THE INDEPENDENT AND LAW REFORM COMMITTEE ESSAY COMPETITION 2004

TITLE:

THE UK PLANNING SYSTEM SHOULD BE CHANGED TO ALLOW THIRD PARTIES THE RIGHT TO APPEAL AGAINST THE GRANTING OF PLANNING PERMISSION

By Conrad Purcell

The current state of the law surrounding third party rights of appeal in the planning system is a good example of what can happen when a combination of good intention and political reality combine to produce a situation which nobody would choose. The subject of this essay is the planning control system that exists today in England and Wales with regard to the rights of third parties, specifically, whether third parties should have the right to appeal against the granting of planning permission. This essay will conclude that they should.

In planning development control nomenclature the 'first party' is the one applying for planning permission. The 'second party' is the local authority and anyone else who is affected by the development in question is a 'third party'. The current system is largely the product of the *Town and Country Planning Act 1947* ('the 1947 Act'), which brought about great changes to the planning system when it came into effect in 1948. The 1947 Act created a system for planning under which for the first time planning authorities could refuse the owner of land planning permission and not have to pay him compensation. It is interesting to note that the right to compensation in those circumstances still exists in the USA. The 1947 Act heralded a great reduction in rights for landowners, and created the distinction between land with planning permission and land without planning permission for the first time. The fact that certain landowners now had land with planning permission whilst others did not, changed the market in land drastically. It meant that some land was much more valuable than it had been while some became less valuable depending upon whether or not it had planning permission. This resulted in the creation of windfall profits for certain landowners, although that was not what had been intended. The original plan was for the government to take all of the development value of the land across the country and provide landowners with compensation on an *ex gratia* basis. This did not happen, not least because the Labour Party was deprived of office in 1951[1]. The 1947 Act was clearly radical as it deprived landowners of rights, and it was as a concession to those landowners that a right of appeal was included in the 1947 Act. This meant that if a first party was deprived of his historic

right to develop his land by a second party he would have the right to appeal to the Secretary of State whose department was in charge of planning (currently the Office of the Deputy Prime Minister 'ODPM'). The result of this has been that the right to appeal became seen as an 'attribute of the right of property'[2]. Given the history of an individual's rights over his own property, in England and Wales, which has always allowed for a presumption in favour of development,[3] it is possible to see why no rights attach to third parties who wish to block planning permission from being taken up by a first party who has been awarded it.

The diagram in appendix 1 shows the planning system as it is now, with the change I have proposed added to it as a dotted line representing a third party right to appeal. The law is something of a moving target in this area because the *Planning and Compulsory Purchase Act 2004* (the '2004 Act') has recently completed its 18 month passage through Parliament and will come into force on a piecemeal basis, through secondary legislation from the 13th of July 2004 onwards. The 2004 Act does change the planning system quite fundamentally, removing many of the powers of the Local Planning Authority ('LPA') and creating new Regional Planning Boards as well as other structural changes to the system. Nevertheless the 2004 Act can be ignored for the purpose of this essay as it does not change a third party's right to appeal.

The question of whether there should be third party rights of appeal was addressed by the Government when discussing the Planning Green Paper in December 2001, but they rejected the need for a third party right of appeal on the basis that 'such rights would not be consistent with the UK's democratically accountable system of planning, where elected councillors represent the community'[4]. The fact that the 2004 Act has almost totally restructured the planning system and has not created a third party right of appeal

---

[1] Barclay, Christopher, *Third Party Rights of Appeal in Planning*, London, House of Commons Library, 2002, p13
[2] Green Balance & ors, *Third Party Rights of Appeal in Planning*, London, Council for the Protection of Rural England & ors, 2002, p22
[3] See the dictum of Lord Hoffman in the case of *Tesco Stores v Secretary of State for the Environment [1995] JPL 581 at 595*.
[4] Barclay, Christopher, *Third Party Rights of Appeal in Planning*, London, House of Commons Library, 2002, p14

means that it is unlikely to happen for some time in the UK, at least under the current Government. Nevertheless the principles which support the introduction of a third party right of appeal remain unchanged despite the introduction of the 2004 Act and I shall discuss them under the regime, that is currently in force. The right of a third party to appeal against a decision made by an emanation of the State is not what opponents of a third party right of appeal dispute *per se*, rather they say that it is not possible to have such a right under the current system, and cite a number of reasons for that as I shall show below.

