

Friends of the Earth Scotland Response to Scottish Planning System Review Call for Evidence



1 December 2015

Introduction

We welcome the opportunity to input to this call for evidence.

Our long-term wellbeing and prosperity is underpinned by many factors including, very importantly, a healthy and safe environment. On a finite planet in a resource and carbon constrained world, it is both a strategic priority and moral duty to ensure that Scotland does not exceed its fair share of the earth's ecological resources – with respect to both intra- and inter-generational environmental justice – particularly given the historical ecological debt we owe as an industrialised country.

The planning system has a key role to play in achieving this, and therefore any review of it must recognise these constraints. We are disappointed that this review does not start with an overarching aim of achieving sustainable development in order to respond to the most pressing environmental issues of our time, such as climate change.

Rights of appeal and a place to hear them

While few would disagree that streamlining and simplifying the planning system is desirable, we are wary that the stated aims of this review appear to be geared towards 'cutting red tape' for housing developers rather than achieving sustainable development.

Although aspects of the current planning system work well, there is growing evidence that the aims of the 2006 overhaul of the planning system to 'frontload' public engagement in planning decisions is not working.¹ The current system is weighted towards the interests of developers rather than the public interest. Scottish Planning Policy and the National Planning Framework are both geared around the Scottish Government's central purpose of 'increasing sustainable economic growth'. The default position of planning authorities tends towards approving developments. Should an application be refused, developers can appeal; however other parties have no right to challenge decisions to approve potentially damaging developments, other than by way of going to court. Should a legal challenge take place, or indeed a public inquiry be triggered, communities and other non-commercial interest third parties are still at a significant disadvantage both in terms of raising and meeting the cost of action and in facing 'repeat litigators' across the court room.

Two important changes are necessary to improve decision-making and increase public confidence in the planning system.

The first of these is the introduction of an Equal Right of Appeal for parties in certain planning cases, for example, those which require an Environmental Impact Assessment. The second is the introduction of an independent court or tribunal to hear these (and other

¹ <http://www.planningdemocracy.org.uk/2014/equal-rights-of-appeal/>

environmental) cases. These changes would go some considerable way to moving Scotland into compliance with its international obligations under the Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters, of which it is currently in breach, particularly in relation to cost and substantive review. They would also help achieve the Scottish Government's ambition of a fairer and more equal Scotland.

The Aarhus Convention aims to improve the accountability, transparency and responsiveness of developers, decision makers and authorities in relation to the environment. The Convention recognises every person's right to a healthy environment – as well as his or her duty to protect it, including when necessary through appeal processes and the courts. The environment cannot do so itself, so it depends on individuals, communities and NGOs to take action on its behalf. The first two 'pillars' of Aarhus enshrine rights to access information and participate in decision-making that impacts on the environment. EU Directives² are in place to implement many of these provisions. In Scotland these are translated into freedom of information³ and environmental assessment⁴ legislation.

The third 'pillar' of Aarhus requires that members of the public and NGOs have access to a review procedure "to challenge the *substantive and procedural* legality of any decision, act or omission...relevant [to] provisions of this Convention" and that these procedures "shall provide adequate and effective remedies".⁵ These procedures must also be "fair, equitable, timely, and not prohibitively expensive". The Public Participation Directive also requires substantive review in relation to its provisions.

The number of judicial reviews and statutory appeals on environmental issues in Scotland is low, and the courts are rarely stray into the merits of cases under judicial review. The majority of cases are taken by developers or third parties with a commercial interest, with very few taken on an Aarhus basis.⁶ This is largely due to the enormous costs of taking legal action in such cases in Scotland. Protective expense orders (PEOs) have been introduced to limit the costs a petitioner is liable to pay should they lose their case, however, there are still significant cost barriers facing petitioners in environmental cases. Firstly, it is not possible to access legal aid in cases which impact on more than one person (which is more than often the situation in environmental cases). Secondly, the notoriously high costs of doing business in the Court of Session means that even where PEOs are awarded costs can still run into tens of thousands of pounds.

Building on recent civil court and tribunal system reforms, a new planning and environmental court or tribunal could not only provide a speedier, more cost-effective system, and a more level-playing field for developers and operators, but better access to justice for citizens concerned with protecting the environment.

² For Pillar 1, Directive 2003/4/EC on public access to environmental information (repealing Council Directive 90/313/EEC); for Pillar 2 Directive 2003/35/EC providing for public participation in planning, which amended Directives 85/337/EEC (Environmental Assessment) and 96/61/EC (Integrated Pollution Prevention and Control) in relation to public participation and access to justice.

