Democratic tensions in decentralised planning – rhetoric, legislation and reality in England

1 Introduction

As has been discussed previously in this journal, devolution and decentralisation of power and/or finance to sub-national tiers of government has been "a global trend" (Rodriguez-Pose and Gill, 2003) for a number of years. More recently, England appeared to have begun, in rhetorical terms at least, to follow the trend – the 1997-2010 UK Labour Government[1], towards the end of its tenure, began to consult upon decentralisation measures (DCLG, 2009); and following the 2010 general election, the Conservative-Liberal Democrat coalition Government stressed in its "Coalition Agreement" that decentralisation was a source of common ground between the two parties: "We share a conviction that the days of big government are over; that centralisation and top-down control have proved a failure" (HM Government, 2010, page 7). How long this approach may last is unclear – the 2015 general election brought in a solely Conservative Government, whose manifesto mentioned localism only once and decentralisation not at all (The Conservative Party, 2015). The example of decentralisation discussed in this paper may then be a short-lived experiment, but it provides valuable insights into the issues at play regardless of how long it remains in place.

The 2010-2015 UK Government set about delivering upon their rhetoric around decentralisation with, *inter alia,* the 2011 Localism Act (hereafter, the 2011 Act) which, it was claimed, "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'" (DCLG, 2011b, page 1). Various justifications were made for this, generally in line with the three forms of discourse used to justify decentralisation (not the same as localism, as we will go on to elucidate, but related to it) identified

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[1] UK Governments hold responsibility for planning law in England

by Rodriguez-Pose and Sandall (2008) – Identity, Good Governance and Efficiency. The second of these received the most emphasis in the various policy and political statements made in support of the 2011 Act. A 'Plain English Guide' to the Act, published alongside it, exemplifies this, claiming a problem with what had gone before, wherein "central government has hoarded and concentrated power" (DCLG, 2011b, page 1), was that it "leaves people feeling 'done to' and imposed upon - the very opposite of the sense of participation and involvement on which a healthy democracy thrives" (ibid.). Referring back to the work of Rodriguez-Pose and Sandall shows that this emphasis is unsurprising, because the discourse of good governance, or 'the democratic discourse' is popular with both the right and left, and "it is self-evidently almost impossible to challenge the value of 'good' governance" (Rodriguez-Pose and Sandall, 2008, page 57).

The superficiality of this discourse, however, conceals much complexity. In particular, we must be sensitive to the differing variants of 'democracy' that might be engaged as part of a good governance narrative. Of greatest significance for this paper will be the well-known distinction between representative and direct democracy, and the nature of the relationship between these two differing conceptions (see, e.g. Dahl, 1998; Weale, 1999). Specifically, we aim to explore some practical concerns: in what circumstances is it appropriate to establish decision-making processes which engage *both* representative and direct democratic mechanisms in generating outcomes? And if such democratic mechanisms are combined in a decision-making process, how can this effectively be done?

This interdisciplinary paper takes the English planning system, which has been substantially amended by provisions contained in the 2011 Act, as a case study through which to explore these challenges, drawing on a distinctive combination of insights from theory and practice, and exploiting the perspectives of planning and legal scholarship. It has been argued that "the legitimacy of public participation has become an unassailable pillar of the planning system" (Inch, 2012, page 523), due largely to criticisms of representative democracy as an "incomplete form of

procedural legitimacy" (Davoudi, 2013, page 4). The 2011 Act might be seen to respond to these criticisms, altering the planning process in a way which engages new mechanisms for representative and direct democracy in the creation and approval of neighbourhood development plans. Yet in so doing, we will argue that while opening up new channels for democratic participation by citizens, the Localism Act 2011 has also created democratic and legal tensions in the neighbourhood planning system, specifically because these new channels lead to the production of plans with *statutory weight*, quite different from previous "bottom-up" plans in England or most other contexts. It is far from clear from the early stages of implementation of the Act, we suggest, how these tensions will be balanced in, and impact upon, decision-making.

2 Localism, Democracy, Participation and Power (in Planning)

It is common to treat *decentralisation* and *localism* as synonyms – indeed, the 2011 Act was initially the Localism and Decentralisation Bill. For us, decentralisation refers to some movement of power (and we will return to what we mean by *power* below) from the central state to other, "lower" tiers of government/governance – this could be, depending on the national context, to the state, province, region, sub-region, local or sub-local tier(s). Localism, conversely, is more specifically associated with power being held by specific tiers – the local and sub-local. In practical terms in England, since the Government abolished the regional tier of government/governance (DCLG, 2010), decentralisation and localism are, *de facto*, the same. As noted above, one of the discourses used to support moves to decentralisation and localism is that of "good governance: the democratic discourse" (Rodriguez-Pose and Sandall, 2008, page 57). It is important to unpack this discourse, and understand in more detail the justifications for it.

