



JUDICIAL REVIEWS

(Scotland, January 2020)

If you are thinking of going to court to challenge a planning decision in Scotland, using the process called 'Judicial Review' we hope you find this information sheet useful. It outlines some of the things we think you should know before you make your decision.



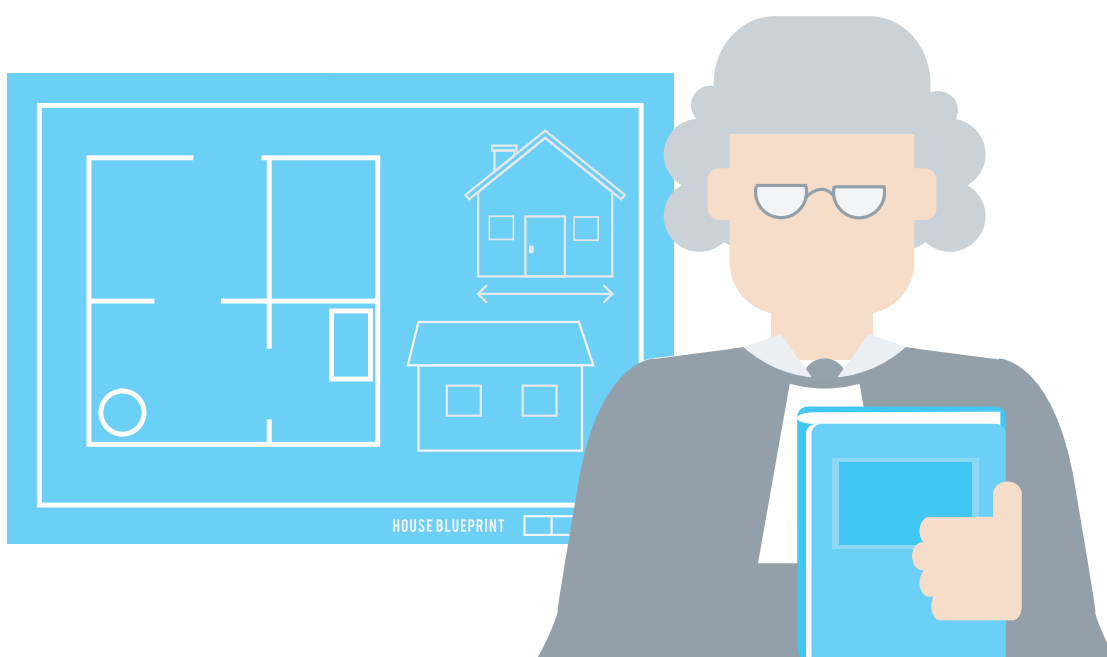
Currently there is no option for communities to appeal a decision once a planning application has been granted (see our [Equal Right of Appeal campaign](#)). If you are unhappy with a planning decision, unfortunately, your only real option is to consider going to court. **This should perhaps come with a health warning as it can be extremely stressful, time consuming and expensive. You will also have to act quickly as there are time limits.**

What is Judicial Review?

Judicial Review allows you to ask a judge to review the legality of what a public body (such as a local authority) has or has not done. It is a legal procedure for challenging the legality of decisions.

Things you should know about a Judicial Review:

- It is a last resort to be used only when all else has failed (when there is no other right of appeal).
- It can only be used where you believe that the public body has acted unlawfully.
- It is not concerned with the merits of a decision (i.e. with whether or not there was a bad planning decision), unless the decision is fundamentally irrational. (See pages 3-4 of this briefing).
- In most Judicial Review proceedings, the court will focus on the lawfulness of the process of decision taking (i.e. how the decision was made) rather than the actual decision (i.e. what was decided). There are some exceptions to this, however.
- It involves significant financial risks - seek expert legal advice before you start.



Grounds for Judicial Review

Public authorities must act in accordance with the law. When they act and make decisions, public authorities are either (a) carrying out a legal duty (something that they *must* do in certain circumstances); or (b) exercising a power (something that they *may* do in certain circumstances).

