

COVID-19 – Time Limits Paused Across the Planning and Development System

Introduction

- Last week we reported on the Planning and Development aspects of the Government’s second COVID-19 emergency Bill, since enacted as the Emergency Measures in the Public Interest (Covid-19) Act 2020. The planning elements of the new emergency legislation are intended to stabilise the system of planning and development in the face of Covid-19-related social and administrative disruption. To access last week’s briefing (published before the measure came into force and which looked ahead to its main features) see [here](#).
- This follow-on article provides an update on the main developments since last week; principally, the coming into force of the planning stabilisation mechanism (a step that was expedited in light of the Taoiseach’s announcement last weekend of increased restrictions on public movements). The article also looks at how it will operate across the wider planning system and signals some early uncertainties.
- First, to recap on the key features of the planning stabilisation mechanism that we described last week:
 - The central planning-related proposal in the Act is provision for the introduction of a pause or freeze period to the running of the various time limits that govern the steps and processes within the system of land use planning and development in Ireland.
 - While intended as an efficient and pragmatic response to the current upheaval, it is also a radical and novel approach in its universal application across the full breadth of the Irish system of land use planning, development and building control.
 - The Act provides that the duration of the pause is to be “disregarded” in the calculation/running of any “appropriate period, specified period or other time limit” referred to in a range of planning-related legislation. In effect the pause period is to be added on to whatever is the relevant time period applying to a step in the planning process (that is, added to what, in any particular case, is the unexpired portion of a relevant time period).
 - We emphasised the very wide scope/meaning given to ‘planning system’ for the purpose of the new pause mechanism, with the pause period intended to apply, not just to steps and procedures covered under the core planning legislation (the Planning and Development Act 2000, as amended) but, also, to the Building Control Act, the Derelict Sites Act; the legislation underpinning the ‘Vacant Site Levy’ system and the legislation governing the recent ‘strategic housing development’ regime and also to time periods and time limits mentioned in any Regulations made under all of these Acts.

- We highlighted that provision is made for the duration of the initial pause period to be extended; and that, under the Act, the 9 November 2020 is specified as the very outside or 'longstop' duration of the initial (plus any extended) pause period(s).
- We noted that it was intended that the initial pause period would not come into effect automatically on the passage into law of the second Emergency Bill (which occurred on 27 March 2020); rather it required (i) a 'Commencement Order' by the Minister for Housing, Planning and Local Government to bring it into effect (with the Commencement Order operating as the start of the pause period) followed immediately by (ii) the nomination by the Government of a termination date for the pause period.
- On Sunday (29 March 2020) the Minister and the Government moved (earlier, it appears, than had been envisaged) to activate the new mechanism. The Minister made the Commencement Order on that date (29 March) followed by a Government Order specifying that the pause period is to terminate on 20 April 2020 (unless extended in the meantime). Thus, the initial 'pause period' that is now in effect in respect of time limits across the full planning regime (and related legislation) runs for the 23 day period from 29 March to 20 April 2020 inclusive.

1. How will the Pause Period apply to standard ('Section 34') Planning Applications?

Lodging planning applications

The Pause Period will not affect the facility to make and lodge planning applications as it is concerned with time limits that apply once a planning process is activated.

Pre-planning meetings

The Pause Period will apply in respect of so-called 'pre-planning meetings' – the facility, under section 247 of the 2000 Act, for applicants/developers, prior to the lodgement of a planning application, to meet with local authority planning staff. There is a requirement for pre-planning meetings requested under section 247 to be held within four weeks of such request. This four-week period (or the portion of it that, in any specific case, remained unexpired when the Pause Period came into effect on 29 March) is extended by the full duration of the Pause Period (23 days).

Public/Third party submissions on a planning application

The measure is clearly intended to ensure that the full benefit of the five-week period that third parties/the public have to make submissions or observations on an application for planning permission is maintained. The following table sets out how the Pause Period will impact a planning application depending on when the application was made.

