Equal Right of Appeal

Key Committee conclusions / recommendations

Recommendation: We want people to feel involved in the planning system at all stages and we urge the Scottish Government to look at these issues before Stage 2.

- I recognise the long-running debate over appeal rights and the differing views. But our position is clear on this. Stronger early engagement is much more constructive.
- This Government will not support changes which will add further conflict to the system, or to act as a disincentive to investment. That would run entirely counter to the thrust of our planning reforms.

Recommendation: Previous attempts to front-load the system have not been successful. The Committee is not persuaded that proposals in this Bill go far enough to address that.

- There have been good examples of public engagement to capture the views and aspirations of local people. For example, Aberdeen, Dundee, Highland and Tayplan have been recognised for their work with communities, including children and young people.
- The charrette process has been a good example; and the Place Standard has been very successful.
- There is more that can be done to embed frontloading; for example through our proposals for the NPF, development planning, local place plans, SDZs and pre-application consultation.

Recommendation: The Committee is conscious that the availability of appeals to applicants undermines confidence in a plan-led system.

- The ability for an applicant to appeal remains a vital and necessary part of our planning system.
- Much needed homes, places of work and facilities only exist because they have been approved on appeal.

Recommendation: Appeals can be lodged free of charge and irrespective of whether an application is in accordance with the Development Plan. The Committee believes that in a plan-led system appeals should only be allowed in certain circumstances.

- It would add further process, complexity and frustration to the system if the boundaries for a right to appeal were not clear.
- It is not always a clear-cut assessment whether a development is in accordance with the development plan. And the flexibility for material

considerations to outweigh the development plan position is vital to the responsiveness of the planning system.

Third Party Right of Appeal

- **I agree entirely with the independent panel**. Stronger community engagement at an early stage is much more constructive than more adversarial appeals at the end.
- There is already **too much conflict and mistrust** in the system – third party right of appeal can only add to that.
- Developers and communities would be much more likely to adopt a tactical approach, aiming to 'win' an appeal rather than engaging meaningfully with each other from the outset.
- Stronger engagement in development planning, and in communities' own local place plans, as a better means to influence future development – TPRA would be a disincentive to that positive collaboration.
- Planning to support development delivery, including clear need for significantly more housebuilding – would risk delaying and discouraging the investment we need.

Removal of Applicant Right of Appeal

- Significant number of much-needed homes, facilities and places of work only exist because they have been approved through appeal. This isn't all about profit for the development industry – but about real people's actual homes and jobs.
- This risks developers choosing not to invest in some parts of the country where they do not feel welcome, even if there's an identified need for development.
- If we are serious about delivering the investment in development our communities need, we cannot afford to make that more difficult.
- Since 2014, around 5,500 housing units have been approved on appeal, following refusals from planning authorities. This includes housing on new sites and also changing the use of existing buildings i.e. using brownfield sites.
- Appeals have successfully helped to deal with inequalities, minority groups and provide resources for young people. For example:
    - Gypsy/traveller sites in Falkirk, Perth and Kinross and East Lothian
    - Residential and training centre for vulnerable people in Motherwell
    - Residential accommodation for children in Kilsyth
    - Student accommodation in Edinburgh and Stirling

- Care home in Edinburgh

- Around 1.4 gigawatts of renewable energy generation have been consented. Using the formulae set out by Renewables UK this equates to 696,294 homes powered equivalent per annum, or 1.2 million tonnes of CO_2 saved per annum.

Hybrid: Limited Third Party and Applicant Rights of Appeal

- It would add further complexity and frustration to the system if there was to be a right of appeal where the boundaries for that right are unclear. There will always be those who see unfairness if they cannot make an appeal, while others can.
- It is not always a clear-cut assessment as to whether a proposed development is in accord with the development plan. Often some aspects of the plan will support the development and other aspects will not.
- The flexibility for material considerations to be able to outweigh development plan provisions is vital to the flexibility and responsiveness we sometimes need in the system.
- Limiting 'who' can appeal will likely only add to further claims of unfairness. For example, how can you be confident that those who have the right to appeal are a fair representation of the community?
- Limiting an appeal right by scale or type of development would be a source of frustration – where would you draw the line?
- It would add even more process, more delay and more cost if there needed to be some kind of 'screening' or 'leave to appeal' arrangement, just to clarify whether an appeal can proceed.
- We want to make the planning system simpler to work with and more attractive for people to engage in it – not wrap it up in more complex procedure.

