Friends of the Earth Scotland

29th July 2004

Richard West
Rights of Appeal in Planning
Scottish Executive Development Department
Area 2-H (Bridge)
Victoria Quay
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Dear Mr West

Response to Scottish Executive Consultation on Rights of Appeal in Planning

Summary
Friends of the Earth Scotland strongly welcomes the Executive's consultation on widening the rights of appeal in planning. We have long campaigned for the introduction of a limited third party right of appeal within the context of wider planning system reform, and broadly support the first model put forward in the consultation document. We recognise that this is a complex issue with wide-ranging resource and procedural implications, yet we believe that adoption of TPRA, alongside other reforms, will lead to increased public confidence in planning, greater democratic involvement and will help generate better planning decisions. We also believe that the principles of environmental justice and sustainable development, which this government has pledged to uphold, cannot be delivered without greater equality in the planning system. It is imperative that the rights of individuals and communities are strengthened by giving them the same right of appeal as developers since third parties are, or represent, key stakeholders in the processes that affect them.

General comments
Friends of the Earth Scotland has responded to the consultation with the vision in mind of a Scotland where individuals and communities are involved in local decision-making processes, where planning applications and developments are of a high quality, where there is increased community involvement in management and ownership of natural resources, and where sustainable development and environmental justice are principles which underpin all aspects of government.

The need for greater community involvement was highlighted in the government's white paper, *Your Place, Your Plan.* From a broader perspective of public environmental rights, the introduction of a third party right of appeal (TPRA) would be in tune with the spirit of the UNECE Aarhus Convention in terms of

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promoting a more active environmental citizenship. Irrespective of this current consultation, the government needs to prepare for the adoption and implementation of this Convention. It is debatable as to whether or not the current judicial review process meets the requirements of an appeal system which, under the terms of Aarhus, should be "equitable, timely and not prohibitively expensive". In this context, a third party right of appeal would offer a crucial mechanism in allowing greater access to justice and public participation in environmental decision-making. The introduction of TPRA would go some way towards assuring the legal imperative of Scotland's compliance with Aarhus. The European Convention on Human Rights, Article 6, is also pertinent to this issue, 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, and it is not clear that the current judicial review process adequately meets these requirements either.

The process of modernising the planning system is long overdue but should not be rushed, since this is an extremely complex area with far-reaching implications. For example, one of the main criticisms of opponents of TPRA is the delays they believe it will add to the processing of planning applications. However, in view of other reforms being considered, such as streamlining development plans and the review of public local inquiries, we need to assess how time savings will be made in other areas of the system. In addition, the fact that two-thirds of first party appeals are refused is an indication that it is the development industry which is currently causing delays in the system by submitting unreasonable appeals, along with twin-tracked, repeat and poor quality applications which all add to congestion.

In any case, we wish to emphasise the point that the underlying aim of the changes being consulted upon is to bring about a better, more equitable system, and therefore any short-term delays would be acceptable as the new rights of appeal are assimilated. In the long run we believe that an improved pre-application consultation process will negate the need for many third party appeals, and that developer participation in such a process would be encouraged by the existence of TPRA.

The consultation documents point out that the introduction of new rights of appeal will result in greater resource costs, both directly and indirectly. However, in a process of modernisation it is inevitable that costs arise, as happened in the reform of the justice system; these costs are acceptable since ultimately the system is becoming fairer. Furthermore, along with other proposed changes, up-to-date development plans will result in cost savings which will offset most of the other expenses. Qualitative improvements to the system cannot of course be counted, but we believe that in the long run the overall benefits to an improved system with TPRA will far outweigh any costs. These benefits include a better planning process, better outcomes and greater public involvement.

It is worth noting here that even with TPRA and the other reforms currently foreseen, the planning system will still be biased in favour of planning applicants, by virtue of their greater access to resources, skills and knowledge.