One such justification is that it is desirable to broaden the ways in which "democracy happens", beyond the representative democracy which remains the principle by which the UK is governed, by opening up different ways for people to participate (Pratchett, 2004). This does not necessarily

equate to an argument for localism, of course – these multiplicities of channels and opportunities could happen at the central level, but it may be easier at the local level (Lowndes and Sullivan, 2008). Localism should also facilitate different forms of political engagement and discussion between people and service providers (Pratchett, 2004; Stoker, 2004).

In the case of England the previous, 1997-2010 New Labour, Government's version of localism was criticised as being ineffective at deepening democracy. It has been claimed on the one hand that enhanced public participation was central to that administration's reforms of local government (Lowndes et al., 2001), but on the other that such participation was only considered acceptable if it delivered outcomes in line with centrally set objectives (Mooney & Fyfe, 2006); that Labour gave power to local authorities with one hand whilst introducing a range of tools to restrict local autonomy on the other (Pratchett, 2004) – something which Evans et al (2013a; 2013b) have referred to as "Managerial" localism. More critically, some have argued that the New Labour emphasis on participation and decentralisation was intended to build support for policies that were at heart neoliberal in nature (Davies, 2012).

Excepting the latter point, similar criticisms were core to the 2010-2015 Government's critique of the planning system, and, by extension, the previous Government's centralising tendency. The new approach was presented as being far more radical:

> 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
> (DCLG, 2011b, page 1)

Many of the reforms in the 2011 Act related to the planning system. Regional plans, an integral part of the system up to that point, were the subject of particularly powerful criticism – they "robbed local people of their democratic voice, alienating them and entrenching opposition against new development" (DCLG, 2010). The abolition of regional plans, and the introduction of neighbourhood plans, were two of the key components in the 2011 Act, which is the latest example of regulatory change in relation to the planning system in recent years, often focusing on "democracy". Indeed, attempts to deepen the democracy in planning in England have focussed almost exclusively on improving participation in decision-making. Whilst there has been a parallel process of local government reform that has sought to improve the transparency of representative democratic structures (Coaffee and Johnston, 2005), this has not focussed on planning *per se*.

Despite the fact that since the 1960s "ministers have consistently expressed their desire to see local communities making their own decisions on planning matters" (Cullingworth and Nadin, 2006, page 433), and an ongoing pursuit of greater/more effective participation by planning theorists over the same period (see, amongst many others, Forester, 1989; Healey, 2006; Jacobs, 1961), it remains the case today that planning and planners in England continue to be accused of adopting the "decide-announce-defend" model of decision-making (Bell et al., 2005, page 462). That model of decision-making has been accused of both being insufficiently participatory, and, by its nature, encouraging an adversarial and oppositional attitude amongst communities – this is problematic because: "To be invariably told, rarely asked, infrequently consulted, and be expected not to participate in the formation of collective goals is hardly a secure basis for obtaining commitment to these goals" (Clegg, 1989, page 135).

To address this lack of participation in the formation of collective goals, various changes have been made in previous years to the process and format of plan-making in England. In rural England, for example, documents known as *Parish Plans* have been produced since 2000, in

response to a 1995 rural White Paper which, in an interesting precursor to localism, noted that "People... do not expect Government to solve all their problems for them... local decision making is likely to be more responsive to local circumstances" (DoE & MAFF, 1995, page 16). There is a great deal of work exploring Parish Plans and related documents (see for example Gallent et al., 2008; Owen and Moseley, 2003; Owen et al., 2007; Parker and Murray, 2012) which we do not have space to explore here. One of the distinctive elements of the neighbourhood plans introduced by the 2011 Act which sets it apart from Parish Plans and other community-driven planning initiatives, is that neighbourhood plans will have statutory weight – they become part of the *development plan*, in line with which local planning authorities are obliged by law to determine planning applications. This means that a key finding of research into Parish Plans may assume greater significance – that such plans "tended to reflect more the priorities of the 'haves' than those of the 'have nots' of the local community" (Moseley, 2002, page 400).

This potential tendency for the 'haves' to dominate the 'have nots' in more localist forms of governance has been highlighted by others, with questions raised about how effectively participation can safeguard minority groups from the so-called "tyranny of the majority", without the calming hand of the central state (Parvin, 2009). Further, others have noted that participatory governance can be dominated by vocal, active or powerful local voices (Clifford and Warren, 2005; Curry, 2012; Gallent and Robinson, 2012). This illustrates that the rhetoric cited above, with its emphasis on devolving *power* from the centre to the local, and giving new *powers* to communities, ignores the variable ability of communities, and individuals within them, to exercise that power. It is also unclear what is meant by power in this context, as it is a far from uncontested term. There is a long and sophisticated literature addressed to unpicking power as a concept, but particularly in terms of planning and democracy a number of key themes can be briefly highlighted.

