PLANNING

Neighbourhood development

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» The government continues to promote neighbourhood plans which it considers fundamental to delivering new housing.

A neighbourhood development plan (NDP) is seen as a way of diverting local objections to large-scale housebuilding by influencing where building takes place and how it is integrated into communities.

The 200th neighbourhood plan recently came into force, representing a small fraction of the 10,000 or so town and parish councils in England and Wales empowered to produce a plan (though some are made jointly). Many more, primarily urban, unparished areas are untouched by an NDP or any attempt to produce one. Even in the parishes, many are started but grind to a halt.

The slow rate of adoption may be partly due to an over-zealous, centralist approach by NDP examiners, but legislative anomalies also frustrate what was intended to be a relatively simple process subject only to a 'light touch' examination.

The starting point for any NDP is the designation of a neighbourhood area, but even this is no longer as straightforward as it should be. Poorly drafted statutory provisions are allowing landowners and developers to seek exclusion of their land from area designation and avoid the effects of neighbourhood planning entirely.

Principles

An adopted NDP is the lower tier of the statutory development plan alongside the local plan. The primacy of the plan, asserted by section 38(6) of the Planning and Compulsory Purchase Act 2004, underpins the plan-led system.

There is a Local Planning Authority (LPA), with a statutory duty to make a local plan, for every part of England and Wales. A LPA also has a duty to assist with an initiated neighbourhood plan. So the planning system seeks to achieve universal coverage of the development plan, though there is no compulsion to start an NDP.

In every parish, the town or parish council has a statutory power to make an NDP and is the only possible plan-making body, or 'qualifying body'. (A town council area is a 'parish' and the term 'parish council' includes town councils.) In unparished areas, a 'neighbourhood forum' may be formed to produce an NDP.

In a parish, area designation should be an administrative formality. However, the existing legislation is not well-resolved and the circumstances in which an LPA may designate a smaller area than the area applied for are unclear.

Some landowners are exploiting this and, fearing the effects of an NDP on their development aspirations, are forcing the hand of LPAs to exclude their land from the neighbourhood area.

Legislation

The statutory provisions are imported into the amended Town and Country Planning Act 1990 (TCPA) by schedule 9 to the Localism Act 2011. Section 61F (authorisation to act in relation to neighbourhood areas) and section 61G (meaning of 'neighbourhood area'), relating to Neighbourhood Development Orders, are applied to NDPs by section 38C(2) of the TCPA.

Section 61F provides that only the parish council is 'authorised to act in relation to a neighbourhood area if that area consists of or includes the whole or any part of the area of the council'. A parish council is the obvious qualifying body for an NDP – it is council-tax funded, already part of the government family and a statutory consultee on all planning applications in its area.

In an unparished area, there is no parish council equivalent or any other body recognised for planning purposes, so section 61F addresses how a neighbourhood forum may be authorised in relation to such an area.

A neighbourhood forum must establish its standing by satisfying the prescribed criteria of section 61F(5) which require a sufficient connection between the forum and the area applied for. A neighbourhood forum area application therefore contains two inextricable elements: what is an appropriate area can only be determined by reference to the constitution of the neighbourhood forum seeking authorisation in relation to it, and vice versa.

Neither consideration applies to a parish council application. Provided the area is the whole, or part, of the parish, the LPA simply needs to ensure there is no overlapping of neighbourhood areas.

However, the distinction between parish council and neighbourhood forum recognised in section 61F is less clear in section 61G, which deals with how area applications are dealt with. In particular, there is ambiguity on whole parish area applications.

Section 61G(4)(a) provides that 'in determining an application the [LPA] must have regard to the desirability of designating the whole of the area of a parish council as a neighbourhood area'.

In other words, the LPA should designate the whole area unless for some reason it is not desirable to do so. This appears to grant a limited discretion for the LPA to designate a smaller area only where it is not desirable to designate the area applied for. However, there is no statutory or other guidance on when it may not be desirable to designate the whole parish.