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Responses to individual questions

Q1	Paragraphs 3.3.1 to 3.4.9 have identified arguments made to us previously both for and against a third party right of appeal. Do you think they accurately reflect the arguments? Are there other arguments not covered here which you wish to raise?

No, the arguments put forward against TPRA do not accurately reflect the case, since they appear to interpret TPRA as a veto on development, rather than an opportunity for more rigorous re-examination of the arguments for and against a proposal. We wish to add three further arguments in favour of a TPRA:

- TPRA has the opportunity to act as a mechanism to enhance the status of the development plan and ensure that plans are up to date.
- TPRA allows communities to initiate an appeal process rather than hoping that the Scottish Executive will call-in the application, which often means a concerted, time-consuming campaigning effort.
- TPRA will give communities increased feelings of ownership of a development.

We would also like to highlight that while, as mentioned in paragraph 3.4.3, England & Wales have decided against TPRA, Scotland's planning system is separate and there is no reason why any decision should be influenced by Westminster. Third party rights are widespread in many other planning systems, and exist in many European countries, Australia and New Zealand and also closer to home in the Channel Islands, Republic of Ireland and the Isle of Man. The Northern Ireland Assembly had also made a commitment to consider TPRA before being suspended in 2002, and under the Orkney and Zetland County Council Acts 1974, third party appeals against works licences in the coastal zone are allowed in Orkney and Shetland. TPRA has been used successfully in Shetland by community representatives to ensure they are involved in negotiations regarding the conditions for aquaculture operations.

Q2	Do paragraphs 3.5 to 3.14 accurately reflect what supporters of a third party right of appeal are seeking in a new appeal process?

The arguments are not fully reflected in these paragraphs. We are seeking:

- Better processes which are more conducive to developing and maintaining trust, through rigorous and transparent examination of proposals.
- Opportunities to improve the quality of new development by changing conditions and influencing the nature and scale of developments.
- To stimulate developers to consult in advance and then bring forward high quality and locally supported proposals.

We wish to point out in relation to paragraph 3.14, that it is not only an opportunity to overturn decisions which is sought. Studies from the Republic of Ireland have shown that in 2002, 54% of appeals succeeded in changing the conditions of the application, while just 45% overturned the decision. This is an important point as it shows that in most cases the appellants did not want to stop development but rather to make sure it was more respectful of the wishes of local residents, and it is likely that this pattern will be repeated in Scotland. Communities

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are not opposed to development *per se*, but they do not want development at any price. In Ireland, just 1% of third party appeals were unsuccessful, suggesting that appeal rights are not exploited but are based on valid grounds. If 65% of applicants' appeals in Scotland are currently unsuccessful, as pointed out in paragraph 3.14, this suggests that it is developers who are clogging up the system with unreasonable appeals, and the appeals system would benefit from greater screening of both first and third party appeals to decide which can proceed.

Q3	If the right of appeal were to be extended to third parties, do you think it should be restricted to all or some of the four categories identified in the *Partnership Agreement*? Please give reasons to support your views.

We believe that the right of appeal should be limited, and restricted to the four categories given in the Partnership Agreement, but with an extension to the category outlined in paragraph 4.5.4 for cases where an EIA is needed, as justified below. We support the use of TPRA in maintaining the public interest and protecting our built and natural heritage. We believe that these categories ensure that only developments with major environmental impacts or implications of environmental injustice can be subject to a third party appeal in the public interest.

Cases where the local authority has an interest: 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, and this criterion for a right of appeal would help restore confidence in the transparency and accountability of local authority decisions. PPP/PFI developments would also benefit from greater scrutiny, although more consideration is needed as to whether developments proposed by the council under Notice of Intention to Develop should be liable for appeal, as these are usually necessary projects for local services.

Concerns have been raised about developments by community-based housing associations, cooperatives or voluntary organisations seeking to provide services for disadvantaged people, such as affordable housing, sheltered accommodation, etc. In order for TPRA not to impact negatively on these developments, mechanisms need to be in place, such as exemptions for development which is subject to national strategic priorities, like homelessness.

