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Rights of appeal in planning
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Dear Richard

Response by the Scottish Environment LINK to the Rights of Appeal in Planning'

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Scottish Environment LINK is the forum for Scotland's voluntary environment organisations comprised of 36 member bodies representing a broad spectrum of environmental interests with the common goal of contributing to a more environmentally sustainable society. The organisations listed below have expressed support for this response.

We particularly welcome this consultation by the Scottish Executive as a significant step towards delivering an accessible, equitable and effective planning system in Scotland. Our detailed answers to the questions below clearly conclude that an extended right of appeal must form a key component of the Executive's wider programme of modernisation for the planning system.

LINK was pleased to be invited to sit on the Steering Group, which was asked to contribute to the production of the consultation document but we feel it would be inappropriate not to mention that the document as finally produced is not what we had hoped for. We recognise that this is a complex topic but feel that the consultation document heightens rather than clarifies the complexity. Nevertheless, we welcome the opportunity to comment and trust that the Executive will be willing to take decisive action to deliver a widened right of appeal in Scotland.

We are happy for this consultation response to be made public.

Scottish Environment  The voice of Scotland's environment movement

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Q 1: 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? & Q 2: 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?

In addition to those arguments identified in the consultation document, we would make the following points:

- The introduction of a third party right of appeal for situations where there is a departure from the development plan would provide a unique incentive to ensure that development plans are kept up-to-date. We share the Executive's desire to operate a plan-led planning system where decision makers, developers and third parties can place confidence in the development plan. We also appreciate that there are a number of proposals currently out for consultation that aim to improve the system. Unfortunately, the many demands on local government make it inevitable that resources will not be put into the development plan process unless there is a tangible dis-benefit associated with failing to do so.
- We believe the document underplays the potential legal obligations arising from the Aarhus Convention. We believe the implementation of these obligations will require the creation of a system that provides third parties, and particularly NGOs, access to a review procedure where they can challenge the substantive as well as the procedural legality of decisions. The implementation of a widened right of appeal would avoid the necessity of re-visiting this issue in 2005 by which time the UK must convert these obligations into domestic legislation.

Q 3: 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 categories identified in the Partnership Agreement offer a sound basis for a limited right of appeal.

Cases where the local authority has an interest:

Where local authorities are required to be both applicant and decision-maker the need for transparency of process is paramount. However, the nature of local government operations frequently means that the financial,

corporate or business links between local authorities and a particular development proposal may not be widely known. Inevitably, it can then appear that planning application decisions are influenced by this relationship, even if this is not the case.

Cases where the application is contrary to the development plan:

In a plan-led system where all parties are actively encouraged to engage in the forward planning process any decisions which depart from the agreed plan must be subject to an increased level of scrutiny. Failure to make decisions in accordance with development plans serves to alienate the public and devalue the forward planning process. In addition, the introduction of a widened right of appeal will serve to encourage local authorities to produce up-to-date plans in order to avoid the necessity of departing from the development plan

Cases when planning officers have recommended rejection:

LINK organisations work across Scotland and are acutely aware of the different approaches taken by different local authorities to planning matters. While some level of local variation is a welcome reflection of local democracy, an inconsistent application of national policy does not reflect well on the planning process. Planning officers are employed as professionals, operating under a professional code of conduct, which requires them to provide impartial advice on planning matters. Should councillors then decide to depart from this advice this decision should be made subject to an additional level of scrutiny in order to ensure the departure was for sound planning reasons.

Cases where an Environmental Impact Assessment is needed:

Despite the relatively small number of proposals accompanied by an EIA, we believe this to be highly important category for inclusion in any widened right of appeal. The requirement for an EIA serves as an indication that the development may have significant environmental impacts (either positive or negative). As such, it is an invaluable barometer of those proposals that are likely to give rise to significant environmental change, frequently extending beyond the immediate vicinity of the development.

Q 4: Which planning decisions do you think should be capable of appeal to the Scottish Ministers?

We agree with those categories identified in paragraph 4.10 and also recommend that those categories identified in 4.11 should also be subject to third party right of appeal.

Electricity Act applications: By excluding deemed planning permission under the Electricity Act 1989 the Executive will create a curious

imbalance between larger schemes determined by Scottish Ministers and marginally smaller schemes determined by local authorities – we see no logical reason why this should be the case.