If a public authority has a duty to do something then it must act consistently with that duty. If it does not, its failure to act will be unlawful.

If a public authority has a power to do something, then it has a choice whether or not to do it. However, there are likely to be legal constraints on how that power can be exercised.

For example, a public authority will usually be required to take account of all relevant matters, disregard irrelevant ones and act fairly (especially towards anyone who will be affected by their decision). In addition, the authority must follow a lawful procedure in deciding whether and how to exercise its power – such procedures are commonly set out in legislation or policy documents. Failure to do any of these things could give rise to a Judicial Review claim.

The arguments put forward by someone raising a Judicial Review are referred to as the ‘grounds’ for the judicial review. Some of the **most common grounds** for judicial review in planning cases are set out below. There is often overlap between them, depending on the factual context and the decision being challenged.

- **Misunderstanding the law** - A public authority must act according to the law. Sometimes they misunderstand what the law requires of them.
- **Acting beyond their powers** - Public authorities are only able to act within the limit of their powers. Those powers are often set down in legislation.
- **Limiting their discretion** - Where a public authority is given a general discretion on how to act in certain circumstances, it must not limit that discretion by, for example, agreeing to act in accordance with the decision of another public authority.
- **Exercising a power for the wrong purpose** - Where an authority is given a particular power it will usually be given for a particular purpose. Sometimes that purpose is explicit and sometimes it is implicit. In either case the authority is not allowed to exercise a power for any other purpose.
- **Taking the wrong factors into account** - Public authorities often have to make complicated decisions balancing a number of competing factors. When they do so they must take into account all of the factors that are legally relevant to the decision and must not take into account any other factors (i.e. legally irrelevant factors). Sometimes the legislation will explicitly say which factors are relevant or not. In other cases it will be a matter for the decision-maker to exercise their judgement as to what is relevant.

- **Acting contrary to a European Law requirement** - It is unlawful for any public authority to act in a way that is contrary to a European Law requirement. Environmental law in this country is largely driven by European law and there will often be a European law angle to an environmental case. It may also be relevant to some extent during any transitional arrangements.
- **Acting contrary to a Human Rights Act requirement** - It is unlawful for any public authority to act in a way that is in breach of a person's human rights as set out in the Human Rights Act 1998.
- **Irrationality** - Although Judicial Review is not about the 'merits' of a decision, the courts may reach a view that a decision is so unreasonable or irrational that no reasonable authority could have reached that decision, having regard to all the facts. In that case the Court can declare the decision unlawful. It is very difficult to succeed on this ground – the threshold is high.
- **Fairness** - Public authorities must act 'fairly' in accordance with 'natural justice'. For example a decision must not be affected by actual or apparent 'bias', and people who will be affected by a decision must be given a 'fair hearing'. Importantly, that does not necessarily mean that they have the right to speak in person to the decision-maker (for example at a public hearing). It may be sufficient that they were given the opportunity to put in a written statement about the decision.
- **Inadequate consultation** - In many cases public consultation is required. Even if not required by law, where a consultation is carried out it must be carried out fairly. That means that it must be carried out at a stage where the results may make a difference to the outcome. Consultees must be given sufficient information to allow them to respond meaningfully to the proposals and public bodies must ensure that all consultation responses are considered properly.

Who can you challenge?

Judicial Review proceedings can only be used to challenge public authorities. In planning matters in Scotland, these include:

- Government ministers;
- Local authorities (councils);
- The Scottish Environmental Protection Agency;
- Other regulators;

What can you challenge?

Judicial Reviews can be used to challenge unlawful decisions, acts and failures to act by a public authority. Sometimes these will be easily identifiable, for example a grant of planning permission or a waste management permit. In other cases the decision may be less easy to identify, for example the existence of a policy or a decision in a letter to you stating that the authority will or will not do something.

Importantly, you can challenge both what the authority has done and how they have done it i.e. the process by which they reached a decision or when they have acted in a particular way.

Who can bring the challenge?