The first is that there is not "a single, unified concept of power" (Pansardi, 2012, page 73); rather two twin concepts, "power over" and "power to". The two are not mutually exclusive, indeed Clegg et al. (2006) pointed out that to exercise the power *to* do something can often involve asserting power *over* others. Nevertheless, the distinction is useful and we use it in our discussion below. From the rhetoric above, it seems that those advocating localism see it as transferring (some of the) power *to* do things to the sub-local level. This approach, it has been argued, is flawed, because the power *over* is more common and of more relevance to "many policy issues in contemporary British politics" (Hickson, 2013, page 410). As we will discuss below, whilst the 2011 Act does give the "power to" plan to communities, local authorities and the central state retain a great deal of "power over" those communities to frame and limit their planning activities (cf. Featherstone et al., 2012; Gallent and Robinson, 2012 and others). This is in part because in planning, where knowledge about society is integral to planning for its future, "power defines what counts as knowledge and rationality, and ultimately… what counts as reality" (Flyvbjerg, 1998, page 27).

Flyvbjerg, in common with others drawing on the work of Michel Foucault, rejects the idea that power is hierarchical, instead arguing that power is multi-dimensional and complex (Jacobs and Manzi, 1996). This, of course, may undermine the thesis of the 2011 Act that devolving power "down" the hierarchy of state structures will empower "local people" in a straightforward manner. A number of authors have drawn on Foucault, Pierre Bourdieu and Stephen Lukes to explore how power has been used to effect outcomes *within* as well as *across* tiers of state authority both internationally (Flyvbjerg, 2002, 2004) and in an English context before the 2011 Act (Sturzaker, 2010; Sturzaker and Shucksmith, 2011). Similar speculations have been made about the post-2011 Act English context, with some concluding that any power which is devolved is likely to be to the benefit of "the dominant classes" (Hastings and Matthews, 2015, page 556).

The "localist" agenda influencing the English planning system therefore raises complex questions about the distribution of power and control in democratised decision-making, which must be appreciated when considering the impact of the 2011 Act. In the next section we discuss the changes made by the Act in more detail, before, in section 4, analysing some of the early outcomes of the neighbourhood planning powers created by it, informed by the discussion in the preceding paragraphs.

3 Democracy, Representation and Participation in the Neighbourhood Planning Scheme

3.1 Overview of Planning Scheme

The Localism Act 2011 amended the Town and Country Planning Act 1990 (TCPA) and the Planning and Compulsory Purchase Act 2004 (PCPA) to allow for the creation of neighbourhood development orders (by which approval can be given for certain forms of development, by s.61E(2) TCPA) and neighbourhood development plans (in which policies for development in a particular area can be set out, by s.38A(2) PCPA). Such orders or plans can be developed by two kinds of representative bodies: a Parish Council[2] for the neighbourhood area (s.61F(1)-(2) TCPA), or, where no such Parish Council exists, a "neighbourhood forum" specially constituted for planning purposes (s.61F(3)-(4) TCPA).

A neighbourhood forum must be designated as such by the local planning authority, on the satisfaction of certain statutory conditions. Among these conditions are: (i) the requirement that the forum be constituted "for the express purpose of promoting or improving the social, economic

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[2] Parish and Town Councils are elected bodies with limited powers that have historically focused attention on administering the daily affairs of towns and villages (the former are usually called town councils, the latter parish councils, an almost entirely semantic difference, as both types of council have the same powers). For brevity we use Parish Councils in this paper to refer to both Parish and Town Councils.

and environmental wellbeing" of the neighbourhood area (s.61F(5)(a) TCPA); (ii) that membership of the forum is open to those who live or work, or are elected council members, in the area (s.61F(5)(b) TCPA); and (iii) that at least 21 members of the forum fall into one of these three categories (s.61F(5)(c) TCPA). The forums are intended to represent the population in the area, but they are not legally required to include any elected representatives. When determining an application for designation as a neighbourhood forum, the local planning authority must have regard to the desirability of designating a body which has taken reasonable steps to ensure it has a membership running across the area, and from "different sections of the community in that area" (s.61F(7)(a) TCPA). Only one neighbourhood forum may be designated in each area (s.61F(7)(b) TCPA).

The local planning authority is responsible for the designation of the neighbourhood area, and this can only be done in conjunction with an application from a Parish Council or neighbourhood forum to be designated for a specified area (s.61G(1) TCPA). Neighbourhood areas must not overlap (s.61G(7) TCPA), and a local planning authority is not obliged to designate the whole area requested as a neighbourhood area, if this would not be appropriate (s.61F(4)-(5) TCPA). The local planning authority *is* obliged to designate at least some part of an area covered by an application as a neighbourhood area, if it is not already covered (s.61F(5) TCPA).

