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Using the law and challenging redevelopment through the courts

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How the law can help communities experiencing regeneration

Law is a critical resource in ensuring fair decision-making. It can also play a key role in shaping communities and the built environment we want to see. Communities affected by regeneration and housing campaigners working in this field need to be aware of their legal rights, and how to enforce them, in order to participate in the planning process. Decision-makers are under a host of legal duties – for example, to consult the public, to provide reasons for their decisions and to reach those decisions in a reasonable and transparent way. We know, however, that public bodies often fail to discharge those duties. Every aspect of the regeneration process – from accessing environmental information to tenants’ rights to be consulted through to land acquisition and development control – is governed by legal rules which must be followed. It is vital, therefore, that communities and individuals alike are able to understand those rules, so they can seek redress where public bodies take unlawful or unfair decisions.

The law can assist communities affected by regeneration plans or schemes in two broad ways. First, legal advice can help communities inform and shape plan-making and decision-taking. Using the law in this way can help to resolve residents’ concerns and prevent future disputes arising. The planning system, in theory, offers many opportunities for communities to make their voices heard – for example, through public consultations, at Local Plan examinations or by attending planning
inquiries or hearings on development proposals. However, whether community voices are effective can depend on how residents’ arguments are framed. Very often the community’s concerns need to be presented in legal terms to be heard. Legal support can be vital in navigating consultations and quasi-judicial processes. Reinforcing political or policy arguments with legal advice can thus add authority to community campaigns. As illustrated in the case studies below, when deployed effectively the combination of legal advice and community organising can have a constructive impact on shaping the plans of developers, housing bodies and planning authorities alike.

The second way in which the law can be used in this context is in directly challenging public authorities’ unlawful decisions. Litigation of this sort usually takes the form of a Judicial Review or ‘JR’. This chapter focuses primarily on Judicial Review as a tool for challenging redevelopment. It looks at the nature of Judicial Review, the procedure for bringing a claim and ways of funding a claim. It also provides examples of where communities have successfully used this tool in the regeneration context.

In addition, the role that law and litigation can play in mobilising and creating community and housing campaigns is underappreciated. In my experience, bringing a legal challenge can become a focus for mobilising people, empowering communities and attracting local – and even national – attention on the issues raised by social housing regeneration. By involving residents in identifying the grounds of challenge, in preparing supporting evidence and in supporting a claim financially or by attending court, the law can create community and solidarity. It can also be a powerful force in helping people to shape decisions and, in some cases, to resist unwanted development.

**What is Judicial Review?**

Judicial Review is a procedure by which a person or group which has been affected by a decision, action or failure to act of a public body (or a body exercising a ‘public function’) may challenge that decision in the High Court on the basis that the body has acted unlawfully. Public bodies such as central and local government have to obey the law in how they take decisions. Where they fail to, they have acted unlawfully. Judicial Review is concerned not with the merits of the decision (e.g. whether the proposed development is good or bad), but only with whether the public body has acted lawfully.
In the regeneration context, Judicial Review challenges will be to decisions of the local authority or the Secretary of State (usually through one of their appointed planning inspectors). A Judicial Review may be brought by an individual or by a group affected by the decision in question.

A public authority may be acting unlawfully if it has made a decision or done something:

- without the legal power to do so (illegality).
- so unreasonable that no reasonable decision-maker could have come to the same decision or done the same thing (irrationality). This could be because a decision-maker has taken into account an irrelevant consideration or failed to have regard to a relevant consideration.
- without observing the rules of natural justice (procedural impropriety). Examples of procedural unfairness include biased decision-making, a failure to consult, a failure to give reasons for a decision or the breach of legitimate expectation that something would happen based on a promise made or practice adopted by the authority.
- in breach of Public Sector Equality Duty.

These grounds are neither exhaustive nor mutually exclusive. A claim may be brought on multiple grounds.

**What can the court do?**

If one of these grounds of challenge is made out and the court finds that the public authority has acted unlawfully, it can grant a remedy including:

- a mandatory order (i.e. an order requiring the public body to do something)
- a prohibiting order (i.e. an order preventing the public body from doing something)
- a quashing order (i.e. an order quashing the public body’s decision)
- a declaration
- (in rare cases) award damages.
A successful Judicial Review will often result in the quashing of the decision under challenge. For example, a successful Judicial Review of a decision to grant planning permission for the redevelopment of an estate will usually mean the planning permission is cancelled and the matter is remitted to the decision-making body for reconsideration.

