislature have not specifically de-exempted section 4 developments where the initial structure is unauthorised, certainly gives pause for thought. But this does not get away from the fact that the structure is illegal in the first instance. That illegal foundation cannot be a ground for a normally exempted development to be carried out, as per *Slattery*. In addition, we cannot escape the clear statement from O'Caoimh J in *Crean* that the exemption provided for in section 4(1)(h)[66] cannot apply to unauthorised development. Furthermore, whilst it may seem somewhat peculiar to prohibit repairs or maintenance to a structure that cannot be enforced against, to permit same would infringe the general principle that fundamentally, you cannot benefit or profit from unlawful activity.[67] This would go against what certainly appears to be the policy of the Oireachtas and also the general approach of the courts that unauthorised developers cannot avail of the benefits that attach to authorised developments.

The specific point may require an authoritative decision in due course, but I believe that an unauthorised structure is not entitled to the exempted development provisions contained in section 4 of the Act and, in particular, section 4(1)(h), whether the unauthorised development is immune or not. A practical example of this would be repairs to the roof of an unauthorised dwelling house. Normally, such works would be exempted development under section 4(1)(h) subject to the caveat that the works 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.' However, if the house itself is unauthorised, by extension any repair works thereto are unauthorised as well. Again, it might seem anomalous that repairs to a roof on such a structure would be actionable and susceptible to enforcement proceedings under the Act, and certainly issues regarding equitable considerations and discretion would come into play. Such may be the price to pay for not having obtained planning permission for the structure itself in the first instance.

(*b*) where land becomes used for any of the following purposes—

(i) the placing or keeping of any vans, tents or other objects, whether or not moveable and whether or not collapsible, for the purpose of caravanning or camping or habitation or the sale of goods…

…the use of the land shall be taken as having materially changed.

[66] At the time of the decision in *Crean*, the relevant provision was s (4)(1)(g) of the 1963 Act, in identical terms to s 4(1)(h).

[67] See for example *Cawley and others v Lillis* [2011] IEHC 515.

(iv) As development can be in the form of works or a material change of use,[68] it is possible that a structure may have been erected and that time begins to run for that structure from the date of commencement of the building the structure. However, the actual change of use of the lands will in all likelihood not commence until a later date. Accordingly, there can be two separate and distinct dates of commencement of development: first, the date of commencement of the works and secondly, the date when the change of use first occurs.

In those circumstances, whilst the structure itself may be unauthorised but immune from enforcement action, it may still be possible to maintain and take enforcement action against any unauthorised change of use, depending on when such use commenced. In *Cork County Council v Slattery Pre-Cast Concrete Limited*[69] Clarke J had to consider the position regarding a quarry where it was alleged that there were various features of unauthorised development ongoing which related to both structures and use. Having extrapolated the various unauthorised features, Clarke J had to consider whether some or all of them were statute barred by way of reference to the seven-year rule. He stated at paragraph 10.7 as follows:

> It is, however, a very different thing to suggest that because there is an unauthorised structure, which was built (but was not in use) outside a relevant limitation period, a person concerned has an entitlement to carry on an unauthorised use of that structure, even where the unauthorised use concerned begins after the limitation period commenced. There is nothing, in my view, in s. 160 of the 2000 Act, which would lead to such a consequence. The enforcement which is prohibited by that section is enforcement in respect of unauthorised development which was existing at a relevant time (i.e. the commencement of the limitation period by reference to the date of commencement of the proceedings). If a structure is completed (in whole or in part) but not in use at the relevant time, then the only form of unauthorised development that has occurred at that time is the building of all or the relevant part of the structure concerned but not its use for even the natural purpose of the structure. It follows that it may not, by virtue of s. 160 of the 2000 Act, be possible to maintain enforcement proceedings in respect of the structure. There is nothing, in my view, however, to prevent enforcement in respect of use of such a structure. It would only be if the structure was actually in use for the relevant purpose as of the commencement of the limitation period that enforcement proceedings in respect of that use would also be statute barred.

