A British Property Federation response to:

Judicial Review: Proposals for Reform

Introduction

1. The British Property Federation (BPF) is the voice of property in the UK, representing companies owning, managing and investing in property. This includes a broad range of businesses – commercial property owners, the financial institutions and pension funds, corporate landlords, local private landlords – as well as all those professions that support the industry.
2. It is recognised that this consultation encompasses all types of judicial review claims and that many of these are immigration and asylum related. However, we very much welcome examination of the issue of judicial review, as it has been causing increasingly significant problems for development, the development industry and local planning and other public authorities in recent years. The particular focus of concern is in relation to judicial review challenges to the grant of planning permission and it should therefore be emphasised that the focus of this response is in relation to such challenges only.
3. We had been in the process of carrying out some research on the issue before the publication of this consultation document. The research had been prompted by the widespread anecdotal perception that the incidence of claims by objectors to planning permissions by way of judicial review had become increasingly frequent in recent years and that the Administrative Court is becoming slower at disposing of those claims, not least due to the high number of immigration and asylum claims and due to the constrained resources of the Court.

Background

4. In this regard, we note, and are encouraged by the explicit recognition of planning-related issues in the consultation paper. Judicial review can have significant impacts upon development and the development industry, but it is useful to explain briefly in more detail what these are.
5. Once a judicial review challenge to a planning permission is lodged, a developer's response is usually to delay commencing the development that is the subject of the planning permission until the claim is disposed of, thereby delaying or frustrating altogether the potential social and economic benefits arising from that development. Indeed, the legal documentation in relation to most development transactions (large and small) makes the acquisition, funding or commencing of construction dependent upon there being no judicial review or any judicial review having been disposed of.
6. The availability of judicial review for those affected by the unlawful acts and decisions of the State and public bodies is an essential ingredient of the rule of law. However, many parties are affected and there are significant direct and indirect impacts of such challenges. In order that those against whom claims are brought are not unfairly affected and, in order that the process of applying for judicial review is not seen by objectors as a useful weapon in its own right in their wider struggle against a particular development project, it is essential that the process operates efficiently and in a timely manner.
7. Speeding up the process would deliver significant benefits in terms of enabling economic activity to take place more quickly; bringing forward jobs in construction and the completed development; bringing forward the development itself; including housing and development contributions to the community; as well as reducing investors' costs (development holding costs, legal costs) and in reducing the risks that may discourage investment. A less talked about but equally important impact is the cost to local planning authorities (LPAs) and

hence the tax payer as, when a challenge to a planning permission is made, it is a decision of the LPA that is being challenged and it is therefore the LPA that is the primary respondent. The LPA has to expend significant resources in defending against each claim, resources which it is increasingly unable to recover (even where the claim fails) because many claimants these days have the benefit of Legal Services Commission funding ("legal aid") or a protective costs order.

8. During the process of trying to carry out our research, we and our research partners found that there was a scarcity of available quantitative data. While it has been possible to obtain some data in relation to the numbers of claims that have been lodged in relation to planning permissions, it does not appear to be consistent. However, what information is available points to a general increase since at least 1998. There have been fluctuations in recent years, but these need to be set against the impact of the recession on development and the corresponding reduction in numbers of planning applications made and decided. In particular, and since 2008, these have largely either been in decline or static on a quarter by quarter, year on year basis. Simply having the data would give a clearer picture of the scale of the problem which anecdotally already appears to be significant. Reliable and accurate monitoring and information would enable some sort of quantification of the costs to the development industry and local government, caused in particular by ultimately unsuccessful judicial review claims.
9. Today's challengers are often organised (aided by social and electronic media and the resulting ability to contact, form or become part of community groups), well-advised (either by existing campaigning organisations and/or litigant-friendly lawyers) and as a result have the knowledge required to obtain public funding. This is symptomatic for development of all scales and sizes across the board, from householder development through to large scale projects.
10. Whilst we would not suggest that all challengers are by definition abusing the judicial review system, it is often used as a method of trying to frustrate development when an objector's merits-based objections submitted in response to the planning application have not resulted in it being refused. The result is many claims being lodged without legal merit and which only serve to delay approved development coming forward. Many objectors are fully aware that the cost of delay to a developer and that this can risk development ever coming forward as investors and potential tenants and purchasers may withdraw their interest and backing.

