

PE1534/F

CONSULTATION RESPONSE

Public Petitions Committee Petition PE01534: Equal Rights of Appeal in the Planning System

December 2014

PAS

PAS is an independent organisation which helps people in Scotland to understand and engage with the places they live in through advice, training, education and awareness raising, so that everyone has the power to create positive communities for the future.

PAS is a trusted, impartial organisation which inspires individuals to be aware of the planning process and their role within it, while raising awareness of the positive effect good planning can create for all. With over 20 years of experience, the expertise of our staff and associates and with a large network of volunteers inspires and empowers people across Scotland.

PAS is especially interested in planning policy and law; engagement and consultation; and in involving all of society in a transparent and equitable way with planning matters.

COMMENTS

PAS welcomes the opportunity to provide written evidence on this petition.

Introduction

PAS believes that any consideration of reforming planning appeal rights must be undertaken within a contextual understanding of the evolution and aims of the Scottish planning system, which was established in 1947 – and has evolved subsequently - within a set of unique social, political and economic circumstances. This statutory planning system is founded on the principle of removing the automatic right to develop property unless it is deemed, through the process of applying for planning permission, to be for the public good - as defined in development plans which are prepared in consultation with the public.

In fact, the 1947 Town and Country Planning Bill did not initially envisage any right of appeal, with the current applicant appeal rights introduced in an amendment only to compensate land owners for their loss of development rights. After the 1968 Skeffington Report, which was produced following two decades of comprehensive re-development in Great Britain, the right for all stakeholders, including members of the public, to participate in the development plan preparation process was established, introducing the beginnings of the concept of “front-loading” the planning system in the anticipation of early engagement leading to fewer objections later in the process. The Skeffington Report did not refer to existing rights to make representations on planning applications, however, and it was largely in the 1980s – when neighbour notification was introduced – that a raised awareness and culture of objecting to planning applications arose, arguably also in tandem with a rise in home ownership and an increased focus on the protection of private property rights.

More recently, the Planning etc (Scotland) Act 2006 and associated subsequent reforms enshrined “inclusiveness” and “front-loading” as key aims of the Scottish planning system, in the belief that early and effective engagement would lead to better outcomes and a less adversarial system. The greatest number of amendments made to the bill by the Scottish Parliament related to matters of inclusiveness and front-loading as the preferred response to the lobby at that time for a Third Party Right of Appeal (TPRA). This focus on inclusiveness and front-loading is the current context within which PAS interacts with the planning system, always from the perspective of promoting effective engagement, and more widely, informing people about their rights and responsibilities to be involved, thus promoting active citizenship.

With regard to the petition, PAS does not support introducing TPRA. This position is informed by the above understanding of the founding principles and evolution of the Scottish planning system, and is based on the six thematic perspectives set out below.

1. Purpose of planning and third party rights

The Scottish planning system is tasked with taking decisions about current and future land use. These decisions must be taken in the “public good” by elected and politically accountable representatives. Planning decision-making is inherently complex, often without a clear right or wrong answer, but it is a discretionary process under the scrutiny of the electorate and benchmarked by the provisions of the development plan. PAS believes there is generally a lack of awareness of this crucial context within which planning decisions must be made, reflected in the high number of ineligible planning complaints submitted to the SPSO.

The current applicant appeal right operates in the context described above as compensation for landowners’ loss of automatic development rights - at the time a

very radical intervention, and as an extra checking process that these rights have not unreasonably been denied. In contrast, TPRA has the potential to offer a right of review to a single aggrieved individual or interest group with no ownership interest in the land in question and who may be basing their reasoning on self-interest, rather than, as required by planning law, on material considerations, which have been established by legal precedent.

On this basis, if there is ever to be an argument for extending third party rights, there would have to be certainty that they were available to organisations which were democratically constituted and on behalf of a clear and democratic community interest. The risk, however, is that it could leave the door open for people to pursue non-planning interests, potentially at the expense of decisions being taken expeditiously in the public good and the planning system achieving sustainable development and the current Scottish Government's aim of sustainable economic growth.

