

Briefing on the Introduction of a Third Party Right of Appeal in Scotland

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**Friends of
the Earth
Scotland**

Summary

Friends of the Earth Scotland welcomes the Scottish Executive's consultation on widening rights of appeal in planning. We support the introduction of a third party right of appeal (TPRA), limited to specific circumstances, within the context of wider planning reform. The introduction of TPRA, in conjunction with other changes, will help to level the playing field in a planning system which is currently weighted in favour of developers over individuals and communities. TPRA is an essential aspect of environmental justice, a central aim of this government, and we believe it will lead to increased public confidence in planning and improved standards of applications and decisions.

What is TPRA?

Despite the extensive rights of participation which already exist in Scotland, the focus of Scotland's planning system remains on the relationship between local authorities and developers, rather than with community groups and individuals. This imbalance is reflected in the planning appeal process.

In planning, the 'first party' is the proposer of the application, the 'second party' is the planning authority and an individual or community who objects to the application is referred to as the 'third party'. Where permission is refused, the developer can appeal the decision to the Scottish Executive. However, third parties do not have the right to appeal against the granting of permission, even when the decision is a departure from the democratically-adopted development plan. Currently, the only option for third parties is to apply for a judicial review, but this an expensive procedure which can only look at the legal arguments rather than examining the merits of the case.

Why is TPRA a current issue?

In the 2003 Partnership Agreement, the government promised to consult on widening the right to appeal, and the Scottish Executive will soon be launching a consultation leading up to a new Planning Bill in 2005. Friends of the Earth Scotland (FoES) has long campaigned for the introduction of a limited TPRA in Scotland as part of a widescale review of the planning system. In addition, an independent report by Green Balance¹ strongly made a legal case for TPRA within limited circumstances. TPRA is not a new idea – it exists in many other European planning systems, including the Isle of Man, the Channel Islands and the Republic of Ireland, as well as in Australasia.

Why do we need TPRA?

TPRA would help to address current inequities within the planning system. Third party rights are also essential for environmental justice and for promoting sustainable development. FoES has worked with many communities around Scotland who have had no recourse against unjust planning decisions, except by campaigning for a costly and confrontational public local inquiry (PLI), or a judicial review, where the odds are stacked against them. Environmentally degrading developments such as opencast mines, landfills and major roads are often clustered in disadvantaged communities. These

¹ Green Balance et al (2002). *Third Party Rights of Appeal in Planning*. London: Council for the Preservation of Rural England

communities, and indeed all members of the public, need to be able to participate on an equal footing with developers. TPRA would have helped communities in cases like those listed below:

- St Andrews Bay hotel and golf course development at Kingask opened in 2001 despite objections from, among others, the local Community Council, Scottish Natural Heritage and Historic Scotland. It was a departure from the development plan and one local councillor described the development as “a monstrous plook” which overlooked the town and spoiled the landscape setting.
- Benderloch sand and gravel quarry in Argyll & Bute was based on a disputed EIA and was a departure from the structure plan. It was strongly objected to by the local community but was given approval in July 2003.
- Dunblane and Bridge of Allan communities in Stirling are currently fighting the second proposal in 12 years for a golf course development on green belt land at Park of Keir, which would be a departure from the development plan.
- Greengairs in North Lanarkshire, dubbed “dustbin village” by the press, is surrounded by 9 opencast mining and landfill sites. The opencast mine at Boglea & Cameron Farm was approved in 1996, despite the recommendation for refusal by planning officers, and a substandard EIA. The community understandably feel they have no means of opposing forthcoming applications without TPRA.

It should not be assumed that the public will always oppose development. In Shetland, TPRA was granted in the ZCC Act 1974 for appeals against work licences in the coastal zone, and representatives of the local communities have used the existence of TPRA to strengthen their hand in negotiations with aquaculture operators and to improve conditions. In 2002 in the Republic of Ireland only around 7% of all planning decisions were appealed and of those appeals 52% were brought by a third party². In these cases, more third party appeals resulted in a revised decision (54%) rather than an outright refusal of permission (45%), giving evidence that third party appeals were successful in upholding the rights of the community, rights that are not available in Scotland.

How would having TPRA help?

We believe that TPRA would enhance the planning system in the following ways:

- It would help to create a level playing field between the public and developers, providing a foundation for trust and cooperation, and a disincentive for developers to produce repeat, twin-tracked or poor quality applications.
- It would increase local authority accountability, since there would need to be reasons given for a decision, and thus improve the quality of planning decisions.
- It would enhance the status of a development plan if one of the criteria for third party appeals were to be departures from the development plan, and may act as an incentive to councils to make sure plans are up to date.
- It would enable the cumulative impact of decisions to be challenged, especially in areas which have a high number of negative developments.
- The lack of TPRA is not consistent with the spirit and objectives of the Aarhus Convention on environmental rights, and may also be pertinent to the European Convention on Human Rights, Article 6. These links are being investigated.

What are we recommending?

It is recognised that TPRA would probably increase the total number of applications appealed if it were introduced within the planning system as it now stands. However, FoES is calling for a long-overdue reform of the planning system with TPRA as one

² Ellis G. School of Environmental Planning, Queens University Belfast. Briefing paper for Scottish Parliamentary seminar: The case for a Third Party Right of Appeal. 4th February 2004

element within a more participative system with greater corporate and government accountability. TPRA would thus create an incentive for developers to undertake pre-application consultation with communities and help improve the standards of planning applications and decisions. It could be used against the entire application or to modify the proposal with conditions. FoES therefore suggests the introduction of a limited TPRA for applications falling within the following criteria:

- I. where the planning decisions is a departure from the development plan;
- II. where the local authority has an interest in the planning application;
- III. where the application is a 'major development', defined as those which fall under either Schedule 1 or 2 of the Environmental Impact Assessment regulations;
- IV. where the planning officer has recommended refusal of planning permission to the council.

