

# Scottish Environment

## Comments in response to LGCC letter from Minister for Local Government and Housing on the Planning (Scotland) Bill - Equal / Third Party Rights of Appeal

### Introduction

No one wants to have to appeal a planning decision. Appeals happen when the system has not worked elsewhere. However, the right of the public to review procedures to challenge public decisions is enshrined in the Aarhus Convention, to which the UK is a signatory, and review is a critical part of ensuring good decision making in the long term public interest and in the interests of achieving sustainable development.

The Scottish planning system currently provides for a review of decisions by those fortunate enough to be able to submit applications for planning permission but provides no comparable review for others with an interest in the outcome or how places develop or are protected from development. Scottish Environment LINK therefore strongly believes that appeal rights need to be made more equal, as part of a number of major changes required to the Planning Bill.

The Minister's letter and annex unfortunately seem to assume that any change to the current appeal arrangements will automatically be abused and result in many developments being stopped. This is illustrative of the wider culture change that is required in order to shift planning from being about regulating and restricting the worst excesses of development to being about making places better in future in the long term, wider public interest. This is not possible whilst only applicants for planning permission can instigate a review of planning decisions.

We provide some commentary on the Minister's [letter](#) below and in Annexe further detailed responses.

### Overall:

- It is disappointing that the Minister refers to "third party rights of appeal". While the legal history and reasoning for this term used is understood, it reflects the fact that a culture change is needed to ensure that planning has a clear purpose of acting in the wider public interest, to achieve sustainable development. In this context, local communities and communities of interest are not 'third parties' they are at least equal parties with an equal interest in good outcomes alongside applicants for planning permission and planning authorities.
- We welcome the City of Edinburgh Council position on community rights of appeal. It is surprising that the Scottish Government imply that that this position should have been discussed with them prior to being adopted by the Council.
- The issues around equal rights of appeal were not fully explored by the independent panel. The issue was touched on briefly only and not given the depth of consideration such a fundamental issue requires. The response from the Minister is helpful in this regard in that it sets out more of the Government's thinking than has so far been made available.
- Some aspects of the review do encourage early engagement and a plan led approach (although this needs to go much further). However, all the front loading conceivable will not address the fundamental unfairness of the system whilst applicants can have two shots at getting a consent (an appeal is free) and others are unable to challenge decisions through the same appeals process in any circumstances.
- The Minister acknowledges that appeals processes are, "in certain circumstances, vital and are designed to ensure that any unresolved representations on an application from all sides will be robustly examined by the Reporter." We would largely agree with this but the process can only be instigated by applicants for

LINK is a Scottish Charity (SC000296) and a Scottish Company Limited by guarantee (SC250899). LINK is core funded by Membership Subscriptions and by grants from Scottish Natural Heritage, Scottish Government and Charitable Trusts.

Registered office: 13 Marshall Place, Perth PH2 8AH, T. 01738 630804, [information@scotlink.org](mailto:information@scotlink.org)  
Advocacy office: Dolphin House, Hunter Square, Edinburgh, EH1 1QW, T. 0131 225 4345, [advocacy@scotlink.org](mailto:advocacy@scotlink.org)

planning permission. Why should those fortunate to be applicants (by their nature, developers and often landowners) be able to instigate a review of a decision but no others can?

- We support efforts to introduce frontloading but it will always be of limited value when applicants can have two shots at getting consent whilst no other party can instigate a review of a decision.
- The Minister suggests there is no consensus. This is wrong. There is a clear consensus from community groups and community of interest representatives that there needs to be an equalising of appeal rights to make the planning system fair and fit for a modern Scotland.

## Annex

The below Annex provides excerpts from in the Minister's letter in *italics*. LINK member comments appear in green.

### 1. Departures from the local development plan.

*“Consistency with the local development plan would be very difficult to determine. This is a matter of professional judgement in each case. For example, a proposal may accord with some policies set out in a development plan but not with others.”*

Broad consistency with the development plan is a matter of judgement but is not difficult to determine in the majority of cases. Planning professionals (and often elected members) make this decision on every planning application, often multiple times every day. It is a longstanding principle, which planning students learn almost on their first day at planning school, that planning decisions must be made in accordance with the development plan unless material considerations indicate otherwise. No planning decisions would ever be issued if consistency with the development plan was always “very difficult to determine”.

*“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.”*

No more than for any planning decision at present – except applicants have a right to review decisions whilst others do not.

*“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.”*

This happens all the time at present. Appeals to local review bodies and appeals to Scottish Ministers both mean that the decision shifts from officials to elected members or vice versa.

*“Whilst the planning system is plan-led, each appeal location is different and material considerations relevant to the locality require to 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.”*

Agreed – However, this could equally apply to appeals lodged by parties other than applicants and there is no reason why a fair and equal right of appeal would do anything other than enable this to be done in the context of a more balanced and fairer system



## 2. Cases where an Environmental Impact Assessment (EIA) is required.

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

Why? EIA screening should be robust regardless of any possibility of appeal. Does this imply that some EIA screening decisions are not currently robust? In our experience the majority of EIA screening decisions are robust and would face no additional risk of legal challenge.

*“There is already enhanced public engagement and scrutiny on these decisions.”*

There is but applicants still have an opportunity for two shots at gaining consent whereas the wider public have no opportunity for a similar review of decisions which fundamentally undermines current public engagement.

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

If an unscrupulous developer is minded to take this approach they will likely already be trying to avoid EIA and introducing a right to instigate review or appeal is exactly the sort of measure required to disincentive this type of behaviour.