In parliamentary stages of the 2006 Planning Bill a suggested amendment was that a limited "community right of notification" to Scottish Ministers, prior to any decision, could exist for recognised community bodies. Full TPRA was also raised as a further potential amendment in cases where the development plan was out of date. In the summing up of the stage 3 debate the lead minister stated that the proposals for both full TPRA and for community right of notification would not improve the quality of decision making, would add significant delays to the planning system, and would fail to give communities better social and environmental justice. Ultimately, these proposed amendments were withdrawn.

In terms of local democracy in Scotland, the only community group which could have been offered a right of notification is Community Councils - with their statutory role in the planning system. Whilst this right was never introduced, PAS remains concerned that there has been no further empowerment of Community Councils or improvement in local democracy since 2006 - many areas of Scotland no longer have an active Community Council and Community Council elections rarely take place. There is thus no comprehensive network of community organisations to facilitate such a community right of notification process or similar.

PAS believes that in other ways, it is possible for Community Councils to be empowered further within the parameters of the current planning system. By way of example, PAS is currently leading a [Charretteplus™](#) process on behalf of a Community Council and Community Development Trust who approached PAS and secured funding for the process.

It is also relevant to note here, with regard to the petition statement, that the right to judicial review available to all parties, while admittedly potentially very expensive, exists not as an alternative to planning appeal, but rather as a checking process that

planning decisions have been made legally, and also sets case law precedents which allow planning decision making to evolve.

2. Constitutional perspective

The constitutional context of any country informs how its planning system operates and, inherently, appeal rights. Thus, the USA, whose constitution prohibits any judgemental intervention in individual property rights, operates a “zoning” system not requiring applications for planning permission, and thus has no need for any right of appeal. Other European countries also operate similar zoning-type systems. In the Republic of Ireland, the existence of TPRA in a similar discretionary system to the UK systems is a result of the interpretation of citizen rights as expressed in its constitution at the time of the establishment of its planning system.

In Scotland, there are no constitutional constraints on the planning system and also on how people might use an equal right of appeal. Thus, the existence of current appeal rights must be seen only in terms of the compensation for loss of development rights and assessed against the Aarhus Convention and human rights legislation, both of which have identified the current planning system as sufficiently participatory.

3. “Frontloading” the planning system

The 2006 Act aims to create a more inclusive planning system through “front-loading” the process: encouraging more participation in the development plan process; increasing pre-application consultation obligations; and generally striving for better engagement in all aspects of planning. Actual reforms stemming from the 2006 Act relating to planning applications and appeals/local reviews were not introduced until August 2009, meaning that they have had only 5-6 years to settle in.

PAS does not believe that sufficient time has elapsed to allow the reforms stemming from the 2006 Act to have the chance of realising the “culture change” which the Scottish Government envisaged. It might be argued that enhancing late stage third party rights would force developers to engage better with communities, however this would represent engagement stemming from the top down rather than the genuine partnership approach which PAS advocates and the 2006 legislation intends.

PAS believes that it is important to continue to promote early involvement of communities in development plan preparation and, when appropriate, in discussion of planning proposals. Introduction of TPRA at this stage could be a threat to this happening as it may discourage people from engaging at the early stage in the knowledge that they can challenge any decision made by means of appeal. In particular, the requirement of the 2006 planning reforms for development plans to be

reviewed on a strict five yearly basis may well be a key factor in achieving better front-loading, but which has, as yet, to establish itself in terms of positive impacts.

An unintended outcome of the introduction of extending appeal rights would be that planning decisions become more centralised i.e. taken by Scottish Government officials, rather than at planning authority level, which again sits at odds with the 2006 planning reform aims of front-loading and decisions being taken at local level, and also undermines the position of the planning authority as a democratically elected body.

