

Communication to the Aarhus Convention Compliance Committee

Inequality in planning appeal rights in Scotland

I. Information on correspondent submitting the communication

Names: Ben Christman (In-house Solicitor, Environmental Rights Centre for Scotland), Clare Symonds (Chair, Planning Democracy), Mary Church (Head of Campaigns, Friends of the Earth Scotland) and Rosie Sutherland (Head of Environmental Law and In-house Solicitor, the RSPB).

Environmental Rights Centre for Scotland
Care of Scottish Environment LINK
Dolphin House
4 Hunter Square
Edinburgh
Scotland
EH1 1QW
Tel no: 00 44 131 358 0038
Email: bchristman@ercs.scot

Planning Democracy
3 Charles Court
Limekilns
Scotland
KY11 3LG
Email: info@planningdemocracy.org.uk

The RSPB
The Lodge
Potton Road
Sandy
Bedfordshire
SG19 2DL
Tel no: 00 44 1767 680 551
Email: rosie.sutherland@RSPB.org.uk

Friends of the Earth Scotland
Thorn House
5 Rose Street
Edinburgh
EH2 2PR
Tel no: 00 44 131 243 2700
Email: mchurch@foe.scot

II. Party concerned

1. United Kingdom.

III. Facts of the communication

Introduction

2. This communication arises from the inequality in planning appeal rights between applicants for planning permission and other members of the public in Scotland.

3. Applicants for planning permission enjoy statutory appeal rights which enable them to have the full merits of planning decisions reviewed at no or low financial cost. Members of the public who may be affected by planning decisions do not enjoy those statutory appeal rights. The ability of members of the public to challenge planning decisions is significantly limited relative to the appeal rights enjoyed

by applicants for planning permission.

4. This communication alleges that planning appeal rights in Scotland are non-compliant with the Article 9(4) requirement that the procedures referred to in Article 9(2-3) must be ‘fair’.

5. This communication raises similar issues which were considered by the ACCC in ACCC/C/2013/90. In ACCC/C/2013/90, the ACCC assessed the absence of equal rights of appeal in the planning legislation which applies in Northern Ireland and made a finding of non-compliance.

6. The crux of the ACCC’s decision on that point was stated at paragraph 145 as follows:

...it is clear that for a planning decision in Northern Ireland subject to article 6 of the Convention, the developer is entitled to a full merits review of that decision by a specialist planning body, whereas other members of the public seeking to exercise their rights under article 9(2) are not. This situation is clearly not fair within the meaning of article 9(4) of the Convention.

7. The ACCC’s findings applied to planning legislation applicable in Northern Ireland. This communication alleges that Scottish planning legislation is similarly non-compliant.

Background - the town and country planning legal framework in Scotland

8. The main legal framework for the planning system in Scotland is the Town and Country Planning (Scotland) Act 1997 (herein referred to as the ‘1997 Act’ – Annex 1).

9. A developer who seeks to carry out any development in Scotland which requires planning permission must apply for planning permission under the 1997 Act. A decision on whether to grant planning permission is made by the relevant ‘planning authority’ in accordance with a framework of rules set out in the 1997 Act and various other applicable legal instruments and policy documents.

10. There are three categories of developments which require planning permission in Scotland: national, major and local.¹ National developments are those which are designated as such in the ‘National Planning Framework’ (Annex 2).² Major developments are defined in The Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009 (Annex 3).³ Local developments are those which are not national or major developments.⁴

11. Article 6 of the Convention sets out public participation requirements in decisions on specific activities. Article 6 applies to decisions on whether to permit proposed activities listed in Annex I of the Convention, and decisions on proposed activities not listed in Annex I which may have a significant effect on the environment.⁵

12. The Communicants’ position is that ‘national’ and ‘major’ developments in Scotland are likely to be activities subject to Article 6 of the Convention, because they will either be activities listed in

¹ Town and Country Planning (Scotland) Act 1997 (TCPSA 1997), Section 26A.

² TCPSA 1997, Section 3A(4)(b).

³ The Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009, Regulation 2(1) and Schedule.

⁴ The Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009, Regulation 2(2).

⁵ Article 6(1)(a-b).

Annex I or will have a significant effect on the environment due to the large scale of such developments. Some ‘local’ developments may be activities subject to Article 6, on the basis that some local developments may have a significant effect on the environment.

