Briefing

Friends of the Earth Cymru

Cyfeillion y Ddaear Cymru

Planning justice for Wales

The Case for a Third Party Right of Appeal in the Welsh Planning System

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Introduction

The planning system is one of the most important and controversial parts of local government. Planning decisions shape the future of localities for generations and have major environmental and social consequences. Too often these decisions deliberately exclude the voice of the local community.

The current planning system is heavily stacked in favour of the private sector developer who has the professional expertise and resources to dominate the local planning process. It is grossly unfair that those who apply for planning permission have a privileged right to appeal against a local council when their application is refused. Individuals and communities who object have no such right. This imbalance reinforces the impression of the planning system as closed, remote and interested only in reinforcing the power of those with substantial property interests.

Developments which involve real community participation are an asset to the regeneration of localities. But the planning system must also provide rights of redress when the decision-making process goes wrong. Friends of the Earth Cymru is determined to see a planning system which is fair, transparent and open to all sections of the community. Attempts to increase public participation in planning will fail unless backed by real rights of appeal for the public. The introduction of such rights is not just legally and administratively achievable but an ethical imperative.

This briefing gives an introduction to the planning system in Wales and explains why there is a pressing need for more rights of appeal in that system. It then sets out Friends of the Earth Cymru's policy on third party rights. It builds on research sponsored by a coalition of environmental, community and legal groups and offers a clearly defined and workable structure for the introduction of such rights.

The planning system in Wales

Until 1998 the Welsh planning system was broadly the same as in England. The majority of national planning policy guidance was issued jointly between the Welsh Office and the relevant Whitehall department. The 1998 Government of Wales Act gave responsibility for planning administration to the new National Assembly for Wales. The primary legislation for the structure of planning remains the Town and Country Planning Act 1990 (as amended by the Planning and Compensation Act of 1991).

Who has rights in planning?

Local authorities have powers to make decisions based on a statutory local plan. The final decision on a planning application is made by local politicians but based on the influential opinion of professional planning officers. The policy framework for decisions is necessarily complex but there is a tacit understanding that development should be allowed unless it would harm important interests.

If the applicant is refused permission then they may appeal to the Minister for the Environment who holds the delegated power of the National Assembly. Appeals are overseen by the Planning Inspectorate and heard either by public inquiries or through written representations. Ultimately the Planning Inspectorate can recommend to the Planning Decisions Committee of the Assembly (see box

1) whether to uphold or dismiss the appeal.

Box 1

The National Assembly's Planning Decision Committee comprises four Assembly Members (usually from across political parties) and is elected anew for each appeal or application (or group of appeals/applications). Members are selected from the Planning Decision Panel which comprises members of the Environment, Planning and Transport Committee.

The person who makes a planning application is referred to as the first party, the local authority is the second party and any individual, business or community group which objects to the application is the third party.

Third parties have no right of appeal when planning permission is granted. They may lodge a complaint with the local government ombudsman but even if this is upheld it cannot overturn the planning decision. They may also seek judicial review through the courts but this is extremely expensive and can only examine procedural issues.

Why doesn't the current system grant third party rights of appeal?

When the planning system was introduced in 1947 it nationalised the right to develop all land. This radical step had to be balanced with substantial compensation payments to landowners and by rights of appeal to protect the interests of property owners. Crucially it was assumed that:

- Democratically elected councillors would always act in the general public's interest.
- Professional planning officers would act to restrain politicians by ensuring a rational and impartial decision-making process.

Although, democratic accountability remains one of the most important principles in the planning process, experience has shown that the community needs additional safeguards to protect its legitimate interests. This is particularly important in an era when many feel excluded from the democratic process and mistrust professional advice. Additional safeguards are particular important in those cases where local authorities have a clear conflict of interest, and in those cases which involve large-scale and complex environmental impacts which challenge the expertise of planning officers.

The call for a qualified third party right of appeal has become stronger over the last twenty years and has been supported not just by environmental and community groups but by the legal profession, leading planning academics, House of Commons select committees and by a broad cross-section of political parties. In January 2002 a group of NGOs including Friends of the Earth, CPRE, RSPB and the Environmental Law Foundation published a major report which analysed the case for third party rights. The report concluded that there was a powerful argument for the introduction of such rights and that this could be achieved without undue administrative cost or delay. The proposals highlight the need to qualify the right of appeal to focus only on those with a legitimate interest in a case and only on those cases which have major environmental impacts or represent a conflict of interest for the local authority.

