Six Pump Court

CHALLENGING PLANNING PERMISSIONS –
HOW TO USE YOUR SIX WEEKS
(July 1, 2013)

The rules for challenging the grant of planning permission just got tighter. So, no matter how good your case may be, the expectation is that the challenge to the local planning authority's decision must be made within 6 weeks.

This Note is intended to help you make the best use of the short time that you now have. There is much that you can do before you even pick up the phone or email a lawyer.

Of course, there is still scope for very strong cases to be allowed to proceed after that cut off date – but why throw yourself on the mercy of the court? It is difficult enough to persuade a court that an authority has made an error, without adding a timing problem to your tasks.

The only 'good' news is that the rules on costs protection have been made clearer.

Why the change?
It used to be possible to bring all judicial review claims within 3 months. The government's agenda has meant that they wanted to restrict this. The Justice Secretary, Chris Grayling, has said that the changes were intended to prevent claims being used as a "cheap delaying tactic" in planning matters. Whatever we might say about the evidence to justify this statement, the changes were announced in April 2013. They came into effect on 1st July.

Anyone considering challenging a grant of planning permission by way of judicial review must be aware of these changes in order for a challenge to be lodged effectively. You do not have the option, unlike the applicant, of appealing to the Secretary of State (and the Planning Inspectorate).

What is the relevant date of the planning decision ?
The 6 week time period runs from the date of the Decision Notice, not the earlier committee resolution, or the later date when you find out about the decision. If there has been more than one decision, get all this information.

What if six weeks has already passed ?
You will need a very good reason to explain why the 6 week time limit should be varied - for instance, that there was a failure to notify neighbours. The Court will then decide if it will exercise its power to vary the time limit (under CPR 3.1(2)(a)), and you will need to set out why it should do this in the Claim Form. As the court guidance itself notes, this is an exceptional power and delaying whilst you comply with the pre-action protocol is unlikely on its own to be sufficient to persuade the court to allow a late claim.

Our suggested checklist
If you are considering challenging a planning decision by judicial review, complete this checklist and you are already saving valuable time :-

 Get copies of the basic documents that you need -

(1) The Decision Notice, or notices; every planning permission has a "Decision Notice", on which the local planning authority will have set out a summary of its reasons for granting the permission.
(2) The planning officer's report on the application. This will go into far more detail than the Decision Notice. If the decision was made by the planning committee, this will have been published before the committee date. If the decision was delegated to the officer, you may have to ask the authority specifically for it.
(3) A copy of the relevant local plan policies (you need the actual wording, not just the summary given by the officer in his or her report).
(4) Your letter(s) of objection.

Getting electronic copies (and scanned documents) as well as paper copies will save time later as well.
Further useful documents include: any minutes of committee meetings, copies of the planning application supporting documents (usually there will be a weblink on the Authority's website); copies of any relevant national policy (this will be available online, e.g. the National planning Policy Framework)

 Get the names and addresses of the proposed defendant –

(1) Where the claim concerns a decision by a local authority, the address should be on the decision letter/notification, and it helps to get the legal department's details as well.
(2) Where the claim concerns a decision by a government department or body, and the Treasury Solicitor has already been involved in the case a copy should also be sent, quoting the Treasury Solicitor's reference, to: The Treasury Solicitor, One Kemble Street, London WC2B 4TS.
(3) In all other circumstances, the letter should be sent to the address on the letter notifying the decision.

 Decide who is making the claim –

Every claim needs a named claimant, with their title, first and last name and address. Also decide what is going to be the address for any reply to be sent to, and where should any court documents be served.

 Identify who the interested parties to the decision are -

The applicant for the permission is an obvious candidate, as will any landowner. You will need to set out the details of any interested parties in the Claim Form and, if you write a pre-action letter they must be sent a copy of this letter.

 Draft a brief summary of the facts and why you say the decision is wrong.

 What do you want the local planning authority to do ?

This may be obvious (e.g. revoke the decision) but it needs an answer. The High Court is restricted in the orders that it can make if you succeed – quashing the decision, making a declaration, granting an injunction. If a building or, say, woodland, is under threat – do you want an interim remedy to stop its loss ?

 Is there any further information you need from the Council -

You can ask them for this, and you can include a request for a fuller explanation of the reasons for the decision that is being challenged.

The pre-action letter

The information in this checklist above is the same information as would be included in the letter before action to the local planning authority. But there is a timing problem created by these new rules – the Court's advice is still that the parties should attempt to comply with the Pre-Action Protocol.

As anyone who has read the court's guidance on pre-action letters knows, 14 days is normally seen as a reasonable time to allow for a reply in most circumstances. This clearly will only rarely be available where there is only 6 weeks overall to make a claim. So, do the best you can in the circumstances. But note that **writing to the local authority does not stop the clock running.**

What happens in judicial review?

If you want to see what a judicial review Claim Form looks like, this is available on the internet, at the Ministry of Justice website. Or just google/search for "Form N461". Note that claims can now be filed in the Administrative Court Offices in London, Birmingham, Manchester, Leeds or Cardiff.

It is worth bearing in mind that there is one main hurdle to clear before your case will be heard – the court must give you permission to proceed. This is normally done by a judge reading your application, as well as any reply from the defendant

authority and interested parties – which is why you need to get the details of your claim clear at the beginning.

A further change has been brought it, that allows the judge to find that your application for judicial review is "entirely without merit" – and if so, this will prevent you from seeking an oral hearing for permission for judicial review. Again, your claim must be properly framed from the beginning.

You will also (soon) have to pay a further £215 court fee for an oral hearing to renew claims that have been previously refused on the papers (previously the fee was £60). It is only if permission is granted at the oral permission hearing that the fee for the substantive judicial review hearing will be waived.

What could be the Grounds of judicial review?

This is likely to be an area in which specialist advice will be needed. Remember that the Court is only reviewing the legality of the decision, and has no power (unlike a planning inspector) to make the decision itself. If you win in court, the matter will be returned to the local authority to decide, in the light of the court's decision.

As a starting point, there are three basic rules:

(1) The Local Planning Authority must have complied with the law. If an authority has exceeded the powers it has been given, or hasn't complied with its legal duty to act in a particular way, or ignored the development plan, policies or guidance, then it may have acted unlawfully.
(2) Authorities must act fairly. This means that they must not be, or appear to be, biased. They must act consistently.
(3) Finally, authorities must not act illogically or irrationally.

Funding a claim – protection yourself from a costs award

It is inevitable that you must consider funding issues. The general rule is that the losing party has to pay its own costs and the costs of the winning side.

However, you can protect yourself from the worst consequences of losing. You will see on the new Claim Form (ref N461) that there is a section for an "Aarhus Convention claim". If you ask for this to apply, the maximum risk of exposure to the other side's costs is limited for individuals to a cap of £5,000 and for an organisation to a cap of £10,000. Your side will normally be restricted to recovering a maximum of £35,000 in costs from the defendant.

You need to explain why your claim is an Aarhus Convention claim in the Claim Form – essentially that it relates to the protection of the environment. For the purposes of the CPR, a claim is considered to be an Aarhus Convention claim if it is "a claim for judicial review of a decision, act or omission all or part of which is subject to the provisions of the Aarhus Convention." The Aarhus Convention covers all aspects of environmental justice.

In summary, it is clear that these changes have been designed to make the process of bringing an application for judicial review more difficult. Nevertheless, assuming that you consider your position immediately after you are informed of a grant of planning permission and seek (and act on) legal advice promptly, it is still possible to challenge decisions successfully though judicial review.

WILLIAM UPTON
NICHOLAS OSTROWSKI