Accordingly, it is clear that the distinction between works and material change of use as set out in section 3 of the 2000 Act has implications for the statutory time limits under the seven-year rule. This also applies to a subsequent change of use of an unauthorised

[68] Section 3 of the Act provides that 'In this Act, "development" means, except where the context otherwise requires, the carrying out of any works on, in, over or under land or the making of any material change in the use of any structures or other land.'
[69] [2008] IEHC 291.

but immune structure, or works with the statutory time limit commencing as and from the date of the change of use. This may result in the seemingly anomalous position whereby a particular structure may be immune from enforcement due to the passage of time, but the restriction on the use of that structure is perfectly lawful and allowed.

(v) As stated above, the immunity conferred by the seven-year rule does not amount to a grant of planning permission. There are serious consequences for title purposes. From a conveyancing and title perspective, any purchaser buying a property will look to acquire good and marketable title. Furthermore, a bank or financial institution will have to consider its position if good and marketable title is not on offer, which it cannot be in this instance. Such a situation will impact on a bank's decision of whether to advance funds where the planning is not in order. Accordingly, if purchasing an unauthorised but immune development, title will have to be qualified with any lending institution advancing funds for such purchase. Acceptance of such qualification on title by the bank or lender should not be taken for granted.

Whilst there is no statutory definition of a good marketable title, this term is understood to mean the standard of title to be accepted by conveyancers following what are regarded as good Conveyancing rules and practice. This relates not only to evidence of ownership in the form of title deeds but also includes any planning documents. Planning is a fundamental part of title to any property and all planning documentation including permissions, certificates/opinions and declarations should be furnished to a prospective purchaser with any conditions of sale.[70]

Accordingly, if purchasing or refinancing a property which comprises unauthorised development or which has any unauthorised development element to it, care must be exercised. It is not simply good enough to obtain a declaration to the effect that the development has been in place for in excess of seven years and 119 days or 12 years and 164 days, whichever the case may be, and that no notices have been served and to the best of the declarant's knowledge, no enforcement proceedings are in being. All appropriate enquires and due diligence should be carried out.

It should be noted that any such declaration will be from a private individual. There is no professional indemnity insurance backing it up and if it is incorrect, it may not be worth the paper it is written on. Whilst section 6(1) of the Criminal Justice (Perjury and Related Offences) Act 2021 makes it a criminal offence knowingly to make a false statutory declaration, this will be of little use or comfort to a purchaser that has bought an unauthorised development in reliance on that declaration if the property is subsequently the subject matter of enforcement proceedings by a local authority that are in fact within time. Neither will it be of comfort to a bank that might have lent money on foot of a qualification on title that relied on such a declaration. A purchaser of an unauthorised development is not home and hosed just because the vendor provides such a declaration and the bank accepts it as a qualification on title.

[70] See Law Society Practice Note in the Law Society Gazette May 2019, 56.

In addition, there are other serious practical consequences of which purchasers or owners of unauthorised developments should be aware. A lender will want to know the commercial consequences of such a status. There will be possible difficulties regarding any future sale of the property. The unauthorised status will impact on the ability to sell on the property, as well as its possible resale value. It restricts any further extensions, additions or alterations. There will be restrictions on any possible change of use. The inability to carry out any necessary repairs will also likely deter any interested parties. There is likely to be a restriction on the pool of possible future purchasers. If qualifications on title are not accepted by financial institutions in a future sale, it may be that only cash buyers will be in a position to purchase a particular unauthorised property. There are serious practical consequences from a conveyancing point of view for a development that is unauthorised but immune.

(vi) Such unauthorised but immune status may also impact on other matters, rights and entitlements relating to the property under different statutory codes or regimes. As McKechnie J made clear in *Fallowvale,*[71] the mere fact that a party has permission under one statutory code to carry out a particular act does not entitle that party to ignore the provisions and requirements of another statutory code that is applicable. He said that:

> The law on this point is relatively clear-cut. It is that mere compliance with one statutory regime does not absolve the affected party from compliance with a different regime unless such is expressly provided for.[72]

In *Terry v Stokes,*[73] the respondent landlord sought to deny the applicant tenant the right to a new tenancy on the basis that the property was not a tenement within the meaning of the Landlord and Tenant Act 1980. O'Hanlon J was of the view that the buildings in their then use comprised an unauthorised but immune development. Noting that the landlord had not chosen to avail of enforcement remedies under the Planning Acts, he was not prepared to hold that the property should not be regarded as a tenement which qualified for such relief. Accordingly, the Landlord owner was refused relief under an entirely separate piece of legislation due to the fact that the property was not planning compliant.

