How the Irish judicial review procedure can be utilised to challenge planning decisions

Insights - 18/03/2021

When applying to construct an SHD

Where an application is made to the Irish planning authority An Bord Pleanála ("ABP") for permission to construct a Strategic Housing Development ("SHD") in Ireland, ABP is under no obligation to provide a grant with conditions in the first instance and may simply opt to refuse the application.

The relevant legislation here is Ireland's *Planning and Development (Housing) and Residential Tenancies Act 2016 (as amended)* which under *Section 9(4)* provides the ABP with complete discretion when considering whether to grant an application for a SHD, provided that other criteria within the Act are satisfied.

Refusal of Strategic Housing Development ("SHD")

What options then are available to a SHD applicant who is refused permission by ABP? Outside of preparing and lodging a new SHD application, the applicant's only option of a 'quasi-appeal' is the legislative process of judicial review against the decision of ABP. Although judicial review is not an appeals process at all.

So, how can the process be utilised to challenge a decision by APB?

The judicial review procedure

Decisions taken by public bodies may be subject to judicial review proceedings in the High Court.

This mechanism allows an applicant (which can be either a natural or legal person) to question the constitutionality or legality of a decision taken by a public body.

A specific statutory procedure applies to applications for judicial review of decisions made by ABP.

Sections 50 and 50A of the Planning and Development Act 2000 (as amended) set out this procedure. In particular the time limit for instituting judicial review in respect of a decision under the Planning and Development Act is eight weeks from the date of the decision or the doing of an act by a planning authority or the Board.

This time may be extended by the Court if it is satisfied there is good and sufficient reason for doing so, and the circumstances that resulted in the failure to make the application for leave within the 8 weeks were outside the control of the applicant for such extension.

One of the most important characteristics of judicial review is that the jurisdiction of the High Court is one of review rather than appeal.

If successful in judicial review of a planning decision, whereby it is satisfied that the decision made was flawed, the High Court may grant an order of *certiorari* quashing the decision and will usually remit the matter back to ABP with a direction to reconsider it and reach a decision in accordance with the findings of the Court.

The High Court cannot substitute its own findings for the decision being challenged.

The High Court is principally concerned with the fairness of the decision and does not concern itself with the correctness of the decision.

To avail of judicial review, the applicant must first identify some fault in the decision making process on the part of the decision maker due to an error of law, an error of fact, or if the decision was made on irrational grounds or by following an unfair procedure etc.

As such, judicial review may provide a means of challenging a decision of ABP if inadequate reasons were given for the refusal to grant an application for a SHD or if ABP failed to provide adequate reasons explaining why it had departed from an earlier recommendation of an inspector to grant permission etc.

Increase in judicial review cases in the High Court in 2021

The number of ABP planning decisions challenged in the High Court has more than doubled in the last three years. The bulk of the challenges concern applications by third parties seeking to challenge a grant of permission rather than a developer questioning a refusal by ABP to grant permission.

ABP's legal costs increased last year by 38.5% rising to a total of €1.5 million as it experienced a spike in the number of parties challenging its 'fast track' planning permissions in the courts.

Figures published by ABP show that the volume of all decisions subject to High Court judicial review challenges last year rose by 51% from 55 to 83 and more than doubled since 2018 when 41 planning decisions were subject to High Court judicial review.

As such, it is clear that the judicial review mechanism is increasingly becoming a means of challenging the decisions of ABP, more commonly in the context of a challenge to a grant of permission rather than a challenge to a decision to refuse permission. However, limited examples of the latter do also exist – [*Crekav. Trading GP Ltd v. an Bord Pleanála [2020] IEHC 400]*.

The benefit of judicial review for developers

Judicial review allows applicants and the High Court to hold the ABP accountable where it issues a decision that it cannot justify and will help to prevent arbitrary or inadequate refusals of permission to grant a SHD.

The Programme for Government issued in June 2020 confirmed that the SHD process would not be extended beyond 31 December 2021.

There is no clarity as to whether an alternative planning arrangement will be proposed for the purpose of facilitating housing development. In the absence of this information, one can expect that it will revert back to the previous process of applications for large scale housing developments being submitted to local authorities, with an appeal to ABP and the further possibility of ABP's decision being challenged by way of Judicial Review proceedings. The delays experienced through this process will inevitably arise again.

Accordingly, where a SHD application has been refused by ABP, it is a sensible for a developer to consider all options available to it, particularly in contemplation of the expiry of the SHD process in December 2021.

If any grounds for Judicial Review exist, a developer might consider keeping the planning application '*alive*' through Judicial Review proceedings. If successful, the proceedings could afford the refused scheme a further opportunity for consideration and the possibility of permission being granted on second review.

Whilst the proceedings are ongoing, the developer might also prepare a new SHD application (before the 31 December 2021 deadline) which addresses ABP's reasons for refusal. This SHD application could in fact be lodged and decided before the judicial review proceedings are heard by the High Court.

If granted, the proceedings are likely to become moot. However, if the second SHD application is refused, the Judicial Review proceedings provide an underlying possibility for permission which, in contemplation of the SHD process expiring in December 2021 and the local authority process resuming, may be a possibility worth investing in.

Whilst the judicial review procedure has more commonly been availed of to challenge a grant of permission rather than a challenge to a refusal, the imminent expiry of the SHD fast track system could be the catalyst for further consideration of its benefits to developers in certain

circumstances.

If you would like to discuss judicial review further, please contact Maria Edgeworth at maria.edgeworth@ogier.com

About Ogier

Ogier is a professional services firm with the knowledge and expertise to handle the most demanding and complex transactions and provide expert, efficient and cost-effective services to all our clients. We regularly win awards for the quality of our client service, our work and our people.

Disclaimer

This client briefing has been prepared for clients and professional associates of Ogier. The information and expressions of opinion which it contains are not intended to be a comprehensive study or to provide legal advice and should not be treated as a substitute for specific advice concerning individual situations.

Regulatory information can be found under Legal Notice

Meet the Author

Maria Edgeworth

Partner

Ireland

E: maria.edgeworth@ogier.com