# Report on the Introduction of a Third Party Right of Appeal in Scotland

**27th February 2004**


A third party right of appeal would have helped the communities below:

- St Andrews Bay hotel and golf course development at Kingask in St Andrews opened in 2001 despite objections from, among others, the local Community Council, SNH and Historic Scotland. It was a departure from the development plan and one local councillor described the development as "a monstrous plook" which overlooked St Andrews 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 despite calls for the plan to be scrutinised by the Scottish Executive.

- 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, with the support of local MSPs.

**Summary**
Friends of the Earth Scotland has long campaigned for a third party right of appeal (TPRA) in planning within a widescale review of the planning system. We have worked with many communities around Scotland who have had no recourse against planning decisions which they felt were unjust, except by campaigning for a costly and confrontational public local inquiry, or a judicial review, where the odds are stacked against them. Developers have the right to appeal against a refusal of their application, and have deep pockets to fund their appeals. It is imperative that communities have the same right of appeal against certain decisions.

We are calling for a limited TPRA for those applications which fall within the following criteria:

I. where the planning decision is contrary to 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.

Drawing on the experience of the Republic of Ireland, which already has a form of TPRA, we reject suggestions that TPRA in Scotland would lead to greater costs and delays in the planning system over the long term. Instead, we believe that adoption of TPRA, alongside other reforms, would lead to increased public confidence in planning, greater democratic involvement and would contribute to enhanced planning decisions being made.

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## 1. Introduction

From early 2004 the Scottish Executive is launching a consultation process leading up to a new Planning Bill. One of the issues for consultation is the proposal that third parties should be given a right of appeal against a grant of planning permission in certain circumstances. Friends of the Earth Scotland (FoES) has long campaigned for the introduction of a limited third party right of appeal (TPRA) in Scotland within the context of wider planning legislation reform. TPRA would help to address current inequities within a planning system which is biased in favour of developers over individuals and communities. Adoption of TPRA would lead to increased public confidence in planning and greater democratic involvement, and contribute to enhanced planning decisions being made.

The question is therefore not whether the injustice, whereby one party has rights which are not available to another party, should be rectified, but how to do so without undermining other important rights and interests. In other words, how can we widen rights of appeal without undermining the positive gains that development can bring.

Third party rights are essential for environmental justice, and reflect the increased public awareness of environmental issues, along with the growing pressure for developments on more marginal sites in planning terms. The Partnership Agreement between the Scottish Labour and Liberal Democrats (2003) promises to consult on TPRA and pledges:

*"We want a Scotland that delivers sustainable development; that puts environmental concerns at the heart of public policy and secures environmental justice for all of Scotland's communities."*

The concepts of environmental justice and sustainable development offer useful guidance for the consultation on wider rights of appeal. It is often the case that environmentally degrading developments such as opencast mines, landfills and major roads are clustered in disadvantaged communities. These communities, and indeed all members of the public, need to be able to participate on an equal footing with the developers who are proposing these projects. It should not be assumed that the public will always oppose development: the experience in the Republic of Ireland, which

already has a TPRA, shows that in 2000 only around 5% of all planning decisions were appealed and of those appeals 41% were brought by a third party (Ellis, 2002). In these cases, more third party appeals resulted in a revised decision (57%) rather than an outright refusal of permission (41%), giving evidence that third party appeals were successful in upholding the rights of the community, rights that are not available in Scotland.

This report defines TPRA and describes the current planning situation in Scotland with regard to TPRA. Arguments for and against its implementation are discussed and criteria suggested by FoES for TPRA to be applied are outlined and illustrated with examples drawn from recent planning cases in Scotland. Finally comparisons are made with countries where TPRA is already in place within planning system.

## 2. What is Third Party Right of Appeal?

There are already extensive rights of participation in the planning system in Scotland. However, despite this, 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 a developer's permission is refused the developer can appeal the decision to the Scottish Executive, who can recommend whether to uphold or dismiss the appeal. However, if the authority approves the decision there is no opportunity for appeal against this decision by the third party. In other words, if a developer's application is refused by the planning authority, even where it is a departure from the democratically adopted local plan, the developer can appeal. This is an important democratic right, as it helps hold local authorities accountable for the impacts their decisions have. But developers are not the only group affected by such decisions. Neighbours and others in the local community are also affected by new developments, but have no right of appeal against the granting of planning permission, even for the most major developments.

Particularly bad decisions by the planning authority in favour of an application can be subjected to a legal challenge, but this is costly. In addition, judicial review is usually confined to examining the process by which the decision was made in terms of its legality, rather than looking at the merits of the planning arguments. Judicial review is used as much by industry as by members of the public, yet McCrory (2003) suggests that with the Aarhus Convention promoting the idea of active environmental citizenship, this could lead to an increased pressure on judicial review as a default appeal route to which it is not best suited. The public does have recourse to the Ombudsman, but again this is limited to determining whether there has been maladministration in a case, rather than the merits of the argument. It is felt that it is inappropriate to widen the powers of the Ombudsman in these situations (Green Balance 2002). Some local authorities do provide opportunities for an advance public hearing on a planning application, but this is not statutory, nor do such hearings offer the same benefits as a right of appeal.