I believe that if I can establish that a right of appeal is desirable in principle, then it should be possible to devise a system within which the right of a third party to appeal against the grant of planning permission by an LPA is possible, without the right being abused. Few people would argue that this right is desirable, in the same way that few would argue against the right of a person to bring Judicial Review 'JR' proceedings against an emanation of the State if they had evidence of maladministration for example, and JR is essentially a right to question the propriety of a decision or action of a public body by asking a Judge to investigate the actions of the public body and review them.
Whilst it is true that JR is already an option which is available to any third party who objects to the grant of planning permission, but it is a blunt tool and does not challenge the substance of an LPA's decision, it examines the whether there was impropriety rather than re-taking the decision for the LPA, whilst creating the possibility that the party bringing an action for JR will be lumbered with the LPA's costs if they lose. As well as JR being a blunt and ineffective tool for planning appeals, it seems instinctively unjust for a first party to have a right to appeal a decision of an LPA which a third party does not have. The result of this situation is that the first party can apply for JR if they choose to but have the added option of appealing an LPA decision if they choose to, whilst the third party has only got the option of JR. One reason often given by way of a justification for this state of affairs is that the first party is losing something when planning permission is not granted, since he should have a right to build on his land[5], whereas a third party

[5] Green Balance & ors, *Third Party Rights of Appeal in Planning*, London, Council for the Protection of Rural England & ors, 2002, p22

loses nothing if permission is granted. I reject this, since someone who lives close to a development and as a result suffers from increased noise, traffic and congestion etc. does lose something. I do not think that there is therefore any fair objection to a right of third parties to appeal against an LPA decision *in principle*, and it may be because of this that the Government's objections to a third party right of appeal seem to revolve around the practicality of preventing abuse of such a right. If a third party right of appeal did exist, it would have to be constrained to some degree, as otherwise anyone who wanted to disrupt or prevent development would be able to do so regardless of whether their appeal raised a legitimate question over the granting of planning permission or was simply frivolous or vexatious. A research project[6] commissioned by a group of charities and pressure groups, and carried out by independent researchers, on the subject of third party rights of appeal suggested a number of constraints which should be applied to a third party right of appeal. When the Government considered the introduction of a third party right of appeal in 2001 it rejected the introduction of such a right even with these restrictions.[7] I shall deal with the points made by the Government and show how in each case their reasons do not provide a convincing argument against the introduction of a third party right of appeal.

Firstly it was suggested that there should be a third party right of appeal in situations where an LPA has granted planning permission to a development which is outside an adopted development plan. This would seem to be one of the best reasons for an appeal since the argument that councillors who have been elected by the public to represent us and therefore have a democratic mandate for their actions does not apply, since the planning permission they have approved falls outside the development plan mandated by the public and as such they have acted outside of that jurisdiction. The reasons given by the Government for rejecting a right of appeal in these so called 'departure applications' was that many proposals could contain minor departures and that defining what a significant departure was would not be possible without a stream of litigation slowing

