Third Party Rights of Appeal in Planning

The ‘first party’ in development control in planning is the applicant for planning permission and the ‘second party’ is the local authority. ‘Third parties’ are anyone else with a view on a planning application, whether they have a direct interest (e.g. as owner of the land on which the application is submitted) or a personal interest (e.g. as a neighbour) or a wider interest (e.g. as a parish council or interest group).

Relevant cases have been incorporated in this text up until 1 September 2001

Third Party Rights of Appeal

A research project for

Council for the Protection of Rural England
Royal Society for the Protection of Birds
WWF-UK
Civic Trust
Friends of the Earth
Town and Country Planning Association
Environmental Law Foundation
ROOM

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Foreword

As communities are exhorted to take an active role in informing the land use planning decisions which shape their surroundings, the odds are still stacked against them. The system remains focussed on a dialogue between developers and local authorities, and community groups and concerned individuals cannot compete using the time and resources available to them.

Nevertheless, many individuals and community groups rise to the challenge of overcoming this inequality of resource through sheer effort and commitment. At least, they believe, they have the same ***opportunity*** as everyone else in our democratic society to put their case.

If they succeed in convincing their planning authority of the merits of their case to refuse permission for a damaging development proposal, communities soon discover that the applicant has the option to appeal to the Secretary of State seeking to challenge the decision and gain permission. The arguments must be put and considered again. But all parties have the same opportunity to put their case, and it seems only fair that the aggrieved party can have the evidence reviewed.

However, if the planning authority decides in favour of the developer, this is not the case. Many people find this fact incredible: while a developer may appeal against the refusal of planning permission, no-one can appeal against the grant of permission – no matter how good the case for refusal may be. Worse still, planning authorities may be swayed by a simple desire to avoid having to defend an appeal: and thus the mere existence of this one-sided option could tip a decision in favour of the applicant.

Particularly bad decisions can, of course, be subjected to legal challenge. However, in practice, this means going to court, and few people feel sufficiently wealthy and confident to take this route. Furthermore, the courts rarely examine the merits of the planning arguments. Judicial review is usually confined to examining the process by which the decision was made.

In summer 2000, representatives of a number of voluntary organisations were exploring the issue of a public right of appeal in the planning system. Some doubted its wisdom, some were curious about what impact it might have, others favoured the idea. In preference to acting on individual assumptions, they resolved to commission research into the subject. The research report which follows was undertaken by an independent team of respected academics, consultants and legal experts in the field of planning. They have made their own, independent assessment and drawn their own conclusions. The result is an authoritative, thorough and balanced exploration of the issues.

This document is not intended to be definitive but it is meant to stimulate and inform debate. The organisations which commissioned this work do not necessarily share all the views of the research team. Some

feel the proposals are too limited in their scope, some feel that the limits should be defined differently, others oppose the imposition of fees or question the proposed level of fees.

But they all agree on one issue and that is this: a reform of the long-standing imbalance – which allows one party in the planning system to appeal against a decision but denies a similar opportunity to other parties – needs urgently to be addressed. The report makes a compelling case for this. There are no practical reasons why this cannot be done and the Government's current proposals to reform the planning system offer a rare opportunity to do so. We urge the Government to act on this report.

Conclusions and Recommendations

Conclusions

We consider that the current arrangements for challenging planning approvals are inadequate in a democratic society. Strengthening the rights of third parties at this stage could be expected to raise public confidence in the planning system and introduce higher standards for deciding planning applications. Increased transparency at an early stage and a right of redress at a later stage would go a long way to addressing public concerns about the way planning decisions are taken at present.

In our view there is a strong case for limited third party rights of appeal in planning, focusing on those types of case which give greatest grounds for concern about quality, transparency, probity and accountability in the development control process. Whilst this will have impacts on the speed of planning decisions, and in some cases adverse effects on developers, we consider that these will be outweighed by the benefits. Further detailed arguments to support this case are presented within chapter 3, which also tackles the main arguments for not proceeding with third party appeals.

Most of the alternative remedies which might be considered for challenging planning decisions which third parties consider weak, outlined in chapter 6, are woefully inadequate. Only the greater use of call-in powers by the Secretary of State, combined with other changes to the regime, would come close to providing so effective a mechanism for reviewing cases, and this option will always suffer from the uncertainty and unreliability of the Secretary of State's discretionary exercise of the powers available to him. Our inclination is to favour a system in which the review of decisions puts power in the hands of those who are aggrieved by those decisions, and gives them access to an independent arbitrator of planning merits.

Recommendations

Who can appeal?

- Only those who have objected to the original planning application should be permitted to appeal, with any exceptions at the discretion of the Inspectorate.

- The Secretary of State should make it clear that he will legislate if necessary to prevent abuse of the right of appeal by third parties who seek simply to delay development, to gain commercial advantage, to secure benefits from a developer in return for the withdrawal of an

appeal, or to gain publicity.

Which cases?

We strongly favour controlling the volume of appeals by the selection of categories. There should be a right of appeal against approval in the following cases:

- when the planning application is contrary to the provisions of an adopted development plan;
- when the planning application is one in which the local authority has an interest;
- major applications (as defined by the Planning Inspectorate);
- when the application is accompanied by an Environmental Impact Statement; and
- when the planning officer has recommended refusal of planning permission to the members.

The phasing of the introduction of third party rights of appeal should recognise the time required to recruit and train additional Planning Inspectors.

Grounds of appeal

- There should be no restriction to the grounds of appeal.

How appeals are decided

- There should be parity of choice (written representations or oral hearing) between developers and third parties.

Time limit for lodging an appeal

- The time limit for lodging an appeal should be 28 days from the granting of the full or outline planning permission.

Fees for lodging appeals

- There should be a flat fee of £30 for lodging an appeal.

Awards of costs

- There should be no costs awarded in written representation cases.
- Costs should be awarded for unreasonable or vexatious behaviour in oral hearing cases, including against third parties.
- Where local authorities consider that an appeal against one of their approvals is vexatious or hopeless, and it is proposed that the appeal should be decided following oral procedures, the local authority

should be invited to indicate this to the appellant and the Planning Inspectorate within three weeks of the appeal being lodged; costs awards on merits would be awardable against third parties only if this had been done, thereby putting the appellant on notice without the need for a time-consuming process to filter out inappropriate appeals.

Delay caused by third party appeals

- The Secretary of State should set demanding administrative targets for efficient handling of third party appeals.

- The Planning Inspectorate should be encouraged to issue more instant decisions.

Summary

Summary of the case for third party rights of appeal

(i) There is a perceived unfairness in the procedures for participation in planning in that prospective developers may appeal against refusal whereas third parties cannot appeal against approval.

(ii) There should be an opportunity for those disadvantaged and aggrieved by planning approvals to seek redress from an independent body, for example:

- people directly affected by the development;
- nearby local authorities;
- interest groups/concerned persons;
- statutory agencies (if their statutory objectives would be impeded or their advice on planning applications would be overriden);[1] and
- Government departments (if their policies would be compromised).

(iii) Third party rights of appeal would raise standards in planning authorities and redress the present imbalance, by making them as accountable for their approvals as they are for their refusals.

(iv) Some other countries with advanced democratic planning systems have third party rights of appeal which are reported as having led to better decisions.

1 We note that the Government has recently kept open the possibility of requiring local planning authorities to refer planning applications to the Secretary of State for possible call-in in cases where authorities propose to ignore flood risk objections by the Environment Agency (Press Release 326, 17th July 2001, accompanying the publication of Planning Policy Guidance note 25, *Development and flood risk*); a comparable arrangement already exists under Regulation 49(5) of the Conservation (Natural Habitats &c.) Regulations 1994 for cases where local authorities propose to override an objection by English Nature to development proposals affecting a site of European importance for nature conservation.

Summary of the case against third party rights of appeal

(i) There is insufficient evidence of a problem with the current discretionary system for deciding planning applications to require the significant change of depoliticising the planning system by greater use of independent arbitrators and less reliance on locally elected councillors.

(ii) Landowners need the ability to appeal because their expectations to develop their land are being taken away; third parties are not being denied a right and do not need it.

(iii) There are already ample opportunities for third parties to express views on planning applications and have them properly considered at the most appropriate time: that is, before the decision is made.

(iv) Any benefits would be outweighed by the disadvantages, not least the delay to development.

Summary of the report

Background

This project investigates the case for a right for third parties in the planning system to be able to appeal on merits to a higher authority against the decision of a local planning authority to grant planning permission.

The research evaluates:

(i) whether a third party right of appeal is necessary or desirable in principle, and if so how it might be made to work in the context of the British planning system, examining a range of options; and

(ii) whether British law needs to be changed to introduce a third party right of appeal to conform with the *Human Rights Act 1998* and/or with the *Aarhus Convention*, and if so what changes to planning law and practice are needed.

The research draws on our own analysis of the issues, as well as:

- a review of experience in selected democratic western nations and states, to see what lessons we might learn in England from them: the results of this original research are set out in full in Appendix 1;

- a seminar held at The Law Society on 1 May 2001 to explore the main issues raised by third party rights of appeal (a list of those attending is given in Appendix 2); the event provided expert input to the debate, which helped this research enormously.

The town and country planning legislation gives no legal rights for private individuals who have objected to a proposed development to pursue a challenge if the development is approved by the local planning authority. At present their sole right is to make their objections known to the local planning authority before the planning application is determined. The underlying assumption is that objectors can rely on the authority to take into account their views and interests in determining what is in the public interest.

The absence of third party rights of appeal in planning has for many years been a subject of concern to some commentators. The House of Commons Environment Committee recommended as long ago as June 1984 that '*a direct system of appeal by a third party to the Secretary of State be introduced, in cases where not only local authorities but also statutory undertakers and Government departments wish to grant* t*hemselves, or any other public body, planning permission in a Green Belt*'. All three main political parties have in recent years supported the introduction of third party rights of appeal, although a recommendation by the House of Commons Environment, Transport and Regional Affairs Committee in 2000 for a limited right of appeal was rejected in the Government's response.

Implementing third party rights of appeal

In reviewing the practicalities of implementing third party rights of appeal, our primary assumption is that any right of third party appeal should in some way be limited. There should not be an opportunity for anyone to appeal against the grant of any permission for any reason, but rather the right should be concentrated on the circumstances where the scope for perceived unfairness or inadequacy in the current arrangements is most obvious. Our reasons for making this assumption are:

- to ensure that the role of local planning authorities is not undermined by indiscriminately opening their decisions to further review without good cause;

- we do not wish to delay development, or increase the financial risk faced by investors, without good cause; and

- the Planning Inspectorate should not suddenly be burdened with a flood of case work.

The principal opportunity for third parties to engage in decisions on development proposals is by commenting at the planning application stage, so that the local planning authority has before it the opinions of those who have a view on the matter. This would be distorted, or the principle of participation at the application stage undermined, if potential objectors to planning applications were in a position to make their first representation after the local planning authority (LPA) decision by means of a third party right of appeal. We therefore propose that persons or organisations which lodged an objection to the original planning application – and whose objections were not satisfied by the terms of the approval – should normally be the only parties allowed to register an appeal.

A new third party right of appeal might create the circumstances which encouraged additional objectors to planning applications. Interested parties might identify the possibility of using or threatening third party appeals to:

- delay development;
- secure benefits from a developer in return for withdrawing an appeal; or
- generate publicity for their own cause.

It is difficult to see how this could be prohibited by law, as it would depend on establishing that the motive for lodging a planning appeal was a commercial or non-planning motive. Furthermore, prohibitions on appeals might prevent some entirely legitimate objections from being heard. Initially at least, we consider that self-regulation will be more appropriate. We consider that the Government should make clear that some kind of restraint on delaying tactics would be introduced if required, such as a power for Inspectors summarily to dismiss appeals.

Limiting the occasions on which a third party right of appeal is available is the single most significant means of constraining the overall volume of appeals. Preferred categories of appeal would allow third party rights of appeal to focus on those cases which attract the most adverse attention and which most merit the right of appeal. We consider this would be superior to other arrangements such as requiring objectors to seek leave to appeal.

We consider there is a strong case for third parties to seek a further review of cases in which a development is approved contrary to the provisions of an adopted development plan. There are two schools of thought on how readily these ‘departure applications’ could be identified, but our own view is that the introduction of a third party right of appeal specifically against approvals of departure applications would bring closer attention to the definition of ‘departures’ and the thresholds for triggering a right to appeal. If the problem of defining a departure is as bad as some claim it to be, then a review is in any event overdue to implement existing requirements to notify departure applications to the Secretary of State.

Another contentious category of case is local authorities' deemed approvals of their own development or those in which they have an interest (e.g. as landowner or investor). There is a strong case for removing temptation by rescinding the power of local authorities to approve these cases. In the absence of such a change there is a strong case for third party rights of appeal here.

The right of third party appeals might be prioritised to developments that are distinctively ‘major’ in some way. For example, the Planning Inspectorate’s ‘major’ cases accounted for just 5.5% of all appeals decided in 1999-2000. We are also impressed by the specific category of applications accompanied by Environmental Impact Assessments (EIAs). These are cases by definition likely to have significant effects on the

environment and thus merit special attention, with the need for EIAs decided not only by the scale of proposed developments but also according to the sensitivity of the development's local context. We also consider that, the broader the scope of third party rights which the Government considers appropriate, the more categories of 'major' development proposal by size or location could be brought within the new system.

Few planning approvals granted against the recommendations of a council's officers are cases which might be decided either way on planning merits. This is therefore the kind of case which may well merit being revisited for further review. In principle, we consider that applications approved in these circumstances should be one of the priorities for third party appeal.

Once a decision has been taken on the kinds of development proposals on which third parties may lodge appeals against approvals, a further decision is required on the scope of the grounds for appeal. We consider that constraining the grounds of appeal would be impractical. Appellants would otherwise feel they were entering an appeal with one hand tied behind their back. At an appeal the original development proposal should be considered as a whole, with objections to it on some grounds being weighed against the arguments in support.

There is a special set of issues around the question of whether third party appeals should be allowed against conditions on a planning permission (on the grounds that the conditions imposed are insufficient). Where full permission is granted, we support the right of appeal against the conditions. The appeal would consider all material planning issues and not just the conditions (as is the case with developer appeals). However, in cases where outline permission only is granted, there is the potential for considerable delay in the system if appeals do not need to be lodged until conditions are decided some considerable time afterwards. A better arrangement than appealing against those conditions, we consider, would be to lodge an appeal against the outline approval, accepting that this appeal might be withdrawn if the third party's concerns are in fact remedied by conditions approved by the authority before the appeal is heard.

Developer appellants have the choice of having their appeals heard by exchanges of correspondence (written representations), informal oral hearing, or formal public inquiry. We have no hesitation in recommending that comparable choices on methods of appeal determination should be available to third party and developer appellants. This is the clearest example of the need to apply the principle that third party appeals are not second class appeals but just as serious as those submitted by developers against refusals.

There should clearly be a time limit on lodging third party appeals. We consider that third parties should lodge appeals within 28 days of the date of dispatch of the approval notice from the local planning authority to those who submitted comments on the application. This period is typical of the period allowed for third party appeals in other administrations in our study.

We consider that third parties should pay a modest fee to lodge an appeal of, say, £30. This would strike a balance between discouraging purely frivolous appeals and impeding legitimate democratic activity.

The tradition of costs awards in the British planning system is that each party normally pays its own costs at all stages of proceedings (except legal challenges to decisions), and does not contribute to other parties' costs. There is a fear in some quarters that the introduction of a third party right of appeal would open the door to a disproportionate volume of ill-considered or even vindictive appeals which had little or no basis in planning policy, and that the threat of an award of costs would go some way to bringing these prospective appellants to their senses.

We have no doubt that the threat of costs awards would indeed be an effective means of filtering out particularly weak cases from being taken to appeal. However, it would also filter out many reasonable, legitimate and even highly convincing cases from appeal, simply because prospective third party appellants might well be unable to afford to take the risk of the award if they were to lose or fail to substantiate part of their case. The overall effect would be very damaging to the concept of third party appeals: the semblance of democratic opportunity would have been presented, but those who would particularly benefit from it might well feel constrained from using it.

We wish to discourage the unreasonable use of appeal procedures. This is different from failure to offer a reasonable argument. Unreasonable behaviour is avoidable, so third party appellants should be exposed to awards of costs just as developer appellants and local authorities are now.

Vexatious appeals which seek to stifle development or to delay it for reasons unrelated to good planning would bring the planning system into disrepute. There is therefore a strong case either to penalise vexatious appeals if they arise or to prevent them from being heard. If all appeals had to pass through a filtering mechanism, this would add to the time taken to reach a decision on each case. We would expect only a tiny fraction of cases to be stopped at this stage. We consider that effort could be put into dissuading vexatious (and 'hopeless') appellants from pursuing their cases, and then penalising them if they do. Forewarning of the risk of an award of costs is one way of doing this, although there are other options worthy of consideration (selective filtering or empowering Inspectors summarily to dismiss appeals). However, we consider that costs should never be awarded on merits in appeals determined by written representations.

There is often an assumption that introducing a third party right of appeal into the planning system will cause delay to the issuing of decisions, and we accept that this is generally likely to be the case. However, third party appeals could speed up planning decisions: in some cases which the Secretary of State would have called-in for his own decision, and in some cases where an aggrieved third party would have challenged the approval in the High Court. Some real delays to other developments are nevertheless inevitable, so to minimise these we consider that the Secretary of State should set demanding administrative targets for handling times for third party appeals, and Inspectors should

make more use of 'instant decisions' in which the headline result of a case is announced as soon as possible after the evidence has been weighed, with the full written report following later.

Planning officers and elected members newly confronted with a third party right of appeal might be troubled that the decisions they produced were largely a waste of effort, at least in the cases which were more interesting because they were controversial, since whatever the outcome one or another party would take the matter to a higher authority for final decision. However, local authorities' views would still be very important during the appeal, and there are reasons to believe that authorities would apply more rather than less effort. Local authorities would no longer be tempted to grant permissions because they lack the resolve to defend refusals at inquiry (against developers' appeals): in future they could equally face cross-examination by aggrieved third parties. We are cautious about the argument that low standards in local authorities could become established, as there is no need for them to try any harder: there remain extensive powers to keep standards of planning control high enough, and it is implausible to believe that normal standards would be maintained on the bulk of applications whilst they fell badly on those few which were subject to a third party right of appeal.