## 3. The case for TPRA

Third party rights of appeal exist in most European planning systems, including the Isle of Man, the Republic of Ireland and the Channel Islands, as well as in Australia and New Zealand. There is even a form of TPRA in Shetland allowing appeals of works licences in the coastal zone, under the ZCC Act 1974. TPRA has been considered on a number of occasions by the UK government, most recently in the *Green Paper on Planning* (DTLR, 2001). This paper rejected the need for TPRA on the grounds that it "could add to the costs and uncertainties of planning" (para 6.22). It recommended

instead that there were greater opportunities for public involvement throughout the process, and stated that since elected councillors represent communities, they must take account of community views before making any decision. However, as pointed out by the Scottish Executive (2003c), a councillor cannot represent all the opinions within a community, thus questioning the reasoning of the DTLR.

The Scottish Executive consultation paper *Getting Involved in Planning* rejected TPRA in 2001, fearing greater delays in approving applications, that third parties may not be representative of the wider community, and significant resource implications for planning authorities and others involved in the appeal process. Nevertheless, in 2002 the Royal Commission on Environmental Pollution (RCEP) in its twenty-third report on Environmental Planning recommended the case for TPRA. It stated that since third parties now increasingly possess legal rights which may be affected by decisions to grant permission, the availability of judicial review is not an effective substitute for an appeals mechanism in this context. (RCEP 2002, para 5.43). The Executive therefore found there would be benefit in carrying out a detailed examination of the issues (*Your Place, Your Plan*, 2003d). In addition, an independent report by Green Balance (2002) strongly made a legal case for TPRA within limited circumstances, focussing on those types of case which give greatest grounds for concern in terms of quality, transparency, probity and accountability in the development control process.

The current debate on TPRA in the UK has been stimulated by a report from the House of Commons Select Committee on the Environment, Transport and Regional Affairs (Thirteenth Report, July 2000), which recommended immediate consultation on the details of introducing a limited TPRA. As the report states: "Regardless of the direct consequences of the Human Rights Act 1998 and the Aarhus Convention, the absence of such a right goes against the spirit of greater public involvement in planning." (para 93). This view is endorsed by FoES, and we believe that TPRA is a vital component of the fight for environmental justice in Scotland. We support the commitment made in the Partnership Agreement (2003) for consultation on wider rights of appeal.

Since the 1947 Town & Country Planning Act, the public has had a valuable role in the planning system. TPRA could be seen as extending that role within a wider context of growing rights of public participation to become a key feature of a more participative democracy. Moreover, by adopting TPRA the government could signal that planning respects other societal values, as well as facilitating needed development and supporting property rights. In the Republic of Ireland, less than 1% of all planning applications result in a decision made by the local authority being overturned by An Bord Pleanala (the Board of Appeal) through a third party appeal (Ellis 2002). However, it is still accepted that TPRA is highly significant in acting as a safeguard to poor planning decisions, increasing accountability and improving the legitimacy of the planning system. The main reasons for adopting TPRA are as follows:

- It would help to create a level playing field between the public and developers, which in turn would provide a foundation for trust and cooperation.
- It would increase local authority accountability in particular, 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.
- It would enable the cumulative impact of decisions to be challenged, especially in areas which have a high number of negative developments, such as landfill sites, and therefore suffer from a blight effect.
- It would create a strong incentive for developers to avoid duplicate, repeat and poor quality applications, thus improving the quality of planning applications.
- It has been suggested that TPRA is required to secure compliance with the obligations of the Aarhus Convention. However, the UK has chosen to rely on national legal rulings that the Aarhus requirements are met by the combination

of elected bodies making planning decisions (with public consultation), and the availability of judicial review of the legality of that decision rather than its merits. Nevertheless, RCEP (2002) suggested that the lack of a TPRA might not be consistent with the spirit and objectives of the Convention.

- The European Convention on Human Rights, Article 6, may also be pertinent to TPRA as it provides that everyone is entitled to a fair and public hearing by an independent tribunal in the determination of their civil rights and obligations. However, it is not as yet a strong argument in the UK which already has a judicial review process. At present it appears that Article 6 protects only those objectors who are directly and seriously affected by the proposed development, and when they are denied an independent and impartial forum to dispute crucial factual issues. The Alconbury case in 2001, heard by the House of Lords, focussed on the role of the Secretary of State as final arbiter of planning disputes, and while this role was upheld, the implications of the Convention for a legal case for TPRA have yet to be fully examined (see Corner & Brown 2002).

TPRA is also a crucial element of environmental justice, which is a general principle of this government's policy making. All communities should have the same rights to a decent quality of life, and have the same rights to appeal a planning decision that developers currently hold. TPRA could improve the quality of planning applications and decisions, improve public confidence in planning and enhance environmental justice by providing accountability to citizens.

## 4. The case against TPRA: scotching the myths

Some of the main opponents to TPRA are developers, who believe that TPRA will increase delays, adding to congestion in the planning system and, in their view, discouraging investment in Scotland. These spokespeople for development interests are spreading myths and misinformation about the proposals under discussion, such as the idea that competitors might use the right of appeal to gain an advantage for themselves by getting the application delayed and running the proposal out of time. It is time to scotch these myths.