However, it is important to understand that Judicial Review remedies are discretionary. This means that even if a claimant is able to show that a decision-maker has acted improperly, the court may decline to grant the remedy sought if, for example, it considers that even without the legal error it is highly likely the decision would have been the same.7

Moreover, even if a Judicial Review is successful and a remedy is granted, that will not necessarily result in a different outcome from the original decision. Where, for example, the Judicial Review succeeds on the basis of a procedural defect, such as failure to consult, it is possible that, following proper consultation, the same decision will be reached. Campaigners considering bringing a claim will therefore need to balance the potentially powerful Judicial Review remedies – which can stop unwanted development going ahead or compel the public body to involve local people – against the inherent uncertainty of outcome.

**When to bring a Judicial Review?**

Time limits for bringing a Judicial Review are tight, and especially so in planning cases. Challenges to the grant of planning permission or the adoption of local development plans must be made within six weeks of the decision. For other types of decisions, for example the failure to consul on a decision to set up a local authority development vehicle or a new development strategy, claimants are required to bring a Judicial Review ‘promptly’ and within three months of the decision under challenge.8

These time limits are strictly enforced, so it is necessary to act promptly. Even though the periods for challenging decisions are short, planning decisions often comprise several stages and can have long lead-in times – for example, from the time a planning application is submitted to its final determination. Given that, as soon as you become aware of redevelopment plans or proposals, you should identify sources of legal and professional support. In practice, it can take several weeks to gather the necessary information to ascertain whether you have a strong legal claim, so the sooner you seek advice the better.

Finally, where decision-making takes place in stages, deciding which decision to challenge can assume tactical importance for your
litigation and campaign strategy. You will need to assess the implications of challenging a decision early in the regeneration process as opposed to waiting until proposals have become more fully developed.

**What is the procedure for applying for a Judicial Review?**

Applying for Judicial Review is a multi-staged process. Below we set out each of the stages that a claim may go through, from the exchange of pre-action correspondence to a final hearing in court.

**Pre-action stage**

Where you consider the public body has acted unlawfully, you should write to them setting out why, expressing the intention to apply for Judicial Review and asking them to rectify the situation. That letter is called a ‘pre-action protocol letter’. It is a critical document and should be prepared, if possible, by a lawyer. Many public authorities may withdraw a disputed decision or agree to take remedial steps in response to a well-crafted letter. A pre-action letter can also lead to obtaining disclosure of critical matters.

On the other hand, a well-drafted response from the public body can help potential claimants by highlighting weaknesses in their arguments which can help refine a claim or inform the decision about whether a case is strong enough to bring to court. The pre-action stage does not carry the costs risks of formal proceedings, discussed below.

Many campaigners have found that public bodies who may have been dismissive of their voices before obtaining legal help suddenly sit up and take notice if they think they may face a legal challenge. Pre-action letters are therefore not only an important part of the Judicial Review protocol, but may themselves be important campaigning tools.

**Issuing the claim**

If you do not get a satisfactory response to your letter, the next step is to apply for Judicial Review. Together with your legal team (usually a solicitor and a barrister), you will need to prepare a written statement of facts and grounds and submit any evidence on which you intend to rely. The public body – referred to at this stage as the ‘defendant’ – and any interested parties – for example, a developer or housing association – is then given 21 days from when they receive your claim to file an acknowledgement of
service and set out their response to the claim. The claim must be issued within the time limits set out above.

Permission stage

All the papers are then put before a judge who decides whether to grant permission for the claim to proceed to a full hearing. To obtain permission, you will need to persuade a judge that your case is arguable. If permission is refused, you have seven days to ask the court to reconsider the claim at an oral hearing. If permission is again refused, an application can be made to the Court of Appeal. If permission is refused once more, that is the end of the case.

Full hearing

If permission to apply for Judicial Review is granted, the case will go to a full hearing. The various parties will then be asked to prepare and serve detailed grounds, evidence and written arguments.

The hearing is very formal. It is unlikely that there will be any oral evidence and the case will revolve around hearing legal arguments from the lawyers. In most cases, at the end of the hearing, the judge will ‘reserve’ judgement, meaning that the judgement will be given in writing at a later date, usually several weeks after the hearing itself. Once judgement has been given, both sides can make representations about who should pay the costs of the proceedings.

While there is no fixed time frame for a Judicial Review, the whole process from start to finish can take around six months or longer. If the matter is urgent, it is possible to apply for the claim to be expedited and decided more quickly. Additionally, parties may apply to the court for an order that the regeneration process be halted while the Judicial Review claim is pending (this is referred to as an injunction).