The Nolan Committee took the view that '*there is also a practical argument that the appeal system would collapse under the weight of additional appeals*': the Planning Inspectorate could not cope with the extra workload. The proportion of local authority planning approvals which would be appealed by third parties is conjectural. In those administrations for which we have been able to obtain information, at most half of all cases heard by the arbitrating body were third party appeals. Doubling the number of appeals would be a significant increase in the Inspectorate's workload, but we note that the number of planning appeals has historically been more than double the current annual rate: it peaked at 32,281 appeals received as recently as 1989/90. It is possible that overseas experience may not be indicative, and the number of appeals in the hothouse planning atmosphere of England could turn out to be greater if there were a general right of third party appeal. It is a matter of judgement about how 'bearable' any increase in workload would be. We suggest that the approach taken should be cautious and phased, beginning with a right of third party appeal limited to specific priority categories of case. Additional categories of planning decision should become open to third party appeal only when it is clear that the system can cope with them.

Requirements of the *Human Rights Act 1998* and the *European Convention on Human Rights*

Article 6(1) of the *European Convention* provides that, in the determination of their civil rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. It is clear that prospective developers have their civil rights determined by local planning authorities, and have the protection of article 6. The jurisprudence of the European Court of Human Rights would suggest that in special circumstances the civil rights and

obligations of those objecting to a planning application are determined by the grant of permission. For article 6 to apply there must be a genuine dispute over the existence, scope or manner of exercise of the civil rights or obligations recognised under domestic law. The matter has not been determined clearly, but there is some case law to suggest that immediate neighbours to a proposed development will have rights under article 6 if the development will have direct adverse effects on their property.

Where a grant of permission affects the enjoyment of property, a third party right of appeal could be seen as necessary to uphold article 1 of the First Protocol, the first paragraph of which provides that:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

It would seem that third parties could also found rights under article 6 by reference to article 8. Article 8 gives a right to respect for private and family life, home and correspondence but this right is qualified as interference can be justified by what is '*necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.*'

Objectors to applications for planning permission do have the legal right to make written representations and to attend the meetings of planning committees. However following the decision in the ***Alconbury*** case, that the Minister is not an impartial tribunal as he is both policy maker and decision-maker, it would seem very unlikely that the decisions of a planning officer or the deliberations of a planning committee would be seen as satisfying article 6. These shortcomings are compounded by the lack of a legal duty to give reasons for the grant of permission.

As the House of Lords decision in ***Alconbury*** shows, even if the grant of planning permission in itself is in breach of article 6, article 6 could be satisfied by the right to challenge the legality of the decision in a court that certainly satisfies the requirements of article 6. The House in substance held that the right to an adequate and impartial judicial review cured the Secretary of State's lack of impartiality. It did not matter that the courts could not review the decision on its merits. So it could equally be argued that the right to a judicial review of the grant of permission cures the lack of impartiality of the local planning authority. However there are substantial grounds for distinguishing ***Alconbury*** in which the decisions rested with the Secretary of State from planning applications decided by local planning authorities. In the case of a decision by the Secretary of State, the right to a hearing before a planning inspector precedes the decision. A public inquiry or hearing has many of the attributes required to satisfy article 6.

Nevertheless it is considered that in the case of grants by local planning authorities, the remedy of judicial review does not cure the complete absence of a fair and public hearing before an independent and impartial tribunal. However if Lord Hoffmann's approach in ***Alconbury*** is

correct this would not help an objector who was simply basing his case on the court's inability to review the merits of the local planning authority's decision. This would mean that objectors would have to argue that the inadequacies of the procedures leading up to the grant of permission have meant that they have not been able to test crucial findings of fact on which the decision is based or that they have not been given reasons for the decision.

Lord Hoffmann's approach was applied by Richards J in the ***Kathro*** decision. The Judge rejected the argument that the grant of planning permission by a local planning authority in respect of its own development was inherently incompatible with article 6. He held that in the case of decision-making by local planning authorities, there was no equivalent of the fact-finding role of the Inspector and its attendant safeguards. Richards J therefore concluded that:

> *For those reasons there is in my view a real possibility that in certain circumstances involving disputed issues of fact, a decision of a local planning authority which is not itself an independent and impartial tribunal might not be subject to sufficient control by the court to ensure compliance with article 6 overall.*

Article 2 enshrines a right to life. It is obviously difficult to mount a claim based on the right to life in the context of perceived fears over threats to health arising from a proposed development.

Article 14 of the *European Convention* provides that the rights and freedoms in the Convention shall be secure '*without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'*. It could be argued that by providing rights of appeal to applicants but not to objectors there was a breach of article 6 when read in conjunction with article 14. However for this argument to succeed the court would have to accept that to discriminate between applicants and objectors came within the purpose of article 14. It would also have to be shown that applicants and objectors were in an analogous situation and that the differential treatment could not be objectively justified as legitimate and proportionate. There must therefore be considerable uncertainty whether such an argument would succeed.

On the matter of who may obtain remedies from the *Human Rights Act*, insofar as the Act gives rights to third parties, those rights will be limited to objectors who can show that their civil rights have been directly and genuinely affected. It will not be available to individuals and pressure groups who are purely motivated by their desire to protect the environment in the public interest.

In conclusion, the absence of third party rights of appeal is not conclusively incompatible with the *Convention* rights protected by the *Human Rights Act 1998*. The courts are still in the process of working out the meaning of article 6 as applied to the granting of planning permissions. Until there is a decision of the House of Lords directly on the issue, the position will remain uncertain. It would however at present seem likely that article 6 protects only those objectors who are directly

and seriously affected by the proposed development and when they are denied an independent and impartial forum to dispute crucial factual issues.

Implications of the *Aarhus Convention 1998*

The *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (known as the *Aarhus Convention*) was signed on 25 June 1998. The Convention itself does not directly require a right of third party appeal. The main provisions concern the right to environmental information, public participation in decision-making and the right to challenge environmental decision-making in the courts. Its main impact will therefore be to improve the alternatives to third party rights of appeal.

It includes general requirements for what is termed '*effective public participation*'. These would seem to fall short of providing objectors with a right to a hearing before any decision is made. However where there is a public hearing, such as a planning committee meeting, it goes further than the present law in England and Wales in suggesting that it may be appropriate to allow the public to address the committee. It should therefore provide the basis for improving the rights of objectors in the decision-making of local planning authorities which do not already accommodate this.

Overall, the Aarhus Treaty does not directly further the cause of third party rights of appeal but it does help to focus on the needs for objectors to be involved in the decision-making process.

Alternatives to third party rights of appeal

We have identified considerable concern – from our own experiences with the planning system, from comments made to us and from our seminar – that the planning system is too often failing to satisfy people's aspirations for greater engagement, transparency and competence in planning decisions. Whether or not these concerns are justified is not the point: the perception of a shortfall in practice against expectations is present and important.

The case for a third party right of appeal to an independent body capable of offering a fair hearing on the merits of arguments is attractive because of these perceived problems. However, the need for such a mechanism might be reduced if other arrangements were in place which helped people to feel that their concerns had been taken into account more thoroughly and clearly at an earlier stage in the planning process. The report suggests a series of improvements to the decision-making process which may be worth further research evaluation. In addition, we have briefly considered four alternatives for further review of proposed or actual planning decisions by local authorities.

First, local authority internal review provides an opportunity for more councillors to contribute to the discussion of controversial cases, but this

is never going to be, or be seen as, independent or impartial. We therefore consider there will always need to be scope for external review of local authority decisions, either afterwards or by intervention to forestall decisions.

Second, the Secretary of State has the power to take planning decisions out of the hands of local planning authorities by 'calling in' planning applications, though this is exercised highly selectively. Third parties can ask the Secretary of State to call in applications, particularly if they are concerned that the local planning authority will grant permission, but the Secretary of State does not have to stick rigidly to his own criteria, and even if he does it is a matter of judgement as to whether the criteria are satisfied. Reform of the call-in procedure might temper the case for a third party right of appeal, but the lottery effect would to some extent remain. If power is to be put in the hands of those directly affected by actual or potential planning approvals, then a third party right of appeal would arguably be a better mechanism.

Third, judicial review allows planning decisions to be challenged in the High Court on points of law, not for the most part on merits. Judicial review as a means of resolving planning problems is clearly unreliable and difficult for the large majority of participants in planning procedures, and carries the significant disincentive of a risk of costs awards against the loser. The law governing judicial review in planning cases might be made more wide-ranging and there are clear signs that the courts are moving towards expanding the grounds of review and in particular to adopting 'proportionality' as a ground of review. This would necessarily involve a closer scrutiny of the rationality of decisions. However, judicial review would still fall far short of a right of appeal and the courts themselves would be very reluctant to take on that function.

Fourth, complaints may be made to the Local Government Ombudsman on the subject of whether local authorities have carried out their administrative duties correctly. The Ombudsman's concern is with procedure, particularly where shortcomings in procedural practices ('maladministration') have resulted in 'injustice' to individuals. The Ombudsman is only peripherally concerned with the merits of planning cases, however, and his involvement is well short of the detailed analysis of cases which a third party right of appeal would allow. We see no advantage in expanding the role of the Local Government Ombudsman in an attempt to deal with the problems which would be addressed by a third party right of appeal.

Introduction

The brief

This project investigates the case for a right for third parties in the planning system to appeal on merits to a higher authority against the decision of a local planning authority to grant planning permission.

The research evaluates:

(i) whether a third party right of appeal is necessary or desirable in principle, and if so how it might be made to work in the context of the British planning system, examining a range of options; and

(ii) whether British law needs to be changed to introduce a third party right of appeal to conform with the *Human Rights Act 1998* and/or with the *Aarhus Convention*, and if so what changes to planning law and practice are needed.

Outline of the report

The central part of the research for this project has been a detailed analysis of the cases for and against third party rights of appeal. This has been informed by a number of specific considerations.

- The traditions of the British planning system and its evolution since 1947 will shape the debate on changes that may be appropriate now. Third party rights of appeal would not be introduced into a vacuum but would change well-established existing procedures. The historical themes are set out in Chapter 2.

- There has been discussion of the possibility of third party rights of appeal over many years, and the main considerations arising are also set out in Chapter 2.

- The brief did not extend to a full review of alternative means of delivering the benefits claimed of a third party right of appeal, but part of the evaluation of the issues is necessarily to address these. Chapter 6 mentions some of the topics which would merit discussion on how confidence in the development control process might be built up, thereby reducing the enthusiasm for revisiting planning decisions, and also considers briefly the main alternatives for challenging local authorities after they have come to a view on planning applications.

- Third party rights of appeal against decisions to approve developments have been introduced in a number of other countries. We have therefore studied experience in selected democratic western nations and states, to see what lessons we might learn in England from them.

The results of this original research are set out in full in Appendix 1, but the key points arising are also presented at relevant points in the text.

- A seminar was held at The Law Society on 1 May 2001 to explore the main issues raised by third party rights of appeal. Held by invitation (a list of those attending is given in Appendix 2), the event provided expert input to the debate which helped this research enormously. We are most grateful to the contributors but of course what follows is not to be taken in any way as the views of those who took part.

The body of the research divides mainly between Chapter 3, on how third party rights of appeal might best work in practice to meet the objectives we identify, and Chapters 4 and 5, on the implications for third party rights of appeal in England which might follow from, respectively, the *European Convention on Human Rights* (introduced into domestic law through the *Human Rights Act 1998*) and the *Aarhus Convention 1998*.

Chapter 3 describes in detail the main implications of introducing third party rights of appeal and how these might be addressed. Some policy principles therefore emerge from the review as well as purely practical points of administration. These, with the rest of the research, inform our conclusions and recommendations.

Background to the Case for Third Party Rights of Appeal

The 'first party' in development control in planning is the applicant for planning permission and the 'second party' is the local authority. 'Third parties' are anyone else with a view on a planning application, whether they have a direct interest (e.g. as owner of the land on which the application is submitted) or a personal interest (e.g. as a neighbour) or a wider interest (e.g. as a parish council or interest group).

Town and Country Planning Act 1947

The introduction of comprehensive control over the development of land by the *Town and Country Planning Act 1947* was accompanied by the granting to applicants for planning permission of a right of appeal to central government if their application was refused. It is clear that at the time it was considered that such a radical interference with the right to develop property could be justified only by conceding this right of appeal to the applicants.[2] So, as Stephen Crow has pointed out,[3] the right of appeal was seen as an attribute of the right of property. At the same time it gave the Government the power to ensure that its planning policies would prevail when the refusal of permission contradicted these policies.

The result was that, where the local planning authority intends to grant permission, the only way for Government to impose its policies is to use the 'call-in' power to give itself the right to determine the application. Where the development proposed is contrary to the development plan the Secretary of State should be alerted to this by the Departure Regulations, but in practice the call-in power is exercised only sparingly. We set out later the present policy as to how this power is exercised. The onus and responsibility is therefore on central Government to check how the power to grant permissions is exercised and to ensure that developments are not allowed that will be totally contrary to national policies. In contrast, the legislation gives no legal rights of challenge to private individuals who have objected to the proposed development. At present their sole right is to make their objections known to the local planning authority before the planning application is determined. While the present requirements to publicise the application mean that there will be an opportunity to object, there is no legal right to participate in the decision-making process of the local planning authority and the

2 For a colourful account of what is alleged to have happened, see Sir Desmond Heap *50 Years of the Town and Country Planning Act 1947;* or *The Door by Which I Entered* [1997] JPL 697; also see Purdue, M., *The case for third party planning appeals* [2001] Environmental Law Review 83, where some of the material in this chapter was originally published

3 See *Third Party Appeals: Will They Work? Do We Need Them?* [1995] JPL 376

actual practice varies between authorities. The underlying assumption is that objectors can rely on the authority to take into account their views and interests in determining what is in the public interest.

A presumption in favour of development

The legal bias in favour of the developer has until recently been underlined by the presumption in favour of development. It is now clear that this presumption was never a legal presumption and was simply the overriding policy of central Government as to how applications should be decided. Lord Hoffmann set out clearly the status of this presumption in the decision of ***Tesco Stores v Secretary of State for the Environment.***[4] Having stated that there was nothing in the legislation that required the Secretary of State to adopt the tests of necessity and proportionality as standards for planning obligations, he continued:

> *It is of course entirely consistent with the basic policy of permitting development unless it would cause demonstrable harm to interests of acknowledged importance. But even that policy was not mandated by Parliament. There may come a Secretary of State who will say with Larkin* [and he then quoted from Larkin's poem *'Going Going'*] *and promulgate a policy that planning permissions should be granted only for good reason.*[5]

So while local planning authorities strictly did not have to apply the policy as a matter of law, in practice it meant that permission should be refused only if it could be shown that the development would *cause* '*demonstrable harm to interests of acknowledged importance'*. Therefore, although the 1947 Act had removed the right to development, permission should be granted unless refusal could be justified on the basis of proven harm. The developer did not have to justify the proposed development by proving a need or benefit that would result. This approach obviously conflicts with what is now understood by the precautionary principle.

The Planning and Compensation Act 1991

The Planning and Compensation Act 1991 introduced into *the Town and Country Planning Act 1990* a new section 54A, which required that planning decisions should be taken in accordance with the development plan unless material considerations indicate otherwise. Thus, if the policies in the plan stated that permission for a certain type of development should be granted only if there were a proven need, the legal presumption would be that permission should be refused in the absence of such a need, even if the development would not apparently

4 [1995] JPL 581

5 At page 595

cause any harm. The change effectively created a presumption in favour of development in accordance with the development plan.

Presumably because of the incompatibility of having two potentially conflicting presumptions, Planning Policy Guidance note 1: *General Policies and Principles*, as revised in February 1997, now contains no mention of there being a presumption in favour of granting permission, accepting merely that '*Those deciding such planning applications or appeals should always take into account whether the proposed development would cause demonstrable harm to interests of acknowledged importance*' (para 40). The lack of harm is now, technically, just one of many material considerations and no longer has the status of a presumption.

Reasons for permission

The lack of a need to justify the granting of permission is reinforced legally by the fact that the legislation imposes no duty on the local planning authority to give reasons for granting permission, even where the grant is contrary to the policies in the development plan. This not only means that objectors are not formally told what is the justification for the grant, they also have no means of checking the legality of the reason for granting permission. It is now settled law that those persons who will be adversely affected by the grant have sufficient interest to be allowed access to the courts to challenge the legality of the grant by way of an application for judicial review. An application for judicial review is often used as a substitute for a third party right of appeal, even though judicial review is not for the most part concerned with the merits of decisions. Mounting an effective legal challenge, however, is made more difficult because of the lack of a duty to give reasons for a grant of permission. In contrast, reasons must be given by planning authorities for refusing permission, and developers can challenge these as inadequate through judicial review.

The planning committees of local planning authorities do of course debate whether permission should be granted and the minutes of the meeting will often set out why the committee granted permission. So, although the courts have resisted holding that there is a general duty to give reasons derived from the duty to act fairly, where there is evidence of the reasons, they will examine the validity of those reasons. For example, in ***R v East Hertfordshire District Council ex p Beckham***[6] a grant of permission was quashed by the court on the grounds that the committee had taken into account, as a relevant consideration, something that was plainly irrelevant and factually incorrect. More recently, Sullivan J in ***R v Mendip District Council ex parte Fabre***[7] accepted that there would be circumstances where a duty to give reasons will arise, as when there is a grant of permission contrary to the recommendation of the planning

6 [1998] JPL 55

7 [2000] JPL 810

officer and an application has been previously refused.[8]

The position is therefore that the courts are getting close to requiring reasons where there is some suspicion that the decision may be invalid. In cases where Environmental Impact Assessment is required, European Community law demands that when permission is being granted the 'main reasons' for the determination must be given.[9] Applying the rule developed for Ministerial decisions,[10] this would require that the decision-maker address the fundamental controversial issues raised by the application.

Proposals for third party rights of appeal

The absence of third party rights of appeal in planning has for many years been a subject of concern to some commentators. The House of Commons Environment Committee recommended[11] as long ago as June 1984 that '*a direct system of appeal by a third party to the Secretary of State be introduced, in cases where not only local authorities but also statutory undertakers and Government departments wish to grant themselves, or any other public body, planning permission in a Green Belt*'.

A further investigation by the Committee in early 1986[12] rejected the case for a third party right of appeal, however, on the basis that third parties were not losing any property rights and could already comment on planning applications. As Malcolm Grant has argued, this rather conservative attitude neglects the contemporary realities of a modern participatory democracy.[13] Property rights are only part of a wider bundle of 'rights'.