[6] Green Balance & ors, *Third Party Rights of Appeal in Planning*, London, Council for the Protection of Rural England & ors, 2002
[7] Barclay, Christopher, *Third Party Rights of Appeal in Planning*, London, House of Commons Library, 2002, p14

down the planning system which could not be tolerated[8]. They seem to have failed to spot that article 8 of the General Development Procedure Order 1995 already requires LPAs to be able to identify departure applications[9] so it is simply wrong to say that it would not be possible to have a third party right of appeal because it is impossible to identify departure applications. Currently the only option available to third parties who wish to oppose developments which have been granted permission outside the development plan is to seek JR, which in addition to being an expensive and risky way of preventing someone from imposing a development on them, sets a very high threshold for anyone attempting to have an LPA's decision overturned. JR will address the question, 'was the LPA's decision so unreasonable that no reasonable LPA could ever have come to it?[10]' and an LPA can grant a planning permission which is not in accordance with the local development plan and it still not be sufficiently unreasonable for the hurdle set in the test above to be crossed. This means that a gap can appear between the implementation of Government policy and the local development plan on the one hand and a lack of any right of appeal or redress on the other.

The second ground on which is was suggested that there should be a right of appeal was in the case of planning permission being given for major projects to go ahead.[11] Where developments are a sensitive issue as well as being above a certain size, such as development on the 'green belt' around London or in other environmentally sensitive sites such as Sites of Special Scientific Interest (SSSI), National Parks, Conservation Areas, floodplains and Most Versatile Farmland a right of appeal should exist if LPAs grant planning permission and the people who will be most affected by it are opposed to it. This is not tantamount to saying that the rules for granting planning permission should

[8] Barclay, Christopher, *Third Party Rights of Appeal in Planning*, London, House of Commons Library, 2002, p14

[9] Green Balance & ors, *Third Party Rights of Appeal in Planning*, London, Council for the Protection of Rural England & ors, 2002, p32, *Article 17* of the *General Development Procedure Order 1995* allows the Secretary of State to issue Directions on the handling of development not in accordance with the development plan. *Circular 07/99 Town and Country Planning (Development Plans and Consultation)(Departures) Direction 1999* makes detailed provision.

[10] *Per* the *dicta* of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1KB 223*, a more recent statement is contained in *R v Secretary of State for the Home Department, ex parte Brind [1991] 1 AC 696, 757 per* Lord Ackner.

be changed, they are a separate matter, and the right of third parties to appeal would not affect the process of deciding whether or not planning permission should be granted. The Government rejected a right of appeal for third parties in these cases because it might delay investment[12]. This is a fatuous argument since any kind of scrutiny may delay development, but that does not mean that it should not take place. If a large development is being planned, the fact that planning permission given to it may be scrutinised by an appeal panel is unlikely to prevent it from going ahead, if the planning permission was legitimately given. There are for example large scale development in other countries which do have third party rights of appeal such as the Republic of Ireland, Denmark, Sweden, New Zealand and Queensland Australia.

The third ground for appeal should exist where an officer of an LPA makes a recommendation to reject an application which is ignored by councillors. The Government rejected the proposal on the basis that it went to the heart of the democratic process that a body of elected councillors should have the power to reject their officer's recommendations so it should not allow third parties to appeal against their decisions. It is accepted that councillors should be allowed to reject a council officer's recommendations, but that is not the same thing as saying that one may not question that decision. After all JR is still allowed of an elected councillor's decisions, and first parties who make applications are allowed to appeal against them, so if the democratic process is not undermined by first party appeals, it seems a little selective for it to be unseated by third party appeals. I do not accept the Government's arguments, and since we no longer live in the 1940s[13] (when the public seems to have had less of a voice with regard to landowners rights) anyone affected by a development should have the same rights of appeal as the first party who applied for the permission.

The fourth situation in which a right of appeal is proposed is one where the local authority grants planning permission to an applicant for a proposed development in which

---

[11] Green Balance & ors, *Third Party Rights of Appeal in Planning*, London, Council for the Protection of Rural England & ors, 2002, p34

