



Alliance against road building

Briefing on taking legal action to stop damaging developments

How can I use a lawyer? What does it cost?
What steps are involved? How much time do we have?

“Using the law in anti-roads campaigning”

How to challenge a planning decision

There are 2 legal routes to challenge planning decisions. If a local planning authority has granted planning permission, the decision can be challenged in the High Court by means of a procedure known as judicial review. Of course, there have to be grounds on which a challenge may be brought. Grounds may be procedural or substantive (i.e. either to do with failures to follow proper procedures, or to do with mistakes or errors in assessing the planning application.)

If a planning permission has been granted following a successful appeal against a previous refusal of permission, or if permission is granted by the Secretary of State, then the procedure to challenge is similar to a judicial review, but is made under Section 288 of the Town and Country Planning Act. See below for the differences between the procedures.

Judicial review

Judicial review is a means by which the Courts can examine a decision of a decision making body (such as a planning authority). Any person or group who may be adversely affected by a decision may ask the Courts to examine the legality of the decision.

It is first necessary to write a “pre-action protocol” letter to the decision making body, setting out the basis of the complaint. If the decision maker doesn’t provide a satisfactory response, then an applicant can proceed with a judicial review.

It is a 2 stage process. Firstly an application is made, setting out the grounds of challenge and the evidence relied on (such as the planning documents, Officers’ reports etc). The respondent has the opportunity to set out its response to the challenge by filing its arguments and evidence with the Court. A High Court Judge will then look at both sets of papers, and either grant permission to go ahead to a full hearing, or to refuse permission to proceed. If the Judge thinks that there is an “arguable case”, then permission will be granted. If permission is refused the applicant has a second chance to apply for permission by way of an oral hearing, arguing the case as to why permission should be granted.

The second stage is a full hearing where both sides have the opportunity of making their case before a Judge. The cases are usually made by a barrister, and do not usually involve witnesses giving evidence.

A Section 288 challenge differs from judicial review in that there is no permission stage to go through. An application is made to the Court, and a full hearing takes place a number of months later.

Powers of the Court

The most usual remedy asked for by applicants is to quash the planning permission. If a decision is quashed by the Court, then the situation returns to the position pre- planning permission, as if the permission had never been granted. It is nevertheless possible for the decision maker to reconsider the planning application again, and to grant permission a second time. This can, and does happen, but sometimes the costs and delays to schemes resulting from successful judicial reviews can prove effective in stopping developments.

Costs

The costs of bringing a judicial review, and the risks of paying the other side's costs if unsuccessful can be a significant obstacle to groups bringing challenges. The professional costs (involving a solicitor and barrister) of stage 1 (application for permission) can be up to £5,000. If unsuccessful at the permission stage, the applicant may also be liable to pay the costs of the other side (usually about £1,500).

The total costs of a full hearing will depend on the complexity of the case. If it is a major scheme, involving environmental and/or traffic impact assessments, the total costs can amount to about £20,000. If unsuccessful there is the likelihood of having to pay the winner's costs, which can amount to the same again. There is always the possibility that costs may not be awarded, or that total costs may be capped, but that is quite rare, and should not be relied upon.

Funding

In principle, Legal Services Commission funding ("legal aid") is available to individuals on low income. The LSC will need a barrister's written opinion as to the strength of the case and the prospects of success. If, as is the case with road schemes, many people may benefit from the action, the LSC can ask that the community make a contribution to the costs of bringing an action (usually about £2,000).

Some law firms will work on a "no win no fee" basis, but that is not often the case in judicial review work, and some firms will work at discounted rates for community groups. Legal costs insurance may be available, although premiums can be very expensive, and legal costs cover may be provided by some insurance premiums (e.g. house, contents etc.), which are always worthwhile checking.

Setting up a group as a company limited by guarantee can provide individual members of the group with limited liability against adverse costs orders, although in such circumstances some security for costs may have to be held, and the costs of bringing the action will still need to be met.

Organising

It's essential that a campaign against major development schemes assumes from the outset that there is always the possibility of having to go to the Courts to challenge a grant of planning permission. It's vital that good records are kept of every stage of the planning process and all relevant documents are kept in good order. Equally essential is the need to

raise any possible complaints at as early a stage as possible in the planning process. The courts tend not to entertain arguments that could and should have been made during the planning process itself, so, however tempting it may be to keep an ace up your sleeve, it's not to be recommended.

DIY challenges

It's always possible for an individual or group to bring a challenge themselves, without using lawyers, but there are close parallels with DIY dentistry or surgery. It may work, but there's a high risk of it being painful, sometimes bloody, and often unsuccessful, as well as costly to put right, if it can be put right at all.

Judicial review is a specialist area, and environmental or planning judicial review is a particular specialism within that area of law. Some immigration or housing lawyers may be experienced in judicial review procedures, but will have no particular expertise or familiarity with the substantive issues of environmental and planning law. There are relatively few lawyers who work on behalf of local, community groups, who have experience in dealing with the particular issues which affect local protest groups. Given that any legal challenge will be costly and time consuming it's probably wisest to find someone who knows what they're doing, and who can work closely with the group.