Once a neighbourhood area is designated the local planning authority must take appropriate steps to facilitate the neighbourhood planning process (Schedule 4B, para.3 TCPA). The local planning authority will receive proposals from designated bodies (Schedule 4B, para.1 TCPA), and must establish whether any proposal is eligible for consideration (Schedule 4B, para.5-6 TCPA). If the proposal is fit for consideration, the local planning authority must submit it for independent examination (Schedule 4B, para.7 TCPA), with the examiner to recommend whether the proposal is fit to progress to the next stage of the approvals process, should be modified, or refused (Schedule 4B, para.10 TCPA). The local planning authority must respond to these

recommendations, and be satisfied that the proposal meets the basic conditions (Schedule 4B, para.8(2) TCPA). This will include having regard to the appropriateness of the proposal in light of national policies (Schedule 4B, para.8(2)(a) TCPA), and the requirement that it "is in general conformity with the strategic policies contained in the development plan for the area of the authority" (Schedule 4B, para.8(2)(e) TCPA).

If the basic conditions are deemed satisfied, the local planning authority must submit the proposal for approval at a referendum (Schedule 4B, para.12(4) TCPA). The electorate for such a referendum must constitute at least all those registered voters in the designated neighbourhood area (Schedule 4B, para.12(7) TCPA), but the local planning authority may extend this to include other areas where appropriate (Schedule 4B, para.12(8) TCPA). If the proposal is approved by a majority of those voting in the referendum, the local planning authority *must* make the neighbourhood development order (s.61E(4) TCPA) or plan (s.38A(4) PCPA).

3.2 Analysis of Actors and Processes

The planning process established under the Localism Act 2011 is therefore a complex statutory scheme, engaging multiple actors with different mandates, expertise and legitimacy in the creation, scrutiny and approval of neighbourhood development orders or plans. Representative democratic decision-makers, in the form of local planning authorities, remain central and crucially responsible for the designation of neighbourhood areas, initial determinations as to the fitness of proposals for further consideration, their submission to independent examination, and ultimately, a referendum before a local electorate defined by the authority itself. The local planning authority also retains the legal power to make an approved neighbourhood development order or plan.

Where in existence, a further representative democratic decision-maker is engaged directly in the neighbourhood planning process: a Parish Council, which has the power to lead proposals for a

substantive development plan or order. There has been criticism of the robustness of this form of representative democracy (Gallent and Robinson, 2012; Tewdwr-Jones, 1998), centring on Parish Council candidates running for election unopposed, and/or the co-option of Parish Councillors in the absence of elections. We do not seek to minimise these problems, but nonetheless Parish Councillors are in general elected to represent constituents and Parish Councils are bound by similar rules and regulations as local authorities regarding probity and transparency of decision-making. Parish Councils are, however, present largely only in rural parts of England – for the majority of urban England there is no system of Parish Councils. Whilst it is possible for new parishes to be established in urban areas – indeed, the first Parish Council in London has recently been inaugurated (Future of London, 2014) – the 2011 Act empowers a representative – but, significantly, not democratic – institution instead to fulfil these functions: a neighbourhood forum. Again, the (representative and democratic) local planning authority retains a key role, allocated the statutory responsibility for the designation of an appropriately constituted forum. But the differing underlying character (and potentially, legitimacy) of Parish Councils and neighbourhood forums, while fulfilling a common function in the statutory scheme, is important to appreciate, as it provides an initial example of the way in which a delicate balance must be sought in this context between democratic, representative, and participatory inputs into policy-making. That there is no obligation for neighbourhood forums to be democratically elected bodies (or contain otherwise democratically elected representatives among their members) indicates that, at this stage of the reformed neighbourhood planning process, ideas of representation and participation have been given priority. Oversight and management of the process remains with the democratic local planning authority, but the scheme opens up space in which interested citizens may participate directly and definitively in the formulation of substantive proposals to govern planning decisions in their local area.

The possibility of direct participation by more active citizens in the policy formulation stage of the neighbourhood planning process, channelled through local representative bodies, clearly

reflects the government's intention to give people a "meaningful say" (DCLG, 2011a, page 1) in planning. However, there is nothing in the 2011 Act to make active participation by citizens compulsory. Part 5 of the 2012 Neighbourhood Planning regulations specifies the requirements for publicity and consultation, which are effectively the same as for the extant system of local plans. So the Localism Act and accompanying regulations could simply decentralise the power to make plans to an unaccountable/unrepresentative body at neighbourhood rather than local authority level, which may be no more likely to give people a "meaningful say" – smaller geographical areas can be just as readily dominated by elite individuals or groups as larger areas. Yet the potential lack of democratic legitimacy of the local representative bodies, and the lack of mandated broader participation, is arguably compensated for by the direct democratic component of the reformed planning scheme. The statutory requirement that a neighbourhood plan or order be approved by a majority of voters in a local referendum provides a further, and decisive, democratic input into the planning process, with the representative local planning authority obliged to act to implement the wishes of a majority of citizens voting to approve any proposals ultimately put to them. In principle, this might be thought to limit (or mitigate) the possibility of the elite or the interested capturing the policy formation process, and imposing their own priorities on the local community at large.

