

client alert

COMMERCIAL PLANNING | FRANCE

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PUBLICATION OF THE IMPLEMENTING DECREE FOR THE PINEL LAW

Section III of French Law no. 2014-626 of 18 June 2014 on craft industries and trades, commerce and very small enterprises, known as the "Pinel" law, introduced a major reform of commercial planning legislation. In particular, from now on, when a project requires planning permission, such planning permission will double up as a retail licence.

When the project requires a retail licence, as defined under Article L. 752-1 of the French Commercial Code, the planning permission will constitute such retail licence, provided that the planning application receives a favourable opinion from the Departmental Commercial Development Commission or, as applicable, the National Commercial Development Commission.
(art. L. 425-4 French Town Planning Code)

Although the new legislation entered into force on 18 December 2014 (six months after the law's promulgation), the implementing decree was widely awaited, as the application of the new provisions in practice was far from clear cut.

Decree no. 2015-165 of 12 February 2015 on commercial development was published in the French Official Gazette on 14 February 2015. It provided a number of valuable clarifications regarding the new commercial planning regime, the most significant of which are set out below.

REFERRAL TO THE CDAC

The applicant

Previously, applications to the Departmental Commercial Development Commission (CDAC) for retail licences could only be made by:

- the owner of the property;
- parties entitled to build on the land (and able to provide evidence of such entitlement);
- parties entitled to run a commercial business within the property (and able to provide evidence of such entitlement) (former art. R. 752-6 of the French Commercial Code).

The new decree provides that any "person entitled to benefit from an expropriation in the public interest" is also entitled to apply for a retail licence (art. R. 752-4 of the French Commercial Code).

Conversely, operators will henceforth only be able to submit such applications if the project does not require planning permission.

Documents to be submitted with the application

The new article R. 752-5 of the French Commercial Code stipulates that "the form for retail licence applications or to be attached to applications for planning permission comprising a retail licence" shall be defined by means of an order from the Minister for Trade.

Article R. 752-6 lists the documents to be submitted with the application.

However, Article A. 752-1, in its wording pursuant to the order of 21 August 2009 stipulating the content for retail licence applications for certain stores, remains in effect, for the present.

Filing requirements

When the project does not require planning permission, the retail licence application is filed, as previously, with the registry of the CDAC. The applicant may:

- send the application by registered letter with advice of receipt;
- deliver it by hand, against receipt; or
- send it electronically (art. R. 752-11 of the French Commercial Code).

When the project requires planning permission, the planning application - together with the dossier referred to under Article R. 752-5 - must be filed at the town hall. The mayor then transfers the dossier to the CDAC registry "within seven clear days after the filing" (art. R. 423-13-2 of the French Town Planning Code).

The CDAC then has 15 clear days in which to check that the dossier is complete and, if necessary, to request any missing documents from the applicant (when the project does not require planning permission - art. R. 752-12 of the French Commercial Code) or the mayor (when the project requires planning permission - art. R. 752-10 of the French Commercial Code).

Time frame for processing

The CDAC has two months from receipt of the application in which to respond. In the absence of any response, the retail licence is tacitly granted after such two-month period (art. L. 752-14(II) of the French Commercial Code).

When the project requires planning permission, such period is increased to five months (three months plus two months - art. R. 423-25(e) of the French Town Planning Code).

If an appeal against the CDAC's opinion is filed with the National Commercial Development Commission (CNAC), a further five months are added (art. R. 423-36-1 of the French Town Planning Code).

CONTESTING THE CDAC'S OPINION OR DECISION

Appeal to the CNAC

Any challenge of a CDAC decision (when there is no planning application) or opinion (for a planning application) must be filed with the CNAC; failing this, any legal appeals filed subsequently with the administrative courts will not be admissible. The appeal must be filed with the CNAC within one month (art. L. 752-17 and R. 752-30 of the French Commercial Code) as from:

- for the applicant, notification of the decision or opinion;
- for the Prefect or members of the CDAC, the meeting of the commission or, in the event of a tacit decision or opinion, the date on which the authorisation is deemed to have been granted;
- for all other persons referred to under Article L. 752-17 (in particular for professionals exercising an activity within the trading area that is likely to be affected by the project), the later of the following two publications: (i) publication in the digest of administrative decisions of the prefectural authorities or (ii) publication of an excerpt from the decision or opinion in two regional or local gazettes distributed within the relevant *département* (art. R. 752-19, paras. 3 and 5 of the French Commercial Code).

The period during which appeals may be filed with the CNAC is not a "clear" period. Unlike the periods allowed for filing administrative appeals with the ordinary courts, the first and last days within the period are not excluded from the calculation. For example, if the CDAC's decision is served on the first day of the month n , the applicant can file an appeal with the CNAC up until the first day of month $n+1$.

NB: The appeal is deemed to have been filed on the date on which it is sent (art. R. 752-30 of the French Commercial Code).

Notification requirement

The new Article R. 752-32 of the French Commercial Code requires any party wishing to contest a CDAC opinion or decision to notify the retail licence applicant by registered letter with advice of receipt or "by any other secure means" within five days of filing the appeal with the CNAC.

The appeal against the CDAC's decision or opinion is therefore subject to a notification obligation similar to that applicable to appeals against town planning authorisations (see art. R. 600-1 of the French Town Planning Code).

Consequences of appealing to the CNAC (planning permission comprising retail licence)

Under the new article R. 423-36-1 of the French Town Planning Code, when issuance of planning permission is conditional upon a favourable opinion from the CNAC, the processing time for the application is extended by five months (see above).

In practice, this extended period will apply when the CDAC's opinion is negative, thus preventing issuance of the planning permission, which can then only be granted if the CNAC ultimately rules in favour of the project.

Conversely, if the CDAC approves the project, there is nothing to prevent the relevant authority (in principle, the mayor) from granting planning permission immediately, even if the CDAC's opinion could still be contested.

So what would then happen to such planning permission if the CNAC subsequently rejects the project?

Under the previous rules, planning permission could be granted upon issuance of a retail licence from the CDAC. However, the project could not be implemented until either the appeal period had expired or the CNAC had ruled on any appeals filed (former art. L. 425-7 of the French Town Planning Code)

In that this provision has been repealed by the Pinel Law, there is no longer anything to prevent holders of planning permission comprising a retail licence from implementing their project, even if the CDAC's opinion is contested. Such option would nonetheless be risky, in that any party contesting the CDAC's opinion is also likely to challenge the planning permission itself before the administrative court of appeal (it should be recalled that, under the Pinel Law, the administrative courts of appeal have jurisdiction to hand down first and final rulings on disputes involving planning permission comprising a retail licence, art. L. 600-10 of the French Town Planning Code).

TRANSITIONAL MEASURES

Article 4 of the new decree provides for a certain number of transitional measures applicable in particular to retail licence applications that are currently being processed.

As a general rule, retail licence applications already pending before the CDAC for projects requiring planning permission will not have to be "included" with the planning application. They will be processed under the regime for retail licences for projects not requiring planning permission, so that they can continue to be handled separately.

In addition, the decree specifies that:

- cancellation of a retail licence issued prior to 15 February 2015 for a project requiring planning permission does not entail cancellation of the planning permission;
- cancellation of planning permission issued prior to 15 February 2015 for a project for which a retail licence has also been issued does not entail cancellation of the retail licence.

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