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Third Party Rights of Appeal in Planning

This paper discusses the suggestion that there should be a right of appeal available to a Third Party against the grant of planning permission by a local planning authority. The suggestion is rejected in the Government Planning Green Paper, but continues to arise elsewhere. This paper concentrates on England, but there are no Third Party Rights of Appeal in the UK.

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Summary of main points

- When a planning application is approved, the only way for a third party to challenge it is by judicial review in the High Court.
- There has been much debate on the question of whether there should be a right of administrative appeal against the granting of planning permission, similar to the right of appeal for an applicant whose application is refused by a local planning authority.
- The Government rejected this option in the Planning Green Paper, arguing that such rights would make the system more legalistic and much slower. Previous administrations have taken the same view.
- The *Human Rights Act 1998* could result in the introduction of third party rights, but in the *Alconbury* case, in a challenge to the UK planning system on other points, the House of Lords decided in 2001 that the system was not incompatible with the European Convention on Human Rights.
- This paper also describes the process for third party rights of appeal on planning decisions in Ireland and New Zealand.

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I Background on the Appeals Procedure

A. The Current Position

The principles of planning law in England and Wales are laid down in the *Town and Country Planning Act 1990* (as amended). A basic point is that an applicant whose planning application is turned down by the local planning authority has the right of appeal to the Secretary of State, which means in practice to a planning inspector. He can also appeal in the same way if he is granted planning permission subject to certain conditions. This method of appeal is relatively cheap and amounts to a re-hearing of the case by a planning inspector, who should decide it according to published Government guidance and local development plans.[1] For minor issues, the appeal normally takes place by the "written representation" method. Major appeals involve a hearing of the arguments before the planning inspector who will then decide the matter.

When a local planning authority grants planning permission, however, there is no equivalent right of administrative appeal open to third parties. The idea of Third Party Rights of Appeal is equivalent to the idea of there being a procedure for appeal against the granting of planning permission.

B. What happens if a council approves applications that should be refused?

The Secretary of State has the power to revoke a planning consent granted by a local planning authority under section 100 of the *Town and Country Planning Act 1990*. However, Governments have taken the view that the power should only be used "if the original decision is judged to be grossly wrong, so that damage is likely to be done to the wider public interest".[2] The power of the Secretary of State to revoke a planning application is used only very rarely for several reasons. First, compensation has to be paid by the local planning authority to the developer. In some cases, the cost would be a great burden for a small local authority. Second, the Secretary of State already has a way of intervening in cases where broader issues than purely local ones are involved. This is the power to call in planning applications (before they are determined by the local planning authority) so as to determine them himself. Third, any broader and more frequent intervention by the Secretary of State might risk undermining the position of the local planning authorities.

The Alnwick case is an example of this process. In 1993 Alnwick District Council granted planning permission to Northumberland Estates for a supermarket near Alnwick. A protest

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1 DOE, *Planning Policy Guidance: General Policy and Principles PPG1*, February 1997 paragraphs 35-56

2 *Sweet & Maxwell Encyclopedia of Planning Law and Practice*, P100.05

campaign was launched two years later when it emerged that Safeway had bought the land. Protestors feared that Safeway would close its existing branch in Alnwick and consolidate operations on the new site. The Secretary of State in 1997 (John Gummer) revealed that he proposed to revoke the permission. The council challenged the decision in the High Court but lost. Safeway submitted a claim for £4.6 million in compensation for the loss of its planning consent. The council feared that it might be bankrupted. However, in the end it was all settled amicably with the Duke of Northumberland buying back the land that he had sold to Safeway. Safeway agreed to forego £2.6 million of its compensation claim and accepted £2 million, which was paid by the council's insurers, Zurich Municipal.[3]

The question of whether councillors might be liable for costs if they approved planning applications contrary to Government guidance was considered in North Cornwall. Complaints were made that councillors were granting planning permission for isolated houses in the countryside, partly because they felt that local people had the right to build houses there. Yet Government Guidance plainly stated that such building should not be allowed. A senior civil servant was appointed to enquire into the situation, and reported in 1993.[4] As a result, North Cornwall had to cease its practices. The report notes that the Secretary of State does have certain powers to revoke or modify planning permission, but that they are used only in exceptional cases. It also notes the financial issues:

> 12.23 Four extraordinary headings of expenditure which could arise from decisions of a Council or its Planning Committee are:
>
> > i an ombudsman finding of maladministration and injustice giving rise to recommendations for remedial action and financial recompense;
> >
> > ii costs of litigation and award of costs following application for judicial review in the High Court;
> >
> > iii costs of local public inquiries including possible award of applicants' costs following use of Secretary of State's call in powers;
> >
> > iv costs of local public inquiries together with landowner's costs and possibly substantial compensation payments following actions by the Secretary of State for revocation, modification or discontinuance.
>
> 12.24 It would depend on the circumstances of each individual case whether any councillor might be held personally liable for such expenditure. Where it appears to the auditor that a loss has been incurred or deficiency caused in the Council's accounts by the wilful misconduct of any person he is required to certify that the loss or deficiency is due from that person. There is a right of appeal to the court against such a certificate.

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3 "Alnwick Relief as Safeway Settles Case", *Daily Telegraph*, 10 February 2000

4 Audrey M Lees, *Enquiry into the planning system in North Cornwall*, HMSO, 1993

> 12.25 The consequences of such a certificate for a councillor are that:
>
> i the councillor has to pay the sum certified due to the Council; and
>
> ii the councillor is disqualified from holding office as a councillor for five years if the sum exceeds £2,000.

In other words, councillors are only personally liable in cases of "wilful misconduct".

C. Judicial Review in the High Court

It is possible to challenge the grant of planning permission in the High Court by judicial review. Judicial review in the High Court is very different from an appeal to a planning inspector and involves far greater costs. The decision of the High Court is based on consideration of the procedures involved by a planning authority in reaching a decision, rather than on the planning merits of the case.

An article in a planning magazine noted that the grant of planning consent by a local planning authority was often challenged, but that it was still relatively rare for a decision to be overruled. It then gave an idea of what happens when the decision of a local planning authority was challenged by judicial review:

> A challenge can only succeed if there is some proven irregularity in the way the local planning authority determined the application in question. Officer reports to planning committees will be put under the microscope to try to find grounds for challenge. Perhaps the officer has failed to mention a material consideration, or placed too much emphasis on something of questionable relevance. Elected members may be accused of bias. Committee chairs and clerks may be challenged on the way they have allowed a meeting to be conducted or a vote to be taken. Judicial review challenges have to be brought promptly if they are to be entertained by the court.[5]

The Court has to decide whether an applicant has the right to bring an action for judicial review. There is no statute law clearly defining the matter. The *Sweet & Maxwell Encyclopedia of Planning Law and Practice* notes:

> There has been a wide variety in approach to this issue in recent years, and a number of decisions of the High Court are simply irreconcilable. There were several cases in the 1980s which demonstrated a liberality of approach, in which the courts accepted that sufficient standing to challenge a planning decision might be found in individuals or groups of residents likely to be affected by the matter, though without property rights at stake…However, in *R.v.Secretary of State for the Environment ex p. Rose Theatre Trust* [1990] 1 P.L.R.39, the High Court

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[5] C.Ward, "When permissions may be overturned", *Planning*, 7 July 2000, p 13

> (Schiemann J.) expressed the view, *obiter*, that the applicants, a company formed by archaeologists and others to preserve the site of Shakespeare's Rose Theatre, had no *locus* to apply for judicial review of the Secretary of State's refusal to schedule the remains of the theatre as a scheduled monument, notwithstanding that they had written formally to him requesting that he do so, and that he had written a detailed reply giving his reasons for declining their request.[6]

D. Rights Already Available to Third Parties

Third parties already have the right to object to the original application, while the local planning authority has the democratic right to take the decision, subject to the appeal option mentioned above. In an appeal against the rejection of a planning application, the case for retaining the original decision is led by the local planning authority, which has an interest in justifying its original decision. It is clearly in its interests to take on board any useful arguments by third parties that support the decision to reject the application.

In a case where the application has been called in by the Secretary of State for his determination, there is a public inquiry to which third parties can make written submissions and which they can attend in person, to give evidence and often to question witnesses.

The Government has argued that current Third Party Rights are sufficient; the Planning Green Paper of December 2001 dismisses the case for third party rights of appeal. Indeed, its new proposals for the handling of major infrastructure projects would limit the role of public inquiries in such cases. The main decision would be taken by Parliament, followed by a Public Inquiry relating to details of the proposal.[7] However, supporters have continued to make their case in reports during 2002.

E. Who might be a Third Party?

There are many possibilities. The right of appeal might be granted to anybody, but that might present problems if appeals were undertaken by companies or wealthy individuals because of the commercial advantage deriving from forcing a rival to delay development. Neighbours might be allowed to appeal. Environmental or conservation groups could be given rights so that, for example, the Georgian Society would be allowed to appeal against any planning permission affecting a Georgian house. Another possibility is that a public body like the Environment Agency, which has a statutory right to be consulted, might have the right to appeal if its advice were rejected. For example, if the Environment Agency advised against a development on the grounds of flood risk, but the local planning authority granted permission, then the Agency could appeal against that permission.

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6 *Sweet & Maxwell Encyclopedia of Planning Law and Practice*, P288.29 – P288.31

7 DTLR, *Major Infrastructure Projects: Delivering a Fundamental Change*, December 2001

Arguments in favour of a right of appeal against the granting of planning permission are common. At one level they are typified by complaints that a neighbour has been granted planning permission. At a higher level, the extension of such rights is supported on two main grounds. First, there are those whose support is based on environmental concerns. Second, there are those who argue that the UK system infringes the European Convention on Human Rights.

II Environmental Support for Third Party Rights of Appeal

A few major projects are called in by the Secretary of State to be determined by him. In such cases there is a public inquiry, conducted by an inspector, followed by a recommendation to the Secretary of State, who can choose whether or not to accept it. The vast majority of planning applications, however, are handled by local planning authorities. If they grant planning permission to a development, even a controversial one with serious environmental implications, that, in practical terms, is the end of the matter.

Inevitably, environmental pressure groups dislike this situation. They may feel that a local planning authority is under too much pressure too approve applications, perhaps through fear of having costs awarded against it by a planning inspector if its rejection is considered to be unreasonable. Environmentalists may also feel that local authorities stand to benefit commercially from the grant of planning permission, so that the environmental case may not be heard. On the other hand, industrialists and developers are concerned that Third Party Rights of Appeal will lead to delays and, ultimately, additional costs even if the appeals are unsuccessful.

A consortium of environmental groups commissioned a research report on Third Party Rights of Appeal in January 2002.[8] The report, by lawyers and planning experts, argued for third party rights on the following grounds:

(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); and

[8] Council for the Protection of Rural England; Civic Trust; Environmental Law Foundation; Friends of the Earth; National Council for Housing and Planning; Royal Society for the Protection of Birds; Town and Country Planning Association; WorldWide Fund for Nature.

- 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.[9]

The rights would only be available in cases satisfying one or more of the following conditions:

- 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.[10]

Cases in which the local authority has an interest would include cases in which the authority owns the land and granted itself planning permission.

The Royal Commission on Environmental Pollution has also argued for Third Party Rights of Appeal in 2002. The Commission noted that third parties increasingly possess legal rights that may be affected by decisions to grant permission, such as those under the *Human Rights Act* or inherent in European Community environmental Directives.

> 5.44 We therefore favour introduction of a third party right of appeal, but we do not believe it should be an unrestricted right available to any third party under any circumstances. Subject to compliance with the Human Rights Act and the Aarhus Convention, the right of appeal should be available only in certain circumstances that would be specified in legislation. Appropriate criteria might include the size of a development and whether the applicant has been required to provide an environmental impact assessment. Despite the arguments in the Green Paper, we consider it possible to devise a satisfactory set of clear criteria: it will be for the government to put forward detailed proposals. A clear candidate is where a local planning authority takes a decision which is not in accordance with the development plan. That presupposes the system of development plans can be improved to overcome the problems created by plans which are technically in force but manifestly out of date…

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9 Green Balance et al, *Third Party Rights of Appeal: Summary*, January 2002, p 7

10 Green Balance et al, *Third Party Rights of Appeal: Summary*, January 2002, p 5

> 5.45 We also consider that, where a decision by a local planning authority is not in accordance with the views expressed by a statutory consultee, that body should have a right of appeal on merits. A right of appeal in that type of case, which is not mentioned in the Green Paper, would be an important mechanism to secure greater integration between the planning and environmental systems. Even if statutory bodies exercised their right of appeal only on rare occasions, its existence would strengthen the weight of their views in the process, and provide an important safeguard.
>
> 5.46 We recommend that third parties should have a right of appeal against decisions on planning applications in certain circumstances, and that similar rights of appeal for third parties should be introduced for other forms of environmental regulation.[11]

The *Aarhus Convention* is discussed on p 18 of this paper.

III The Government's Rejection of Third Party Rights of Appeal

The Town and Country Planning system started to operate in 1948 in more or less its current form. Before 1948, planning permission could only be refused by the planning authorities if the owner of the land was paid compensation. That remains the position, incidentally, in the USA. Therefore a local authority could not normally afford to refuse planning permission apart from a few very exceptional cases.

For landowners, the 1948 system represented a considerable reduction in rights. The sudden reduction of rights for landowners by a decision of the local authorities was slightly mitigated by the right of appeal to the Secretary of State. The original idea was to expropriate for the State the development value in all land and, in consequence, to enable a landowner to make a claim on a £300m fund for an *ex gratia* payment. However, that policy was never carried out, partly because of the fall of the Labour Government in 1951. The result was that land with planning permission became substantially more valuable than land without it.

Concern over Third Party Rights of Appeal arose as concerns increased about the environmental implications of development. However, the poor performance of British industry relative to its competitors provided another incentive to remove restrictions from the planning system.[12]

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11 Royal Commission on Environmental Pollution, *23rd Report on Environmental Planning*, March 2002

12 "Tight Planning Restrictions Curbing Growth; The McKinsey Report…", *Financial Times*, 30 October 1998

Successive Governments have rejected the idea of Third Party Rights of Appeal. The current Government has stated its firm opposition many times. The Planning Green Paper in December 2001 discussed and rejected the argument for Third Party Rights of Appeal. It accepted the criticism that such rights would not be consistent with the UK's democratically accountable system of planning, where elected councillors represent the community:

> 6.21 Proponents of a third party right of appeal themselves recognise that it could not be unlimited because there must be some mechanism to prevent frivolous appeals. The situations in which advocates of third party rights suggest they might be exercisable are as follows:
>
> - Departures from the plan. The difficulty with this proposal is that a considerable number of development proposals could contain minor departures from the detail of a plan or under our new proposals from the Local Development Framework. In practice, proponents of third party rights have in mind only significant departures. But defining what is and what is not "significant" is not straightforward and is ultimately a matter of judgement exercised by local authorities. We believe that the end result of such an approach would be a stream of court cases debating which approvals can be appealed. This would make planning more uncertain, legalistic and confrontational. This is precisely what we are seeking to avoid and we therefore do not believe that the planning system can operate efficiently in such a climate.
> - Major projects. This links with a separate proposal that third party rights should be exercisable to challenge projects that require an Environmental Impact Assessment. These are normally larger projects. The problem with either proposal is that it would further delay investment in major developments that will already have received particularly thorough and careful scrutiny by a local planning authority following consultation with local people. We are separately proposing in a companion consultation document new Parliamentary procedures for planning for major infrastructure projects of national significance.
> - Where officers' recommendations to reject an application are overturned by the elected councillors. Again this proposal goes straight to the heart of the democratic process. Elected members must be allowed to reject their officers' advice; it is the councillors, not the officers, who are answerable to their electorate. We are proposing that local authorities should now give reasons for approving a planning application as well as for refusing it.
> - Where a local authority grants planning permission to itself. There are around 5,000 cases a year in which local authorities have an interest in land to which they grant planning permission. Sometimes these are town centre sites, often they involve regeneration. Local authorities are very often in the position of taking decisions on issues in which they have dual interests (for example, social services polices may bear directly on residential care provided directly by the authority) and they operate under strict rules to deal with possible conflicts and avoid any impropriety.

> 6.22 None of these approaches adds up, in our view, to a case for a third party right of appeal. It could add to the costs and uncertainties of planning. We cannot accept that prospect.[13]

In a debate on the Green Paper, the Planning Minister, Lord Falconer, put the matter in a more homely way:

> The current system produces a totally rules-driven process. There are 852 pages of national planning guidance and QCs coming out of your ears in major planning inquiries and public inquiries on local issues or development plans. That system does not empower the local community and promote sustainable development. Instead, the moment a planning application of any significance is made, everybody reaches for the law books and the lawyers.
>
> The noble Lord, Lord Renton, and the noble Baronesses, Lady Byford and Lady Hamwee, want to make the situation worse by introducing a third party right of appeal. That would result in an even more legally driven process. We have considered that important issue in detail. Those who support that proposal should consider the experience of Queensland in Australia, which introduced a third party right of appeal to empower third parties. Some years later, in 1997, another Act of Parliament had to be introduced to free local authorities from the consequences of a precedent-driven system, which meant that instead of being allowed to decide what was in the best interests of the communities, local authorities or local communities had to spend all their time perusing the decisions that had been made in the greatly expanded jurisprudence in relation to it.[14]

IV Will the Human Rights Act bring Third Party Rights of Appeal?

A. Possible Effects of the *Human Rights Act 1998*

The *Human Rights Act 1998* brought the European Convention on Human Rights within the UK legal system. Previously appeals on the basis of the Convention had had to be made to the European Court of Human Rights at Strasbourg. The Act opened up the possibility of using the Convention to challenge the UK planning system, mainly through Article 6.

> **Article 6**
>
> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law…

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13 DTLR, *Planning: Delivering a Fundamental Change*, 2001 pp 54-5

14 HL Deb 17 April 2002 c 1023

Paradoxically, the UK planning system does offer openness and a chance for both sides to put their views, along with the opportunity for appeal by a disappointed applicant, yet the system faced various possible challenges. Is an appeal to a planning inspector a hearing by an "independent and impartial tribunal"? What about applications that are called in by the Secretary of State to be determined by him/her? What about the rights of third parties?

A well-known planning expert, Professor Malcolm Grant, argued that the Human Rights Act would lead to the right of appeal for third parties. He explained his view before the Environment Select Committee in March 2000:

> 3. What will be the main impacts of the Human Rights Act 1998 in respect of town and country planning?
>
> *(Professor Grant*) I believe that its impact will be mixed, but probably more radical than many commentators presently assume, as borne out by the tenor of the evidence given to the Committee. One likelihood is that it will require a fresh look to be taken of the system of planning appeals, in particular to look at the prospect of introducing a third-party right of appeal, and to consider what the implications are in terms of the tension that presently exists between individual rights and collective rights. My belief is that we shall need to see something of a resettlement in the relationship between the individual rights being determined by the planning inspectors and the collective rights that government policy is keen to advance.
>
> 4. Arising from that answer, when talking about third party rights of appeal, are you saying that objectors should be able to appeal against a decision just as a putative developer can?
>
> (*Professor Grant*) Yes. When one looks closely at the convention rights and looks at the case law that has arisen from the court in Strasbourg and from our national courts, it is difficult to avoid two conclusions. One is that in planning appeals Article 6 applies to appeals by developers because it involves the determination of people's civil rights and obligations. If that is true of prospective developers, it is also equally true of objectors, although not in every case. However, there will be cases in which it would be foolish to deny that people who are objectors to a development had civil rights and obligations that were being determined. If that is the case, at present we would be falling short of our convention obligations were we not to have a third-party right of appeal in such instances.