PAS has noted that the petitioner's organisation appears to have a particular concern about large scale development proposals with potentially significant impacts on neighbouring communities. In this regard, PAS is aware, anecdotally, of a level of dissatisfaction about the lack of opportunity for concerned individuals or community groups to express their views in person as part of the development plan examination process, as a result of the significant reduction in Public Local Inquiry and hearing procedures. PAS also considers that it would be beneficial to review the relatively scarce use of the statutory pre-determination hearing process for major and national development proposals. This was a further key opportunity introduced by the 2006 reforms for stakeholders who have made representations to present their case but which is often denied by the decision of the planning authority not to regard the proposal as a significant departure from the development plan.

4. Effective engagement

Engagement in planning is not easy - planning can be a complex and often emotive area with which to engage as an individual or community group. New skills have to be learned by all parties, confidence to undertake effective engagement at an appropriate level developed, and knowledge of opportunities to participate increased. Engagement on most development proposals tends to reveal varying levels of difference of opinion and still leaves the question of if and how the views of those who have not responded should be represented. Realisation of the aims of planning reforms introduced in 2009 are all predicated on achieving better public engagement in planning through effective engagement. PAS believes that there is a great deal of scope for planning professionals in all sectors to achieve a higher level of engagement at early stages of development plan preparation or development proposals. PAS has a particular focus on informing young people about their rights to engage with the planning system through our [education programmes](#) such as IMBY™ and Young Placemakers™.

Earlier this year PAS launched its engagement skills for planners programme – [SP=EED™ Verification](#) (based on the PAS guidance on effective engagement SP=EED™ (Successful Planning = Effective Engagement and Delivery). As the guidance outlines, if a genuine “partnership” approach between developers and other

stakeholders is to be achieved, developers will need – when appropriate – to be prepared to involve members of the public in the design process potentially via charrette-based processes such as PAS's [Charretteplus™](#) approach.

5. Mediation

Currently, there is no requirement for mediation to take place in any aspect of the planning system although it is an area of public life which can be emotive and adversarial. PAS believes that there is great potential for mediation to have a key role in the planning system and its potential scope should be re-examined and we note that it has already been established in public services such as education, health and more widely in employment law. In 2009, the report of a Scottish Government study into the potential role of mediation within the planning system was published, and several pilot case-studies ensued. However, since then there has been no obvious further progression. PAS believes that not only is there a clear role for mediation in next-door-neighbour type disputes but also in negotiations over master plans or larger land allocations within the development plan process.

6. Delays and additional costs

A further impact of introducing a third party right of appeal would be significant delays in the delivery of development – including community-led proposals, which are likely to become more and more common in the context of the Community Empowerment (Scotland) Bill and further land reform. In addition to delay there is the related further issue of potentially massive financial losses and legal costs where property purchase, lease option agreements and construction contracts are triggered by the issue of a planning consent as is normal practice in the development industry.

CONTACTS

PAS would be pleased to respond to any queries with regard to these representations and is always willing to take forward further research or training on any aspect of the subject which relates to the PAS's core business.

Petra Biberbach
Chief Executive

PAS: Background Information

PAS is an independent organisation that helps people in Scotland to understand and engage with the places they live in through advice, training, education and awareness raising, so that everyone has the power to create positive communities for the future.

Advice Service – PAS is the trusted body for anyone looking to understand the planning process and the places around them. We encourage active participation in planning and raise awareness in order to create positive change.

Training – PAS promotes education for all in the planning process, to encourage community engagement in creating positive places. With over 20 years of experience, the expertise of our staff and volunteers inspires and empowers people across Scotland.

Influencing Place – People and places make Scotland a unique and interesting country to live in. PAS is a trusted, impartial organisation which inspires individuals to be aware of the planning process and their role within it, while raising civic awareness of the positive effect good planning can create for all.

Education and Events – PAS runs events which raise awareness about community spaces. We believe that education and participation are key to enabling our communities to engage with the built places around them, and we support that process in schools, communities and in our nation's life.

Volunteer led – PAS services are delivered by a combination of associates, staff and a large volunteer network of more than 400 built environment professionals, including planners, architects, landscape architects and legal experts. Our personnel offer not only their time but share their professional skills in order to enable people to engage proactively with the planning system. Volunteering is at the heart of what we do.