In *Dunnes Stores v Dublin City Council (No. 1)*[74] an applicant sought a licence from the respondent council for street furniture in circumstances where unauthorised development in the form of an unauthorised awning was being carried out at the premises. Whilst the unauthorised awning was immune from prosecution, the Court was of the clear view that this did not translate into planning compliance, which was what the licence required. The terms of the licence required compliance with the planning laws

[71] [2005] IEHC 408.
[72] See also *Curley v Galway Corporation* (HC, 11 December 1998) (Kelly J);*Coyne and Coyne v Enginenode Limited* [2022] IEHC 220 (Barr J).
[73] [1993] 1 IR 204.
[74] [2017] IEHC 148.

and in circumstances where planning was not in order, albeit immune, it was not possible to grant the licence.[75]

Accordingly, you cannot avail of benefits afforded under other statutory provisions where planning permission is required but a development is unauthorised but immune. Put simply, unauthorised but immune is not planning compliant and does not equate to such when dealing with other statutory regimes.

(vii) Having an unauthorised albeit immune development can also lead to difficulties when it comes to compensation for such development. Section 190 of the 2000 Act allows for compensation to be paid arising from the refusal of planning permission by An Bord Pleanála or where permission is granted subject to onerous conditions by the Board, in certain circumstances. However, this statutory right to compensation is nullified by section 191(4) of the Act, which states that 'Compensation under section 190 shall not be payable in respect of the refusal of permission, or of the imposition of conditions on the granting of permission, for the retention on land of any unauthorised structures.'

Perhaps of more relevance in practice is a situation whereby land upon which an unauthorised structure is located or whereupon an unauthorised use is being carried out, is subject to a compulsory purchase order. Given the constitutionally protected property rights of citizens and the protection afforded by the European Convention on Human Rights, it is well established that the power of compulsory acquisition should only be exercised in the public interest and should only be exercised in a proportionate manner.

Sections 210 to 223 as set out in part XIV of the 2000 Act deal with the acquisition of land. There is a statutory right to compensation which is calculated in accordance with the statutory rules for the determination of the amount of compensation set out in the second schedule to the Act as amended. In determining value, the antecedent and subsequent values of the land should be determined. However, paragraph 2(b)(v) of the second schedule states that in determining these values 'No account shall be taken of … any value attributable to any unauthorised structure or unauthorised use.'

Accordingly, in a compulsory purchase order situation, the property arbitrator is obliged by statute to disregard any increase in the land value arising from any unauthorised use of the lands or unauthorised structures on the lands. It is arguable that the arbitrator should treat the lands as if the use was never carried out or the structures were never on the lands, and value the lands accordingly.

(viii) Another consequence of an unauthorised but immune development relates to possible difficulties in obtaining planning permission into the future. This relates not only to the particular development in question but also to any other developments of any other properties or lands by the same developer.

[75] See also *O'Connor v Nenagh UDC* (HC, 16 July 1996) where Geoghegan J suggested *obiter* that an unauthorised but immune development would preclude an applicant for a liquor licence from being entitled to hold such licence where the building was not planning compliant.

In relation to the particular development that is unauthorised but immune, we have seen how further normally exempted development is de-exempted and therefore unauthorised by association with the initial unauthorised development. It would therefore be necessary to seek planning permission for such a development. In addition, where there is unauthorised development in place, the consolidation of that unauthorised development can often be cited as a reason for refusal of a planning application with respect to different development. Accordingly, the existing unauthorised development, even though immune from enforcement, can impact on applications for other developments on the site.

Alternatively, if an application for permission is made with respect to land upon which unauthorised but immune development is being carried out, a local authority could insert a condition into a grant of permission that existing unauthorised development, even though immune from enforcement, be removed or cease as the case may be. This can even occur when the unauthorised development has been in place for well in excess of the statutory enforcement time limits. Section 34 of the Act sets out a non-exhaustive list of conditions that may be attached to a planning permission. Any conditions attaching to a planning permission must be reasonably related to the development and not imposed for an ulterior or ultra vires motive. It is not uncommon for conditions to be inserted into planning permissions seeking to deal with any existing unauthorised development located on the lands, the subject matter of the application. Indeed, it is not uncommon in practice for applicants for permission, on sites where unauthorised but immune development is being carried out to offer to cease such unauthorised development and give up the immunity obtained in the hope that this might appeal to the planning authority when considering the application.

