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A What is your name?

Name:
Compulsory Purchase Association

B What is your email address?

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C How are you responding to this consultation?

Choose an option from the list provided:
Representative body

D What is the name of your organisation?

Please add text to this box:
This response is provided by the Compulsory Purchase Association.

The Compulsory Purchase Association's objective is to work for the public benefit in relation to compulsory purchase and compensation in all its forms. This includes promoting the highest professional standards amongst practitioners at all levels and participating in debate as to matters of current interest in compulsory purchase and compensation. The CPA has some 500 members practising in this field, including surveyors, lawyers, accountants, town planners and officers of public authorities. The CPA attempts to take an objective and balanced position on matters within its remit, taking into account the points of view of all those involved in compulsory purchase and compensation.

Compulsory purchase is involved in many major developments, including housing and town centre regeneration schemes, as well as in infrastructure projects of all sorts. Powers of compulsory purchase and similar powers to interfere with private property rights can be conferred by compulsory purchase orders or as part of other orders (such as those made under the Transport and Works Act 1992 or the Highways Act 1980) as well as under private or hybrid Bills of Parliament. CPA members have considerable experience of such development and infrastructure projects.

1 Do you agree that it is appropriate to shorten the time limit for procurement and planning cases to bring them into line with the time limits for an appeal against the same decision?

Please add text to this box:
No. The consultation paper is correct when it says at paragraph 42 that the time between a decision or action being taken and a judicial review being commenced is used both to take and consider legal advice on the merits of the case and often to seek to reach a negotiated settlement without needing to commence litigation. If the time period before a judicial review must be launched is reduced there will be less time for these two important steps to take place.

The result of shortening the time period will not be that persons aggrieved simply do not bring cases, but that they bring them without the benefit of fully considered legal advice and without having been able to discuss the case and attempt to negotiate a solution with the authority. Cases will also be commenced on a protective basis, so that judicial review proceedings are lodged, before proper legal advice is taken, in order to avoid the ability to bring a judicial review being lost. Those claims that are commenced will be less well-considered and the grounds of challenge are likely to change and become reformulated and refined as the case proceeds, once proper legal advice is taken.

The overall result will be more judicial reviews commenced and less well-considered cases being brought. The result of the proposed change will be precisely the opposite of that intended by the Government in its consultation.

There is a false comparison between a six week time limit under, for example, s288 of the Town and Country Planning Act 1990 and a judicial review of a planning decision. Under s288 a claim can only be brought by someone who has been involved in the planning appeal process in some way and will therefore already be aware of the decision-making process and would normally be sent a copy of the decision when it is issued. This will not apply in many planning cases, when objectors only find out about a decision after it has been issued, and perhaps some weeks after it has been issued, given the limited publicity now given to applications by local planning authorities and the large proportion of applications which are decided by officers under delegated powers rather than at planning committee meetings. Moreover, a s288 challenge comes after a prior appeal process which follows from the original planning refusal of planning permission. So, not only does a s288 challenge come after a second consideration of a planning proposal but it also comes after an appeal which may well have been considered by a hearing or inquiry. This means that issues will have been considered and ventilated much more thoroughly by the time a s288 challenge comes to be considered than a judicial review against a first instance local authority's decision to grant permission. Whilst it may be reasonable to expect challengers under s288 to bring proceedings within six weeks of the appeal decision, the circumstances of a planning decision by a local authority are very different indeed. It would not be reasonable to expect a judicial review to be brought within six weeks.

Overall, the proposed change would be unfair but also more importantly perhaps entirely counter-productive.

In our experience, including major infrastructure projects and regeneration and other developments, the process of judicial review is not being abused and is not

being used simply as a delaying tactic. The effect of the reforms will, contrary to what is said in the consultation paper, be to deny or restrict access to justice in cases where the state has acted unlawfully. The existing processes are sufficient to ensure that weak or frivolous cases are identified and dealt with promptly and that legitimate claims are dealt with efficiently, in particular where there is active judicial case management. Providing greater resources to the Administrative Court would be the single most effective way to ensure that the aims of the consultation are achieved. The process is not unsound; it works as well as can be expected given the resources available to the Administrative Court (save in relation to immigration cases, which are a genuine concern). Moreover, our experience is not that fear of judicial review is leading authorities to be overly cautious in decision-making. If anything the reverse is the case: some authorities do not give enough consideration to their powers and obligations. The prospect of judicial review ("the judge over your shoulder") provides entirely appropriate discipline to authorities, especially those exercising compulsory purchase powers to take land and property from the owners against their will.

