

Plan B: How to challenge bad developments in court

A short guide to how and when
you can challenge planning
decisions in the courts

Introduction and key actions

This guide is principally aimed at members of the public and community groups who are concerned about a proposal for development which has gained, or may gain, planning permission, and outlines the scope for legal challenge of land use planning decisions.

This guide will help you decide whether you have a case and sets out how the procedure currently works. The Government (in November 2012) has announced an intention to review procedures for bringing such challenges. This guide will be updated when firm details are made available and implemented.

If you've read the information in this guide and believe challenging a planning decision in the courts is the right course of action, make sure that you:

Seek legal expertise. This guide does not constitute legal advice. You should seek legal guidance as to whether you have a case. Remember that if you reach court, the party you are challenging will be legally represented. Losing due to lack of expertise could incur great costs.

Establish whether you have a case. Use the information contained in this guide to help consider whether the decision in question was taken lawfully and whether you have sufficient standing and a robust case to make a challenge.

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 'promptly' after the decision is taken.

Encourage other interested parties to get involved. This could include your local authority, a local environmental group / amenity society or one of the statutory agencies e.g. the Environment Agency, English Heritage or Natural England. Encourage them to support or take up the case – they may have more funds available or legal expertise to hand. Working with or as part of a campaign group can also help with meeting the costs of legal action, for example through group members making financial pledges of support.

Carefully consider whether the risks involved, especially costs, are worth the potential benefits. Remember that even if you are successful, normally a court challenge can only quash the decision you are challenging. It may not necessarily prevent the same decision being made again in future. If you do wish to proceed, it is advisable to carefully plan as to how you will meet your costs, as well as those of other parties if you are unsuccessful. Consider how risks can be minimised by, for example, identifying stages at which you are able to pull out of the process if necessary.

Pursue other solutions in future. Consider whether focusing your campaign to call for a change in policy, or using the Local Government Ombudsman service, will be a better use of time and money than seeking to quash an individual decision.

Keep the pressure on. A court challenge may not prevent the same decision being made again in future or address the issue at stake, so 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.

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1. How planning decisions are challenged in the courts

If you are a member of the public or a community group affected by a planning decision, you are a 'third party' and do not have a formal right of appeal against the decision. You do have some scope to challenge the decision in the courts. If you choose this route, there are a number of constraints and potential risks which have to be born in mind, as set out in this guide.

The two principal means of legal challenge are judicial review or statutory challenge. There are a number of differences between the two procedures, explained in this guide. Otherwise the information in this guide applies equally to both judicial reviews and statutory challenges.

The most realistic outcome is that a bad decision will be quashed and returned to the relevant authority, which must then make a fresh decision. The same decision may be made by the public body again, however, as long as it is then made lawfully.

1.1 Judicial review

Judicial review is exercised by High Court judges under the Part 54 of the Civil Procedure Rules (CPR) and applies to:

- decisions by public authorities. This includes planning decisions by development corporations, local planning authorities, statutory agencies such as the Environment Agency, English Heritage and Natural England, and by the relevant Secretaries of State;
- decisions by domestic tribunals and certain courts (e.g. the Magistrates' Court);
- decisions by Parliament if incompatible with European Union law or the European Convention on Human Rights (ECHR);
- decisions not to act in the exercise of a public function, which in the field of planning could include a local planning authority not taking enforcement action against a breach of planning control. An important issue here is whether the function relates to a duty or a power to act (see Section 3.1 below); and
- the legality of subordinate regulations and rules, which includes statutory instruments as well as policies, advice and guidance. This encompasses the National Planning Policy Framework (NPPF) and the National Policy Statements (NPSs) that will be produced by the Secretary of State for nationally significant infrastructure projects in accordance with the Planning Act 2008.

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, or for those decisions which can only be questioned through statutory challenge (see below).

The court will only intervene as a matter of discretion to: (a) either quash, prevent, or require a decision, or (b) clarify the law. The court cannot disagree with the merits of the decision, but it can right a recognisable public wrong.