Time limits for bringing a claim

Q1: Do you agree that it is appropriate to shorten the time limit for procurement and planning cases to bring them into line with the time limits for an appeal against the same decision?

11. In practice, the current three month time limit results in a "stand still" period before development can be begun. To reduce the period would have a significant and quantifiable positive effect for development.
12. We therefore support any reduction in time limit for bringing judicial review claims of planning permissions. We would support the specific proposal to bring it into line with the 6 week time limit for bringing statutory planning challenges to for example planning appeal decisions, challenges to development consent orders for Nationally Significant Infrastructure Projects, etc.
13. The statutory appeal time limit is an absolute 6 weeks and there is therefore little or no latitude to extend the deadline. But this is balanced by the fact that no resistance to the claim can be made by a defendant on the grounds of delay, even if the claim is lodged the day before expiry of the time limit. Therefore unlike with judicial review any claimant has the benefit of the full 6 weeks, without fear of having permission refused for being slow to lodge.

14. It would seem appropriate that the same principles apply to planning permission judicial reviews if the deadline were to be limited to 6 weeks; this change would provide a certainty which currently does not exist.

Q2: Does this provide sufficient time for the parties to fulfil the requirements of the PAP? If not, how should these arrangements be adapted to cater for these types of case?

15. A 6 week deadline is considered to be sufficient to comply with the relevant pre-action protocol, not least as the process of submission and determination of a planning application includes statutory procedures requiring publicity of the application and public consultation. The larger the development, the more likely it is to be subject to rigorous statutory and locally imposed consultation requirements. Indeed, one of the results of the increased fear of judicial review is that developers generally go beyond what may be required of them as regards consultation, or they carry out consultation they are not statutorily required to do, prior to any application proposals being finalised and submitted.
16. Consequently by the time that a planning committee makes a resolution to grant permission, application proposals have been publicised and in the public domain for at least several months. If permission can only be issued once a s106 planning agreement is entered into, negotiation and completion of the agreement between an LPA and developer will take further time, again at least a number of months. Any potential challenger will therefore often have all the information necessary and be clear on any issues they have with a planning decision, well before the decision notice itself is issued.
17. Most commonly, challengers have engaged at the planning application stage and submitted objections to a proposal on the basis of its merits - it should be noted that the Court will often criticise any claimant that has not engaged at the application stage. We do not believe that a shortening of the timescale for judicial review would result in more protective claims being lodged, due to inadequate time for proper consideration of potential grounds and to negotiate and settle matters, as this ignores the reality of the planning context. In addition, there is little evidence that the Pre-Action Protocol(PAP) procedure is used as a genuine attempt to settle matters by a claimant. Indeed, we understand that it is more often used by the claimant to test the strength of its potential grounds of claim and to refine them for the purposes of submitting the substantive claim. LPAs (and developers who may choose to take part in the proceedings as interested parties), by contrast, respond as fully as possible at the PAP stage in an attempt to genuinely narrow areas of difference. We believe that the use of the PAP procedures rarely results in potential claims being resolved but is more often regarded simply as a routine part of the procedures that must be undertaken in order to bring a claim.

Q3: Do you agree that the Courts' powers to allow an extension of time to bring a claim would be sufficient to ensure that access to justice was protected?

18. See response to Q1 above.
19. We consider that the ability, if any, to extend the deadline should be in line with statutory challenges to planning appeal decisions (i.e. those brought under s288 and s289 of the Town and Country Planning Act 1990).

Q4-Q6: Not applicable to judicial review of planning permissions, in particular because the decision which gives rise to the grounds for the claim is clear and there is no dispute about when the time limit commences and expires.

Applying for permission

Q7-Q9: These do not appear to be applicable to planning permission JRs as these are challenges to LPA decisions, where no 'prior' judicial hearing has occurred.

Q10: Do you agree that where an application for permission to bring JR has been assessed as totally without merit, there should be no right to ask for an oral renewal?