The Court will only allow a 'person' who has 'standing' to bring proceedings.

A 'person' can include an individual, a group or a company or other organisation. Whether they have 'standing' is decided on the basis of whether that person or organisation has a 'sufficient interest' in the matter. Normally, in environmental cases, that is not a problem. However, a solicitor can advise you on whether or not you are likely to have standing and, if not, will try to help you to find someone who does.



Strengths of Judicial Review

Judicial Review is the only way of forcing a public authority to recognise it has acted unlawfully and to act lawfully. Done properly it provides a very powerful mechanism to force a public authority to act within the law. If you 'win' a Judicial Review, then it will often force a public authority to act lawfully in the future and may clarify a point of law for other public authorities too.

Weaknesses of Judicial Review

Judicial Review is only concerned with the question of whether a public authority has acted lawfully and not with the question of whether they have made a good decision. It is perfectly possible for a public authority to lawfully make a very bad decision. One of the particular problems with judicial review is the potential costs exposure if you lose. Another problem is that because judicial review can take a long time, the environmental harm that you are trying to prevent might have already occurred by the time that you get a judgment in your favour.



Time & cost

Time Limits

Act promptly! The limit for starting proceedings (i.e. lodging your detailed papers with the Court) is three months from the date of the relevant decision.

You should always act very promptly. That is particularly the case in relation to planning decisions where a developer may start spending money on a development as soon as it gets planning permission.

As soon as you are aware of a decision or act that may be subject to judicial review challenge, you should take urgent legal advice. Often you will have advance notice that a decision is going to be made. In those circumstances it is a very good idea to speak to a lawyer before the decision is actually taken.

Judicial Reviews can take several years and costs can rise to £50 – 60,000 or more. The general rule in litigation in Scotland is that the loser pays the winner's legal expenses. This means that, if your Judicial Review is unsuccessful, you will have to pay your own legal costs plus your opponent's legal costs (possibly in addition to the costs of a third party intervener – e.g. a developer).



Protective Expenses Orders (Cost Caps)

To overcome costs groups or individuals can apply for a **Protective Expenses Order (PEO)** and if the Court considers the cost 'prohibitively expensive' the PEO may be granted. There is no certainty that it would be granted. Some info on Brodies website: <https://brodies.com/blog/public-law/protective-expenses-orders-in-scotland/>

PEO's can be expensive to apply for (around £15,000), there is no guarantee you will get one if you apply, and if you do get one – they only protect you against uncapped liability to your opponent if you lose your case – they do not cover your own legal expenses or other litigation expenses.

It is also very difficult/impossible to get legal aid in such cases because of the legal aid rules - <http://www.scotlink.org/wp/files/documents/Scottish-Environment-Link-Legal-Aid-Review-response-May-2017.pdf>



WARNING!!!

Judicial Review is a complex and highly specialised legal process. It is not designed to make it easy for a non-lawyer to act on their own. If you lose, you will have to pay the legal costs of the other parties. Your first step should normally be to contact a lawyer and take legal advice (list of contacts below).

Legal representation

You will need a solicitor and an advocate. They are the Senior Council and are more expensive, but they have more experience which could be useful. Ideally, you might seek to gain pro-bono public-spirited support from semi/ retired members of the legal profession with particular experience in planning, environment legislation etc. Suggestions to find a solicitor – [Law Society website](#)

While the support of lawyers and advocates is essential, you will on occasions have to work around their ‘professional’ commitments. Enlisting retired individuals from the legal profession helps to avoid this and encourages the spirit of active citizenship.

What happens and when?

