

LOCALISM ACT 2011

Neighbourhood Development Orders and the Community Right to Build

Richard Turney

1. One element of the Localism Act 2011 is the creation of a new form of development order, the “neighbourhood development order” (“NDO”). An NDO is a development order granting planning permission in relation to a particular neighbourhood area for development specified in that order, or any class of development specified in that order. NDOs may be in the form of “Community Right to Build Orders”. The approach of the Act is to “plug” the localism agenda into Part III of the Town and Country Planning Act 1990, so that NDOs sit alongside other development orders as an alternative means of granting planning permission for development.
2. However, the scheme for the adoption of NDOs is predicated upon the substance of the order coming from the local community, and being adopted following a referendum within that community. In short, the NDO allows for planning by plebiscite.

Background: the development order and the local development order

3. It is worth recalling the scheme of Part III of the 1990 Act to understand how the NDO will work in practice. By s 57, planning permission is required for development. Section 58 provides that planning permission may be granted in a number of different ways, namely:
 - a. By a development order (i.e. the Town and Country Planning (General Permitted Development) Order 1995 (“GPDO”)) or by a local development order;
 - b. By a local planning authority (or, where relevant, the Secretary of State) following an application;
 - c. Pursuant to a simplified planning zone or an enterprise zone.

4. The Localism Act 2011 will add a further means of granting planning permission, namely by NDO. The operation of the GPDO is well known to those who work in the planning system and it grants permission for a range of developments, such as residential extension, agricultural buildings and so on.
5. Local development orders (ss 61A – 61D TCPA 1990) are perhaps less well known, having been introduced by s 40 Planning and Compulsory Purchase Act 2004. The purpose of the local development order is to allow LPAs to grant planning permission for particular developments, or particular classes of development, which are provided for in the authorities local development documents. This scheme is particularly notable because – contrary to the established system in the UK – it merges the process of plan making and development control (as seen in North America with “zoning”). Local development orders must be in accordance with a DPD, and PPS 12 advises that the development order be promoted alongside the DPD. There is provision for the Secretary of State to intervene in the making of the order, and provision akin to those in respect of the GPDO as to disapplication, revocation and compensation.
6. Local development orders have been used in a variety of different contexts:
 - a. The development of an aviation related business park at Newquay Airport;
 - b. The use of small-scale renewable energy infrastructure within business parks;
 - c. The regeneration of a town centre by permitting changes of use of ground floor units.
7. With local development orders already available to LPAs, it seems that the NDO will have to assume a different role relating to neighbourhood planning ambitions as opposed to those of wider interest at the LPA level.

The NDO and its place in the localism scheme

8. The NDO system needs to be seen in the wider context of the new “powers” afforded to communities. In particular, NDOs are closely related to neighbourhood development plans. However, they also relate closely to the wider scheme of “community empowerment” in Part 5 of the Localism Act 2011. For example, the

provisions in respect of the compilation of lists of assets of community value, and the consequential provision for community groups to have first refusal upon disposal of those assets, can together with NDOs form a suite of powers which allow a local community to bring forward development.

Making an NDO

9. The procedure for making an NDO is to be set out in ss 61E – 61Q and a new Schedule 4B to the TCPA 1990. What follows is not intended to be a comprehensive analysis of those lengthy provisions, but an overview of the mechanism for making the order:
 - a. The first step is for LPAs to designate “neighbourhood areas”. The power to designate such an area only arises where a parish council or a body capable of being designated a neighbourhood forum has requested the designation of a neighbourhood area. Rules will be prescribed in respect of the creation of neighbourhood forums (s 61I). A parish council may ask for the designation of a neighbourhood area in respect of the whole or part of the parish, and neighbourhood forum can only ask for the designation if the land does not fall within the area of a parish council. Neighbourhood areas may not overlap with each other. Regulations will set out the process for designation and for public participation in that process (s 61G);
 - b. In designating a neighbourhood area, the LPA must consider whether to designate it a “business area”. Such a designation may only be made if, having regard to prescribed criteria, the LPA consider that the area is wholly or predominantly business in nature (s 61H);
 - c. A “qualifying body” (i.e. the parish council or a neighbourhood forum¹) may submit a proposal for an NDO in respect of a neighbourhood area to the LPA. Guidance (“standards”) will be given as to the form and substance of a proposal for an NDO, and regulations will be made as to publicity and consultation (Sch 4B, paras 1 & 4). The LPA is obliged to give advice and assistance in making the NDO (Sch 4B, para 3). The LPA must consider whether the proposed NDO complies with the statutory requirements, and if

¹ Or in the case of CRBOs, a community organisation (see below)

so notify the qualifying body of the same (Sch 4B, paras 5 & 6). It should be noted that this stage does not allow the LPA to review the merits of the proposal;

- d. Once the LPA has expressed its satisfaction that the statutory requirements have been complied with, it must submit the draft NDO for independent examination. The person conducting the examination may be appointed by the LPA if the qualifying body consents to that, or alternatively the examination will be conducted by a person appointed by the Secretary of State (Sch 4B, para 7);
- e. The questions on examination are whether the statutory requirements have been met, and whether the order meets the “basic conditions” which include whether it is appropriate to make the NDO having regard to national policy, the need to preserve listed buildings and conservation areas, the achievement of sustainable development, “general conformity with the strategic policies contained in the development plan” and compliance with EU law (Sch 4B, para 8). The general rule is that independent examination will take place on the basis of written representations, although provision is made for oral hearing (Sch 4B, para 9);
- f. The examiner must recommend that the draft order is submitted to a referendum, that modifications are made, or that it is refused. Modifications may only relate to bringing the proposal into compliance with the statutory requirements and the “basic conditions” – it is not for the examiner to re-write the order (Sch 4B, para 10). The recommendations are then considered by the LPA, which will decide what action to take. The LPA is at this point entitled to depart from the recommendations of the examiner, including as to compliance with the “basic conditions”. This may trigger a further examination (Sch 4B, para 13);
- g. The LPA may then send the draft NDO out for a referendum. It is for the LPA to make the arrangements for the referendum. The referendum area is identified in the NDO. Those entitled to vote in local elections are entitled to vote in the referendum (Sch 4B, para 14);

- h. Where the NDO relates to a “business area” there must be a second referendum of non-domestic ratepayers and other prescribed persons in the area concerned (Sch 4B, para 15);
 - i. If a referendum succeeds by a simple majority, the LPA must make the NDO as soon as practicable after the referendum (s 61E(4)) unless to do so would breach an EU obligation or ECHR rights (s 61E(8)). If there are two referenda (in a business area) then the LPA may still make the NDO (but is not required to) (s 61E(5)).
10. Throughout the process, the LPA is required to have regard to the Secretary of State’s guidance (s 61O). The making of an NDO, the decision of the LPA as to whether to accept the recommendations of the examiner, or the conduct of a referendum may be challenged by way of judicial review, subject to a six week time limit (s 61N).

Effect of an NDO

11. An NDO may be made in respect of all the land in a neighbourhood area, part of that land, or a specific site (s 61J(1)). The NDO may grant permission for any development so long as it is not excluded development. Excluded development is defined as (s 61K):
- a. County matters including waste operations;
 - b. Development listed in Annex 1 to the EIA Directive;
 - c. Nationally significant infrastructure projects (see Planning Act 2008);
 - d. Prescribed development (or development in a prescribed area).
12. Permission may be granted subject to conditions and/or prior approval (s 61L(1)) and provision may be made for approvals to be determined by the parish council rather than the LPA. Provision is also made for the revocation of an NDO by the Secretary of State or the LPA, or modification by the LPA with the consent of the qualifying body.

Community right to build orders

13. The new Schedule 4C to the 1990 Act makes provision for community right to build orders, which are a special form of NDO. A CRBO is an NDO which has been made pursuant to a proposal by a community organisation and must relate to specific development at a specific site (Sch 4C, para 2). Regulations may be made to restrict the scope of CRBOs.
14. "Community organisations" which can seek CRBOs are bodies corporate which are established to further the social, economic and environmental well-being of individuals living, or wanting to live, in a particular area and which meet other prescribed criteria. Regulations will be made to specify how community organisations shall operate. A community organisation will be treated as a qualifying body for making a CRBO if the area of the development consists of or includes a neighbourhood area and more than half the members of the organisation live in that area. The LPA may decline to consider a proposal for a CRBO if there is another proposal is pending (for an NDO or CRBO) and the development and site to which that proposal relates is the same or substantially the same.
15. Subject to the identity of the body proposing the order, generally speaking, the procedure for making a CRBO follows the procedure for making any other NDO. However, regulations may be made to prevent the exercise of enfranchisement rights in respect of land which is the subject of a CRBO (Sch 4C, para 11). The nature of development permitted by a CRBO is slightly more restricted than that permitted under an NDO, because development in Schedule 2 of the EIA Regulations which is likely to have significant effects on the environment, or development likely to have significant effects on a European protected site, is excluded (Sch 4C, para 6).

Potential application

16. It of course remains to be seen whether extensive use will be made of NDOs, and for what purposes they will be used. The Government's publicity has been focused on CRBOs, and their potential application to community facilities such as sports facilities, as well as new affordable housing. In Cornwall, Penzance Town Council is intending to promote an NDO to allow the replacement of windows and doors within a certain area, so long as the proposals comply with a design guide. Such schemes may be attractive in areas with distinctive neighbourhood characteristics and existing

pro-active parish councils, although elsewhere the prospect of such schemes coming forward seems remote.

17. It might be anticipated that the NDO scheme will encourage LPAs to be more pro-active in using the existing provisions for local development orders, so as to retain a degree of control over the way in which development is carried out in its area.

Conclusion

18. The NDO scheme is a significant extension of the current system of development orders, which takes a degree of control away from LPAs and places it in the hands of the community organisations promoting the scheme, and those people who are sufficiently engaged to vote in the referendum. Whether this encourages a wholesale change in respect of the planning system will depend on how frequently these powers are used and the purposes for which they are used.

Richard Turney
Landmark Chambers
December 2011

This seminar paper is made available for educational purposes only. The views expressed in it are those of the author. The contents of this paper do not constitute legal advice and should not be relied on as such advice. The author and Landmark Chambers accept no responsibility for the continuing accuracy of the contents.