During the passage of the *Planning and Compensation Bill* in 1990 and 1991, amendments were proposed which would have introduced limited third party rights of appeal, in particular to applications contrary to development plans, but these were resisted by the Government. The reasons given by the Minister were, in outline:

- local authorities already act '*in the interests of third parties*',[14] so third parties should not have a further opportunity;

8 At page 822

9 See Article 9 of Directive 85/337/EEC as amended by Directive 97/11/EC

10 See ***Bolton M.D.C. v Secretary of State for the Environment*** [1995] JPL 1043

11 Report on *Green Belt and Land for Housing*, para. 32

12 Report on *Planning Appeals and Major Public Inquiries*

13 *Human Rights and Due Process in Planning*, [2000] JPL 1216

14 House of Commons, Standing Committee F, (*Planning and Compensation Bill*, Report), 16 April 1991, *Hansard* Col. 176

- there may be good reason to depart from the development plan;

- departure applications which would materially conflict with or prejudice the implementation of development plans must already be notified to the Secretary of State, providing a specific opportunity for call-in;

- there is a risk that applications said to depart from development plans could generate a considerable number of appeals because of the uncertainty about which cases qualify;

- the Environment Select Committee had recommended against third party rights of appeal (noted above); and

- whether there was indeed a conflict with the development plan would have to be established first.

The House of Commons Environment, Transport and Regional Affairs Committee returned to the subject in 2000 and this time recommended that third party rights of appeal should be introduced,[15] although this view was rejected in the Government's response.[16] The Committee argued that the absence of such a right '*goes against the spirit of greater public involvement in planning*' and was an important principle demanding a rapid response. To avoid an avalanche of appeals, the Committee recommended that the Government consult only on a limited right of appeal (e.g. on applications contrary to the development plan or on land in which the local planning authority has an interest). The Government, on the other hand, responded that the existing opportunities for public participation were ample and considered that more weight should be given to the adverse effect of delay on development: efficiency and effectiveness matter in the planning system as well as fairness. This appears to have been the first occasion on which the Government did not take the opportunity to invoke the 'property' argument to distinguish the case for developer appeals from third party appeals.

All three main political parties have in recent years supported the introduction of third party rights of appeal:

- '*We also think that there is merit in giving bona fide objectors an automatic right of appeal to the Environment Secretary in cases where there has been a departure from the local plan'*, *In Trust for Tomorrow*, Report of the Labour Party Policy Commission on the Environment, 1994;

- '*Conservatives propose that local residents should have a new right of counter-appeal*', *Conservative Party Environment Manifesto* for the General Election 2001, also restated in a press release on 11 May 2001;

- '*Conference therefore proposes that... Objectors as well as applicants be allowed to initiate appeals against planning decisions*', Motion passed by the

15 Report on *The Planning Inspectorate and Public Inquiries*, July 2000, para. 93

16 Cm 4891, October 2000, page 17

Annual Party Conference of the Liberal Democrats at Bournemouth in September 2000.

The Government also issued a Green Paper on the planning system in December 2001. The Secretary of State for Transport, Local Government and the Regions launched a debate on this issue on 26 July 2001. His speech included the view that '*One aim must be a planning system which is efficient and open. And which has the renewal and protection of communities as one of its key objectives*'. In our view, a third party right of appeal could contribute to this.

Implementing Third Party Rights of Appeal

This chapter reviews the practicalities of implementing third party rights of appeal, suggesting the scope of the legislation and policy that would be needed to make the idea function effectively. The proposals are argued from principle, without reference to any legal obligations which may arise from the *European Convention on Human Rights*. The latter is the subject of Chapter 4. There are difficult balances to strike between competing interests and competing arguments on many of the detailed issues evaluated, so this chapter is presented as a contribution to the debate rather than a definitive statement.

The screening process

Our primary assumption is that any right of third party appeal should in some way be limited. There should not be an opportunity for anyone to appeal against the grant of any permission for any reason, but rather the right should be concentrated on the circumstances where the scope for perceived unfairness or inadequacy of the current arrangements is most obvious. Our reasons for making this assumption are:

- to ensure that the role of local planning authorities is not undermined by indiscriminately opening their decisions to further review without good cause;

- we do not wish to delay development, or increase the financial risk faced by investors, without good cause. The availability of a third party right of appeal, whether or not exercised in specific cases, will in itself tend to delay development (because developers could not be sure their approvals would stand until after the expiry of the period allowed for a third party appeal, and, if appeals are lodged, there will be a further period of uncertainty until the final decision is issued). This may be acceptable on balance in a democratic society, but should not be undertaken lightly;

- the Planning Inspectorate should not suddenly be burdened with a flood of case work. Rather, it would be necessary to phase in the grant of any third party rights of appeal so that the Inspectorate could adjust to the increase in the number of appeals. Without this, there would be a risk of a reduction in quality and speed in the Inspectorate's output. Recruitment and the training of additional Inspectors to the necessary and expected high standard takes time. New Inspectors undergo a fifteen month period of initial training to ensure quality and consistency in their work,[17] which would be difficult to speed up.

17 Alan Langton, *Inspector training*, Planning Inspectorate Journal, Issue 12, Summer 1998, pp. 13-15

These circumstances argue for both modest rights of appeal at the outset of a new regime and good preparation for it.

If the scope of third party rights of appeal is to be limited in one or more ways, then a screening process is required. This section discusses the main subjects around which constraints and opportunities revolve.

Who can appeal?

Appeals against approval of planning permission are a form of public participation, enabling people to assert environmental, social and economic arguments against specific development proposals. The principal opportunity for third parties to engage in the process is by commenting at the planning application stage, so that the local planning authority (LPA) has before it the opinions of those who have a view on the matter. This would be distorted, or the principle of participation at the application stage undermined, if potential objectors to planning applications were in a position to make their first representation after the LPA decision by means of a third party right of appeal. We therefore propose that persons or organisations which lodged an objection to the original planning application, and whose objections were not satisfied by the terms of the approval, should normally be the only parties allowed to register an appeal. This is the normal practice in most other countries with third party rights of appeal and ensures that the issues are placed before the planning committee in the first instance.

We also consider that there should be provision for exceptional circumstances so that, for example, a party did not miss out on the right to appeal if it should have been consulted at the application stage but for some reason was not consulted (and did not hear about the application). Discretion should be left with the Planning Inspectorate in the rare cases where this or other inadvertent unfairness arose. We consider it unlikely that a third party could make a successful case to be allowed to exercise an appeal because it had not initially spotted the importance of an application. For example, a third party might consider a local authority approval to be particularly perverse, but it had not commented on the application because it had anticipated a refusal. Rather than allow an appeal, we consider this would serve as a reminder to third parties of the importance of contributing at the application stage.

In drawing a distinction between those who can and cannot appeal, we recognise that excluded parties may attempt to overcome their exclusion by seeking to pursue their views through a party which does have a legal right to appeal. We consider that such cases will be rare: interested parties who are so concerned about an application will normally have registered an objection at an earlier stage, guaranteeing their rights to appeal (not least on their own terms). There is in any event little that can be done to stop ‘piggy-backing’, which is a common feature in legal practice in any event. The boundary between ‘piggy-backing’ and ‘advice’ to an interested party would be difficult to draw.

A new third party right of appeal might create the circumstances which encouraged additional objectors to planning applications. Interested

parties might identify the possibility of using or threatening third party appeals to:

- delay development;
- secure benefits from a developer in return for withdrawing an appeal; or
- generate publicity for their own cause.

They might be motivated primarily by such considerations rather than any special concern about the planning merits of the case. This is most likely to apply to businesses in competition with the applicant firm (though other factional and warring interests might also appear). Supermarkets, house builders, property companies, businesses already established in a locality and others may have an additional reason for wishing to lodge an objection to a competitor planning application (we recognise that this already happens to some extent, but its incidence could increase). In principle we would deplore this kind of abuse of the planning system. However, it is difficult to see how it could be prohibited by law, as it would depend on establishing that the motive for lodging a planning appeal was a commercial or non-planning motive. Was an objection by a business commercial rather than a genuine concern for, say, design standards in that industry? Prohibitions on appeals might prevent some entirely legitimate objections from being heard. Initially at least, we consider that self regulation will be more appropriate: trade associations might wish to set membership rules which discouraged this kind of activity, and industries would be mindful that any objections they had to delays or difficulties caused by the third party right of appeal would carry little weight if their own firms were among the miscreants.

However, we are not entirely satisfied with this approach. Though difficult, some kind of restraint on delaying tactics might in due course be required. We note that recent legislation in the Republic of Ireland amending the arrangements for third party rights of appeal include the provision for the Planning Board to dismiss or refuse an appeal or referral where it is of the opinion that '*it is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducements by any person*'.[18] Experience with this provision should be monitored. Meanwhile, we consider that the Government should make clear that a restriction of this kind will be imposed if the problems identified in the previous paragraph do arise. That might be enough to deter abuse if this provision were omitted from the legislation in the first instance.

Apart from seeking to resist appeals by certain kinds of interested party, entitlements might be established to encourage the engagement of parties felt to have special contributions to make. This is the arrangement in Denmark and Sweden, for example. In Sweden, rights are conferred on environmental organisations which have conducted activities in the country for at least three years and have at least 2,000

18 *Planning and Development Act 2000*, section 138(1)(ii)

members. In Denmark, special rights are given to named organisations (e.g. environmental groups and fishing industry bodies) in respect of proposals in which they are likely to have particular interests. The Danish system is conceptually similar to an extension of the planning application consultation requirements on local authorities in England under the General Development Procedure Order 1995. However, on balance we consider special rights for specific bodies as unlikely to be desirable in England, for the following reasons:

- well-established non-governmental organisations (NGOs) who know their way around the planning system are likely to be the ones which least require special assistance to become involved;

- it is not clear how in England a distinction could be made between eligible and ineligible NGOs;

- granting the advantage to NGOs might itself be perceived by others as unfair; and

- if NGOs or others are expected to have a special contribution to make through third party appeals, there would be greater merit in efforts to engage their interest at an earlier time so that they can object if necessary to planning applications, and acquire third party rights to appeal by the same means as anyone else. This could be assisted, for example, if selected NGOs were formally consulted, with copies of planning applications, on cases particularly relevant to their interests. (If, however, special consideration were to be given to selected third parties within the appeal system, we consider that reduced or waived appeal fees would be appropriate, as applies in the Republic of Ireland, or some similar modest recognition of the merit of their participation.)

Which cases should be open to appeal?

Limiting the occasions on which a third party right of appeal is available is the single most significant means of constraining the overall volume of appeals. From known typical numbers of cases arising each year in each category of planning application, the possible maximum number of appeals could be predicted reasonably accurately. The Government could decide, at least initially, to limit appeals to the most controversial categories of case so as to expose a particular proportion of all planning applications to possible appeal (e.g. about 1%, or about 5%, or about 10%).

Eligibility to appeal could be limited either to specific categories of application in this way, or by some other kind of filter. For example, if there were a general or unlimited right of third party appeal, constraints to discourage weaker challenges could be exercised by means such as:

- an intermediate arrangement for seeking leave to appeal; or

- awarding costs more readily against losers.

These are discussed in more detail below, but we favour the exercise of constraint on overall volumes of appeals by the use of preferred categories for appeal rather than the other two mechanisms. Leave would require an additional stage in the process which would slow decisions still more, whilst liberal awards of costs would discriminate by wealth, inhibit participation and create still more frustration for most participants by the misleading semblance of an opportunity to intervene. Preferred categories of appeal, however, would allow third party rights of appeal to focus on those cases which attract the most adverse attention and which most merit the right of appeal. In this section we comment briefly on some of the main candidates for inclusion as priority categories for third party appeal (although this is not intended as a definitive list).

Departures from adopted plans

We consider there is a strong case for third parties to seek a further review of cases in which a development is approved contrary to the provisions of an adopted development plan. This has been put forward as the key reason for introducing such a right, both by the Royal Commission on Environmental Pollution[19] and by the Labour Party[20]. The volume of cases which would be open to appeal in this category has been estimated by CPRE as under 0.5% of all planning applications[21], so the impact on the appeal system could not be onerous. There are two schools of thought on how readily these 'departure applications' could be identified. These are set out below and then reviewed.

On the one hand, article 8 of the *General Development Procedure Order 1995* already requires that an application for development which does not accord with the provisions of the development plan must be publicised, and the Secretary of State is able to direct local authorities to notify him for possible call-in[22] of certain planning applications which they wish to approve contrary to a development plan. This suggests that the matter of

19 *Transport and the Environment*, Eighteenth Report, 1994, Cm 2674, HMSO, para. 9.67

20 Manifesto for the 1992 General Election, and *In Trust for Tomorrow* (Report of the Labour Party Policy Commission on the environment, 1994)

21 Oral submission to the Select Committee on Environment, Transport and Rural Affairs, 5 April 2000, Questions 298-319; this is calculated from about 500,000 applications being processed each year (501,000 received and 466,000 decided in 1998/99), compared with 846 applications referred to DETR under Departures Direction in 1998 (Written Answer, *Hansard* 4 May 1999, col 304), meaning that at most 0.18% of applications result in departures which would have been eligible for third party appeal

22 Article 17 of the *General Development Procedure Order 1995* allows the Secretary of State to issue Directions on the handling of development not in accordance with the development plan. Circular 07/99 *Town and Country Planning (Development Plans and Consultation) (Departures) Direction 1999* sets out the details

definition of a departure application is soluble and could be honed with experience and court decisions.

Definition of departure applications can be argued as unduly difficult, on the other hand, because it involves a considerable element of judgement. The existing procedures for notifying departures can be argued from this perspective to operate on a basis of little more than goodwill. In particular, the Direction on departure applications asks for the Secretary of State to be notified of 'any other development which, by reason of its scale or nature or the location of the land, would significantly prejudice the implementation of the development plan's policies and proposals'. Disentangling scale, nature and prejudice can be challenging. How is a case treated that departs from just one policy in a Local Plan but conforms with all others? Are all plan policies sufficiently precise to be sure whether an application is or is not in conformity with them? Should some policies qualify for appeal purposes but not others? Who decides these matters? In future, should some policies qualify for appeal purposes but not others? As the Planning Minister said of planning applications, when rebutting proposed amendments to the Planning and Compensation Bill in 1991: '*one can nearly always come up with an ingenious argument about why it is in conflict, especially as policies and development plans are sometimes couched in rather flexible terms which allow a wide variety of approaches to a development proposal*'.[23] We note that none of the other countries we studied with third party rights of appeal provided for appeals specifically against decisions contrary to plans (but indeed most of them offered wide-ranging rather than limited opportunities to appeal).

Our view on these alternative arguments is that anxiety about defining a departure application is a counsel of despair. Given the importance of section 54A to the *Town and Country Planning Act* and the relevance of departures to notification of cases to the Secretary of State, an inability to define them would be a remarkable admission of a decade of failure. It is likely that the introduction of a third party right of appeal specifically against approvals of departure applications would bring closer attention to the definition of 'departures' and the thresholds for triggering a right to appeal. If the problem of defining a 'departure' is as bad as some claim it to be, then a review is in any event overdue to implement existing requirements to notify departure applications to the Secretary of State. We accept, though, that any definition would start life on a 'warts and all' basis until refined in the light of experience and Government advice.

There are likely to be steps which can be taken to improve the identification of departure applications. For example, greater attention may need to be given to the drafting of plan policies. A further possibility would be to require the local planning authority when it first receives an application to certify whether or not it is broadly in accordance with the plan (to the extent that this is possible in advance of consultations). This could have spin-off benefits, too, in educating applicants about what

23 House of Commons, Standing Committee F, (Planning and Compensation Bill, Report), 16 April 1991, *Hansard* Col. 178

constitutes an appropriate application. Evidence arising from mediation experiments shows that applicants benefit from this sort of communication and guidance.

Applications in which local authorities have an interest

Another contentious category of case is local authorities' deemed approvals of their own development or those in which they have an interest (e.g. as landowner or investor). There is a strong case for removing temptation by rescinding the power of local authorities to approve these cases. In the absence of such a change there is a strong case for third party rights of appeal here. Cases which would qualify should be readily identifiable.

Major applications

The right of third party appeals might be prioritised to developments that are distinctively 'major' in some way, e.g. over a certain size (distinctly above the *de minimis* threshold for permitted development rights), or in sensitive locations (e.g. designated Conservation Areas, Green Belts, Sites of Special Scientific Interest, National Parks, Areas of Outstanding Natural Beauty, Best and Most Versatile farmland). The Planning Inspectorate has for many years classified appeals so as to distinguish 'major' and 'minor' housing, manufacturing, office, retail and other schemes,[24] and these or other criteria could be chosen to focus attention preferentially on schemes likely to be more controversial. The Inspectorate's 'major' cases accounted for just 5.5% of all appeals decided in 1999-2000. Any size or locational criteria chosen should be clear and difficult to dispute, so there can be no question about eligibility to appeal in those cases.

There is clearly some merit in prioritising 'major' types of development, although the possible significance of developments below the threshold size or at sensitive but undesignated sites should not be ignored. We are impressed by the specific category of applications accompanied by Environmental Impact Assessments (EIAs). These are cases by definition likely to have significant effects on the environment and thus merit special attention, with the need for EIAs decided not only by the scale of proposed developments[25] but also according to the sensitivity of the

24 'Major' dwellings means 10 or more dwellings or the site area was at least 0.5 hectares; 'major' office, retailing, manufacturing, storage, warehousing and other means gross floor area of at least 1,000 square metres or the site area was at least 1 hectare

25 For example, 50 new houses on high grade agricultural land adjacent to an existing settlement might not be considered 'major', but the same number of houses next to a site valuable for nature conservation (such as a Special Area of Conservation) could give rise to direct or indirect effects which did have potential 'major' adverse impacts on the conservation objectives for the designated site

development's local context. We recommend that a third party right of appeal also be introduced in this category of case. We also consider that, the broader the scope of third party rights which the Government considers appropriate, the more categories of 'major' development proposal by size or location could be brought within the new system.

Applications recommended for refusal by officers

Few planning approvals rile third parties more than those granted against the recommendations of a council's officers. Third parties feel they have 'won the argument' when technical planning staff back their views, and often feel that a 'correct' result was taken away from them for 'political' rather than planning reasons if permission is then given. In the same way that developers at planning appeals at present are quick to point out an officer recommendation in support of a development, so there is a case for third parties to have the chance to revisit decisions where officer recommendations have been for refusal.