- 1** **You contact a solicitor** - You get in touch with a solicitor to discuss your case.
- 2** **Inform the public authority about your complaint** - Your solicitor can help you to set out your complaint in writing to the public authority concerned.
- 3** **Your solicitor hires an advocate for your case** - (An advocate is a special court lawyer) Your solicitor will ‘instruct’ an advocate to act on your behalf in relation to the Judicial Review. You will need an advocate to present your Judicial Review case in court.
- 4** **Your advocate lodges a petition for Judicial Review** - Your advocate will then lodge your ‘petition’ for Judicial Review. This is your written application to the court which explains why the court should consider your case.
- 5** **Permission stage** - Before the full hearing for your case, you have to ask the Court for ‘permission’ to bring your Judicial Review action.
- 6** To be granted permission, you have to be able to show that you have ‘sufficient interest’ in the subject matter and that your case has a real prospect of success. This is not usually a high bar and your solicitor can advise you about this.
- 7** If you are refused permission, you can appeal the refusal. If you are granted permission, your case will then proceed to the hearing stage.
- 8** **Hearing stage** - The hearing is where your advocate presents your case in court. The other side’s advocate will also have an opportunity to respond to your advocate’s arguments and will present the other side’s case. The hearing will take place in the Court of Session in Edinburgh.
- 9** **The judgement** - After the hearing (often several months afterwards), the court will issue a written judgement. The written judgement will explain the judge’s decision on your case.
- 10** **Appeal** - You may appeal, or the other side may appeal the judgement. Your solicitor will be able to advise you on whether this would be worthwhile.

What happens if you win?

It is a matter for the judge's discretion whether or not to order the public authority to do anything differently. This will depend on many factors.

Sometimes you might 'win' your case but be told by the judge that they are not going to order the public authority to do anything different. In other cases, the judge might order the public authority to do something (e.g. to go away and re-take the decision) or not to do something. Sometimes the judge will make a formal 'declaration' as to what the law means.

Because judicial review is often concerned with process rather than substance, there is a risk that a public authority will go away and take a decision again following the correct process. In such cases the authority may reach exactly the same outcome as the one that you objected to originally.



What happens if you lose?

The most important feature of losing is the "loser pays" principle, which means you must pay the costs of the other side.

However, protective limits on your liability to the other side if you lost can now be put in place for environmental judicial reviews in Scotland. This is called a 'Protective Expenses Order' (PEO).

You have to apply to the court at the start of your case for a protective expenses order. Take legal advice on whether your case would be eligible for a protective expenses order.

If you are awarded a PEO then the following default caps apply to the respondent's expenses if you lose:

- A cap on your liability - you could be liable to contribute to the other side's costs up to a maximum limit of £5,000;
- A 'cross-cap' on your opponent's liability to you – this limits the other side's liability to pay your costs (if you win) to a maximum of £30,000.

These limits can be increased or decreased when you apply for a PEO. They do not change if your opponent appeals the first judgement, which means that even though your legal expenses increase on appeal – you can still only recover up to £30,000 from the other side if you are successful (or any other level of cap which has been set by the court).

Your solicitor should advise you about all of these costs issues when you first talk to them.

Remember, if you lose you can still appeal (with permission). However, there is likely to be a further financial risk involved in embarking on another round of litigation.



Campaigning & fundraising

As it is hard for individuals to raise the money needed, it is better to act as a group. **Set up a campaign website and Facebook page** as soon as possible and **establish a crowd fund** such as www.crowdfunder.co.uk in conjunction with an internet based petition site, such as 38 Degrees, as a platform for building support. Note, almost all crowd funders are commercial enterprises and take a commission on the total raised. There is an independent Scottish non-profit organisation - Earth Ways which offers a free crowd fund platform with full Paypal facilities: <https://earth-ways.com/>

Share it as widely as you can. We are happy to pass these around our network of supporters.

Use your local media and try to get an investigative journalist interested. The mainstream media can be ok but you might get a more community perspective from the independent media like [The Ferret](#) and [Commonspace](#).

You could approach your local and [national](#) elected representatives (find local Councillors on your Council website) and try to persuade relevant government ministers to support your case. Enlist the support of your [community council](#), local residents' associations or other campaign groups.



What is the reality of taking a judicial review?

1 Remember Judicial Reviews in most cases can only look at the process NOT the substance (or quality) of the decision i.e. you usually need to find a defect in the process to take the case, you can't say "the decision is incorrect".

