

Judicial review and planning decisions

A short guide to how and when
judicial review works.



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Introduction

Judicial review is the legal process by which you may challenge the lawfulness of a local planning authority's decision that impacts on you or your interests. This guide looks at the scope for judicial review in relation to land use planning. It will help you decide whether you have a case and sets out how the procedure works.

You are strongly recommended to seek legal advice before making an application for judicial review. The Environment Law Foundation (ELF) can help find legal expertise, including a free initial consultation to evaluate your case. Contact ELF by using the details on the back of this guide.

Judicial review is exercised by High Court judges under the Civil Procedure Rules and applies to:

- decisions by public authorities. This includes local planning authorities, Planning Inspectors, the Secretary of State and statutory agencies such as English Nature, the Environment Agency, English Heritage and the Countryside Agency;
- decisions by domestic tribunals and certain courts (e.g. the Magistrates Court);
- decisions by Parliament if contradictory to European Union Law or Convention (e.g. the European Convention on Human Rights);
- the legality of subordinate regulations and rules, which includes statutory instruments.

Judicial review cannot be used for decisions made by the Crown Court (in most circumstances), the High Court, the Court of Appeal or the House of Lords.

In judicial review proceedings the court will intervene as a matter of discretion to: (a) either quash, prevent, or require a decision, (b) clarify the law or, (c) to compensate the applicant, NOT because it disagrees with the merits of the decision but in order to right a recognisable public wrong.

In most planning cases (e.g. an application for planning permission for development) there are generally only two parties involved; the developer making the application and the local planning authority (LPA) deciding whether or not to grant planning permission. Most communities and individuals that live close to the proposed development are regarded as third parties and do not usually have a direct influence on the decision whether to grant permission.

Since there is no right of appeal for third parties on planning decisions in the UK, judicial review provides the only opportunity for further action once a decision to approve development has been made. However, it can only consider the lawfulness of a decision and test whether it was legally right or wrong. The best outcome is that a bad decision will be

quashed and returned to the relevant authority who is open to make a fresh decision. The same decision may be made by the LPA again as long as it is then made lawfully. This is also true where the challenge is to a decision made by an Inspector or the Secretary of State as an appeal or following a call-in.

Judicial review is not an easy option. It usually requires expert knowledge of the law and can incur considerable costs. If you are thinking of using judicial review to challenge a decision you should make yourself fully aware of the risks and uncertainties and establish whether:

- you have adequate cause;
- you have a provable case; and
- you are willing to take on the risks involved, including the possibility of substantial financial costs.

Any person or group may make an application for judicial review providing that they have sufficient interest or 'cause' in the matter and providing they lack any other suitable remedy.

Do you have cause?

You can only bring a judicial review challenge if you are judged to have *sufficient* cause. You must be able to prove that you or your interests will somehow be harmed sufficiently if the decision stands. In legal terms this is called *locus standi*.

In recent years pressure groups have been recognised by the Courts as having *locus standi*¹. This means that, except for cases involving the Human Rights Act 1998, organised local campaign or residents groups may be able to make an application for judicial review.

¹ R v HMIP ex parte Greenpeace Ltd (1994) & R v SoS for Employment ex parte Equal Opportunities Commission (1994)

Do you have a case?

To decide whether the public authority arrived at its decision lawfully it is necessary to consider:

- unlawfulness – what powers UK legislation gave the authority and how it used them;
- unfairness – how the decision was reached, what procedure the authority followed and whether this was in accordance with what was both required and expected;
- unreasonableness – whether the decision was rational;
- whether the decision violates human rights;
- whether the decision abides by European Union law.

In any case, you will have to prove your claim and produce evidence that the authority acted unlawfully in reaching its decision.

Unlawfulness – what powers did the public authority have and how did they use them?

UK legislation outlines the powers that public authorities have and the duties and responsibilities required of them. These powers and duties vary depending on the type of decision being made. A public authority can only do what the law allows it to do and what it requires it to do. It is unlawful for a public authority to act outside its powers – a condition called *ultra vires*. If you can prove *ultra vires* has occurred then you can challenge the lawfulness of a decision at judicial review.

A public authority might behave *ultra vires*:

- through excess of jurisdiction (i.e. by going beyond what it is entitled to do by law);
- through error of law (i.e. by failing to use its powers as required); and
- through error of fact (i.e. by applying the wrong legislation).

As well as having specific powers and duties that the law says must be used in a certain way LPAs also have discretionary powers that they can decide whether or not to use on a case-by-case basis. While they cannot be made to exercise such powers they should be able to show that they have considered the opportunity to use them.