*“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.”*

Responsible developers that deliver high quality developments and engage meaningfully with communities will have nothing to fear from appeal. The potential for an appeal to be instigated by others will only incentivise developers to improve practice.

## 3. Limited to certain parties e.g. recognised community groups.

*“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.”*

Obviously, there are a range of views in every community of place and interest. However, there could be consideration given to ensuring that there is a wider public interest in the appeal. If a decision is made contrary to the development plan there would be a wider public interest in a review of the decision to ensure this departure was appropriate.

*“This proposal could mean that opposition to a single development dominates the agenda of some community bodies and could be divisive in some circumstances. It would be disappointing if local pressures led to people choosing not to volunteer in their communities.”*

This argument does not stand to reason. In some circumstances, opposition to a single development will inevitably, and quite rightly, dominate the agenda of a community body. Major developments such as power stations, major roads and other infrastructure and even major housing development can result in fundamental change to local places and risk major environmental harm. In these circumstances it is only right that opposition to a development take up considerable time. We also strongly disagree that this would deter volunteering. In our experience it has the opposite effect, often mobilising people to get engaged. In fact, to our knowledge, many local and national politicians started their careers in response to a major development threat to their local communities. Recent debates in the Chamber highlighting the issue of repeat applications and greenbelts clearly illustrate this.

LINK is a Scottish Charity (SC000296) and a Scottish Company Limited by guarantee (SC250899). LINK is core funded by Membership Subscriptions and by grants from Scottish Natural Heritage, Scottish Government and Charitable Trusts.

Registered HQ office: 13 Marshall Place, Perth PH2 8AH tel 01738 630804 email [information@scotlink.org](mailto:information@scotlink.org)  
Advocacy office: Dolphin House, Hunter Square, Edinburgh, EH1 1QW tel 0131 225 4345 email [advocacy@scotlink.org](mailto:advocacy@scotlink.org)

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

Local place plans could be positive but as currently proposed are very weak. They are not even to be part of the development plan and would easily be undermined by existing appeal rights for developers only.

#### **4. Cases where a local authority has an interest.**

*“It is reasonable and normal for a local authority to have an interest in a development and also to make a decision on a planning application for that development, reflecting the range of their roles and duties.”*

Agreed – but the potential for conflict of interest makes it appropriate to have an ability for decisions to be reviewed (note: reviewed, not overturned)

*“This option would apply to a limited number of cases and is therefore unlikely to satisfy supporters of ERA on its own.”*

Agreed – this would be only one type of circumstance but would significantly increase confidence in the system and also have very limited resource implications.

*“If there is 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 the advice in our Planning Advice Note (PAN 82) on Local Authority Interest Developments.”*

This is welcome – it would have been helpful if this suggestion had been raised before, perhaps as part of an offer to undertake a wider review of how appeal rights could be made more fair and equal.

#### **5. Decisions by elected members contrary to officer recommendations.**

*“There are many different circumstances for these cases.”*

Agreed. But this is not a reason to maintain appeal rights only for applicants.

*“There may well be good reasons for elected members departing from the recommendation of the planning officers.”*

Agreed. But this is not a reason to maintain appeal rights only for applicants. If there are good reasons, a review would come to the same conclusion as the original decision but the option of a second consideration would significantly increase confidence in the system.

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

Agreed. However, this applies at the moment with appeals by applicants, illustrating the need for a wider consideration of appeal rights.

#### **6. Removal of rights of appeal for applicants.**

LINK is a Scottish Charity (SC000296) and a Scottish Company Limited by guarantee (SC250899). LINK is core funded by Membership Subscriptions and by grants from Scottish Natural Heritage, Scottish Government and Charitable Trusts.

Registered HQ office: 13 Marshall Place, Perth PH2 8AH tel 01738 630804 email [information@scotlink.org](mailto:information@scotlink.org)  
Advocacy office: Dolphin House, Hunter Square, Edinburgh, EH1 1QW tel 0131 225 4345 email [advocacy@scotlink.org](mailto:advocacy@scotlink.org)

- *“This has been suggested as an alternative approach, driven by views that the system favours views of one sector over another.*
- *Industry representatives have highlighted the likely significant impact that removing the applicant’s right of appeal would have on development and investment in Scotland.*
- *Many national policy objectives have been supported as a result of the appeals system:*
  - *Since 2014, around 5,500 housing units have been approved on appeal, following refusals from planning authorities.*
  - *Appeals have helped to deal with inequalities, minority groups and provide resources for young people. Examples in recent years include Gypsy / Traveller sites in three local authority areas, residential accommodation and a care home.*
  - *Around 1.4 gigawatts of renewable energy generation have been consented – we estimate that this could power the equivalent of 696,294 homes, saving 1,167,684 tonnes of CO2 per annum”.*

This section simply illustrates the value of having a system of review. However, it can currently only be instigated by applicants for planning permission, which means the process is completely self-selecting from an applicant’s perspective.

This LINK Parliamentary Briefing was developed on behalf of LINK’s Planning Group. Members supporting LINK views on the Planning Bill are listed [here](#).

**For more information contact:**

Aedán Smith, Convener of the LINK Planning Group  
E-mail: [aedan.smith@rspb.org.uk](mailto:aedan.smith@rspb.org.uk) | Tel: 0131 317 4100

Daphne Vlastari, Advocacy Manager Scottish Environment LINK  
E-mail: [daphne@scotlink.org](mailto:daphne@scotlink.org) | Tel: 0131 225 4345  
[www.scotlink.org](http://www.scotlink.org)  
[www.savescottishseas.org](http://www.savescottishseas.org)  
[www.scotlink.org/local](http://www.scotlink.org/local)