Finally, the enduring role in the neighbourhood planning scheme of actors and processes which are not democratic, representative, or inherently participatory, must also be recognised. The independent scrutiny of planning proposals provided by examiners appointed by the local authority remains fundamental in establishing the potential suitability of neighbourhood development orders or plans – that such proposals derive from representative or participatory bodies does not invest them with immunity from traditional forms of expert oversight. Further, the possibility of judicial review of planning decisions and processes in the courts is no less excluded by the participatory nature of the policy formulation process, or the democratic character of the local electorate's decision directly to approve the outcome.

We therefore have a planning scheme which engages actors that are democratically representative (local planning authorities and Parish Councils) and representative but not necessarily democratic (neighbourhood forums). We have opportunities for representative bodies to participate directly in policy formulation (Parish Councils and neighbourhood forums), and for the wider electorate definitively to decide whether to accept those proposals (neighbourhood referendums). And we have democratic bodies vested with overarching responsibility for facilitation and oversight of the operation of this participatory decision-making (local planning authorities), and non-democratic, independent actors retaining a key role in ensuring the appropriateness (independent examiners) and legality (courts) of the outcomes of the neighbourhood planning process.

In this sense, the neighbourhood planning scheme represents a sophisticated attempt to mix representative and direct democracy, to create opportunities for varied, but potentially meaningful, participation by citizens, and as a result, to push beyond more formal means of providing democratic legitimation for decisions taken to establish local planning frameworks – to shift some of the "power to" make plans to community groups. Nevertheless, while the participatory ambitions of the neighbourhood planning process will be laudatory to many, the competing and overlapping ideas of democracy, representation and participation which the statutory scheme invokes offers the potential to create tensions in practice. Having mapped the nature of these competing and overlapping claims and functions as they exist in principle in the legislative architecture, in the next section we explore a number of these tensions as manifested in practice in the early operation of the neighbourhood planning scheme.

4 Tensions in Neighbourhood Planning Scheme

Through an analysis of emerging Neighbourhood Planning practice, we identify three sets of tensions between and within the different forms and types of democracy, representativeness and

participation discussed above, and differing patterns of power (re)distribution: first, the extent to which Neighbourhood Planning can be said to possess a democratic or representative mandate, and whether there are 'intra-representative' issues; secondly, the competition between different representative bodies – Local Authorities and Neighbourhood Forums; and thirdly, the role of independent actors in the Neighbourhood Planning process, reflecting different views on the balance between "power to" and "power over". In what follows we expand upon and illustrate these three sets of tensions.

4.1 The nature of the popular mandate(s)

As of August 2016 there have been 206 referendums under the Localism Act; most in relation to Neighbourhood Plans. All of these have been successful, in most cases with a "yes" vote of over 80%, but average turnout has been 32.4% (Carpenter, 2016), so in most cases an absolute majority of the eligible electorate have not voted in favour of the neighbourhood plan being adopted. Regardless of the turnout, referendums are clearly what Scharpf (1999) referred to as "output" rather than "input" based legitimacy, so whilst voting in a referendum is arguably bringing citizens closer to the point at which decisions are made, it is not necessarily involving them in the broader work of developing options, etc. That would require more effective participatory democracy. Davoudi & Cowan (2013), drawing on the work of Pitkin (1967), consider the extent to which the new neighbourhood forums are "representative" in a broader sense than simple "formalistic" representation through electoral democracy. They conclude that the requirements for forum members to live in, work in, or be elected councillors for the area offers some guarantees about Pitkin's *descriptive* representation, albeit based on very broad categories of person that do not necessarily reflect the diversity of a population; that low turnouts in the referendums are indicative of a lack of his *symbolic* representation, in that local communities have not accepted the neighbourhood forums as representing them; and that a high Yes vote in a referendum indicates a reasonable degree of his *substantive* representation, but there is a lack of

evidence on whether plans satisfy "the interest and values of those who are outside the planned area… [or] the wider social and environmental issues and values" (Davoudi & Cowan, 2013, page 564). Two examples of Neighbourhood Plans in practice illustrate these concerns.

