NEIGHBOURHOOD PLANNING AS PROVIDED FOR

IN THE LOCALISM ACT 2011

By

Stephen Morgan

LANDMARK CHAMBERS

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INTRODUCTION: BRIEF BACKGROUND TO THE PLANNING PROVISIONS OF THE LOCALISM ACT

1. A good starting point for understanding the underlying approach driving these current reforms now enshrined in the Localism Act is the idea of The Big Society. As the Prime Minister put in (in his speech in July 2010):

   But before I get into the details, let me briefly explain what the Big Society is and why it is such a powerful idea.

   You can call it liberalism. You can call it empowerment. You can call it freedom. You can call it responsibility. I call it the Big Society.

   (http://www.number10.gov.uk/news/speeches-and-transcripts/2010/07/big-society-speech-53572)

2. In terms of what is envisaged in applying the Big Society idea to the planning system, is what is proposed in the Localism Act 2011 really new? The Skeffington Report (late 1960s) accepted the need to involve the public in planning and made what were then far-reaching recommendations, which influenced subsequent legislation in the early 1970s. Publicity and consultation became required components of the statutory planning system, providing local people with

opportunities to comment on and object to development plans and planning applications.

3. However, the Coalition Government has progressed the localism reforms to the planning system but at a time when economic considerations are particularly critical. The Government has cast a degree of blame on the planning system (and even on planners and planning silks!) for holding up development. It has referred to the need for development to be allowed to proceed. This culminated in the Planning for Growth Statement with its default response of "yes" to development. This just exposed the tension between localism and a liberal planning system. Whilst the final version of the National Planning Policy Framework is awaited, the Government has nonetheless proceeded with the key planning features of the Bill and included these in the Act.

4. One of the key elements of this localism and decentralisation agenda is neighbourhood planning. This paper seeks to explore how this is provided for in the Localism Act. The provisions need to be seen in the context of the move from top down targets to relying upon co-operative or pro-active locals. This is backed up by incentives, such as the New Homes Bonus. Will these really reverse the prevailing perception that locals may welcome development provided that isn't too near or otherwise affect them? Is the response of one commentator that in future the response from locals to development proposals will not be "over my dead body" but "what's worth?"

5. The Neighbourhood Planning provisions also need to be seen in the context of the other "decentralising"/"localism" provisions. Section 109 of the Act abolishes regional strategies and thus removes that strategic level of planning and, as the Government puts it, centrally imposed figures and requirements. The absence of that strategic level is partly addressed by the imposition of the duty to co-operate in relation to planning of sustainable development[1].

6. These provisions should also be considered having regard to the comments of John Howell, who is permanent secretary to decentralisation minister, Greg Clark, and chairs a government group called the Planning Sounding Board, has said that the

[1] Section 110 of the Localism Act inserts section 33A into the Planning and Compulsory Act 2004.

existing concept of consultation will become extinct under government plans. He says: "As far as I am concerned, consultation is dead. Taking a plan, and saying "take it or leave it" is over. Instead, engagement is what it's about. Local people will be encouraged to bring forward their ideas". So we can say goodbye to consultation and hello to localism[2]. This paper explores whether is of course assuming that the Localism Act lives up to the much trailed expectations and fears with regard to neighbourhood planning.

WHAT THE GOVERNMENT SAYS ABOUT THE ACT

7. In the Plain English Guide to the Localism Act (extract attached) it is stated:

…..The Localism Act sets out a series of measures with the potential to achieve a substantial and lasting shift in power away from central government and towards local people. They include: new freedoms and flexibilities for local government: new rights and powers for communities and individuals; reform to make the planning system more democratic and more effective, and reform to ensure that decisions about housing are taken locally…..[3]

There are, however, some significant flaws in the planning system that this Government inherited. Planning did not give members of the public enough influence over decisions that make a big difference to their lives. Too often, power was exercised by people who were not directly affected by the decisions they were taking. This meant, understandably, that people often resented what they saw as decisions and plans being foisted on them. The result was a confrontational and adversarial system where many applications end up being fought over.

The Localism Act contains provisions to make the planning system clearer, more democratic, and more effective.[4]

NEIGHBOURHOOD PLANNING

"*Neighbourhood planning will allow communities, both residents, employees and business, to come together through a local parish council or neighbourhood forum*

[3] Page 4.

[4] Page 14.

and say where they think new houses, businesses and shops should go and what they should look like"[5]

Neighbourhood planning is a new, community-led, level of planning. Our aim is for an effective and transparent system which inspires communities to get involved, gives communities confidence that their views will have real influence, and delivers the growth the country needs.[6]

8. This is dealt with in Part 6, Chapter 3 of and Schedules 9-12 to the Act. These provisions will come into force probably in April 2012. However, by s. 240(5):

   (1) sections 116 (neighbourhood planning) and 121 (consequential amendments) and Schedules 9 to 12 come into force on the day of the passing of the Act so far as those sections or Schedules confer power on the Secretary of State to make regulations or publish documents setting standards.

   (2) Sections 117 to 120, relating to charges for meeting costs relating to and financial assistance for neighbourhood planning, came into force on the day the Act was passed.

9. "Neighbourhood Planning" is a new concept formulated in the Act. Section 117, dealing with charges for meeting the costs relating to neighbourhood planning, defines a local planning authority's neighbourhood planning functions as those exercisable under:

   (1) Any of sections 61E to 61Q of, or Schedule 4B or 4C to, the Town and Country Planning Act 1990 (neighbourhood development orders (NDOs)).

