Introduction

It is easier for interest groups to seek judicial review of planning and environmental decisions following the clarification by the Supreme Court. As Lord Hope eloquently explained:

“Take, for example, the risk that a route used by an osprey as it moves to and from a favourite fishing loch will be impeded by the proposed erection across it of a cluster of wind turbines. Does the fact that this proposal cannot reasonably be said to affect any individual’s property rights or interests mean that it is not open to an individual to challenge the proposed development on this ground? That would seem to be contrary to the purpose of environmental law, which proceeds on the basis that the quality of the natural environment is of legitimate concern to everyone. The osprey has no means of taking that step on its own behalf, any more than any other wild creature. If its interests are to be protected someone has to be allowed to speak up on its behalf.”

Lord Hope – Walton v Scottish Ministers 2012

Has this and other changes influenced the frequency of planning judicial reviews, and the outcomes?

This Report analyses planning judicial reviews in Scotland in the last 5 years. It compares the findings with our 2013 Report, which covered a longer period (10 years). Although direct numerical comparison is not therefore possible, comparative analysis has been undertaken using percentages and by doubling the number of cases in the 5 year period.

Our 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 standing, but the success rate for individuals/ groups remains very low (6%).
Background

In Scotland, judicial reviews – legal challenges to land-use planning decisions (and other decisions taken by public bodies) – are decided by the Court of Session in Edinburgh, subject to a right of appeal to the Supreme Court. There have been several recent high profile cases, including the Jordanhill College housing development, and the challenge by the RSPB to the Neart na Goithe offshore wind farm.

Although judicial review often refers to a legal challenge brought by objectors to a grant of planning permission, aggrieved developers or councils also have the right to bring a legal challenge against a decision by the Scottish Ministers/ their reporter. This report includes all these legal challenges.

Significant changes - judicial review

Standing - In 2011 the Supreme Court clarified the approach to standing, removing the need to demonstrate a greater impact on the challenger than upon other members of the public.

Protective expenses orders (PEOs) – These can be granted by the court, capping potential liability to pay legal costs. This stems from the provisions in the Aarhus Convention that environmental litigation should not be prohibitively expensive. New rules on PEOs were introduced in March 2013. There are no readily accessible statistics on PEOs, although some decisions have been reported, showing that several challengers have been refused PEOs by the judges.

Time limit – Although planning decisions by the Scottish Ministers/ their reporters are subject to a 6 week time limit for submission of a legal challenge, there was no specific time limit for other legal challenges. In 2015, a 3 month time limit was introduced for judicial review, including challenges to decisions by local councils.

Permission stage - This new procedural step means the legal challenge can only proceed if the applicant can demonstrate sufficient interest and the challenge has a real prospect of success. However, in practice the requirement to obtain permission has been a low threshold for challengers to meet.

“Judicial Review of planning decisions will always be seen as a last resort. However, it is a vital last resort that communities of interest and place, and the NGOs that represent them, must be able to access. This is particularly important in the absence of equal rights of appeal in the planning system itself, Scotland's ongoing failure to comply fully with the Aarhus Convention and the prospect of possible governance and oversight gaps presented by Brexit.”

Anne McCall, Director, RSPB Scotland
Judicial review of planning decisions in Scotland.

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- Proportionally, there is no increase in challenges brought by objectors. Those remain approximately 50% of the total.
- In 2013–17 challenges by individuals/groups rose from 25% of the total to 41%; challenges by commercial rivals fell from 27% to 12%.
- Planning authorities remain reluctant to bring legal challenges.

“The low number of legal challenges for housing development in Scotland highlights the tiny proportion of applications that are contentious. Whilst this is obviously welcomed, it is important that where Judicial review is instigated, the process is handled swiftly to avoid delays in delivering much needed homes across the country.”