It is recommended that a **fee** should be levied for third party appeals, perhaps in the region of £30-60 – in Ireland the cost is currently €200. **Time limits** for lodging appeals are recommended, and we suggest 28 days. There should also be targets for handling appeals to avoid any backlog and undue delay. We believe that the **use of mediation services** should be investigated, as these informal proceedings can lead to improved applications and decisions, and to public and private cost savings. **Greater corporate responsibility** is also an important feature of avoiding the need for third parties to appeal, and the adoption of mechanisms such as Good Neighbour Agreements can help to create channels of communication between developers and communities. There needs to be **greater accountability** by local authorities over the decisions they make, as developments can have an electoral impact, and also authorities need to give reasons for both approval and rejection of applications in order to enhance transparency. **PLI reform** is also encouraged to help communities engage more equitably in the process. For example, costs are high and legal representation expensive for local community groups. FoES also recommends an **education component** to new legislation on both the existence and appropriate use of TPRA, aimed at communities and individuals.

The arguments against TPRA

Opponents of TPRA raise some concerns which merit serious consideration, but overall we believe the benefits outweigh any costs. These arguments are countered below:

Myth 1: TPRA would add significantly to delays in the planning system

Truth: Although some applications would take longer, many others should be speeded up by the greater advance community consultation TPRA would encourage, and the disincentive it would provide to submit proposals departing from the development plan. Moreover, tight time limits would ensure rapid determination. Most appeals could be dealt with by written representations, as in Ireland where 98% of appeals are by written submission. Overall, if resourced sufficiently, TPRA would help rebuild public trust and confidence in the planning system - especially if accompanied by new mediation provisions - thus making it possible to speed up the majority of planning applications.

Myth 2: TPRA would add to the cost of the planning system

Truth: By using written representations, and by helping to reduce or avoid the cost of PLIs, TPRA should not add significantly to the costs of the planning system. At the discretion of inspectors, costs awards could be made to ensure that the costs borne by developers were reasonable. TPRA may well be seen to add to costs within the context of the current planning system, with a need for greater staffing in the reporter's unit and more training. Yet many of these costs would be offset by the other changes, and by the reduced number of cases proceeding to appeal.

Myth 3: TPRA would create a 'meddler's charter'.

Truth: This is not the case in Ireland and it is unlikely to be the case in Scotland. Rights to appeal would be limited and only open to original objectors to the proposal. Rules to deter frivolous and vexatious appeals could be easily put in place, such as cost awards

against such appellants, and the power of the Reporter to summarily dismiss appeals (subject only to legal challenge).

Myth 4: TPRA would be used to block needed development and investment

Truth: As noted above, TPRA would be limited to certain types of application, with a clear role to protect the public interest. Most importantly, evidence from Ireland suggests TPRA has served mainly to improve the conditions placed on developments, thus enhancing their public benefit, and not to block them.

Myth 5: TPRA would undermine local democracy

Truth: TPRA would enhance local democracy by increasing the direct accountability of planning authorities to their citizens. Although appeal decisions would be made by independent reporters, this is no more undemocratic than developers' appeals being heard by independent reporters as at present, nor can councillors be expected to actively represent all interests within a community.

Myth 6: TPRA would create an unmanageable administrative burden

In the past, numbers of planning appeals in England and Wales have been as high as double the current level, without overwhelming the authorities. Over the past 5 years in Scotland, the number of cases dealt with by the reporters unit has stayed relatively stable. Any administrative burden would be made more manageable through the use of written representations, and potentially by providing powers for summary decisions.

Myth 7: The supporters of TPRA are unrepresentative of communities, fundamentally opposed to change, and would object to any development

Truth: Only a tiny fraction of permissions have been appealed by third parties in Ireland, and many appellants seek only to change the conditions of the development rather than prevent it. Community representatives and local residents would be the main users of TPRA.

Myth 8: Other improvements in the planning system are more important than TPRA and should be pursued instead.

Truth: Other improvements should be, and are being, pursued alongside TPRA. In fact many reforms would be mutually reinforcing, such as improved neighbour notification. But TPRA is a critical link in re-establishing public trust, and raising standards in the system, and its success will be measured by how little it needs to be used.

Conclusions

For the vast majority of planning applications, the system works well in Scotland. However, for a significant minority of applications, decisions have been made which have not taken into account the community's justifiable opposition to a development. While some of these cases have been heard at a PLI, communities are disadvantaged on grounds of expense, time or expertise. In any case, local residents should be able to initiate an appeal themselves, rather than petitioning the Scottish Executive to raise the issue. FoES believes that TPRA would improve the whole planning system, especially leading to better pre-application consultations, which would mean fewer appeals overall in the long term. The lessons from Ireland and other jurisdictions show that TPRA can assist, rather than hinder, the decision-making process, that it does not have to introduce prohibitive additional costs, and that in general it is accepted as a positive mechanism in the planning process.

FoES believes that TPRA – developed and introduced in good faith – could be expected to increase public confidence in planning, improve the standards of applications and decisions, and enhance justice by balancing the developers' right to appeal. The Scottish Executive is making a genuine effort to undertake meaningful consultation on wider rights of appeal. All the stakeholders should engage with this process in good faith.