   (2) Any of sections 38A to 38C of the Planning and Compulsory Purchase Act 2004 (neighbourhood development plans (NDPs)).

   (3) Any under section 117 itself.

[5] Page 15 of the Plain English Guide.

[6] Page 10 of DCLG's Consultation document on Neighbourhood Planning Regulations.

10. At the heart of neighbourhood planning functions are those relating to NDOs and NDPs. However, it is important not to overlook the cost and financial provisions included in the Act. Sections 117-119 provide for the making of regulations (by the SoS with the consent of the Treasury) for meeting costs relating to neighbourhood planning, and the collection and enforcement relating to charges. Under section 120 the SoS may provide financial assistance or make arrangements for the provision of financial assistance in relation to NDOs and NDPs.

11. The Government's Impact Assessment on the Bill estimated the average cost of neighbourhood plans as between £17,000 and £63,000 but also states that Councils is some areas could end up paying £200,000 to develop their plans. The cost to community groups of bringing forward a Community Right to Build scheme is estimated at approximately £40,000. It is stated that around 4,189 electoral wards (around 55 per cent of local communities) are expected to produce neighbourhood plans in the first 11 years. The Government estimates that 380 neighbourhood plans will be created annually in the first five years after enactment. Based on the number of electoral wards the puts the number of neighbourhoods in England at around 7,618.

12. The RTPI was very active in monitoring and commenting on the Bill and consideration of the Act can usefully take into account the concerns raised by that body. At the Report Stage it had highlighted four outstanding issues:

(1) The duty to co-operate in clause 90 of the Bill – the strengthening of this by the Government has been welcomed by the RTPI.

(2) Neighbourhood Planning – the RTPI considers that this remains overly complex and the Government amendments still do not deal with many of the key issues.

(3) National Policy Framework – this needs to be on the face of the Bill to be effective.

(4) New clause 15 – financial considerations as a material consideration – this proposal is deeply flawed and potentially very damaging to proper planning.

NEIGHBOURHOOD DEVELOPMENT ORDERS

13. The Act amends the TCPA 1990 by inserting a new section 61E Neighbourhood Development Orders after section 61D. Further Schedule 10 inserts a new Schedule 4B into the TCPA headed "Process for Making of Neighbourhood Development Orders" Section 61 of and Schedule 4A to the TCPA 1990 deal with Local Development Orders. The new provisions will be added onto these. The considerations that arise from these new provisions are:

WHAT IS A NDO?

WHO CAN PROMOTE ONE?

WHAT IS THE PROCEDURE?

OTHER ASPECTS

WHAT IS AN NDO? (s. 61E(2))

14. It is an order which grants planning permission in relation to a particular neighbourhood area for:

(a) Development specified in the order, or

(b) Development of any class specified in the order.

An NDO cannot relate to more than one neighbourhood area.

15. The Order may make provision in relation to (61J):

(a) All land in the NA specified in the order;

(b) Any part of that land; or

(c) A site in that area specified in the order.

16. The Order cannot provide for EXCLUDED DEVLEOPMENT, which is (61I(2) and 61K):

(a) A county matter within paragraph 1(1)(a) to (h) of Schedule 1 to the TCPA 1990;

(b) Waste development that is not development of a prescribed description;

(c) Development within Annex 1 to the Environmental Assessment Directive (85/337/EEC);

(d) Nationally Significant Infrastructure – as that is covered by the development consent regime under the Planning Act 2008. Development that consists, whether partly or wholly, of a nationally significant infrastructure project is excluded.

(e) Prescribed development or development of a prescribed description; and

(f) Development in a prescribed are or an area of a prescribed description.

17. A proposal for a NDO may not be made at any time in relation a neighbourhood area if there is at that time another proposal in relation to that area that is outstanding (S.61F(10)).

WHO CAN PROMOTE AN NDO? (61E(1))

In Short

18. Under the provisions of the Act this is the **Parish Council** for the area or if there is not a PC then an organisation or body designated by the lpa as a **neighbourhood forum** for the area in question (s.61E(3) & (4)).

19. As addressed below there is also a special type of NDO which is promoted by another body recognised in the Act, a **community organisation**.

In Detail

20. Any **qualifying body** is entitled to initiate a process for the purpose of requiring an lpa in England to make a NDO (s.61E(1)).

21. A qualifying body, which is entitled to initiate a process for the purpose of requiring an lpa to make a NDO, means (s.61E(6)):

(i) A **Parish Council**; or

(ii) An organisation or body designated as a **neighbourhood forum**, authorised in accordance with 61F(3), for the purposes of an NDO to act in relation to a neighbourhood area but only if it does not consist of or include the whole or any part of the area of the PC.

A **community organisation** is regarded as a qualifying body for the purposes of section 61E (paragraph 4(2) of Schedule 4C).

Parish Council

22. A PC is authorised to act for the purposes of an NDO in elation to a neighbourhood area if that area consists of or includes the whole or any part of the area of the council (s.61F(1)). Where there is more than one PC for a neighbourhood area, one PC is only authorised if the other/s consent (s.61F(2)).

