Neighbours will need a Plan B: introducing third party appeals to planning decisions in a soon-to-be streamlined planning system

1. Introduction

On 6 August 2020, in the Government's White Paper, *Planning for the Future*, Prime Minister Boris Johnson announced 'radical' reform to England's planning law 'unlike anything we have seen since the Second World War.'[1] To meet the country's current housing shortfall and other objectives, the White Paper proposes overhauling the legislative framework that governs the process of obtaining planning permission. Condemning the current system as too complex, uncertain and beset by delay for developers, the White Paper indicates that future Government policy will be to make it easier for developments to proceed.[2] This includes passing reforms to 'streamline' applications for planning permission, speed up decisions, and make local development plans more 'rules-based' rather than discretionary.[3]

The reforms' implications for democracy and accountability in the planning system are a cause for concern. The current legal position in England is that third parties do not have the right to appeal planning decisions made by local authorities. Streamlining planning applications will further restrict the avenues by which members of the public may object to planning decisions. An accelerated planning process will also increase the risk that planning decisions are poorly thought-out.

[1] Ministry of Housing, Communities and Local Government, *Planning for the Future* (White Paper, 2020) 6.
[2] ibid, para 1.3.
[3] ibid, para 1.16.

In this essay, it is argued that the anticipated reforms will imperil the already fragile democracy in planning decisions. Citizens should have the right to object to planning decisions that affect them and that appear to have been made erroneously. Third party involvement in planning also provides necessary independent scrutiny of planning decisions, which will only become more urgent as decisions are accelerated. It is proposed that a two-tier system for a third party right of appeal would keep the planning system democratic and accountable without compromising the interests of developers and landowners.

2. The current law

At present, local authorities play an important role in the planning application process. They determine the types of planning developments that are permitted by drawing up a local plan of development for their area in accordance with the National Planning Policy Framework.[4] Local authorities also decide planning applications.[5] Prior to a decision, the local authority publicises applications by a site notice and in local newspapers,[6] marking the beginning of a formal consultation period. The consultation normally lasts for a minimum of 21 days, during which neighbours and other interested parties, like environmental groups, are invited to voice concerns.[7]

Local authorities can grant planning permission, reject the application or impose conditions as a prerequisite for permission. When making the decision, local authorities

[4] Ministry for Housing, Communities and Local Government, *National Planning Policy Framework* (Government of the United Kingdom, February 2019), para 2.
[5] Town and Country Planning Act 1990 (TCPA 1990), s 58(1)(b).
[6] Town and Country Planning (Development Management Procedure) (England) Order 2015 (DMPO 2015), art 15.
[7] ibid, art 18.

must have regard to their local plan.[8] Proposed developments that conform to the plan must be granted permission unless there are material considerations that indicate otherwise.[9] Although material considerations are undefined by statute, the courts have previously ruled that they can include loss of visual amenity,[10] the noise and disturbance generated by the development,[11] and the resulting loss of ecological habitats.[12] The National Planning Policy Framework advises that purely private rights, like the right to light, are not material considerations.[13] In any case, the weight afforded to a material consideration is decided by the local authority.[14] So, although local authorities must be guided by the law, ultimately they will exercise their own judgment and the decision will be led by policy.

In this system, the consultation period helps to uphold a degree of democracy by allowing residents and neighbours to voice their objections and engage in a discussion about the development with the local authority. But inevitably some legitimate third party concerns fall through the cracks. For example, objections may not be fully understood or given appropriate weight. Meanwhile, applicants for planning permission enjoy a statutory right of appeal if their application is denied.[15] These appeals are made to the Secretary of

---

[8] TCPA 1990, s 70(2).
[9] Planning and Compulsory Purchase Act 2004 (PCPA 2004), s 38(6).
[10] *Worcester City Council v Worcester Consolidated Municipal Charity* (1994) 9 PAD 723.
[11] *East Devon District Council v Roberts* (1994) 9 PAD 260.
[12] *St Vincent Housing Association v Secretary of State for Communities and Local Government* [2012] JPL 845.
[13] 'Use of Planning Conditions,' *Planning Practice Guidance* (Government of the United Kingdom, 6 March 2014) para 008 < https://www.gov.uk/guidance/use-of-planning-conditions> accessed 22 September 2020.
[14] *Bolton BC v Secretary of State for the Environment* [1991] JPL 241; *Fairclough Homes Ltd and Rayford Properties v Secretary of State for the Environment* [1992] JPL 243; *Wansdyke BC v Secretary of State for the Environment* [1993] 1 PLR 15.
[15] TCPA 1990, s 78.