Thame, a town in South Oxfordshire, was one of the first areas to reach the referendum stage, on 1st May 2013. This referendum was passed, with 76% of the 40% turnout voting "Yes". However, there is some evidence of tension between citizen participation, representative and direct democracy, with a letter to the trade journal *Planning* magazine on 14 June 2013 complaining that "What started as a planning process soon became a political process". Planning theorists now argue that planning is an *inherently* political process, so this in itself is perhaps neither a surprise nor a concern, but the content of the letter suggests a more nuanced set of issues. According to the letter, the main form of participation used by those writing the neighbourhood plan was to engage with residents' associations, but these do not appear to have had comprehensive coverage, with the letter alleging that areas without a residents' association have had development proposed adjacent to them, whilst the areas covered by associations "were able to reduce the previous threat of development near their areas" (Earley, 2013).

This seems to provide evidence in support of the arguments explored above, that such participatory decision-making processes can be dominated by particular voices, in this case in particular geographical areas. Subsequently, a further controversy arose in Thame, with a campaign group being established to lobby for the removal of one of the other housing sites, currently a field, from the neighbourhood plan. That group "questions the way [the site] was 'quietly slipped into'" (Geoghegan, 2014a) the plan, raising questions about the participatory processes in relation to the Thame plan, the broader "fantasies of the consensus that a fit-for-purpose planning process will create" (Inch, 2012, page 532) and perhaps the extent to which more powerful voices have been able to dominate the neighbourhood plan-making process, ensuring they benefit (or at least do not lose out) as a result of it.

Concern over powerful voices dominating the locality appears to be behind a different example from inner-city London. Hackney Metropolitan Borough Council rejected two bids from competing neighbourhood forums, the Stamford Hill Neighbourhood Forum (SHNF) and the North Hackney Neighbourhood Forum. The first of these was described as "being 'a front organisation' for the local Conservatives and Liberal Democrats" (Geoghegan, 2013). A great deal of activity was generated by these two bids, with many letters and petitions of support and opposition to each, and to both being produced (ibid). In addition to illustrating the problems of 'intra-representative' body issues, the Hackney example also therefore illustrates a second issue: that of competition between competing representative bodies, as the local authority had the power to reject both bids and propose an alternative plan.

4.2 Local authorities vs. Neighbourhood Forums

Daws Hill Neighbourhood Forum sought judicial review after Wycombe District Council (WDC) amended their application for a neighbourhood plan area, omitting two "key strategic sites" (Wycombe District Council, 2012, page 1). In the notice explaining their decision to reduce the size of the neighbourhood area, WDC stated that it was necessary to omit these sites because development on them would involve "larger than local impacts and larger 'communities of interest'" (ibid.). Section 61G(5) of the TCPA gives local planning authorities the discretion to vary, or refuse, applications for neighbourhood areas. In refusing the application for judicial review of the decision of the WDC (a decision subsequently affirmed in the Court of Appeal, [2014] EWCA Civ 228), Supperstone J held:

> the discretion given to the authority is a broad one. The exercise of discretion
>
> turns on the specific factual and policy matrix that exists in the individual case

at the time the determination is made. In my judgment the Council properly

had regard to the specific circumstances that existed at the time.

(*R (Dawes Hill Neighbourhood Forum) v Wycombe District Council* [2013]

EWHC 513 (Admin) at [57])

A case in Exeter St James, another early referendum success, illustrates that even after adoption

of a neighbourhood plan, the local authority remains the arbiter of planning issues. In that case,

the Exeter St James Forum had applied for "a judicial review against Exeter City Council's

planning permissions" for a housing scheme at Exeter cricket club (Geoghegan, 2014b). The

Forum argued that the permissions contravened the neighbourhood plan, adopted in July 2013.

After negotiations with the developer concerned, the application for judicial review was dropped,

but the case illustrates neighbourhood plan policies, as with any policy in development plans, are

open to interpretation. The Forum complained that "'the council did not have to formally consult

us or check whether we were satisfied with their interpretation of neighbourhood plan policies…

And they didn't'" (ibid.).

These examples, along with the Hackney case in the preceding section, illustrate that traditional

representative democratic institutions, in the form of local authorities, retain considerable powers

to "trump" the more strongly participatory components of the local planning regime in the initial

framing of, and subsequent implementation of, neighbourhood plans. This can be seen as evidence

both of "Managerial" localism Evans et al (2013a; 2013b); and the use of power by the local

authority to define what is "rational" (Flyvbjerg, 1998).

4.3 The role(s) of independent actors

One of the several checks and balances built into this localist system is the role of independent

actors to check the appropriateness and legality of putative Neighbourhood Plans, which has in

practice ensured that such actors continue to play a key role in planning decision-making. While the latter – legality – is the function of the courts, the former – appropriateness – is the function of independent examiners, whose role is to decide whether draft Neighbourhood Plans should go forward to referendums. On four occasions so far (from a total of more than 200), the Neighbourhood Plan examiners have recommended that their plans should not be subject to the direct democracy of a referendum. Two of these are of particular interest to us.