B. The *Alconbury* Judgement

A group of four test cases in December 2000 resulted in a High Court ruling that the planning system was incompatible with the Convention. The issue of third party rights was not directly considered. The Government stated the position as it was in December 2000, before the judgement was appealed to the House of Lords:

> **Mr. Waterson:** To ask the Secretary of State for the Environment, Transport and the Regions what action he proposes to take in the light of the High Court decision on his planning powers and their relationship to the Human Rights Act 1998; and if he will make a statement.
>
> **Mr. Raynsford:** On Wednesday 13 December the Divisional Court gave judgement on four test cases brought in relation to the compatibility of certain aspects of domestic legislation with Article 6(1) of the European Convention on Human Rights (ECHR) concerning the right to a fair hearing before an independent and impartial tribunal. The Convention right was incorporated into UK legislation in the Human Rights Act 1998, which became operative in England and Wales on 2 October this year.
>
> The legal challenges related to cases involving the Secretary of State's ability under the Town and Country Planning Act 1990 to call in and determine applications for planning permission and to recover and determine appeals, the confirmation by him of Compulsory Purchase Orders and related Orders under the Highways Act 1980 made by one of his departmental agencies and the making of orders under the Transport and Works Act 1992.
>
> The Court concluded that the processes involved in each of the cases were not compatible with Article 6(1) of the ECHR. In particular, the Court concluded that:
> The Secretary of State for the Environment, Transport and the Regions is not 'an independent and impartial tribunal' for the purposes of Article 6(1), but is a judge in his own cause as both policy maker and decision taker;
>
> Judicial Review is not sufficient to remedy the defects in the Secretary of State for the Environment, Transport and the Regions' decision-making role--the scope of Judicial Review is not sufficiently wide and the Court is not prepared to enlarge its power of review...[15]

The case, called *Alconbury v SSETR* [2001] JPEL 291, was heard in the House of Lords in early March 2001. Judgement was announced on 9 May 2001, overturning the High Court judgement and upholding the planning laws. The House of Lords ruled that although the Secretary of State did not constitute an independent and impartial tribunal, the whole procedure, including the public inquiry, was compatible with Article 6 of the Convention. The *Times Law Report* gave Lord Slynn's judgement, with which the other Law Lords concurred, including the following points:

> Lord Slynn said that it seemed plain that the dispute was one which involved the determination of civil rights within the meaning of the Convention. The European Court of Human Rights had, however, recognised from the beginning

[15] HC Deb 19 December 2000 cc 119-120W

> that some administrative law decisions which affected civil rights were taken by ministers answerable to elected bodies…
> It was not suggested [by the respondents] that there was actual bias against particular individuals, on the part of the secretary of state or the officials who reported to him or who advised him. But it was contended that the secretary of state was involved in laying down policy and in taking decisions on planning applications in accordance with that policy. He could not therefore be seen objectively to be independent or impartial…
>
> Before the House, the secretary of state did not contend that in dealing with called-in or recovered matters he was acting as an independent tribunal. He accepted that the fact that he made policy and applied that policy in particular cases was sufficient to prevent him from being an independent tribunal and for the same reasons he was not to be seen as an impartial tribunal for the purposes of article 6. But the many decisions of the European Court did not stop there…The European Court had recognised that in many European countries planning decisions were made by elected or appointed officers with a limited judicial review even though the extent of that might vary from state to state…
>
> The common law had developed specific grounds of review of administrative acts and those had been reflected in the statutory provisions for judicial review such as were provided for in the present case…The legality of the decision and the procedural steps had to be subject to sufficient judicial control. But none of the judgements before the European Court of Human Rights required that the court should have full jurisdiction to review policy or the overall merits of a planning decision.[16]

It would be possible to take the challenge to the European Court of Human Rights at Strasbourg, but that process normally takes around two years.

C. The Position after the *Alconbury* Judgement

As noted, the *Alconbury* case did not directly resolve the issue of third party rights of appeal. The Sweet & Maxwell Planning Encyclopedia Monthly Bulletin for May 2001 posed the question:

> Given that the House of Lords unanimously (if reluctantly) accepted that planning disputes fell within art 6, it is necessary to ask whether decision-making by local planning authorities is governed by the same principles as that by the Secretary of State. Given that a third party may challenge the grant of planning permission by a claim for judicial review, under broad rules of standing, does this overcome the evident want of independence and impartiality on the part of the local planning authority? It is not evident that it does so. Both the Divisional Court and the House of Lords were at pains to stress the significance of context. It was because of the highly structured decision-making process in Secretary of State cases,

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[16] "Minister's power is Convention compatible", *Times Law Report*, 10 May 2001