Cases where the application is contrary to the local plan: this should refer to the local, structure or other adopted 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. We are concerned about this situation and believe that the Executive has the power to ensure that development plans are up-to-date by issuing a directive to planning authorities, with a deadline of, for example, March 2007. For those authorities who had submitted a plan within the previous two years they could be invited to re-submit and thus all local authorities would be starting from the same position. TPRA could help by providing an additional incentive to bring development plans up-to-date, perhaps with the further motivation that there should be an automatic appeal right given if the development plan is out of date. It is possible that departures from the plan could be an issue which will increase in contentiousness in the future as pressure grows on greenbelt land: SEIRU indicated that appeals lodged involving development on greenbelts increased more than

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threefold in the year 2002-3 from the previous year.

Bullet point 6, which mentions minor forms of developments, is irrelevant to this consultation, as such developments are not seen as being within the scope of TPRA.

One further aspect of development plan departures also bears closer investigation. Applications are currently advertised as being *potential* departures from the development plan, which make it straightforward to identify which decisions are eligible for appeal under this category. However, we would like to see the removal of the word "potential" since it can lead to a loophole for developers. One case which highlights this was the application for a sand and gravel quarry at Culcharron, Argyll & Bute. The application was advertised as a potential departure, but after a large number of objections were received by the council, it was decided that the proposal did not after all constitute a departure from the development plan and as a result the council were able to avoid the need for referral to the Executive. The community felt aggrieved and that there was a clear departure from the plan.

Cases where planning officers have recommended rejection: in these cases it is likely that the officers' decision is made on the basis of planning merits. While 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, communities should have the right to ask for further scrutiny of the application by calling for an appeal. For example, the village of Greengairs in North Lanarkshire has suffered from an accumulation of negative developments and the proposal for an opencast mining operation at Boglea & Cameron in 1996 was recommended for refusal by the planning officer before being approved by the council. A current application for the extension of an opencast mine at nearby Ballochney, which has again been recommended for refusal, is being considered by the council, but the community is fearful that this application will again be approved against their will.

The arguments cited against this category, such that councillors might put officers under pressure to alter recommendations, or refuse to serve on a planning committee, are tantamount to slander, suggesting that some councillors are not trustworthy. Furthermore, a recent survey by the Scottish Executive into community involvement in planning found that planners and councillors were poor at interpreting local views, and that the consultation process was in great need of improvement. Thus, the community would benefit from the independent scrutiny of a proposal that TPRA would bring.

Cases where an EIA is needed: along with developments requiring an EIA, we believe developments which are screened under Schedule 2 should also be included in this category, whether or not it is deemed that an EIA is required. The reason for this is that if only applications accompanied by an EIA are allowed to be appealed, it may be the case that a loophole is created whereby borderline applications fall under the threshold in order to avoid the possibility of appeal by a third party. 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. We also call for TPRA even when only a partial EIA is deemed to be required. The extra scrutiny of EIAs brought about by TPRA will

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also act as an incentive to improve the quality of EIAs.

We dispute the assertion in paragraph 4.5.4 that developers prefer to undertake an EIA to ensure that any permission given is robust and unlikely to fail any subsequent challenge. We have evidence to suggest that this is not always the case, as happened at Birkhill, near Douglas in South Lanarkshire, where an application for an industrial estate and distribution depot was given outline planning permission in 2003. No EIA was carried out on the site, despite the size of the proposed development (30ha), which was over the 0.5ha required for EIA screening.

Q4	Which planning decisions do you think should be capable of appeal to the Scottish Ministers?

Regarding volume of appeals, we feel the analysis here over-emphasises marginal concerns such as risks of early appeals vs deemed refusal, rather than focussing on the key issue that improved quality of applications would mean fewer appeals by either first or third parties.

We agree with the suggested categories listed in paragraph 4.10. We also believe that planning permissions for consents under the Electricity Act 1989 should be included, unless there are clear equivalent mechanisms for appeal which are needed for Aarhus compliance, and that the issue of enforcement should undergo further consideration.