In Dawlish, which was the first Neighbourhood Plan to be examined, the examiner recommended that the Neighbourhood Plan not proceed to referendum because the local plan, with which Neighbourhood Plans must be in accordance, had not been adopted, so it was impossible to judge whether the Plan was in accordance with it (Balch, 2012). The second Neighbourhood Plan to be terminated at examination stage was in Slaugham, Mid Sussex, where the issue in question was the Strategic Environmental Assessment (SEA) of the Neighbourhood Plan. SEA requires, as a matter of EU law (in accordance with Directive 2001/42/EC, which has been transposed into domestic law by the Environmental Assessment of Plans and Programmes Regulations 2004) an assessment of the environmental impact of policies, plans and programmes. In the Slaugham case, the examiner found that the Neighbourhood Plan required an SEA, and the one that had been produced was insufficiently rigorous (Skippers, 2014). These two cases are highlighted because the opposite view was taken in relation to both issues by a later examiner, of the Tattenhall and District Neighbourhood Plan in Cheshire. In relation to the conformity with a local plan that has not been produced, the examiner in that case concluded, tongue firmly in cheek, as follows:

> A number of housebuilders… agreed with one another that Policy 1 did not meet the Basic Conditions because it could not be in general conformity with a policy that doesn't exist. Whilst I have read Sartre, I struggled a little with the existentialist nature of this. However, after contemplation with a cold towel on my head, I am

satisfied that not being in general conformity with something that doesn't exist is not

a test relevant to this examination.

(McGurk, 2013, page 18).

Similarly, McGurk concluded that a comprehensive SEA was not required for the Tattenhall and District Neighbourhood Plan. Both conclusions were challenged by judicial review in *BDW Trading Ltd (t/a Barratt Homes) v Cheshire West and Chester BC* [2014] EWHC 1470 (Admin). In this case, two national house building companies, due to be adversely affected by the introduction of the neighbourhood plan, sought to have the decision to proceed to a local referendum reversed, on the basis of flaws in the conclusions reached by the examiner. The court rejected, among others, two claims of relevance here. First, Supperstone J held that the examiner was entitled to reach the conclusion that the neighbourhood plan was compatible with the SEA Directive, notwithstanding the fact that an environmental and sustainability assessment of alternative planning options had not been exhaustively carried out. Assessment of the environmental and sustainability implications of the Tattenhall plan had been conducted throughout the process of its development (and would continue to be assessed in the future), was but one part of a matrix of relevant planning policy documents directing development decisions (each of which would individually be subject to environmental and sustainability assessments), and the compatibility of the neighbourhood plan with the requirements of the SEA was therefore a matter of planning judgement for the examiner to determine in context ([70]-[75]). Secondly, the court upheld the decision of the examiner that the plan was compatible with the basic conditions. The issue to be assessed was the *general* conformity of the plan with, among other things, the national policy framework, and in establishing this matter, it was not necessary for the examiner to determine whether one part of the neighbourhood plan was compatible with one part of an eventual emerging local plan ([81]-[89]).

The court in *Barratt Homes* therefore seemed keen to allow a reasonable degree of latitude to the independent examiner to form a judgement as to the appropriateness of the plan to go forward to a local referendum. Indeed, this is a tendency which appears to be reflected in subsequent case law, albeit a tendency which is still embryonic. Similar legal challenges brought to the decision of a local authority to allow a local neighbourhood plan to proceed to a referendum have been both rejected (*R. (Larkfleet Homes Ltd) v Rutland CC* [2014] EWHC 4095 (Admin), and upheld [2015] EWCA Civ 597; *R. (Gladman Developments Ltd) v Aylesbury Vale DC* [2014] EWHC 4323 (Admin); *R. (DLA Delivery Ltd) v Lewes DC* [2015] EWHC 2311 (Admin)). Also upheld was a challenge to the decision of the Secretary of State to refuse planning permission on the basis of the incompatibility of the proposed development with a neighbourhood plan (*Crane v Secretary of State for Communities and Local Government* [2015] EWHC 425 (Admin); although see also *Woodcock Holdings Ltd v Secretary of State for Communities and Local Government* [2015] EWHC 1173 (Admin), where unjustified weight had been placed on an emerging neighbourhood plan in the Secretary of State's flawed rejection of a planning application). Yet while the courts have continued to reach decisions which seem facilitative of neighbourhood plans, which are not open to challenge on the basis that they have one element which is incompatible with broader regional or national planning frameworks (e.g., *R. (Kebbell Developments Ltd) v Leeds City Council* [2016] EWHC 2664 (Admin)), a referendum result has been quashed on the basis that one aspect of the plan voted on had been unlawfully altered by the local authority, contrary to the recommendation of the independent examiner (*R. (Maynard) v Chiltern DC* [2015] EWHC 3817 (Admin)). However, this decision might be seen as a constraint on the power of the representative local authority – which could not lawfully modify a single aspect of a draft neighbourhood plan on the basis that it was not in conformity with broader planning policies – as much as a constraint on the local electorate. There are also limits to the courts' facilitation of other neighbourhood planning actors: the SEA Directive has provided the basis for a successful challenge to a neighbourhood plan in circumstances where alternative options were rejected 'unsupported by