20. We generally support the proposition that the procedures for considering whether permission should be granted to proceed to a full judicial review hearing presently give too many opportunities for claimants to seek to re-argue their case, once it has been determined to be unarguable. In planning cases, even where claimants may be aware that their case is weak or unlikely to ultimately succeed, our experience is that claims are regularly pursed through each available stage; the main objective of the challenge may be simply to cause delay to the development, as many well-informed objectors are aware that this may in itself be sufficient to result in an approved development proposal failing to come forward at all.
21. We agree that there should be no right to an oral hearing where a claim has been assessed as being totally without merit. However, planning challenges are rarely this *black and white* and in our experience, judges are unlikely to be willing to characterise many, if any, claims in this way.
22. We consider that it is entirely reasonable that there should be one single opportunity only to appeal a refusal of permission, which is in line with many other procedures. Whilst we agree with the proposal that cases totally lacking in merit should not have the right to an oral renewal, we still consider that there should be a right to an oral hearing within the permission process as a whole. This could be by: request of the claimant, either as part of the initial consideration of the paper claim; the High Court, as to whether to grant permission to proceed to a full hearing; or alternatively if there has been a refusal of permission on the papers, as part of the appeal against the refusal to the appeal body (and we question whether this needs to be the Court of Appeal), but again only at the request of the claimant.

Q11: N/A to our focus of response - question about other JR cases.

Q12: Are there any circumstances in which it might be appropriate to allow the claimant an oral renewal hearing, even though the case has been assessed as totally without merit?

23. No.

Q13: N/A to the focus of our response.

Fees

Q14: Do you agree with the proposal to introduce a fee for an oral renewal hearing:

24. Although it would seem reasonable to do so, we consider that if the intention is to deter claimants with weak cases from proceeding with making applications to review, this proposal is extremely unlikely to have any impact at all, particularly with the availability of Legal Services Commission funding which, once agreed in principle, would routinely cover court fees.

Q15: Do you agree that the fee should be set at the same level as the fee payable for a full hearing, consistent with the approach proposed for the Court of Appeal where a party seeks leave to appeal?

25. Yes, we agree.

Impact assessment and Equality Impacts

Q16: No response.

Additional Issues

26. In the course of carrying out research on judicial review of planning permissions, we have identified a number of other steps that could help to ease the problem of delay that judicial review causes to development:

- A particular cause of the problem is the lack of adequate court resources, both in terms of administrative and judicial capacity. There is insufficient judicial capacity, with London being particularly badly affected. We understand there is more capacity in the regional courts but the administrative resources required to deal with transferring claims to the regions (where such claims are appropriate for transfer) is limited, resulting in a delay with dealing with any applications to transfer.
- In addition there are a very limited number of judges with appropriate planning and development expertise; the general perception is that this may result in, for example, decisions on permission being granted, on the basis of a less than robust claim and understanding and examination of the issues.
- To remedy these problems it would be extremely useful for resources to be committed to enable consideration of allocation of cases to the regions where there is capacity. In addition, there could be greater use made of Queen's Counsel specialising in planning law sitting as Deputy High Court judges, called upon to deal with claims at the permission stage. In our view this would enable robust decisions to be made quickly.
- A review should be undertaken of the permission stage more generally, to ensure that it is rigorous enough to ensure that only the genuinely arguable judicial claims granted permission proceed to a full hearing and to prevent ultimately unmeritorious claims from being permitted to proceed.
- There are other opportunities for Review within the planning process, particularly when LPAs are making decisions concerning Environmental Impact Assessments. This should be reviewed to ensure that valuable time and resources are not wasted for fear of potential claims.
- A government review is needed as to whether any procedural requirements can be relaxed or converted to "good practice" so that they cease to be triggers for judicial review. Some changes could be introduced to minimise commonly made (and reviewable) mistakes.
- A review is needed of the operation of the "legal aid" system in relation to planning-related judicial review - our perception is that a lot of state money is being spent, and wasted, on proceedings that ultimately fail. Some consideration should also be given to the procedure for the award of costs too.
- There should be a reinvigoration of attempts to more formally introduce and encourage mediation in the planning process, so as to give an opportunity for issues to be resolved prior to grant of planning permission.
- Monitoring and publication of statistics is urgently needed to track the position.

For more information, please contact

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