We see this circumstance as similar to departures from development plans: local authorities do not have to follow advice all the time (indeed councillors would be redundant if this were so), but there must be a demonstrable cause for departing from that advice. These are often cases which might be decided either way on planning merits, and are therefore the kind of case which may well merit being revisited for further review. In principle, we consider that applications approved in these circumstances should be one of the priorities for third party appeal. This would probably need to be accompanied by a legal requirement for officers to make clear recommendations on their reports: they might otherwise be under pressure from developers or councillors to fudge the issues or make no recommendation at all.

Should grounds for third party appeals be limited?

Once a decision has been taken on the kinds of development proposals on which third parties may lodge appeals against approvals, a further decision is required on the scope of the grounds for appeal. The opportunities could be wide-ranging, as they are for developers' appeals against refusals, or constrained in some way.

There is no doubt that wide-ranging appeals would be simplest: there would be no question about whether a ground of appeal were valid or not, and no problem in deciding whether the detailed case made in the course of an appeal were exceeding the third party appellant's standing. New information could be taken into account. The arrangement would offer parity with developers, and avoid the problem of developers or local authorities advancing counter-arguments in favour of approval of developments which third parties were constrained from rebutting.

Despite these advantages, there may be a case for some constraint on the third party appeal process. For example, might it not be reasonable to limit appeals simply to the points on which third parties originally objected – in effect with objections at the planning application stage

amounting to an outline 'statement of case' for any subsequent appeal? Should there be pre-determined grounds of appeal from which third parties would select, as there are for enforcement appeals?

We consider that constraining the grounds of appeal would be impractical. Appellants would otherwise feel they were entering an appeal with one hand tied behind their back. At an appeal the original development proposal should be considered as a whole, with objections to it on some grounds being weighed against the arguments in support (which may not have figured prominently in parties' original comments on the application). If, therefore, there is concern that the burden of appeals on the planning system or the Inspectorate might become too large, we should prefer to see constraint on the categories of development against which appeals may be lodged, than constraint on the grounds of appeal within those categories. Objections should be restricted only to valid planning grounds, as is the case in the Republic of Ireland. The potential difficulties caused by vexatious appeals are considered later in this chapter.

There is a special set of issues around the question of whether third party appeals should be allowed against conditions on a planning permission (on the grounds that the conditions imposed are insufficient), in the same way as developers may appeal (this would arise amongst those categories of development eligible for third party rights of appeal). Highly contentious applications may be approved on the erroneous assumption that conditions can overcome objections. For example, conditions can seek to by-pass serious nature conservation objections where the relevant information has not been available prior to the decision being taken, and conditions are drawn up on the assumption that deficiencies can be overcome after the approval of the development in principle. If the subsequent information shows that no 'mitigating' condition can undo the damage, should an appeal remedy not be available? Conditions may also be poorly drafted or, for example, fail to incorporate the mitigating measures proposed in an Environmental Impact Assessment. There is provision for third party appeal against conditions in Queensland, Australia.

We agree that conditions on a permission may be highly relevant to the development allowed, and that the problems noted above can indeed arise. We consider that a distinction should be drawn between full and outline planning applications. Where full permission is granted, we support the right of appeal against the conditions. The appeal would consider all material planning issues and not just the conditions (as is the case with developer appeals). However, in cases where outline permission only is granted, there is the potential for considerable delay in the system if appeals do not need to be lodged until conditions are decided some considerable time afterwards. We consider that third parties are likely to be aware of cases in which they doubt whether planning conditions can resolve their concerns at a later date. A better arrangement than appealing against those conditions, we consider, would be to lodge an appeal against the outline approval, accepting that this appeal might be withdrawn if the third party's concerns are in fact remedied by conditions approved by the authority before the appeal is heard.

So far as unexpectedly deficient conditions on outline applications are concerned, we are inclined on balance to prefer this to be tackled by other means (which can be implemented immediately):

- the Secretary of State should indicate that he is prepared to call-in permissions with significantly inadequate conditions, as an alternative to a third party right of appeal;

- third parties should indicate in their comments on an application whether they consider that their concerns could be overcome by conditions on an outline approval;

- third parties should propose their own conditions after an outline permission has been granted.

How should appeals be decided?

Developer appellants have the choice of having their appeals heard by exchanges of correspondence (written representations), informal oral hearing, or formal public inquiry. The choice to be made on the method(s) for deciding third party appeals is essentially between (a) parity for third party and developer appellants on the one hand, and (b) the greater speed and lesser burden on the system of using written representations on the other.

The experience of other countries is for the most part different. Third party rights of appeal in our selected case studies (other than the Republic of Ireland) normally resulted in oral hearings rather than written exchanges. We see no need to adopt oral hearings as the default mechanism in this country – partly because the option of an oral hearing (whether in the form of a public inquiry or a hearing) is available to those who want it – and partly because the system of written representations (which over the years has resolved a progressively higher proportion of cases) has not attracted significant criticism.

We have no hesitation in recommending that comparable choices on methods of appeal determination should be available to third party and developer appellants. This is the clearest example of the need to apply the principle that third party appeals are not second class appeals but just as serious as those submitted by developers against refusals. We therefore recommend that whatever choice is available to developers should be available to third parties. The current arrangement is broadly that the appellant or local authority can insist on a hearing or inquiry, although the default is effectively written representations. With the addition of third party appeals, the third party would be able to insist on a hearing rather than written representations as is the present case with the developer. The Planning Inspectorate will in any event hold an oral hearing if it considers it to be necessary. We see no need to change the existing opportunities for Planning Inspectors to exercise limited discretion on who may or may not appear at oral sessions.

What should be the practical constraints on appeals?

Time limits to lodge appeals

There should clearly be a time limit on lodging third party appeals. The most obvious option is to use the same period as is offered to the prospective developer following refusal. However, that period is normally six months, and there is a case for avoiding delay which could be held to be more important than parity. The speed of an appeal by a developer against refusal is in the developer's hands, but the developer has no means of speeding up an appeal by a third party against refusal – and limits should therefore be provided in law. Furthermore, third parties should be able to decide reasonably easily in advance on their likelihood of appealing against approval. This may be easier than is realistic for a developer considering appealing against refusal.

We consider that third parties should lodge appeals within 28 days of the date of dispatch of the approval notice from the local planning authority to those who submitted comments on the application. This period is typical of the period allowed for third party appeals in other administrations in our study (1 month in the Republic of Ireland, 20 business days in Queensland, and 8 weeks in Denmark, whilst the 15 days allowed in New Zealand is proposed to be changed to 30 days). This period is less than the maximum of 84 days within which an application for judicial review must be lodged but it has to be remembered that there is an additional duty to ensure that an application for judicial review is made promptly; in practice this can be far less than the maximum period.

Fees to appeal

There are modest fees in New Zealand ($55) and Queensland ($20), but fees in Ireland have recently been raised to substantially higher levels (with certain concessions). A third party objector in Ireland would now typically pay a £120 appeal fee. We consider that third parties should pay a modest fee to lodge an appeal of, say, £30. This would strike a balance between discouraging purely frivolous appeals and impeding legitimate democratic activity. As this fee is quite small in relation to the expenditure likely to be incurred when exercising the right of appeal in practice, we see no necessity to offer reduced rates for special categories of appellant.

Costs awards

There is a power for the Secretary of State to award costs in planning appeals.[26] The tradition of costs awards in the British planning system is that each party normally pays its own costs at all stages of proceedings (except legal challenges to decisions), and does not contribute to other

26 Section 250 of the *Local Government Act 1972*, as applied by section 322 of the *Town and Country Planning Act 1990*

parties' costs. Costs are not awarded to or at the expense of other parties in the handling of planning applications in any circumstances. In planning appeals decided by oral proceedings (hearings and inquiries) costs can be awarded in whole or part for unreasonable behaviour, for example to penalise inappropriate appeals, to penalise local authorities for refusing permissions they should clearly approve, or to penalise parties whose misuse of the procedures puts other parties to unnecessary expense. For the most part, third parties are not expected to receive or be penalised by costs awards. Detailed policy on this matter is set out in Circular 8/93.

There is a fear in some quarters that the introduction of a third party right of appeal would open the door to a disproportionate volume of ill-considered or even vindictive appeals which had little or no basis in planning policy, and that the threat of an award of costs would go some way to bringing these prospective appellants to their senses. We have no doubt that the threat of costs awards, let alone an actual award,[27] would indeed be an effective means of filtering out particularly weak cases from being taken to appeal. However, it would also filter out many reasonable, legitimate and even highly convincing cases from appeal, simply because prospective third party appellants might well not be able to afford to take the risk of the award if they were to lose or fail to substantiate part of their case. The overall effect would be very damaging to the concept of third party appeals: the semblance of democratic opportunity would have been presented, but those who would particularly benefit from it might well feel constrained from using it. This would generate frustration and mistrust about the procedures – just the feelings that the third party right of appeal was set up to address in the first place. We therefore consider that a most cautious approach to costs is required.

Our approach is similar to the practice in the majority of other administrations we studied. In Queensland, Australia costs awards against third parties are limited to frivolous or vexatious cases, and similarly they are rarely awarded in the Republic of Ireland. For most third party appeals in Denmark and Sweden there is no provision for costs awards against appellants. However, the exception is in New Zealand, where 10% of third party appeal decisions are accompanied by costs awards to one or another party, though public interest groups are now less likely to have costs awarded against them.

We consider that there should be great caution in ever awarding costs on merits. We consider that costs awards to the winner at the expense of the loser is a particularly poor way of responding to the merits of the arguments at appeals by third parties. We are wholly opposed to costs being awarded in all or most cases ('following the event'), which is contrary to the national tradition of each party paying its own way and

27 In 1996, a comunity environmetal group in New Zealand, Peninsular Watchdog Group, incurred a partial award of costs of $20,000 following an unsuccessful challenge to exploratory mining activities. The mining company had sought costs of over $85,000 out of a total expenditure of over $400,000 on the case (Birdsong, B., 1998, *Adjudicating sustainability: New Zealand's Environmental Court and the Resource Management Act*)

would have the adverse consequences noted above. This is not to condone exceptionally weak cases which put other parties to unnecessary expense, but in response to the wider damage that the risk of costs would do to the concept of third party appeals. Even relatively low incidences of actual costs awards would have far-reaching consequences for the wider perception of what the system has in store for third parties.

We therefore recommend that costs awards should never be made on merits in appeals determined by written representations. (This is the current position: although the Secretary of State has powers to award costs at written representation appeals, these have not been brought into force in England and Wales, although they have in Scotland). The no-costs regime for written representations appeals should remain equally applicable to developer appeals and third party appeals. This will ensure that there will always be a financially risk-free vehicle by which appeals may be pursued. We also propose that third party appellants who seek to use the written representation route but are required by the local authority to attend oral proceedings should not be exposed to costs awards (as is currently the case in England and Wales). To the extent that a few 'hopeless' appeals are lodged, this would have to be considered the price of democracy. This is already the arrangement with hopeless developer appeals. However, we consider in the next section what more might be done to discourage frivolous and vexatious oral hearings.

We wish to discourage the unreasonable use of appeal procedures. This is different from failure to offer a reasonable argument. Unreasonable behaviour is avoidable, so third party appellants should be exposed to awards of costs just as developer appellants and local authorities are now. Thus late withdrawal of appeals just before inquiries, failure to attend, failure to submit evidence to anything like the inquiry timetable and similar unreasonable behaviour should be penalised. We therefore consider that costs awards should be available for imposition for unreasonable procedural behaviour in oral proceedings (though written representations should be excluded to maintain that mechanism as 'risk-free' for third parties unfamiliar with the planning system). We also consider that current practice should continue, whereby somewhat greater leniency is shown to unrepresented third parties as to what is 'unreasonable' behaviour.

Dealing with the consequences

Tackling vexatious appeals

Vexatious appeals which seek to stifle development or to delay it for reasons unrelated to good planning would bring the planning system into disrepute and strengthen feelings there may be in the development industry against third party rights of appeal. Individuals or organisations with grievances to pursue, or competitor firms with economic imperatives in mind, might well be able to use the appeal system to delay or threaten development that was acceptable in planning terms. There is therefore a strong case either to penalise vexatious appeals if they arise or to prevent them from being heard.

The clear principle is difficult to achieve in practice because of the need to strike a balance between competing interests. We are reluctant to curtail the right of third party appeal (in approved categories of case) any more than is absolutely necessary, and would not wish to catch legitimate appellants in a net intended for vexatious ones. The process of filtering out vexatious appeals would itself be time-consuming and is a matter of judgement rather than absolute certainty. The threat of awarding costs after the event might put off legitimate prospective appellants at least as much as the vexatious ones, whilst if costs were awarded these would still cover only the legitimate costs of the proceedings incurred by the developer and not any income foregone or risk costs.

Filtering out vexatious appeals appears as the ideal solution so that time and money are not wasted on them. A filter mechanism might take the form either of requiring an appellant first to seek leave to appeal (i.e. the 'right' of appeal would be compromised) or of passing appeals through the hands of an independent body with the power summarily to dismiss them. In practice, neither of these remedies is likely to be especially helpful. In minor cases, a filtering mechanism might be disproportionate to the issues at stake and take just as long as deciding the appeal itself (so the remedy would offer little improvement on the disease). In major cases, where the issues are more complex, the likelihood of a third party appeal being filtered might be smaller, since it would be easier for appellants to construct a plausible case on planning grounds (so the remedy would not work).

If all appeals had to pass through a filtering mechanism, this would add to the time taken to reach a decision on each case. We would expect only a tiny fraction of cases to be stopped at this stage (the Planning Board in the Republic of Ireland summarily dismisses about 1% of appeals), so the overall benefit to be gained from the filter is small. On balance it would be simpler, quicker and probably more cost-effective to allow all appeals to be heard, including the occasional vexatious one.

Rather than walk away from the issue, we consider that effort could be put into dissuading vexatious (and 'hopeless') appellants from pursuing their cases, and then penalising them if they do. Forewarning of the risk of an award of costs is one way of doing this. Local authorities which consider that an appeal against one of their approvals is vexatious or hopeless should be invited to state to the appellant (with a copy to the Planning Inspectorate) at the earliest possible time that they will seek an award of costs. Costs would be awardable only if this had been done (e.g. within three weeks of the appeal being lodged). (The power should not be available to developers, as there would be no risk to them in threatening this of every appellant!). On receiving the costs warning, the appellant could consider whether to withdraw an appeal or take the chance of convincing the Planning Inspector that his case was sufficiently reasonable not to attract costs (or even convincing enough to have the approval overturned!). The effect of this package would be that costs would only rarely be awarded against third parties on merits. (We would anticipate that the most likely cause of costs would be third parties pursuing 'make-weight' arguments as well as their main ones and thus incurring partial costs.) A key attraction of this route is that it does not

necessitate an intermediate stage in the appeal process to filter out hopeless cases.

Alternative mechanisms to this one could be devised. Two that might be worth considering are as follows.

A A filter mechanism could be devised which did not affect the vast majority of (reasonable) cases. Local authorities, and perhaps developers, could be given the power to ask for third party appeals which they considered vexatious to be put through a filtering mechanism, such as a Panel of Inspectors within the Planning Inspectorate. This could deal with planning merits, to weed out 'hopeless' cases, as well as spotting appeals driven by non-planning motives. The temptation on developers to ask for all appeals to be struck out would be significantly moderated by the additional time, and thus delay to acceptable projects, which would be incurred by requiring appeals to pass through this mechanism. If an appeal were found to be reasonable rather than vexatious, the developer would simply have wasted his own time, as the full appeal would then proceed. If this mechanism were adopted, then costs awards against third parties on merits could be abandoned completely for hearings and inquiries (as well as written representations), since any case passing the filter would by definition be 'not unreasonable'. This would offer further advantages by doing away completely with any financial risk to appellants and therefore increasing the credibility of the third party appeal arrangement. There might be a case for allowing local authorities comparable powers in respect of 'hopeless' developer appeals. We accept that there is always the possibility that a third party 'filtered out' from the appeal process may appeal against this decision to the High Court, taking yet more time, but we suspect that the cost of doing so would deter most appellants.

B The Gordian Knot of vexatious appeals could be cut by empowering Planning Inspectors summarily to dismiss such cases before they are heard. Having read the papers, the Inspector would decide that the local authority had no case to answer and dismiss the appeal. This would be draconianly un-English but effective. The stage at which this decision was reached would be important. It might be done early in the process, before parties had submitted their detailed evidence. This would save the time and cost of preparing full evidence, but would involve decisions based on incomplete information. Dismissal might happen after all papers for an appeal had been submitted: dismissal would be indistinguishable from refusal at this stage if based on written representations (apart from the absence of an Inspector's report), but in the case of decisions awaiting oral proceedings the oral element at least could be avoided. If the power of summary dismissal were introduced, costs awards on merits of the issues could be abandoned completely for hearings and inquiries (as well as written representations), since any case not dismissed would by definition be 'not unreasonable'.

Delay and risk in the development process

There is often an assumption that introducing a third party right of appeal into the planning system will cause delay to the issuing of decisions, and we accept that this is generally likely to be the case. Current practice in England is that the period from the lodging of a planning appeal to the issuing of a decision is about 18 weeks for written representations, 22 weeks for hearings and 34 weeks for inquiries. The average time for all appeals in Ireland is about 21 weeks. If these were to apply also to decisions on third party appeals, then the overall average delay in reaching a final decision would be these periods plus the time from local authority approval to the lodging of an appeal.

Additional procedures do not automatically cause delay, however, and we note that the Government has introduced an additional second stage deposit for development plans explicitly to speed up the plan-making process overall. A distinction should be drawn between additional time spent by a planning application in the planning system and delay to development on the ground. The former will only contribute to the latter if time in the planning system is on the development's 'critical path'. If it is not, and there are other reasons why development cannot proceed in any event, then time in the planning system matters much less, if at all.

We consider that there are likely to be two circumstances where third party appeals will speed up planning decisions. The first is in cases which the Secretary of State would have called in for his own decision. A considerable length of time and uncertainty can surround the Secretary of State's process for deciding whether to call in an application for his own determination, complete with potentially substantial delays allowed by means of article 14 Directions. Third party rights of appeal will appear to developers as a positively swift alternative in these cases.

The second opportunity to speed up decisions is in some cases where an aggrieved third party would have challenged the approval in the High Court: planning appeal would become the preferred route instead in most cases, which would be speedier. Chapter 6 briefly reviews the relative merits of third party rights of appeal compared with local authority internal review, call-in, judicial review and the Local Government Ombudsman.

