

# JUDICIAL REVIEW IN THE NEW PLANNING SYSTEM

## What is Judicial Review?

*“Judicial control of administrative action”* (Lord Diplock). Judicial review is a process by which the courts review the lawfulness of a decision made (or sometimes lack of a decision made) or action taken (or sometimes failure to act) by a public body. It is a mechanism by which a judge considers whether a public body has acted in accordance with its legal obligations and if not, can declare a decision taken by it invalid.

*And what it is not...*

It is **not** a third party appeal. It is not the role of the Court to second guess the decision maker, but rather to ensure that this decision making power is exercised lawfully. The Court recognises the decision maker’s authority and discretion, and it will not intervene unless the decision or judgement was, for example, “irrational”.

## Why is it important to be aware of Judicial Review in the new planning system?

- The planning system in Northern Ireland is litigious. The number of JRs taken remains relatively small in percentage terms to the overall number of planning applications, but they are very expensive in terms of costs and staff resources.
- In the new planning system unsound decisions that are brought before the courts could be hugely expensive for a Council. Costs for JRs can range from a few thousand pounds to hundreds of thousands of pounds. In addition to potential costs associated with JRs, there will be the risk of costs associated with planning appeals in the new system. The 2011 Planning Act will empower the Planning Appeals Commission (PAC) to award costs in planning appeals where one party has put another party to unnecessary expense because of unreasonable behaviour; for example, where the planning authority is unable to produce any credible evidence to substantiate its reasons for refusing permission.
- The increasing complexity of the planning system in terms of process and legislative requirements (for example the emergence of EU Environmental Directives) makes it fertile ground for legal challenge. Commentators have

noted the low bar set by the Court in this jurisdiction for the granting of leave for JR, which further increases its attraction.

- Those who specialise in taking JRs in this jurisdiction may be hoping that new Council planning authorities will be vulnerable to legal challenge in the first few years because of inexperience. The role of your professional planners and your legal representatives will be important in helping to ensure that your planning decisions are robust and legally sound.

## **Who can bring a Judicial Review?**

Anyone with 'standing' (locus standi) – sufficient interest/connection to the subject matter of the claim.

The Usual Suspects...

1. Major commercial interests where even the temporary delay of a competing development can be worth millions of pounds. For example: out of town retail proposals or the proposed expansion of a regional airport.
2. Special interest groups or groups of local residents who will seek JR in lieu of a third party appeal. The Costs Protection (Aarhus Convention) Regulations (NI) 2013 now makes it easier and more attractive for such groups to challenge decisions in environmental matters by way of JR. The regulations provide for protected costs orders in these environmental challenges limiting the costs recoverable from an applicant to £5,000 if the applicant is an individual, and to £10,000 in all other cases.

## **What are the grounds for Judicial Review?**

- Illegality
- Irrationality (Unreasonableness)
- Procedural impropriety/unfairness

### Illegality

Public bodies must understand and apply the law that regulates their decisions and actions. For example, it is likely to be unlawful if a public body refuses to do something because of the mistaken belief that the law does not allow it to do so; or

if the public body takes into account irrelevant factors when making a decision or fails to take into account relevant factors.

When a decision maker unlawfully goes beyond their power in making a decision it is known as “Ultra Vires”.

### Irrationality

It is unlawful for a public body to make a decision which is so unreasonable as to be perverse or irrational (known as “Wednesbury unreasonableness”). This is a difficult argument to win in court as the threshold for irrationality is extremely high. Lord Green stated in the case of Wednesbury that for a decision to be irrational it must be “a decision on a competent matter ...so unreasonable that no reasonable authority could ever have come to it.” Only then will the courts intervene.

Unlike illegality and procedural impropriety, the courts under this head look at the merits of the decision rather than at the procedure by which it was arrived at or the legal basis on which it was founded. The question to ask is whether the decision “makes sense”.

### Procedural impropriety / Unfairness

Public bodies should not act so unfairly as to amount to an abuse of power. This means that if there are clear procedures a public body is required to follow, it must do so.

Similarly, public bodies must not breach the rules of “natural justice”. For example a public body must act impartially and be seen to do so. There must be a “fair hearing” before a decision is made. Fairness also demands that in most cases the public body gives reasons for its decisions.

### **What is the procedure for Judicial Review?**

- Pre-action protocol letter (or “letter before action”)
- Application for permission (Order 53). An application for leave must be made promptly and in any event within 3 months of decision unless the court considers there is good reason to extend the period.
- Affidavits

- Full judicial review hearing
- Decision
- Appeal

### **What are the potential remedies in Judicial Review?**

If an application for judicial review is successful the court has four potential orders it can grant to the claimant:

- Quashing orders – the original decision is declared invalid, it is struck down and the public body has to take the decision again;
- Prohibiting orders - the public body is forbidden from doing something unlawful in the future;
- Mandatory orders – the public body is ordered to do something specific which it has a duty to do;
- A declaration – for example on a way to interpret the law in the future or a declaration that legislative provision is incompatible with the Human Rights Act.

### **Conclusions**

***“Trust the Captain, trust the crew” .... But don’t be afraid to take decisions!***

Trust the advice of your Chief Planner and his/her staff and use them for protection. They have experience in the planning process, the application of policy and the weighing and balancing of material considerations. Your legal advisor(s) also has an important role to play.

But remember, as elected members **you are the rightful decision makers**. You are free, indeed obligated, to make planning decisions, provided those decisions are taken *within the bounds of administrative law*. You are entitled to depart from your planning officer’s conclusions and to form your own planning judgement - each case is unique and is treated on its merits.