Neighbourhood Forum

23. An lpa can only designate an organisation or body as a neighbourhood forum:

(1) If they are satisfied that the 4 specified conditions are met (61F(5)) or they are satisfied that the organisation or body meets prescribed conditions (61F(6)). The specified conditions are:

(a) The organisations or body is established for the express purpose of furthering the social, economic and environmental well-being of an area that consists of or includes the neighbourhood area concerned (whether or not it is also established for the express purpose of promoting the carrying on of trades, professions or other businesses in such an area),

(b) The membership of the organisation or body is open to -

(i) individuals who live in the neighbourhood area concerned,

(ii) individuals who work there (whether for businesses carried on there or otherwise), and

(iii) individuals who are elected members of a county council, district council or London borough council and any of whose area falls within the neighbourhood area concerned

(c) There are at least 21 (it was originally just 3) individuals each of whom –

(i) lives in the neighbourhood area concerned,

(ii) works there (whether for a business carried on there or otherwise), or

(iii) is an elected member of a county council, district council or London borough council any of whose area falls within the neighbourhood area concerned.

(d) The organisation or body has a written constitution, and

(e) Such other conditions as may be prescribed. Are met

24. The Draft Neighbourhood Planning (England) Regulations 2012[7] require that an application by an organisation or body to be designated a neighbourhood forum for a neighbourhood area includes a written statement, which explains how the proposed neighbourhood forum meets these conditions (draft regulation 9(e)).

25. In determining whether to designate an organisation or body under section 61F(5) an lpa must also have regard to the desirability of designating an organisation or body –

(i) which has secured (or taken reasonable steps to attempt to secure) that its membership includes at least one individual falling within each of the categories in s.61F(5)(b) (i.e. living, working or being an elected councillor),

(ii) Whose membership is drawn from different places in the neighbourhood area concerned and from different sections of the community in that area, and

(iii) Whose purpose reflects (in general terms) the character of that area,

Limitations on Designation of a Neighbourhood Forum

[7] Consultation period from 13 October to 5 January 2012.

26. A lpa may only designate an organisation or body as a neighbourhood forum if the organisation or body has made an application to be designated (61F(7)(c)).

27. An LPA may only designate one organisation or body as a neighbourhood forum for each neighbourhood area (61F(7)(b)).

28. The designation lasts for 5 years – but its cessation does not affect the validity of any proposal for a NDO made before the end of that period (61F(8)(a). In the case of the designation of an unincorporated, that designation is not to be affected merely because of a change in the membership of the association (s.61F(8)(b)).

29. The Bill had originally provided that an LPA cannot withdraw a designation (61F(8)). However, s.61F(9) of the Act now provides that a lpa may withdraw a designation as a neighbourhood forum if they consider that the organisation or body is no longer meeting –

    (a) the conditions by reference to which it was designated, or

    (b) any other criteria to which the authority were required to have regard in making the designation.

    Where an organisation's or body's designation is withdrawn, the authority must give reasons to that organisation or body.

30. An LPA must give reasons for refusing an application to be designated (61F(7)(d))

31. Regulations may be made (61F(11)&(12) –11(a) and 12(c) apply to CRBO but nothing else in section 61F).

Neighbourhood Area (s.61G)

What it is

32. A NA is an area of an lpa in England:

    (1) Which has been designated by the authority as an NA (61G(1)):

    (2) On an application by either a PC or an organisation or body which is or is capable of being designated as a Neighbourhood Forum (61G(1)&(2)). A community

organisation can also apply if certain criteria are met (paragraph 5 of Schedule 4C).

(3) Must not overlap with another NA (61G(7)).

(4) On an application by a PC the NA may consist of the whole or part of the area of that council (61G(3)(a)).

(5) An NA applied for by a neighbourhood forum must not include any part of the area of a PC (61G(3)(b)).

(6) On an application (provided that is made in connection with a proposal or anticipated proposal for a CRBO) by a community organisation the NA may consist of the whole or part of the area of a PC (paragraph 5(2) of Schedule 4C). That is subject to –

(a) the area specified in the application consisting of or including the area in paragraph 3(1)(a) of Schedule 4C (i.e. the area for which the community organisation is established); and

(b) at the time the application is made more than half of the members of the organisation live in the area specified in the application.

(paragraph 5 of schedule 4C)

33. In determining an application by a relevant body for the designation of a neighbourhood area the lpa must have regard to:

(a) the desirability of designating the whole of the area of a PC as a neighbourhood area;

(b) the desirability of maintaining the existing boundaries of areas already designated as neighbourhood areas.

(s.61G(4))

34. There is also power to adjust and modify designations of neighbourhood areas (s.61G(5)&(6)).

35. If an lpa refuses an application to designate an area as a neighbourhood area, it must give reasons for so doing (s.61G(9)).

36. Further, where an lpa designate as an area as a neighbourhood area or modify an area under s.61G(6), they must consider whether they should designate the area as a **business area**. That only applies where the authority considers that the area is wholly or predominantly business in nature.

37. There is provision for designation of an area which falls within two or more local authority areas (s.61I).

Community Right to Build Orders

38. There is also provision for a particular type of NDO called a **community right to build order** (CRBO) (s.61(Q) and Schedule 4C):

(1) This is an NDO pursuant to a proposal by a community organisation (paragraph 2(1)(a) of Schedule 4C);

(2) The order grants planning permission for specified development in relation to a specified site in the specified neighbourhood area; and

(3) The specified development does not exceed prescribed limits, which may be prescribed in Regulations.

(4) An lpa must decline to consider a proposal for as CRBO if they consider that it:

(a) Falls within Annex 2 to the EIA Directive and is likely to have significant effects on the environment;

(b) The specified development (i.e. specified in the CRBO) is likely to have significant effects on a qualifying European site.

