

Time Limits In Planning Appeals

April 2009

Introduction

A recent court decision has confirmed that the right to lodge an appeal against deemed refusal of a planning application lapses if an appeal is not lodged within six months of the expiry of the period in which the application should have been determined.

The legislation on deemed refusal appeals provides that if a planning authority has not issued its decision on an application within two months of the date it received the application, or within such extended period as may be agreed between the applicant and the planning authority, the applicant may appeal to the Scottish Ministers within six months of the expiry of the appropriate determination period.

The right to appeal against a deemed refusal cannot be revived if the applicant has failed to lodge an appeal within the six month period but then agrees with the planning authority to an extended timescale to determine the application.

The Vattenfall Case

In the case of *Vattenfall Wind Power Limited -v- The Scottish Ministers*, Vattenfall, a wind farm developer, applied to Scottish Borders Council on 10 April 2003 for planning permission to develop a wind farm. As the development required an environmental impact assessment, the time limit for a decision by the planning authority was four months from the date of receipt of the application, rather than the usual two months. The Council failed to determine the application within the four month period i.e. by 10 August 2003. No agreement was reached between the applicants and the Council for the period for determination of the application to be extended. Vattenfall did not appeal to the Scottish Ministers against the deemed refusal of the application in the six month period following expiry of the determination period.

By August 2007 the application had still not been determined. Vattenfall wrote to the Council seeking to extend the time period for determination to 31 December 2007, which was agreed. The Council did

not issue a decision within that period and the developers lodged an appeal to the Scottish Ministers against the failure to determine the application on 6 June 2008. The Scottish Ministers declined to determine the appeal on the basis that it was out of time.

Vattenfall appealed that decision to the Court of Session on the grounds that they had agreed a valid extension to the period for determining the application. They argued that the six month period for appealing against a deemed refusal should run from 31 December 2007 and that the appeal had therefore been submitted in time. The court refused the appeal and held that a developer has a single right of appeal to the Scottish Ministers on the grounds of non-determination/deemed refusal. That right can only be exercised within six months of the date on which the statutory period for determination has expired. If the applicant appeals within this period then the jurisdiction to determine the application passes to the Scottish Ministers. If the applicant does not appeal, jurisdiction remains with the planning authority, which has a legal obligation to determine the application. The court left open the issue of whether in such circumstances the planning authority would be subject to any time limit to determine the application.

Implications For Developers

The court's decision underlines the importance of ensuring that any right of appeal against a deemed refusal is exercised in time. Appeal rights cannot be revived at a later stage even if agreement is reached with the planning authority to extend the time period for issuing a decision. The two month/ four month for determination of an application can be extended with the agreement of the planning authority but any extension must be agreed within the subsequent six month period before the right to appeal has expired.

Developers will need to be alert to the timescales for deemed refusal appeals, particularly in view of the imminent changes to the time periods for determining planning applications and lodging appeals. If such appeals are not lodged in time, developers will have

lost their chance to force early decisions on applications and will have to wait for planning authorities to make decisions in their own time.

Changes to Appeal Timescales from 3 August 2009

As a result of the reforms made under the Planning etc (Scotland) Act 2006 from 3 August 2009 the time allowed for determination of planning applications will depend on the category of development an application falls into. For national developments and major developments, the time period for determination will be four months from the date of validation of the planning application. For local developments (that is all other developments which are not national or major developments) the period for determination will be two months.

The time period for submitting an appeal against a deemed refusal of an application will be reduced from six months to three months from the date on which the decision should have been made. As at present, applicants and planning authorities will be able to agree extensions to the timescale for determination before the appeal period has expired.

Applications for local developments which are to be determined by a planning officer under a scheme of delegation will be treated differently on appeal. In such cases there will be no right of appeal to the Scottish Ministers, only the right to request a review of the officer's decision by a panel of councillors. As with appeals to the Scottish Ministers, a request for a review must be made within three months from the date of the planning officer's decision or the expiry of the two month period in which the decision should have been made. If an application is not determined by the planning officer within two months the applicant can seek a local review on the grounds of non-determination. Unlike appeals to the Scottish Ministers, the two month period for determining the application cannot be extended by agreement.

Appeals or requests for review against deemed refusal will therefore have to be lodged within five months of validation of an application for a local development. For national and major developments, appeals to the Scottish Ministers will have to be lodged within seven months of the validation date unless an extended time period for determination has been agreed with the planning authority before the three month appeal period has expired. The six month period for submitting appeals to the Scottish Ministers will continue to apply for applications where the time period for determining an application has expired before 3 August 2009.

This briefing note sets out a summary of the law at the time of writing and is for information purposes only. It should not be regarded as legal advice but if you would like further information please contact:



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