Time Limits

Any judicial review has to be lodged within 3 months of the date that the decision under challenge was made. Time will start to run from the formal grant of planning permission. However, sometimes it's best to put the local authority on notice, by way of a pre-action protocol letter (see above), as soon as any "minded to grant" resolution has been made. To complicate things, the Courts have held that an applicant can be criticised for not lodging any application "promptly". To be on the safe side, it's best to be prepared to make a challenge before any decision has actually been made.

Time limits for Section 288 applications are even tighter. Any challenge under S288 has to be made within 42 days (6 weeks) of the decision. This is a strict time limit and cannot be extended.

Appeals to the Court of Appeal

If a full judicial review is unsuccessful it is possible, in principle, to take it to the Court of Appeal. Leave to appeal must be obtained, either from the High Court or from the Court of Appeal itself. Appeals tend not to be as expensive as High Court actions, largely because most of the work on the case has already been done for the High Court, and hearings tend not to last as long or to hear as much detailed evidence as in the High Court. Costs of appeals are about half the costs of bringing actions in the High Court.

Other legal tools for campaigners

The Freedom of Information Act 2000 and the Environmental Information Regulations 2004 permit individuals to request disclosure of environmental information held by public bodies, such as Government Departments and Local Authorities. There is a presumption in favour of disclosure, although there are significant exemptions to the rules, particularly when the advice

of civil servants is being sought. On the other hand, requests for the disclosure of factual material are more difficult to refuse. If possible, requests should be as specific as possible, as excessive cost (which is set at £600) is another ground for refusal. Information should be provided within 20 working days. Any refusal can be reviewed, internally in the first place, and then to the Information Commissioner, who is currently dealing with a substantial backlog of complaints.

It is also always worth considering whether any European protected species or habitats may be affected by a proposed development. Under European and UK law a number of rare species (e.g. bats, great crested newts, otters etc – see the Schedules to the 1994 Conservation Regulations and the Habitats Directive 92/43 EEC) and designated habitats (candidate Special Areas of Conservation cSACs, and Special Protection Areas SPAs) are strictly protected from disturbance or destruction. Permission can only be granted where there are no alternatives, and where the development is of overriding public interest. These are very high hurdles for a developer to overcome and sometimes major projects can be brought to a grinding halt by the presence of small, furry creatures.

Public Inquiries

There are distinct advantages to using a lawyer to prepare and present a group's case at a public inquiry. Inquiries are not as formal as court hearings, and it is possible for groups to prepare and present their own cases successfully. DIY inquiries are not so much like DIY dentistry as like DIY plumbing or car maintenance. Provided you know what you're doing it's possible to do the job properly. The main disadvantage of DIY inquiries is that you'll be up against professional lawyers acting for the Government, developers or local authorities and expert witnesses, who'll be far more familiar with the rules and procedures, and probably much more experienced when it comes to presenting evidence and cross-examination of witnesses.

The biggest disadvantage of using a lawyer to prepare and present a case at an inquiry is cost. There is no public funding (legal aid) available for public inquiries (or only in very exceptional circumstances – which means almost never). Inquiries into major developments can run for weeks (which means they also take weeks of preparation), and costs can escalate into tens of thousands of pounds. Trying to form alliances with other environmental groups, parish and town councils, as well as the great and good, can all help to share the costs on inquiries.

Costs savings can be made however, by concentrating on the weakest (or most objectionable) elements of a scheme, such as, for example, ecological or landscape impacts, and not trying to compete and challenge on all areas of a project, some of which will involve some seriously technical evidence. By focusing on the chinks in the armour, and using local knowledge and expertise, it's perfectly possible for local groups to persuade planning Inspectors to refuse to recommend major development projects.

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<http://www.earthrights.org.uk/>

February 2006

Some useful links

Organizations

Campaign for Freedom of Information

Includes a very handy guide to using the Freedom of Information Act

<http://www.cfoi.org.uk/>

Campaign for Planning Sanity

A large store of useful information to help you play the system... and win.

<http://www.planningsanity.co.uk/>

Legislation

European directives on environmental law.

Links to the full texts are on the EarthRights website, halfway down on this page:

<http://www.earthrights.org.uk/links.html>

The Conservation (Natural Habitats, &c.) Regulations 1994

This is the full text of the UK implementation of the Habitats Directive 92/43/EC:

http://www.opsi.gov.uk/si/si1994/Uksi_19942716_en_1.htm

The Environmental Information Regulations 2004

The full text is available here:

<http://www.opsi.gov.uk/si/si2004/20043391.htm>

Town & Country Planning Act 1990

Full text available here:

http://www.opsi.gov.uk/acts/acts1990/Ukpga_19900008_en_1.htm

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