Unfairness – did the public authority follow the correct procedure?

Procedural requirements of public authorities arise in a number of ways, through:

- (a) legislation i.e. Acts of Parliament and statutory instruments;
- (b) the rules of natural justice; and
- (c) a legitimate expectation.

(a) Procedural requirements in legislation

These may be specific requirements, for example in terms of requirements for the publicity of planning applications, the duty to give reasons for refusal of planning permission or the requirement to consider an Environmental Impact Assessment for certain types of major development. They also outline how decisions should be made in light of:

- (i) material considerations;
- (ii) their purpose – ensuring that these are not improper;
- (iii) the use of discretion; and
- (iv) the delegation of powers.

(i) *Material considerations*

A public authority acts unlawfully if it fails to take into account relevant considerations or takes into account irrelevant considerations when reaching a decision. This means that the significance of a material consideration should be considered even if no weight is given to it.

Material considerations in planning law include the Government's Planning Policy Guidance notes, Regional Planning Guidance, the relevant development plan, the purposes that justify designated areas, environmental statements and representations from statutory consultees and the wider public.

(ii) *Purpose*

A public authority acts unlawfully if it makes a decision for improper purposes. This may involve the authority or individuals being swayed by personal gains or taking a decision driven by motives beyond its duties.

(iii) The use of discretion

When exercising discretion decision-makers must have an open mind and consider all relevant things.

(iv) Delegation of powers

Unless otherwise stated in legislation it is generally unlawful for public authorities to delegate their powers to individuals or another body. While local planning officers may make certain decisions, the planning authority remains accountable.

(b) Were the rules of natural justice obeyed?

The rules of natural justice mean that a decision-maker must not be biased (or appear to be biased) and must provide a 'fair' hearing.

(c) Was there a legitimate expectation that the public authority would act differently than it did?

A legitimate expectation can occur when an authority's policy supports a particular approach or it has acted in a certain way in the past. Failure to meet such an expectation may be judged unlawful.

Is the decision rational?

A decision can be unlawful when it is so outrageous that no sensible person could have lawfully arrived at it. Such decisions are called irrational, perverse or '*Wednesbury unreasonable*' (after the leading court case *Associated Provincial Picture Houses v Wednesbury Corporation* (1948)) because they have no rational justification in the context of the legislation in question (e.g. planning permission was granted because the LPA always grants permission for applications that are heard on a Tuesday, or a decision is made which accepts contradicting arguments).

Does the decision violate human rights?

Under the Human Rights Act 1998 (HRA), all UK legislation must now be read so as to be compatible with the European Convention on Human Rights (ECHR). Where the rights outlined in the ECHR are infringed by the decision of a public authority it may be possible to pursue an application for judicial review.

Under the HRA it is possible to challenge the decision of any 'public authority' as long as you are a 'victim'. Here the definition of a public authority stretches wider than that which is traditionally covered by judicial review to include any court or tribunal and any person whose

functions are of a public nature (unless the nature of the act was private). The requirement to be a 'victim' is more restrictive than the requirement for *locus standi* in English law. In principle, the test is that a 'victim' needs to be directly affected in some way by the matter complained of but not necessarily have suffered detriment.

The rights conferred by Articles 6, 8, 14 and Article 1 of the First Protocol of the ECHR are likely to be of most relevance in planning and environmental law. These are the rights to a fair hearing, family life, the prohibition of discrimination and the peaceful enjoyment of possessions respectively. The case law surrounding these rights is constantly changing and you should seek legal advice if considering a judicial challenge on such grounds.

Does the decision abide by European Union law?

European Union (EU) law is distinct from the ECHR. The provisions and requirements of numerous EU Directives are of particular relevance in the field of environmental law. EU legislation is translated into English law by the UK government passing legislation. For example, the Pollution Prevention and Control Act 1999 implemented the EU Directive on Integrated Pollution Prevention Control. Where the interpretation of an EU Directive into UK legislation is incorrect or incomplete, it may be possible to pursue judicial review of a decision affected by it.

How it works

Once a decision has been made to which you object, it is vital that you make an application for judicial review without delay. As a ‘rule of practice’, challenges concerning planning permissions should be brought *within six weeks* of a decision. For other cases an application must be made, at the very latest, within three months. It is important to note that many applications have been refused on the grounds of delay even though they have been made within the three-month time limit.