Third party rights of appeal would have further implications for the planning system in respect of negotiation on proposals by developers. It is difficult to predict the overall effects, because circumstances could vary between cases. One prospect is that developers would have a new incentive to negotiate with actual or potential objectors in advance of planning decisions to a much greater extent than they do at present, to limit the chance of an appeal being lodged against an approval. This could lead to adjustments to development proposals to address local concerns, producing a more consensus-based and less adversarial system, with less risk or delay to the developer. On the other hand, developers might take the view that an appeal against an approval would be likely, and therefore be much less forthcoming than they are at present with offers of discussion or planning gain. Furthermore, there might also be a segment of public opinion which preferred third party appeal to any negotiation.

Despite certain opportunities to speed up proceedings, some real delays to other developments are inevitable due to the exercise of third party rights of appeal. This will mean greater expense and greater risk to developers in some of these cases. We believe there are some limited steps which could help minimise delays:

(1) The Secretary of State should set demanding administrative targets for handling times for third party appeals. These might be preferential over handling times set for appeals by developers so that, if necessary, the Inspectorate has to give some additional priority to them. Most other countries we studied had target times for handling third party appeals, the most rapid being the issuing of decisions within two months of the close of the hearing (Sweden).

(2) Inspectors should make more use of 'instant decisions' in which the headline result of a case is announced as soon as possible after the evidence has been weighed, with the full written report following later.

Will local planning authorities still have a worthwhile role?

Planning officers and elected members newly confronted with a third party right of appeal might be troubled that the decisions they produced were largely a waste of effort, at least in the cases which were more interesting because they were controversial, since whatever the outcome one or another party would take the matter to a higher authority for final decision. Whilst we see an element of justified concern in this, we do not consider that it follows either that the role of the local authority would be demeaned or that such impact as there might be argues against the principle of third party rights of appeal. Authorities would, we are confident, soon learn to be more broad-shouldered about the democratic process and appreciate that their views will still be very important during the appeal. We consider their role would be enhanced in the following ways.

First, some of the frustration felt by third parties at present arises from what they see as inadequate justification for planning approvals and, in some cases, local authorities granting permissions because they lack the resolve to refuse applications which they would then in all probability have to defend at inquiry. The most common reasons for this lack of enthusiasm are concerns about the expenditure (or staff time) at inquiries, a misplaced fear of an award of costs against the authority and undue caution in officer advice. We consider that third party rights of appeal should be accompanied by a requirement on local planning authorities to give reasons for approval of planning applications. This would not only provide a more satisfactory basis for discussion at appeal, but would encourage LPAs to give more active consideration to all material considerations rather than just possible reasons for refusal.

Second, as authorities could face the likelihood of cross-examination by aggrieved third parties, we anticipate a higher standard of decision on planning applications. LPAs would not be able to hide so easily behind planning approvals. This is the reverse of the assumption that third party appeals would lead to greater disengagement by LPAs from the issues on

the basis that their views no longer mattered.

Third, we are cautious about the assumption sometimes made that a third party right of appeal would lower standards in local planning authorities. The argument that low standards in local authorities could become established, as there is no need for them to try any harder, is based on overseas experience where some authorities can be weak and lack the sophistication built up with over 50 years' planning experience in England. In some of these cases, it has been suggested to us, the weak local authorities are only too pleased that a more sophisticated body exists to deal with appeals by the developer or third parties (and that those parties are relieved too). This does not mean that standards will be driven down in British local authorities. Apart from established standards and pride in the job, there remain extensive powers to keep standards of planning control high enough, such as awards of costs against authorities for unreasonable decisions, revocation of bad local authority decisions by the Secretary of State and powers for the Secretary of State to take over the implementation of local authorities' planning duties. There is also a large volume of legislation, instruction and advice which local authorities are obliged to take into account, so it is difficult to see how standards could slip very far. Under our proposals, the arrangements for dealing with the bulk of planning applications would in any event remain unchanged, as we are recommending only limited rights of third party appeal. It is implausible to believe that normal standards would be maintained on the bulk of applications whilst they fell badly on those subject to a third party right of appeal.

Could the Planning Inspectorate cope with the extra workload?

The charge, essentially, is the Nolan Committee's that '*there is also a practical argument that the appeal system would collapse under the weight of additional appeals*'.[28] The proportion of local authority planning approvals which would be appealed by third parties is conjectural. In those administrations for which we have been able to obtain information, about 40% of all cases heard by the arbitrating body were third party appeals in Ireland, 10% in Denmark and between one third and one half in New Zealand. If this pattern were followed in England, the workload of the Inspectorate in England and Wales would at most double following the introduction of a general third party rights of appeal. Whilst this is a significant increase, we note that the number of planning appeals has historically been more than double the current annual rate: it peaked at 32,281 appeals received as recently as 1989/90. Even with 50% of all cases being third party appeals, the number would not revert to that high level (there were 14,772 first party appeals in 1999-2000 in England). The fact that the Inspectorate has coped with that volume of activity before also suggests that substantially more appeals would not be the administrative cataclysm that some fear.

The assumptions used above may be incorrect, and overseas experience

28 *Standards of Conduct in Local Government*, Third Report of the Committee on Standards in Public Life, July 1997, Vol. 1, Cm 3702-1, para. 331

not offer a sound basis for action in England. Whilst we have focused our analysis on large administrative areas (e.g. not on the Isle of Man), it is nevertheless true that the number of cases handled in these places is modest: 423 cases in 1996 in Queensland, 509 in 1999 in New Zealand, and 4,708 in 1999 in Ireland (of which only about 40 each year are full inquiries). This compares with 14,772 first party appeals in 1999-2000 in England, including 882 inquiries and 2,536 hearings.

The number of appeals in the hothouse planning atmosphere of England could turn out to be greater if there were a general right of third party appeal. Whilst the volumes of appeal activity are higher in England, the relevance of experience elsewhere may be affected by various other considerations. First, longevity of the system of development control is one topic, since third parties will have greater knowledge of the opportunities and a more mature approach to their use where the land use regulation arrangements are well-established. Second, popular strength of feeling about environment and development issues may be different elsewhere. There may be some merit in this point, since England is densely populated, has a highly valued environment and has a growing economy. However, the other countries studied are all advanced western democracies, and we doubt that their residents would feel distinctly less strongly about their surroundings than British residents. Third, the strength of the NGO movement varies between countries, with England's being rather better organised and resourced than those in some other countries. This could increase the propensity to appeal in England.

Depending on the extent of third party rights of appeal introduced, there would probably need to be a transition period as additional Inspectors were taken on and trained for the work. The staffing, administrative and financial implications of this increase in workload for the Inspectorate would be substantial if there were a general right of appeal. Nevertheless, we would expect that a considerable increase in the number of Inspectors could be achieved over a transition period if the determination to proceed existed. On present evidence we are not impressed by the administrative argument against third party rights of appeal. Even Stephen Crow has argued, in an article which sets out the case against third party rights of appeal, that '*it must be said that the experience of these administrations, where third party appeals amount to roughly one third of the total, does not suggest a cause for alarm...*'.[29]

It is a matter of judgement how 'bearable' any increase in workload would be. We suggest that the approach taken should be cautious and phased, beginning with a right of third party appeal limited to specific priority categories of case. Additional categories of planning decision should become open to third party appeal only when it is clear that the system can cope with them.

Would users of the planning system notice improvements?

Whilst this is clearly the objective, the answer to the question is clearly

29 *Third party appeals: will they work? do we need them?*, JPL, 1995, pps 376-87

that only time will tell. However, we asked the authorities supplying us with information about third party rights in other countries whether the benefits outweighed the costs, and responses from all four countries from which a view was expressed were positive (the Republic of Ireland, Denmark, New Zealand and Queensland, Australia) – although the views from Denmark were from an environmental rather than independent source. They identified benefits of democracy, transparency, impartiality and clarity in decision-making. Legislation has recently been passed in the Republic of Ireland to constrain somewhat the rights of third parties to appeal, notably by confining appellants to those who submitted evidence at the application stage and the payment of a fee. The pressure to limit rights of appeal came from the construction industry, which argued with some effect that the Republic's economic boom was at risk from planning delays.

A commonly held view amongst those who do not support third party rights of appeal is that the basic case for intervention is not proven and would be an over-reaction. For example, the Nolan Committee argued of it:

> *Although superficially attractive, this would not be in keeping with the basis of the present system, which is to permit development unless there are good planning reasons not to do so... On balance, we do not consider that the problems which have been revealed by investigations into some authorities* [the North Cornwall case was one that was quoted] *have created a demand for this degree of reform. That would be to make the mistake of judging all authorities guilty of the sins of the few.*[30]

Whilst acknowledging the view fairly held, we consider that the Nolan Committee got the wrong end of the stick: we agree that third party rights of appeal would not solve problems of endemic poor performance in a few planning authorities, but this is different from seeking a second opinion on the planning merits of difficult cases, which third party appeals could address.

One indicator of the merits or otherwise of a third party right of appeal would be the success rate of appeals lodged. In the countries for which we have information, third party appeals have had a success rate recently of 25% of decisions reversed and 33% decisions amended in Ireland, and 18% of decisions reversed and 42% decisions amended in New Zealand. The Danish Society for Nature Conservation overturned approvals in about half the cases it appealed. Developer appeals in England currently have a success rate of 36% (1999-2000). With significant levels of reversal and amendment of decisions in other countries, there is an open question on the extent to which this experience would repeat itself in England. However, taken with the significant level of overturning of developers' appeals in England, it would stretch credibility to assume that the level of reversal or amendment of approvals in England would be negligible. It is reasonable to conclude that the overall quality of planning decisions would be improved.

30 *Standards of Conduct in Local Government*, Third Report of the Committee on Standards in Public Life, July 1997, Vol. 1, Cm 3702-1, para. 331-2

Requirements of the *Human Rights Act 1998* and the *European Convention on Human Rights*

While the United Kingdom has been bound in international law by the *European Convention on Human Rights* for over fifty years and has accepted the right of individuals to seek redress through the European Court of Human Rights (ECHR) since 1966, the *Convention* rights have not been directly enforceable in the United Kingdom courts. The bringing into force in the United Kingdom of the *Convention* rights by the *Human Rights Act 1998* has therefore led to a reassessment of the compatibility of planning law in the light of those rights.

The Human Rights Act 1998

Section 6 of the *Human Rights Act 1998* (HRA) makes it unlawful for a public authority to act in a way which is incompatible with a *Convention* right set out in the Act.[31] A public authority, however, does not act unlawfully if the authority is required to act this way because of primary legislation.[32] This equally applies to subordinate legislation, made under primary legislation that cannot be read or given effect in a way that is compatible with the *Convention* rights.[33] There is therefore no attempt to entrench the *Convention* rights and it is clear that the HRA in no way repeals previous Acts or restricts the legal powers of future Acts of Parliament.[34] The potential for incompatibility is however reduced by the courts' duty to try to interpret all legislation in a way that is compatible with the *Convention* rights.[35] The position of the *Convention* rights is further strengthened by the requirement that a Minister in charge of a Bill in either House of Parliament must make a statement either that the Bill is compatible or that he is unable to make such a statement.[36] Also, where an Act of Parliament is found by the courts to be incompatible with a *Convention* right, certain courts may declare that

31 Section 6(1) of the *HRA*

32 Section 6(2)(a) of the *HRA*

33 Section 6(2)(b) of the *HRA*

34 Section 3(2) of the *HRA*

35 Section 3(1) of the *HRA*

36 Section 19 of the *HRA*

the legislation is incompatible.[37] Such a declaration does not make the action of the public authority unlawful, but it gives the Government the power to amend the offending Act by way of a statutory instrument, if the Government considers that there are compelling reasons to do so.[38]

Article 6 of the European Convention

Article 6(1) provides that, in the determination of their civil rights and obligations, everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law.

What civil rights and obligations are covered by article 6?

The House of Lords, in what have become known as the ***Alconbury*** cases,[39] accepted that article 6 could apply to the exercise of administrative or regulatory decision-making. Lord Clyde put the position as follows:

> *It is thus clear that article 6(1) is engaged where the decision which is to be given is of an administrative character, that is to say one given in an exercise of a discretionary power, as well as a dispute in a court of law regarding the private rights of the citizen, provided that it directly affects civil rights and obligations and is of a genuine and serious nature.*[40]

In the case of the determination of a planning application the obvious person whose civil rights and obligations are directly affected is the applicant, and in the Alconbury cases most of the parties challenging the Secretary of State's decision-making role in planning applications were applicants. Therefore from ***Alconbury*** it is clear that prospective developers have their civil rights determined by local planning authorities, and have the protection of article 6. The basis would presumably be that their property rights are directly affected. In any case there is clear authority of the European Court of Human Rights that the right to carry out development on land is protected by article 6.[41]

None of their Lordships however discussed the question whether objectors to the grant of permission are included within the protection of article 6. The jurisprudence of the European Court of Human Rights would suggest that in special circumstances the civil rights and

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37 Section 4 of the *HRA*

38 Section 10 of the *HRA*

39 Reported at [2001] 2 WLR 1389

40 At para. 150, p1435

41 See ***Fredin v Sweden*** (1991) 13 EHRR 784 and ***Skarby v Sweden*** (1991) 13 EHRR 90

obligations of those objecting to a planning application are determined by the grant of permission. For article 6 to apply there must be a genuine dispute over the existence, scope or manner of the exercise of the civil rights or obligations recognised under domestic law (see ***Le Compte Van Leuven and De Meyere v Belgium***[42]). An objector to a grant of planning permission is clearly disputing that a right of development should be granted. On the other hand in ***Balmer-Schafroth v Switzerland***[43] it was held that objectors to the extension of a licence to operate a nuclear power station did not come under the protection of article 6. The court appeared to accept that the objectors had a right to physical integrity but concluded that they had failed to:

> *…establish a direct link between the operating conditions of the power station which were contested by them and their right to protection of their physical integrity, as they failed to show that the operation of Muhleberg power station exposed them personally to danger that was not only serious but also specific and above all imminent.*

This clearly limits the type of objector who can claim protection under article 6 on the grounds that the development will endanger their health. Article 2 enshrines a right to life. The judgement of the majority did not refer directly to article 2 but in referring to the right to physical integrity it would seem likely that the Court had in mind the right to life set out in article 2. It is obviously difficult to mount a claim based on the right to life in the context of perceived fears over threats to health. In the recent decision of ***R (on the application of Vetterlein) v Hampshire County Council***[44] Sullivan J held that the grant of planning permission for an energy recovery facility and waste transfer station was not directly decisive of the objectors' civil rights. It was argued by the objectors, who lived some distance from the proposed development, that the emissions from the facility would affect their health but Sullivan J found that their connection with the development was tenuous at the best and the environmental consequences for them were remote in the extreme. However, there are other cases that suggest that immediate neighbours to a proposed development will have rights under article 6 if the development will have direct adverse effects on their property.

In ***Ortenberg v Austria***[45] the Court had to consider a complaint by a neighbour to a grant of a building permit. The Austrian Government argued that '*…a grant of planning permission concerned a relationship between a public authority and an individual; it did not directly affect the owner of adjacent land.*' The Court disagreed and found that '*Having regard to the close link between the proceedings brought by Mrs Ortenberg and the consequences of their outcome for her property, the right in question was a civil one*', and so article 6 applied. Where the grant affects the enjoyment of property, a

42 (1981) 8 EHRR 1

43 25 EHRR 598

44 Decided on 14th June 2001 but not yet fully reported at the time of writing

45 [1994] EHRR 524

third party right of appeal could be seen as necessary to uphold article 1 of the First Protocol, the first paragraph of which provides that:

> *Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No-one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.*

Then in ***Zander v Sweden***[46] the European Court held that the granting of a licence for waste disposal was a determination of a neighbour's civil rights as they were arguing that the disposal of waste was polluting the drinking water that they received from a well on their property. In this regard it would seem that third parties could found rights under article 6 by reference to article 8. Article 8 gives a right to respect for private and family life, home and correspondence. But this right is qualified, as interference can be justified by what is:

> *necessary in a democratic society in the interest of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.*

While the jurisprudence of the European Court lays down that the determination must directly and genuinely affect the civil rights of the party seeking protection, it is not clear whether rights under article 6 can arise only in association with a right under article 8 or under article 1 of the First Protocol, or whether they can arise more generally under article 6. However, both the wording of article 6 and the jurisprudence would indicate that it is not crucial that another Convention right is in issue as long as civil rights and obligations are at stake. Equally, it would follow that, while interference with property rights and the family home can be justified in the public interest, this should not affect any separate rights under article 6 for a fair hearing.

In conclusion, while it is very unclear as to what categories of objectors would be protected by article 6, it does seem likely that there would be circumstances where the impact of a proposed development would be sufficiently adverse and direct to make the present state of United Kingdom law incompatible with the *Convention* rights. A possible case would be where a family lives adjacent to land on which it is proposed to build a waste disposal facility. The grant of permission for the facility in the face of sustained and credible objections from members of the family that the development would damage their amenities, lower the value of their property and risk their health could be taken to be a determination of that family's civil rights. The latest decision of the English courts has left the issue open. In ***R (on the application of Kathro and others) v Rhondda Cynon Taff County Borough Council***,[47] residents of a village challenged by way of judicial review the legality of the local planning authority granting permission for educational and leisure facilities in the village. The

46 [1993] 18 EHRR 175

47 Decided on 6th July 2001 but not yet fully reported at the time of writing.

development was to be carried out by the planning authority. The application had not yet been determined and Richards J rejected the challenge on the grounds that the granting of the permission would not be inherently contrary to article 6. Counsel for the local planning authority conceded that the grant of planning permission would be a determination of the residents' civil rights within the meaning of article 6. The Judge therefore simply observed that the point may not be entirely free from difficulty.

Do the procedures for granting planning permission satisfy article 6?

Objectors to applications for planning permission do have the legal right to make written representations and to attend the meetings of planning committees. However, following the decision in ***Alconbury*** that the Minister is not an impartial tribunal as he is both policy maker and decision-maker, it would seem very unlikely that the decisions of a planning officer or the deliberations of a planning committee would be seen as satisfying article 6. The objectors have no legal rights to be heard or to give evidence or to cross-examine.[48] These shortcomings are compounded by the lack of a legal duty to give reasons for the grant of permission. The European Court of Human Rights has held that article 6 in requiring a fair trial implies a duty to give reasons for the decision.[49] This prompted the Privy Council in ***Stefan v General Medical Council***[50] to state:

> *They are conscious of the possible re-appraisal of the whole position* [concerning the duty to give reasons] *which the passing of the* Human Rights Act 1998 *may bring about. The provisions of article 6(1) of the* Convention on Human Rights*, which are now about to become directly accessible in national courts, will require closer attention to be paid to the duty to give reasons, at least in relation to those cases where a person's civil rights and obligations are being determined.*[51]

Therefore, as long the civil rights of objectors are being determined, reasons at least should be provided.

