Asda Background

Asda has been serving the people of Scotland for over 40 years. We currently employ around 20,000 colleagues throughout Scotland and support a further 10,000 jobs in our wider supply chain.

Every single one of our 59 Asda stores and two distribution centres across Scotland is actively involved with the local communities they serve.

Overview

When it comes to the issue of judicial review as outlined in the Bill (Part 3, Chapter 2, Para 85 – Insert 27A) Asda considers it would be more appropriate to reflect the recent change in legislation in England and Wales and use a six week limit for planning cases, as opposed to the three month limit which is currently contained within the Bill.

It is a long standing variance that grants of planning permissions by local authorities in Scotland are not subject to a time limit as such, whereas the statutory six week time limit applies to planning decisions taken by the Minister/ Scottish Ministers/ Inspector/Reporter.

Asda welcomes the UK Government’s implementation of legislation to use a six week limit for judicial review and would like to see the same timescales being proposed in Scotland so that there is uniformity. We feel that such a move would be in keeping with Scottish Government proposals to streamline the planning process.

We also welcome Court of Session powers to sift and dispose of appeals without a reasonable prospect of success (Para 85 – Insert 27B).

Planning process

Asda feels that reducing the time limit for bringing a judicial review in planning cases from three months to six weeks would still allow sufficient time for the parties to fulfil the requirements given the party will have been involved during the planning process.

Community consultations form a major part of the planning application process in Scotland for major applications and there are a number of points at which objectors can make their views known. Once an application is received it is consulted on by the local planning authority, which invites and considers objections from members of the public and third parties. The planning officer’s report is published in advance of
any decision being made and objectors may also have the opportunity to address the Planning Committee when the application is decided. As well as this, major applications are well documented in the local media and the public are made aware of key dates in the process.

As a result, we feel there is no reason why judicial review cases could not be brought forward within a six week timescale, echoing the position in England and Wales and do not see anything fundamental between the two legal systems to prevent this happening.

**Judicial review challenges**

Asda feel that the judicial review process is being used too frequently by companies in the development industry who are looking to delay competitors and thereby retail investment and job creation. A six week time limit on judicial review being brought would decrease the impact of lost revenue and additional professional costs when these tactics are applied.

Over the last three years we have experienced a significant increase in Judicial Review challenges to our new store proposals. A large proportion of these have been technical challenges, based on a perceived procedural error committed by a local planning authority when drafting a decision notice, or “trade objections” from a rival supermarket operator where we consider the intention is to prevent or delay the opening of one of our stores.

An unwritten rule is that challenging parties looking to undertake a judicial review will currently do so within a three month period. In Asda’s experience challenges tend not to be submitted until the very end of this three month period, which adds delay to the process as well as the investment coming forward. A six week period would therefore reduce these delays.

The following case studies demonstrate the significant delays that can be caused by Judicial Review challenges:

- **Dundee:** Our application for a new store in Dundee was challenged at the outer court, inner court at Court of Session in Scotland and the Supreme Court in England by Tesco Stores Ltd. Tesco had the highest market share within Dundee. The application was originally approved at committee in January 2010 and was finally approved by the Supreme Court decision in March 2012, a total of 26 months from the original determination. The point of challenge related to Tesco suggesting that Dundee City Council did not adequately assess the former Tesco unit in Lochee District Centre which they vacated from to their larger out of centre store at South Road within the sequential test. Tesco’s challenged failed and this is now case law, being used ironically by Tesco themselves to justify their own out of centre proposals in locations within the UK.

  This delayed £24 million of investment and the creation of 350 jobs.

- **Tain:** Planning permission was granted to Asda whilst Tesco was in build for a new supermarket in the town. Tesco judicially reviewed the planning
committee decision in the Outer House and the challenge was thrown out after Tesco opened for trade. Asda opened two years later due to the delay caused by the judicial review and it, along with Highland Council, was awarded costs.

This delayed £10 million of investment and the creation of 150 jobs.