It should also be noted that section 35 of the Act allows a planning authority to take account of previous planning transgressions such as non-compliance with previous planning permissions or the previous carrying out of substantial unauthorised development, when considering planning applications. This procedure is primarily aimed at rogue developers or serial unauthorised developers. It is important to note that section 35 does not envisage a decision on the merits of such application. The application is not even considered if the local authority is of the view that previous transgressions are serious and substantial enough to warrant invoking section 35. If the planning authority is of the view that there is a real and substantial risk that the development for which planning is sought would not be completed in accordance with the permission if granted or any conditions attaching thereto, a notice to that effect can be served. A developer does have a right to make submissions and can ultimately make application to the High Court, but this is a serious tool at the local authority's disposal to deal with unauthorised developers. It should also be noted that section 35 can be invoked in respect of any application for permission by a particular applicant, and not just applications for permission on lands where previous unauthorised development has been carried out. It is quite possible that an unauthorised but immune development at one end of the country could be used to justify a notice under section 35 regarding an application for planning at the opposite end of the country.

Accordingly, whilst a particular unauthorised development may be immune from enforcement, its existence can clearly impact on other developments for which permission is being sought, whether on the same site or elsewhere.

(ix) Finally, it should be observed that section 46 of the 2000 Act contains a truly remarkable power which effectively enables a local authority serve notice requiring that any particular structure be demolished, removed altered or replaced, any use discontinued, or conditions imposed on the continuance of a use in exceptional circumstances. This is whether the development in question is permitted or not. Section 46(1) provides that:

> If a planning authority decides that, in exceptional circumstances—
>
> (a) any structure should be demolished, removed, altered or replaced,
> (b) any use should be discontinued, or
> (c) any conditions should be imposed on the continuance of a use,
>
> the planning authority may serve a notice on the owner and on the occupier of the structure or land concerned and on any other person who, in its opinion, will be affected by the notice.

Section 46(2) specifically considers the disapplication of the section to unauthorised but immune developments, stating that the section does not apply to unauthorised development of less than seven years. Obviously, if the unauthorised development is in place less than seven years, enforcement proceeds by way of section 160 injunction.

Accordingly, even if a development is unauthorised but immune, there is still a mechanism under section 46 whereby such development can be stopped, removed, discontinued or whatever the case may be. Admittedly, this extraordinary power can only be exercised in exceptional circumstances and there is a statutory right to compensation under sections 196 and 197 of the Act. I am not aware as to whether this section has ever been invoked to date and certainly am not aware of any case in relation to section 46 of the Act. However, the reality is that even where a development is unauthorised but immune, there is still a statutory mechanism to ensure that the development ceases and I would venture to suggest that should this section require to be invoked by a local authority, it is far more likely to be done with respect to an unauthorised development as opposed to a permitted development.

Once Immune, Always Immune

It should be noted that despite the various consequences, implications and restrictions set out above with respect to unauthorised but immune developments, once an immune status attaches to a development, it cannot be lost. This of course is on the basis that no subsequent development takes place, such as a change of use or other works to the development, which then becomes actionable as and from the date from when such development commences.

The position with regard to retention permissions provides guidance here. Where unauthorised development is being carried out, the position may be regularised by way of an application for retention permission, or substitute consent in certain circumstances.[76] The previous school of thought was that an application for retention permission disentitled a person to subsequently argue in enforcement proceedings that planning permission was not in fact required. Such a view arose from certain obiter dicta from the Supreme Court in the case of *Dublin County Council v Tallaght Block Co Ltd.*[77] In effect, the view from *Tallaght Block* emerged that a person who was accused of carrying out unauthorised development and subsequently applied for retention permission for that development, was estopped from arguing that no planning permission was in fact needed. This estoppel argument was clarified by the Supreme Court in the case of *Fingal County Council v. William P. Keeling & Sons Ltd*[78] where the Court set out a number of reasons as to why planning permission may not have been sought in the first instance and why a retention application might have been made. The Court concluded that '…no principle has been identified whereby the owner of land should be estopped from asserting the exemption merely by reason of the fact, and by nothing more, that he or she has made a perfectly proper and lawful application for planning permission.'[79]