39. **Community organisation** means (paragraphs 3 and 4 of Schedule 4C) a body corporate:

(a) Which is established for the express purpose of furthering the social, economic and environmental well-being of individuals living, or wanting to live, in a particular area, and

(b) Which meets such other conditions in relation to its establishment or constitution as may be prescribed in regulations. These may cover the

distribution of profits and assets; membership; and control of the body whether by the exercise of voting rights or otherwise (paragraph 3(2)).

(c) A community organisation is authorised for the purposes of a CRBO to act in relation to a NA (whether or not part of it falls within the area of a PC) if –

(i) the area for which the Community organisation is established to further (under paragraph 3(1)(a)) consist of or includes the NA (whether or not any part of the NA falls within the area of a parish council), and

(ii) at the time of the proposal for the order is made more than half of the members of the organisation live in the NA.

40. Under the Draft Regulations (draft regulation 13):

(a) individuals who live or work in the particular area must have the opportunity to become members of the community organisation (whether or not others cam also become members);

(b) the constitution of the community organisation must provide that –

(i) individuals who live in the particular area control at least 51% of its voting rights;

(ii) one of its objectives is to provide a benefit for the local community;

(iii) any assets of the community organisation cannot be sold or developed except in a manner which the trust's members consider benefits the local community;

(iv) any profits from its activities will be used to benefit the local community (otherwise than being paid directly to members);

(v) in the event of the winding up of the community organisation or in an other circumstances where the community organisation ceases to exist, its assets must be transferred to another body corporate which has similar objectives; and

(vi) the organisation has at least 5 members, who are not related to each other, who live in the particular area.

WHAT IS THE PROCEDURE FOR THE MAKING OF AN NDO? (s.61E(3) and Schedule 4B)

41. Schedule 4B (of the TCPA 1990) makes provision for the process of making of NDOs including:

(a) Provision for independent examination (paragraphs 7-15), and

(b) Provision for the holding of referendums on proposed NDOs.

42. This applies, with modifications, to CRBOs as well (paragraphs 7-10 of Schedule 4C). The proposal for an NDO is made to the lpa and accompanied by a draft order and a statement which contains a summary of the proposals and sets out the reasons why an order should be made in the proposed terms (paragraph 1(2)). The requirements for the information to accompany an application and the publicity of the application are set out in draft regulations 22 and 23.

43. This Schedule sets out the detailed procedure and documentary requirements, which are not detailed here save to refer to:

(1) The requirement of an lpa (under paragraph 3 of Schedule 4B) to give such advice or assistance (but not financial) to an applicant as they think appropriate.

(2) The power to make regulations as to the requirements that must be complied with before proposals for an NDO may be submitted to or considered by an lpa (paragraph 4).

(3) An lpa can decline to determine a repeat application (paragraph 5(1)). A repeat application is defined (in paragraphs 5(2)-(5)). In short it is one where:

within 2 yrs of the receipt of the application there has been an application that has been refused:

(a) as being in breach of or incompatible with any EU obligation or any of the Convention rights; or

(b) in accordance with the recommendation of an examiner or where a referendum rejected a same or similar proposal.

44. Where in those circumstances the lpa considers that there has been no significant change in relevant considerations since the refusal of the proposal or the holding of the referendum.

Examination

45. Once the lpa have considered preliminary matters they must submit the draft NDO and such other documents as may be prescribed for independent examination (paragraph 7(1) & (2) of Schedule 4B). The Examiner must have appropriate qualifications and experience, be independent of the qualifying body and the authority and not have an interest in any land that may be affected by the draft order (paragraph 7(6)).

46. The qualifying body must consent to the person appointed by the lpa (Paragraph 7(4)). If not, the appointment can be by the SoS (paragraph 7(5)).

47. The examiner must consider specified matters and none other (apart from compatibility with the Convention rights) (paragraphs 8(1) to (6)). The examiner must consider (in accordance with paragraph 8(1) of Schedule 4B):

(a) whether the draft NDO meets the basic conditions;

(b) whether the draft order complies with the provision made by or under ss. 61E(2) (re. what the order grants permission for), 61J (provision that may be made by an NDO) and 61L (permission granted by an NDO);

(c) whether any period specified under section 61L(2)(b) or (5) is appropriate, which relate respectively to the time with in which any application to the lpa for approval of any matter as specified in the NDO and the period in which the development must be begun;

(d) whether the area for any referendum should extend beyond the neighbourhood area to which the draft order relates; and

(e) such other matter as may be prescribed.

48. The basic conditions are met if:–

(a) it is appropriate to make the order having regard to national policies and advice contained in guidance issued by the SoS;

(b) It is appropriate to make the order having regard to the desirability of preserving any listed building or its setting or any features of special architectural or historic interest that it possesses. This applies only in so far as the order grants planning permission for development that affects the building or its setting;

(c) it is appropriate to make the order having regard to the desirability of preserving or enhancing the character or appearance of any conservation area. This applies only so far as the order grants planning permission for development in relation to buildings or other land in the area.

(d) the making of the order contributes to the achievement of sustainable development;

(e) the making of the order is in general conformity with the strategic policies contained in the development plan[8], which is defined in this context so as to exclude a NDP (paragraph 17(b) of Schedule 10 to the Act);

(f) The making of the order does not breach, and is otherwise compatible with, EU obligations, and

(g) Prescribed conditions are met and prescribed matters have been complied with.