Q5	If the right of appeal were to be extended, which third parties should be able to appeal and in what circumstances? Please give reasons for your answer and also, where relevant, explain why you think any of the third parties identified above should not qualify for a right to appeal.

Although this is a complex area for consideration, we believe the option outlined under paragraph 4.12.3, *those who objected to the original planning application*, is the best option, although further refinements may be necessary. For example, we suggest that the criterion should be extended to *those who objected or submitted comments to the original planning application,* so that anyone who expressed an interest in the application is given notice of the decision. Original objectors or respondents may include statutory consultees, local residents, Community Councils, interest groups and NGOs, as well as other developers and small businesses, but by showing an interest in the original application they are demonstrating a commitment to the whole process. The Aarhus Convention specifically makes provision for environmental NGOs to have access to an inexpensive review procedure, acknowledging that NGOs would only seek an appeal where there are legitimate planning grounds for objections. In addition, NGOs are representative of local communities and often have the required expertise to engage in the process. It is therefore imperative that they are allowed the right to appeal.

Evidence from Ireland shows that 75% of appeals are made by individuals, while 10% are by residents' associations. This study found that 67% of all third party appellants were making an appeal for the first time, and of the 15% who had made more than 5 appeals, all of these were community organisations or NGOs. Therefore, the claims made by the development industry that third party appeal

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rights will be exploited by nimbys does not stand up to the evidence from Ireland.

The point raised in the consultation, paragraph 4.12.3, about amended applications which may raise concerns in people who had not originally objected is well made, and thus there may be a need to allow appeals by new objectors on applications which have been altered, as is the case in Ireland. However, our preferred option would be that if the application is altered significantly, then the entire planning process should begin again. We are aware of cases whereby some developers abuse the system by altering applications after submission, and these amendments may never be advertised or consulted upon by the public. If developers know that they will have to resubmit their application, it would force them think more carefully about involving the public in prior consultation and ensure that planning applications are of better quality.

We do not believe that restricting the option to *persons with interest in the land* gives valid grounds for appeal. Examples of why this is not acceptable include small retailers in town centres objecting to an out-of-town shopping centre development which may result in increased traffic impacts and the loss of town centre vitality and security, or residents objecting to a new quarry operation which may be distant from their houses on the grounds of extra traffic generated in the area.

The options to restrict the right of appeal to "*representatives*" or *other interested parties* are problematic in several ways, mainly because it would add to complications in the system to work out who would be eligible to appeal in each case, and which group had legitimate planning interests. It might, however, make it easier to exclude appeals motivated by competitive interests.

In addition, this option would not address the issue of allowing individuals access to justice, as laid down in the Aarhus Convention. Also, the existing role of Community Councils would have to be greatly strengthened in most cases, and indeed new Community Councils formed in many areas of Scotland to ensure coverage. Environmental NGOs have made a significant contribution, usually through the process of judicial review, to ensuring that environmental laws are enforced. They have succeeded in upholding the public interest and it is vital that this role is not lost. They should certainly qualify for the right of appeal, although ideally public interest should be upheld through making representations or objections to the original application.

Q6	Do you support, in principle, the introduction of a wider right of appeal in the planning system? Please give reasons to support your views.

Yes, we support the introduction of a wider right of appeal in the planning system. Alternatively we would support a levelling of the playing field by taking away the right of appeal for developers.

This is an important principle because if third party rights are not granted, the government runs the risk of further alienating those communities around Scotland who are already feeling frustrated and that their voices are unheard in processes which are intended to be participatory and consultative. TPRA would ultimately affect a very small proportion of proposed developments, but these rights have symbolic value that suggests the planning system is not entirely pro-development

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and as such they have a wider impact on how development is designed and how developers engage with the local community. Debates around potential procedural impacts, such as delays, should therefore be seen as being secondary to a more fundamental discussion around issues of principle, particularly on whether it is acceptable to have absolute inequality between those proposing development and those that are affected by it.