State, but most are heard by the Planning Inspectorate, a government agency, by way of private hearings or written representations.[16]

If third parties are aggrieved by the local authority's decision, their only recourse is to the High Court for judicial review of the decision.[17] There are two drawbacks to this route. First, the court fee, the need for legal representation, and the awarding of costs to the winner make judicial review highly expensive. Second, judicial review allows only for very narrow grounds of appeal: the local authority's decision must be unlawful or irrational. The merits of the planning application, however controversial, are not subject to review unless the local authority's decision meets the high threshold of being Wednesbury unreasonable.[18]

Although imperfect, the current system has successfully resisted past campaigns for reform.[19] Compelling arguments against introducing third party appeals cited the prospect of delay for investments in major developments that had already undergone careful scrutiny by the local authority.[20] It was also argued that the consultation period already provided adequate opportunities for third parties to object to developments.[21] However, it is difficult to see how these arguments can be sustained in light of the incoming reforms.

---

[16] TCPA 1990, sch 6 para 1(1).
[17] TCPA 1990, s 288 (1).
[18] *Associated Provincial Picture House Ltd v Wednesbury Corporation* (1948) 1 KB 223.
[19] For example, the Council for the Protection of Rural England led a campaign for third party appeals in 2001 (for more information see *Third Party Rights of Appeal in Planning* <https://www.cpre.org.uk/wp-content/uploads/2019/11/third_party_rights.pdf> accessed 27 September 2020); see also the Green Paper *Open Source Planning* (2010) in which the Conversative Party itself suggested introducing third party appeals.
[20] Department for Transport, Local Government and the Regions, *Planning: Delivering a Fundamental Change* (Green Paper, 2001) 54-55.
[21] *Delivering a Fundamental Change* (n 40) 54-55; see also Martin Edwards and John Edwards, 'A Theory that Could Cause Chaos' [2010] 1011 EG 118; and David Brock, 'Third Party Rights of Appeal' [2011] 1 JPL 5, 8-9.

3. The White Paper

Three of the changes proposed by the White Paper carry particularly significant implications for civic participation.

First, planning decisions will become more centralised and rules-based. The White Paper seeks to diminish the discretion currently afforded to local authorities and instead impose a top-down approach, with area and site-specific requirements set centrally.[22] Local authorities will remain responsible for drafting local plans, but these scaled-back plans will contain a core set of standards for developments, rather than a long list of varying policies. In addition, an annual housing target would be distributed by central government using an algorithm to assess housing need.[23]

Second, local plans will be simplified using a zoning method. Local authorities will be required, while making the plan, to assign three different categories to land in their area: *growth* areas, suitable for substantial development; *renewal* areas, suitable for some development; and *protected* areas, which will include green belt areas, conservation areas, local wildlife sites and areas of significant flood risk.[24] In growth areas, proposed development outlines will get automatic approval, provided that they meet the design requirements of the local plan.[25] Therefore, applicants can be assured that their development is acceptable in principle, and can later obtain approval for the full details or 'reserved matters.'[26] In renewal areas, there will be a statutory presumption in favour of

[22] *Planning for the Future* (n 1), paras 2.13.
[23] See Ministry of Housing, Communities and Local Government*, Changes to the current planning system* (Government of the United Kingdom, August 2020), 11-16 for the Government's proposed approach to the methodology for assessing local housing need.
[24] *Planning for the Future* (n 1), para 2.8.
[25] ibid, para 2.35.
[26] ibid, para 2.32.

development, ensuring that the application process is faster than normal.[27] In protected areas, developments will be subject to the same planning application process that is currently used.[28]

Third, there is an emphasis on speeding up decisions. The White Paper proposes increasing community involvement at the plan-making stage, with residents helping to set standards for local design codes.[29] Meanwhile, the consultation period that normally follows applications for specific developments will be 'streamlined.'[30] The White Paper is vague on the details, but this could mean a shortened duration for the consultation period or a replacement with something more efficient. There is also a planned digitalisation of the planning process, allowing communities to learn about a planning application on their smartphone or laptop rather than from a lamppost sign.[31]