Statutory planning appeal rights for applicants for planning permission

13. For planning decisions relating to national and major developments, an applicant for planning permission has a right of appeal to the Scottish Ministers.⁶ The 1997 Act states that the decision-maker, “may deal with the application as if it had been made to him in the first instance”.⁷ This right of appeal is a full merits review.

14. For certain local developments, an applicant for planning permission has a right of appeal to the Local Review Body (‘LRB’).⁸ This right of appeal is also a full merits review. In *Sally Carroll v Scottish Borders Council* (Annex 4),⁹ the Court of Session noted at paragraph 55(6) that an LRB:

...must approach the matter “de novo”... What is required is that the LRB should apply its collective mind afresh to the materials which were before the appointed person, together with any further materials or information properly before it. It is not merely considering whether the appointed person’s decision was reasonable in Wednesbury terms, but rather it is looking at the materials afresh.

15. There is no fee payable for submitting an appeal to the Scottish Ministers or the LRB. The applicable guidance document (Annex 5) explains that parties involved in such appeals are normally expected to meet their own expenses and expenses are only awarded on grounds of unreasonable behaviour.¹⁰

16. The above planning appeal rights are available to an applicant for planning permission and to no other person. Other members of the public do not enjoy the above planning appeal rights.

Legal recourse for other members of the public vis-à-vis planning decisions

17. The only legal recourse for members of the public in Scotland who are not applicants for planning permission and who seek to challenge a planning decision, is to use the statutory review process under Section 239 of the 1997 Act or judicial review. Both statutory review and judicial review are legal actions which are raised in the Court of Session.

18. The courts have held that the statutory review process does not allow them to carry out a full merits review of a planning decision. In *Sally Carroll v Scottish Borders Council*, the Court of Session explained that, “...the planning merits of this proposal, and issues of planning judgment, are not matters for this court... We are concerned with legal validity and procedural regularity, not planning judgment.”¹¹

⁶ TCPSA 1997, Section 47.

⁷ Section 48(1).

⁸ TCPSA 1997, Section 43A(8)

⁹ [2015] CSIH 73.

¹⁰ Circular 6/1990: awards and expenses in appeals and other planning proceedings and in compulsory order inquiries, at paragraph 4.

¹¹ Paragraph 54.

19. Similarly, numerous decisions of the courts have established that judicial review does not allow for the full merits review of a planning decision. In *West v Secretary of State for Scotland* (Annex 6),¹² the Court of Session explained that:

*Judicial review is available, not to provide machinery for an appeal, but to ensure that the decision-maker does not exceed or abuse his powers or fail to perform the duty which has been delegated or entrusted to him. It is not competent for the court to review the act or decision on its merits, nor may it substitute its own opinion for that of the person or body to whom the matter has been delegated or entrusted.*¹³

20. The ACCC will be aware that in communication ACCC/C/2017/156, the Communicants made reference to the absence of a review of substantive legality in statutory and judicial review in Scotland in some detail. For brevity, reference is made here to the terms of that communication and the supporting documentation which was enclosed with that communication.¹⁴

21. Planning law expert and practising solicitor Neil Collar has commented that in general for a member of the public looking to challenge planning decisions in court, their right of challenge “only extends to the legality of the decision, and not its planning merits” (Annex 7).¹⁵ He has also noted that members of the public “have no opportunity to challenge the planning merits of a grant of planning permission or the adoption of a development plan”.¹⁶

22. In legal actions in the Court of Session, the ordinary rule is that the loser pays their own legal expenses in addition to their opponent’s legal expenses. Litigation in the Court of Session is extremely expensive. The ACCC and the MOP have found on numerous occasions that the Scottish civil justice system is non-compliant with the requirement of Article 9(4) that access to justice over the environment must be “not prohibitively expensive”.¹⁷

Alleged non-compliance

23. Applicants for planning permission in Scotland enjoy statutory appeal rights which enable them to have the full merits of planning decisions reviewed at no or low financial cost. Other members of the public do not enjoy equivalent statutory appeal rights. The only legal recourse for other members of the public is statutory review or judicial review in the Court of Session.

24. Statutory review and judicial review have two significant shortcomings relative to the statutory appeal rights which are enjoyed by applicants for planning permission. First, they do not allow for full merits reviews of planning decisions. Second, they are prohibitively expensive.

¹² 1992 SLT 636.

¹³ Page 486.

¹⁴ Pages 7 to 10 of the communication.

¹⁵ *Planning* (4th Edition, 2016), page 337.

¹⁶ *Planning* (4th Edition, 2016), page 339.

¹⁷ ACCC, ‘Report of the Compliance Committee on compliance by the United Kingdom of Great Britain and Northern Ireland – Part I’ ECE/MP.PP/2021/59, paragraphs 81-113. Meeting of the Parties, Decision VII/8s on compliance by the United Kingdom of Great Britain and Northern Ireland with its obligations under the Convention, paragraph 1(b).

25. Applicants for planning permission have a privileged position in terms of their statutory planning appeal rights, relative to other members of the public. This situation is not fair for other members of the public.

26. Planning appeal rights in Scotland do not comply with the Article 9(4) requirement that the procedures referred to in Article 9(2-3) must be 'fair'.

IV. Provisions of the Convention with which non-compliance is alleged

27. This communication alleges non-compliance with the Article 9(4) requirement that the procedures referred to in Article 9(2-3) must be 'fair'.

V. Nature of alleged non-compliance

28. The nature of the alleged non-compliance is detailed at paragraphs 23 to 26 in section III above.

29. This communication relates to a general failure by the Party concerned to implement the Convention. Relevant supporting documentation is enclosed and is specified below at section IX.

VI. Use of domestic remedies

30. The Convention has not been incorporated into the Scottish legal system. As such, the Convention is not enforceable in Scotland. There is no available domestic judicial or other remedy which is open to the Communicants.

31. Some of the Communicants were involved in previous campaigns with other civil society organisations to secure the introduction of equal rights of appeal to the Scottish planning system. Those campaigns focused on the last two major legislative reforms of the Scottish planning system in 2006 and 2019. Planning Democracy also submitted a petition to the Scottish Parliament's Petitions Committee in 2015. All prior attempts to introduce equal rights of appeal were opposed by the Scottish Government and were unsuccessful.

32. The Communicants have attempted to engage the Scottish Government directly by written correspondence on the matters raised in this communication. This was done with a view to resolving the matter without need for recourse to the ACCC.

33. On 3 December 2021 Planning Democracy sent a letter to the Scottish Government Minister with responsibility for planning. Said letter raised the issue of alleged non-compliance (Annex 8). No response was received.

34. On 20 January 2022 Planning Democracy sent an email to the Minister requesting a response to their letter of 3 December 2021 (Annex 9).

35. On 28 January 2022 the Scottish Government responded to Planning Democracy by letter (Annex 10). Said letter indicated that the Scottish Government was not minded to introduce new planning appeal

rights into law.

36. On 3 March 2022, the Environmental Rights Centre for Scotland sent a letter to the Minister raising the issue of non-compliance (Annex 11). Said letter explained that in the absence of a satisfactory response, further steps would be considered including submitting a communication to the ACCC.

37. On 7 April 2022, the Minister responded to the Environmental Rights Centre for Scotland by letter (Annex 12). Said letter explained that, “The Scottish Government has no plans to make changes to rights of appeal in the planning system at the present time”.

38. The Communicants have taken all reasonable steps to resolve the subject of this communication without recourse to the ACCC. Said steps have failed and this communication is now necessary in order for the Communicants to obtain a remedy.

VII. Use of other international procedures

39. There are no available alternative international procedures which are open to the Communicants for the purposes of resolving the subject of this communication.

VIII. Confidentiality

40. The Communicants are content for all correspondence relating to this application to be made public. No confidentiality measures are requested.

IX. Supporting documentation

41. The following annexes are enclosed as supporting documentation for this communication:

- Annex 1 - Relevant sections of The Town and Country Planning (Scotland) Act 1997.
- Annex 2 - Relevant extracts of National Planning Framework 3.
- Annex 3 - The Town and Country Planning (Hierarchy of Developments) (Scotland) Regulations 2009.
- Annex 4 - *Sally Carroll v Scottish Borders Council* [2015] CSIH 73.
- Annex 5 - Planning Circular 6/1990: awards and expenses.
- Annex 6 - *West v Secretary of State for Scotland* 1992 SLT 636.
- Annex 7 - Relevant extracts from Neil Collar, *Planning* (4th Edition, 2016, W Green).

- Annex 8 - Planning Democracy letter dated 3 December 2021.
- Annex 9 - Planning Democracy email dated 20 January 2022.
- Annex 10 - Scottish Government letter dated 28 January 2022.
- Annex 11 - Environmental Rights Centre for Scotland letter dated 3 March 2022.
- Annex 12 - Scottish Government letter dated 7 April 2022.

X. Signatures

Date of submission to ACCC: Monday 29 August 2022