The Partnership Agreement promised: "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." It is difficult to believe this promise if TPRA is not adopted. We believe that the lack of a TPRA will negate the progress which will be made in pursuing other planning reforms, and will mean a huge setback in delivering environmental justice for Scotland.

As mentioned above, for the vast majority of new developments, the current system works, although for communities as well as developers, delays and costs are common concerns. However, we have numerous case studies from our work with communities around Scotland which show that for a significant minority of people, decisions have been made which they feel have not taken into account their legitimate concerns about a development. Many of these objectors started out with good faith in the planning system but feel let down by the process. 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 an inquiry themselves, rather than waiting for the Scottish Executive to call in the application. We therefore welcome the intent to address PLI reform within the planning bill.

Friends of the Earth Scotland believes that TPRA would help improve the whole planning system, especially leading to better pre-application consultations, which would mean fewer appeals overall in the long term. The quality of planning applications is also likely to improve and currently, as Jim MacKinnon, the Executive's Chief Planner recently admitted at a conference, for the planning system "quality is the exception rather than the rule". (Planning for Scotland's Success, Edinburgh, 16th March 2004)

The planning system should be there to guide the future development of land in the long-term public interest: in other words, to promote sustainable development. Indeed, SPP1 states: "The aim is to ensure that development and changes in land use occur in suitable locations and are sustainable. The planning system must also provide protection from inappropriate development."

We need to move away from our current confrontational system to a more cooperative process, with the use of mediation services in pre-application consultations where the community can deal on a more equal basis with developers, supported by the right to appeal the final decision. In this way, TPRA would serve to help rebuild trust in the planning system and between developers and communities.

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Q7	How do you feel the planning service at both planning authorities and the Scottish Executive would be placed to manage the likely increase in workload?

The underlying principle behind our answer to this question is that a better, more equitable planning system will result from the changes leading from the introduction of a TPRA and this outweighs any obstacles that might ensue. We do, however, recognise the resource and staffing implications that may arise. We suggest that advance notice of the change, with resources provided in advance to help adjust, alongside careful design and changes in other aspects of the system should greatly lessen any foreseen increase in workload.

We particularly dispute the assertion that local authorities would divert staff from pre-application discussions to deal with appeals. This would be especially short-sighted as the interest of the developers in particular in such discussions will increase with TPRA. If this is considered to be a real risk, then such consultations should also be made compulsory. We would expect to see extra central resources allocated, along the lines of the planning delivery grant in England & Wales, and more funds for Planning Aid Scotland. Changes which will reduce the workload include the following:

- Written representations: we suggest that the vast majority of appeals be heard by written submission, as is the case in Ireland where 98% of appeals are considered in this way. This will greatly reduce the time and expense of appeal hearings for all parties.
- The use of mediation services would benefit pre-application consultation processes in many situations, as long as communities have TPRA, which will strengthen their voice in negotiations. Without the ability to appeal a proposal, there is no mechanism which forces a developer to take account of the wishes of the local community. However, if the application is fully consulted-upon, it is less likely that major objections will ensue and thus the need for many PLIs will be avoided with consequent resource savings.
- Modernisation of the PLI system is currently being considered, with a move for cases to be heard in a more informal hearings forum.
- If front-end consultation takes place, developers will be discouraged from submitting twin-tracked, repeat and poor-quality applications which all slow down the system at present and cause confusion.

It is important to give adequate time before TPRA is introduced in order to put resources in place.

The comparison with Ireland in paragraph 5.2 also bears closer scrutiny. While the Irish planning system gives a valuable insight into how TPRA may be adopted by Scotland, it is not an exact replica of the Scottish planning system. If 7% of all applications are appealed in Ireland, the figure is likely to be much lower in Scotland, and not similar as suggested in the consultation document. This is because the Irish planning system allows for less public participation at earlier stages of the application than in Scotland, relying on the appeal system to arbitrate between parties after the decision has been made. Although it is difficult to give an accurate number of applications to be appealed in Scotland, the figure of 3,500 is likely to be over-estimated. In any case, as the system beds in, it is likely that the number of appeals will decrease as developers adopt new techniques of community involvement, and improve the quality of their applications.