Planning Application Submission Date	Impact of Pause Period	Comment
Applications made up to and including 21 February 2020 (i.e. more than 5 weeks prior to the pause Order of 29 March).	The Department's view is that the planning authority is free to proceed to make a determination on the planning application - on the basis that public participation will not be compromised (as the public consultation period has already expired).	The Department has stated that planning authorities may still avail of the Pause Period to defer decision-making in those cases (until the termination of the Pause Period) if they wish; but where public consultation has already concluded, and the planning authority considers it is in a position to make a decision it may do so.
Applications made after 21 February 2020 but before 29 March 2020 (i.e. not more than 5 weeks prior to the pause Order of 29 March).	Pause Period 'kicks in' and 'stops the clock running' on the unexpired tranche of the five-week public consultation period. The clock will not begin to run again on the unexpired period of public consultation until after 20 April 2020.	No decisions on such planning applications can be made until after 20 April at the earliest. During the Pause Period, the Department has emphasised that it is still open to third parties to make their submissions within the Pause Period. A third party may also, if he has not lodged his submission before 29 March, elect to defer the submission until after the Pause Period has ended.
Applications made after the pause Order of 29 March.	The five-week consultation period will not commence to run until the pause period has elapsed on 20 April.	Such planning applications cannot, therefore, be decided before 25 May 2020. The Department has stated it is still open to persons making third party submissions to lodge those submissions during the pause period (29 March to 20 April); they do not have to wait until the pause period has terminated.

2. How will it affect the making/lodging of Planning Appeals?

The key here is the four-week appeal period:

Date of Planning Authority Decision	Impact of Pause Period on appeal period	Commentary	Special arrangements at An Bord Pleanála's Office.
Decision made more than 4 weeks prior to pause Order of 29 March.	No impact as four-week appeal period expired.		
Decision made not more than 4 weeks prior to pause Order of 29 March.	Pause Period 'kicks in' and 'stops the clock running' on the unexpired tranche of the four-week appeal period. The appeal period will reactivate immediately after 20 April when the appeal can be lodged (as long as it is done, after 20 April, within the length of the currently unexpired period).	An appellant does not have to wait until 20 April to lodge an appeal. It will still be a valid appeal if lodged during the course of the pause period.	Appeals may be submitted by post to the Board offices as the Board's offices will be closed to the public from Tuesday 31 March to Monday 13 April inclusive. Arrangements to be put in place to enable documents (appeals, submissions, observations, applications, etc) to be submitted on working days during this period On reopening on Tuesday 14 April, the Board will acknowledge and/or validate all submissions and appeals.
Decision made after pause Order of 29 March (i.e. during the Pause Period)	The clock does not begin to run on the four-week appeal period until after the end of the Pause Period on 20 April 2020.	An appellant does not have to wait until 20 April to lodge an appeal. It will still be a valid appeal if lodged during the course of the Pause Period.	

Can An Bord Pleanála decide appeals during the Pause Period?

The Department's position on this again emphasises one of the principal rationales for the Pause Period i.e. ensuring public participation is maintained. According to the Department, the Board can proceed to the decision-making stage in respect of 'planning appeals and/or strategic housing development applications' where the public consultation period has ended and where the Board members are able to convene meetings, subject to Covid-19 restrictions. This presumably can only relate to those cases where it is absolutely clear from the Board's appeal file that each and every element of required input from appeal parties, observers and other consultees has been exhausted prior to or during the pause period.