Whilst *Tallaght Block* and *Keeling* were not dealing with cases where the protection afforded by the seven-year rule had been claimed, (*Tallaght Block* related to intensification of use and *Keeling* related to a claim of exempted development), it is clear that similar principles apply. Not only would such a proposition defeat the purpose of the statutory provisions and the legal certainty they seek to provide, but it would be illogical, and indeed, counterproductive if an estoppel did arise. The planning regime seeks to encourage compliance with the planning laws and if such an estoppel did exist, unauthorised developers would be discouraged from seeking to regularise their unauthorised but immune developments. Accordingly, all things being equal, once immune means always immune.

Conclusion

The general obligation to obtain planning permission is set out in section 32 of the Act. Section 32(1) states that permission is required for any development of land which is not exempted development, and for retention of unauthorised development. Section 32(2) places a positive obligation on citizens not to carry out any development for which permission is required except under and in accordance with a permission granted by law.

As Browne points out, if we are to have an elaborate system requiring permissions and consents to be obtained, there should be a proper system of enforcement in existence.[80] The objectives of such a system are firstly, to ensure that objectional development is discontinued and that all necessary steps are taken to restore the position that obtained before the unauthorised development was carried out; secondly, that the terms and conditions of planning permissions

[76] See Browne, *Simons on Planning Law* (n 2) 1681 paras 16-11 to 16-132.
[77] [1982] ILRM 534 (HC, Supreme Court, 17 May 1983.
[78] [2005] IESC 55, [2005] 2 IR 108.
[79] See also Browne, *Simons on Planning Law* (n 2) 672 paras 11-23 to 11-25.
[80] ibid paras 11-06 to 11-11.

granted are observed; and thirdly, enforcement should police the regulatory requirement to obtain a grant of planning permission prior to development commencing.

As part of any enforcement system, there should be applicable rules to provide certainty and proportionality. The seven-year rule is in the Planning and Development Acts to give such certainty. Those who comply with the law and obtain planning permission and carry out a development in conformity with such planning permissions or alternatively, within the confines of the exempted development provisions of the Regulations, obtain legal entitlements and practical benefits which flow from compliance with the law. Those that do not so comply cannot avail of such consequent legal entitlements and benefits.

As the Supreme Court said in *Michael Cronin (Readymix Limited) v An Bord Pleanála,*[81] the Planning and Development Act 2000 is not a penal statute. Ms Justice O'Malley noted that:

> The purpose and scheme of the Act is to create a regulatory regime within an administrative framework which, in the interests of the common good, places limits on the right of landowners to develop their land as they might wish. The principal objectives of the regime are proper planning and sustainable development, and the chief method of ensuring the attainment of those objectives is the planning permission process.

Having said that, the legislature has decided that engaging in unauthorised development is a criminal offence. Section 151 of the 2000 Act very simply provides that 'Any person who has carried out or is carrying out unauthorised development shall be guilty of an offence.' The Act provides for penalties for conviction on indictment to a fine not exceeding €12,697,380.00 or a term of imprisonment of 2 years, or both. On summary conviction, the fine can be up to €5,000.00 or 6 months imprisonment, or both.[82] A person carrying out an unauthorised but immune development is still engaging in a criminal offence. It is just that under section 157(4) of the Act, that person cannot be prosecuted due to the effluxion of time.
It has been suggested that unauthorised but immune developments should be treated as existing or established developments and not tagged with an unauthorised status with resultant difficulties, some of which have been detailed above. It has also been suggested that there are constitutional difficulties with such status, which is an impermissible and disproportionate interference in constitutionally protected property rights.[83] One solution proposed is that having regard to conveyancing practice and title matters, there should be a general amnesty on all development for a period of, for example, 10 years where no permission was granted, and 10 years after the expiration of the life of a planning permission where one has been granted, to the effect that after that time the development is regarded as both authorised and conforming.[84]

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[81] [2017] 2 IR 658.
[82] Section 156 of the Planning and Development Act 2000 as amended. Section 156 of the Act also permits for the imposition of daily fines for continuing offences following on from conviction if the unauthorised development continues. On indictment, daily fines can be up to €12,697.00 and/or 2 years imprisonment or both, with daily fines for summary matters up to €1,500.00 and/or 6 months imprisonment.
[83] See Conroy, 'Unlawful but not Against the Law? The Planning Code' and 'Illegal but Immune Developments'(2005) 12(1) *Irish Planning and Environmental Law Journal.*
[84] John Gore-Grimes, *Key Issues in Planning and Environmental Law* (Bloomsbury 2002) 102.