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Q8	Do you think there would be any implications for the attractiveness of planning as a career if there were to be a significant increase in the appeal caseload? Please give reasons for your answer.

First of all, we believe that there would be no significant sustained increase in workload in the longer term, as other reforms would be assimilated into the system leading to better pre-application consultation processes and a reduced number of appeals. However, to answer the question, TPRA will bring positive gains to the planning system in terms of more community involvement, more public interest and engagement with the process, and enhanced trust in the system. We feel that these elements will bring greater job satisfaction to the work of planning officers. Anecdotal evidence from our own research suggests that younger planners are much more receptive to the introduction of TPRA because they can see the lack of equity in the current system, and thus it may be easier to recruit students to planning courses in the future. We understand that planning courses in Ireland are over-subscribed.

Q9	Should a fee be payable to object to a planning application and/or to lodge an appeal against a planning decision? If so, what do you think would be an appropriate level of fee?

We believe there should be no fee payable to object to a planning application, or for first parties to lodge an appeal. However, we do believe that there should be a fee for third parties to lodge an appeal in order to demonstrate their serious intent and to discourage any nimby-ism. The level of the fee needs to be low enough that it does not discourage individuals or residents' associations from appealing, yet not too low that it allows serial appealers. We suggest a fee in the region of £30-60. One issue that needs to be discussed here is the role of Community Councils as statutory consultees to planning applications. Currently Community Councils are under-resourced if their role is to be expanded to allow them to lodge appeals on behalf of the community, and they are unable financially to carry out the statutory duty placed upon them. A central fund should thus be available for grant applications by Community Councils. This could be one role of the proposed Environmental Justice Fund. The problem of multiple appellants or objectors clogging up the system is unlikely to be an issue if community members can rely on one well-founded submission by their Community Council, supported by the right of appeal.

We do not believe that cost awards should be made for third party appeals, but that each appellant should pay their own expenses. Expense awards should only be made in exceptional circumstances in the case of unreasonable behaviour. Provision should be made so that this deterrent is available to reporters.

Q10	Should the Scottish Ministers retain their role in deciding particular planning appeals, or should SEIRU decide all appeals?

Friends of the Earth Scotland believes that there are advantages to the Scottish Ministers no longer deciding particular planning appeals, since it can lead to a conflict of interest where they are the promoter and final arbiter of a planning

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decision. This is the case with the proposed M74 extension. We feel it would be more appropriate for SEIRU to be an arms-length body with greater independence which decides all appeals, except in exceptional circumstances. However, if the Executive were to retain its role as final arbiter, this could be balanced by allowing Parliament to scrutinise cases where the Executive and the Reporter have come to opposing decisions.

Q11	Would the introduction of mandatory public hearings in defined circumstances increase public confidence in planning authorities' decisions?

No, overall we do not believe this would be the case, although we would require further information on how this system of public hearings would work in practice before making a full response to this question. For example, is it envisaged that the hearing system would be the same throughout the 32 local authorities or would each authority be allowed to devise their own systems?

In general we are opposed to this idea since we feel it would add an extra tier to the system with the subsequent delays this would bring, and would also add extra costs for few added benefits. If the aim of the current modernisation process is to streamline the planning system, it is unlikely that mandatory hearings are going to assist this objective. Although in some cases a hearing may be beneficial in producing improved planning applications, there is no evidence of their additional value overall. We would support the idea of a code of conduct for these hearings, but our underlying objection is that despite the process of the hearing, a developer would still have the right to appeal any decision, a right not available to the communities who took part in the discussions in good faith. This would undermine any increase in public confidence gained by the process. Without the substance provided by rigorous examination of arguments, the participation provided by such hearings would be just 'going through the motions', and therefore of little benefit to public confidence.

