Proposed Third Party Planning Rights of Appeal (Scotland) Bill

A Consultation Paper

3 July 2003

Sandra White MSP
Scottish Parliament
George IV Bridge
Edinburgh, EH99 1SP

Tel: 0131 348 5688

Email: sandra.white.msp@scottish.parliament.uk
## Contents

<table>
<thead>
<tr>
<th>Chapter Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Foreword</td>
<td>2</td>
</tr>
<tr>
<td>2. Proposal</td>
<td>4</td>
</tr>
<tr>
<td>3. Definition</td>
<td>4</td>
</tr>
<tr>
<td>4. Current Legislation</td>
<td>5</td>
</tr>
<tr>
<td>5. Suggested Changes to Current Legislation</td>
<td>6</td>
</tr>
<tr>
<td>6. International Comparisons</td>
<td>7</td>
</tr>
<tr>
<td>Ireland</td>
<td>7</td>
</tr>
<tr>
<td>Denmark</td>
<td>8</td>
</tr>
<tr>
<td>Sweden</td>
<td>8</td>
</tr>
<tr>
<td>New Zealand</td>
<td>9</td>
</tr>
<tr>
<td>Queensland Australia</td>
<td>9</td>
</tr>
<tr>
<td>7. Human Rights Implications</td>
<td>10</td>
</tr>
<tr>
<td>8. Views on TPRA</td>
<td>11</td>
</tr>
<tr>
<td>For</td>
<td>11</td>
</tr>
<tr>
<td>Against</td>
<td>13</td>
</tr>
<tr>
<td>9. Policy intentions and consultation questions</td>
<td>14</td>
</tr>
</tbody>
</table>
Foreword

by Sandra White MSP

The lessons of the Scottish Parliament elections in 2003 were clear. We have an electorate who are becoming increasingly disengaged and alienated from mainstream politics; therefore we must find ways of re-engaging ordinary people in the political process. As an elected politician I have been acutely aware of the feelings amongst ordinary folk that they are powerless in their communities, that decisions affecting them are taken without adequate consultation and often directly opposed to the expressed views of the community. That is why one of my first acts following my re-election to the Scottish Parliament was to re-introduce my proposal for a bill on third party rights of appeal in planning applications.

As a Glasgow MSP it was clear to me that planning was one of the most contentious subjects, stirring up many controversies in the city as my postbag will testify. Following my involvement in a number of local planning controversies I became aware that planning was the root of many controversies not only in the area I represent but throughout the country as a whole. Time and time again applications have been approved despite considerable local opposition. Many of those involved in these campaigns, interest groups as well as ordinary folk, believe the system to be unfair and heavily skewed in favour of developers. They point out, rightly in my view, of the inherent unfairness of a system in which, developers have the right to appeal, when applications are rejected, whilst objectors do not have the same right when applications are approved. The imposition of controversial applications in the face of considerable community opposition has engendered increased bitterness and alienation with the political system.

To restore public confidence not only with the planning system but with the political system as a whole we must trust the people and give them
the power to have a real influence in decisions which affect their local communities. I believe people have the best interests of their communities at heart and should have the right to influence proposals for developments in heavily built up areas or areas of environmental sensitivity. We must re-engage the people and restore confidence in the political system. I believe introducing Third Party Right of Appeal (TPRA) would be an excellent first step in this process.

I am aware of opinions that the introduction of TPRA should be considered alongside a review of all planning legislation and this is a view with which I do sympathise. However I believe that this is such a key issue that it merits consideration in its own right. Whilst the executive are considering this issue I have decided to take the initiative in advancing TPRA and I hope my proposal will be the first step towards its establishment in the framework of planning legislation.

Details of my policy intentions are outlined in chapter 9 of this consultation document, I would very much welcome your comments on this and on my proposal that the Scottish Parliament should legislate on introducing Third Party Right of Appeal in Planning Applications.

Please address all responses to:

Sandra White MSP
The Scottish Parliament
Edinburgh
EH99 1SP

Email: sandra.white.msp@scottish.parliament.uk
**Proposal**

Ms Sandra White: Proposed Third Party Planning Rights of Appeal (Scotland) Bill—Proposal for a Bill to provide third parties with a right of appeal against decisions made in planning applications under the Town and Country Planning (Scotland) Act 1997. (Lodged 14th May 2003)

The proposed bill aims to address what is seen as inherent unfairness in the current legislation which allows applicants in planning applications the right of appeal when an application is refused but allows no such right to objectors when an application is approved.

This consultation seeks to further the progress of the aforementioned bill by seeking opinions, gathering and disseminating information to the public and interested parties, prior to the commencement of the legislative process.