1.2 Statutory challenge

The procedure differs where the challenge is to a decision made by the Secretary of State following a planning appeal¹ or 'call in' of an application that would normally be decided by a local planning authority; or to the adoption of a development plan document.

Challenges to Secretary of State decisions are required to be brought through statutory review proceedings under section 288 of the Town and Country Planning Act 1990 (TCPA) or for development plans, Section 113 of the Planning & Compulsory Purchase Act 2004, respectively. This guide refers to the procedure as 'statutory challenge'.

1.3 When action has to be taken

Strict time limits apply to both judicial review and statutory challenges.

Judicial review: Rule 54.5 of the CPR requires proceedings to be brought 'promptly' and in any event not later than three months after the grounds to make the claim first arose.

Although the decision to issue planning permission is often taken at a committee meeting, it is an established principle that the decision does not take effect until a decision notice is issued. Sometimes this can be on the same day as the committee meeting, but in others it may be weeks, or even months, before permission is formally granted. In the case of *Burkett*² the House of Lords ruled that the correct date for decisions was when the planning permission was granted and not any other date, such as the date of a committee resolution to grant outline planning permission.

There is no definitive guidance on what 'promptly' means, but it is advisable not to delay bringing proceedings, and to notify the local planning authority and the affected developer of your intention as soon as possible. Factors the court will take into account are likely to include the length of time the claimant has known about the matter (the longer you have known about it the less sympathetic the court will be to any delay in commencing proceedings) and whether the developer has incurred any significant costs in the belief that there was a valid planning permission.

The court does have discretion to extend the time limit for submitting judicial review applications, but this should not be assumed.

Statutory challenge: Applications must be made within six weeks of

1. the date of the decision in relation to a planning application; or
2. the date of adoption in relation to a development plan document.

This time limit is strict and the court has no discretion to extend it.

¹ In most planning appeals decisions are made by inspectors appointed by the Secretary of State.

² *R v Hammersmith & Fulham LBC, ex parte Robert Burkett and Sonia Burkett* (2002) 3 All E.R. 97

2. Can you bring a challenge?

You can only bring a **judicial review** challenge if you are judged to have *sufficient* standing. This means that you must be able to prove that you or your interests will some how be harmed sufficiently if the decision stands. Organised local campaign or residents' groups have some scope to challenge planning decisions. In recent years the courts have tended to take a liberal approach to standing of public interest and campaign groups in judicial review cases, and such groups have been recognised as having standing³.

For **statutory challenges**, any 'aggrieved' person may apply to challenge planning decisions by the Secretary of State or an inspector appointed by him. 'Aggrieved' should be taken in the ordinary sense of the word as any person whose rights (whether legal, procedural, monetary or personal) have been infringed⁴. There has been a liberal approach to allowing 'aggrieved' parties to bring applications for statutory challenges since the 1970s⁵. But it has also been recently ruled that the meaning of 'aggrieved person' for the purpose of bringing statutory challenges is much more restrictive than that of 'standing' in judicial reviews. A third party needs to prove a grievance by showing that it has taken a sufficiently active role in the planning process, or has a relevant interest in the land⁶. This illustrates the importance of participating fully in the process of development plan policy making and responding to planning applications on issues that concern you. Advice on these points is available on the CPRE Planning Help website.

If you are thinking of challenging a decision or failure to act you should be confident that it will provide a meaningful remedy to the situation that has prompted the action. Make yourself fully aware of the risks and uncertainties, and whether the outcome of a successful case justifies taking these on. In particular, there is a possibility of incurring substantial financial costs.

At the outset you should establish if:

- **You have sufficient 'standing' (judicial review) or a provable grievance (statutory challenge).**
- **For cases involving judicial review (but not statutory challenges), you have a case that the court will consider is 'arguable', in effect worthy of a full hearing. Judicial review applications are filtered through an initial 'permission' stage.**
- **You are likely to be able to succeed on some or all of your points, taking account of the possibility (known as 'litigation risk') that new evidence or lines or argument may arise during the proceedings.**
- **You are likely to be able to persuade the court to exercise its discretion to grant a remedy, through showing for example that there was no alternative remedy you could have been expected to use instead of a legal challenge.**

³ *R v HM Inspectorate of Pollution ex parte Greenpeace Ltd no.2* (1994), 4 All ER 329, & *R v SoS for Employment ex parte Equal Opportunities Commission* (1994), UKHL 2 1995.