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

Truth: Although some applications would take longer (perhaps 2 or 3 in a hundred), many others should be speeded up by the greater advance community consultation TPRA would encourage, and the disincentive it would provide to proposals departing from the development plan. Moreover, even for those additional proposals going to appeal, there would be tight time limits to ensure rapid determination. The current 6-month period for developers to appeal would clearly be inappropriate for third party appeals, as it would mean no work on a development could be started until the appeal period was over, and we have suggested a 28-day limit for all appeals. Most appeals could be dealt with by written representations; currently 90% of the casework of the Scottish Executive Inquiry Reporters Unit, SEIRU, is dealt with by written submission. In Ireland 98% of appeals are by written submission, rather than oral hearings. Overall, if resourced sufficiently, TPRA would help rebuild public confidence and trust 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 avoid the need for high barristers' fees at public inquiries, TPRA does not need to add significantly to the costs of the planning system. At the discretion of inspectors, costs awards (either against appellants or funded through some form of insurance scheme) could be made to ensure that the costs borne by developers were reasonable. TPRA may well add to costs if it is seen within the context of the current planning system, with a need for greater staffing in the reporter's unit, more planners and more training requirements. Yet many of these costs would be offset by the changes outlined above, and by the reduction in the number

of cases proceeding to appeal thanks to higher quality applications, greater levels of public participation, and use of mediation services. In addition FoES are recommending the payment of fees to lodge an appeal, which would contribute to the costs of the system.

*Myth 3: TPRA would create a 'meddler's charter' – giving anyone the ability to block any application for any reason.*
Truth: This has not been the case in Ireland and it is unlikely to be the case in Scotland. In fact the right to appeal would be limited to those who had originally objected to the application, and only certain categories of application would be subject to TPRA (those departing from development plans, those considered for EIAs, those where the planning authority has an interest, and those approved against planning officers' advice). Since in recent years only 1.4% of applications annually were advertised as departures from the development plan, it is unlikely that the number of applications in all categories will total more than a small percentage of all applications. In Ireland, 2.7% of appeals in 2002 were for proposals which were subject to an EIA. Fees and rules to deter frivolous and vexatious appeals could be easily put in place, including rules to award costs against such appellants, and perhaps even the power for the Reporter to summarily dismiss appeals (subject only to legal challenge). Experience from Ireland suggests that repeated appeals by meddlers are unlikely to occur: 67% of all third party appellants in Ireland had never made an appeal before, and of the 15% who had made more than 5 appeals, these were legitimate organisations such as local residents groups or national environmental groups (Ellis 2002).

*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. It might also provide rights for public authorities to challenge permissions which undermine the delivery of their statutory duties in the public interest. Most importantly, evidence from regimes where TPRA has been introduced is that it has served mainly to improve the conditions placed on developments (in Ireland almost 60% of appeals led to revised conditions in 1999 and 2000), thus enhancing their public benefit, and not to block them. There is no suggestion that the presence of TPRA adversely affected Ireland's economic growth over the past decade, or that projects were displaced to Northern Ireland which does not yet have TPRA.

*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. In addition TPRA would help remove the harm to democracy that arises when developers threaten to appeal and seek costs awards against a council which refuses their proposal. It is possible that setting the fee for appeals too high might discourage challenges, or that only relatively well-off people would be able to appeal, but this is a matter for further consideration and it is clear that the advantages to local democracy brought about by having a TPRA would outweigh any charges of undermining it.

*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 (Green Balance 2002:13). Over the past 5 years in Scotland, the number of cases dealt with by the SEIRU has stayed relatively stable, although overall the trend has fallen slightly in the past two years (Scottish Executive 2003b). *(Number of cases handled: 1998-9: 1,283; 1999-2000: 1,283; 2000-01: 1,340; 2001-2: 1,144; 2002-3: 1,143).*

In Ireland, developers' appeals still outweigh the number of third party appeals. There the number of appeals increased from 2,989 in 1991 to 5,308 in 2000. This was largely as a result of the boom in Ireland's economy during that period and a growing awareness of environmental issues. To ensure cases were met within the statutory 18 week period, in 2001 the appeals board, An Bord Pleanala, increased its members and employed extra consultancy firms to handle the caseload. The number of staff and board members increased from 112 in 2000 to 130 in 2002. By 2003, 80% of all cases were being determined within the time period, thus showing that it is possible to respond quickly to administrative burdens, and that they do not need to be unmanageable. Despite these difficulties, Ellis (2002) found that 100% of local authority officers and 88% of appellants in Ireland were firmly in support of third party appeals. Administrative burdens in Scotland would be made more manageable in Scotland by using 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 in Ireland, and most appellants seek only to change the type or design of development rather than prevent it. However, the significant minority rejected on appeal shows the value of the system as a potential deterrent to fundamentally bad proposals. Moreover, the political proponents of TPRA would not be the main users, which would be community representatives and organizations such as Community Councils, and these groups are more representative of communities than development interests. This myth reveals the terrible paranoia of developers that no-one actually likes or wants them. Unfortunately the more they resist reforms to enhance justice in the system, the more true this is likely to be.

*Myth 8: Other improvements in the planning system are more important that 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, the introduction of pre-application consultations, mediation services, a requirement for authorities to give reasons for approval, as well as reasons for rejection, and reform of planning gain so it is not abused by either developers or local authorities. But TPRA is a critical link in re-establishing public trust and confidence, and raising standards in the system, and its success will be measured by how little it needs to be used.