The need for third party rights of appeal in Wales

Currently in Wales there are two democratic safeguards on planning applications: the local planning authority (either a unitary authority or National Park Authority) and the National Assembly for Wales.

A safeguard on local authorities

A third party right of appeal has often been demanded because, since local government reorganisation in Wales, there have been a number of high profile cases of local authorities granting planning permission either to themselves or on land in which they have a financial interest. One stark example is that of John Bright High School in Llandudno, in which Conwy County Council granted itself permission to build a new school on a reclaimed tip, gasworks and incinerator site while giving permission to supermarket developers to build on the site of the old school – greatly increasing the price of the old council-owned school site. The National Assembly refused to call in the planning application despite repeated requests from local residents and campaigners.

A safeguard on the Assembly

Currently, the power to "call in" a planning application for consideration by the Assembly rests soleley in the hands of the Minister for Environment, Planning and Transport. The Minister is a member of the Assembly Government and is appointed by the First Minister. Just as a local authority may have an interest (either financial or political) in a planning application, so might the National Assembly, the Assembly Government or a range of Assembly Sponsored Public Bodies (ASPBs).

It is quite proper that the Assembly, either directly or through ASPBs, should do things which require planning permission. However, there will inevitably be times when the role of the Assembly as an agent for change in Wales will conflict, or at least appear to conflict, with its role as the the nation's ultimate planning authority.

There are numerous examples of controversial planning applications in Wales which were either made by, or publicly supported by, the Assembly or ASPBs. The Legend Court case study in Box 2 gives an example of a situation in which Assembly action would have been in opposition to the actions of its own Quango. This application was fully supported by an ASPB which was acting on instruction from its masters in Government (in this case a very old instruction from a previous Government).

The establishment of the Assembly Planning Decisions Committee was an welcome step in depoliticising planning decisions and provides an important check on the power of the Assembly Government. The decision to call in an application currently resides with the Minister alone. Given the role of the Assembly in encouraging development, doubts are bound to remain over the independence of Assembly Ministers in deciding whether to call in planning applications in the first place.

The provision of a qualified third party right of appeal would provide balance in the system which

would only benefit the transparent exercise of democracy and justice in the planning system.

Box 2

Legend Court Theme Park, Magor

In 1998, the company Legend Court submitted a planning application to Newport County Borough Council to build a major theme park on agricultural land near the M4 motorway. Residents and environmentalists objected on the grounds that such a theme park would massively increase traffic levels in an already congested area, and that construction would lead to a loss of wildlife and amenity in the area. Much debate around the application centred on the viability of the company's plans for the theme park. For advice, Newport Council turned to the Wales Tourist Board (WTB). The Board assured the local authority that it had examined the company's business plan and found it to be sound. However, on closer examination by Friends of the Earth Cymru, it emerged that the WTB had played a key role in advising the company on how it should write its plan. Indeed, the WTB was acting with the express intention of attracting a big theme park to Wales on the basis of a letter of direction it had received from John Redwood, Secretary of State for Wales in 1995.

Ryder Cup Golf Course Application

In June 2001, Newport Council approved an application for a golf course extension which theatened to damage the River Usk, a site designated as a Site of Special Scientific Interest (SSSI). The Usk is designated a candidate Special Area of Conservation (cSAC), under European Wildlife law for a number of species of rare fish and the plans threatened a vulnerable otter population. The golf course was to be extended in order to accommodate Wales' bid for the prestigious Ryder Cup Tournament in 2009. The application sparked controversy as local residents complained about the potential impact of traffic on their homes and wildlife groups objected that the plans could damage a wildlife site of international importance. It was no surprise to observers of Newport Council that the application for such a high profile development was approved by councillors. The town's plans to host the Ryder Cup were to play a central role in its bid to become a city in 2002. In such circumstances one might have expected the planning application to be called in by the National Assembly. However, the First Minister and Sports Minister of the Assembly had been vocal in their support for the Ryder Cup coming to the course. The application was supported by a range of ASPBs – it was considered a "Team Wales" effort to secure the Ryder Cup prize. The planning application was not "called in" for further scrutiny.

The proposals

Who can appeal?

Only those who have objected to the original planning application.

What kind of cases could be appealed?

- Applications where local authorities have a conflict of interest. These include: where they are the applicant, have an interest in a company applying for planning permission, where the local authority owns the land and has an interest in increasing its asset value and cases where the local authority will benefit from substantial capital payments through planning obligations.