⁴ *Times Investment Ltd v Secretary of State for the Environment* (1991) JPL 67.

⁵ *Encyclopaedia of Planning Law & Practice*, Section P288.07 (Release 148, April 2005).

⁶ See the case law summaries at (2010) JPL 5-7 and (2010) JPL 295-296.

3. What grounds do you need for a challenge?

To decide whether or not you have grounds for a challenge it is necessary to consider whether the decision could be either:

- Unlawful or illegal;
- Unfair (otherwise known as involving 'procedural impropriety');
- unreasonable (or 'irrational');
- incompatible with human rights as contained in the ECHR; or
- not in conformity with European Union law.

In any case, you will have to prove your claim and produce evidence. A challenge cannot be mounted on the basis of (i) whether a better decision could have been reached, or (ii) the quality of the evidence used to reach it.

3.1 When a decision is unlawful

Public bodies have **duties**, which they are required to comply with, and **powers** which they have discretion to use. These powers and duties are set out in legislation and vary depending on the subject matter.

Unlawfulness can arise when a public authority does not exercise its duties or use its powers when it should do so. It is also unlawful for a public authority to use its powers or duties for a purpose other than that intended, or going beyond what it is entitled to do by law (a condition referred to as '*ultra vires*').

3.1.1 When a public body is required to act

In the field of planning, possibly the most commonly encountered duty is the requirement to decide planning applications in accordance with the development plan unless relevant factors (known as 'material considerations') dictate otherwise. This is briefly discussed below.

Other examples of duties relating to both planning and the environment include the duty of public authorities to 'have regard' to the statutory purposes of National Parks and Areas of Outstanding Natural Beauty, and the duty for development plans to contribute to the achievement of sustainable development.

(i) Material considerations in town and country planning decisions

In decisions on planning applications a public authority can be open to challenge on grounds of unlawfulness, if it fails to take 'material considerations'⁷ into account.

The primary material consideration in planning law is the development plan. The development plan comprises policies in those parts of the Local Plan or Neighbourhood Plan called Development Plan Documents (DPDs). Where policies from county Structure Plans

⁷ Planning and Compulsory Purchase Act 2004, Section 38 (6).

and older Local Plans have been 'saved' under the 2004 Act, these policies also form part of the development plan.

There are many types of material consideration, and they can vary with the details of an individual case. The key ones include the Government's National Policy Statements, the NPPF or associated guidance notes, statements setting out the purposes that justify designated areas, environmental statements and representations from statutory consultees and the wider public.

(ii) Nationally significant infrastructure projects under the Planning Act 2008

Under the Planning Act 2008, the largest or 'nationally significant' infrastructure projects in the areas of energy, transport, waste and water will be processed through the planning system in the form of National Policy Statements (NPSs) produced by the Secretary of State; followed by an application for a 'development consent order'. Relevant considerations in relation to decisions to grant or refuse development consent orders are, in theory, much narrower than for other planning cases. The primary consideration is whether the proposal is in accordance with an NPS, although the Secretary of State can also refer to anything else that he considers to be important or relevant to the application.

The decision-maker can only deviate from the NPS where it is satisfied that the local impacts of the scheme outweigh the benefits. This includes a requirement to have regard to any local impact report prepared by a local planning authority in or adjoining to the area where the scheme is proposed.

Legal challenges to NPSs and development consent orders can only be brought by means of judicial review and are permitted only in specified circumstances⁸.

3.1.2 When a body has discretion to act

Examples include the powers of local planning authorities to work with other local planning authorities in creating joint development plan documents, as well as the various reserve powers of the Secretary of State to intervene in the production of a development plan document or to call in a planning application for his own determination. Government policy and guidance, as well as development plan policies to varying degrees, often play a crucial role in determining how powers should be used, however.

