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.

CPRE, 25 Buckingham Palace Road, London SW1W 0PP
Tel: 020 7976 6433 *Fax:* 020 7976 6373 www.cpre.org.uk *Email:* info@cpre.org.uk

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.

Civic Trust, 17 Carlton House Terrace, London SW1Y 5AW
Tel: 020 7930 0914 *Fax:* 020 7321 0180 www.civictrust.org.uk *Email:* pride@civictrust.org.uk

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.

Environmental Law Foundation, Suite 309, 16 Baldwins Gardens, London EC1N 7RJ
Tel: 020 7404 1030 *Fax:* 020 7404 1032 www.elflaw.org *E-mail:* info@elflaw.org

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

Friends of the Earth, 26-28 Underwood Street, London N1 7JQ
Tel: 020 7490 1555 *Fax:* 020 7490 0881 www.foe.co.uk *Email:* info@foe.co.uk

ROOM (the National Council for Housing and Planning) aims to improve the contribution of planning and housing to the social, economic and physical regeneration of local communities.

ROOM, 14 Old Street, London EC1V 9BH
Tel: 020 7251 2363 *Fax:* 020 7608 2830 www.room.org.uk *Email:* mail@room.org.uk

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.

RSPB, The Lodge, Sandy, Bedfordshire SG19 2DL
Tel: 01767 680551 *Fax:* 01767 692365 www.rspb.org.uk
Email: mark.southgate@rspb.org.uk

The TCPA campaigns for the reform of the UK's planning system to make it more responsive to people's needs and aspirations and to promote sustainable development.

Town & Country Planning Association, 17 Carlton House Terrace, London SW1Y 5AS
Tel: 020 7930 8903 *Fax:* 020 7930 3280 www: tcpa.org.uk *Email:* tcpa@tcpa.org.uk

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.

WWF-UK, Panda House, Weyside Park, Godalming, Surrey GU7 1XR
Tel: 01483 426444 *Fax:* 01483 426409 www.wwf.org.uk *Email:* infor@wwf.org.uk

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Third Party Rights of Appeal in Planning

Summary

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

Summary

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

by
Green Balance
Leigh Day & Co Solicitors
John Popham
Professor Michael Purdue

January 2002

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 themselves, 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.