Are any shortcomings cured by the right of objectors to seek judicial review of the grant of planning permission?

As the House of Lords decision in ***Alconbury*** shows, even if the grant of planning permission in itself is in breach of article 6, article 6 could be satisfied by the right to challenge the legality of the decision in a court

48 However, in ***Vetterlein***, Sullivan held that article 6 had been satisfied as the local planning authority had held a special public meeting

49 ***Se Van de Hurk v Netherlands*** (1994) 18 E.H.R.R. 481 at 501

50 [1999] 1 W.L.R. 1293

51 At page 1301

that certainly satisfies the requirements of article 6. The House in substance held that the right to an adequate and impartial judicial review cured the Secretary of State's lack of impartiality. It did not matter that the courts could not review the decision on its merits. So it could equally be argued that the right to a judicial review of the grant of permission cures the lack of impartiality of the local planning authority. However, there are substantial grounds for distinguishing ***Alconbury***, in which the decisions rested with the Secretary of State, from planning applications decided by local planning authorities. In the case of a decision by the Secretary of State, the right to a hearing before a planning inspector precedes the decision. Although, as was held in ***Bryan v United Kingdom,***[52] the Inspector does not have the appearance of complete impartiality and applies the policies of the Government, the public inquiry or hearing has many of the attributes required to satisfy article 6. Thus Lord Slynn in ***Alconbury*** emphasised that:

> *The fact that an inquiry by the inspector is ordered is important. This gives the applicant and the objectors the chance to put forward their views, to call and cross-examine witnesses. The inspector as an experienced professional makes a report, in which he finds the facts and in which he makes his recommendations. He has of course to take account of the policy which has been adopted in e.g. the development plan but he provides an important filter before the Secretary of State makes his decision and it is significant that in some 95% of the type of cases with which the House is concerned, the Secretary of State accepts his recommendation.*[53]

However, Lord Hoffmann clearly considered that safeguards were important only for fact-finding and not for policy decisions.[54] The rest of their Lordships did not make their position clear on the need for safeguards, though both Lord Clyde and Lord Hutton refer to the safeguards that existed.

Nevertheless, it is considered that, in the case of grants of permission by local planning authorities, the remedy of judicial review does not cure the complete absence of a fair and public hearing before an independent and impartial tribunal. However, if Lord Hoffmann's approach is correct, this would not help an objector who was simply basing his case on the court's inability to review the merits of the local planning authority's decision. This would mean that objectors would have to argue that the inadequacies of the procedures leading up to the grant of permission have meant that they have not been able to test crucial findings of fact on which the decision is based or that they have not been given reasons for the decision.

Lord Hoffmann's approach was applied by Richards J in the ***Kathro***[55] decision. The Judge rejected the argument that the grant of planning

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52 (1995) 21 E.H.R.R. 342

53 At para. 46, p1404

54 See para 128 at p 1427

55 See footnote 40

permission by a local planning authority in respect of its own development was inherently incompatible with article 6. While he accepted that the planning authority could not be regarded as an independent and impartial tribunal in such a case, he considered that, following the House of Lords decision in ***Alconbury***, the availability of the remedy of judicial review cured the lack of independence and impartiality. However, he went on to hold that, in the case of decision-making by local planning authorities, there was no equivalent of the fact-finding role of the Inspector and its attendant safeguards. Richards J therefore concluded that:

> *For those reasons there is in my view a real possibility that in certain circumstances involving disputed issues of fact, a decision of a local planning authority which is not itself an independent and impartial tribunal might not be subject to sufficient control by the court to ensure compliance with article 6 overall.*

What is the relevance of article 14?

Article 14 of the *European Convention* provides that the rights and freedoms in the Convention shall be secure '*without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'*. It is a feature of article 14 that it can apply even if there has been no direct breach of any of the other rights and freedoms in the *Convention*. For example, in ***Belgian Linguisitics Case (No 2),***[56] the European Court accepted that article 6 did not require a system of appeal courts. It was however held that it would violate article 14 to provide for appeal courts but to debar certain persons from these remedies without legitimate reason, while making them available to others in the same type of actions. So it could be argued that, by providing rights of appeal to applicants but not to objectors, there was a breach of article 6 when read in conjunction with article 14. However, for this argument to succeed, the court would have to accept that to discriminate between applicants and objectors came within the purpose of article 14. It would also have to be shown that applicants and objectors were in an analogous situation and that the differential treatment could not be objectively justified as legitimate and proportionate. There must therefore be considerable uncertainty whether such an argument would succeed.

Who may obtain remedies from the Human Rights Act?

While anyone with sufficient interest in the matter can bring a claim for judicial review, section 7(1) of the *HRA* requires the person bringing

56 (1968) 1 EHRR 252

proceedings to be a victim of an unlawful act. However section 7(6) states that a person is a victim of an unlawful act '*only if he would be a victim for the purposes of article 34 of the Convention if proceedings were brought in the European Court of Human Rights in respect of that act*'. This would seem to rule out a right under article 6 for NGOs and pressure groups to bring actions. However, the European Court of Human Rights has held that actions can be brought by groups of individuals if each member can show a violation of the relevant right.[57]

This means that insofar as the *HRA* gives rights to third parties, those rights will be limited to objectors who can show that their civil rights have been directly and genuinely affected. It will not be available to individuals and pressure groups who are purely motivated by their desire to protect the environment in the public interest.

Does the planning legislation authorise breaches of article 6?

Finally, it is important to understand that the present lack of third party rights of appeal, even if it is in some circumstances incompatible with article 6, is clearly lawful. Local planning authorities are required by law to determine valid planning applications that are submitted to them and so they cannot act differently according to the statutory scheme. So by virtue of section 6(2)(a), the action of the local planning authority is not unlawful because that action is required by primary legislation, and the legislation cannot be read or given effect in a way that is compatible with the *Convention* right. The only way around this would be for the Secretary of State to call in all such decisions. Of course, the High Court has the power to make a declaration of incompatibility under section 4 of the *HRA*. The only direct legal effect of such a statement is that it enables the Executive to amend the law without the need for an Act of Parliament, as long as a Minister of the Crown considers that there are compelling reasons.[58]

Conclusion

The absence of third party rights of appeal is not conclusively incompatible with the *Convention* rights protected by the *Human Rights Act 1998*. The courts are still in the process of working out the meaning of article 6 as applied to the granting of planning permissions. Until there is a decision of the House of Lords directly on the issue, the position will remain uncertain. It would however at present seem likely that article 6 protects only those objectors who are directly and seriously

57 See ***Open Door Counselling and Dublin Well Woman v Ireland*** (1993) 15 EHRR 24

58 Section 10(3) of the *HRA*

affected by the proposed development and when they are denied an independent and impartial forum to dispute crucial factual issues.

The importance of article 6 to third party rights of appeal is that, once it is accepted that some third party rights should be provided to comply with our *Convention* obligations, it opens the door to the full consideration of the merits of third party rights generally.

Implications of the *Aarhus Convention 1998*

The *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (known as the *Aarhus Convention*) was signed on 25 June 1998. However, it is still uncertain when the United Kingdom will formally ratify the treaty and implement its provisions into United Kingdom law. The preamble to the *Convention* makes clear that it is concerned to improve public participation in decision-making in environmental matters. Third party rights of appeal fit in with this objective of public participation in decision-making but the *Convention* itself does not directly require such a right. The main provisions concern the right to environmental information, public participation in decision-making and the right to challenge environmental decision-making in the courts. Its main effect will therefore be to improve the alternatives to third party rights of appeal discussed above. Thus the increased access to environmental information set out in article 4 should enhance the ability of objectors to oppose the grant of planning permission.

Article 6 then provides for certain rights of public participation in decision-making but only with regard to activities which may have a significant effect on the environment. It therefore covers much of the same ground as the European Community Directive on the assessment of the effects of certain public and private projects on the environment and it similarly requires an assessment to be made of the effect of the proposed activity. There are also general requirements for what is termed '*effective public participation*'. More specifically article 6(7) sets out that:

> *Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.*

This provision is rather ambiguous but it would seem to fall short of providing objectors with a right to a hearing before any decision is made. However, where there is a public hearing, such as a planning committee meeting, it goes further than the present law in England and Wales in suggesting that it may be appropriate to allow the public to address the committee. It should therefore provide the basis for improving the rights of objectors in the decision-making of local planning authorities, though many local planning authorities already provide for public participation well beyond the statutory minimum requirements before planning decisions are made.

Article 9 is concerned with access to the courts but the present law in England and Wales on judicial review generally already complies with its requirements. Article 9(2) does however improve the position of non-governmental organisations with regard to activities covered by article 6. Such bodies are deemed to have sufficient interest to have access to challenge the substantive and procedural legality of certain categories of

decisions. This is because non-governmental organisations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest.[59] The courts already tend to accept that bodies such as Greenpeace have sufficient interest[60] but this provision should remove any doubts about their standing.

We conclude that the *Aarhus Convention* does not directly further the cause of third party rights of appeal but it does help to focus on the need for objectors to be involved in the decision-making process.

59 See Article 2(5)

60 See ***R v Secretary of State for the Environment ex p Greenpeace Ltd*** [1994] All E R 352

Alternatives to Third Party Rights of Appeal

A third party right of appeal would be a response to a series of concerns about the current operation of the planning system. However, it need not be the only response, nor should the assumption be made that nothing can be done to address the original concerns which prompted the interest in third party appeals.

We have identified considerable concern – from our own experiences with the planning system, from comments made to us and from our seminar – that the planning system is too often failing to satisfy people's aspirations for greater engagement, transparency and competence in planning decisions. Whether or not these concerns are justified is not the point: the perception of a shortfall in practice against expectations is present and important.

The case for a third party right of appeal to an independent body capable of offering a fair hearing on the merits of arguments is attractive because of these perceived problems. However, the need for such a mechanism might be reduced if other arrangements were in place which helped people to feel that their concerns had been taken into account more thoroughly and clearly at an earlier stage in the planning process.

Improving the decision-making process

A detailed investigation into these issues has been beyond the scope of the current project. Nevertheless, the kinds of change which may be worth further research evaluation include:

- all planning approvals to be accompanied by a reasoned explanation;
- planning authorities to be barred from deciding their own applications or those applications in which they have an interest;
- greater use of mediation techniques and meaningful public participation in the discussion of development proposals prior to local authority decisions;
- additional mandatory training in town planning for all planning committee members;[61]
- a higher profile for planning in local authorities, both through budgeting for staff (including higher staffing levels and better pay) and employing sufficient officers for defending appeals against refusals of permissions;

61 In addition to the LGA, RTPI, IDeA and DETR booklet *Training in Planning for Councillors* (DETR, 1999)

- a general right for objectors to address planning committee meetings, to question developers and to attend site visits; and

- greater access for third parties to Section 106 negotiations.

Alternatives to third party rights of appeal

Aside from arrangements to improve planning decisions in the first place, we have briefly considered the alternatives for further review of proposed or actual planning decisions by local authorities. Our views are initial ones only: each would benefit from further research evaluation.

The alternatives we have included are:

- internal review by the authority itself;

- the call-in powers of the Secretary of State;

- judicial review; and

- the Local Government Ombudsman.

Local authority internal review

Some local authorities already have Standing Orders which allow planning applications to be brought for decision by a higher committee (or even full Council) rather than be decided by the Planning Committee (or equivalent). This typically allows members concerned about the committee's or sub-committee's approach to have the matter reconsidered. Whilst this provides an opportunity for more councillors to contribute to the discussion of controversial cases, there is a tendency for decisions on these cases to become more influenced by party politics the further up the Council they are decided. New forms of scrutiny are being considered under the revised arrangements for service delivery under the *Local Government Act 2000*. These may involve, for example, a separation of cabinet-style government from scrutiny committees, more powerful portfolio holders and new structures within which development control committees find themselves located.

Internal scrutiny is still well within the scope of reasonable political judgement on planning applications, but may not offer the more in-depth, let alone independent, analysis that third parties hope for. No amount of internal review, even the setting up of a special internal review body will be sufficient, to deal with contentious cases such as intentions to approve departures from the development plan if an authority is politically determined on a specific course of action. An internal review is never going to be, or be seen as, independent or impartial. We therefore consider there will always need to be scope for external review of local authority decisions either afterwards or by intervention to forestall decisions.

Call-in

The Secretary of State has the power[62] to take planning decisions out of the hands of local planning authorities by 'calling in' planning applications. This power has always been used sparingly: there is little merit in providing a general power to local planning authorities to decide applications if in practice this is undone by its habitual removal. Various statements set out how the Secretary of State intends to use this power,[63] most recently in answer to a Parliamentary Question on 12 December 2000 when the Parliamentary Under-Secretary of State said:

> *His policy is to be very selective about calling in planning applications. He will, in general, take this step only if planning issues of more than local importance are involved. Such cases may include, for example, those which, in his opinion:*
> - *may conflict with national policies on important matters;*
> - *could have significant effects beyond their immediate locality;*
> - *give rise to substantial regional or national controversy;*
> - *raise significant architectural and urban design issues; or*
> - *may involve the interests of national security or of foreign Governments.*

When planning applications are called in, this is often done after a local planning authority has indicated its intention to grant permission. The Secretary of State may then need to act quickly, before the authority issues a notice of approval. Call-ins are often left until this last moment because, if an authority is likely to refuse permission, the need for a public inquiry might be avoided altogether as the prospective developer may not appeal against the refusal. In effect, the Secretary of State is a third party who has reserved to himself alone the right to appeal against a local authority approval.

Furthermore, the Secretary of State has a right[64] to issue a Direction placing on hold a decision by the local planning authority on a planning application while he decides whether or not to call it in. This limbo can be for as long as he considers necessary, even indefinitely. In controversial cases, particularly, all the main parties can experience some anxiety as to whether or when the Secretary of State will call in a planning application, all the more so if an article 14 Direction is issued.

The option is open to anyone concerned by the prospect of an approval to ask the Secretary of State to call in the application, and many individuals and groups do so. From their point of view, success at achieving a call-in can be a lottery: the Secretary of State does not have to stick rigidly to his own criteria, and even if he does it is a matter of judgement as to whether the criteria are satisfied.

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62 Under section 77 of the *Town and Country Planning Act*

63 See a summary of these in M Casely-Hayford and K Leigh, January 2001, *The Birth of the Human Rights Act: The Death of the Planning Call-in Procedure?*, JPL, 7-11

64 Under Article 14 of the *General Development Procedure Order 1995*

The call-in procedure is designed as a safeguard to ensure closer scrutiny of planning applications in the more significant cases. To the extent that call-ins occur after a local authority has indicated how it is minded to decide cases, there is emphasis on looking again at potentially inappropriate approvals. Opponents of third party rights of appeal tend to argue that this safeguard is sufficient, whilst those who think the safeguard is insufficient may be in favour of a third party right of appeal.

Reform of the call-in procedure might temper the case for a third party right of appeal. For example, the Secretary of State could extend his criteria to include other brackets of case such as those most often cited as priorities for third party rights of appeal, e.g. applications:

- not in conformity with the development plan;
- in which the local authority has a financial interest;
- accompanied by an Environmental Impact Assessment;
- recommended for refusal by local authority officers;
- approved against the advice of a statutory consultee; and
- adversely affecting designated areas.

In addition, further safeguards could be added:

- call-in criteria defining more rigidly when applications will definitely be called in (even if some cases falling short of the criteria may also be called in);
- applications would be called in only where third parties had requested this (to avoid calling in cases where there was local agreement on the merits of approval);
- the Secretary of State could be required to give reasons for his call in decisions; and
- a deadline for the Secretary of State to decide whether or not to call in any application could be imposed.

With regard to the procedures on call-ins it is interesting to note that section 36 of the *Control of Pollution Act 1974* used to impose a duty on Water Authorities who proposed to grant consent for discharges to inform those who had made representations. These people then had 21 days to request the Secretary of State to call in the application. This effectively prevented consent being granted until the Secretary of State had indicated that he was not going to call in the application.

Changes of these kinds would go some way to meeting concerns which might otherwise be dealt with by a third party right of appeal. Nevertheless, the lottery effect would to some extent remain, and the Secretary of State could adjust the criteria at will: these difficulties could only be overcome by providing third parties with clear rights (even if this were technically

expressed as a right to force the Secretary of State to call in an application). If, in contrast to the Secretary of State's discretion, power is indeed to be put in the hands of those directly affected by actual or potential planning approvals, then a third party right of appeal would arguably be a better mechanism.

Judicial review

Decisions on planning applications, whether by local planning authorities or the Secretary of State, may be challenged in the High Court on points of law by judicial review.[65] For the most part, the merits of planning decisions (i.e. the judgement exercised by the decision-maker on the weight to be afforded to the different arguments in a case) cannot be challenged. Only where the decision on merits is so unreasonable that no reasonable authority could have reached it would the legal aspect of merits arise.[66] Nevertheless, in many cases where judicial review is sought, it is clear that the applicants' main complaint is that the decision is wrong rather than illegal. The current power for judicial review therefore fails to match up to the aspiration for further scrutiny of the merits of controversial cases. Furthermore, the normal requirement that the loser pays the winner's costs (as well as his own) is a significant disincentive for most third parties to seek a judicial review. Judicial review as a means of resolving planning problems is clearly unreliable and difficult for the large majority of participants in planning procedures.