Nicola Barclay, Chief Executive, Homes for Scotland

- Overall success rate after full hearing has dropped significantly from 27% to 17%.
- The most significant changes are lower success rates for developers and commercial interests.
- Planning authorities challenging decisions had a 100% success rate, but that was for only 2 cases in the 5 year period.
- The success rate for individuals/groups remained very low.
The % success rate for challenges to decisions remained similar for local planning authority decisions (28%), and the Scottish Ministers (13%), but for decisions by reporters dropped by almost half, to 17%.

Approximately twice as many decisions by Scottish Ministers were challenged in the last 5 years. The majority of those (6) were challenges to section 36 decisions on wind farms. That probably reflects a significant increase in the number of those decisions in the same period.

Although Local Review Bodies were introduced 8 years ago, there has only been one judicial review decision involving an LRB. That challenge was unsuccessful. However, we are aware of several other challenges which have been settled.
There continues to be a wide range of developments throughout Scotland challenged.

Three times as many wind projects were challenged than previously. However, that probably reflects the increase in applications and appeals for those developments in the period. Also, with the relaxed rules on standing, groups such as the RSPB and John Muir Trust became involved in legal challenges to wind farms.

Individuals/groups are much more likely to challenge renewables projects than other developments - 50% higher than the overall average.

No significant changes in success rates in sectors. In particular, challenges to renewables decisions remain 100% unsuccessful.

"Creating and sustaining a fair and robust planning system is critical to ensuring that well-sited, responsibly developed projects continue to contribute towards achieving sustainable and inclusive growth across Scotland, as well as to our energy and climate change targets. The planning appeals and judicial review system must be fair and robust to ensure that Scotland’s world-leading climate change targets are met."

Claire Mack, Chief Executive, Scottish Renewables

Analysis and comment

The risk of judicial review remains low, but the actual risk depends on the circumstances of the individual case, which is why expert planning law advice should be sought.

Individuals and interest groups appear to have taken advantage of the relaxation of the rules on standing to challenge wind projects, but there has been no significant rise in challenges by objectors to housing developments.

The new rules on protective expenses orders introduced in March 2013 might also have been encouragement to objectors, although several challengers have been refused PEOs by the judges.

There is no information in the reported decisions to indicate whether the new 3 month time limit and the permission stage have had a significant impact.

Judicial review is still an important remedy for applicants for planning permission, not just objectors - the proportion of planning judicial reviews brought by applicants for planning permission remains around 40%.
Appendix

Research methodology

Brodies audited all Opinions (judgments) issued by the Court of Session in planning cases in the last 5 years (January 2013 - December 2017). There is no data available on numbers of cases settled by the parties without a full hearing or those withdrawn by the challenger.

As the grounds of challenge are broadly similar, the audit includes both statutory appeals (i.e. right of appeal provided by Act of Parliament) and common law petitions for judicial review (available where there is no statutory right of appeal).

In addition to challenges to planning permission applications/ appeals, the cases audited included enforcement action, listed buildings, and development plans.

To avoid double-counting, multiple decisions in the same case are ignored, with only the final decision being taken into account (i.e. where a decision by the Outer House of the Court of Session was appealed to the Inner House, the audit ignores the Outer House decision).

Account has been taken of the 3 cases appealed to the Supreme Court.

The cases were classified according to the nature of the interest of the party challenging the planning decision:

<table>
<thead>
<tr>
<th>Applicant</th>
<th>The party applying for planning permission; in enforcement cases, the owner/ operator of the site</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planning authority</td>
<td>The local council</td>
</tr>
<tr>
<td>Commercial interest</td>
<td>A person or organisation objecting to the development, whether explicitly or impliedly, for commercial reasons</td>
</tr>
<tr>
<td>Group/ individual</td>
<td>An environmental or other group, or member of the public objecting to the development</td>
</tr>
</tbody>
</table>

This report covers a shorter period (5 years) than the 2013 report (10 years). Although direct numerical comparison is not therefore possible, comparative analysis has been undertaken using percentages and by doubling the number of cases in the 5 year period.

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