49. The general rule (paragraph 9) is that the examination of the issues identified by the examiner is to be in the form of consideration of **written representations** save that the examiner must convene a hearing (which must be in public) where:

(a) The examiner considers that the consideration of oral representations is necessary to ensure:

(i) adequate examination of the issue; or

(ii) a person has a fair chance to put a case; or

[8] For the purposes of paragraph 1 of Schedule 8 to the Planning and Compulsory Purchase Act 2004 (transitional provisions).

(b) in such other cases as may be prescribed.

50. At a hearing the following persons are entitle to make oral representations (paragraph 9(3)):

(1) The qualifying body,

(2) The lpa,

(3) Where a hearing is held to give a person a fair chance to put a case, that person,

(4) Such other persons as may be prescribed.

It is for the examiner to decide how the hearing is conducted including in respect of who may be questioned and on what issues and the amount of time for making oral representations and questioning (paragraph 9(5)).

Questioning

51. The examiner must apply the principle (paragraph 9(6)) that the questioning of a person's oral representations **should be done by the examiner** except where the examiner considers that questioning by another is necessary to ensure-

(a) Adequate examination of a particular issue, or

(b) A person has a fair chance to put a case

Recommendations (paragraph 10 of Schedule 10 (4B))

52. The examiner's report, which must give reasons for each of its recommendations and contain a summary of its findings, must recommend either –

(a) That the draft order is submitted to a referendum – such a recommendation must also be accompanied by a recommendation as to whether the area for the referendum should extend beyond the neighbourhood area (and if so what the extended area should be) or

(b) That modifications specified in the report are made to the draft order and that the draft order as modified is submitted to a referendum (again such a recommendation – such a recommendation must also be accompanied by a recommendation as to whether the area for the referendum should extend beyond the neighbourhood area and if so what the extended area should be) The only modifications that may be recommended are:

(i) Those to secure that the draft order meets the basic conditions in paragraph 8(2);

(ii) To secure compatibility with the Convention Rights,

(iii) To secure compliance with the statutory requirements for the content/scope of the NDO in 61E(2), 61J and 61L.

(iv) Specifying a period under 61J(2((b) or (5) (periods for obtaining approval of the authority under a permission and in which the development must commence), and

(v) For the purpose of correcting errors.

or

(c) That the proposal for the order is refused.

53. However, the report may not recommend that an order (with or without modifications) is submitted to a referendum if the examiner considers that the order does not:

(a) meet the basis conditions in paragraph 8(2), or

(b) comply with the provisions made by or under sections 61E(2), 61J and 61L.

54. There is provision for Regulations making provision in connection with examinations (paragraph 11). The current draft Regulations don't cover referendums – these will be brought forward through separate regulations, which will be based on existing local government referendum regulations.[9]

[9] See pages 6 & 13 of DCLG's Consultation on Neighbourhood planning regulations.

Consideration of the Examiner's report by the LPA

55. The lpa only have to consider the Inspector's recommendations, which are not binding (paragraph 12 (2)). (Save for a CRBO where, if an examiner's report recommends that the draft order is refused, the authority must refuse the proposal – paragraph 10(2) of Schedule 4C).

56. The authority must hold a referendum (in accordance with paragraph 14) if it is satisfied that (paragraph 12(4)):

(a) The draft order meets the basic conditions in paragraph 8(2), is compatible with the Convention rights and complies with the provision made by or under sections 61E(2), 61H and 61J - relating to the statutory requirements for the content and scope of the NDO; or

(b) That meeting, compatibility and compliance would be achieved if modifications were made to the draft order (whether or not recommended by the examiner). The authority cannot make recommendations that go beyond those that the examiner has power to recommend (under paragraph 10(3) – see paragraph 12(6)).

If these matters are complied with and the NDO relates to a neighbourhood area that has been designated as a business area under s.61H then the authority must also hold an **additional referendum** under paragraph 15 of Schedule 4B. This is for voters who are non-domestic ratepayers.

57. Except where the recommendation relates to the area for the referendum, if the authority is to make a decision differing from that recommended by the examiner the authority has to notify prescribed persons of this with their reasons must invite representations (paragraph 13) where the reason for the difference is wholly or partly as a result of:

(i) New evidence; or

(ii) A new fact; or

(iii) A different view taken by the authority as to a particular fact.

There is provision that allows such an issue to be considered by way of examination (paragraph 13(2)).

The Referendum

58. The referendum must cover **as a minimum** the neighbourhood are to which the proposed order relates but the authority has power if they consider it appropriate to include other area (whether or not those areas fall wholly or partly outside the authority's area) (paragraph 12(7)).

59. Where a referendum is required to be held under paragraph 12(4), the procedure is set down by paragraph 14 which covers:

(i) Who the relevant council is for arranging the referendum;

(ii) Who is entitled to vote – a person who is on the electoral role and whose qualifying address is the referendum area (save for in the City of London).

60. Regulations may make provision about referendums (paragraph 15).

Duty on LPA (s. 61E(4))

61. LPA must make a NDO **if more than half of those voting** in a referendum under Schedule 4B have voted in favour of the order (61E(4)(a)). The order must be made as soon as reasonably practicable after such a referendum is held (61E(4)(b)). Where there are two applicable referendums because the area is designated as a business area, and more than half of those voting has voted in favour in only one of the referendums, the authority may (but need not) make a NDO (s.61E(5)).

62. The duty under subsection (4)(a) does NOT apply if the authority considers that the making of the NDO would breach, or would otherwise be incompatible with, any EU obligation or any of the Convention rights (within the meaning of the Human Rights Act 1998) (61E(8)). Regulations may be made to set down a procedure in such cases (61E(9) & (10)).