Q12	Would extending the circumstances in which the Scottish Ministers are notified, to include all development plan departures, sufficiently address concerns about decisions being made by planning authorities against the terms of development plans?

We believe that there are advantages to the situation whereby Ministers should partially lose their right of call-in, since in most cases it will become superfluous if TPRA is introduced. Call-in would be useful for those cases which are not eligible for third party appeal. The loss of call-in powers would save time and resources within the Executive, and it would further signal that the Ministers place their trust in the system. However, this needs to be considered alongside other proposed changes within the system, such as the recommendation in Q10 that SEIRU become an independent appeals body. In any case, the call-in process must be made more transparent. Extending notification, even to the public as well as ministers, would be insufficient to address existing concerns. Public notification, alongside TPRA, would be sufficient for departures.

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Q13 Would it be appropriate to introduce a screening process for planning appeals? Please let us have your comments on relevant screening criteria.

We agree with the criteria outlined in the consultation document. We believe that any system of TPRA, whether under Model 1 or Model 4, must include a screening process to ensure the appeal falls within one of the four criteria and that the appellant is entitled to appeal. Our reservations with the outlined proposal are to do with the fact that if the Scottish Ministers are in control of the screening process, plus retaining the power of call-in and also being the final arbiter on a decision, this could represent a serious conflict of interest. We would prefer to see SEIRU taking on the screening role. Whoever undertakes the screening, they will need to be exposed to possible legal challenge via judicial review.

Q14 Are there circumstances in which any right to appeal against planning decisions should be withdrawn? Please give details.

No, on balance we do not believe that there are any circumstances which would justify the withdrawal of the right of appeal. As long as the 4 criteria are followed and the process has been within the planning system, in the interests of transparency and accountability, appeal rights must be allowed. Even if the decision is upheld on the grounds of vital economic interest or social need, etc, a project of this importance would benefit from the further scrutiny brought about by the appeal process. If such provisions are to be considered, they must be confirmed by ministers and only applicable where a delay (of three months) would critically harm the public interest in the development.

As mentioned earlier, developments by community-based housing associations, cooperatives or voluntary organisations could be liable for appeal as the council often has an interest in these cases. We would therefore accept arguments for exemption on social grounds, such as for development which is subject to national strategic priorities.

Q15 (a) Please give us your views on each of the models outlined in section six.

(b) Can you think of any alternative package of changes to the planning system to ensure a system which is both fair and effective.

(c) How would each of these models (and any other package you suggest) impact on the resources and objectives of you or your organisation?

(a) Friends of the Earth Scotland's views on the four proposed models
Model 1
This is our preferred option for the reasons outlined in answer to Q6, with Model 4 as a second preference. 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. Those who are set to gain in Scotland from this option are communities and individuals, Community Councils and

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residents' associations, small businesses and NGOs.

Many objectors to TPRA claim that the system will be clogged up by developers trying to block each other's plans. However, there is no evidence of more than negligible abuse of the system in Ireland. Likewise, third party appeals dismissed as frivolous or vexatious in Ireland account for less than 2% of all such appeals which demonstrates that the system is unlikely to be abused by so-called nimbys. We also dispute allegations that TPRA would act as a deterrent for future investment in Scotland or have a detrimental effect on the Scottish economy. The planning system is just one factor among many for those considering investment, and the existence of TPRA certainly has not deterred investors in Ireland, or pushed development over the border to Northern Ireland.

While we recognise that there are resource implications if TPRA is introduced, we believe these are secondary to the crucial principle of levelling the playing field and bringing greater equity to the planning system. There are also opportunities for cost savings within an improved planning system as outlined in the various sections above, which will offset the new costs. We believe that a right of appeal accessible to everyone, albeit in limited circumstances, would help Scotland move towards compliance with the third Article of the Aarhus Convention, Access to Justice. We support the other reforms the Executive is undertaking in its modernisation of the planning system, especially with regard to the PLI process and increasing public participation, but we do not believe that they will lead to greater public confidence in the system if they are not also backed up by TPRA. TPRA will ensure better pre-application consultation, better quality applications and greater transparency and accountability.