The duration of a Judicial Review has important consequences for community groups and campaigners. If the Judicial Review results in delaying the regeneration process, that can lead local authorities or developers to modify their plans. On the other hand, delay can produce hardship for some sections of the community if it postpones necessary works or affects the relocation and compensation of individuals who do wish to move. It is therefore important to think through the potential consequences of a Judicial Review and its timing for all those involved.
When we recommend using this tool

It is important to recognise some of the challenges of bringing a Judicial Review:

• **The cost**: Judicial Review can be expensive, although not as expensive as many people think (see below, ‘Technical and financial support’). Claimants will need to pay their own lawyers, and if you lose you will normally have to pay the other side’s legal costs. All of those costs must be considered before commencing a claim.

• **The risk**: Even if a court finds that a public body has acted unlawfully, it may decide not to set aside the decision being challenged. This is because, as explained, the remedies in Judicial Review are at the court’s discretion. Legal experts can advise in advance on the prospects of success, but there is no such thing as a ‘sure win’ in Judicial Review.

• **The complexity**: The law, derived from legislation and case law, as well as the technical evidence which may be involved in regeneration cases – for example, on viability or environmental impacts – mean that specialist legal input is essential.

So how should a group decide whether this is an appropriate route for them? Judicial Review should be viewed as a remedy of last resort. Where you consider the public authority has acted unlawfully, you need to consider whether you have exhausted any alternative avenues of redress – such as a complaints procedure – before resorting to Judicial Review. In practical terms, the threat of bringing a Judicial Review may be considered a ‘nuclear’ option. If, for example, you or your group have been working closely and co-operatively with the local planning authority, the threat of legal action may irrevocably change that relationship.

However, if you consider that local voices are being ignored and that decisions are not being fairly or lawfully taken, Judicial Review can be a powerful tool – sometimes the only one available – for challenging the regeneration process. As the case studies illustrate, the use of legal argument and Judicial Review can be extremely effective in holding public bodies to account, securing a voice for local people and setting a legal precedent.
Technical and financial support

Individuals and groups wishing to bring a Judicial Review naturally worry about the costs involved. However, there are plenty of sources of support available. You must budget for two main items of expenditure:

- the cost of paying your own legal representatives (which are likely to be paid by the other side if you win)
- the other side’s costs (which you are likely to have to pay if your challenge is unsuccessful). As noted above, if you win the other side is likely to have to pay your legal costs.

The usual rule in Judicial Review is that costs follow the event, meaning that the loser of a Judicial Review is ordered to pay the winner’s costs. You may be able to agree a fixed fee with your own lawyers, but you will not know the other side’s costs in advance. The cost of running a Judicial Review from start to finish can cost in the region of £30,000. However, there are a number of ways to reduce and remove the financial barriers to litigation:

- **Legal aid**: In certain cases, individuals may be eligible for legal aid funding. Applicants for legal aid will have to meet the eligibility requirements and demonstrate they are of limited means, as well as having a meritorious claim. In practice, even when a potential claimant is eligible for legal aid it can take considerable time to put this in place, and a community contribution may be required.
- **Costs caps**: The EU’s Aarhus Convention\(^5\) confers on individuals the rights to public participation and access to environmental justice. It has had a significant impact on our legal system in preventing claims from becoming prohibitively expensive. Most notably, it has led to the introduction of costs caps. In most cases a Judicial Review in the regeneration context will be treated as an ‘environmental’ or ‘Aarhus’ claim, meaning that it is likely to be subject to a costs cap. This means that a claimant’s costs liability is capped from the start of the litigation, so that they know, for certain, how much they will have to pay to the other side in the event that the claim is unsuccessful. The default costs caps under the Civil Procedure Rules are £5000 for an individual or £10,000 for a group.\(^10\) This means that if you bring an environmental claim in your name, you will not be liable to the other side for more than £5000 in costs, i.e. that is the most you will have to pay the other side if you lose (in addition to paying your own legal representatives).
• **Crowdfunding**: Increasing numbers of public interest environmental/regeneration claims are funded through crowdfunding procedures, which seek to raise money through donations from the community and wider public. There are a number of crowdfunding platforms that support this form of fundraising.\(^{11}\) Crowdfunding for litigation can be a site of mobilisation for community groups, as well as a chance to reach and attract the ‘buy-in’ of the wider public in cases raising issues in the public interest.