The bill has gained wide support both inside and outside the Scottish Parliament. In Parliament it has received cross party support and was quick to gain the required number of signatories for the bill to progress. Signatories to date are: Mark Ballard MSP (Green), Patrick Harvie MSP (Green), Campbell Martin MSP (SNP), Michael Matheson MSP (SNP), Eleanor Scott MSP (Green), Christine Grahame MSP (SNP), Mr Mark Ruskell MSP (Green), Chris Ballance MSP (Green), Mr Rob Gibson MSP (SNP), Mr Adam Ingram MSP (SNP), Robin Harper MSP (Green), Alex Neil MSP (SNP), Linda Fabiani MSP (SNP), Ms Rosemary Byrne MSP (SSP), Tommy Sheridan MSP (SSP), Donald Gorrie MSP (Lib Dem), Colin Fox MSP (SSP), Frances Curran MSP (SSP), Mr Adam Ingram MSP (SNP), Mark Ballard MSP (Green), Shiona Baird MSP (Green)

**Definition**

The “first party” in planning applications is the applicant the “second party” is the local authority. “Third parties” are anyone else with a view on the planning application, whether they have a direct interest, (owner of the land), personal interest, (as a neighbour), or a wider interest, (community council or interest group)¹

**Current Legislation**


Planning appeals are currently heard by the Scottish Executive Inquiry Reporters Unit on behalf of the Scottish Ministers. Under current legislation appeals can be lodged under the following conditions:

- When an application has been refused, approved conditionally or the application has not been determined within the statutory period.
- When the planning authority has failed to give the applicant notice of their decision.
- When the planning authority has failed to give notice that they have declined to determine the application.

But the act is explicit in only allowing provision for the applicant to appeal against any decision.

The Scottish Executive produced a consultation paper on planning in November 2001. The paper specifically ruled out Third Party Right of Appeal, stating that there were sufficient avenues open to appeal and that further measures would create delays in planning application approval that appellants may not represent the wider community and increased financial implications would result. However the consultation conceded the TPRA would remain an issue of concern and that developments in case law would be monitored.

Despite the consultation paper ruling out TPRA, 80 responses to the consultation were on the topic of TPRA, almost all in favour. Respondents felt that they had no specific remedies to bad planning decisions and that the Executive should give further consideration to the issue as Judicial review could not deal with the merits of any case only the legal aspects and the Ombudsman could only deal with cases of maladministration. However one respondent suggested that the role of the Ombudsman could be extended to deal with bad decisions.

Following the consultation the Scottish Executive published a White Paper on planning which addressed TPRA and conceded that planning

---

2 Town and Country Planning (Scotland) Act 1997- HMSO 1997
3 Getting Involved in Planning – The Scottish Executive. November 2001
4 Getting Involved in Planning: Analysis of Consultation Responses - The Scottish Executive. November 2002
5 Your Place, Your Plan A White Paper on Public Involvement in Planning – Scottish Executive. March 2003
has to be demonstrably transparent, objective and fair to maintain public confidence in decisions. It went on to say that there would be value in carrying out a detailed examination of the issues and therefore a consultation paper on TPRA would be issued and a stakeholder group set up to assist. However following the Scottish Parliament elections we await a firm commitment and further details on the process.

The only recourse currently open to objectors when they have been the victim of a bad planning decision is to seek judicial review. Applications granted by the Scottish Executive or local authorities can be challenged by application to the courts. Objectors can take action when the authority has failed to comply with procedural requirements. However there are strict criteria for Judicial Review including deciding who is permitted to take such action. Judicial Review can only decide whether a consultation was taken in accordance with the law and can not make judgements on the basis of whether a bad decision was made.6

Currently there are approximately 580 planning appeals per year decided by the Scottish Ministers (see table below).7 Under delegated powers the Scottish Executive Inquiry Reporters Unit processes planning appeals which are then determined by the Scottish Ministers.