If the change is made, the CPA would ask that it is clarified that the category of planning case does not include challenges to or related to compulsory purchase and similar orders (eg Transport and Works Act orders and orders under the Highways Act 1980) and hybrid Bills, which authorise the compulsory purchase of land. Where the state is appropriating property from a person compulsorily and against their will, which may well include their home or business premises, it is entirely inappropriate that additional restrictions on challenging decisions by the state should be introduced. There are in any event existing statutory processes which apply to some challenges to compulsory purchase orders which have their own problems and which require some reform (see eg the result in Enterprise Inns v SSETR [2000] JPL 1256).

2 Does this provide sufficient time for the parties to fulfil the requirements of the Pre-Action Protocol? If not, how should these arrangements be adapted to cater for these types of case?

Please add text to this box:

No. A six week period would not allow any meaningful compliance with the pre-action protocol to take place. The minimum time that an authority would need to consider a pre-action letter before claim and to produce a letter of response would be two weeks. The minimum time for a claimant to consider a letter of response before lodging proceedings would be one week. This leaves only three weeks within the overall six week period from the decision or action for a claimant to have received notice of the decision or action, investigated it, taken legal advice, considered the position and drafted a letter before claim. This is an impossible expectation. Nothing could be done to make the pre-action protocol process work properly and meaningfully within an overall six week period from the decision or action challenged.

3 Do you agree that the Courts' powers to allow an extension of time to bring a claim would be sufficient to ensure that access to justice was protected?

Please add text to this box:
No. In any event, claimants will not be able to rely on courts extending time and many will therefore seek to bring hastily-prepared claims on a protective basis simply to avoid missing the shortened deadline.

4 Are there any other types of case in which a shorter time limit might be appropriate? If so, please give details.

Please add text to this box:
No. Judicial review challenges to or related to compulsory purchase and similar orders should not be included within the ambit of the shorter time limit.

5 We would welcome views on the current wording of Part 54.5 of the Civil Procedure Rules and suggestions to make clear that any challenge to a continuing breach of multiple decisions should be brought within three months of the first instance of the grounds and not from the end or latest incidence of the grounds.

Please add text to this box:
The proposed change should not be made because of the consequences explained in answer to Q6 below. It would be a very serious error if this change was introduced due to the problems it would cause to public administration and decision-making.

6 Are there any risks in taking forward the proposal? For example, might it encourage claims to be brought earlier where they might otherwise be resolved without reference to the court?

Please add text to this box:
Yes. If claimants are forced to choose between losing the right to bring a judicial review and losing the ability to seek to discuss and negotiate a solution without litigation, claimants will choose not to lose the right to bring the judicial review. They will bring claims earlier when they might otherwise be resolved without recourse to litigation. This change is likely to lead to many more judicial reviews being commenced than currently is the case. They will be brought protectively so as to avoid losing the right to do so, even if discussions continue or take place in parallel with the litigation (rather than prior to it). Claims will also be brought prematurely and perhaps hastily and will therefore be less well-considered. This proposal would be counter-productive and will have the opposite effect to that intended by the Government. It would be a very serious error if this change was introduced due to the problems it would cause to public administration and decision-making.

7 Do you agree with the proposal to use the existing definition of a court as the basis for determining whether there has been a "prior judicial hearing"? Are there any other factors that the definition of "prior judicial hearing" should take into account?

Please add text to this box:
The restriction on the right to an oral renewal should not be introduced. If this change is to be introduced, then the definition should explicitly exclude inquiries held into, and decisions taken in connection with, compulsory purchase and other similar orders (eg Transport and Works Act orders and Highways Act 1980 orders) and hybrid Bills. Paragraph 80 of the consultation paper uses the phrase “considered by a Judge”. It is clear that planning inspectors are not judges in any sense. And nor is the Secretary of State comparable to a judge, even when acting in a quasi-judicial role.

In considering the question in any later judicial review, the court must have regard to whether there has been a change of circumstances since the earlier hearing and whether new information or evidence is available. Otherwise the prior hearing would not have addressed the same points. The restriction must only apply, if at all, to points which genuinely have been properly argued in the prior hearing.

8 Do you agree that the question of whether the issue raised in the Judicial Review is substantially the same matter as in a prior judicial hearing should be determined by the Judge considering the application for permission, taking into account all the circumstances of the case?

Please add text to this box:
Yes, if the change is to be introduced at all. As a result of introducing this restriction, however, there will be satellite litigation about whether or not any particular judicial review case is caught, and whether it falls within the “prior judicial hearing” and the “same matter” definitions. This will be counter-productive and lead to delays and increase the costs of judicial reviews (as well as the burden on the courts). The restriction on the right to an oral renewal should not, however, be introduced at all.

