

# Equal rights of appeal and access to justice in Scotland

## Joint briefing, August 2022

### Introduction

The Environmental Rights Centre for Scotland (ERCS) was established in January 2020. We assist the public and civil society to understand and exercise their rights in environmental law and to protect the environment. We carry out advocacy in policy and law reform<sup>1</sup> to improve environmental rights and compliance with the Aarhus Convention on access to information, public participation in decision-making, and access to justice on environmental matters.<sup>2</sup>

Planning Democracy is a community-led organisation campaigning to strengthen the voice and influence of the public in the planning and development of Scotland's land. We aim to deepen democratic control and promote environmental justice.

This briefing outlines the current inequality in planning appeal rights between developers applying for planning permission and communities that may be adversely affected by a proposed development. ERCS, Planning Democracy, Friends of the Earth Scotland, and RSPB Scotland have submitted a complaint to the Aarhus Convention Compliance Committee that planning appeal rights in Scotland are not 'fair' and therefore in breach of Article 9(4) access to justice requirements.

This is why we are calling for equal rights of appeal.

### Current inequality in planning appeal rights

Currently, only applicants for planning permission (usually developers) have the right to appeal refusals of planning permission at low or no cost. In contrast, members of the public who may be affected by the planning decision do not enjoy the same statutory appeal rights. This results in an uneven playing field, where people most affected by poor planning decisions are unable to make their voices heard. The aim of introducing equal rights of appeal is to confer statutory rights to communities so that they are empowered to appeal poor planning decisions.

### Summary of legal complaint submitted

ERCS, Planning Democracy, Friends of the Earth Scotland, and RSPB Scotland have submitted a complaint to the Aarhus Convention Compliance Committee (ACCC) that planning appeal rights in Scotland are not 'fair' and are therefore in breach of Article 9(4) access to justice requirements.<sup>3</sup>

While developers enjoy statutory appeal rights if their planning permission is refused, members of the public do not enjoy equivalent rights to appeal poor planning decisions, for example, if a development is approved in an inappropriate site or contrary to a planning policy. The only legal recourse for affected communities is statutory review or judicial review in the Court of Session,



which the Convention's governing bodies have already ruled as 'prohibitively expensive' and in breach of the Convention.

In July 2022, the UK and Scottish Governments were required to submit an Action Plan to the ACCC, detailing how they will, 'as a matter of urgency' address their findings and recommendations to ensure that court costs are 'fair and equitable and not prohibitively expensive'. You can read our evaluation of the Scottish Action Plan, and recommendations for reforms.<sup>4</sup>

In addition, the statutory review and judicial review processes in the Court of Session do not allow for a full review of the merits of a planning decision. This means that only the legal validity and procedural regularity of decisions are considered by the Court rather than the actual substance of the concerns about the planning proposal, creating additional setbacks for affected communities.

Crucially, in 2021, the ACCC found that the absence of equal rights of appeal in Northern Ireland's planning system was in breach of the Convention.<sup>5</sup> Our complaint is that Scotland's planning law has the same inequality in planning appeal rights.

## Equal Rights of Appeal: experience of local communities

The purpose of planning is to promote the allocation of land in the public interest and for the good of the environment. Planning can be a force for good for delivering high-quality environments, reducing inequalities and promoting the public interest in the use of land. However, a recent survey of 226 community councillors across Scotland by Planning Democracy confirms previous reports that people feel they have very little influence over planning decisions.<sup>6</sup>

In contrast to developers, communities have no rights to instigate a review of a planning decision. Even if a local authority approves a development that undermines the Local Development Plan for their area, a plan which takes years to prepare and involves extensive consultation and consideration, communities must live with the consequences.

Equal rights of appeal would encourage developers to meaningfully engage with local communities and propose developments that are informed and consistent with development plans. It would encourage environmental considerations to be given their proper weight, leading to improved environmental and social outcomes as well as sustainable development.

Within the current planning system, decision-making processes are often flawed. For example, in Carmunock, a housing development was approved on a greenfield site despite procedural irregularities and a lack of evidence to support the decision. There were a range of reports that were required to inform the planning case including: an energy statement, tree survey, flood risk assessment, drainage impact assessment, and economic impact report. However, the committee declined to follow advice from council officials that they should refrain from granting approval until these reports were available. A legal challenge was not launched as expenses were too high, the case was deemed too risky, and it was too hard to raise money in time.



Another case in Dunbar illustrates how communities have no way to appeal planning approvals that contravene development plans and risk significant negative impacts on communities and the environment. In this instance, permission for 115 houses was approved on agricultural land that lies within a historic battlefield site. The main concerns voiced in objections included that the development was not in the development plan. The council officers' opinion was that residential housing was not deemed in keeping with the landscape and did not reflect the quality of place. The community council objection also claimed that it was not in keeping with climate change strategy, and some residents voiced concern about the pressure on existing services.

Both examples highlight the unfairness in the planning system, a lack of accountability, and the need for urgent reform. Yet despite two major civil society campaigns supporting planning reforms: the first in 2005 led by Friends of the Earth Scotland, and then 2015-19 led by Planning Democracy, opportunities to level the playing field were missed. An amendment to include equal rights of appeal was voted down by Conservative and Scottish National Party (SNP) MSPs in the Planning (Scotland) Act 2019.

## Recommendations

In order to empower communities, bring fairness into the planning system, and move towards full compliance with the Aarhus Convention's access to justice requirements, the Scottish Government must:

- Enshrine equal rights of appeal in Scots Law
- Implement the recommendations of the ACCC to ensure access to justice is not prohibitively expensive before the deadline of October 2024

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<sup>1</sup> For more information read our Advocacy Manifesto ERCS (Dec 2021) [An enforceable human right to a healthy environment](#) or one-page [Summary of recommendations](#).

<sup>2</sup> United Nations Economic Commission for Europe (1998) [Convention on access to information, public participation in decision-making and access to justice in environmental matters](#).

<sup>3</sup> Environmental Rights Centre for Scotland, Planning Democracy, Friends of the Earth Scotland, RSPB Scotland (2022) Communication to the Aarhus Convention Compliance Committee

<sup>4</sup> Environmental Rights Centre for Scotland (2022) [Evaluation of Scotland's Action Plan on access to environmental justice](#)

<sup>5</sup> United Nations Economic Commission for Europe (2021) [Findings and recommendations with regard to communication ACCC/C/2013/90 concerning compliance by the United Kingdom of Great Britain and Northern Ireland](#)

<sup>6</sup> yellow book ltd (2017) [Barriers to community engagement in planning: a research study](#)