## 5. What is the situation now in Scottish planning?

The planning system long wrestled with the need to facilitate participation, yet balance interests. Today it is widely recognised that a review of the system is imperative to increase levels of public confidence and involvement in the planning process. Public involvement is generally sought in two instances in Scotland: by contributing to the development plan, and by commenting on planning applications. A consultation carried out on behalf of the Scottish Executive (2001) highlighted gaps in public participation, and led to the announcement of a new Planning Bill to be put before Parliament in 2004-5. The consultation on this Bill is due to begin early in 2004, and TPRA is one of the issues for possible inclusion in the Bill.

In 2001-2, there were 47,312 planning applications made in Scotland, an increase from 2000-1 of more than 5,000 applications, or almost 10% (Scottish Executive 2003a). The target is for 80% of applications to be dealt with within 2 months, although on average only 66% of applications were determined within the time limit in 2002, and 82% within 3 months. The bulk of planning applications (44%) were household applications, and 94% of these were determined within 3 months. However, while the number of applications for major developments were lower than those of householders, the percentage determined within 3 months was also much lower, showing that it tends to be these complex proposals which tie up the time of planning authorities (35% of major residential applications determined, 49% of major business and industrial developments,

51% other major developments, 34% mineral applications). Approval rates were around 94% for all applications. Planning permission appeals referred to the SEIRU have amounted to around 2.5% of all applications made in Scotland in recent years.

## 6. What is Friends of the Earth Scotland asking for?

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 element within a process that is more participative, with greater community involvement and greater corporate and government accountability. TPRA would create an incentive for developers to undertake pre-application consultation with communities and a disincentive for them to submit ill-founded, repeat or twin-tracked applications all of which generate unnecessary burdens on planners. TPRA would therefore help improve the standards of planning applications and decisions, and could be used against the entire application or to modify the proposal with conditions. To minimise planning delays overall, FoES therefore suggests the following revisions, which are in line with the recommendations of the Green Balance report (2002):

### 6.1 Criteria for appeals

FoES recommends the introduction of a limited TPRA, available only to the objectors of the original application, and that specific criteria should apply to the use of TPRA. These are:

*I.* *Where the planning decision is contrary to 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.*

Limiting the kind of appeals that can be made to defined circumstances will prevent frivolous or vexatious appeals being made. More broadly, inspectors should have the power to summarily dismiss such appeals, subject only to judicial review. In Ireland, only 1-2% of all appeals are rejected as being frivolous or vexatious, so it is unlikely that the case would differ greatly in Scotland. Below is a discussion of the four criteria with details of case studies showing how the lack of TPRA has adversely affected the rights of local communities in Scotland.

*I. Where the planning decision is contrary to the development plan*

Development plans form the context for all decisions made by a planning authority, and yet many authorities are operating with out-of-date plans. FoES calls for stronger development plans and believes TPRA could help to correct this situation by providing an additional incentive to bring development plans up to date. However, development plans are not seen as fixed documents, but have a degree of flexibility which needs to be protected. It is possible that this is an area which will increase in contentiousness in the future as pressure grows on green belt land: the SEIRU (2003b) indicated that appeals lodged involving development on green belts increased more than threefold in the year 2002-3 from the previous year. In order to identify these cases, applications are advertised as being potential departures from the development plan; for a number of years around 1.4% of all applications have fallen into this category.

Case study 1: *Kingask golf course, St Andrews, Fife*

The St Andrews Bay Hotel with its 2 surrounding golf courses, 'manor houses' and clubhouse stands prominently on a cliff top just outside St Andrews, in clear view of the town and on one of the highest points in the area. The development of this hotel was always going to be controversial. The first application was made in 1998 for one of the biggest hotels in Scotland, with over 200 beds. The £50m plan was also the biggest single investment to come to North East

Fife with the promise of many jobs to be created. The proposal was opposed on the grounds of, among others, impact on an Area of Great Landscape Value, scale of the development, traffic, development on the forthcoming green belt, and location (the site is also adjacent to an SSSI). It was a departure from the local plan and the St Andrews Transportation Plan, and also contravened the St Andrews Strategic Study. Opposition not only came from the local Community Council and the Preservation Trust, but also from Scottish Natural Heritage, Historic Scotland, the Association for the Preservation of Rural Scotland, the Architectural Heritage Society of Scotland and many local residents. The East Area Development Committee rejected the application, but a new application in 1999 was called in to Fife Council Strategic Development Committee to be considered centrally, ostensibly since the strategic repercussions of the proposal were too important to be judged by locally-elected councillors. The Committee approved the development in July 1999, but were then subject to an investigation over alleged maladministration on their handling of the case. The investigation cleared the Council, but there was criticism over their handling of several issues. The Community Council were unable to take the case to judicial review because of the risk of members becoming personally liable. Instead, six local residents served Fife Council with a judicial review and their fundraising efforts raised £91,000 over six months. However, after six days in the Court of Session the judge ruled against them on the grounds of delay. As developers have six months to appeal a decision, it is inequitable that petitioners who take four months to serve a legal notice, because of the need to fundraise, should lose in this way. With a TPRA, there would be no need to find vast expenses to pay for the legal process and the community would feel that their interests had been independently reviewed.