• **Pro bono representation**: There are a number of organisations, charities and community-based law centres that provide free advice and, in some cases, *pro bono* representation in Judicial Review.\(^{12}\) However, this does not protect you from the costs risk of having to pay the other side’s costs if you lose.

• **Conditional or discounted fee agreements**: It is critical to engage specialist lawyers with experience of public and planning law. Some lawyers may agree to act for you under a conditional/discounted fee agreement. This is sometimes referred to as a ‘no win, no fee’ arrangement. This means that your solicitor or barrister will not charge any fees or will not charge their full fees unless you win your case. You will still need to be protected against having to pay the other side’s costs (see ‘Costs caps’ above). Most lawyers will prefer to work under an agreed conditional/discounted fee rather than *pro bono*, as there is a chance they will get paid in full (out of the other side’s costs) if the case is successful.

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**Case study 1: Equalities law and regeneration, Foxhill Estate, Bath**

The Foxhill estate consisted of 500 homes, mainly council houses, and was earmarked for regeneration. Residents had sought to resist the regeneration plans for several years, forming the Foxhill Residents’ Association and lobbying Bath and North East Somerset Council to consider refurbishment of the estate rather than its redevelopment. Eventually, the council granted planning permission to the housing association responsible for the estate to demolish the Foxhill estate completely and redevelop it. The proposal re-provided 700 mainly market rent homes, with the net loss of over 200 council houses.

Peter Buckley, a Foxhill resident, sought legal advice and issued a Judicial Review of the planning permission. I represented Mr Buckley. We argued, among other things, that the council had not discharged its
Public Sector Equality Duty (PSED) under section 149 of the Equality Act 2010. That duty requires public bodies in the exercise of their public functions to have due regard to the impacts of their decisions on persons with protected characteristics (including by virtue of their race, sex, sexuality, age, disability and religion). We argued that the council’s Planning Committee had not been provided with information, and therefore had failed to consider the impact of the redevelopment and the forced displacement, in particular, on elderly and disabled residents. Had they had due regard for this, their decision might have been different.

Mr Buckley funded his claim through crowdfunding and obtained a costs cap, by agreement with the council, which limited his costs exposure to £2000. His claim succeeded on the basis that the council had failed to discharge its PSED; the court ordered that the planning permission be quashed and that the council pay Mr Buckley’s costs. The judgement received extensive coverage in the press. The developer housing association subsequently decided to withdraw its planning application and is now refurbishing the estate. As well as securing a successful result for Foxhill residents, the case set a national precedent that the PSED and equalities considerations apply to all development decisions, and particularly in the context of estate regeneration.

**Case study 2: Fair consultation of residents, Cressingham Gardens**

Planning authorities are required to consult residents on plans and on planning applications which may affect their estates. The obligation to consult may arise due to a specific statutory requirement or as a matter of fairness. If a planning authority fails to consult, or fails to carry out that consultation properly, it can give rise to grounds for Judicial Review.

The courts have laid the criteria (known as the Principles of Fair Consultation) that all fair public consultations must satisfy, namely that:

- consultation must be at a time when proposals are at a formative stage
- sufficient reasons must be given for any proposal to allow an intelligent consideration of and response to the proposal
- adequate time must be given for the consideration and response
- responses must be conscientiously taken into account in any final decision.
In a case about reductions in council tax support, for example, the Supreme Court considered the extent to which a decision-maker is required to provide information on options that have been considered but not pursued, and the reasons why such options have been discarded. The court indicated that in some cases fairness will require that interested persons be consulted not only upon the preferred option, but also upon available, yet discarded, alternative options. This is potentially important in the context of estate regeneration where different options are being explored. The court underscored the constitutional value of involving the public in the decision-making process. It specifically underlined that where the affected members of the public are economically disadvantaged, those people should be given more specific information about proposals.

A notable example of a challenge to a consultation in the regeneration context arose in relation to Cressingham Gardens (see chapter 3). As part of a wider campaign, a tenant of Cressingham Gardens applied for Judicial Review of Lambeth’s decision to redevelop rather than refurbish the estate. The council was required under section 105 of the Housing Act 1985 to inform and consult residents on matters relating to housing management. Having announced that it would consult on five options, including refurbishment as well as redevelopment options, the council later dropped the refurbishment options, saying that these would be too costly. The High Court found there was no legitimate basis for the council to stop consulting on all of the options after it had promised to do so. The effect of the Judicial Review was that the decision to redevelop the estate was quashed. Lambeth later retook its decision to redevelop Cressingham Gardens. Due to this claim and another unsuccessful Judicial Review, the redevelopment of the estate has been delayed. See chapter 3 on Cressingham Gardens for an update on the situation and other strategies used by residents.