Issues and Accusations

Current system unfair and unbalanced

- There are opportunities for people to get involved and contribute their views throughout the planning system; and we want to increase and improve collaboration with communities through the Bill.
- It would not create a more balanced system by adding new opportunities for conflict and dispute resolution at the end of the planning process.

Frontloading pursued through 2006 Act has not worked

- There have been good examples of public engagement to capture the views and aspirations of local people. For example, Aberdeen, Dundee, Highland and

Tayplan have been recognised for their work with communities, including children and young people.

- The charrette process has been a good example; and the Place Standard has been very successful.
- There is more that can be done to embed frontloading; for example through our proposals for the NPF, development planning, local place plans, SDZs and pre-application consultation.

How to measure the success of the frontloading approach

- No matter how engaged people become – there will still be instances where people do not get the results they want from planning.
- We will monitor closely the way planning is operating, and our proposals for performance management can pick up on stakeholder satisfaction with the way in which they have been engaged and listened to in the planning of development.

TPRA strengthens trust in planning

- It will be transparent and effective collaboration in the future planning of our areas that will serve to improve trust in the system among all planning stakeholders, including local people.
- Adding further options for conflict between parties and employing tactics designed to secure a result will not strengthen trust.

TPRA would not lead to a reduction in investment

- We cannot afford to have Scotland at a competitive disadvantage; to make it more difficult for those seeking to invest in the development our communities need.
- The prospect of more favourable conditions in other parts of the UK could potentially influence investment choices.

TPRA works in Ireland

- There are a number of differences between the planning systems of Scotland and Ireland. For example, there is no independent examination of development plans in Ireland – while we do, and we want to build on the engagement and scrutiny at the earliest stage of the planning process. That is when people have a clear opportunity to help shape the future of their areas.
- Ireland exempts specified development or infrastructure projects from a third party right of appeal, showing the need to protect them from the delays and uncertainty such appeals bring.
- 50-60% of all appeals brought to An Bord Pleanala are from 3rd parties, over 800 per year. In over 80% of these cases the decision is not overturned, but changes

are made to conditions. This could be better dealt with by more engagement over conditions at the application stage.

- In the period 2012-2016 the Bord received 50 judicial reviews of third party appeals.

TPRA incentivises better up-front collaboration

It could have the opposite effect - disincentive to positive collaboration in plan-making, if disputes can be carried over to the end of the process.

'No right of appeal' means getting it right first time

- Sometimes much-needed development can be unpopular with people locally – but nevertheless is needed.
- There is a risk that necessary development will always be seen as wrong by some people in our communities, putting pressure on decision-makers.
- The applicants' right of appeal has proved to be vital in the delivery of development of places people value, such as their homes and places of work.

No right of appeal in Germany

- The whole planning system is very different.
- Development plans are strictly binding, with the right to challenge decisions only being on a point of law.
- Our discretionary system – the ability to take account of material considerations that can outweigh development plan provisions – is vital to the flexibility and responsiveness we sometimes need.

You have been in discussion with Edinburgh Council about rights of appeal

- Not so. I recently met with the Council when the matter was briefly raised, but there have been no other discussions.
- I have no plans to progress this as a joint workstream with the Council as their corporate commitment suggests.

Q&A

Q: Do you view the debate as being about an 'equal' right, rather than a 'third party' right of appeal? Should communities be 'equal' in the planning system?

A: I recognise there has been a change in terminology by those who support a right of appeal for community groups and local people. I am content to use that chosen title.

In practice, it is the same thing. I do not see the point in debating the name.

The real issue is that adding such an appeal right would add conflict to the planning system and run counter to our desire for meaningful early collaboration involving local people.

Q: Limited right of appeal for third parties – contrary to the development plan?

A: Consistency with the local development plan would be very difficult to determine. This is a matter of professional judgement in each case.