Although the reforms are still at the consultation stage, the Government has, in fact, already implemented changes that adhere to the White Paper's spirit. On 1 September 2020, an amendment to the Town and Country Planning Act 1990 came into force, which allows some businesses to change the use of their buildings and land without needing to apply for planning permission.[32] Moroever, the planning system has been undergoing forms of deregulation for the past decade. Permitted development was expanded in 2013,[33] and 'Permission in Principle,' a precursor to the White Paper's automatic outline

[27] ibid, para 2.33.
[28] ibid, para 2.35.
[29] ibid, paras 1.16, 1.23.
[30] ibid, para 1.16.
[31] ibid, paras 1.22, 2.38.
[32] Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020.
[33] Town and Country Planning (General Permitted Development) (Amendment) (England) Order 2013.

permission for growth areas, was introduced in 2017.[34] The White Paper could, therefore, be seen as a rapid acceleration of a direction that the planning system has been heading in for some time. There is little room to doubt that these reforms will be reflected, in some shape or form, in the planning system by the end of 2024, the White Paper's timescale for implementation.

4. Case for reform

Planning decisions are not made in isolation. They profoundly affect communities. A number of academic studies show that environment and design of places have a significant impact on residents' physical and mental wellbeing. A 2018 study found that living in a more deprived area correlated highly with having a lower life expectancy, whilst living in a more affluent area increased chance of longevity.[35] A group of planning academics observed that effective planning could reduce this disparity by 'producing better quality housing, encouraging high quality job creation, and by destroying barriers to an active and healthy lifestyle.'[36] Conversely, poor planning decisions will create damaging societal ripple effects. It is therefore only fair that we have a democratic procedure for planning decisions, one in which citizens may influence the design of their surrounding environments.

---

[34] Town and Country Planning (Permission in Principle) (Amendment) Order 2017; 'Permission in Principle,' *Planning Practice Guidance* (Government of the United Kingdom, 28 July 2017) <https://www.gov.uk/guidance/permission-in-principle> accessed 22 September 2020.

[35] James Bennett and others, 'Contributions of diseases and injuries to widening life expectancy inequalities in England from 2001 to 2016: a population-based analysis of vital registration data' *The Lancet* (Volume 3 Issue 12, 22 November 2018) <https://www.thelancet.com/journals/lanpub/article/PIIS2468-2667(18)30214-7/fulltext> accessed 19 September 2020.

[36] Malcom Tait, Kiera Chapman and Andy Inch, 'Is the planning system broken?' *The wrong answers to the wrong questions: countering the misconceptions driving the Government's planning reform agenda* (August 2020) 56-63, 61.

Citizens' needs will certainly not be met by the incoming reforms. Earlier public engagement in the planning process, while laudable, is no substitute for opportunities for third parties to object to individual planning applications. Planning academics have pointed out that 'experience shows it is only when a proposal is actively being discussed, rather than at the plan-making stage, that most people are motivated to engage.'[37] Moreover, a *Guardian* article highlighted that those wishing to object to new developments will find that they should have 'been there to feed into the discussion several years before it was even proposed,' already the case in jurisdictions where a similar zoning method is used, like Germany and the USA.[38] The digitisation of planning could also exclude members of the public who lack digital access from decisions. This could be as much as 16% of the population who, according to the UK Consumer Digital Index 2020, remain unable to use the internet by themselves.[39] Given that opportunities for third parties to challenge individual projects will be reduced, a statutory entitlement to appeal would, in lieu, provide appropriate protection of citizens' rights to participate in decisions that affect them.

Community involvement on a case-by-case basis also ensures that there is accountability in planning. A third party right of appeal would check planning decisions of dubious merit or process. There is a net public interest in maintaining high standards of development and infrastructure, and in making sure that affordable homes are also high-quality. The tragedy of the Grenfell Tower fire in 2017 only serves to show how perilous the

---

[37] 'Executive summary,' *The wrong answers to the wrong questions: countering the misconceptions driving the Government's planning reform agenda* (August 2020), 6.
[38] Oliver Wainwright, 'Race to the bottom: reform to planning system in England could be catastrophic' *The Guardian* (6 August 2020) < https://www.theguardian.com/artanddesign/2020/aug/06/race-to-the-bottom-reform-to-planning-system-in-england-could-be-catastrophic> accessed 19 September 2020.
[39] 'Lloyds Bank UK Consumer Digital Index 2020' (21 May 2020), 7.

consequences of poor planning decisions can be. When consulted on the application to refurbish the tower in 2014, Grenfell residents said that they wanted fire-resistant zinc cladding to be installed on the building.[40] Their wishes were overlooked by the local authority in favour of the developer's proposal of using cheaper combustible aluminium cladding, a decision that was ultimately responsible for helping the fire to spread.[41] While third party appeals will delay developments and increase uncertainty for developers, arguably an extra level of scrutiny is justified in more controversial planning decisions where getting it wrong results in generations pf residents being adversely affected by the decision. Moreover, it could be beneficial for the developers by helping them avoid crippling liability for developments that ultimately backfire.

