Judicial Review, how do you do? Practical considerations

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Lester Aldridge's planning and infrastructure team are regularly asked to advise on the initial prospects, risks and procedures around judicial review and planning determinations and have conducted proceedings to a final judgment for claimants, defendants and other parties affected by judicial review proceedings.

This piece deals with litigation in the High Court's special Planning Court. It doesn't deal with making planning appeals to the Planning Inspectorate, Secretary of State, the Magistrates Court, or the Valuation Office Agency from the decision of a local planning authority on a planning-related application or notice they have issued or seeking reconsideration of a local planning authority decision. Sometimes the deadlines for those cases are even shorter than the requirements here.

This note sets out some of the most critical factors in considering how to approach the prospect of a judicial review in the Planning Court of a planning determination, application, appeal or adoption of a contentious local plan.

Get your skates on

You've no time to lose. Planning decisions made by local planning authorities, mineral authorities, planning inspectors and the Secretary of State have a narrow window of six weeks for a challenge from the decision date. If you are challenging a planning enforcement notice appeal decision, the time frame is 28 days.

In some cases, the proceedings must be filed, issued and served on all the parties within these narrow time frames.

If you leave it too late to instruct your solicitor or don't instruct a solicitor at all, then you might find that you have

- rushed into legal proceedings unnecessarily
- left it too late to make a legal challenge
- don't have time to follow pre-action protocols

- fees that reflect the urgency of actions that must be taken
- haven't had time to gather all the necessary information; or
- submitted too much or irrelevant information (which frustrates the judge).

What's your interest?

A critical matter to take legal advice upon is whether or not the courts will hear your complaint. If you are the developer seeking permission or the local planning authority granting permission, then your interest is quite apparent.

If you are complaining now when you've never involved yourself before, then it's essential to understand if the courts will listen to you. They may decide to hear what you say, but there are some important rules around the question of standing. It often helps if you've shown interest in making representations about your concerns in advance of taking legal action.

Judicial review's two-stage process

The courts strongly encourage you to exchange letters with the other parties in advance of formal going to court to see if there is a concession on where things have gone wrong or scope for some alternative resolution of the complaint. There isn't always time for that, but it is far better to try and take that opportunity than ignore the requirement.

Initiating proceedings and seeking permission

The first concrete legal stage is applying for permission for judicial review by filing proceedings and ensuring the Planning Court has issued them. It is essential to meet the deadlines. Just as critically, these proceedings must be served within the strict timescales. The courts will be tough on all this unless there are the most exceptional circumstances. And for defendants and interested parties, meeting the requirements for acknowledgement of service is critical.

Permission granted

If you've managed all of that, the proceedings will move to the permission stage, which is a judge undertaking a review as to whether there is an arguable case for judicial review. Once that hurdle is overcome, a date will be set for the main judicial review hearing.

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What legal points are the courts considering?

Judicial review or its closely related statutory review procedures serve a vital purpose backstop to ensure planning decisions are arrived at in accordance with the rule of law and the *Seddon Principles* of administrative decision-making.

In summary, the *Seddon Principles* are that the decision-maker must not act perversely, must not take into account irrelevant material or fail to take into account that which is relevant; a decision-maker must abide by the statutory procedures and give proper and intelligible reasons for the decision. Acting fairly and being seen to act fairly as between competing representations may be relevant considerations, depending on how the action, or inaction, has affected the decision making process. There are many related grounds or subsets of these errors, such as mistakes of fact, mistakes of law, illogicality, bias or improper purpose. In all but the most exceptional circumstances, the claimant must be able to articulate the prejudice they have suffered as a consequence of the legal error that has been identified.

Not a second bite

The court will not rerun or re-examine the planning merits of the decision except in the most unusual circumstances. The landscape of the Town and Country Planning Act 1990 and its associated legislation leaves the planning decision-maker a wide discretion to apply their judgement. Properly advised planning committee members and planning Inspectors are given leeway in their decision making. Making a planning decision is quite different from the adjudication by a court on an issue of law. At the earliest possible stage, your legal advisor should explain the difference between planning judgement and legal requirements regarding how that affects the matter you are concerned about.

In the overwhelming majority of cases, the court is far more interested in the course taken by the planning decision-maker to arrive at their decision than the destination.

Your legal advisor can also explain the law around cases in which the court has identified an error of law but declines to quash the decision because even if prejudice might well be identified, and that error was corrected, the court judges that that specific error would not have resulted in any change to the outcome of the decision. The importance of taking early legal advice on this sort of nuance in a judicial review cannot be overestimated.

Redetermination

If the decision is quashed, it will generally be re-determined. If the error identified is appropriately decided, it may result in a different outcome. It may result in a much-improved decision. Yet courts cannot force the decision maker to reach any outcome, only to ensure the decision is made lawfully.

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If you are a claimant with confidence that if the decision-making process is cured, you shall have a better outcome, then the court's intervention is extremely valuable. For example, the decision to grant permission will be reconsidered, which may result in a new decision not to grant permission or an affirmation of grant permission but with different or additional planning conditions.

Costs

It would be silly to suggest that going to law is inexpensive, but occasionally, a claimant may decide it is the only option. In terms of paying for a solicitor's legal costs, launching or defending judicial review proceedings is a front-loaded process. You must be ready to make decisions rapidly, whether initiating or defending proceedings. This means you ought to understand your exposure to your costs and any liability to pay any opposing party's costs at the earliest possible stage.

The discussion between you and your legal advisors ought to be as enlightening and frank as possible around costs, considering that the vicissitudes of litigation mean there may be unexpected requirements.

Before embarking upon a planning judicial review, you should consider if there are any "jumping off points". Of course, the first is where an instinctive decision to litigate may be reconsidered before issuing proceedings. Once a judicial review has begun, there may be opportunities to stop it from reaching a full hearing by exploring a compromise. All these considerations shall require advice to understand how all the parties are to bear their costs and how much they must pay towards the other parties' costs.

Costs protection

In some cases, claimants may be entitled to apply for some costs protection.

If an application is made by the claimant, the courts may limit how much the other side can claim from or recover from another party. There are rules around disclosing your means, and there is an opportunity to make representations about the level of protection that each party requires. Usually all of this is decided at the earliest possible stage in proceedings which adds to front loading for the claimant, the defendant and other interested parties.

Conclusion

In a time when more people are ready to question the decisions made by statutory authorities against the backdrop of constant planning reform, the judicial review of planning decisions has never been so prevalent. Obtaining specialist and practical advice to deal with the complexities of a planning judicial review shall only continue to grow in importance.

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planning and related legal issues, including the conduct of judicial review. Matt advises developers, individuals and local planning authorities on all planning determinations, whether by local planning authorities, planning inspectors or the Secretary of State, and the associated challenge and appeal procedures. Matt can be contacted on 0344 967 0793 and is available to discuss how we may assist you online from our London, Southampton or Bournemouth offices.

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