63. There can only be one proposed NDO at a time by the same PC or neighbourhood forum – in that a proposal cannot be made when another proposed NDO is "outstanding" in that neighbourhood area - (61F(10), (61F(9) which does not apply to CRBOs – see paragraph 4(4) of Schedule 4C – but a lpa may decline to consider a proposal for a CRBO or other NDO if another proposal for either Order has been

made, the other proposal is outstanding and the authority consider that the development and site are the same or substantially the same.

OTHER IMPORTANT ASPECTS

Conditions

64. The planning permission granted may be unconditional or subject to such conditions or limitations as are specified in the order (61L(1)). The order may provide that the planning permission is subject to the condition that the development commences before the end of the period specified in the order – regulations may provide for those periods (61J(5)&(6)).

65. The other conditions that may be specified include (61L(2)):

(a) Obtaining approval of the lpa who made the order but not from anyone else; and

(b) Provision specifying the period within which applications must be made to an lpa for the approval of the authority of any matter specified in the order.

66. There is power for the making of Regulations that entitle a PC in prescribed circumstances to require any application for approval under 61J(2) to be determined by the PC instead of by the lpa (61J(3)&(4)) – treating PCs as in effect lpas for the purposes of the determination of applications for approvals.

Revocation or Modification of an NDO (s.61M)

Revocation

67. An NDO may be revoked by:

(1) The SoS by order; or

(2) A lpa by order but with the consent of the SoS

In each case reasons for revocation must be stated (61M(3)).

68. A revocation order can be made after development is commenced (61L(7)). However, if it is the development may be completed UNLESS the revocation order provides that this should not be allowed (61L(8)). By paragraph 15 of schedule 12 to the Act, Neighbourhood planning: consequential amendments, section 108 of the TCPA is amended so as to provide compensation where the specified criteria are met.

Modification of an NDO

69. An lpa may at any time by order modify a NDO for the purpose of correcting errors (61M(4)). However, that can only be with the consent of the PC or Neighbourhood Forum who initiated the application for the NDO, if they are still authorised at that time (61M(5)).

70. Regulations may make provision dealing with revocation or modification of NDOs (61K(7)&(8)). These regulations may provisions for e.g. the holding of an examination and the costs of and making charges for this.

Legal Challenges (s.61N)

71. Provision is made for challenge only by way of judicial review of:

(1) A decision to act under section 61E(4) (the making of an NDO if more than half voting in a referendum have voted in favour) or (8) (where the development would breach or be incompatible with any EU obligation or any Convention Rights);

(2) A decision under paragraph 12 of Schedule 4B (consideration by lpa of recommendations made by an examiner etc);

(3) Anything relating to a referendum under paragraph 14 or 15 of Schedule 4B.

72. Any such challenge must be made before the end of 6 weeks beginning with the day of the publication of the decision in relation to (1) and (2); and, in relation to (3), during the period of 6 weeks beginning with the day on which the result of the referendum is declared.

NEIGHBOURHOOD DEVELOPMENT PLANS (NDPs)

73. Part 2 of Schedule 9 amends the Planning and Compulsory Purchase Act 2004 and provides that a NDP is part of the development plan.

WHAT IS A NDP?

WHO CAN INITIATE A NDP?

WHAT IS THE PROCEDURE FOR THE PREPARATION OF AN NDP?

WHAT IS AN NDP?

74. A NDP is a plan which sets out policies (however expressed) in relation to the development and use of land in a particular NA specified in the plan (s.38A(2) of the PCPA 2004 as inserted by paragraph 7 of part 2 of Schedule 9 to the Act).

75. A NDP:

(1) Must specify the period for which it is to have effect,

(2) May not include provision about development that is excluded development, and

(3) Many not relate to more than one neighbourhood area.

WHO CAN INITIATE AN NDP?

76. A parish council, or an organisation or body designated as a neighbourhood forum, authorised for the purposes of a NDP as a result of section 61F of the TCPA 1990, as applied by section 38C(2) of the PCPA 2004 (as inserted by paragraph 7 of Part 2 to Schedule 9 to the Act), is entitled to initiate a process for the purpose of requiring an lpa in England to make a NDP.

77. Those qualifying bodies can also make a proposal for the existing plan to be replaced by a new one (s.38A(11) of the PCPA 2004).

WHAT IS THE PROCEDURE FOR THE PREPARATION OF AN NDP?

78. Schedule 4B, which makes provision about the process for the making of NDOs (including re. independent examination of orders proposed by qualifying bodies and the holding of referendums), applies in relation to NDOs (subject to the modifications in s.38C(5))

79. A NDP can only be made if more than half of those voting in a referendum under Schedule 4B have voted in favour of the order (s.38A(4) & (5)). An lpa must make a lpa if more than half of those voting in a referendum under Schedule 4B have voted to in favour of the order (s.38A(4)).

80. The duty to make a NDP does not arise if the authority considers that the making of the plan would breach, or would otherwise be incompatible with, any EU obligation or any of the Convention rights (within the meaning of the Human Rights Act 1998) (s.38A(6)).

OTHER MATTERS

81. By section 38C the following provisions that apply in relation NDOs also apply to NDPs:

(a) Revocation or modification of NDOs (s.61M);

(c) Legal challenges (s.61N);

(d) Guidance (s.61O);

(e) Provision as to the making of certain decisions by lpas (61P).