Section 61G(5) also appears to confer only a limited discretion to designate a smaller area – where it is not appropriate to designate the area applied for: 'If ...
(a) a valid application is made to the authority;
(b) some or all of the specified area has not been designated as a neighbourhood area; and
(c) the authority refuse the application because they consider that the specified area is not an appropriate area to be designated as a neighbourhood area, the authority must exercise their power of designation so as to secure that some or all of the specified area forms part of one or more areas designated (or to be designated) as neighbourhood areas.'

However, the words 'some or all' in the last part of the subsection are ambiguous and undermine what is surely intended – universal coverage of neighbourhood areas.

If that is not the objective, why is the power of designation expressed in the way it is? If section 61G(5) had intended to confer a general discretion on the LPA, that could be far more simply expressed, but it is not and there must be a reason for that.

Section 61G(5)(c) surely refers, though unfortunately not expressly, to an application by a neighbourhood forum for an area that is not appropriate for it to claim authority over. This issue does not arise with parish council applications. Otherwise irregular, or inaccurate, parish applications are caught by section 61G(5)(a) and (b).

Section 61G(5) would be unambiguous if the words 'some or' were omitted. The power of designation would then apply to ensure that any part of a specified area excluded under section 61(5) is 'part of one or more areas [either already] designated (or to be designated [pursuant to a future application])' – surely the statutory intention.

The first real test of section 61G(5) came in 2015 in *Daws Hill*.

Daws Hill

The application for designation of an unparished area in Daws Hill was unusual, particularly when compared to a typical parish council application.

The Daws Hill Residents Association (DHRA) area application included two brownfield sites identified by Wycombe District Council (WDC) in its local plan as strategic sites. DHRA sought to include the sites within its NDP area in order to oppose their strategic allocation for housing. WDC refused the application and designated a smaller neighbourhood area excluding the strategic sites because it considered that their inclusion would interfere with the due planning process.

This appears consistent with the limited discretion conferred by section 61G(5)(c) because in the context of a neighbourhood forum application, the LPA considered that the specified area was not an appropriate area to be designated as a neighbourhood area. However, DHRA was authorised as the qualifying body for the smaller area designated.

The DHRA judicial review was dismissed in the High Court and the matter went to the Court of Appeal (*R (o.a.o. Daws Hill Neighbourhood Forum) v Wycombe DC* EWCA Civ 228 [2014] 1 WLR 1362).

On behalf of DHRA, it was argued that the parliamentary intention behind section 61G was that 'the whole of England and Wales should, wherever it is the wish of the local community, be covered by a patchwork of neighbourhood areas' and that the LPA had no discretion to refuse an area application, even one by a neighbourhood forum not considered an appropriate body under section 61F(5).

The Court of Appeal rejected both propositions saying that section 61G confers a broad discretion on the LPA subject only to 'a duty to consider desirability etc' and that the 'patchwork' argument 'conflicts with the express terms of section 61G whether [it's] an application by a neighbourhood forum or a parish council'. Having had due regard to 'the factual and

policy matrix', WDC's designation of the smaller area was reasonable, and lawful. The appeal was dismissed.

The DHRA did not seek leave to appeal to the Supreme Court. For a residents' group it had showed great commitment taking its case as far as it did.

Analysis of *Daws Hill*

The appellant's argument that section 61G allows no discretion to designate a smaller area is a difficult one. Whatever the parliamentary intention, the words 'some ... of the specified area' must form part of a neighbourhood area allows the possibility that not all of it need be.

In any case, section 61G(5)(c) permits the 'authority [to] refuse the application because they consider that the specified area is not an appropriate area to be designated as a neighbourhood area'. WDC exercised its discretion under section 61G(5)(c) in deciding that the area applied for was not appropriate. The 'factual and policy matrix' is the basis for every planning determination by any decision-maker. There is no particular significance to this phrase. It simply refers to the facts of the case.