³ Environmental Information (Scotland) Regulations 2004 <http://www.hmso.gov.uk/legislation/scotland/ssi2004/20040520.htm>

⁴ Environmental Assessment (Scotland) Act 2005 <http://www.legislation.gov.uk/asp/2005/15/contents> and Environmental Impact Assessment (Scotland) Regulations 2011 <http://www.legislation.gov.uk/ssi/2011/139/signature/made>

⁵ Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, Article 9 <http://www.unece.org/env/pp/documents/cep43e.pdf>

⁶ Brodies, Feb 2013 Judicial Review of Planning Decisions in Scotland, <http://www.brodies.com/sites/default/files/pages/planning%20e-update%20report%20february%202013.pdf>

An important benefit of improved access to justice – by way of an equal right of appeal and a planning and environmental appeals tribunal to hear them in – comes from improved engagement and decision-making from developers and public authorities who know their actions can be challenged. In other words, the credible threat of an appeal or legal action – something that is largely lacking in Scotland – is crucial to ensure decision-making is of a high quality.

The Scottish Government has an outstanding manifesto commitment to consult on options for an environmental court or tribunal, which provides an ideal opportunity to consider the creation of such a tribunal with a jurisdiction in certain planning cases.

Air quality

Air quality safety standards and legal limits are being broken across Scotland well after deadlines set in Scottish Regulations and European law.⁷ Following a UK Supreme Court ruling this April, the Government is currently under an obligation to come up with new measures to ensure it complies with EY law as speedily as possible.

The planning system has a key role to play in protecting our air quality. Modern urban air pollution is mainly caused by excessive traffic on our roads yet new developments continue to be proposed in places which are poorly connected by sustainable transport links to town centres, which forces people to drive, often on roads which are already over-congested.

Scottish Planning Policy does not currently provide adequate protection against this phenomenon. It says that “policies and decisions should... consider... the implications of development for water, air and soil quality.” “Consider” is too vague a word to guide planners and does not actually afford any protection to our air quality.

We recommend that as part of this Review, SPP is revised to provide that new developments cannot be granted planning permission if they worsen air pollution in an AQMA or place at risk of becoming an AQMA.

Planning Advice Note 51 also currently provides inadequate safeguards on air quality. Specifically, paragraph 62 is drafted poorly⁸ and can be interpreted in such a way that allows for planning permission can be given to developments, even if they worsen air pollution in Air Quality Management Areas and with the only potential safeguard that conditions “may” be attached.

We recommend that PAN 51 should be updated to provide the following:

- 1. Air quality must always be a material consideration in relation to planning applications;**

⁷ There are 32 Air Quality Management Areas where Scottish regulations are not being met, and the Scottish Government remains in breach of the EU Ambient Air Quality Directive due to NO₂ levels breaking limits which were due to be met in 2010.

⁸ Paragraph 62 reads “In Air Quality Management Areas (AQMAs) or adjacent to them, air quality is *likely* to be a material consideration for large scale proposals or if they are to be occupied by sensitive groups such as the elderly or young children or are likely to have cumulative effects. *This does not mean that all such applications should be refused even if they are likely to affect local air quality*, but it *may* mean that conditions have to be applied to *mitigate adverse effects*. Generally, it *may* be necessary to consider whether a development could lead to the designation of a new AQMA or if granting planning permission could conflict with an Air Quality Action Plan.” (emphases added)

- 2. Where developments would worsen air quality in an AQMA or area at risk of becoming an AQMA, permission must be refused. This principle must apply even if the development itself is not located in the AQMA, but has polluting effects in an AQMA or area at risk of become one;**
- 3. Where developments would result in adverse impacts on air quality, but not in an area which is an AQMA or area at risk of becoming one, conditions *must* be attached to mitigate the adverse impacts;**
- 4. All new development *must* be consistent with existing Air Quality Action Plans.**

The Scottish Government has a new commitment on planning through its newly launched “Cleaner Air for Scotland Strategy”. Cleaner Air for Scotland is the Government’s blueprint on how it will achieve compliance with its air quality objectives and it must be used to support this current review. It aims for:

“A Scotland where air quality is not compromised by new or existing development and where places are designed to minimise air pollution and its effects.”

It further states,

“New developments can be designed so that they generate less traffic, are well linked to public transport routes, walking and cycling routes and, where appropriate, prioritise active travellers over people using vehicles... Getting placemaking right helps to tackle air pollution, but also creates sustainable places that are vibrant and healthy to live and work in. This makes them more attractive places for businesses to invest in.”

It includes an action to *“Ensure that future updates and revisions to Scottish Planning Policy and the National Planning Framework take account of CAFS”*

This Planning Review therefore presents the opportunity for the Scottish Government to build on Cleaner Air for Scotland, deliver on its legal obligations, and create a lasting legacy of cleaner air for all of us.