<table>
<thead>
<tr>
<th></th>
<th>Planning Permission Appeals Decided</th>
<th>Number Successful</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-4-99 to 31-3-00</td>
<td>563</td>
<td>197</td>
<td>35</td>
</tr>
<tr>
<td>1-4-00 to 31-3-01</td>
<td>614</td>
<td>214</td>
<td>35</td>
</tr>
<tr>
<td>1-4-01 to 31-3-02</td>
<td>566</td>
<td>214</td>
<td>38</td>
</tr>
<tr>
<td>1-4-02 to 31-12-02 (part year)</td>
<td>491</td>
<td>168</td>
<td>34</td>
</tr>
</tbody>
</table>

Concerns have been raised that the increased workload, due to the increased number of appeals if TPRA were to be introduced, would cause considerable difficulties for the planning authorities. It is difficult to estimate how many planning applications would be appealed if TPRA were to be introduced, however there is evidence from countries where TPRA exists, in Ireland approximately 40% of appeals were from third parties, the figure is 10% in Denmark and between one third and one

6 Environmental Campaigning Redressing the Balance 1- Friends of the Earth. May 2002
7 Written Answer S1W-33400- The Scottish Parliament 5th February 2003
half of appeals in New Zealand. The *Green Balance* report on Third Party Rights of Appeal in Planning extrapolated that the number of appeals in England would at the very most double. However this would still result in a number of appeals below previous levels which peaked at 32,282 in 1989/90. It would be logical to conclude that Scotland would follow a very similar pattern.

**Suggested changes to current legislation**

Friends of the Earth considered that the best way to incorporate TPRA into the planning system would be to amend the Town and Country Planning (Scotland) Act 1997 and the Town and Country Planning General (Development Procedure ) (Scotland) Order 1992 as follows:

- Section 47 (1) of the Town and Country Planning (Scotland) Act 1997. Currently this section reads that for a variety of reasons, if an application is refused then ‘the applicant my appeal to the Secretary of State’ this could be amended to read ‘aggrieved persons/party’

- Article 23(1) of the Town and Country (General Development Procedure) (Scotland) Order 1992. Similarly this could be altered to allow aggrieved persons to appeal.

- Article 23(2) of the Town and Country Planning (General Development Procedure) (Scotland) Order 1992. This section would also have to be amended as it refers to the process for making an appeal.

The *Green Balance* report on TPRA considered extending the role of the Ombudsman (Local Government Ombudsman in England, Scottish Public Services Ombudsman in Scotland) to deal with the merits of planning issues in addition to consideration of cases of maladministration. However it concluded that the importance of the Ombudsman in dealing with cases of maladministration should be maintained and that role could possibly be undermined by expanding its duties to dealing with the merits of planning issues.

---

9 Environmental Campaigning Redressing the Balance 1- Friends of the Earth. May 2002
International Comparisons

Ireland:

Third party appeals in Ireland are dealt with by An Bord Pleanala set up in 1977 to deal with appeals under the Local Government (Planning and Development) Acts 1963. Appeals are now dealt with under the Planning Act (2000). Appeals to the board normally consist of:

- First party appeals against decision of planning refusals
- First party appeals against conditions attached to planning permissions.
- Third party appeals against planning permissions.

There are restrictions in the Irish system on those who are allowed to appeal. Only those parties who made submissions or observations in writing to the planning authority in respect of a planning application can appeal. The exceptions to this are any party which was entitled to be notified but was not can appeal even if they have not made a written submission. A person with interest in adjoining lands in which planning permission has been granted can seek leave to appeal.\(^{11}\)

Fees charged for appeals by third parties rose to €200 (£140) on June 3\(^{rd}\) 2003. Fees for first parties rise to €1800 (£1260) for unauthorised developments and €600 (£420) for most other first party applications.\(^{12}\)

Research on the experience in Ireland demonstrated that third party appeals were made against 2.6% of all planning applications and that 37% of these resulted in refusals of permission, 60% with revised conditions and just 3% in a planning permission with the same conditions as those given by the local authority. Nearly 36% of those that appealed sought only to change the type or design of the development rather than prevent it. Given that over 10% of appellants became aware of the proposed development after the local planning authority had made a decision, the right of appeal by third party was critical. In the absence

---

\(^{11}\) Making a Planning Appeal under the 2000 Planning Act- An Bord Pleanala. November 2002

of this the group would not have had any opportunity to participate in the decision making process.¹³

**Denmark:**

Appeals are handled by the Environmental Appeals Board and the Nature Protection Board of appeals. The Danish system is very open and complaints against the decisions of local authorities can be made by:

1. the party to whom the decision is addressed
2. any party having an individual, significant interest in the outcome of the case.