[12] Barclay, Christopher, *Third Party Rights of Appeal in Planning*, London, House of Commons Library, 2002, p14

it has an interest itself. These cases allow for temptation to grant permission which should not be granted, and where a case arises in which the LPA has an interest more needs to be done to ensure that permission is only granted where it ought to be. The Government rejecting this as a ground on which to appeal saying that local authorities often have to take decisions in cases where they have a dual interest and that there are strict rules which will prevent any impropriety. I am not convinced that this is enough and would cite the example of a Local Plan inquiry which took place in Newbury, West Berkshire in February 1998. At this inquiry the Liberal Democrat controlled council allowed a large development company called Trencherwood Homes Ltd to pay for its barrister and expert witness[14] at a supposedly impartial inquiry aimed at finding the best location for future development. This was while Trencherwood Homes Ltd was proposing a development of 1700 new homes at the same inquiry. This blatant conflict of interest was only spotted when a lawyer for another developer had a moment of inspiration and asked the council who was paying for its advisors and they had to admit it was Trencherwood Homes Ltd.

For the reasons cited above I conclude that a third party right of appeal should be provided as long as it can prevent vexatious claims. This can be done and it is already in place in several other countries[15]. This right of appeal should be available to those people who have *valid*[16] objections to a grant of planning permission and have a reasonable prospect of succeeding with their appeal, which is a test already applied by the courts to cases where permission is sought in other matters. The developers whose planning permission was correctly granted have nothing to fear from this system as it is not proposed that the criteria for granting it are changed only that those affected by it have the right to appeal against planning permission which should never have been granted in the first place. A compelling reason for having an appeals system which is accessible to

[13] The 1940's was when the 1947 Act was drafted, which gave us our current system.
[14] Monbiot, George, *Captive State The Corporate Takeover of Britain*, London, Macmillan, 2000, p136-137
[15] Including the Republic of Ireland, Denmark, Sweden, New Zealand and Queensland Australia see Green Balance & ors, *Third Party Rights of Appeal in Planning*, London, Council for the Protection of Rural England & ors, 2002, p80.
[16] Validity can be assessed by insisting that the person bringing the appeal must; a) be affected by the development, b) have already raised his objections to the LPA when the initial application for planning permission was made & c) bring an appeal which falls into the permitted categories of appeal.

both first parties and third parties is that it forces LPAs to account for their decisions and will result in better decisions being taken by them. At present LPAs are not forced to account for their decisions except in the rare case of a JR action. This means that if they face any pressure from first party developers they can give in and grant planning permission knowing that it will very likely be the end of the matter. Pressure from developers can be enormous since any LPA which rejects a first party application can be threatened by them with an appeal against the LPA's decision, forcing it to defend itself, often at great expense and many LPA's can ill afford such a legal battle. This pressure combined with the associated benefits which can accompany a development know as 'section 106' offerings, (as they are derived from *s106* of the *Town and Country Planning Act 1990*,) which a poor LPA could well do with, can swing a decision a developers way. An example may be the decision to sell a school playing field which 'can have a significant impact upon the local authority's finances'.[17] This is one more reason why a third party right of appeal should exist, since an LPA which granted a first party planning permission because it was placed under pressure to do so, or was 'selling' planning permission to developers who made s 106 offerings it could not afford to turn down, would be exposed when the decision was appealed. The right to appeal should principally be granted in the four circumstances described above, i.e. where an LPA departs from a local development plan to a significant degree in granting planning permission. Where permission is sought for a major project or a project in a sensitive area as defined by a set of criteria so that it is limited to what is commonly understood to be a major project. Where councillors reject their own officers recommendations and where the LPA has an interest in the proposed development, and is effectively a judge in its own cause.

[17] Royal Commission on Environmental Pollution, *Twenty-third Report, Environmental Planning*, UK, HMSO, 2002, p74

Bibliography:

1. Barclay, Christopher, *Third Party Rights of Appeal in Planning*, London, House of Commons Library, 22/05/2002.
2. Green Balance, Leigh Day & Co Solicitors, Popham, John, Purdue, Michael, *Third Party Rights of Appeal in Planning*, London, 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, January 2002.
3. Monbiot, George, *Captive State The Corporate Takeover of Britain,* London, Macmillan, 2000.
4. Royal Commission on Environmental Pollution, *Twenty-third Report, Environmental Planning*, UK, HMSO, 2002.