Additional safeguards will only become more important with the advent of an inflexible rules-based system in which local authority discretion is curtailed. Samuel Ruiz-Tagle has noted that 'a system of fixed rules which stifles intelligence in planning administration' will not satisfactorily resolve planning problems which 'involve disagreement over incommensurable values and interests.'[42] Given the complexity of planning, poorly-thought out decisions will lead to ill-conceived results. The proposed algorithm for assessing housing need also risks imposing rigid housing targets on areas that are opposed to substantial development. In August 2020, the use of an algorithm to process students' A-level results led to an unfair distribution of higher grades at independent

[40] Peter Apps, 'Grenfell Tower Inquiry phase two preview: the decision to install the cladding' *Inside Housing* (22 January 2020) <https://www.insidehousing.co.uk/insight/insight/grenfell-tower-inquiry-phase-two-preview-the-decision-to-install-the-cladding-64724> accessed 20 September 2020.
[41] ibid.
[42] Samuel Ruiz-Tagle, 'White Paper Planning for the Future: understanding the importance of judgment in public administration' *UK Constitutional Law Association Blog* (9 September 2020) <https://ukconstitutionallaw.org/2020/09/09/samuel-ruiz-tagle-white-paper-planning-for-the-future-understanding-the-importance-of-judgement-in-public-administration/> accessed 19 September 2020.

schools and in affluent areas.[43] In addition to possibly being in breach of the Data Protection Act 2018, this demonstrated that mathematical models should not be relied upon to make important decisions.[44] Therefore, the White Paper's proposed centralisation of planning decisions only increases the necessity of scrutinising decisions via a third party right of appeal.

5. Proposal

It is proposed that a two-tier appeals system for third parties should be introduced in conjunction with the Government's zoning system. This system would provide for a broad third party right of appeal against planning decisions in protected areas. There would also be a more limited third party right of appeal against decisions in areas demarcated for growth and renewal. The following provisions could be inserted within section 78 TCPA 1990:

(1A) If any person is aggrieved by any planning decision and wishes to appeal that decision on the grounds of its merits, they may by notice appeal to the Secretary of State provided that –

(a) where the decision relates to a growth or renewal area, the Secretary of State is satisfied that the decision relates to a development that significantly departs from the local plan; or

[43] Jonathan Ames, 'A-level results: Grades by algorithm face legal test' *The Times* (17 August 2020) < https://www.thetimes.co.uk/article/a-level-results-grades-by-algorithm-face-legal-test-2q5rkf5xx> accessed 30 September 2020.

[44] ibid; see also Data Protection Act 2018, ss 49-50, 96-97 which provides that individuals may not be subject to a decision based solely on automated processing if that decision has a legal effect on them, unless the decision is required or authorised by law.

(b) where the decision relates to a protected area, the Secretary of State is satisfied that –

(i) the appellant has previously lodged an objection to the original planning application; or

(ii) the appellant is otherwise sufficiently connected to the planning decision.

(1B) Notices of appeal under subsection (1A) must be served within 6 weeks of the date of the decision giving rise to the appeal.

(1C) Appeals under subsection (1A) will be determined by the Secretary of State in compliance with the procedure specified under section 79, unless –

(a) the appellant does not meet the relevant requirements under subsections (1A)(a) and (b), in which case the appeal may be struck out; or

(b) the appeal is considered frivolous or vexatious, in which case the Secretary of State may order the applicant to pay all or any part of the costs.

6. Rationale

There is a need for the appeals system to appropriately balance the many competing interests that exist in planning. One of the White Paper's key goals is to make the process faster and more certain for developers, especially in the growth and renewal areas. Too broad a right of appeal would, inevitably, cause widespread delay, therefore undermining the Government's policy objective. A balanced approach is needed in order to make third party rights of appeal a tenable solution.