Case study 2: *Industrial estate, Birkhill, Lower Clyde Valley*
This area lies alongside the M74 corridor in South Lanarkshire. In 2003 outline planning permission was granted to a 35ha area for an industrial estate and distribution depot, with provision made for the location of future factories. A second detailed planning permission was approved for an animal feeds processing plant on 2.4ha within the larger outline planning area. The development is adjacent to local housing; four nearby communities joined together to object to the proposal, and a representative was present at the planning hearing. The development was contrary to the local plan and on a greenfield site, yet reference was made to the location being within a Rural Investment Area, which aimed to attract business to the M74 corridor. The Rural Investment Plan, on the basis of which approval was given and which apparently justified departure from the development plan, had not yet been approved by committee or put out for public consultation. Therefore it had not been scrutinised by locally-elected councillors. In addition, no EIA was carried out on the site, despite the size of the proposed development, which was over the 0.5ha required for EIA screening. Although no work has to date been carried out on the site, nearby residents are unhappy about the prospect of HGVs using local roads to and from the site, and without a TPRA they had no way of giving voice to their opposition once approval was granted.

Case study 3: *Golf development, Park of Keir, Stirling*
The communities of Dunblane and Bridge of Allan are currently preparing for a public local inquiry (PLI) to stop a developer from building a hotel and golf course in the Park of Keir. This development is on green belt land and contrary to the Stirling district structure plan. It is in an area of great landscape value and is opposed by Historic Scotland and the local Community Councils who fear it would create a precedent and allow more development, in the form of housing estates, to follow. These communities are very well mobilised and have mustered the support of their 5 MSPs and a planning consultant to assist with their case at the PLI. They have, sadly, already had experience of fighting a similar campaign when a previous application was made on the same land in 1991 but was rejected at a PLI. If this proposal is also rejected, it is possible that a future application will again be submitted and it will be difficult to generate the same level of opposition again. Alternatively, the developers might move to another area where the community is not so well-placed to resist. A TPRA would ensure that all communities have equal rights to appeal an application without having to fight for the case to go to a PLI.

*II. Where the local authority has an interest in the planning application*
There is clearly a conflict of interest where the local authority is also the developer. This has been an issue in a number of high profile cases, such as the M74 extension in Glasgow, which is now being considered in a public local inquiry (PLI).

Case study 1: *A701 new road development, Midlothian*
In 1998 Midlothian Council proposed building a new dual carriageway which would involve cutting through the Edinburgh green belt and removing part of Bilston Wood, an area of designated ancient woodland and an SSSI. Local campaigners called instead for an upgrading of the existing road, but were consistently undermined by council practices: for example, the planning permission for the road was advertised at Christmas to discourage objections, campaigners were banned from placing material in the local library and even from using the library photocopier to copy documents relating to the case. Despite this, 400 objections were received by the Council. However, permission was granted to the development in a council meeting that heard no representation from those objecting to the road. In 2000, the then Minister for Environment & Transport, gave the go-ahead to the road after a private meeting with 2 councillors, so the application was not called in even though there had been a high number of objections received and the local council had an interest in the proposal. Although permission was granted, the road has not yet been built, and the route has been subject to subsidence due to old mine-workings, as was pointed out by campaigners. In this case the Council clearly ignored the voices of the local community; without TPRA, they were then not able to appeal the decision.

Case study 2: *Balmossie Village housing development, Dundee*
This development of more than 100 houses was approved in 2003, despite objections from local residents and the Community Council. It was objected to as a departure from the adopted local plan, and concerns that building on a greenfield site would lead to difficulty in resisting future pressure for more housing in the area. Greater traffic volume and congestion would also result. Dundee City Council proposed the development, and then approved the application from the developer, thus having a direct interest in the application. The Community Council expected to be able to put forward their views at a local plan public inquiry, but found the Council had already determined the application, thus denying the community of an opportunity to voice their concerns at an independent and impartial tribunal. This problem would not be solved by a TPRA but it would have given the community an opportunity to have their voices heard. Another proposal in 2003 for 147 houses at North Balgillo, Dundee, is almost identical to that of Balmossie, suggesting it is established practice to pre-empt local plan public inquiries in this way.

Case study 3: *High Blantyre crematorium, South Lanarkshire*
An application was made in 2001 to build a crematorium, car park and garden of remembrance in Greenhall Park, High Blantyre. In this case the Council clearly had an interest in the development as they owned the land on which the crematorium would be built. The proposal was also a departure from the local plan, as the park was designated as a fragile area and green belt. The community complained about the lack of consultation over the application and objected, and the case finally went to a PLI after the Scottish Executive was notified of the Council's interest in the plan. The application was refused in 2003, but a TPRA would have given the community the initiative to make the appeal, rather than waiting for the Scottish Executive to act.

*III. Where the application is a 'major development', defined as those which fall under either Schedule 1 or 2 of the Environmental Impact Assessment (EIA) Regulations*

EIAs are compulsory for large-scale developments such as motorways and nuclear power stations, as listed under Schedule 1 of the EIA Regulations. However, for other developments listed in Schedule 2, screening is criteria-based, and planning officers look at the size, scale and impacts of the project before recommending whether an EIA is required or not. We believe TPRA should be applied to all developments screened for EIA under both Schedules, even if no EIA is ultimately required. If the criteria for TPRA is only for applications accompanied by an EIA it may happen that Councils encourage borderline applications to fall under the threshold in order to avoid the possibility of appeal by third parties.