Enforcement: The failure of local authorities to undertake enforcement action is a criticism frequently voiced by LINK members and the introduction of third party rights of appeal may help to encourage local authorities to allocate appropriate resources to this ‘Cinderella’ of the planning system.

Advertisements: We can see no logical reason why this aspect of the planning system should be excluded from an extended right of appeal and recommend that it be included.

Q 5: 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 of appeal.

We recognise that a universal third party right of appeal has the potential to generate a very large number of appeals. In order to facilitate a workable system we recommend that the right of appeal be limited to those who have objected *or submitted comments* to the original planning application. As the consultation paper indicates these parties have already indicated an interest in the proposal, however we would not restrict it simply to those who have lodged an objection. Many parties may write to seek additional information or provide useful comments and as such should be considered interested parties with a right to appeal.

We do not support any of the alternative suggestions and strongly recommend that the restriction of right of appeal to ‘representatives’ raises very serious concerns about who can legitimately be said to represent a community.

Q 6: 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 a wider right of appeal in the planning system or the removal of the right of appeal for developers.

We believe that a wider right of appeal would:

- Create a more reliable and predictable plan led system;

- Address the inequity which currently exists between developers and third parties in the planning system;
- Increase the transparency of decision making and thereby improve the quality and reliability of those decisions;
- Provide a clear mechanism to deliver and meet the Executive's commitments to social inclusion and environmental justice; and
- Result in a more effective and efficient planning system for all.

Q 7: 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?

We recognise that any significant change to the planning system has the potential to impact on workloads of all those engaged in the planning process. However, accurately predicting what that impact will be should be considered in the context of the following factors:

- As this consultation document clearly states this is part of a package of measures to modernise the planning system and as such, it is difficult to evaluate what the impact of a widened right of appeal would be in isolation. Other measures to involve the public and speed up the process will create new and different demands on all planners.
- A £350 million Planning Delivery Grant has supported the roll out of planning reforms in England and we assume that a similar level of support will be available in Scotland.
- The ODPM has provided substantial funding for Planning Aid in England and again we assume the Scottish Executive is willing to do the same in Scotland.
- The comparisons with Ireland while interesting are obviously not able to give a true reflection of the potential level of appeals we might anticipate given that in Scotland third parties have a far greater opportunity to be involved in the preparation of the development plan, thereby reducing the potential for conflict later on in the process.

In conclusion we would emphasise that the introduction of a widened right of appeal together with the other proposals for reform being explored by the Executive will result in a better planning system which people trust to deliver quality outcomes. This may require slightly more resources allocated to different priorities. The status quo is quite clearly failing to deliver these outcomes and we believe a widened right of appeal is one important step towards addressing this failing.

Q 8: 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.

No. Local authority planners currently work with applications that could give rise to developer appeals, this proposal will simply extend the scope of that activity. In Ireland where third party rights of appeal are currently in use, we understand planning courses to be oversubscribed and heavily in demand. While we are aware that the recruitment of planning students and graduates can be difficult for some employers and universities we believe this may be more a reflection of the salary and status the profession attracts, particularly in local government. With increased resources and an improved professional status, (arising from a more robust planning system) we believe a widened right of appeal may result in planning becoming a more attractive rather than less attractive career choice.

Q 9: 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 strongly reject any recommendation that there should be a fee to object to a proposal – this would seriously curtail access to environmental justice. However, we believe that a modest fee for those seeking to lodge an appeal would help to reduce the potential for frivolous or vexatious appeals.

Q 10: Should the Scottish Ministers retain their role in deciding particular planning appeals, or should SEIRU decide all appeals?

We believe there would be considerable advantage in SEIRU deciding all appeals. Currently Ministers frequently find themselves in the difficult position of both promoting and determining developments. The modification of SEIRU to become an ‘arms length’ body would remove potential criticisms of political interference in the decision-making process. We understand that there may be exceptional circumstances where issues should be determined by Ministers, these types of situation should be clearly identified using publicly available criteria.

The appeals could, alternatively, be heard by an Civil Environmental court, set up to consider this and other environmental appeals, in an informal manner akin to that adopted by the Land Court. The establishment of such a body should effectively manage any increase in workload.