We would also like to highlight the role of TPRA in sending out a wider signal that public bodies are listening to the voices of communities and individuals, that people have a role to play and really can influence decisions, thereby encouraging more engagement in political as well as planning processes. It is accepted that voter "apathy" is often a symptom of public alienation, frustration and mistrust felt by those who feel disenfranchised from political processes.

We are not commenting in detail here on the various issues raised in the consultation document, such as expense awards and roles of the Ministers and Reporters. We feel these points are more suited to being considered under planning guidance once the principle of TPRA has been agreed, rather than for inclusion in the legislation itself. However, we feel the suggestions made for dealing with multiple appellants are reasonable. There would also need to be some kind of screening process to ensure the appeal falls within the 4 adopted criteria.

Model 2
We welcome the proposals outlined within the modernisation programme for the planning system but reject model 2 as an option since the underlying principle of making the system more equitable is not met.

Model 3
Again, the principle of TPRA is not introduced in this option so we do not believe it is a fair or effective model. As outlined in our answer to Q11, while hearings might be helpful in some cases there is no evidence that hearings are beneficial in general, and they will add an extra tier to the system with the potential for greater delays and

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costs. Ultimately, even after the hearing process, first parties will still retain the right of appeal which perpetuates the current inequitable system. If combined with the removal of first party appeal rights, this model might be acceptable.

Model 4
Of the models outlined, this would be our second option. We believe that the use of the 4 criteria and the limited right of appeal for appellants who responded to the original application demonstrate the need for a screening process, although as mentioned above we believe this should be carried out by SEIRU. Consideration is also needed as to whether screening decisions could be challenged in law, and if so how. The stage 2 appeal process would appear to risk additional delay in comparison with Model 1.

If the principle of bringing equity to the system is to be followed, limiting the appeal right for developers would bring about greater parity for the appeal process.

(b) Model 5 – removal of first party right of appeal
If TPRA is not granted, we would advocate the removal of first party appeal rights to level the playing field as noted in paragraph 3.6 of the consultation document. While we realise that this is unlikely to happen, the fact that developers find this so unpalatable should underline the point that the appeal principle has symbolic value and should be available to all parties.

(c) Impact of changes on our organisation
Friends of the Earth Scotland has consistently argued for a third party right of appeal, since our work with various communities around Scotland has shown us that a significant minority of planning decisions do not address the community's justifiable concerns, leading to environmental and social injustice. The introduction of TPRA would be a vindication of the many communities who have fought for environmental justice. We will continue to assist people to engage in the planning system and make use of their rights through our Citizens Environmental Defence Advocacy project. If TPRA were not granted, we would monitor the situation and continue the fight for greater environmental justice as one of our organisation's key objectives.

Q16	Please let us have any additional comments you wish to make, if any, on relevant matters not addressed in this paper.

- *Education*: there is no mention made in the consultation paper of educational activity to assist communities in engaging more easily with the planning system and especially in outlining their new rights and responsibilities if TPRA is introduced. We would like to see resources set aside for this aspect of the new legislation or it is likely that third party rights and other reforms will not be understood or used effectively. Existing bodies like Planning Aid Scotland, or projects such as Friends of the Earth's Citizens Environmental Defence Advocacy could be helpful in carrying out this role.

- *Mediation services*: we would like to see a commitment to an investigation into the use of mediation services in pre-application consultations. We

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believe that if communities have a TPRA they will have a strengthened position in which to negotiate with developers and mediation services can be useful in settling disputes and discussing conditions which will mean fewer objections being received to a planning application. The need for a PLI may also be negated with the attendant cost savings.

Yours sincerely

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