The law governing judicial review in planning cases might be made more wide-ranging and there are clear signs that the courts are moving towards expanding the grounds of review and in particular to adopt 'proportionality' as a ground of review. This would necessarily involve a closer scrutiny of the rationality of decisions. In the context of human rights, the courts have already shown a willingness to apply the test of 'proportionality'. In ***Simms v Secretary of State for the Home Department***,[67] a case concerning rights of journalists to visit prisoners, Lord Hobhouse of Woodborough condemned the policy as '*unreasonable and disproportionate*'.[68] This could involve the courts examining closely the reasoning behind the grant of permission and the balance between the

65 The form of the judicial review depends on whether it is a decision of the local planning authority (when an application must be made under Part 54 of the Civil Procedure Rules) or the Secretary of State (when the right to challenge the legality of the decision is provided by the *Town and Country Planning Act 1990* itself)

66 This is usually referred to as 'Wednesbury Unreasonableness' as this test was laid down by Lord Greene MR in ***Associated Picture Houses v Wednesbury Corpn*** [1948] 1 KB 223

67 [1999] 3 WLR 328

68 At page 353A

competing arguments.[69]

Drawing on the continental approach to proportionality, Craig has argued that the proportionality test would mean that the court would ask if the decision were necessary to achieve the desired objective, whether it was suitable to this end and whether it nonetheless imposed excessive burdens on the individual.[70] In the context of grants of permission the court would be examining the need and suitability of the proposed development and the extent of the burden that it imposed on third parties. Strictly, this would not involve the courts in making the actual planning decision on its merits but it would restrict and confine the discretion of the local planning authority.

The question of the scope of judicial review arose in the ***Alconbury*** case but their Lordships found that article 6 of the *European Convention of Human Rights* did not require the courts to be able to review the policy or the overall merits of the decision. Nevertheless Lord Slynn in particular argued that the time had come to accept that the principle of proportionality was part of English administrative law as a general rule and not only when the courts were deciding European Community law or applying the *Human Rights Act 1998*. Lord Clyde similarly referred to the idea of proportionality or what he thought should more accurately be called disproportionality.

The scope and intensity of judicial review has undoubtedly increased markedly in recent years and the application of the principle of proportionality would enable the courts to overturn planning decisions that were plainly wrong. However, judicial review would still fall far short of a right of appeal and the courts themselves would be very reluctant to take on that function both for constitutional and practical reasons. As Lord Slynn stated in ***Alconbury***:

> *This principle* [proportionality] *does not go as far to provide for a complete rehearing on the merits of the decision. Judicial control does not need to go so far. It should not do so unless Parliament specifically authorises it in particular areas.*

A trend towards the courts becoming progressively more closely involved in planning issues raises the question of whether there is appropriate expertise within the judicial system to tackle planning merits. An obvious alternative would be to turn the Planning Inspectorate into an Environmental Court to deal with these legal issues initially.

Local Government Ombudsman

The Local Commissioner for Administration in England (the Local Government Ombudsman) investigates whether local authorities have

69 See on this ***R (Wagstaff) v Secretary of State for Health*** [2001] 1 WLR 292 where having done this the Court concluded that a decision to hold the Shipman Inquiry in private was irrational and so invalid

70 See *Craig Administrative Law*, Fourth edition at page 591

carried out their administrative duties correctly. The Ombudsman's concern is with procedure, particularly where shortcomings in procedural practices ('maladministration') have resulted in 'injustice' to individuals. Re-running the procedures in individual cases is usually not practicable as the grant of planning permission will have already been made and could be revoked or modified only at great expense to the local planning authority. The normal remedy is therefore a recommendation of compensation for individual loss linked to recommendations to local authorities to change their procedures to avoid a repetition of the maladministration.

The Ombudsman is concerned only peripherally with the merits of planning cases. For example, in a typical case in which an authority has failed to notify a neighbour of a planning application which would adversely affect that neighbour, there is likely to have been maladministration. However, whether there was also injustice would depend in part on what the decision would have been even if the neighbour's views had been brought to the authority's attention (e.g. if other neighbours had already raised the points). This involves an element of judgement on merits. It is, however, a very modest role for merits, and is well short of the detailed analysis of cases which a third party right of appeal would allow.

If the Ombudsman's role were to be expanded to include a greater emphasis on merits of cases (and it is difficult to see how that role could be contained once the principle had been established), then the Ombudsman would become a *de facto* appellate body on merits. The question would then be whether the office of Ombudsman was the one best equipped to deal with merits issues. We believe that the answer is that it is not: that is the function of the Planning Inspectorate. Furthermore, there remains an important role for the Ombudsman in addressing alleged procedural shortcomings, and we consider this should be distinct from planning merits of cases. We see no advantage in expanding the role of the Local Government Ombudsman in an attempt to deal with the problems which would be addressed by a third party right of appeal.

Appendix 1: Rights of Third Party Appeal in Selected Countries

Disclaimer: In compiling this Appendix, we have relied upon information supplied to us. We consider the facts and opinions it contains to be appropriate for our research, but the information contained here should not be relied upon as definitive.

Republic of Ireland

The current regime

- A third party right of appeal in planning was introduced in the Republic as early as 1934. It was retained in s. 26 of the *Planning Act 1963*, although at this stage appeals were determined by the Minister.

- The current regime was introduced in the *Local Government (Planning and Development) Act 1976*. All individuals, interest groups, etc., have the right to appeal to An Bord Pleanala (the Appeals Board) against any planning decision of a planning authority. There is no geographical limit and third party applicants do not currently have to have commented on the application.

- The Board must receive written appeals within one month (statutory time limit – the Board has no discretion to receive late appeals). The applicant must provide his name and address, details of the nature and site of the development, the full grounds of the appeal and the fee. The one-month time limit can be problematic for An Taisce (National Trust for Ireland) as the promptness with which local planning authorities notify interested parties of their decisions varies across the Republic.

- Between 1977 and 1984 there was no fee for submitting an appeal. In 1984, a fee of £10 was introduced. Today, the fee for a first applicant is £300 and a third applicant £120. An Taisce is one of four prescribed bodies under the *Planning Acts* which means it pays half the normal third party fee (£60) and no fee at all as an observer (see below). *An Taisce* has pointed out that the fees have risen significantly in excess of inflation.

- Where an appeal has already been made, another person can become an 'observer' and make submissions or observations on the appeal. The time limit for this is one month from the receipt of the appeal by the Board. The fee is £30. If the appeal is withdrawn, the decision of the planning authority will stand and the observer's submission will lapse.

- The applicant has access to information (internal reports, letters of objection, etc.) held on the planning file from the point of acceptance of a valid appeal. *An Bord Pleanala* is given copies of all these documents.

- An appeal must raise a valid planning ground. In reality, very few appeals are dismissed as vexatious or frivolous.

- The percentage of decisions appealed is some 7-8% of the total. The number of cases received in 1999 (4,708) was the highest in any year since 1983 when appeal fees were introduced and a 3.5% increase on 1998.

- In 1999, appeals involving third parties accounted for 42% of all formally determined appeals. Of these, 40% were third party and only 2% were first and third party. The corresponding figures for all third party appeals for 1998 were 42%, 39% and 3%.

- Any party can request an oral hearing for a non-returnable fee of £50. A copy of the request is sent to the developer who is allowed one month from this later date to submit its views. The Board has absolute discretion to hold an oral hearing, but will normally grant one where this will aid its understanding of a complex case or where significant national or local issues are involved. 45 oral hearings were held in 1999, compared with 39 in 1998 and 37 in 1997. In reality, more than 80% of the requests for an oral hearing are granted.

- There is no difference in the forum for first and third party appeals. If the appeal merits an oral hearing, it will be granted.

- The Board can ask any party or observer to make submissions or observations on any matter that has arisen on the appeal. The Board also has powers to require any party or observer to submit any document, information, etc., which it considers necessary.

- The Board aims to dispose of appeals within 16 weeks. The average time taken to determine cases in 1999 was 21 weeks, compared with 18 weeks in 1998 and 16 weeks at end 1997.

- The Board will decide whether to grant permission,to grant permission with conditions or to refuse permission. In 1999, the decision of the planning authority was reversed in 25% of cases, amended in 33% of cases and confirmed in 42% of cases.

- The Board's decision is final. Its validity may be challenged within 2 months only by way of judicial review in the High Court, on a point of law only.

- The parties generally pay their own costs. On rare occasions, costs can be awarded.

Proposed changes to the current regime:

- The *Planning and Development Act 2000* will make a number of changes

to the regime of third party rights in planning. The climate for change was partly driven by the construction industry, spurred on by the recent economic boom in the Republic. Whilst the planning system in Ireland does not appear to suffer undue delay (and certainly not by UK standards), the time taken to obtain planning consent was felt to be a major constraint to the continuing success of the so-called Celtic tiger. Furthermore, the *Local Government Act 1994* required applicants to publish a site notice. The Department of the Environment (DoE) believes that this may account for the small increase in third party appeals in recent years – people are now simply more aware of development around them and are more likely to appeal.

- As a result, a number of changes to the regime of third party rights will be introduced by the 2000 Act, the following of which are the most significant:

  - Section 137(1)(a) – '*An applicant for permission and any person who made submissions or observations in writing in relation to the planning application may..appeal to the Board against a decision of the planning authority under section 34....*'. Thus, the general right of appeal will be restricted to those who have previously made a submission to the planning authority. There is one exception to this restriction: if the application has changed following submission and the appellant is a neighbouring landowner. An Taisce believes that this restriction is unreasonable as people may not be aware of the application until the local planning authority has made a decision. Following on from the above:

  - Section 137(1)(a) – The introduction of a fee to make a submission on a planning application (this has not yet been set but it is thought that it will be in the region of £20). This has been a controversial proposal. (*Note* – the Republic of Ireland is intending to implement the ECHR and believes that these provisions are not in conflict with the ECHR or the *Aarhus Convention*. The European Commission is presently considering this position). The Department of Environment also pointed out that although a fee will be payable, as a result of the 2000 Act, the local planning authority is now obliged to take into account observations received in the decision-making process (section 34(3)(b)). However, An Taisce believes that there is no justification for the introduction of an objection fee. It argues that submissions to local planning authorities do not delay development, do assist local authorities by giving them local information they may not have and involve no extra cost (beyond the cost of notifying their decison by post to those who made an observation on the proposal). An Taisce believes that the fee will discourage public participation in the decision-making process;

  - Section 138(1)(ii) – the Board has absolute discretion to dismiss or refuse an appeal or referral where it is of the opinion that '*it is made with the sole intention of delaying the development or the intention of securing the payment of money, gifts, consideration or other inducements by any person*'. This section was partly introduced to prevent developers delaying or frustrating other competitors in an attempt to put them out of business;

- The introduction of a leave stage in judicial review. The application must be brought within two months, individuals or organisations must now have a '*substantial interest in the matter*' and there must be substantial grounds (i.e. at least an arguable case).

The benefits and drawbacks of a third party right of appeal

- The DoE clearly believes that it is appropriate to have a third party right of appeal and that the proposed changes to the regime strike the correct balance between the benefits (equality, democracy) and the disbenefits (increased cost and delay). Whilst third party appeals do undoubtedly cause further delay, it was pointed out that some 60% (i.e. the majority) of appeals in the Republic are made by the first applicant.

Acknowledgements

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Denmark

The current regime

- The Environmental Appeals Board (EAB) is established under Part XII of the *Environmental Protection Act 1997* (EPA 1997). It is the appeal authority under the Act and comprises one Chairman, one or more Deputy Chairmen and a number of appointed experts. The Chairman is required to have the qualifications of a High Court judge.

- The jurisdiction of the Board is confined to decisions specified in s.103 of the *EPA 1997* which includes:

  (1) decisions made by the Minister or by Agencies empowered under ss. 25 (water abstraction) or 82 (call-in from local council or regional council on a matter of national importance); and

  (2) decisions in matters of major importance, or of importance in terms of principle, made by the Minister or by an Agency empowered under Part 5 above, or under sections 28 (licences to discharge waste water) and 30 (sewage treatment plants).

- The right to issue a complaint, which is effectively an appeal on the merits, is not limited to the applicant.

- The Board is the final administrative appeals body. Decisions are reached by a majority vote. The decisions of the Board can be

appealed only to the normal civil courts on points of law only.

- In cases concerning town and country planning, nature and the Environmental Impact Assessment rules, the body of first appeal is the Nature Protection Board of Appeals (NPBA). This Board comprises one Chairman (a lawyer), two Supreme Court Justices and seven political representatives. This Board is the final appeal with regard to town and country planning and nature protection.

- The Danish complaints and appeals system is very open. The *EPA 1997* confers specific rights of complaint. Section 98 provides that complaints against the decisions of local councils and regional councils can be made by:

  (1) the party to whom the decision is addressed, and

  (2) '*any party having an individual, significant interest in the outcome of the case*'.

- Specific rights of complaint/appeal are also given to:

  (1) the Danish Society for the Conservation of Nature (DSCN), in respect of decisions taken by the regional council;

  (2) the Danish Angling Society and the Danish Fisheries Association in respect of decisions made by the regional council regarding pollution of watercourses, lakes or the sea;

  (3) Greenpeace and the Danish Sea Fisheries Association in respect of decisions made by the regional council as regards marine pollution;

  (4) the Danish Inland Fisheries Association in respect of decisions taken by the regional council regarding pollution of watercourses and lakes;

  (5) the Economic Council of the Danish Labour Movement in respect of decisions made by the local council and the regional council in cases of significant importance to employment;

  (6) the Danish Consumer Advisory Council in respect of decisions made by the local and regional council to the extent that they are of considerable importance in terms of principle;

  (7) local associations working primarily to protect the environment are entitled to inform the local and regional councils of the types of decisions under the Act of which they wish to be notified. They need to verify their status by submitting a copy of their rules, and by documenting that they are indeed organised locally and working primarily to protect the environment. They then have a right of appeal in respect of any such decisions.

- There are some restrictions on standing, however. Whilst local branches and national organisations can appeal to the NPBA, local

branches of national organisations cannot appeal to the EAB.

- Appeals in the first instance go to the Minister, but their determination has been delegated by the Minister to the Environmental Protection Agency. From the Minister's decision, appeal lies to the EAB, which has final authority to determine the matter.

- An appeal must be lodged within 8 weeks of the decision being made. This would appear to give the larger, more established NGOs (such as DSCN) sufficient time to appeal, though smaller organisations may be unaware of the rules.

- A fee is payable for certain cases relating to waterways. This may be prohibitively expensive for individuals but is not thought to be a problem for established NGOs such as DSCN. Similarly, with regard to costs (which are awarded in certain cases again relating to waterways), this may be expensive for individuals but is not currently prohibitive for DSCN.

- The forum for the first and third party appeals is similar.

- DSCN does not believe that legitimate bodies are prevented from appearing at an inquiry.

- It would appear that somewhere in the region of 10% of appeals are third party appeals. In 2000, DSCN submitted 150-200 appeals (some 1.5-2% of the total number).

- Of those appeals submitted by the DSCN, it is thought that about 50% were 'successful', i.e. the original decision was overturned.

- The number of third party appeals in Denmark is rising. This is thought to be due to a raising of awareness of the Aarhus Convention and '*a general mistrust in the political system*' (DSCN).

The benefits and drawbacks of a third party right of appeal:

- DSCN believes that the advantage of specifying which third parties have the right of appeal is that the spirit of the *Aarhus Convention* is not just to establish democracy, but to reinforce environmental protection. Restricting the right of appeal to those organisations which include nature conservation as their (statutory) purpose ensures that the third party right of appeal remains in the public interest.

- The benefits of a third party right of appeal must, however, be weighed against the delay caused by an increasing number of appeals. DSCN reports that this could be a problem for them if it undermines the authorities' ability to ensure all parties receive a 'fair trial'.

- DSCN believes, however, that the benefits outweigh the drawbacks. The public in Denmark see the environmental organisations as their 'watchdogs' and the right of appeal as extremely important.

- There do not appear to be any changes to the current regime in the

offing, but DSCN points out that the 'right' decision is not always made because the NPBA has a number of political appointments. In its view, this is one aspect of the regime that should be examined.

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The research team wishes to thank Mr Michael Leth Jess, Head of Department, Danish Society for the Conservation of Nature. Factual information taken from Malcolm Grant's *Final Report on the Environmental Court Project* (DETR, 2000).

Sweden

The current regime

- The complexity of the old administrative and legislative system in Sweden led to an extensive programme of review. The proposals were included within a new *Environmental Code* which was adopted in 1998 and which came into effect on 1 January 1999. It contains 33 chapters and 500 sections, and consolidates and reforms 15 existing environmental statutes.

- An important component of the reforms is the introduction of Environmental Courts. In its appellate jurisdiction, the Court reviews decisions taken by the county administrative boards and other Government agencies under the *Environmental Code* (except cases in which the right of appeal lies to the Government).

- Judgements and decisions under the *Code* may be appealed against by the person to whom the judgement or decision relates if the determination went against him or her. The *Code* also has a uniform concept of material interest. A person who may be caused damage or exposed to other nuisance by the operation shall be considered to have a material interest and consequently is entitled to appeal. It is thus not necessary for the person to own the land or have any interest in real property that is affected.

- An important new provision of the *Code* is that environmental organisations are also entitled to appeal against judgements and decisions on permits, approvals or relaxations. To have the right to appeal, an association must have conducted its operations in Sweden for at least three years and have at least 2,000 members.

- A main hearing must normally be held and judgement must be issued within two months from the conclusion of the main hearing.

- Judgements or decisions of the Environmental Court may be appealed to the Environmental Court of Appeal. Leave to appeal is required. If leave is not granted, the judgement or decision of the Environmental Court remains in force. To a greater or lesser extent, the procedure in the Environmental Court of Appeal is in writing.

- Cases which started as first instance matters in the Environmental Court are further appealable, with leave, to the Supreme Court. Those that started with a municipality or administrative authority are not appealable beyond the Environmental Court of Appeals.

- The Environmental Court has the power to award costs, but it is closely circumscribed. In appeal cases concerning water undertakings, the applicant is required to pay not only his or her own costs but also those relating to the appeal of the opposing parties. Environmental organisations are not entitled to reimbursement for their costs; nor are they liable to pay costs.

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New Zealand

The current regime

- The *Town and Country Planning Act 1953* gave limited rights of appeal to parties '*appreciably affected*' by a decision, but this usually excluded environmental groups. The Town and Country Planning Act 1977 allowed those '*representing a relevant aspect of the public interest*' to appeal to the Planning Tribunal and this was interpreted to include environmental and community groups.

- Under the *Water and Soil Conservation Act 1967*, third parties, including environmental groups, could appeal against most applications for water rights and water classifications. Appeals were initially made to the Town and Country Planning Appeal Board (which was replaced by the Planning Tribunal in 1977).

- The *Town and Country Planning Act* and the *Water and Soil Conservation Act* were repealed in 1991 and replaced by the *Resource Management Act* which allowed third party rights of appeal for notified applications with no need to prove standing.