As a result, cases could be open to manipulation, or generate additional conflict where there is disagreement with the initial decision on whether or not it is a departure from the plan.

It is unclear how cases would be treated where officials and committee members take a different view on the matter of compliance with the plan
Whilst the planning system is plan-led, material considerations can also be taken into account by the decision maker. There are long established and sound reasons for this approach and many examples of developments providing employment, homes or low carbon infrastructure which have benefited from sound planning judgement being applied within the relevant context at the time of the decision.

Q: Limited right of appeal for third parties – EIA development?

A: There is already enhanced public engagement and scrutiny on these decisions. There is no reason to add a further burden on those seeking to invest in these developments.

This could also increase the risk of legal challenge to EIA screening decisions.

There is a risk that this will incentivise different behaviours, for example applicants making multistage applications or reducing scale to fit under thresholds.

The proposal could inadvertently drive such behaviours or deter good practice (e.g. voluntary EIA in some circumstances) and reduce the valuable protection and engagement EIA can provide.

Q: Limited right of appeal for third parties – contrary to officer recommendation?

A: There are many different circumstances for these cases. There may well be good reasons for elected members departing from the recommendation of the planning officers.

This could undermine local decision making and exacerbate concerns about local democracy being overridden centrally.

Q: Limited right of appeal for third parties – council has an interest in the development?

A: Reasonable and normal for LA to have an interest in a development and also to make a decision on a planning application for that development, reflecting their range of roles and duties.

Would apply to a limited number of cases and is therefore unlikely to satisfy supporters of ERA on its own.

If significant evidence that these cases raise issues of concern, the current notification direction, which is currently limited to only cover significant local development plan departures could instead be revisited, along with Planning Advice Note (PAN 82) on Local Authority Interest Developments.

Q: Limited right of appeal for third parties – certain/specified community bodies only?

Unfortunately, as reported by the independent panel, it is not always the case that community groups represent the views of their community as a whole. Could mean that opposition to a single development dominates the agenda of some community bodies and could be divisive in some circumstances.

Would be disappointing if local pressures led to people choosing not to volunteer in their communities.

Local place plans would be a more effective means of achieving a broader and more positive aspiration for collective engagement in the system.

Q: Limited right of appeal for third parties – contrary to local place plan incorporated into LDP?

A: Any LPP incorporated into the LDP will be highly influential in the statutory approach to planning decision-making.

But authorities must retain the flexibility afforded by the planning system to reach a conclusion that material considerations can carry sufficient weight in individual cases.

The clear case against equal right of appeal applies equally to cases where the local development plan includes content from a local place plan.

Q: Can a system of seeking 'leave to appeal' be effective in stripping out invalid or vexatious appeals?

A: Screening process – could be regular differences of opinion as to whether an appeal is legitimately made or not; so more frustration and potential legal challenges.

Would add further complexity, administrative burden and another area of dispute between respective parties – as well as even more delay in the appeal process. Our reforms seek to strip out excessive process – not add to it.

Q: Why have you shut down any debate on equal rights of appeal around the Bill?

A: The planning review has been open and inclusive. There has been discussion and evidence presented on appeal rights throughout.

The independent panel received both oral and written evidence, including from many individuals and communities – but did not see this as a necessary or positive change.

Since the independent panel reported we have undertaken two further rounds of public consultation on the proposals for change.
We did not propose substantial changes to appeal rights. Although we have consistently made that position clear, supporters of these ideas have been involved in our working groups and were part of a wider discussion involving all interest.

93% of community respondents to the Barriers to Community Engagement in planning research:
90% of respondents to National Trust for Scotland survey:
86% of respondents to the Rights of Appeals In Planning Consultation (2004):
- expressed support for third party / equal right of appeal

- Agree with the independent panel – stronger early engagement better than adversarial appeal
- Our proposals look at how we can improve communities' trust in the planning system in a more positive way.
- Understand why people can sometimes feel they have not been listened to. Improving collaboration will be a more measured and positive approach than further opportunities for conflict.

ECHR and the Aarhus Convention

Is appeals system compliant with Aarhus and the European Convention on Human Rights?