Before you take any action

It is important that you seek legal advice to determine whether you have a case before you take any action. You can contact ELF for help in finding environmental legal expertise. The ELF Advice and Referral Service includes a free initial consultation with an ELF member lawyer. Details are provided at the end of this guide.

The court will expect you to have written a letter to the public authority you are challenging informing them that you are considering taking action. This should set out clearly why you believe the authority has acted unlawfully and give it an opportunity to reconsider its decision. While it is appropriate to give the authority time to respond, it is vital to pursue legal advice at the same time.

Making a claim

To commence an application for judicial review you must submit to the court a *Judicial Review Claim Form* setting out your case in a logical manner. This should be sent to the Administrative Court Office, Royal Courts of Justice, Strand, London WC2A 2LL. The *Judicial Review Claims Form* and official guidelines for judicial review procedures can be found at www.courtservice.gov.uk (Court Service) and www.open.gov.uk/lcd (Lord Chancellor’s Department).

Section 9 of the claim form can be used to ask the court to hear your case more quickly or to serve an injunction if damaging effects of the decision are pending. Copies of all relevant legislation and background documents should be submitted with your claim form.

Informing other parties

Once the court confirms that you have complied with the formalities of making a claim you must circulate the relevant documents to the public authority whose decision you are challenging, the beneficiary of that decision and anyone else directly involved.

Getting the go ahead

'Leave' to proceed with judicial review will be granted or refused based on the contents of your submission and that of the other parties. You may be granted a short oral hearing in front of the judge who takes this decision.

Before the hearing

Once permission for judicial review has been granted you will be required to make a further written submission setting out the detail of the case you will present at the judicial review hearing.

The hearing

At the hearing, the points of law of the case are argued in front of a judge in a court of law.

The outcome

The judge will inform all parties of the decision. If you are successful in proving a public authority's decision was taken unlawfully the judge may quash the decision and return it to the public authority to make a fresh decision. The court may also allow it to stand if it is decided that there is no material impact on the final decision even though a part of the process was unlawful.

Costs

The unsuccessful party in the case is likely to be held accountable for the legal costs of the opposition and potentially those incurred by other interested parties (e.g. the developer). This can amount to many thousands of pounds.

What to do

If you've read the above information and believe judicial review is the right course of action, make sure that you:



Establish whether you have a case. Use the information contained in this guide to consider whether the decision in question was taken lawfully and whether you have sufficient standing to apply for judicial review.



Seek legal expertise. You should seek legal guidance as to whether you have a case through the Environmental Law Foundation. Remember that if you reach court, the party you are challenging will be legally represented – losing due to lack of knowledge or expertise could incur great costs.



Act promptly. If possible, anticipate a decision you are likely to dispute. Often you will be able to identify unlawful behaviour and begin to collate evidence prior to a decision being made. Make sure that you apply for judicial review 'promptly' after the decision is taken.



Encourage other interested parties to get involved. This could include your local authority, a local environmental group or one of the statutory agencies e.g. English Nature, Environment Agency, Countryside Agency or English Heritage. Encourage them to take up the case – they may have more funds available or legal expertise to hand.



Carefully consider whether the risks involved are worth the potential benefits. Remember that even if you are successful, judicial review can only quash the decision you are challenging, it cannot change it.



Keep the pressure on. Bearing in mind the fact that judicial review cannot change the decision you will still need to encourage the authority you are challenging to change its mind next time it considers the case. Use the local media and public to gain support for your arguments about why it should reach a different decision if it is forced to reconsider.

CPRE exists to promote the beauty, tranquillity and diversity of rural England by encouraging the sustainable use of land and other natural resources in town and country. We promote positive solutions for the long-term future of the countryside and to ensure change values its natural and built environment. Our Patron is Her Majesty The Queen. We have 57,000 supporters, a branch in every county, eight regional groups, over 200 local groups and a national office in Westminster. CPRE is a powerful combination of effective local action and strong national campaigning. Our President is Prunella Scales.

CPRE



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The Environmental Law Foundation (ELF) is a national charity whose primary purpose is to ensure environmental justice for all. One of its core activities is the Advice and Referral Service based on a nation network of environmental solicitors, barristers and consultants. It ensures that any community or individual with an environmental problem can receive free initial advice and consultation from an ELF member, whether this relates to a contentious planning application or a proposed incinerator. If further assistance is required ELF members agree to work for reduced fees as agreed with clients. If you have an environmental problem or concern, please call ELF's Advice and Referral line on 020 7831 7662.



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