

The Case for Third Party Planning Appeals in Wales

A paper prepared for petitioner Emma Eynon

by

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Executive Summary

This is a report into the case for the reform of an aspect of Welsh planning law prepared for Emma Eynon, the petitioner, whose petition calling for the introduction of third party planning appeals was accepted by the Welsh Assembly Petitions Committee, at its meeting on 23 October 2018.

The case for and against the introduction of third party rights in this field has been debated extensively at a United Kingdom-wide level, and also within devolved nations. In its report in 2012 on the development of a distinctively Welsh planning regulatory regime, the Independent Advisory Group (IAG) rejected the case for third party appeals. The IAG considered that third party rights would create excessive administrative burdens, would slow the development control process, and would not benefit the sections of the community whose views are seldom heard. Thus, under the Planning (Wales) Act 2015, provision is made solely for first party rights of appeal, by an applicant who is refused planning permission, or granted it on terms to which they object.

The petitioner's case for reform is based, first, on the experience of the 2015 regime in operation, and second, recent changes in the broader legal architecture relating to Welsh planning and environmental law, which implement a values-based approach to decision making. The most pertinent value for purposes of the petitioner's case is access to justice in environmental matters.

The petitioner recognises that planning authorities are working within extremely challenging financial constraints. This report makes the case for third party appeals as a cost-effective way of improving regulation. The reform which we propose will, if implemented, enhance public understanding, respect, trust and acceptance of planning decisions, by treating the voice of objectors as equal to that of applicants. The reform will also have the wider benefit of building on the Well-Being of Future Generations (Wales) Act 2015 and the Environment (Wales) Act 2016. Third party planning appeals would reinforce Wales' growing reputation as leaders in values-based environmental policy and law.

The Petition

The Welsh Assembly Petitions Committee agreed, on 23 October 2018, to accept the petition in the name of Emma Eynon, calling for the introduction of third party rights of appeal against the grant of planning permission.

Members of the Committee expressed sympathy with the petitioner's concern that the Welsh planning regime (under the Planning (Wales) Act 2015) unduly favours the applicant at the expense of objectors, by confining rights of appeal to the applicant (the first party). Under the current law the applicant has a right of appeal against the refusal of permission by the planning authority, to the Welsh Minister, but objectors have only the procedure of judicial review, which is not a merits-based appeal, and it is *judicial* (making it often prohibitively expensive).

The Committee noted that the case for third party appeals was considered in the course of the enactment of the 2015 Act. In particular, the Independent Advisory Group (IAG), in its report 2012 (paragraph 3.45) stated that:

a significant change [to third party rights] risks overburdening the system and shifting resources away from decision and plan making...We do not consider that a third party appeal right would benefit those sections of the community who are traditionally seldom heard.

The 2015 Act implemented this.

The effect of the Petition Committee's decision is to re-open the issue for debate. This report is a contribution to that debate. The case in support of reform draws upon recent development in formal law in Wales and recent experience of its implementation. These developments, the authors argue, shift the balance in favour of reform.

Structure of the Report

As the case for reform cannot be divorced from understanding of the reasons why the system is as it is, the report begins with a summary of the reasons why third party rights are not currently conferred anywhere in the UK. The analysis thus starts with the case *against* third party rights. Attention is then given to the case that is advanced within the UK generally in favour of reform, without looking at specifically Welsh issues arising from Welsh law and practice. The report will end by tailoring the general case for reform in a way that is specific to Wales.

The Case against Third Party Rights of Appeal

Lesley Griffiths, Cabinet Secretary for Energy, Planning and Rural Affairs, stated in an open letter dated 25 September 2018 that 'no persuasive evidence has emerged to suggest the

introduction of a third party right of appeal would be a step forward or an improvement in the planning system.'

The case against can be summarized under six main headings.

Costs and delay

Increased third party rights will delay the speed of planning decisions and will increase costs

Adequate alternatives to Third Party Appeals

Internal review by the planning authority

Call in powers of the Secretary of State

Judicial review

Ombudsman in respect of maladministration

Presumption in favour of (sustainable) development

Third party rights would water down the presumption in favour of development- a fundamental principle of planning law for 80 years.

Representative democracy

Local and central planning authorities represent the public interest.

Third party rights weaken the representative nature of local (and central government) democracy and decision making by transferring power away from elect members of local (and central) government to the public. This weakens the legitimacy and quality of decisions and reduces accountability in the planning system.

Planning permission does not affect the property rights of neighbours

Third parties are not losing rights of development as land owners are. Third party rights are an affront on traditional property rights.

NIMBYism

The likely beneficiaries of increased third party rights are more likely to be the more affluent sectors of society with the knowledge and money to assert their rights. Potential to open the floodgates to frivolous or vexatious requests and unduly delay development to alleviate the social housing crisis. Potential to exacerbate social inequality.

Case for third party rights of appeal

Access to justice

Lack of justice and unfairness in the procedures for participation in planning - developers may appeal against refusal whereas third parties cannot appeal against approval. Objectors thus get inferior administrative justice than the developer.

Better administration

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.

