

Submission by the Irish Planning Institute in relation to the ‘Development Management Guidelines Draft Consultation for Planning Authorities’

The Irish Planning Institute welcomes the Draft Development Management Guidelines, which will help clarify development management policy and procedures for Planning Authorities so as to ensure consistent, transparent and qualitative decisions within the planning process. We would like to thank you for this the opportunity to make comments in respect of these guidelines.

The Irish Planning Institute acknowledge the term ‘development management’ and accept validity of the term since the change in planning and recognise the ‘unique challenge’ for the planning system.

The Irish Planning Institute welcome the promotion of best practice in the Guidelines thus ensuring that Planning Authorities become more efficient and improve the quality of service to all stakeholders in the Planning process.

The Institute would strongly suggest that relevant case law should be referred to, by way of footnotes, within the Guidelines as was previously used in the Yellow Book so as to clarify certain aspects of the Planning and Development Act 2000 where ambiguities have arisen.

The following are suggestions and comments made in respect of each chapter within the guidelines: -

Chapter 1 Introduction

There is an increasing emphasis on the role of pre-planning, efficiency and use of public indicators in the Management Guidelines. However it is vital that staff resources are increased accordingly to ensure the delivery of a qualitative service. The Institute consider it inappropriate to put undue emphasis on the service indicators within the Guidelines as they tend to deal with the quantitative nature of the planning

system as opposed to the delivery of a qualitative process which ensure that correct development is permitted at appropriate locations.

Chapter 2 Pre-application consultations

Section 2.1.1 It is suggested that ‘Part V consultations’ be mentioned within the procedural requirements for pre-planning consultations. While we recognise that Part V consultations are not mandatory, it is advisable that applicants should enter into discussions at the earliest possible opportunity.

Section 2.2 Adequate staff resources need to be put in place in each Planning Authority to ensure that pre-planning consultations can be dealt with within the suggested 2-week period from when first requested. The Institute considers this time frame to be quite onerous given current staff shortages within Planning Authorities and until such staff shortages are rectified the Institute would recommend that a four-week period is more realistic.

A clear distinction needs to be made regarding ‘formal’ and ‘informal’ meetings. Applicants should be requested to submit proposals in relation to a proposed development prior to a ‘formal’ meeting which should be considered to constitute a Section 247 meeting and where minutes are recorded. Where proposals are not submitted prior to such a meeting such meetings will not be considered to be a pre-application consultation within the definition of Section 247.

Section 2.2.5 The Institute considers the reference to ‘critical economic or market factors’ inappropriate and as such should be omitted as they are not material considerations that are proper for a Planning Authority to take into account in reaching a decision on a planning application. This is well established in case-law, e.g. *Flanagan v Galway City and County Manager* [1990] 2 I.R. 66; *Griffin v Galway City and County Manager*, unreported, High Court, Blayney, J., October 31, 1990, and the inclusion of this phrase in the Guidelines would therefore give an incorrect impression to applicants that these types of issues could be considered, or that, when they are not considered, the resultant decision could be challenged.

Section 2.2.6. The Institute are concerned that this section encourages further dialogue regarding a current planning application which is substantially different from what has been discussed at a pre-planning consultation. Where advice is given at a pre-planning consultation stage and has not been taken on board by applicants, the Institute considers further dialogue to represent an inefficient use of resources and would be contrary to the principles of due process, fairness and transparency under administrative law.

Section 2.5 The Institute fully agrees that pre-auction consultations are inappropriate for reasons set out in this section. However, the last paragraph, in relation to the preparation of design briefs by Planning Authorities should be omitted because the policies and objectives set out in the Development Plan should provide adequate guidance to potential purchasers (which can be ascertained without any need to contact the Planning Authority), and, more importantly, because it is not the proper role of a Planning Authority to engage in the preparation of such briefs, as it could be seen to compromise its quasi-judicial role as the arbiter of the acceptability of proposed developments. Pre-application consultations can be arranged with the new owner when the site is sold.

Chapter 3 Lodging a Planning Application

The Guidelines are very weak in respect of addressing this very serious problem, which still persists in respect of validation of planning applications. The Institute suggests the following:

Planning Authorities should operate the ‘de-minimis principle’ in deciding the validity of a planning application. Planning applications should not be declared invalid for minor matters of no material consequence.

Where a Planning Authority identifies that there is a minor failure to comply with the regulations in respect of validation, they should seek to contact the applicant by telephone or email and ask them to rectify the matter within three working days so that the application can then be validated. The application should only be returned to the applicant as a last resort where there are serious and significant failures to comply with the regulations in respect of validation. This approach is particularly important

having regard to the very substantial costs associated with an invalid planning application declaration. However where this is done the “appropriate period” for consideration of the application must begin from the date of the receipt of completed validated application.