The court will generally defer to the authority's exercise of discretion. One consequence of this is that it is rarely feasible to mount a challenge purely on the basis of an authority not having exercised a discretionary power, such as the Secretary of State deciding not to call in a planning application for his own determination.

A challenge may be possible, however, where it can be demonstrated that the public body has not taken into account relevant factors, taken into account irrelevant factors, or simply acted perversely. Although the development plan or NPS is the primary consideration in deciding planning applications, an authority cannot bind itself (otherwise known as 'to fetter discretion') to stick rigidly to policies if an individual case requires the authority to make an exception to them.

⁸ The circumstances are set out in sections 13 and 118 of the Planning Act 2008.

3.2 When a decision is unfair ('procedural impropriety')

Procedural requirements of public authorities arise in a number of ways, and a failure to meet these requirements can give rise to a claim on grounds of unfairness. Specific procedures are often legal requirements (see Section 3.1 above), such as consultation on development plans and publicity for planning applications.

The Public Law Project gives a number of possible examples of unfairness, which include failing to allow the individual to put their case forward; refusing to hear evidence which might have led to a different decision; failing to consult those who had a 'legitimate expectation' that they would be consulted before the decision was made; and denying access to relevant documents⁹.

Issues of procedural fairness are often raised in planning cases and are considered below under the following three broad headings:

1. The rules of natural justice.
2. Legitimate expectations.
3. Access to information.

3.2.1 Natural justice: avoiding bias and consulting properly

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 or allow for proper consultation.

Issues of bias can often be raised by third parties in planning cases. For example, local planning authorities often make decisions on their own proposals for development. Also, local councillors who vote on planning applications may have a clearly stated interest or position prior to making their formal decision.

Procedures for hearing and consultation on both development plans and planning applications are well established in the planning system.

In the well-known *Coughlan*¹⁰ case, it was ruled that to be proper consultation it must

- be undertaken at a time when proposals are still at a formative stage;
- include sufficient reasons for particular proposals, and give adequate time, to allow those consulted to give intelligent consideration and an intelligent response; and
- result in the product of consultation being conscientiously taken into account when the ultimate decision is taken.

3.2.2 Public authorities can be subject to legitimate expectations

A legitimate expectation can occur when an authority's policy supports a particular approach or an authority has made statements to the effect that it would act in a certain way or it has acted in a certain way in the past.

⁹ Public Law Project, *A brief guide to the grounds for judicial review*, 2006, p.3.

¹⁰ *R v North and East Devon Authority, ex p Coughlan* [2001]QB 213.

A differentiation is sometimes made between:

- *Procedural* legitimate expectations, such as an opportunity for interested parties to be consulted or heard before a change in policy is announced. This can include parties which are well known to have an interest in the policy or who were consulted in the past. This was central to Greenpeace's successful challenge to Government policy on nuclear power in 2007.
- *Substantive* legitimate expectations, or a legitimate expectation of a substantive benefit. *Coughlan* is a particularly well known example of this. The case arose from a health authority promise to residents of a care home that they would have a 'home for life' in the facility, before subsequently deciding to close the home¹¹.

Failure to meet such an expectation may be judged unlawful. The public interest relied upon by the authority for departing from any representation or statement it previously made will be weighed against possible factors such as:

- whether the statement or representation giving rise to the expectation was clear and unequivocal;
- whether the person who promised a benefit in association with the expectation had the legal power to grant it, or was acting beyond his/her powers;
- whether departure from a representation giving rise to an expectation is so unfair to the person or persons to whom it was made as to amount to an abuse of power; or
- whether the recipient of the promise took action in reliance upon it to their detriment¹².

3.2.3 Fair access to information

The issue of access to planning information has become more prominent in court cases since the UK's ratification of the Aarhus Convention on Access to Environmental Information (see Case study 1 below). Article 9 (4) of the Convention requires that procedures for judicial access concerned with environmental justice must 'provide adequate and effective remedies, including injunctive relief as appropriate and be fair, equitable, timely, and not prohibitively expensive.'