If the project is screened for an EIA it means that it will have potentially significant environmental impacts. These impacts may not necessarily be seen to be of major importance by elected representatives, for example if they occur far into the future. Statutory objectors or environmental groups might therefore legitimately seek to

represent these interests. Another issue for consideration is that an EIA is carried out and paid for by the developer of a project, which in some cases may mean that a bias in favour of the developer could be argued, and the case would therefore benefit from the independent review that TPRA would provide. TPRA may also provide a mechanism for ensuring that the quality of EIAs is improved.

Case study 1: *Benderloch sand and gravel quarry, Culcharron, Argyll & Bute*
Permission for this quarry, plus a concrete plant and crusher, was given by Argyll & Bute Council in July 2003 after a campaign by members of the local community failed to persuade the Council to reject the application. Around 100 objections were made from the community of less than 300 people. The community objected to the 2 EIAs submitted on grounds of the inadequate scoping exercise and factual issues such as dust, noise, health, road transport, visual impact, etc. It was felt that they had not interpreted relevant NPPGs, PANs or the local plan and structure plan accurately, nor included consultation with the local community. The EIAs also failed to mention that the nearby existing Glensanda superquarry could easily produce the required sand and gravel which the quarry is to provide. Glensanda was dismissed as a hard rock quarry, yet it supplied sand and gravel to the Channel Tunnel. The 50ha quarry site is located in a woodland area designated 'greenfield' and 'sensitive settlement' on the local plan, and thus the development is also contrary to the development plan which should mean the proposal is automatically scrutinised by the Executive. The site is in close proximity to a number of environmentally-important areas, including Coastal Conservation Zones, a National Scenic Area, archaeological sites, and a European-designated Special Area of Conservation. The quarry site is also near a primary school, 2 large retirement homes and 60 local houses, and would destroy local wildlife habitats. Despite frustrated attempts by the local community to get their voice heard, approval was granted by the Council and there remains no further route open to them without TPRA.

Case study 2: *Boglea & Cameron opencast mine, Greengairs, North Lanarkshire* (see details below)

*IV. Where the planning officer has recommended refusal of planning permission to the council*

In these cases it is unlikely that the permission is decided solely on the basis of planning merits, but it is also important not to be seen to undermine the democratic role of councillors if there are valid reasons for the permission to be granted.

Case study: *Boglea & Cameron opencast mine, Greengairs, North Lanarkshire*
The village of Greengairs, dubbed "dustbin village" by the press, is surrounded by 9 opencast mining operations and landfill sites, including the largest landfill in Europe. According to one member of the local community, the villagers "live in fear for their health". The application for a further opencast mine on green belt, agricultural land at Boglea & Cameron Farms was made in 1996, but the developers attempted to minimise local opposition by posting the public notice of the planning application in the week between Christmas and New Year. Planning officials recommended rejection of the plan and refused the application on 7 different points, one of which related to a sub-standard EIA. The EIA was so far below standard that RSPB refused to comment on its contents. Local opposition was high with 183 letters of objection being received by the Director of Planning, despite a threat by the developer that the offer of compensatory remuneration to the community would be withdrawn if the case went to a PLI. The subsequent PLI upheld the approval of the mine, reflecting the political need for opencast mining, but leaving the community feeling that they had been given no voice. While a PLI is an independent review of a case, the community is unable to compete on an equal basis with developers who have the funds available to make a legal case. The beleaguered village is now facing another application for the extension of an opencast mine at Ballochney, which again has been recommended for refusal by the planning officers. Without a TPRA, they are fearful that this application will again be approved against their will and they have no power to appeal it.

Case study 2: *Leisure centre development, East Middlefield, Kingswells, Aberdeen*
In 2000 an application was made to Aberdeen City Council for a large indoor leisure centre development on green belt land to the west of the city. This would be a departure from the

development plan. The Director of Planning recommended refusal on grounds of green belt, landscape, poor access on foot, by cycle or by public transport, and precedent. The local Community Council had not been notified of the application due to an oversight and therefore did not comment on the plan. There was also a parallel application made, and this twin-tracked proposal caused confusion and drew the attention of objectors. However, the Council was minded to approve the application and it was called in by the Scottish Executive. Following a PLI in 2001, Ministers accepted the Reporter's recommendation and refused the application on grounds similar to those originally identified by the Director of Planning. However, if the local community had had a TPRA they would not have needed to rely on the Scottish Ministers calling in the application, but could instead have demanded the inquiry themselves.

**6.2. Fees for appeals**

In addition to the limitations listed above, FoES suggests that a fee should be levied for third party appeals. This is currently the situation in Ireland where the fee for lodging an appeal is €200. We suggest that in Scotland the fee should be in the region of £30-60, with a cost award being levied for unreasonable or vexatious behaviour.

**6.3. Time limits for appeals**

In Ireland there are strict statutory time limits set down for appeals to be made which ensure a smoothly running system. In 2003, 80% of all appeals were determined within the set time of 18 weeks after the initial planning authority decision. Currently a developer has 6 months to appeal a refusal of permission, but FoES suggests a time limit of 28 days after the initial decision for appeals to be lodged, whether by the developer or by a third party, so that there is no period of uncertainty and development can take place without waiting to see if any appeals are made. There should also be targets for handling appeals to avoid any backlog and undue delay.