Generally the test should be whether any third party is likely to be materially disadvantaged by the particular failure to comply with a point in the regulations. Accordingly issues of validity relating to public notices could not be deemed ‘de minimis’.

For the validation system to work properly and efficiently best practice indicates that the final decision on validation should be made by an appropriately qualified person who would be aware of relevant case law such as the area planner.

Section 3.6 The presence of a site notice is often a contentious issue in appeals and judicial review cases. Limerick County Council take date stamped photographs of site notices and attach a copy of this to the public file. This simple exercise removes all doubt and is an example of good practise for other authorities.

Section 3.8 In contrast to the ‘questions relating to title of land’ contained in the ‘Yellow Book’, this section fails to guide applicants on the established principles regarding legal interest or estate. While legal interest is referred to in the later section 5.10, it is likely that the Guidelines will be consulted in parts rather than as a whole. Therefore, the advice concerning ‘Lodging a Planning Application’ should be clear and comprehensive and refer to recent case law i.e. *Keané v An Bord Pleanála* in addition to the *Frascati* judgement.

Section 3.9 The Institute would suggest that the last line in the first bullet point be expanded as follows ‘Planning Authorities should use this discretion in a manner which ensures the efficient operation of the development management system and avoids unnecessary delays *so as to ensure that public rights are not prejudiced*’.

This section fails to refer to Section 96 (4) of the 2000 Act as amended by Section 3 of the 2002 Act where it states that ‘an applicant for permission shall...specify the

manner in which he or she would propose to comply...etc.’ The absence of a specific proposal under Part V is a frequent failing in applications, and therefore, the guidance manual must refer to the mandatory provision.

Section 3.12 It is suggested that this section should refer to ‘planning consultants’ and should be reworded as follows ‘advisory seminars for agents/architects and planning consultants who lodge planning applications.....’

In relation to the complaints and appeals system the Institute has concerns about how the system is to work in relation to the validation process. If there is to be such a system, then the principles under which it is to be operated must be clearly set out to ensure consistency in dealing with such complaints between all Planning Authorities. In any event the appeal system must ensure that any application which is re-lodged after being deemed invalid needs to be dated from the re-submission date so as to afford third parties the full statutory time frame in which to make submissions.

Chapter 5 Processing a Planning Application

Section 5.2 It is suggested that a footnote be put in after the line ‘In this regard, planning authorities should endeavour to forward copies of relevant applications to prescribed bodies within two working days of validation’, as follows ‘It is not sufficient to forward a site location map. All documentation pertaining to such an application to be forwarded unless such documentation is scanned on the website such as is done in South Dublin County Council.’

Section 5.3 It should be clarified that observations can be submitted from the date that the application is received by the local authority not from the date it is validated by the local authority (as is the practice in some cases at present).

Section 5.5 The Institute suggests that the first line be expanded upon as follows ‘As required by the Regulations, all submissions both from prescribed bodies and others must be acknowledged as soon as possible and best practice requires that this be within three working days’.

Section 5.6 The Institute would suggest that this section should be reworded as follows: “Planning Authorities should establish special procedures for dealing with applications for major developments (such as those deemed to be of strategic local, regional or national importance) or involving complex technical issues. Such procedures should involve the designation of a senior planning staff member to take overall responsibility for processing the application, for ensuring that all relevant external and internal consultees are notified in good time and for co-ordinating the various submission and professional reports when the application is being determined.....’. Regular ‘case conference’ meetings will be helpful in ensuring good lines of communication within the authority, and in integrating internal reports and achieving consistency.

The reference to ‘when framing the recommendation’ should be omitted as it would be contrary to Section 34 (10) of the Planning and Development Act (which allows for differing reports and recommendations).

The Institute feels that it is inappropriate for elected members to be informed as to the progress of a planning application as it interferes with the quasi-judicial role of the planning authority, and also fails to adhere to constitutional principles of fair procedures, as elected members may often have made representations on behalf of one of the parties involved (applicant or objectors).

Section 5.7 We would suggest that reference be made to case law after the second paragraph, *Illium Properties Limited v Dublin City Council*, Unreported, High Court, O’Leary J., October 15, 2004 where further information was requested after a negative reply to a request for an extension of time.

The Institute recommends that the last two sentences of the first paragraph on p. 45 be omitted. The Institute suggests that a new paragraph be inserted as follows ‘The reception of unsolicited further information which departs substantially from the lodged application is not legally valid, would interfere with the quasi-judicial function of the Planning Authority as it would conflict with fair procedures in relation to third

parties, and as there is no legal provision for the submission of revised notices after submission of unsolicited further information.’