Environmental NGOs have argued that the government failure to provide access to judicial review at little to no cost is a breach of the Convention and have called for one way cost shifting to remedy the situation.

¹¹See note 10 above (reference to the *Coughlan* case).

¹²Government Legal Service, *The Judge Over Your Shoulder* (edition 4, January 2006), paragraphs 2.55 – 2.56.

Case study 1: The Aarhus Convention on Access to Environmental Information

The Objective of the Aarhus Convention is set out in article 1 and states that it aims to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or health and well-being’.

The relevant provisions concerned with the rights of access to information and public participation in decision -making have been implemented in EU Directives 2003/4/EC on public access to environmental information; 2003/35/EC providing public participation in the drawing up or certain plans and programmes; Regulation (EC) 1367/2006/EC on the application of the Aarhus Convention to information, public participation and access to justice to Community Institutions and bodies.

Lord Justice Sullivan referred to the Aarhus Convention in his judgment in the 2007 Greenpeace case. Recently, environmental organisations have argued that the Convention requires the ‘fullest’ consultation in environmental concerns in line with the procedure set out in article 6 and 7. In particular, Article 6 requires that the public are informed ‘early in the decision making process’, in an ‘adequate and timely and effective manner, with sufficient time-frames enabling sufficient time for the public to prepare and participate effectively and with due account taken of the outcome of the public participation’.

3.3 When a decision is unreasonable

A decision can be unlawful when it is so unreasonable that no sensible person could have lawfully arrived at it. Such decisions are called irrational, perverse or ‘*Wednesbury unreasonable*’¹³ because they have no rational justification in the context of the legislation in question. By way of illustration of an irrational decision, planning permission could be granted because the public body always grants permission for applications that are heard on a Tuesday, or a decision is made which accepts contradicting arguments. There is some connection between this and the requirement in planning law to make decisions in accordance with ‘material considerations’ (see Section 3.1.3 above).

Since 2004 it has been a legal requirement to give reasons for granting as well as refusing planning permission. Reasons need to be proper, adequate, intelligible and let the person(s) affected know why they have succeeded or not¹⁴. It should be noted however that a claim for legal challenge is unlikely to succeed purely on grounds of inadequate reasoning alone, particularly as a judge could merely direct a public body to list relevant reasons in a decision notice¹⁵. Similarly, it is unusual for unreasonableness to form the sole grounds for a legal challenge, as the threshold of unreasonableness is difficult to meet¹⁶.

¹³ After the leading court case *Associated Provincial Picture Houses v Wednesbury Corporation* (1948).

¹⁴ *R v Brent LBC ex p. Barowa*, 29 HLR 915.

¹⁵ *R (on the application of Helford Village Development Company Ltd) v Kerrier District Council*, 2009 EWHC 400 (Admin), at paragraphs 61-63.

¹⁶ Public Law Project Information Leaflet no.3, *A brief guide to the grounds for judicial review*, accessed from www.publiclawproject.org.uk/downloads/GuideGroundsJR.pdf November 2009.

3.4 When a decision violates human rights

Under the Human Rights Act 1998, all UK legislation must now be read so as to be compatible, where possible, 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 would be possible to pursue a challenge in the courts, in theory all the way to the European Court of Human Rights.

Under the Act it is possible to challenge the decision of any 'public authority' as long as you are a 'victim'¹⁷. Here the definition of a public authority stretches wider than that which is traditionally covered by judicial review to include any court or tribunal, including the highest English courts, 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 standing or a grievance in English law. In order to establish 'victim' status, the complainant must show that he/she is directly affected by the act or omission in issue. Potential, future or indirect effects may suffice for this purpose. A victim can be a person (including a legal person, like a company), non-governmental organisation or group of individuals. Core public authorities, including local authorities, cannot be victims.

