IT'S THE LAW: Planning & Judicial Review

When is it safe for the corks to fly?

Keep the champagne on ice

Securing planning permission is a significant stage in any development project.

The lead up is a long and expensive process, requiring you to incur significant up front costs, from architects' bills through to application fees levied by the planning authority. So, when you see the planning committee vote to grant planning, is it too early to open the bubbly? In a word, YES. The process isn't over yet.

The planning committee only resolve to grant planning. Planning isn't actually granted until the printed and dated planning permission is issued. That can be weeks or months after the planning committee have met. Especially if a section 106 (Planning) Agreement needs to be negotiated.

But then, you get hold of the planning permission, ink still slightly wet. So, is it still too early to open the bubbly? In a word, YES. As many developers have found to their peril, the granting of planning permission is not always the 'green light' they think it is.

Would you like some cheese to go with that Champagne?

The case of **R (oao Oruna Ingredients Ltd) v Hertfordshire Council 2018** is an example of a development being delayed following a judicial review of the local planning authority's decision in relation to planning. The case related to the approval of a reserved matters application for the layout of a housing development located opposite a cheese factory.

The Court determined that the local authority had committed an error in law by failing to take a material consideration into account in approving the reserved matter application. The local authority had failed to properly satisfy itself that acceptable mitigation was possible. The Court quashed the reserved matters approval and remitted the decision back to the Council for determination.

This case points to a need for local authorities to consider and assess the relevance of the vast amount of information they receive in relation to planning applications.

It is also a reminder that planning decisions, being decisions of a public authority, are susceptible to challenge and can be quashed after they have been granted.

Would you like some pickle to go with that cheese?

Judicial review is a form of legal proceeding where the Court reviews the lawfulness of a decision, action or inaction of a public authority. It may provide a remedy if the authority is found to have acted either illegally, irrationally or with some procedural impropriety.

Public authorities include local planning authorities, the Secretary of State and Planning Inspectors - all of whom might have been involved in the grant of planning.

Where the party bringing the claim shows that, in issuing the planning permission, the relevant public authority acted unlawfully, the Court may, amongst other remedies, issue a 'quashing order'. Meaning that the hard-fought for planning permission has no legal effect.

If you've already started your development, you'll be in a bit of a pickle.

You may have to demolish what you've already built and reinstate the land to how it was before you started. That's going to be costly. Particularly if you've only just bought the land, valuing it on the basis that you could carry out your development.

Who can come to the party?

The Court's permission is required for a claim in judicial review. If, on the initial reading of the claim, the Court considers the case justifies a full consideration of the substantive merits then the claim will proceed to a substantive hearing before a specialist planning judge.

Not everyone can challenge a public authority's decision. The Court must not allow an application for judicial review unless it considers that the claimant has a sufficient interest, or 'standing', in the matter. The Courts generally take a liberal approach to standing and various categories of national and local groups, including national lobby groups (such as Greenpeace), have in the past been allowed to bring claims.

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The case is against the public authority, not the person who applied for planning. But developers and landowners who will benefit from the planning permission can apply to become interested parties to judicial review proceedings, giving them the right to file evidence and be heard in the proceedings.

Tick tock

Claims relating to planning permissions must be issued in the Planning Court and must be brought no later than six weeks after the grounds to make the claim first arises. That's not when the planning application was made. It's not when the planning committee met. The six week count down doesn't start until the written planning permission is printed and dated.

So, you've been to the planning committee, you've got your planning permission and you've waited for six weeks with no one launching proceedings. Can you now, at last, open the bubbly? Yes. And No.

In **R (oao Thornton Hall Hotel Ltd) and another v Thornton Holdings Limited 2019**, the Court of Appeal agreed to extend the time allowed for a challenge to be brought some five and a half years after a claim first arose! The circumstances of this case were highly unusual. The local authority accepted that it was at fault, having issued a decision notice which deviated from the planning committee's resolution. That was to grant temporary consent for the erection of marquees for hosting weddings in the grounds of a country house. But, the issued planning consent did not include a condition limiting the consent to 5 years or, in fact, any planning conditions at all. The local authority accepted that this was a manifest error and did not even contest the claim for judicial review but, in fact, supported it.

The Court of Appeal upheld the High Court's decision to quash the planning consent but, in so doing, stated that the circumstances of the case were unique and that the Court will insist on the promptness of bringing challenges in all but the most exceptional of circumstances.

So, whilst a future claim is not impossible, most people are willing to take the view that corks can fly if a challenge hasn't been brought in the six week period.

What you goin' to do about it?

If you are looking to exchange contracts to buy a piece of land, subject to getting planning, you generally have three options about what to do in relation to the risk of judicial review.

You could just **ignore it**. That's not unheard of. In practice, to be honest, JR proceedings are very rare. But it's still a gamble. And if you are unlucky, you'll likely have some very sticky meetings at work trying to explain your rationale. That, or your diary will become very clear very quickly.

The most common approach is to **make the contract conditional**, not just on securing planning, but also on the six week period expiring without a claim being made (or, if a claim is made, then it being defeated). It's usually better to err on the side of caution and add a few days on top of the six week period. Not because it's likely that a challenge will be allowed after the six weeks - but because there is often a time lag between the date that the proceedings are launched and the date that you, as the buyer, become aware of them. Remember, the proceedings are not against you, they are against the planners. So you'll be one step removed from the action. That does mean that unless you are served with a copy of the claim form, you may not be aware of or have the opportunity to take part in the proceedings. Make sure your contract for sale requires the seller to provide you with a copy of any applications for judicial review and to keep you updated on progress of any claim.

The third option is to **insure**. Many financial losses can be covered by putting a judicial review indemnity policy in place. A suitable insurance policy can enable the site acquisition to complete and work to start as soon as planning permission is issued without having to wait.

The extent of indemnity cover will vary in each policy, but most indemnify against the loss in the market value (the difference between the market value of the property with planning permission and without), professional and legal fees you may have incurred, the cost of removing a partially constructed development and costs incurred (or committed to) which are rendered abortive because the planning is quashed.

Insurance can play an important role in mitigating the consequences of a successful judicial review challenge. However, you need to carefully check the policy to ensure that it covers the full range of risks that you might encounter if the consent is quashed. Remember to check the small print. Insurance policies come with a number of strict conditions, such as not revealing the existence of the policy to third parties nor commencing the defending of a judicial review without the insurer's prior approval. Insurance won't suit every scheme and won't cure the fundamental problem of not being able deliver the scheme as intended – but it might be sufficient to enable you to take the gamble.

The fourth way

Of course, an additional course of action is to try to reduce the risk of judicial review in the first place.

- Get to know any objectors. Keep abreast of social media and online campaigns. Log on to Facebook. Understand why opposers object to your scheme. Changing your plans to address genuine concerns can help to mitigate risk.
- Take professional advice before and during the planning process to ensure that the public authority's decision-making process is lawful throughout.

Find out more

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