KEY ISSUES FOR NEIGHBOURHOOD PLANNING

82. The implications of NDOs and NDPs are potentially far reaching. The Government's Impact Assessment assessed the benefits from Neighbourhood Planning and the Community Right to Build as follows:

Economy: additional development (housing, for example) has an associated economic benefit that can be valued by the land-value uplift of those additional units. Average annual benefits: £56m - £113m. Local authorities: Savings from no longer having to process planning applications (nets out the above revenue from fee income). Fee income from developers: £14m - £28m (average annual). Developers: Savings from no longer having to complete the planning application process: £52m. Local authorities, the Planning Inspectorate and Developers: savings from appeals against planning applications: £15m. *Community:* Development that occurs will be more in line with the wishes of the local community and the community will gain from planning incentives as a result of promoting development in neighbourhood plans. Development will often be of a better quality and provide greater civic amenity because of civic engagement. *Developers:* the fee required under a neighbourhood plan will be lower than that of a current planning application reflecting the lower costs to local authorities. There could also be greater certainty for developers as communities will be involved from the start and so there could be a reduction in late objections.

83. Some commentators have however contended that there are sufficient safeguards in the Bill to ensure that neighbourhood planning does not eliminate the pursuit of wider-than-local priorities[10]. This is largely based upon the fact that to be approved, NDPs will need to conform with the strategic content of the local plan, as well as with national guidance and that they will be not allowed to accommodate less housing than proposed by the local plan (although they could provide for more). Indeed John Howell MP, Parliamentary Private Secretary to the Minister for Decentralisation, has (at an Industry Seminar on 21 January 2011) said that the presumption in favour of sustainable development would be a golden thread running through the new planning system. He also went on to say that councils that failed to plan for new development would be "assumed to have a completely permissive planning system". A developer could then build "what they like, where they like and when they like" provided that they meet new national planning guidance being worked up in tandem with the then Localism Bill. That guidance is of course the Draft National Planning Policy Framework.

[10] See e.g. "Neighbourhood plans look arduous for locals" on p.03 of Planning, 14 January 2011 – which contends that "AT least they not quite the nimby's charter that some had feared"

84. In any event questions still remain about the relationship between NDPs and Local Plans. Will NDOs be subordinate to the local plan? The RTPI wanted local plans' primacy over NLPs to be made "clearly explicit"[11].

CONCLUDING THOUGHTS

85. Neighbourhood planning is a key element in the Government's new planning world. This world is borne on the back of the Big Society approach as seen in the aims of localism and decentralisation.

86. The provisions summarised above certainly give the opportunities for local involvement. They do not yet go as far as was indicated in the Conservative's pre-election Green Paper, Open Source Planning – e.g. limiting the right of appeal and introducing a third party right of appeal. However, they may come outside the Act Indeed on the 12 January it was recorded, in the Commons Hansard report (12 Jan 2011, column 127WH) with regard to the right to appeal:

> "Under both the current system and the new system proposed in the Localism Bill, in which we want to place more weight on the view of the local authority, we are looking at the basis on which an appeal could override the view expressed in the local plan, and to what extent that would be the appropriate course.".
>
> The minister promised: "We will address those points about how to get the balance right, not just in the Bill but in parallel with the important reforms and the creation of a national planning priorities framework."
>
> He added: "There are complications to any significant reform of the appeals system. Our instinct is, first, to put the Localism Bill into practice, secondly, to get the national planning framework up and running, and then to look at the appropriate means of proceeding thereafter."

87. However, the proposals in the Bill itself nonetheless have potentially very far-reaching and indeed radical implications. The provisions for neighbourhood planning need to be considered alongside others which relate to pre-application consultation (clause 102 inserting s.61W & X into the TCPA 1990) and collaborative design (s.61Y). The Government's Impact Assessment for the Bill states that the following benefits would arise from pre-application consultation:

[11] RTPI Localism Bill "Living" Brief.

Benefits include: Greater community involvement is expected to increase acceptance rates of proposals, resulting in more development (12-24m), as collaboration will expose unanticipated issues that can subsequently be addressed. Predicted reduction in administrative costs associated with the processing and determination of planning appeals (0.3m – 0.9m per annum). Benefits divided between Applicants, Local Authorities and the Planning Inspectorate. Greater community involvement will benefit society by providing a positive and constructive role for local people in the planning process. The resultant increase in local support for new developments should lead to more, better quality housing (and other development) being delivered. Applicants whose applications currently fall in to abeyance and are granted permission after the statutory period for determination has expired (13 or 16 weeks) are likely to have permission granted earlier, as a direct result of having undertaken community pre application consultation and avoiding controversy at the application stage Local communities have a greater say in developments that are likely to affect them.

88. RDAs and RSSs are being scrapped[12]. Local Enterprise Partnerships have been formed in an attempt to provide some form of co-ordination between different areas. There is also the duty to co-operate in relation to planning of sustainable development imposed by s.110 of the Localism Act, which inserts section 33A into the PCPA 2004.

December 2011

[12] S.109 of the Localism Act.

ANNEX

A plain English guide to the Localism Act

November 2011
Department for Communities and Local Government

Reform to make the planning system clearer, more democratic and more effective

The planning system helps decide who can build what, where and how. It makes sure that buildings and structures that the country needs (including homes, offices, schools, hospitals, roads, train lines, power stations, water pipes, reservoirs and more) get built in the right place and to the right standards. A good planning system is essential for the economy, environment and society.