It is therefore proposed that third parties should only be entitled to appeal in certain circumstances. Many previous proponents of a third party right of appeal in English law

have conceded that a filter is necessary to sift out vexatious and frivolous claims,[45] and most foreign jurisdictions that provide for the right impose qualifications on it. In Ireland and New Zealand, only parties that have already lodged an objection to the planning application in question are eligible to appeal.[46] In Ireland, there is an exception to this rule for parties who were entitled to notification about a planning application but did not receive it.[47] This essay proposes, for protected areas, two alternative criteria in order to limit the scope of applicants who can appeal: those who have already formally objected to a proposed development, and those who can demonstrate a connection to the planning decision. The latter criterion is intended to catch the types of applicants who were not aware of the planning application or who were unable to make submissions at consultation, for example due to their lack of digital access.

In growth and renewal areas, third parties may only appeal a decision if the development significantly departs from the local plan. As the Government intends for there to be greater community involvement in creating the plan, it follows that communities should be able to interject when developments that depart from this plan are approved.

The burden will be on third parties to show that they meet the criteria, which they must demonstrate in their notice of appeal documents. The Planning Inspectorate may strike out appeals where the criteria are not demonstrably met. While this confers considerable discretionary power upon the Planning Inspectorate, it is argued that this is necessary in

---

[45] *Third Party Rights of Appeal in Planning* (n 19), 28; *Open Source Planning* (n 19), 7; David Hart QC, 'Why can't objectors appeal a planning consent or environmental permit?' *UK Human Rights Blog* (6 June 2011) < https://ukhumanrightsblog.com/2011/06/06/why-cant-objectors-appeal-a-planning-consent-or-environmental-permit/> accessed 21 September 2020.

[46] Planning and Development Act 2000, s 37(1)(a) (IR); Resource Management Act 1991, s 120(1)(b) (NZ).

[47] Planning and Development Act 2000, s37(4)(a) (IR).

order to guarantee the appeals system's effectiveness and consequently its chances of passing into legislation.

A strict time limit of 6 weeks for filing appeals is proposed as this will encourage appeals from serious third parties with legitimate cases. In addition, although not normal to award costs in planning appeals, it is proposed that the Planning Inspectorate should be empowered to award costs to the developer if the appeal is judged to be frivolous or vexatious. In Queensland, Australia, the courts have the power to award costs in these circumstances.[48] The mere threat of awarded costs could be an effective deterrent to frivolous and vexatious appeals. However, it is not thought that any fee should be imposed on third parties wishing to appeal because this could be a financial barrier to legitimate appeals and, for this reason, also risks violating the requirements of the Aarhus Convention of which the UK is a signatory.[49]

Although previous calls for reform have suggested giving third parties an identical right of appeal to the applicant's right of appeal, this essay does not consider that to be appropriate. In addition to being impractical for the reasons already discussed, the purpose of providing a right of appeal to third parties differs from the purpose of granting the applicant this right, which historically was intended to compensate the landowner for the removal of their development rights by the Town and Country Planning Act 1947.

[48] Sustainable Planning Act 2009, s 457A(b) (Qld); see also s457A(a) which empowers the court to award costs in circumstances where the court considers that the appellant initiated the proceedings against a party with similar commercial interests 'primarily for an improper purpose' including, for example, to delay or obstruct the other party's development in order to advance their own commercial interests.

[49] Convention on access to information, public participation in decision-making and access to justice in environmental matters (adopted 25 June 1998, entered into force 30 October 2001) 2161 UNTS 447 (Aarhus Convention), art 9.

7. Conclusion

The proposed reform recognises the urgent need to address the housing shortage in England and the Government's policy objectives to 'build, build, build' in view of this.[50] At the same time, developers and the public alike will only benefit from a planning system that is democratic and accountable. The Grenfell Tower fire in 2017 is stark a reminder of the tragic consequences of overlooking residents' objections. The two-tier system of third party appeals, which will limit the appeals being made to those that are legitimate, is a practical solution that would provide the level of independent scrutiny needed to ensure that England's future developments are held to the highest possible standards.

Words: 2998

[50] ''Build build build': Prime Minister announces New Deal for Britain' (Government of United Kingdom, 30 June 2020) < https://www.gov.uk/government/news/build-build-build-prime-minister-announces-new-deal-for-britain> accessed 20 September 2020.