**6.4. Use of mediation**

FoES stresses that TPRA is not an "add-on" to the current planning system, and calls instead for a review of all aspects of planning, with the possibility of using mediation services rather than continuing with the confrontational style used at present. Mediation can be used at any stage of the planning process, such as pre-application and at local plan development. While mediation is not suitable for all cases, studies (eg, Pearce & Stubbs, 2000) have shown that it has the potential to lead to an improvement in the quality of applications and decisions made, and to public and private cost savings; the informality of mediation procedures is often preferred to the more formal setting of a PLI. FoES believes that developers would be more willing to enter into mediation if the community had the potential power to appeal a decision using TPRA, rather than being without any credible opposition as at present. Mediation is widely used in Australia and New Zealand, which already have a TPRA in planning. However, mediation will not succeed unless governments put pressure on the parties involved and offer institutional support for mediation. A pilot project to investigate the use of mediation in Scotland would be a positive first step in determining how this can be incorporated into the planning process.

**6.5. Other planning reforms**

*Greater corporate responsibility* is also an important feature of avoiding the need for third parties to appeal. The adoption of mechanisms such as Good Neighbour Agreements help to create channels of communication between developers and the communities they are located within, and improve the accountability of the operation with its neighbours. Agreements can include undertakings by the company to provide access to information, the right to inspect the facility, provision for accident preparation and a commitment to prevent pollution. TPRA and Good Neighbour Agreements work in both directions, since TPRA will help the agreements to work while the presence of an agreement will reduce the need for TPRA to be exercised. Thus there should be greater guidance within the planning system for this to take place.

There also needs to be *greater accountability* by local authorities over the decisions they make. The most controversial developments can have an electoral impact and thus legal accountability is important. In addition, authorities need to give reasons for both approval and rejection of applications in order to enhance transparency. Local communities realise that theirs is not the only point of view that needs to be taken into account, but if there is no reason given for decisions which seem to ignore the results of their consultation on the matter, they may feel that their views are of no importance.

*Public local inquiry (PLI) reform* is also now on the agenda. While 90% of the appeals heard by the SEIRU are by written representation, appeals for major developments tend to be heard at a PLI, chaired by an independent reporter. Yet the odds are still stacked in favour of a developer: PLIs take place during office hours, so attendance for members of the local community may involve booking holidays from their employment; costs are high, and legal representation expensive. Objectors often work hard under difficult circumstances and in their spare time to comply with the timetable, but delays may be caused by statutory consultees while they consider new information. This has a knock-on effect which can prejudice the outcome, for example, when witnesses have been booked to appear but are no longer available at a later date. The Scottish Executive is currently consulting on how to modernise the PLI process and it is to be hoped that this results in a system which is less formal and intimidatory, more transparent, accessible and inclusive. However, in the long run, the greater consultation brought about by TPRA should result in fewer cases going to PLI.

*Other reforms* include improved neighbour notification, the introduction of pre-application consultations, and a reform of planning gain. FoES also recommends an education component to any new legislation introducing TPRA on both the existence and appropriate use of third party appeals aimed at communities and individuals.

## 7. The situation in other countries

The use of TPRA needs to be evaluated within the context of the planning system of the country in which it exists, and therefore direct comparisons between the UK and other countries must be treated with caution. However, a brief investigation of how TPRA is used elsewhere can inform debate with regard to how Scotland could adopt such a system. Many European countries have some form of TPRA, as do Australia and New Zealand. For further details, see the Green Balance Report (2002), from which the majority of the information is drawn.

### 7.1. TPRA within the UK

The Isle of Man, with its own legislature and development control system, has had a long-standing system of TPRA, and around 16% of these appeals succeed annually (Challis 2000). In addition, TPRA was introduced in the Channel Islands in 2002. In Shetland, the ZCC Act 1974 gave TPRA for work licences granted on the coastal zone, and this has been invoked by community representatives to strengthen their hand in negotiations with aquaculture operators. The Northern Ireland Assembly agreed in 2000 that TPRA should be considered, but this was put on hold when the Assembly was dissolved in summer 2002 and direct rule from the UK was restarted. There has been no substantial movement on this question to date.

### 7.2. Republic of Ireland

The Republic of Ireland's planning system is based on the Town & Country Planning Act 1947 and shares some of the main features of the UK's system. However, Ireland has also had a well-established TPRA since 1934, and it was retained in the Planning Act of 1963. Before this, government officials had made an extensive tour of Europe and North America and studied their various planning systems in order to improve upon that of the UK. Generally, while Ireland's system works well as a basis for comparison with the UK, there is a greater emphasis on arbitration of conflict after the local authority's planning decision has been made, rather than the emphasis that there is in

Scotland on participation prior to the decision. Thus, it is likely that the number of third party appeals could be relatively fewer in number in Scotland. See Ellis (2002) for a more detailed comparison of planning in Ireland.

Safeguards have been built into the Irish system over the past forty years to ensure that the right is not subject to any abuse. These include the setting up in 1976 of an independent tribunal, An Bord Pleanala, to hear appeals *de novo*, strict time limits for submissions (eg, 28 days to submit an appeal), the payment of fees, and limitations on those who are allowed to appeal. Since 2000, only those parties who had previously submitted a written comment on the planning application are able to appeal, along with any person who has an interest in adjoining lands who did not make an earlier submission. The latter condition was added since original proposals can be changed before final decisions are made. The vast majority of appeals (98%, according to Ellis) are decided through written representations, although oral hearings can be requested for a non-refundable fee (currently €90). These hearings are particularly apt for complex cases and when significant national or local issues are involved, but they are held without undue formality.