Case study 3: Community influence in plan-making, the draft London Plan

Planning authorities are required to produce, and keep under review, planning documents which set the policy framework for their areas, including for social housing regeneration. The public should be involved in this process. Given that plans can establish the principle of regeneration of an estate, community engagement at all stages of the plan-making process, including consultation responses and attendance at
the public examination of the draft plan, is vital. If communities do not get involved at this stage, it can mean that when specific development proposals come forward they are more difficult to resist because the principle of regeneration has already been set in the plan.

However, community groups rarely get involved in the plan-making process; often that is because they do not know they can. This is an important missed opportunity as communities can try to influence the substance of the policies that will affect them for years to come. Obtaining legal advice on how best to navigate this process can be of real assistance.

Just Space – the London-wide network of community groups – has engaged extensively over the years on the preparation of the draft London Plan, to great effect. In 2019 Just Space made representations through its members in writing and orally at the Examination in Public on a wide range of policy matters, from the use of industrial sites to social infrastructure and social housing regeneration. Just Space suggested specific changes to the text and approach of the plan, and some of these points are likely to be reflected in the final version, which will be published by March 2020.

In developing its responses Just Space sought legal advice on whether the draft London Plan complied with the legal requirements under the Equality Act 2010. Just Space argued that the Mayor’s Integrated Impact Assessment, published with the draft Plan, did not discharge this duty under the PSED. In particular, Just Space argued that the impact assessment failed to examine the draft Plan’s specific impacts – both negative and positive – on protected groups such as black, Asian and minority ethnic and disabled people, including in the context of estate regeneration.

As a result of Just Space’s intervention, the Mayor was directed by the Examination Panel to publish his underlying evidence base and equalities data. The GLA was asked to explain how they had taken into account different impacts on protected groups, which the draft Plan had failed to do in the original impact assessment. The Mayor’s team produced a report justifying its approach to equalities considerations. This would not have happened without Just Space’s intervention. The outcome exemplifies how legal and policy arguments can hold public bodies to account and can influence the substance of plans.

**Conclusion**

Judicial Review challenges brought by communities have the potential to make a powerful impact in those communities and well beyond. Due to
our common law system, a principle established in one case can have ramifications in other cases – and for other estates – where that precedent is applied. By challenging a council on its process and approach to decision-making, such claims can have a corrective effect on public bodies’ practices and behaviour in respect of future regeneration schemes. A challenge, say, to the failure to discharge the PSED in one case can lead that public body, and more wary others, to improve their policies and culture in respect of equalities, thus reducing the risk of future breaches.

Using the law in this way is an important tool. It is sometimes the only means of resisting unwanted and unlawful development. In addition, the role that Judicial Review can play in mobilising a campaign, formalising it and providing a focus and forum in which the residents’ voices are heard by the courts, and by decision-makers, is underappreciated. Taking legal advice and obtaining legal representation can be empowering for community campaigners. Simply knowing your rights to participate, and the ways in which those can be enforced, can mean that representations are sharper, more focused and more effective – producing better outcomes and genuine community-led regeneration.

Notes

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2. This chapter is intended for information only and is not legal advice. While we hope it will be helpful to those involved in or considering Judicial Review, it is not a replacement for legal advice. If you believe you have a case, you should seek specialist legal advice immediately.


5. In challenges to the grant of planning permission, there are generally only two parties involved: the developer making the application and the local planning authority deciding whether or not to grant planning permission. Communities and individuals are regarded as third parties and do not have a right to appeal. As such, Judicial Review provides the only opportunity for further action once a decision to approve development has been made by a local authority.


7. Under section 31 of the Senior Courts Act 1981, if the public authority is able to show that it was highly likely that the outcome for the claimant would not have been substantially different had the authority acted lawfully, the court may withhold relief and refuse to quash the decision. Senior Court Act 1981, Section 31: Application for Judicial Review. http://www.legislation.gov.uk/ukpga/1981/54/section/31. Accessed 16 October 2019.


13. The claim was funded through crowdfunding and benefited from an agreed costs cap.


22. Another important way in which groups can influence Local Plan-making includes neighbourhood planning under the Localism Act 2011.

23. At the time of writing (October 2019) the draft London Plan had gone through planning examination.

24. Draft policy H10 of the London Plan (for Just Space’s full representations see https://justspace.org.uk/).