> involving a public local inquiry and the careful consideration of the merits of the dispute that this required, that judicial review was thought to provide sufficient satisfaction of art 6 rights. These factors do not operate in the case of local planning authority decisions.[17]

Although Lord Woolf, the Lord Chief Justice, had nothing directly to do with the case, his comments in the Sir David Hall memorial lecture may prove the best guide to what might happen next. He pointed to the judgement of Lord Slynn:

> Slynn said that "in exceptional circumstances" courts may be able to reconsider the merits of a particular case. Slynn's judgement, Woolf claims, gives the green light for a widening of the scope of judicial review which at present can only assess the facts of a given case and not its merits. Slynn said that exceptional circumstances can occur when courts weigh up whether a development is important enough to justify the potential infringement of an individual's human rights. Woolf pointed out that this would involve the introduction of the European human rights legal concept of proportionality into UK administrative law.[18]

However, a note in the *Journal of Planning & Environment Law* in September 2001 suggests that Courts will soon be asked to decide whether Article 6 of the Convention gives objectors the right to challenge grants of planning permission. It notes a recent decision of Richards J. in *R.(on behalf of Alan Kathro and others) v.Rhondda Cynon Taff County Borough Council*, decided on 6 July 2001. The applicants challenged the legality of a proposal by the Council to grant planning permission for their own development. The application was rejected by the Court:

> However, although the judge held that the granting of planning permission in such circumstances would not inevitably be in breach of Article 6, he did accept that such a decision of a local planning authority might be in breach of Article 6.[19]

The report for the Environmental Consortium on Third Party Rights of Appeal (quoted in section II of this paper) relies heavily on the European Convention on Human Rights, but it sums up:

> 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 grant of planning permission. 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

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17 *Sweet & Maxwell Encyclopedia of Planning Law and Practice Monthly Bulletin May 2001*, p 6

18 "Judge says greater intervention likely", *Planning*, 18 May 2001

19 "Third Party Rights of Appeal and the Human Rights Act 1998", *Journal of Planning & Environment Law*, September 2001, p 1029

> directly and seriously affected by the proposed development and when they are denied an independent and impartial forum to dispute crucial factual issues.[20]

The report also considers whether third party rights should be guaranteed as a result of the *Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters* (known as the *Aarhus Convention*).

> 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.[21]

The report argues that the Aarhus Convention should allow objectors the right to address a planing committee. It would not require third party rights of appeal. A reply to a PQ in April 2002 described the UK current position on the Aarhus Convention;

> **Malcolm Bruce:** To ask the Secretary of State for Environment, Food and Rural Affairs (1) what steps her Department has taken to promote the implementation of Principle 10 of the 1992 Rio Declaration;
> (2) if she will make a statement on action taken by her Department with regards to *(a)* the Aarhus Convention and *(b)* the ECE Sofia Guidelines on Access to Environmental Information and Public Participation in Environmental decision-making.
> **Mr. Meacher:** Whilst not formally revoked, the ECE Sofia Guidelines are effectively superseded by the Aarhus Convention. The Aarhus Convention is the primary vehicle for the promotion of Principle 10 of the 1992 Rio Declaration. The Government strongly supports this Convention and signed the treaty when it opened for signature in 1998.
> The majority of the Convention is already implemented in the UK. This Department is responsible for some of the necessary legislative amendments, in particular to the Environmental Information Regulations 1992. These will be made as soon as possible after the EU draft Directive on Public Access to Environmental Information is adopted to replace Directive 90/313/EEC. The Government intends to ratify the Convention as soon as all of the necessary legal provisions are in place. This date will depend on the legislative timetables of the devolved administrations.[22]

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[20] Green Balance et al, *Third Party Rights of Appeal: Summary*, January 2002, p 14
[21] Green Balance et al, *Third Party Rights of Appeal: Summary*, January 2002, p 16
[22] HC Deb 12 April 2002 c 654-5W

V Third Party Rights of Appeal in Ireland

An Bord Pleanála was established in 1977 under the *Local Government (Planning and Development) Act 1976*. It is responsible for the determination of appeals, references and certain other matters under the *Local Government (Planning and Development) Acts* 1963 to 1999. The Board is also responsible for dealing with appeals under the *Building Control Act 1990*, the *Local Government (Water Pollution) Acts 1977* and 1990, and the *Air Pollution Act 1987*.