This section should be limited only to additional information requests under Article 33 and a separate section should deal with Article 34 requests in order to emphasise the distinction between the two procedures. Reference should be made to the Supreme Court decision in *White v Dublin City Council and the Attorney General* [2004], I.E.S.C. 38.

It should be clearly set out in Section 5.7 and 5.8 that the Planning and Development Acts only allow for one extension of time as set out in Section 34, as the Institute is aware that some Planning Authorities are permitting more than one extension of time in certain circumstances. The Guidelines should make it clear that such a practice is not legally correct, and should not be carried out.

There is a need for clear advice in relation to the relationship between the material contravention advertising procedure and time limits in deciding planning applications. There is a different practice in different local authorities in this respect and much confusion reigns.

Section 5.10 See also comments in Section 3.8. We would suggest that a footnote should be put in which refers to case-law ‘see *Frescati estate Ltd v Walker*, Henchy J., 1975 as modified by *Keane v An Bord Pleanala* ‘ after.’these are ultimately matters for resolution in the Courts.’

Last paragraph of this section in relation to proposed development on land owned by local authority where it states that a letter from the Manager etc...is not in accordance with the law. There should be formal notification given to elected members and consent obtained before legal interest can be established, since the elected members could refuse their consent to the disposal.

Section 5.11 The Institute would suggest the re-wording of a section on p. 49 as follows ‘...They must have regard to the matters set out in Section 34 of the Planning and Development Act 2000 and it is not possible to consider matters which

do not relate to the proper planning and sustainable development of the area, such as the personal or financial matters of an applicant'. A footnote should be inserted referring to *Flanagan v Galway City and County Manager, 1990* where it was judicially confirmed that it is not legitimate for a Planning Authority to take into account the personal circumstances of an applicant.

Section 5.12 The Institute would request that this section be omitted as it appears to be sanctioning the use of external consultants. The use of such consultants, while it currently happens in some authorities, should not be sanctioned formally in these Guidelines, as this would give a signal to the public that such use is appropriate and allowable. The use of consultants can raise serious problems in terms of perceived (or even real) conflicts of interest, and also has practical problems for planning authorities in the loss of “institutional memory” and lack of consistency in decision making.

If this section is not omitted than it should clearly set out that adequate resources, i.e. professional planning staff, should be put in place in all planning authorities to deal with the volume of planning applications and the use of external planning consultants should only be used in exceptional circumstances. In addition, the use of the term “external consultants” might imply that persons who are not professionally qualified to carry out such work might be used. Since it is reasonable, in the light of the use of the term “planner” in the rest of the Guidelines, to assume that this was not intended, if this section is to remain we strongly suggest that the use of the term ‘planning consultant’ should be used instead, and be contained in the heading of this section.

Section 5.13 The Institute would recommend that the last sentence in this section be expanded as follows: ‘where this is done all documentation should be available on-line’. It is suggested that South Dublin County Council should be used as an example of best practice where all documentation is available on the web-site including all third party submissions made.

Chapter 6 Preparing Recommendations on Planning Applications

Section 6.2 The institute would suggest that this section be re-worded as follow
‘The level of detail appropriate in reporting on different types of planning applications is a matter for planning authorities to decide upon. However in all cases a planning report should be prepared by the planner responsible for examining its technical aspects and who has sufficient knowledge of the site in question to enable him/her to carry out accurate assessment of the impact of the proposed development. Where a recommendation of a planner differs from that of a more senior officer both reports must remain on file, be available for public inspection in the normal way and in the event of an appeal all reports must be forwarded to An Bord Pleanala.’ Reference to case law *Beades v Dublin City Council* should be referred to in this instance.

Section 6.4 The Institute would suggest that the second and third paragraph are re-worded as follows:

‘In such situations, it is the function of the planning report to set out all the relevant issues and to assign the appropriate weighting to issues raised. It is especially important that the planning report has regard to national planning policy and compliance with the county development plan.’

‘However minor concerns that arise in internal reports may be capable of being resolved by way of conditions in cases where the proposed development would otherwise be consistent with the objectives of the development plan. However the use of such conditions should be rare and should not involve matters which would give rise to legitimate concerns of third parties, such as neighbouring residents.’

Section 6.5 The Institute request that ‘or judicial review’ be inserted at the end of this section.

Section 6.7 The Institute would strongly suggest that ‘the use of professional qualified planners to deal with all applications’ be inserted into the examples of how standards of service can be aided.

Section 6.10 Notification of Planning Decisions

There has been some confusion in the past in relation to dates on the Managers Order. Therefore the institute would suggest that at the end of this section that a further comment be inserted 'Date of notification of the Planning Authority's decision must be the same as the date of the decision to avoid confusion for third parties who may wish to appeal'.