Some other countries with advanced democratic planning systems have third party rights of appeal which are reported as having led to better decisions. For instance, in Ireland, third party appeals ensure the good quality of the planning decisions. From the data in 2004, 60% of approximately 1,600 third party appeals formally decided by the Planning Board resulted in refusal of permission. The high percentage of third party appeals that result in a refusal of planning permission suggests that most appeals are made on very strong grounds for the original planning decision to be overturned. Third party appeals ensure the good quality of planning decisions in Ireland.

Third party appeals will not open the floodgates

The right should be concentrated on circumstances where the scope for perceived unfairness or inadequacy in the current arrangements is most obvious. 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.

In this way the role of local planning authorities would not be undermined by indiscriminately opening all their decisions to further review without good cause. There would be little or no undue delay for developments and little or no increase in the financial risk faced by investors, without good cause. The Planning Inspectorate would not suddenly be burdened with a flood of new case work.

The right to appeal could be limited in a number of ways, restricting the right :

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

- B. Where a decision by a local planning authority is not in accordance with the views expressed by a statutory consultee (eg. Natural Resources Wales), that body should have a right of appeal on merits.
- C. When a development is approved contrary to the provisions of an adopted development plan. 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.
- D. Where local authorities have granted approval for their own developments or for those in which they have an interest (e.g. as landowner or investor). There is already a strong case for 'removing temptation' by removing the power of local authorities to approve development in such cases, but, in the absence of such a change there is a strong case for third party rights of appeal.
- E. Where developments are distinctly 'major' in some way. 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 development, but also according to the sensitivity of the development's local context.

Additionally, the Welsh Minister should make it clear that he/she will legislate if necessary to prevent abuse of the right to appeal by third parties who seek simply to delay development, to gain commercial advantage, to secure benefits from a developer to return for the withdrawal of an appeal, or to gain publicity.

Third party appeals do not increase cost

Many perceived costs could be significantly reduced, eg by the use of written representations. If the system is designed well, it will result in higher quality applications and greater levels of public participation at an earlier stage, with appeals only used as a last resort. Further, any costs are incurred in the first few weeks of evaluating a development, while the better quality of development arising from appeals is a benefit enjoyed over decades.

Third party appeals do not hinder economic development

Arguably, one of the major concern is that appeals can potentially hinder economic development. However, the average GDP of Ireland, Sweden, Australia and New Zealand, all countries that allow third party appeals, have, for the past nearly twenty years, been greater than that of the UK (World Bank, 2018). Evidence from regimes where third party appeal has been introduced shows that it has served mainly to improve the conditions attached to consents. What is worth mentioning, is that, in Ireland, almost 60% of appeals led to revised conditions in 1999 and 2000, enhancing their public benefit, but not blocking development.

Wales-specific Case for Reform

In *The State of the UK Environmental Legislation 2011: Is There a Case for Reform*, the United Kingdom Environmental Law Association commented on a 'desire to create distinctive legislation' in Wales.

This has found expression in the Well Being of Future Generations (Wales) Act 2015, and the Environment (Wales) Act 2016. Both are aimed at implementing a 'values-based' approach to environmental protection. The 2016 provides for the overarching value of Welsh environmental policy and law being the 'sustainable management of natural resources'. This is different 'sustainable development' under paragraph 14 of the National Planning Policy Framework, in the sense that the emphasis is not on development, but management. Section 4 of the Environment Act sets out the 'principles' of sustainable management.

Aspects of section 4 to highlight are:

Section 4 (a), which refers to 'planning, reviewing...and changing action'

Section 4(c), which refers to 'collaboration and co-operation'

Section 4(d), which is 'to make appropriate arrangements for public participation in decision making'

The Well Being of Future Generations (Wales) Act 2015 provides for 'well-being goals', defined in section 4. The petitioner's advocated reforms would promote a number of them, in particular:

'A more equal Wales'

'A Wales of Cohesive Communities'

'A Wales of Vibrant Culture'.

Emma Eynon's concern is that planning regulation currently fails to deliver on these values, principles and goals. She is not alone. She is part of a local community which has organised itself into a community group to promote neighbourhood well-being (the Blaengwrach Community Action Group). She believes that the grant of planning permission in her area, on appeal, and against the wishes of the local authority which opposed the development, highlights that 'the legal system is stacked in favour of the developers'. As a consequence she fears that her country is 'losing heritage and culture, in favour of bigger, templated residential areas.'

Conclusion

The introduction of third party appeals would address the concerns outlined by Emma Eynon, which are felt increasingly around Wales, and to which the recent legal architecture is a

imaginative and pioneering response. Third party appeals, if introduced, would enable people directly affected by a development to put their case, on equal footing to the developer. Although allowing third party appeals would appear to risk slowing the planning process down, the benefits would be overall to improve decisions, and to create a decision making process that is just, fair, inclusive and equitable.

Appendix: About the Authors

The Cardiff Environmental Law Foundation Clinic is run by students working under the supervision of academic staff at Cardiff University, and the access to environmental justice charity the Environmental Law Foundation. For more details on the collaboration between the Cardiff Law School and the Environmental Law Foundation, see <https://elflaw.org/>.

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