Specific rights are also given to various environmental, fisheries and labour organisations. Public perception in Denmark is that environmental groups are their watchdogs and regard TPRA as being extremely important.¹⁴

**Sweden:**

The Swedish system is governed by the *Environmental Code* which came into force in 1999 following an extensive review of the existing complex administrative and legislative system. Environmental Courts were set up to review decisions taken by county administration boards and government agencies. Any person who may be caused damage or suffers any other nuisance is considered to have a material interest and therefore has the right to appeal. Environmental court decisions can be appealed if leave to appeal to the Environmental Court of Appeal is granted. Furthermore any cases which commenced in the Environmental Court are appealable with leave to the Supreme Court.¹⁵

**New Zealand:**

Planning appeals in New Zealand are covered by the Resource Management Act (1991) and are dealt with by the Environmental Court. Those who can appeal are:

- applicants for resource consents/planning

¹³ Third Party Right of Appeal Parliamentary Briefing – Friends of the Earth: May 20003
anyone who has made a submission on a resource consent application
anyone who has made a submission on a proposed plan

parties which have not made submissions can still become involved in proceedings provided they represent some relevant aspect of the public interest and have given 10 days notice to the Environment Court and the parties involved.16

A fee of $55 (£20) is charged for any appeal which is lodged.17

The New Zealand system is well entrenched in law and the right of third party appeal and has not been called into question. The New Zealand high court in the Murray v Whakatane District Council (1997) case said that the TPRA was an essential part of any worthwhile environmental decision making process.18

Queensland Australia:

In Queensland, Australia appeals may be lodged with the Planning and Environment Court about the decision on a development application. The decision of the court may be appealed to the court of appeal. A submitter, any person who has properly made a submission may appeal to the court about the giving of an approval including any conditions, or lack of conditions, or other provisions of the approval.19

The standing rules in Queensland are possibly the most liberal in Australia with TPRA against local planning decisions and a general right of access to the Planning and Environment Court. It is standard practice for parties to bear their own costs. Typically costs are from $3000 - $4000 (£1218-£1624) for a QC and $1200- $2000 (£487-£812) for a junior barrister. Costs can be a major barrier to access to the court for NGOs. The drawback of such a liberal system is that it results in a very prescriptive planning system and an attempt has been made to introduce a more performance based system. However it is felt that benefits outweigh the drawbacks in the system and the right balance has been struck between prescriptive and performance based systems.20

---

17 Ibid
18 Third Party Right of Appeal Parliamentary Briefing – Friends of the Earth: May 20003
Human Rights Implications

The European Convention on Human Rights (ECHR) was brought into force in the UK through the Human Rights Act 1998. Article 6 of the convention states that everyone is entitled to a fair and public hearing by an independent tribunal established by law. Some concerns have been raised whether breaches of article 6 of the ECHR take place in certain planning applications; however legal opinion is not clear on this. The Green Balance report on TPRA concluded that the absence of a third party right of appeal was not conclusively incompatible with the Convention but that until there was definitive decision from the House of Lords the position would remain uncertain.21

The Royal Town Planning Institute considered in its response to the Human Rights for Scotland Consultation that there was a lack of clarity with the law in planning matters in relation to ECHR. It went on to state its concern that third parties should have greater protection when planning authorities depart from statutory development plans, however they conceded that they could not form a complete view on TPRA in the absence of a clear interpretation of the ECHR in relation to TPRA.

Views on TPRA

Previous to the launch of this consultation document I entered into correspondence with a wide range of interested parties. The following views are typical of the responses which I received:-

For
A wide range of opinions exist on the subject of TPRA. Community groups and environmental agencies tend to be broadly in favour of TPRA whereas body such as Government agencies and local authorities are much less sympathetic to its introduction.

Those in favour of TPRA point to the unfairness of the current system which permits developers to appeal when planning applications are refused but gives no such right to objectors to planning applications when permission is granted. Proponents of TPRA argue that it would raise standards as the planning authorities would have to be equally accountable for approvals and refusals. Many believe that in countries where TPRA exists that this has led to better planning decisions being made.

Rural Scotland said that they were very much in favour of the introduction of Third Party Right of Appeal and that its introduction would redress the imbalance which currently exists. They believe that the right should be limited to objectors to planning applications.

They also believed that appeal should be limited to cases such as:

- Large developments which have a major environmental impact.
- Developments in sensitive area such as green belt national parks etc.
- Developments that are contrary to the development plan.
- Developments granted against the advice of planning officers.
- Developments granted despite enormous numbers of objectors.
- Developments in which the council has an interest.

Rural Scotland also suggested that a fee of around £30-£50 should be charged for appeals.

Friends of the Earth believe that the current system leaves many communities and individuals marginalised by the lack of opportunity to engage and that the current system is both undemocratic and leads to poorer standards in planning decisions. They argued that the introduction of TPRA is accompanied by a mediation process and an education on the TPRA and its appropriate use.

Friends of the Earth believe that TPRA should be introduced for developments:

- Which require an environmental impact assessment.
- Where the local authority has an interest.
- Which are contrary to the local plan.
- where planning officers have recommended refusal.