- The *Resource Management Act* does not restrict third party rights of appeal provided the resource consent was notified and the party made a submission. There is also the ability for original submitters to become parties to an appeal on that provision (s. 271A rights).

- Any party which did not make a submission but which '*represents some relevant aspect of the public interest*' has a right to be heard but must give at least ten days'notice and their standing may be challenged. Section 274 of the RMA 1991 gives standing to both incorporated and unincorporated groups representing an aspect of the public interest and, in practice, public interest groups are not prevented from

appearing. For plans and policies, which are all notified, third party rights of appeal are also allowed.

- The Minister for the Environment and any Local Authority can participate as of right on giving the requisite notice (s.274 *RMA 1991*).

- There is currently a 15-day time limit for lodging an appeal. This does not always allow sufficient opportunity for NGOs to submit appeals regarding Resource Consents and plans/policies. An Amendment Bill before Parliament at the time of writing proposes 30 working days. Time limits can be waived (s.281 *RMA 1991*).

- There is a fee of $55 for lodging any appeal (i.e. references and originating applications). It was introduced as part of the reforms in 1991 to '*placate the "user pays" brigade*'. This is considered to be very reasonable when compared with the costs of mediation, negotiation or a hearing.

- Third party appeals are treated in exactly the same manner as those originated by appellants, referrers or respondents, e.g. mediation, hearings, representation, witnesses and participation.

- The question of costs is different between cases involving appeals on plans or policies and resource consents. For plans and policies, it is very unusual for costs to be awarded (in fact there is only one case noted). Otherwise, costs lie where they fall. For Resource Consents, costs are often awarded against unsuccessful parties but there is evolving case law which provides:

  costs will not often be awarded against public interest representatives unless factors militating for costs are present. When those factors are present, the public interest factor may still reduce an award as the ***Peninsula Watchdog Group Inc v Waikato Regional Council*** *[1996] NZRMA 218 case shows.*

- Information from a Ministry for the Environment Survey states that, in 1999, the Court issued over 509 decisions and costs were awarded in a total of 50 (or 10% of) cases. Twenty-five cases concerned appeals on land use consents, three cases dealt with references on plans, 18 dealt with enforcement, declaration and abatement proceedings, and four cases concerned other matters. Of the 50 cases in which costs were awarded, two awards were made against community groups, 29 individuals, 14 companies, and seven councils. In some of the cases, individuals and companies were ordered to pay costs jointly. The effect of evolving case law may be illustrated by a comparison with the figures from 1995. The Court issued over 450 decisions and costs were awarded in 60 cases (community groups 11, individuals 31, companies 11, councils 8 and the Minister of Social Welfare 1). Again, in some of these cases the parties were ordered to pay jointly.

- All proceedings must be heard and determined as soon as practicable after they have been filed (s.272 RMA 1991). There is no fixed time limit. Generally, the court endeavours to issue its reserved judgements within three months of completion of the hearing. In practice, Resource Consent appeals tend to be heard more promptly than

appeals concerning plans.

- The Ministry for the Environment 1998/99 *Annual Survey of Local Authorities* found that during that year, 49,152 Resource Consents were processed and approximately 1% were appealed. Thirty-six percent of those were appealed by applicants only (177), 41% by submitters only (201) and 23% by both applicants and 'submitters' (those making submissions, i.e. third parties) (113).

- Of the appeals heard by the Court, 40% were upheld in their entirety, 42% were upheld with some conditions changed and 18% were overturned. The Royal Forest and Bird Protection Society of New Zealand Inc. estimates that approximately 50% of its third party appeals relating to Resource Consents are successful.

- There is a right of appeal from the Environment Court under s. 299 of the *RMA 1991*, but this is limited to points of law only. There are normally up to 12 cases a year. There can be a further appeal to the Court of Appeal with leave. There are usually three or four such appeals per year, concerning important questions of law of wide public interest. The Court's decisions are final and conclusive.

- It is difficult to estimate whether the number of third party appeals is rising, stable or falling. Whilst the number appears to be rising, this may alter when all the policy statements and plans are finalised (which will take some two or three years yet). A recently announced legal assistance scheme for the groups may also add to the numbers.

- There are thought to be three problems with the current provisions for third party appeals:

  (1) The number of Resource Consents that are non-notified. Approximately 95% of Consents are non-notified which means that there is no third party right of appeal. The only way to review this issue is by applying for judicial review;

  (2) The potential to have costs awarded against you is a significant barrier to environmental groups pursuing litigation under the *RMA 1991* (There is a Bill before Parliament which aims to address this issue, but its fate is uncertain at this stage); and

  (3) Up until now, it has not been possible for groups to obtain legal aid to cover the costs of legal expertise and expert witnesses. As Justice Salmon commented in a recent review of participation (NZJ Env Law 2, 1998):

  It is not uncommon to have the applicant with almost unlimited access to financial and other resources on one side, with a few individuals or a poorly funded community group or environmental organisation on the other. Were it not for the willingness of lawyers and other professionals over the years to give their services freely there would, in many cases, be no contest. Clearly, this is a highly undesirable situation when it comes to making decisions regarding the sustainable management of the Country's resources. (Justice Peter Salmon, *'Access to Environmental Justice 1997: 12'*).

The benefits and drawbacks of a third party right of appeal

- The system of third party rights is well entrenched in New Zealand law. While industry groups have criticised the *RMA 1991*, third party rights of appeal have not been called into question.

- A third party right of appeal is thought to be an essential part of any worthwhile environmental decision-making process. As the High Court said in ***Murray v Whakatane District Council*** [1997] NZRMA 433, 467:

  decisions about resource management are best informed by a participative process in which matters of legitimate concern under the Act can be ventilated.

And as the Environment Court said in the ***Peninsula Watchdog*** case:

We acknowledge the important part that voluntary associations can have in the processes under the RMA, particularly in testing the acceptability of claims by industry and developers about the extent to which their projects serve the promotion of sustainable management of natural and physical resources.

- The benefits in specifying that third parties must have made a previous submission on the policy, plan or application are that they will have participated in the first instance decision-making and that other parties will know about them and their position on the issue.

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Queensland, Australia

The current regime

- A third party right of appeal was present in Queensland as a result of the *Local Government (Planning & Environment) Act 1990* and retained in the *Integrated Planning Act 1997* (*IPA 1997*). The *IPA 1997* effects a substantial reform of development control and environmental protection in the State. It came fully into force on 30 March 1998 but there will be a lengthy transitional period as its provisions are implemented.

- The standing rules in Queensland are possibly the most liberal in Australia. There are third party rights of appeal against local planning decisions and a general right of access to the Planning and Environment Court (s.2.24 *IPA 1997*). Submitters to planning applications made to a local authority have the right to appeal (s.4.1.28 *IPA 1997*) or to be joined as respondents by election in an application appeal.

- The Planning and Environment Court has resisted attempts to narrow the statutory formula that '*any person may bring proceedings*' and has rejected the argument that applicants must demonstrate a special private right of interest in the proceedings.

- There is an important loophole, however, in the scheme of access to the court. There are no comparable third party rights under the Environmental Protection legislation. Whilst there is a provision in the legislation for such rights, the implementation of those sections has been delayed due to sectoral pressures which insist that this would adversely affect the development industry. In practice, the views of third parties are given by the Environment Agency, which calls local residents who are adversely affected by breaches of environmental licences as witnesses.

- A submitter for a development application may appeal to the Court about the granting of planning permission or the imposition (or otherwise) of conditions (s.4.1.28(1), *IPA 1997*).

- A written notice of appeal must be lodged with the Registrar of the Court within 20 business days (the 'submitter's appeal period') of the day of the decision notice being given to the submitter. Under the *Local Government (Planning and Environment) Act 1990*, a fee of some $20 Australian was required for lodging a written notice of appeal. The notice of appeal should specify:

  (1) whether the whole or part only of the decision is being appealed against;

  (2) the grounds of the appeal and the facts and circumstances to be relied upon; and

  (3) what judgement, order or other direction or decision the appellant seeks.

- Submitters may seek to join in an appeal as respondents by election in applicant appeals. In the case of ***Lewiac Pty Ltd v Errenmore Pty Ltd*** the Court held that it should use its powers to avoid there being a multiplicity of proceedings where substantially the same issues were in dispute.

- The *Uniform Civil Procedures Rules* permit the determination of matters on the basis of written representations, but only in certain narrowly prescribed circumstances. It is not, therefore, a general alternative to oral proceedings.

- The Court requires the submitter to carry the burden of proof (civil standard, i.e. on the balance of probabilities).

- In most cases the parties are legally represented. Whilst the Court has a reputation for being helpful to those who are not represented, it must also be careful of procedural fairness and the adversarial nature of the proceedings. In practice, this has implications for individuals/NGOs (see below).

- Parties are normally required to bear their own costs. However, the Court does have the power to make an award of costs in certain circumstances (s.6.1 *Local Government (Planning & Environment) Act 1990*). Whilst applications are frequently made for costs against unsuccessful applicants, costs awards are in practice limited to cases of '*frivolous or vexatious*' claims.

- The generality that parties bear their own costs is problematic for certain individuals and NGOs. Typical costs range from $3,000 – $4,000 per day for a QC, and from $1,200 – $2,000 for an experienced junior barrister. Solicitors' costs and expenses on expert evidence could push the cost to over $8,000 per day. For a five-day hearing, the costs may therefore total approximately $40,000 for legal fees alone. Whilst in theory it is possible for certain individuals to obtain legal aid for environmental matters, in reality funds are tightly rationed.

- In practice, therefore, the cost of the system is a major barrier to access to the Court. Although third parties will usually be protected from an award of the other side's costs (unless their behaviour has been grossly unreasonable) they will have to fund representation and expert evidence. Legal and expert fees at the level above may not be a problem for large developers, but may clearly discourage individuals and NGOs.

- A total of 496 cases were lodged in 1995 and a total of 423 in 1996, but the Court is unable to provide a breakdown by parties or issues.

- There are no published data relating to the time taken from the making of the application to the issuing of the final decision. A best estimate is approximately 18 weeks.

- The jurisdiction of the Court under the *IPA 1997* is absolute. Every determination of the Court is final and is not to be appealed against on merits in any Court. Appeals to the Court of Appeal are allowed only on points of law.

Proposed changes to the current regime

- Whilst not a change to the current regime, it is noted that the ***Integrated Planning Act 1997*** is more pro-development insofar as environmental considerations (e.g. Environmental Impact Assessment, etc.) are not as prominent as they were under the *Local Government (Planning and Environment) Act 1990*. The *IPA 1997* does, however, promote better co-ordination between local planning authorities, State Government Departments and NGOs.

The benefits and drawbacks of a third party right of appeal

- The benefit of a third party right of appeal is that it gives rise to a more robust planning system where decisions are based on a clear hierarchy of planning instruments – Statutory Instruments, Town Plans, Strategic Plans and Policies. Third parties have a clear framework in which to object and prepare a basis for appeal. Furthermore, individuals and NGOs have a greater 'say' in the development control process.

- One drawback of a liberal right of third party appeal is that it results in a very prescriptive planning system – hence the introduction of the *Integrated Planning Act 1997* as an attempt at a more performance-based system. Another problem is that the level of prescription in planning schemes may make it more difficult for members of the public (particularly those less familiar with the system) to participate in the decision-making process.

- On the whole, however, it was felt that the benefits outweigh the drawbacks and that a fair balance between cumbersome prescriptive plans and performance based systems is struck.

- The *Aarhus Convention* reinforces the case for a third party right of appeal, giving local residents and NGOs more power in the decision-making process and more 'say' in their right to enjoy their homes and neighbourhoods.

- The impact of a third party right of appeal can be summarised as follows:

  (1) an application that is approved despite objections must be thoroughly considered, with reasons for approval and representations on objectors' issues reported to a delegated decision-maker (Committee or Senior Officer);

  (2) an application that is refused must similarly be supported by a detailed description of how the scheme conflicts with specific provisions of the planning system.

Acknowledgements

The research team wishes to thank Mr Andrew Chamberlain, formerly Environmental Officer and Town Planner for Brisbane City Council. Factual information taken from Malcolm Grant's *Final Report on the Environmental Court Project* (DETR, 2000).

Third Party Rights of Appeal in Other Countries: Summary Table

	Republic of Ireland	Denmark	Sweden	New Zealand	Queensland Australia
Existence of third party right of appeal	Introduced in 1934. Retained in *Planning Act* 1963. Restricted in *Planning and Development Act 2000*	*Environmental Protection Act 1997* consolidates TPRA	Swedish Environmental Code 1998 consolidates TPRA	Introduced in 1953. Extended in 1977 and now virtually unrestricted under the *Resource Management Act (RMA) 1991*	Present in *Local Government (Planning & Environment) Act 1990* and retained in *Integrated Planning Act 1997*
Scope of decisions subject to third party right of appeal	Any planning decision of any planning authority	Decisions of local and regional councils	Decisions of county boards and other state authorities. Military installations exempt from TPRA	Any policy statement, plan or application for a notified resource consent (5% are notified)	Local planning decisions
Extent of third party right of appeal	*2000 Act* will restrict the right to the applicant and '*any person who made submissions or observations in writing*'	Can be made by '*any party having an individual, significant interest in the outcome of the case*' and specific organisations such as the Danish Society for Nature Conservation (s.98, *EPA 1997*)	*Environmental Code* has a uniform concept of material interest (any person who may be caused damage or exposed to other nuisance by the operation) plus organisations active in Sweden for the last three years and with at least 2,000 members	Applicants and any person who made a submission on a proposed policy statement, plan or application for a resource consent (s.120 *RMA 1991*)	A 'submitter' may appeal against the giving of development approval, including conditions imposed on it (s.4.1.28 *IPA 1997*)
Time limit for lodging third party appeal	Within one month (statutory time limit)	Within eight weeks	Unknown	Currently within 15 days (but 30 working days under consideration)	Within 20 business days

	Republic of Ireland	Denmark	Sweden	New Zealand	Queensland Australia
Fee for lodging third party appeal	£300 first party, £120 third party, £60 reduced fee for prescribed bodies (e.g. *An Taisce*). Approx. £20 objection fee (just introduced)	Fee payable for certain cases relating to waterways	Unknown	$55 for lodging notice of an appeal	A$20 under *Local Government (Planning & Environment) Act 1990*. Fee under *Integrated Planning Act 1997* unknown
Forum for third party appeal	Oral hearing or written reps depending on significance and complexity	First and third party appeals treated similarly	Normally oral hearing	Oral hearing. Court may invite parties to make written reps but this is unusual	Oral hearing (written reps in certain narrowly prescribed cases only)
Rights of appearance at third party appeal	Anyone can be an 'observer' for a fee of £30	Unknown	Unknown	Rights of appearance conferred on '*any person having any interest in the proceedings greater than the public generally*'	General right of access to the Court conferred by s.2.24 *IPA 1997*
Costs	Parties generally bear own costs	Awarded only in certain cases relating to waterways	Environmental organisations not entitled to reimbursement for their costs; nor are they liable to pay costs	Unusual for costs to be awarded in appeals re: plans. Otherwise, costs lie where they fall. Of the 509 decisions in 1999, costs were awarded in 50 (10% of cases): against community groups 2, individuals 29, companies 14, councils 7).	Parties generally bear own costs but the Court has the power to make an award of costs if parties act '*unreasonably*'

	Republic of Ireland	Denmark	Sweden	New Zealand	Queensland Australia
Time limit for disposing of appeals	Within 18 weeks	Unknown	Judgements must be issued within two months of completion of hearing	Guidelines specify 80% of cases to be completed within one year of filing	Average 18 weeks
Proportion of third party appeals to first party appeals	40% third party, 2% first and third party, 58% first party	Third party appeals comprise some 10% of the total	Unknown	In 1998/9, 491 (1%) Resource Consents appealed. Of those: 41% third party; 23% first and third party; 36% first party	Unknown
'Success rate' of third party appeals	In 1998/9: 25% decision reversed; 33% decision amended; 42% decision upheld	Approx 50% appeals submitted by DSCN 'successful' (i.e. original decision overturned)	Unknown	In 1998/9: 18% decision reversed; 42% decision amended; 40% decision upheld	Unknown
Trend in third party appeals	Slow increase in third party appeals	Thought to be increasing	Unknown	Thought to be stable or increasing	Unknown
Benefits	Equality; democracy in decision-making	Essential role for environmental 'watchdogs'	Unquantified	Third party rights an essential part of any worthwhile environmental decision-making process	Democracy; a more robust planning system; decisions based on a clear hierarchy of planning instruments
Drawbacks	Potential increase in delay	Potential increase in delay	Unquantified	None perceived. Low proportion of Resource Consents open to TPRA criticised	A more prescriptive and complex planning system

	Republic of Ireland	Denmark	Sweden	New Zealand	Queensland Australia
Do benefits outweigh the costs?	Yes	Yes		Yes	Yes
Improve-ments to the system?	*An Taisce* suggests abolition of objection fee and removal of requirement for previous involvement in the process	Remove political appointees from NPBA	Unknown	Bill before Parliament will extend time limit for lodging appeals from 15 to 30 days	
Implications of ECHR and *Aarhus*	Unknown. Current proposals under review by European Commission.	*Aarhus Convention* reinforces case for a restricted TPRA	Unknown	Not thought to be relevant	*Aarhus Convention* reinforces the case for a TPRA

Appendix 2: Attendance at a Seminar on Third Party Rights of Appeal

held at The Law Society, 1 May 2001

Sir Robert Carnwath, **Chairman**

Contributors

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Mr Richard Bate, Green Balance
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Professor Malcolm Grant, Cambridge University
Mr Robert McCracken QC, 2 Harcourt Buildings
Mr Christopher Shepley, Chief Planning Inspector
Mr Neil Sinden, ROOM
Sir Jeremy Sullivan
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CPRE exists to promote the beauty, tranquillity and diversity of rural England by encouraging the sustainable use of land and other natural resources in town and country.

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The Civic Trust aims to revive and foster civic pride and community co-operation through programmes and campaigns that substantially improve people's living environments in urban areas.

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The Environmental Law Foundation is a national charity that helps secure environmental justice for communities and individuals through a network of legal and technical experts.

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Friends of the Earth inspires solutions to environmental problems which make life better for people.

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The RSPB works for a healthy environment rich in birds and wildlife. It has over 1 million members throughout the UK. It is involved in planning policy development and deals with over 400 cases a year.

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WWF works to: conserve endangered species; protect endangered spaces; address global threats to the planet by seeking sustainable solutions for the benefit of people and nature.

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