Q 11: Would the introduction of mandatory public hearings in defined circumstances increase public confidence in planning authorities' decisions?

The experience of LINK bodies suggests that the current system of public hearings does very little to improve public confidence in the planning system. The different approaches adopted by local authorities creates confusion and some clarification or guidelines for the process may be appropriate, however, the benefits of undertaking public hearings are minimal. In general, hearings provide a very limited opportunity for objectors and developers to convey their key points to decision makers. In many local authority areas, developers and objectors are allocated one short slot to make their points – regardless of how many objectors there might be.

The introduction of mandatory public hearings would not serve to create a more transparent nor a more equitable planning system. Consequently, it is unlikely to serve as a mechanism to improve public confidence in the planning system.

Q 12: 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?

No. The call-in process is not currently sufficiently transparent, nor does it afford any role for third parties. Simply extending the notification process could result in a larger workload for the Scottish Executive without delivering the range of benefits offered by a widened right of appeal.

Q 13: Would it be appropriate to introduce a screening process for planning appeals? Please let us have your comments on relevant screening criteria.

We strongly recommend the introduction of a widened right of appeal, however, as we have noted above we recognise that focusing that right to particular circumstances will offer the maximum benefit with minimum cost and disruption. To this end, some form of screening will be necessary. The criteria set down in the first and fourth bullet point appear to be useful and reasonable.

Bullet point 2, where the application is contrary to the local plan: we would be concerned that an out of date plan could be used as a justification for

rejecting an appeal, would it be more effective to indicate that third party rights of appeal will be allowed whenever a local plan is out of date?

Bullet point 3, when planning officers have recommended rejection: we understand this criterion to be an attempt to make the criteria appropriate for applicants and objectors. If this is the case then we would support the suggestion in the consultation that it would be applied when councillors have reached a decision contrary to officers' recommendations. In many cases, third parties can have concerns addressed by appropriate conditions that are then removed or modified by councillors contrary to officers' recommendations.

Q 14: Are there circumstances in which any right to appeal against planning decisions should be withdrawn? Please give details.

No, we do not believe that the system would benefit from withdrawing or restricting appeal rights in particular situations. If the Executive is minded to consider this as an option, it must be applied to both applicants and third parties. The value of an appeal system is to allow public scrutiny of difficult decisions, avoiding such scrutiny does nothing to improve public confidence in the planning system.

Q 15 (a) Please give us your views on each of the models outlined in section six.

We do not believe that Models 2 or 3 offer any level of solution to the issues identified both in the consultation document and in our response.

From the consultation document it would appear that the key differences between Models 1 and 4 are that in Model 1 the screening process is less explicitly considered but would, we assume, have to be undertaken by SEIRU with whom the appeals will be lodged. Conversely, Model 4 creates a role for the SEDD in screening appeals and provides greater detail on the criteria that would be applied to both applicants and third parties. We would support an amalgamated version of these two models in which appeals were lodged with SEIRU who then applied the criteria detailed in Model 4.

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

As we have indicated above, in the interests of equity, if a widened right of appeal is not introduced the Executive should remove the right of appeal from developers.

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

Scottish Environment LINK has 36 member bodies with a joint membership of over 500,000 individuals. Many of these member bodies play an active part in the current planning system and we anticipate that the introduction of a widened right of appeal would offer these bodies an additional mechanism to address those instances where we believe a poor decision has been made.

Yours sincerely



Anne McCall
LINK Planning Task Force Convenor

The Following LINK member organisations support this statement:

Association for the Protection of Rural Scotland (ruralScotland)
Badenoch and Strathspey Conservation Group
Biological Recording in Scotland
Butterfly Conservation Scotland
Cairngorms Campaign
Council for Scottish Archaeology
Hebridean Whale and Dolphin Trust
John Muir Trust
Mountaineering Council of Scotland
National Trust for Scotland
North East Mountain Trust
Friends of the Earth Scotland
Ramblers Association Scotland
RSPB Scotland
Scottish Countryside Activities Council
Scottish Council for National Parks

Scottish Countryside Rangers Association
Scottish Wildlife Trust
Scottish Wild Land Group
SUSTRANS
Woodland Trust Scotland
WWF Scotland
Wildfowl and Wetland Trust