There are, however, some significant flaws in the planning system that this Government inherited. Planning did not give members of the public enough influence over decisions that make a big difference to their lives. Too often, power was exercised by people who were not directly affected by the decisions they were taking. This meant, understandably, that people often resented what they saw as decisions and plans being foisted on them. The result was a confrontational and adversarial system where many applications end up being fought over.

The Localism Act contains provisions to make the planning system clearer, more democratic, and more effective.

Abolition of regional strategies

'Regional strategies' were first required by law in 2004. These strategies set out where new development needs to take place in each part of the country. They include housing targets for different areas, set by central government. Local communities had relatively limited opportunities to influence the strategies.

This centrally-driven approach to development is bureaucratic and undemocratic. Rather than helping get new houses built, it has had the effect of making people feel put upon and less likely to welcome new development.

The Secretary of State wrote to local authorities in 2010 to tell them that the Government intended to abolish regional strategies. The Localism Act will enable us to do this.

Duty to cooperate

In many cases there are very strong reasons for neighbouring local authorities, or

groups of authorities, to work together on planning issues in the interests of all their local residents. This might include working together on environmental issues (like flooding), public transport networks (such as trams), or major new retail parks.

In the past, regional strategies formed an unaccountable bureaucratic layer on top of local government. Instead, the Government thinks that local authorities and other public bodies should work together on planning issues in ways that reflect genuine shared interests and opportunities to make common cause. The duty requires local authorities and other public bodies to work together on planning issues.

Neighbourhood planning

Instead of local people being told what to do, the Government thinks that local communities should have genuine opportunities to influence the future of the places where they live. The Act introduces a new right for communities to draw up a neighbourhood plan.

Neighbourhood planning will allow communities, both residents, employees and business, to come together through a local parish council or neighbourhood forum and say where they think new houses, businesses and shops should go – and what they should look like.

These plans can be very simple and concise, or go into considerable detail where people want. Local communities will be able to use neighbourhood planning to grant full or outline planning permission in areas where they most want to see new homes and businesses, making it easier and quicker for development to go ahead.

Provided a neighbourhood development plan or order is in line with national planning policy, with the strategic vision for the wider area set by the local authority, and with other legal requirements, local people will be able to vote on it in a referendum. If the plan is approved by a majority of those who vote, then the local authority will bring it into force.

Local planning authorities will be required to provide technical advice and support as neighbourhoods draw up their proposals. The Government is funding sources of help and advice for communities. This will help people take advantage of the opportunity to exercise influence over decisions that make a big difference to their lives.

Community right to build

As part of neighbourhood planning, the Act gives groups of local people the power to deliver the development that their local community wants. They may wish to build new homes, businesses, shops, playgrounds or meeting halls. A community organisation, formed by members of the local community, will be able to bring forward development proposals which, providing they meet minimum criteria and can demonstrate local support through a referendum, will be able to go ahead without requiring a separate traditional planning application. The benefits of the development, such as new affordable housing or profits made from letting the homes, will stay within the community, and be managed for the benefit of the community. The Government will also fund sources of help and advice for communities who want to bring forward development under the community right to build.

1 More information and details of support can be found at http://www.communities.gov.uk/documents/planningandbuilding/pdf/1985896.pdf 16

Requirement to consult communities before submitting certain planning applications

To further strengthen the role of local communities in planning, the Act introduces a new requirement for developers to consult local communities before submitting planning applications for certain developments. This gives local people a chance to comment when there is still genuine scope to make changes to proposals.

Strengthening enforcement rules

For people to have a real sense that the planning system is working for them, they need to know that the rules they draw up will be respected. The Localism Act will strengthen planning authorities' powers to tackle abuses of the planning system, such as deliberately concealing new developments.

Reforming the community infrastructure levy

As well as being able to influence planning decisions, local people should be able to feel the benefits of new development in their neighbourhood. Local authorities are allowed to require developers to pay a levy when they build new houses, businesses or shops. The

money raised must go to support new infrastructure - such as roads and schools. This is called the community infrastructure levy.

The Localism Act will change the levy to make it more flexible. It allows some of the money raised to be spent on things other than infrastructure. It will give local authorities greater freedom in setting the rate that developers should pay. And crucially, the Act gives the Government the power to require that some of the money raised from the levy go directly to the neighbourhoods where development takes place. This will help ensure that the people who say 'yes' to new development feel the benefit of that decision.

Reform the way local plans are made

Local planning authorities play a crucial role in local life, setting a vision, in consultation with local people, about what their area should look like in the future. The plans local authorities draw up set out where new buildings, shops, businesses and infrastructure need to go, and what they should look like.

The Government thinks it is important to give local planning authorities greater freedom to get on with this important job without undue interference from central government. The Localism Act will limit the discretion of planning inspectors to insert their own wording into local plans. It also ensures that rather than focusing on reporting progress in making plans to central government, authorities focus on reporting progress to local communities.

Nationally significant infrastructure projects

Some planning decisions are so important to our overall economy and society that they can only be taken at a national level. These include decisions on nationally significant infrastructure projects such as major train lines and power stations. Previously these decisions lay in the hands of an unelected public body, called the Infrastructure Planning Commission that is not directly accountable to the public. The Government thinks that these important decisions should be taken by Government ministers, who are democratically accountable to the public. The Localism Act abolishes the Infrastructure Planning Commission and restores its responsibility for taking decisions to Government ministers. It also ensures the national policy statements, which will be used to guide decisions by ministers, can be voted on by Parliament. Ministers intend to make sure that major planning decisions are made under the new arrangements at least as quickly as under the previous system.