3. Effect/Operation of the Pause on other Planning Processes/Steps.

The above discussion of how the pause period will operate relates to the 'standard' planning permission process i.e. under section 34 of the 2000 Act. In relation to other aspects of the planning and development regime, the following are some of the implications stemming from the introduction of the pause period:

- The pause period does not affect the lodging of 'strategic housing development' (SHD) applications. While the Board's Offices will be closed from Tuesday 31 March to Monday 13 April inclusive, arrangements (to be advertised) will be put in place to enable the physical lodgement of SHD applications.
- The various time limits attending SHD applications – time periods relating to notification of the application, public submissions, statutory consultee and local authority submissions, additional information responses and decision-making - are all covered by the Pause Period and, in the case of any extant or recent SHD application, need to be recalculated taking into account the Pause Period.
- As regards the holding of SHD 'pre-application consultation' meetings with An Bord Pleanála and also 'tri-partite SHD consultation' meetings, the Board has no plans to hold such meetings during the Pause Period. It may consider holding such meetings remotely if the Pause Period is extended.
- As regards decision-making on SHD applications already with An Bord Pleanála, according to the Department it will be open to the Board to proceed to make its decision in those cases where all public consultation steps have been completed and where the Board members are able to convene decision-making meetings.
- Any Bord Pleanála oral hearings already scheduled to take place during the pause period – whether as part of standard planning appeals, SHD applications or 'strategic infrastructure' developments - are to be rescheduled.
- In relation to judicial review challenges to the decisions or acts of local planning authorities or of An Bord Pleanála, as the eight-week limitation period for initiating such proceedings is a period stipulated in the Planning legislation (and not in the more general 'Statute of Limitations' regime) it is a time limit that is also covered by the Pause Period.
- It is also clear that strategic planning will be impacted generally across local authorities by the Pause Period. At any one time, there will be a number of local authorities around the country that will be reviewing or replacing their Development Plans or involved in the statutory process for effecting variations to current Plans or in making local area plans. Various statutory timelines and timeframes attend the sequential steps and stages that are involved in the preparation of Plans, in the consideration of draft Plans and in their formal adoption. The adoption of a Pause Period for the planning system generally on 29 March implicates all of the Plan-related, time-specific steps and communications laid down (i) as between the Council executive and elected members and (ii) as between the Council as a body and wider public. With the latter in mind (ensuring public consultation is preserved), the Department has confirmed that the Pause Period affects the timelines relevant to the various Strategic Planning exercises and has 'recommended' that 'all Plan public consultation and council briefing and meeting activity ceases during the period of the Order.'
- The Pause Period and 'Part 8' processes: the Department also envisages the Pause Period applying to the time-related aspects of the 'Part 8' process (the special development consent mechanism in place for authorising many local authorities' own development projects). The Pause Period therefore would pause/extend the periods for the public display of the Part 8

plans/proposals; the period stipulated for the Chief Executive's Report to the elected members on public submissions and for decision-making on the proposal. The one adjustment to that - namely that if the initial six-week public consultation period on a Part 8 proposal has concluded before 29 March (the start of the Pause Period) the Chief Executive may submit a report to the elected members - again reflects how the mitigation of disruption to public consultation is one of the main underlying justifications for the Pause Period mechanism.

4. Early Uncertainties arising from the Pause Period mechanism

As we indicated in last week's briefing, the Pause Period mechanism is being introduced as part of a fast-moving, wide-ranging legislative response by Government to COVID 19. Inevitably uncertainties and controversies regarding its application will emerge, particularly if the initial period (to 20 April) is extended further. Among the areas where its application will require further scrutiny are the following:

- Some processes within the planning system are themselves time-sensitive and could be undermined by a time freeze on their finalisation. An example is the 'development contribution scheme' mechanism under Section 48 of the 2000 Act (the basis for local authority funding of roads, water and waste-water infrastructure and services). These schemes, when considered and adopted, are based on a detailed, underlying economic costing analysis the currency of which could, potentially, be undermined in the event of a prolonged, rolled-over pause period. Even though it may well not ultimately materialise, the statutory 'long-stop' duration for the pause period mechanism can conceivably run out as far as November 2020.
- How the Pause Period will affect the initial 'duration' of a planning permission i.e. the period within which a permitted development is to be constructed/implemented: the wide scope of the Pause Period mechanism (again it is designed to apply to all time limits or time periods referenced in the Planning and Development Acts) means it extends the standard or 'default' five-year duration of planning permissions mentioned in the Acts. However, it is open to planning authorities to grant (via the planning permission) a duration for a different and specific period and it is less clear whether the Pause Period applies to that situation.
- Also related to planning permission durations, is how the Pause Period mechanism interacts with the power for planning authorities to extend the original duration of a planning permission.
- The Pause Period and planning conditions: time limited steps (related to the implementation of planning permissions) are habitually included in conditions attached to planning permissions; and it is not fully clear from the legislative scheme relating to the pause period whether it is intended to capture those time-frames i.e. those that are included in planning conditions.
- For many projects, particularly larger developments, the land use consent/planning permission process is conducted in parallel with related assessments and processes such as environmental impacts assessment (EIA), 'appropriate assessment' (AA) under the Habitats Directive and the process for the compulsory acquisition of land (CPO), all of which involve elaborate public consultation and other time-limited steps and all of which are referenced within and/or incorporated into planning legislation and planning procedures. The Pause Period mechanism though is directed specifically to the 'Planning and Development Acts' and it is less than clear whether it captures time limits applying to EIS, AA and CPO steps.
- The Pause Period and planning enforcement: while it is evident that time-frames/limitation

periods specified in the Planning Acts for the commencement of planning enforcement proceedings are covered by the Pause Period, it does not address whether certain time limits that arise post-commencement of planning enforcement proceedings are covered, such as when an issued enforcement notice 'takes effect' or the timings attaching to compliance steps that are specified within an enforcement notice.

- An important issue is whether the Pause Period mechanism will of itself be adequate to fully protect the integrity of the planning system if accompanied by further and wider COVID19-related disruption to the planning system e.g. if planning offices close temporarily and/or are unable to provide access to planning application files (physically or remotely). For example, the eight-week limitation period for initiating judicial review proceedings against the decisions/acts of planning authorities is a strict time limit – capable of being extended only exceptionally (where there is good and sufficient reason and where the circumstances are outside the control of the litigant). It is not possible to say at this stage if the Pause Period mechanism (which applies a limited pause – currently 23 days - to the running of the eight-week judicial review limitation period) will of itself provide an answer to every attempt by judicial review litigants to invoke the wider COVID19 crisis/disruption as justifying a broader setting aside of the eight-week limitation period.
- The extent to which planning authorities will have to update their standard form documentation to take account of the pause period: EU and international measures on access to justice in environmental decision-making (such as the EU's 'Public Participation Directive' and the Aarhus Convention) require that persons affected by environmental/planning decision-making, including those who have participated, are informed of their rights of appeal and of legal challenge. In the Irish planning system one way in which this is achieved is through the inclusion of specific wording in planning authority notices to participants/third parties that inform them of the outcome of planning processes and of their remedies/appeal rights and relevant time-frames for exercising those rights. In light of the Pause Period, some planning authorities will consider whether their current standard form wordings in notices/communications etc sent to individual participants and to wider public will remain accurate as regards time periods/time limits if not changed to reflect the operation of the Pause Period.

5. Concluding remarks

The relevant Orders dealing with the making and the scope of the Pause Period (the Order of 29 March 2020 by the Minister for Housing, Planning and Local Government commencing the pause and the Government Order of the same date specifying the initial termination date) have not yet been published. Currently, the available information sources regarding the activation of the Pause Period mechanism on 29 March (and its scope) comprise the Department's press releases/announcements since 29 March and a Department Circular (Circular Letter PL 02/2020) to planning authorities. The Departmental Circular can be accessed [here](#). We will advise of any further changes/developments once the official instruments are published.

In the meantime, for further information on the measure or to discuss the impact of its provisions on your business, please contact Conor Linehan or your usual William Fry contact.

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