According to Grist (1999), TPRA is a feature well suited to current public demands for involvement in planning and environmental issues. However, as mentioned earlier, there was recently a huge rise in the number of appeals from 2,989 in 1991 to 5,308 in 2000, due to the growth of Ireland's "Celtic Tiger" economy. This extra workload was met by expanding the number of members of An Bord Pleanala and using consultants from the UK, and by 2003 80% of all cases were being met within the statutory 18 weeks.

Nevertheless there are still problems to be overcome in Ireland. For example, there is a tendency for a large percentage of major decisions to be passed on to the Bord, and while the Bord is transparent and needs to make decisions in line with development plans, it is not democratically accountable. In addition, Ellis (2002) noted that appellants from higher socio-economic groups were significantly over-represented, showing that TPRA can still lead to lower status groups being excluded due to a high level of fees or lack of support and understanding of the processes involved. This has implications for Scotland in introducing a third party right of appeal on an equitable basis and with an educational component.

### 7.3. Sweden

The Swedish planning system was extensively reviewed in 1998, and strongly emphasises environmental protection through the adoption of an Environmental Code and introduction of Environmental Courts. The Code covers all environmental licensing decisions as well as land-use planning. Appeals can be lodged against main planning permits within 3 weeks of the decision being made. Judgements should be issued within 2 months of the hearing. TPRA can only be used by certain groups as defined in the Code, including the person to whom an original judgement against giving permission was made, anyone with a material interest in the proposal (ie, they may be damaged or exposed to other nuisance by the operation), or an environmental group with at least 2,000 members which has been active in Sweden for more than 3 years.

### 7.4. Denmark

Third party appeals exist but are limited to specific environmental decisions, such as pollution consents, rather than to planning appeals. Decisions are made by government agencies and are heard by an Environmental Appeals Board. Appeals must be lodged within 8 weeks of the decision and can only be made by specified environmental organisations. Around 10% of appeals are by third parties, and of these, 50% succeed in overturning the original decision.

### 7.5. New Zealand

The system of TPRA is entrenched in New Zealand law, and since 1991 planning permission has been replaced with resource consents in order to introduce a more

integrated environmental management system. Appeals are limited to those who have made written comments earlier in the decision-making process, and there is a time limit of 15 days (currently being considered for lengthening to 30 days) with costs of $55. In 1998-9, only 1% of resource consent decisions were appealed, with 40% of appeals upheld in their entirety, 42% upheld with conditions and 18% overturned.

### 7.6. Australia

Five of Australia's seven states have established some form of TPRA in planning, while the others are currently reviewing the issue. Each state employs different rules governing third party appeals and Environmental Courts have been established to deal with disputes in this sector. Mediation and other dispute resolution procedures have also been adopted, which help to avoid formal hearings. To give an example of practice in one state, Queensland has had TPRA since 1990. Any person may bring proceedings yet in practice this has tended to mean the Environment Agency has represented third parties, calling on local community members as witnesses. Appeals have to be lodged within 20 days and there is a fee payable of $20. The major barrier to access of third party appeals is cost, since parties are liable to pay their own costs and a 5-day hearing could amount to as much as $40,000; legal aid is available but rationed. Despite the difficulties this brings, the benefits of having TPRA are felt to outweigh the costs (Green Balance 2002).

It can thus be seen that TPRA is not an unusual or radical element of the planning system in other countries, but a widespread right that exists both in Europe and Australasia. Many other European countries have rights of appeal for all parties, including France and the Netherlands, but as stated above it is difficult to draw direct comparisons with different planning systems. Given the growing integration of planning with environmental rights and regulations, and the need to enhance public participation evidenced by the adoption of the Aarhus Convention, an expansion of rights to include those of third parties is becoming essential.

## 8. Conclusions

For the vast majority of planning applications, the system works well in Scotland. However, the case studies in this report show that for a significant minority of communities, decisions have been made which they feel have not taken into account their justifiable opposition to a development. Many of these opponents started out with good faith in the planning system but feel let down by the process. Sometimes the local authority's own planning officers have recommended refusal of the application but it has still been approved. While some of these cases have gone to a public local inquiry (PLI), it is suggested that this process does not give communities an equal footing with developers to fight their own corner, on grounds of expense, time or expertise. In addition, local residents should be able to initiate a PLI themselves, rather than waiting for the Scottish Executive to raise the issue. PLI reform is on the agenda now, but 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.

Amongst the misinformation, the opponents of TPRA raise some concerns which merit serious consideration. But all too often they seem to forget who the planning system is for. It is not there for the developer, nor was it put in place to provide jobs for planners. It is there for us – the public – to guide the future development of land in the long-term public interest: in other words, to promote sustainable development. We need to move away from our current confrontational system to a more cooperative process, with the use of mediation services where the community can deal on a more equal basis with developers if they have a right to appeal a decision.

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. Alternatively we should perhaps level the playing field, by taking away the right of appeal for developers. 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.

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