Section 6.11 We suggest that the first bullet point be expanded as follows to ensure consistency with previous comments in this submission, 'a copy of any report prepared by or for the authority in relation to the planning application, - this includes all reports whether or not they are in line with the decision of the Planning Authority'.

The Institute suggest that the public should be able to purchase documentation on the planning file including the planners report at a reasonable cost. At present the cost of photocopying planning reports vary greatly between the different planning authorities.

Chapter 7 Drafting planning conditions/reasons for refusal

The Institute are concerned that this chapter appears to contradict previous chapters which set out that an issue which can be dealt with by way of condition should be dealt with as so rather than requesting further information in the interests of expediting a planning application. However this Chapter sets out that 'the number of conditions should be kept to an absolute minimum as the attempt to regulate details to an excessive extent may defeat its own ends'. This statement should be qualified in the context of the previous chapters. The Institute contends that further information may be a more appropriate way of dealing with issues rather than by way of condition as it reduces the need for attaching conditions that require revised details to be agreed with the Planning Authority, thus reducing the number of compliance submissions which are so labour-intensive.

The Institute suggest that Planning Authorities should not include, in planning permissions for housing developments, conditions requiring the establishment of management companies, unless such companies have been proposed by the applicant, or are necessary for the maintenance of communal open space (as opposed to public open space). The provisions of the Act in relation to taking housing estates in charge should not be circumvented by the general provision of management companies.

It is also suggested that Planning Authorities should not include conditions requiring the developer to pay for the monitoring of developments. A security bond should be sought in appropriate circumstances to ensure satisfactory completion of such developments.

Section 7.3.5 The Institute would suggest that a line should be added to the last paragraph as follows... 'if such a condition cannot be complied with, the application should be refused'.

Section 7.5 There is a need to highlight that temporary permission can relate to structures or a particular use. Therefore we recommend that the first line should read as follows 'in deciding whether a temporary permission which can relate to structure or use is appropriate,'

Section 7.9 The Institute would request that the second paragraph of this section in relation to conditions that require agreement should be omitted. It is considered that such conditions, which are to be negotiated during the construction phase, are inappropriate and may not be workable as works will have commenced on the particular development.

Section 7.10.1 The Institute, while agreeing with the general concept that compliance should be responded to within the four week period, has concerns about the workability of such time-frames given that there is no provision for the four week period in legislation. Further given the heavy workload of planners in most Planning Authorities at present, and the lack of adequate staffing (due in part to the public service recruitment restrictions) this time frame is unrealistic and unworkable. Therefore this section should be re-worded to ensure that all current submissions are

dealt with within a reasonable time frame. It would be highly inappropriate to insert this time limit, as it would give a misleading impression to applicants and developers that the legislation sanctions such a timeframe, and that this reference might lead to unauthorised development, or development in breach of conditions, taking place.

Chapter 8 Planning Appeals under Section 37 of the Planning and Development Act

Section 8.2 The Institute suggest that a further bullet point be added to the section where there is no appeal to An Bord Pleanala as follows ‘against financial conditions levied under the general contribution scheme as per Section 48 of the Planning and development Act’.

Section 8.4 The Institute feel that notification of a decision to a person who has made a submission should be dealt with as expeditiously as possible and would suggest that ‘and within three working days’ should be added.

Section 8.5 The Institute would further highlight the need for the move towards an ‘e-planning’ system given the importance of a timely and efficient submission of application files to An Bord Pleanala. If all documents in relation to a planning application were scanned onto the local authority web-site, as soon as a decision is made, all parties would have more ready access to same thus ensuring greater effectiveness.

Chapter 9 Enforcement

Section 9.3 The Institute would suggest that an additional paragraph should be inserted at the end of the section on enforcement notices as follows:

‘When a developer has complied with the requirements set out in an enforcement notice, the Planning Authority should send notification to the developer that the enforcement notice has been complied with, the notice should be withdrawn and details of this entered onto the register within a reasonable time frame’.

The Institute are aware that some planning authorities are not currently entering such details on the register and this can give rise to difficulties in respect of planning and/or conveyancing matters at a later stage.

Conclusion

As stated in the introduction to this submission the Irish Planning Institute acknowledge the term ‘development management’ and accept validity of the term however the point should be made that this unique challenge requires the provision of exceptional resources which are currently not available to meet the challenge.

As set out in the submission in relation to the Draft Planning Regulations, the Institute welcome the suggested move towards a ‘e-planning’ system however would emphasise that such a system requires considerable investment in both technological and staff resources within the Planning Authorities.

The promotion of best practice in the Guidelines is welcomed by the Institute however, given the current constraints in terms of staff recruitment in planning authorities, many of the work practices recommended in the Guidelines and that are supported by the Institute, will require significant additional resources. The Institute would welcome an opportunity to review the need for such resources nation-wide based on the new Guidelines.