- Cases where the local authority grants planning permission against its own development plan policy. In theory the public can participate in development plans and make objections at an early stage. Overturning the plan may undermine public involvement and therefore creates a need for a right of redress.

- Cases which have major environmental impacts. These cases are defined by the requirement for the submission of an environmental impact assessment.

- Cases where an officer has recommended refusal and elected members overturn this decision.

How will appeals be decided?

- There should be consultation with developers and third parties as to whether appeals should be heard through written representations or oral hearings.

Would there be a time limit?

- A third party would have 28 days from the decision to grant planning permission in which to lodge an appeal.

Would it cost anything to lodge an appeal?

- In order to limit trivial or vexatious appeals there would be a flat fee of £30 payable by a third party.

Would third parties be liable for costs?

- In principle, third parties should not be subject to unlimited costs as this would discourage anyone from lodging an appeal. No cost should apply to written representations but the planning inspector would have discretion to award costs to any party for unreasonable behaviour at an oral hearing.

Top five third party myths

"Third party rights would make the planning system grind to a halt."

The right of appeal described above would be limited to a very small number of all planning

applications (between 1-5%). Ordinary householder applications would not be subject to appeal rights.

"Third party rights would introduce a huge delay into the appeals process."

Third party rights may increase the number of appeals but because of the strict limitations the increase would not be dramatic. The efficiency and speed of the appeals process has increased considerably in recent years and there is no reason to think that third party challenges would create undue delay.

"Third party rights have proved disastrous elsewhere."

Third party rights have existed in the Republic of Ireland since the 1930s and are successfully administered in Denmark, Sweden, New Zealand and parts of Australia. The rights of appeal suggested in this briefing are in fact more conservative than in any of these other nations.

"Third party rights would be a charter for nimbyism"

Any third-party seeking to appeal would have to make a clear and convincing planning argument to persuade the Planning Inspectorate. Only those appeals with clear merit would be upheld. Third party rights provide an opportunity to test decisions: it does not give undue influence to local communities or individuals.

"Introducing third party rights undermines the role of democratically-elected councillors."

This briefing has made clear that third party rights of appeal would only apply in cases where a local authority and its elected members have a conflict of interest, or where additional safeguards are necessary because of the scale of the environmental impacts of the proposal. Elected members would still play a supremely influential role in the process and an inspector is always likely to be impressed by the legitimacy of their decision. It is also significant that many local politicians welcome the opportunity for controversial planning decisions to be tested in the more open environment of a public inquiry.

The benefits of third party rights

As well as the principled argument about fairness and justice, the introduction of third party rights would make a number of other positive contributions to the planning process:

- They would help re-engage communities with controversial planning decisions by demonstrating that they had a real and powerful role to play.

- The prospect of the detailed testing of decisions will improve their quality and legitimacy. In the Republic of Ireland some 25% of third party appeals were successful. In a further 33% of cases substantial modifications to schemes were made before approval. Third party rights not only safeguard communities from bad decisions, they can also improve schemes for the benefit of the whole community.

The Human Rights Act and the Aarhus Convention

The HRA 1998 and the Aarhus Convention both provide for rights to a fair hearing, due process and public participation. The legal position is not yet clear whether a third party right of appeal is a requirement of these provisions. The introduction of qualified third party rights of appeal now will avoid costly legal challenges and uncertainty in the future and would achieve the objective of equal rights and fairness.

Legislative implications

In order to introduce a third party right of appeal it would be necessary to make changes to primary legislation either by a simple amendment to existing law or by enshrining the rights in a new planning bill. The Welsh Assembly's consultation document 'Planning: Delivering for Wales' acknowledges the need for a Welsh planning bill to make necessary changes to the existing system. This would be dependent on UK Parliamentary time but its introduction represents a real opportunity to introduce a third party right of appeal.

Conclusion

The introduction of a third party right of appeal is central to achieving a fair, open and modern planning system for Wales. The proposals contained in this briefing are sensible, modest and workable, striking the right balance between the need for civil rights and the need to limit such rights to those cases where the safeguards of democratic accountability are inadequate. Establishment of a third party right of appeal would balance the rights of local communities with the rights of developers in the appeals system.

The campaign to introduce such rights will be a litmus test of the National Assembly's commitment to a progressive and equitable planning system. We cannot go on supporting a process in which the ownership of property confers privileged civil rights. Such a position is a political anachronism more fitting to the eighteenth century than the twenty first.

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