2 One exception to this rule is IF the decision can be shown to be something called "Wednesbury unreasonable". This refers to this case: *Associated Provincial Picture Houses, Limited v. Wednesbury Corporation* [1948] 1 KB 223 - <http://www.bailii.org/ew/cases/EWCA/Civ/1947/1.html>

Essentially in this case the court said that it can interfere with the substance of a public authority's decision where the decision-maker has made a decision "so unreasonable that no reasonable authority could ever have come to it". This is a very high test to meet.

Many people assume that you can challenge a bad decision in the Courts. This planning law interpretation means that is very rarely true.

3 It can be very difficult to get a Protective Expenses Order (PEO) and the indications are that it is getting harder both in Scotland and England. See what happened to the John Muir Trust (JMT), (see [PEO experience of John Muir Trust at Stonelairg case as appearing in UKELA ejournal](#)).

4 Even if a PEO is obtained, your own costs are likely to be much higher than you anticipate, even if the legal team are providing their services on a reduced fee basis. Court costs are significant. Lawyers might under-estimate their preparation time and days in court can be extended. Some powerful opponents, e.g multi-national companies might try and make the case more costly so that it becomes too expensive for you to proceed.



5 You might win in the [Outer House](#) but your opponents may decide to appeal in the Inner House (court of appeal). They can also have another go in the Supreme Court too. All this adds to costs.

6 **A very small percentage of cases taken to protect the environment are successful.** Leading law firm Brodies did a [review](#) which showed that the overall success rate is very low and only 6 planning decisions have been quashed in 5 years. Their key findings:

- Although planning judicial reviews have increased, the peak of 11 decided in 2015 is miniscule compared to the number of planning decisions being made throughout Scotland.
- The increase is probably a consequence of more planning decisions on wind projects.
- The overall success rate is very low – and has dropped significantly, from 27% to 17%.
- Only 6 planning decisions were quashed by the courts in the last 5 years.
- Challenges by individuals/ groups rose from 25% of the total to 41%, possibly due to more relaxed rules on who could take a case (standing), but the success rate for individuals/ groups remains very low (6%).

7 **If you lose your court case, you do not have an automatic right of appeal. You must first get the court's permission – or 'leave' – to appeal.** Judges in the UK Supreme Court refused the RSPB leave to appeal: <https://www.supremecourt.uk/news/permission-to-appeal-decisions-07-november-2017.html>

You will see from this that we wouldn't necessarily encourage people, in most circumstances, to take court action to challenge a planning decision. We realise this might sound very negative but perhaps the unvarnished truth is helpful for you to know exactly what you are dealing with, before you embark on the process.

We wish you well.

Contacts

Law Society of Scotland - find a solicitor

<https://www.lawscot.org.uk/find-a-solicitor/>

Living law

<https://www.livinglaw.co.uk/> - 07929 996105 - contact@livinglaw.co.uk

Environmental Law Foundation

<https://elflaw.org/get-help/> - 0330 123 0169 - info17@elflaw.org



For more information you can also look at [2016 SPICe briefing](#) (from the Scottish Parliament's research unit) below is a good place to get the factual "how is it done?" information

If this has helped you can you help us?

Planning Democracy have played a key part in helping communities get better access to justice by making it easier to keep court costs down when making legal challenges. We initiated and supported a Judicial Review ([McGinty / Hunterston case](#)) challenging undemocratic procedures regarding the National Planning Framework. With support from RSPB, WWF FoES and local organisations the case went ahead. Although the Judicial Review was lost, there was a positive outcome because the way that Scotland's national developments are decided was highlighted and subsequently made more open and transparent.

IMPORTANTLY the Hunterston judicial review created a precedent for [access to justice](#) by winning the first cost cap (protective expenses order) in Scotland providing communities with more certainty and limits on legal costs when challenging decisions. Read more [here](#).

If you have found this briefing useful you may consider signing up as a Planning Democracy supporter or making a donation to <https://www.planningdemocracy.org.uk/support-donate/>

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