- Inverness: Asda received planning permission from the Scottish Government following a call in of the Highland Council Planning Committee decision to approve a new store on an allocated district centre. A local developer with a competing application in an urban extension area judicially reviewed the decision to the Outer House, despite appearing as an objector at the planning enquiry. The Scottish Government took the decision not to defend the challenge and the decision was quashed, despite Asda’s legal advice there was a strong likelihood of success. It took a further 11 months for the decision notice to be reissued. Overall the project was delayed by two years from the point of challenge and eventually opened in June 2012.

This delayed £27 million of investment and 350 jobs.

- Viewpark: Our planning application for Viewpark in North Lanarkshire was lodged on 1st February 2013 and was approved on 25th September of that year subject to a Section 75 agreement. It was judicially reviewed by Scotmid with a Court Hearing initially in February 2014 but now 17th-19th March.

This is delaying £15 million of investment and 200 jobs.

In cases such as these the consequences of a judicial review can cause:
- Delays and ultimately lost investment of between £10-50 million.
- Delays to planning gain, section 75 requirements and business rates contributions.
- Excessive delays in bringing hundreds of new jobs to an area and the spin-off benefits.
- Financial impacts on local contractors and the building industry as construction is delayed.
- Uncertainty of timescale for deliverability and the impact this has on the overall viability of the project (given we cannot programme opening dates accurately).
- Financial cost to the local authority and interested parties for often spurious challenges.
- Uncertainty in the local market and stymieing of development, with local planning authorities often reluctant to determine further similar applications where a legal challenge is ongoing.

**Uncertainty**

The removal of the element of uncertainty caused by the absence of a time limit on bringing a judicial review is significant and Asda feel that if a limit of six weeks were imposed the planning process would be more efficient and timescales for delivery could be more accurate.
The potential for legal challenge of planning decisions and the absence of a time limit in Scotland causes uncertainty, not only for developers, but for Councillors and local people. By imposing a time limit, Councils can provide an element of certainty to third parties and customers who rely on the decisions they make. As it stands these decisions can be left as the subject of challenge for some time, resulting in unnecessary delays to otherwise sound developments, which could be creating immediate jobs and retail investment. This in turn can have a negative financial impact on local contractors and building industry as construction is delayed.

**Introduction of a leave to proceed**

Asda welcomes the Court of Session powers to sift and dispose of appeals without a reasonable prospect of success and would look to ensure that this is robustly enforced (Para 85 – Insert 27B).

Currently the Scottish Court of Session will allow appeals to be heard, despite the likelihood of success.

In our experience every judicial review challenge taken against our business in Scotland has failed at both the Outer and Inner Courts. and we believe that several of these challenges could have been rejected earlier in the review of the case.

Ensuring that spurious challenges are thrown out earlier would reduce the period of uncertainty and give greater confidence to the development sector, enabling Asda to programme developments with confidence and less risk to investment. Funds could also be released earlier in the development programme.

**Resources**

The introduction of a time bar on judicial reviews being brought and a mechanism to sift would see cases resolved more swiftly and efficiently, avoid wasting time and resources on unmeritorious claims. One local authority which responded to the Scottish Government consultation on the Bill outlined the potential benefits as saving Council staff from getting tied up in litigation over decisions that were made some time ago and over (some) vexatious claims. It was also suggested this would be more cost-effective for local authorities. Asda welcomes the resources this would free up within public bodies if the review period was reduced to six weeks.

**Conclusion**

Asda fully supports the sentiments of Bill to improve the judicial review procedure.

Given the impact that judicial review challenges have on our ability to implement legitimately obtained planning permissions we support measures intended to speed up the judicial review process.

Asda would like to reiterate that while we fully support the proposed change to judicial review timescales, we strongly believe that bringing this into line with the six week period we have recently seen in England and Wales would be more beneficial.
We also welcome the Court of Session powers to sift and dispose of applications made without a reasonable prospect of success and would look to ensure that this is robustly enforced in order to ensure that those applications to the Court have a real prospect of success.

Lisa Rooke
Senior Property Communications Manager, Scotland
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¹ Court Reform (Scotland) Bill - analysis of consultation responses - http://www.scotland.gov.uk/Publications/2013/09/8038/8