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 and private life, the prohibition against discrimination and the peaceful enjoyment of possessions respectively. It should be noted that not all rights are absolute: the ECHR allows many to be overridden if there is a sufficiently compelling public interest. This can be particularly important in planning.

3.5 When a decision does not comply with European law

European Union (EU) law is distinct from the ECHR, but in both respects it is possible in theory to challenge decisions of the highest English courts abroad. The provisions and requirements of numerous EU Directives are of particular relevance in the field of environmental law. EU legislation is transposed 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 a relevant EU Directive in a planning decision is incorrect or incomplete a challenge to the decision may be possible (see Case study 2 below).

Case study 2: The importance of European law to planning in England

The EU Directive on Strategic Environmental Assessment is applied to all plans with a significant effect on the environment. Successful challenges were made by CPRE groups and local authorities to the adoption of draft Regional Spatial Strategy policies in the East of England and the South East, on the grounds that the requirement of the Directive to identify, discuss and evaluate alternatives to environmentally damaging development had not been fulfilled¹⁸.

¹⁷ *Human Rights Act* 1998, section 7 (1).

¹⁸ See, in particular, *City and District Council of St Albans v Secretary of State for Communities and Local Government*, [2009] EWHC 1280 [Admin].

4. Before you take any action

4.1 Get advice on the risks and how to minimise them

It is important that you seek professional 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 process carries high risks, particularly in terms of costs (see Section 5.6 below) and may not rectify the situation that prompted legal action. Making clear to a public authority that you are prepared to challenge a planning decision in court, however, can often lead to a damaging proposal being abandoned or at least modified, sometimes without even needing to go to a full hearing (see Case study 3 below). It is important to be aware that there are a number of opportunities, particularly in judicial review procedures, to achieve a resolution to the dispute and bring a halt to proceedings without going through the full process, thereby minimising the risk of substantial costs.

Case study 3: When the threat of judicial review is enough

Objectors successfully challenged two planning permissions for an agricultural building and associated stockman's cottage. The objectors based their arguments around issues such as inconsistency with national and local planning policies, and alleged flaws in the decision-making process.

The court granted permission for a judicial review hearing. The local planning authority removed its objections before the hearing took place, causing the decisions to be quashed. This demonstrates that when a strong case can be made for quashing a decision, a court hearing is not always necessary.

4.2 There are limited alternatives to legal action in planning cases

Legal action is usually considered a remedy of last resort. In judicial review cases, the Civil Procedure Rules make clear that the parties should consider whether there is some form of alternative dispute resolution that would be more suitable than litigation. Both the claimant and the defendant may be required to produce evidence that alternative means of resolving their dispute were considered.

If the land that you are concerned about has been used by a significant number of inhabitants for lawful sports and pastimes, for at least 20 years, as of right, then it may be possible to register the land as a Town or Village Green (TVG) under Section 15 of the *Commons Act 2006*. The registering authority (usually the county or unitary council) will consider all the evidence presented and then decide whether the land should be registered as a village green. Presently, a successful registration can override any existing policy designation or planning permission for new development; the law is expected to change, however, with the passage of the Growth & Infrastructure Bill. In future applications for TVGs are likely to be prevented in cases where, for example, planning permission has been granted.

Applying for village green status is not an alternative to challenging a decision in court. Sometimes, however, you may be more likely to succeed in protecting an important open

space through getting a site designated as a village green, rather than purely challenging a planning permission. Furthermore, a village green decision that goes against you may also be challenged by way of judicial review (see Case study 4 below). More information about putting land forward for village green status can be obtained from the Open Spaces Society (www.oss.org.uk).

Case study 4: Using the law on village greens to protect valued spaces

A development of more than 300 houses was proposed on land which local residents had long regarded as a village green¹⁹. The Supreme Court, following a judicial review challenge by the residents, ordered that the land should be registered as a village green. As long as local residents showed that they had used the land for sports and pastimes, for the past 20 years, as of right, the space could be registered as a village green, even though the residents had in the past also allowed a private golf club to use the land.

Other possible alternatives in relation to planning decisions could include mediation at various stages including the formulation of policy or before an application is submitted, a local authority internal complaints procedure or the **Local Government Ombudsman**²⁰. These are narrowly confined in what they can achieve and may not be relevant to the issue at stake. Mediation has often been used successfully in small scale planning cases involving householders, but research has shown it to be less useful in resolving issues of policy, legal principle or wide public interest²¹. The Ombudsman can often provide significant assistance in addressing the impact of a bad planning decision, however. Members of the public and community groups can also use **the 'call in' procedure** to request that the Secretary of State intervenes to make a decision in a major or controversial planning case where a local planning authority is expected to grant planning permission. Call ins are only possible before a notice granting planning permission is issued. More guidance on using both the Ombudsman and call-in procedures is available from the CPRE Planning Help website.

4.3 You should follow the pre-action protocol when making a judicial review claim

The Civil Procedure Rules state that it is good practice for every applicant for permission for judicial review to complete a Pre-Action Protocol²² and to send this to the public authority whose decision is challenged.

The protocol states that before making the claim the claimant should send a 'Letter Before Claim' to the defendant identifying the issues in dispute and establishing whether a settlement can be reached and litigation avoided. **This only applies in judicial review cases.** It is not necessary or appropriate to send a Letter Before Claim before bringing a statutory challenge.

A standard format for the letter is provided and should be followed. The letter must also contain the date and details of the decision, act or omission being challenged, a clear summary of the facts and details of any relevant information that the claimant seeks from the

¹⁹ *R v Redcar and Cleveland Borough Council*, [2010] UKSC 11.

²⁰ More details of how you can use the Local Government Ombudsman service in relation to planning decisions are available from www.cpre.org.uk/planninghelp.

²¹ See, for example, Planning Inspectorate and National Planning Forum, *Mediation in Planning*, June 2010, p.42; and Scottish Government, *A Guide to the Use of Mediation in the Planning System in Scotland*, March 2009, pages 10 and 11.

²² The Pre-Action Protocol for Judicial Review is available from www.justice.gov.uk/civil/procrules_fin/contents/protocols/prot_jrv.htm.

defendant. The Protocol also seeks disclosure of relevant documents from each party at this stage, rather than being produced for the first time in court.

A claimant is not required to follow the Protocol where the case is urgent or where the defendant does not have the legal power to change the decision being challenged. This may be the case with decisions taken by LPAs, particularly where they grant planning permission.

Sanctions exist, however, for not complying with the Protocol. For example, costs may be awarded against parties for producing case documents at the hearing which could have been produced at the pre-action stage and thereby minimised the need for consideration in court.

The defendant should respond to the Letter Before Claim. This may provide a good opportunity to reconsider whether judicial review proceedings are still appropriate before you become liable for costs. An offer of settlement may sometimes be made. If so, then your professional adviser will need to determine whether the offer is fair.

Although it will often be necessary or advisable to write a Letter Before Claim, this is not the same as actually applying to the court for judicial review, and does not alter the need to meet the time limits for making your application to the court.

5. Making a claim

To commence an application for judicial review or statutory challenge you must submit a claim form setting out your case in a logical manner. Copies of all relevant legislation and background documents should be submitted with your claim form. The forms and official guidelines on procedures can be found on the HM Courts Service website.

You can ask on your claim form for the court to hear your case more quickly or to serve **an injunction** if damaging effects of the decision are pending. An application for an injunction may be particularly effective where a polluting activity is about to commence pending the granting of a planning decision and prior to the outcome of any challenge. However, the current approach of the courts is to seek an undertaking for costs from the claimant protecting the defendant against any interim losses.

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

Permission to proceed with judicial review will be granted or refused based on the contents of your written submission, and will generally depend upon whether the judge considers the case is arguable. If permission is refused you are entitled to renew your application by way of an oral hearing in front of a judge who will decide whether your case can proceed to full judicial review. There is no permission stage in the procedure for statutory challenges.

5.1 The hearing and outcome

Once permission for judicial review has been granted you will be required to make a full written submission together with supporting documentary evidence setting out the detail of the case you will present at the judicial review hearing. In cases involving statutory challenge a witness statement must be filed with the court within fourteen days of service of the claim form, if not already filed with it.

At the hearing, the points of law of the case are argued in front of a High Court judge usually in the Royal Courts of Justice, although increasingly cases are heard in regional centres.

Quashing a decision is usually by far the most realistic outcome to aim for in judicial reviews of planning decisions, and the only available remedy in statutory challenges.

The judge will inform all parties of the decision. If you are successful in proving that a public authority's decision is unlawful, the judge may quash the decision and return it to the public authority to make a fresh decision. However, the judge has discretion whether or not to quash a decision even if he finds in your favour. He may 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.

5.2 Costs

The issue of costs is one of the most significant potential risks involved in a court challenge (see Section 4.1 above and Case study 5 below). It is important to consider two potential dimensions to costs: (i) those relating to your own representation; and (ii) should your claim be unsuccessful, those of the defendant and others.

At the permission stage in judicial review cases, if the application is refused by the judge on consideration of the papers, the claimant is likely to be liable for the defendant's costs in preparing a response to the claim, and possibly also those of the developer. If the application for permission is renewed at an oral hearing the claimant is not generally liable for the defendants' costs of the hearing, save in exceptional circumstances.

Following a full hearing, the general rule is that the unsuccessful party in the case bears the costs of the successful party (CPR Part 44). The losing claimant may be liable not only for the costs of the defendant but also, exceptionally, those incurred by other interested parties (e.g. the developer). These may amount to many thousands of pounds.

Case study 5: Avoidable costs?

A recent High Court decision²³ is a salutary lesson in how to minimise the risk of mounting costs. Despite succeeding in a judicial review claim against the local planning authority, a village society was only awarded half of its costs due to pursuing a number of arguments at the hearing that had been identified as weak by the judge granting permission for the hearing.

More recently the courts have allowed applications by community groups at the start of proceedings for a Protective Costs Order (PCO). This is a court order which limits the amount of costs payable to the successful party should the applicant lose the case. The Court may specify what costs and up to what limit each party will have to pay.

Before applying for a PCO, a claimant must satisfy the guidelines set out in the *Corner House* case²⁴. This includes satisfying the court that the case raises issues of general public importance, not simply of local significance. If you wish to pursue a claim it may be possible to obtain costs protection or costs cover by various means, including:

- (a) a PCO where the criteria in *Corner House* can be satisfied.
- (b) a Conditional Fee Agreement (CFA) with your legal advisers.
- (c) Insurance.
- (d) Public funding (previously known as Legal Aid).

Some of these, particularly CFAs and insurance, are often used together. The use of CFAs is, however, relatively rare in court challenges to planning decisions. This is because the outcome of planning-related court cases can be difficult to predict, in comparison with other types of claims such as personal injury. Insurance can be expensive and its availability can also be highly restricted. Eligibility for public funding is means-tested.

Some campaign groups have addressed the issue of costs by building in the seeking of pledges for assistance in meeting insurance costs and in conjunction with a CFA. Pledges can be sought from supporters of an overall campaign of which the court action forms an element. Increasingly, residents' groups are also forming limited companies to act as a claimant, funded by individuals with an interest in the case, which allows the company rather than the individuals to be made liable for costs. The courts have accepted that such companies can have standing or be considered 'persons aggrieved' as applicable, even if they are incorporated only a couple of days before the claim is lodged²⁵. More information about (i) organising a campaign is available in the CPRE guide *Getting Organised and Getting Results*, and (ii) sources of funding is available from www.legalservices.gov.uk and www.publiclawproject.org.uk.

²³ *R (on the application of Helford Village Development Company Ltd) v Kerrier District Council*, [2009].

²⁴ *R (Corner House Research) v Secretary of State for Trade and Industry* [2005].

²⁵ For example, *Residents Against Waste Site Ltd v Lancashire County Council and Global Renewables* [2007].

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 around 60,000 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 Bill Bryson.



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The content of this guide does not constitute legal advice.

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