Yes. The Scottish planning service is inclusive, engaging all interests as early and effectively as possible.

Is Equal Right of Appeal required to comply with Arhus and the European Convention on Human Rights?

- Do not accept the view that equal right of appeal is required to meet ECHR and the Aarhus Convention.
- The Scottish Planning system is inclusive, engaging all interests as early and effectively as possible.

The Scottish Government has rejected calls for a Specialist Environment Court or tribunal. Environmental Groups have criticised this decision.

- Scotland already has in place strong protections for the Environment.
- The courts system offers an effective forum to bring environmental cases.

Rights of appeal - International

It is superficially attractive to look at one system and propose that it is adopted in Scotland. No system of third party appeals is universally transferrable to Scotland.

Generally, the other jurisdictions have less opportunities for engagement and consultation than being proposed in the bill. It is recognised that enhancing upfront engagement, encouraging proactive public participation and collaboration in plan and place making, policy formation and decision making is preferable to allowing third party appeal rights and should lead to better policy and greater certainty in the process and outcomes. Third party appeals tend to encourage adversarial rather than collaborative debate on planning issues

Only Scotland appears to have an independent examination of plans which will be enhanced through the gatecheck process - upfront engagement and community involvement at the earliest point in the plan led system gives third parties an opportunity to influence plans. Examination by an independent person provides check and balances.

Decision making in the first instance tends to be by officials rather than democratically elected members and unlike Scotland, where decisions must be in accordance with the development plan, in most jurisdictions considered the decision

maker only requires to have regard to the development plan. The development plan in Scotland has considerably more weight and status.

We are not aware of any jurisdictions where a third party's right to appeal is linked to whether an application is granted contrary to the development plan. This is untested and the consequences and practicalities unknown.

In **Ireland** around 54% of all appeals are third party appeals. The majority are unsuccessful in overturning the decision but may lead to conditions being amended. In **Jersey** it is 38% of appeals of which 38% have changed the outcome. In **Denmark** it was only around 10% of cases but it is thought that this is increasing.

Certainty, transparency, simplicity and trust must be at the heart of any appeal system if it is to be robust, free from abuse and credible. Reform on the hoof is likely to do more harm than reform based on careful consideration and evidence.

Ireland: Third Party Right of Appeal

Headlines:

- Around 800 third party appeals are made each year (between 50-60% of total planning appeals)
- 8% of all planning applications decisions are subsequently appealed; that is over 4% of all decisions appealed by third parties.
- Around 80% of third party appeals do not result in overturning the consent (most lead to some changed conditions)
- Ireland charges a fee (€220-€270) for third party appeals
- Charging a fee places a financial burden on communities; not charging a fee would likely lead to a higher still number of appeals
- Over 1% of third party appeals are subject to judicial review; so further process, costs and delays

Third party right of appeal works in Ireland. So why not here?

- Different countries take different approaches to appeal rights. And they also take different approaches to their overall planning systems.
- Rather than comparing us to other countries, I want to compare Scotland's planning system to what Scotland's planning system can become.
- Differences between Scotland and Ireland – for example, there is no independent examination of development plans in Ireland – while we do.
- Scottish solution is to build on the engagement and scrutiny at the earliest stage of the planning process. That is when people have a clear opportunity to help shape the future of their areas.

As in Ireland, you could exempt specified development or infrastructure projects from a third party right of appeal.

- Exactly our point. Why would you see a need to exempt some projects?
- It is because of the need to counter the delays that would come from these appeals.
- We want to see reduced complexity of process and faster decision-making across the planning system.

Only a small proportion of Irish applications are subject to TPRA

- More than half of all appeals in Ireland are submitted by third parties. Around 800 third party appeals each year.
- Most planning application decisions can be subject to appeal, from large-scale investments down to very minor and non-controversial works.
- I do not want us to adopt that model. It would not be a good fit with our early collaboration approach to planning.

Most third party appeals in Ireland lead to changes to conditions

- In the vast majority of cases (around 80%), third party appeals are unsuccessful in having the original decision overturned – but rather most see some changes in conditions attached to the consent