Local groups such as community councils also tend to be favourable to TPRA. Scotstoun Community Council in congratulating Sandra White MSP on her initiative stated it fully supports the initiative to Third Party Planning Rights of Appeal as a means of increasing community involvement in the planning process.

Glasgow community group West End Stands Together (WEST) which has campaigned on a number of planning issues, felt that a number of cases have demonstrated imbalance in current planning procedures
which gives applicants a substantial advantage over objectors. TPRA would be of great benefit when questionable applications are granted.

Falkirk Council unlike most local authorities expressed some sympathy with TPRA. In a response to the Scottish Executive’s “Getting Involved in Planning” it expressed concern that objectors to planning applications did not have the same rights as applicants, that there was not a level playing field in the planning system.

Against
Opponents of TPRA believe that opportunities exist in the current system for objectors to make their case against planning decisions. Introduction of TPRA would they contend create delays for new developments. Local authorities tend to be unsympathetic to the introduction of TPRA. North Lanarkshire Council’s view, in response to the introduction of the proposal for TPRA, was typical of many local authorities. They stated that TPRA would lead to considerable delays in the process, citing delays which would be caused by the time period allowed for an appeal to be submitted, the time for the appeal to be assessed and the time taken for consideration of the appeal. They also contended that there would be resource implications for local authorities.

Glasgow City Council was of the opinion that the opportunity already existed to influence the planning process, objectors can comment and object at the planning application stage or in the preparation of development plans. They also can request that the Scottish Ministers call in an application. They expressed a common view amongst local authorities that appellants may not necessarily be representative of the wider community.

Renfrewshire Council and Scottish Borders raised the issue of democratic accountability. They were concerned that decisions would be taken out of the hands of democratically elected councillors. Renfrewshire stated that a blanket right of appeal would act against the democratic principle. However most proponents of TPRA concede that there should be some limitations on who should have the right to appeal and which cases can be appealed.

Policy intention and consultation questions
A) General views on the introduction of a TPRA.

I believe that in the interests of fairness, openness and transparency that there should be a statutory procedure to enable third parties, who believe that their interests have been adversely affected by a planning decision, to lodge an appeal against that decision.

**Question 1:** What are your general views on the introduction of a statutory procedure to allow third parties the right of appeal in planning decisions?

B) How it would work in practice

It is my policy that there should be certain restrictions on those third parties that can lodge an appeal against a planning decision. This is to help ensure that the appeals process is not abused.

**Question 2:** What are your views on certain restrictions being place or do you believe that there should be no restrictions on who can appeal?

I would propose to place similar restrictions to those in place in Ireland; effectively this would mean that only those who had made written submissions to the planning application could appeal the decision. An exception to this would be made for those who should have been notified but were not and for those who have an interest in adjoining land.

**Question 3:** What are your views on the proposal to follow the Irish model for third party appeals? Are you aware of any other models that you believe would be more suitable, if so can you provide details of them?

I am proposing that there would be an administrative fee of £20 to lodge a third party appeal against a planning decision. I do not believe the fee requires to be higher to deter deliberately obstructive or malicious appeals being lodged as under my proposal there would be restrictions on who was able to lodge an appeal.

**Question 4:** I propose that there should be a fee for third party appeals which is set at £20. What are your views on the level of the fee? Should it be set higher for businesses and commercial
organisations with a reduced rate for charitable organisations and individuals?

I believe that the Scottish Ministers should be responsible for handling third party appeals against planning decisions. As it is now, this function would be carried out on behalf of the Ministers by the Scottish Executive Inquiry Reporters Unit (SEIRU). The SEIRU currently handle appeals against planning decisions and I believe that they would have the skills knowledge and experience to carry out this additional function.

**Question 5:** What are your views on the proposal that Scottish Ministers should be responsible for handling third party appeals against planning decisions? If not, can you suggest an alternative?

*Rural Scotland* in chapter 8 (p12) outlined their views on which cases should be subject to the right of third party appeal.

**Question 6:** What are your views on which cases should be subject to third party of appeal?

C) Resource and financial implications of TRPA

I am aware that there may be a certain amount of resource and financial implications placed upon organisations if a TRPA was successfully introduced.

**Question 6:** Do you believe that your authority or organisation will be affected by resource or financial implications if third party appeals are introduced? If so can you please provide an indication of where these costs would occur and an approximate estimate of their level (if possible)?

D) Human rights implications

Implications for current European human rights legislation were outlined in chapter 7 (p10).

**What are your views concerning any ECHR implications in the proposal?**