9 Do you agree it should be for the defendant to make the case that there is no right to an oral renewal in the Acknowledgement of Service? Can you see any difficulties with this approach?

Please add text to this box:
If this approach is to be adopted, it should be for the defendant to raise the issue and to satisfy the court that there should be no right to an oral renewal. However, the restriction on the right to an oral renewal should not be introduced.

10 Do you agree that where an application for permission to bring Judicial Review has been assessed as totally without merit, there should be no right to ask for an oral renewal?

Please add text to this box:
No. The restriction on the right to an oral renewal should not be introduced.

11 It is proposed that in principle this reform could be applied to all Judicial Review proceedings. Are there specific types of Judicial Review case for which this approach would not be appropriate?

Please add text to this box:

The restriction on the right to an oral renewal should not be introduced at all. This approach would be particularly inappropriate for judicial review challenges to or related to compulsory purchase and similar orders (eg Transport and Works Act orders and orders under the Highways Act 1980) and hybrid Bills, which authorise the compulsory purchase of land. Where the state is appropriating property from a person compulsorily and against their will, which may well include their home or business premises, it is entirely inappropriate that additional restrictions on challenging decisions by the state should be introduced.

12 Are there any circumstances in which it might be appropriate to allow the claimant an oral renewal hearing, even though the case has been assessed as totally without merit?

Please add text to this box:
Yes.

13 Do you agree that the two proposals could be implemented together? If not, which option do you believe would be more effective in filtering out weak or frivolous cases early?

Please add text to this box:
No. Neither should be implemented. Whilst four opportunities to argue the case for permission might be considered more than is necessary (two paper and two oral) the removal of any oral hearing in some or all cases would be wrong. There are cases where an oral hearing is necessary to ensure that a judge understands that there has arguably been illegality. The consultation paper itself identifies, at paragraph 31, 300 cases where permission was refused on the papers but granted after an oral hearing. That shows the importance of retaining an oral hearing. Those are 300 cases in which the state had arguably acted unlawfully but which would not have been allowed to have been heard had the consultation paper’s proposals been in place at the time.

The impact assessment for these proposals is wrong to assume that there will be no overall impact on the volume of cases brought; the changes are likely to increase the number of cases brought, adding costs to defendants and HMCTS. The impact assessment is also wrong to assume that oral renewals which are no longer heard would have been unsuccessful. Our experience is that a significant proportion of cases which are refused permission on the papers but where permission is grant at an oral renewal hearing are ultimately successful. And these are cases where the state is found to have acted unlawfully. These cases would be, but should not be, shut out of court under the proposals. Similarly, the impact assessment is wrong to assume that the eventual outcomes of the judicial review process would be the same. The result of the proposals would be that some cases which would otherwise succeed will be shut out – and the state will have acted unlawfully in some cases and not be held to account for it. The impact assessment is wrong to assume that there would be no increase in appeals to

the Court of Appeal. If there is no ability to renew orally in the High Court following a refusal on the papers, an appeal would be made (albeit on the papers) to the Court of Appeal instead of an oral renewal. The effect will be greatly to increase the number of paper permission to appeal applications which have to be dealt with by Court of Appeal judges.

If change is to be made, a better solution would be to retain the first stage as a paper consideration in the High Court, and to retain the oral renewal in the High Court, but to remove any right of appeal thereafter. This is in effect the approach taken under s289 of the Town and Country Planning Act 1990, where (although there is no prior paper application stage) there is no onward appeal from the High Court from the refusal of permission after an oral permission hearing. This approach would preserve an oral hearing, which is important, but still cut the number of opportunities from four to two, and without increasing the number of cases to be considered by Court of Appeal judges.

Of the two sets of proposals in the consultation paper, the certification of cases as totally without merit would be the more effective of the two.

14 Do you agree with the proposal to introduce a fee for an oral renewal hearing?

Please add text to this box:
Yes.

15 Do you agree that the fee should be set at the same level as the fee payable for a full hearing, consistent with the approach proposed for the Court of Appeal where a party seeks leave to appeal?

Please add text to this box:
Yes.

16 From your experience are there any groups of individuals with protected characteristics who may be particularly affected, either positively or negatively, by the proposals in this paper?We would welcome examples, case studies, research or other types of evidence that support your views. We are particularly interested in evidence which tells us more about applicants for Judicial Review and their protected characteristics, as well as the grounds on which they brought their claim.

Please add text to this box: