

Judicial Review & Planning



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How can planning be overturned?

The six week wait

Can you insure?

Who shot JR?

No one – it's alive and kicking

You've applied for planning; you've seen the councillors at the planning committee approve your application; you've collected your planning permission from the council offices.

Is it too early to open the champagne?

In a word, YES.

Anyone who thinks the battle for planning is won when they get their permission is, potentially, in for a nasty surprise - in the shape of Judicial Review.

Start the clock

A Judicial Review claim is, essentially, a challenge made against a decision that has been taken by a public body or a body which exercises a public function. In the case in hand it's a challenge against the decision of the planning authority to grant planning permission.

The challenge is made via the Courts. They examine the process by which the decision maker has reached its decision in order to ascertain whether that decision was properly made. It is not an appeal against the decision; it is a claim that the proper procedures have not been followed.

A Judicial Review claim can be brought up to six weeks from the date that the grounds for the claim first arose. In the case of planning, that's six weeks from the date on the permission not six weeks from the committee meeting. Although the committee resolve to grant planning, planning isn't actually granted by the planning authority until the printed planning permission is issued. That is often weeks, if not months, after the planning committee met – particularly if a s106 (Planning) Agreement is being negotiated.

Full stop

When a land owner or prospective buyer of land is seeking to develop it, they will usually apply for planning permission for the proposed development.

The decision of the local planning authority (or Secretary of State) to grant planning permission is a decision that could be the subject of a Judicial Review challenge. If a Judicial Review claimant was successful, then the planning

permission could be quashed. This would of course be a significant problem for the land owner/prospective buyer. The development could not proceed. Worse still, if the development had been started, the landowner might need to take down what had already been built.

A third way?

The most common solution for a prospective buyer is to enter into a conditional contract. The contract should not only be conditional upon grant of satisfactory planning permission, but also upon that planning permission surviving unchallenged for six weeks. Sometimes the contract will provide that if a challenge is made in that six week period the prospective buyer must wait until the Judicial Review proceedings have run their course. If the Judicial Review quashes the planning permission the contract falls away, if the planning is upheld, the buyer proceeds.

However, often neither the seller nor the buyer will want to wait until the six week period has expired. The seller, in particular, doesn't want to wait around for its money. Once it's completed the sale, it doesn't care whether the planning survives or not.

It would be fair to say that JR proceedings are quite rare – so even buyers may be willing to take the risk.

But there is a 'third way' – which is for the buyer to proceed to complete but take out Judicial Review insurance. This type of insurance policy seeks to cover the insured party (i.e. the buyer) against the risk of a Judicial Review claim being made.

Protect and survive

Generally, Judicial Review insurance policies provide cover for the loss in market value in a property as a result of a planning permission being quashed due to a successful Judicial Review claim. Such policies may also cover:-

- wasted building costs
- architect's and surveyor's fees
- the costs of removing a partially completed development

legal costs that a party might incur in participating in a defence to a Judicial Review claim (i.e. in trying to make sure

that the planning permission is not quashed)

sums which may need to be paid as damages or compensation

As with any insurance policy, the specific cover being offered and the terms and conditions of the policy need to be checked very carefully to ascertain whether or not they are suitable and acceptable in all the circumstances.

Judicial Review insurance isn't a solution to all the buyer's problems. They will still end up with a site they can't develop in the way they want to and a scheme they can't deliver. But at least it eases the pain by compensating them financially.

Health Warning

As with all insurance policies, JR insurance comes with small print and you need to be careful that you read and understand it. Policies will usually come with a number of strict conditions that must be complied with. These will include obligations to tell the insurer immediately you become aware of a potential claim and a requirement to keep the existence of the policy secret from third parties. Breach those restrictions and you are likely to find you are no longer covered.

If you only remember five things, remember these five things:

1. The JR clock starts ticking from the day the written planning permission is issued
2. The JR clock generally ticks for six weeks
3. If you are a buyer, consider making the contract conditional not just on planning – but on that planning surviving unchallenged for six weeks
4. Insurance may be an option – but it won't solve all of your problems
5. Insurance policies will come with a number of conditions. If these are breached, the policy may be void

An almost completely irrelevant fact:

83,000,000 American viewers tuned in to find out who shot JR when the 'Who Done It?' episode of Dallas was first broadcast on 21 November 1980.

...little bits of law

This is one in a series of leaflets published by Lewis Silkin LLP, providing information on a range of legal issues that face our developer clients. Other topics discussed range from boundaries to wildlife.

Professional advice should be obtained before applying the information in this client guide to particular circumstances.

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