To adopt such a position would be effectively to regulate or legalise unauthorised developments, which has not been the attitude or desire of the courts or the Oireachtas to date. A relatively recent example of such policy can be found in The Planning and Development (Amendment)(No. 2) Regulations 2018[85] which designated the change of use of certain vacant commercial premises, including above ground floor units to residential use as exempted development. One of the stated aims was to increase housing supply. These Regulations were due to expire on 31 December 2022 but were extended by The Planning and Development Act (Exempted Development) Regulations 2022.[86] It is notable that Article 3(d)(xi) of the Regulations specifically excludes, inter alia, 'unauthorised structures or structures subject to an unauthorised use.' Even in the midst of a national housing crisis, government policy is unchanged regarding unauthorised developments, whether immune or not.

Accordingly, unauthorised developments that are immune from enforcement, are still illegal. Perhaps this is due to the provisions of section 151 whereby an ongoing criminal offence is being committed; perhaps it is due to the fact that members of the public have been disenfranchised from participating in their democratic and statutorily prescribed right of participation in the planning process; perhaps it is due to the huge public and community interest in protecting the environment and the integrity and efficacy of planning law enforcement; perhaps it is because the development should not have been carried out in the first place; or perhaps it is simply against public policy to reward somebody for carrying out illegal activity and not complying with the law as required of all citizens.

In *Wicklow County Council v Kinsella*,[87] Kearns P. considered why we have planning laws in the first place and why they must be enforced. He stated that:

> In one sense the reason is obvious: without effective planning laws and adequate enforcement procedures to ensure compliance with them, anarchy would rule the roost with regard to all sorts of developments. Dangerous, unsuitable and haphazard developments would be likely, some of which might be constructed or established in locations where a single citizen could inconvenience neighbours, destroy areas of natural beauty, disrupt traffic and even undermine the capacity of the community to engage in normal social function and activities. In short, there would be nothing to stop a 'free for all' development culture from running riot.

In *Meath County Council v Murray*, the Supreme Court stated that:

> From the Act as a whole, which includes the enforcement provisions from sections 151 to 163, inclusive, it seems clear that the policy aspiration is one of legislative compliance so that orderly development takes place in a regulated and coherent manner, consistent with an adopted Development Plan, either at area or local level, or both, and having regard to any coordinated policies with neighbours, all under the general direction of national policies. In effect, the

[85] Planning and Development (Amendment) (No 2) Regulations 2018, SI 2018/30.
[86] Planning and Development Act (Exempted Development) Regulations 2022 SI 2022/75.
[87] [2015] IEHC 229.

> armoury as given is to ensure that the environmental and ecological rights/amenities of the public are preserved and enhanced and that the integrity and efficacy of planning control is maintained. In addition, at the individual level, as Morris v Garvey shows, no person should have to suffer a diminution of his rights, including the enjoyment of his property rights, unless such interference can lawfully be justified.[88]

We have a statute of limitations in planning enforcement to provide for certainty and accord with constitutional principles of proportionality. This limitation period has been extended by both case law and legislation as detailed above. The burden is on the respondent to show that he or she is entitled to the immunity afforded by the rule, and if the respondent can come within the parameters of these extended periods, he or she can avail of the statutory immunity provided for.

However, there is a general rule of law that one cannot benefit from illegal behaviour or activity. There is a positive statutory obligation on all citizens to apply for planning permission for development that is not otherwise exempted development. If everybody else must do it, why should the unauthorised developer be rewarded for not complying with the law and have the same benefits and legal rights as others, just because he or she has managed to evade enforcement for over seven years? It is clear that both the courts and the Oireachtas take the view that permission to keep the unauthorised structure or continue with an unauthorised use is reward enough.

[88] [2017] IESC 25, [2018] 1 IR 189. See also *Morris v Garvey* [1983] IR 319.