

# Ireland's General Counsel Forum 2010

Environment, Planning, Health & Safety

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# ENVIRONMENT, PLANNING, HEALTH & SAFETY

## SPEED READ: KEY POINTS

1. Regulatory enforcement is more rigorous so be prepared!
2. Comfort letters in planning – beware of legality of these
3. Planning and Development Act 2010 – interesting changes to the extension of planning permission provisions, and to legal costs in judicial review
4. Environmental liability – key issues that arise for sellers, buyers and lenders
5. Sustainable development – companies looking at reducing energy demand, and creating innovative self sufficient options

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## 1. Regulatory enforcement is more rigorous and courts are getting tougher

It has become apparent over the past year or so that the Environmental Protection Agency and the Health and Safety Authority have placed more of an emphasis on their role in relation to the implementation and enforcement of legislation.

Companies should be aware that in doing so, inspectors have honed their skills, particularly with regard to carrying out interviews, and will use persuasive tactics in an attempt to gain valuable information from staff members to assist in the assembly of their case. Questions will be asked about Directors' roles as well as responsibilities for environmental and health and safety issues. Board consideration will also be questioned. These issues should be tabled regularly on the Board agenda. If a prosecution is brought relative to 'technical breaches' beware of giving up a 'soft' first conviction. Subsequent prosecutions will result in much higher fines where a second conviction is at issue.

## 2. Comfort letters in planning

Sometimes a developer discovers in the course of a development that they need to do something different than what a planning permission allows them to do (e.g., relocate an access route or change the location of windows). In other cases, a planning permission may state that certain issues need to be agreed with the planning authority. This does not give the planning authority carte blanche. A developer must look to the legal entitlement of the public body to give them what they are asking for. An example of this can be seen in *Tracey v. An Bord Pleanála, respondent and Waterford County Council and Noel Frisby Construction Limited and TJX (Ireland) Limited (t/a TK Maxx)*(Unreported, High Court, McMenamin, J., 22 January, 2010). Reliance on such letters should be stress tested.

## 3. Planning and Development Act 2010

The provisions dealing with extensions of planning permission in the Planning and Development Act 2000 have been changed. There is now one opportunity only to apply for an extension of up to 5 years on your planning permission. You still have to apply before the expiry of the original planning permission. However, the basis on which you can get an extension has been extended. Where, as before, substantial works have been carried out in relation to the planning permission, and the development can be completed within a reasonable time, an extension of up to 5 years can still be granted. In addition, however, an extension can also be granted where the development has not gone ahead because of "commercial, economic or technical" issues beyond the control of the applicant. There are other conditions that apply to this as well. This will be of interest, particularly to so called "mothballed" developments. There is no provision made for updating any environmental impact assessment that accompanied the original planning application, and this may prove controversial.

#### 4. Environmental Liability

Environmental problems are among the most costly and risky, and require attention from the outset. Knowledge is key. In order to assess risk, information will be required on the nature of the activities carried out currently and previously on the relevant site; the compliance and evidence of compliance with Operating Licences; and, at the very least, a visual inspection by a competent person should be carried out to ascertain what further environmental investigations may be warranted. Compliance issues arise relative to the need for and compliance with licences. Clean-up liability can arise due to the existence of contaminated land, irrespective of whether it was caused by the vendor. The issue is essentially one of control – offences arise when you cause, or permit, pollution to occur. For sellers, the objective must be to get rid of as much environmental liability as possible, with buyers having the opposite objective. Lenders too should be concerned to assess environmental risk as it can affect the value of the asset, the borrower's ability to repay, and a receiver's appointment can trigger direct environmental exposure.

#### 5. Sustainable Development

Many companies are thinking of new and innovative ways to reduce energy costs by developing sustainability programmes. Facilities are looking at ways to reduce their energy demand (i.e., process efficiency) and at the provision of on-site power generation, with a view to becoming self-sufficient. For example, Coca Cola are constructing a combined heat and power plant at their Knockmore Hill facility to supply heating, cooling and electricity needs of the bottling plant. Also, in the UK, Pfizer's Sandwich site can satisfy over 60% of its electricity needs using its combined heat and power plants. Other facilities e.g. Lisheen Mines and Diageo have on site wind farms. Indeed our own firm has CHP capacity! It is great to see that this is finally becoming a reality. It would also appear that a culture of corporate responsibility and a drive for sustainable development has brought about higher levels of environmental compliance, which is good news for directors concerned about corporate and personal liability.