Appeals under section 26 of the *1963 Planning Act* constitute the principal task for the Board and account for around 98% of its decisions. These appeals fall into three categories:

- First party appeals against decisions of planning authorities to refuse permission.
- First party appeals against conditions proposed to be attached to permissions by planning authorities.
- Third party appeals, which are normally against decisions of the planning authorities to grant permission.

In some cases, there may be both first party and third party appeals against a decision of the planning authority.

The following groups are entitled to appeal:

- An applicant for planning permission, and
- Any person, body or interested group etc. who made submissions or observations in writing to the planning authority in relation to the planning application in accordance with permission regulations. There are two possible exceptions to this:

1 Where a prescribed body was entitled to be notified of a planning application by the planning authority and was not notified, the body may lodge an appeal against the decision of the planning authority without having made submissions or observations on the planning application.

2 A person who has an interest in adjoining lands who did not make a submission or observation may apply to the Board for leave to appeal the decision of the planning authority.

The proportion of third party appeals is growing and in 1997 third party appeals represented 42% of determined planning appeals.[23]

[23] www.pleanala.ie/char.html

VI Third Party Rights of Appeal in New Zealand

New Zealand (NZ) has had an environmental court since 1996. Professor Malcolm Grant has written a report for the DETR on the NZ environmental court, on which this section is based. Central Government in New Zealand has never had strong policy responsibility for town and country planning matters compared with the UK. Dispute resolution has always been assigned to an independent tribunal:

> This has meant that quite central policy issues, such as the extent to which the RMA (*Resource Management Act 1991*) was intended to supersede "conventional" town and country planning with a more flexible impact-based approach, are matters for local practice under the supervision of the court, rather than matters in which the Minister can intervene directly, save through promoting new legislation. It also means that there is a tendency to prescribe in great detail in legislation that which would, in the British context, be left to national policy guidance.
> Second, the general courts have played a relatively limited role in the implementation and supervision of the resource management system, largely through occasional judicial review of the decisions of the Court. There is no separate power of oversight conferred by any constitutional protection of property rights. The powers of the local authorities in relation to planning are defined by legislation, and disputes regarding them fall to the Court for resolution on questions both of law and of merits.

The Court has wide jurisdiction to hear appeals, including planning, environmental consents and compulsory purchase. There is access for third parties to the Court:

> The Resource Management Act establishes public rights of participation before the Environment Court. The Act allows the Minister, the local authority, any party to the proceedings and any person "having any interest in the proceedings greater than the public generally, [or] any person representing some relevant aspect of the public interest" to appear and call evidence. While this may look as if it grants open standing in all matters, this is not the case and the Court must deny standing in appeal matters to those who have not made earlier submissions, or who cannot then show that they have an interest greater than the public generally. Any person who is not a party to the proceedings must give at least 10 days notice to the Court of a wish to appear and be heard at the hearing. All hearings are held in public.[24]

The UK Royal Commission on Environmental Pollution examined the New Zealand system, and was impressed by the clear explicit purpose of safeguarding sustainability. It noted however, that environmentalists had not always been happy with the decisions

[24] M.Grant, *The New Zealand Environmental Court*, 2000, Report for DETR

reached, perhaps fearing that economic considerations were overriding environmental ones. The Commission did not recommend the model for the UK:

> 3.35 We concluded however that the New Zealand model could not easily be transferred to a much more densely populated and highly urbanised country such as the UK. Even in New Zealand, the Resource Management Act is not regarded as dealing satisfactorily with the situations in urban and peri-urban areas. An adequate system for setting and achieving environmental goals for the UK needs to be capable of dealing effectively with much more complex interactions and cumulative effects. Moreover, a single regulatory regime covering both land use and other effects on the environment may be desirable in the long run, but it does not seem a feasible aim in the UK for the foreseeable future.[25]

[25] Royal Commission on Environmental Pollution, *Environmental Planning*, March 2002 Cm 5459, pp 41-2