The apparently wide discretion to determine what is an appropriate area under subsection 61G(5)(c) actually corresponds with an application by a neighbourhood forum that must also demonstrate a connection with the area under the section 61F(5) conditions. The DHRA established a connection with the smaller area designated but not with the two excluded areas, both redundant MoD sites.

However, the application of section 61G(5)(c) to parish applications sits uncomfortably with the desirability of designating the whole of the area of a parish council under section 61G(4)(a).

Neither does the judgment deal convincingly with the power of designation ... to secure that some or all of the specified area forms part of one or more areas designated (or to be designated) as neighbourhood areas; section 61G(5). *Daws Hill* did not involve an area application by a parish council so the Court of Appeal's comments on such cases are *obiter*. They are nonetheless difficult to reconcile with a purposive or literal interpretation of the legislation.

Section 61G(5) suggests that even where part of an area is not appropriate, the LPA should look to designate that part of the area under another application, perhaps from a more appropriate neighbourhood forum. If the distinction between parish and non-parish areas is properly understood, the legislation clearly attempts to create universal coverage of neighbourhood areas. It certainly contains no express intention or expectation that part of a parish may be excluded altogether from neighbourhood area designation.

Surely a patchwork of interlocking neighbourhood areas is precisely what parliament intended.

Prompt reaction to *Daws Hill*

Within weeks of the *Daws Hill* decision, the Housing and Planning Bill was introduced with clauses to reform neighbourhood area designation.

Section 139 of the Housing and Planning Act 2016 provides for secondary legislation to clarify the law on neighbourhood area applications. Detailed proposals were published in the Department for Communities and Local Government's (DCLG) Technical Consultation on Implementation of Planning.

Changes in February

One of the proposals to which DCLG is considering responses is that 'when a parish council applies for the whole of the area of the parish to be designated as a neighbourhood area, or applies to enlarge an existing designation of part of the parish to include the whole of the parish area ... [the LPA] must designate all of the neighbourhood area applied for, with no discretion to amend the boundary'.

This must be what was intended by section 61G(5).

Unfortunate effects

Although the strict precedent set by *Daws Hill* is a narrow one, it has left underresourced LPAs weakened by the threat of judicial review from landowners or developers keen to avoid the regulatory effect of the development plan. The *obiter* parts of the judgment are relied upon to claim that, even on whole parish applications, LPAs have a wide discretion to designate a smaller area.

Daws Hill is also associated with the proposition that strategic sites should be excluded from neighbourhood areas. This too runs counter to planning guidance. National Planning Policy Framework paragraph 036 clearly states that 'a neighbourhood area can include land allocated in a local plan as a strategic site...' and that in such cases the qualifying body for the area application should discuss the circumstances with the LPA. The LPA is not required to discuss the merits of strategic site inclusion with the owners or potential developers of the site because vested interests should not be able to affect the area covered by the development plan.

There is no doubt that 'strategic sites', 'strategic policies' and 'conformity with the strategic objectives of the local plan' will prove increasingly problematic for neighbourhood planning unless planning guidance sets out more clearly the proper context of strategic considerations in the development plan process. That is another discussion.

Conclusions

Neighbourhood planning could benefit from a number of reforms but clarity on area designation is the obvious starting point.

It is essential that the government gives effect to the consultation proposal that where a parish council applies for designation of the whole, or any undesignated part, of its parish the LPA must designate the area applied for, with no discretion to designate a smaller area.

Provided such an application is valid and accurate, it is difficult to think of any exceptions that should apply. There is no reason to exclude strategic sites. It is far more logical to include strategic sites in neighbourhood areas so that NDPs can recognise them as such. An NDP that does not 'conform with strategic objectives' is modified at examination in any case.

The secondary legislation due in the autumn must preserve the distinction between the area covered by a neighbourhood plan and the policies it contains. While landowners and developers should have a say in the latter through the due process of consultation, they should not be able to affect the former because that amounts to avoiding the regulation that is the planning system.

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