anything other than guesswork' by Henfield Parish Council (*R. (Stonegate Homes Ltd) v Horsham DC* [2016] EWHC 2512 (Admin), [74]).

Given the complexity of the statutory scheme – especially evident in the discussions in *Dawes Hill* as to the proper interpretation of the provisions related to the designation of neighbourhood areas and their interaction with the rules relating to the designation of neighbourhood forums – that the courts appear largely willing to avoid an excessively technical approach to the neighbourhood planning rules is significant. It is perhaps most interesting to consider, although at this stage very difficult to assess, whether the democratic character of the decisions taken to approve neighbourhood plans – most particularly, through local referendums – is informing the approach taken by the courts, especially given the sensitivity non-democratic judicial actors could (and arguably should) feel when called to review the legality of developments plans approved by direct popular vote. If this trend persists, and the courts continue to take a generous approach to the interpretation of the neighbourhood planning rules – especially in cases where the legality of a decision to proceed to a local referendum is challenged *after* that referendum has been held, and a positive result achieved, as in *Barratt Homes* and *Gladman Developments* – it may be that this provides (implicit, and after *Maynard*, to some extent qualified) judicial recognition of the democratic tensions we identify in this paper, and establishes a relatively limited role for the courts within this scheme. It may be that the courts are attempting to interpret the law, where possible, in such a way as to maximise the "power to" of communities to make plans, and minimise the "power over" such plan-making by developers seeking to bring challenges via judicial review.

5 Conclusions

For most theorists, decentralisation and localism do not simply imply moving the locus of decision-making from the central tier of government downwards/outwards – though this is clearly

inherent to the concept – but somehow "broadening" the sphere of decision-making beyond elected politicians (Pratchett, 2004; Stoker, 2004), consequently "deepening" in some way democracy itself (Davoudi, 2013), and thus redistributing power. We have demonstrated in this paper that this is very easy to say, but somewhat more difficult to do, through exploring one example of localism in practice (the 2011 Localism Act in the UK, and specifically its Neighbourhood Planning powers). Drawing upon evidence regarding the legislation and the interpretation thereof, we have identified three sets of tensions in the Neighbourhood Planning scheme: the extent to which Neighbourhood Planning can be said to reflect a democratic or representative mandate, and whether there are 'intra-representative' issues; the competition between different representative bodies – Local Authorities and Neighbourhood Forums; the role of independent actors in the Neighbourhood Planning process.

We have explored how each of these sets of tensions is playing out in reality via an analysis of early practice around Neighbourhood Planning. We have noted examples wherein the democratic and/or representative nature of Neighbourhood Planning can be questioned, bearing out concerns in the literature about the potentially exclusionary nature of localism (Parvin, 2009), that localism does not automatically make decision-making more democratic (Evans et al., 2013b) and that it could benefit those who are already most powerful in society (Hastings and Matthews, 2015). We have identified conflicts between different bodies that each claim to represent people: traditional representative democracy, in the form of elected local authorities; and neighbourhood forums, which are representative in a non-democratic participatory way. These conflicts can come about because of different understandings of representativeness (Lowndes and Sullivan, 2008), and because much power "over" (Hickson, 2013) remains with local authorities, casting doubt to the extent to which we can call this example of localism "genuine" (Evans et al., 2013b). Yet in contrast, we have also found that the courts appear willing to avoid an excessively technical approach to Neighbourhood Planning. We have hypothesised that this may be due to an (implicit) view that local democracy should be given substantial space in the decision-making process,

while perhaps also reflecting judicial sensitivity about the courts' own position when attempting to navigate and accommodate the tensions between bodies with competing democratic characters.

Even if the neighbourhood planning scheme is attractive as a matter of participatory or democratic theory, the tensions which we map in this paper are likely to condition, at least in part, how substantial a success (if a success at all) this English planning experiment may be. And as the different actors further establish their places within this emerging framework, how effectively they respond to the challenges these democratic tensions pose will be a crucial factor in shaping the potential of this decentralised planning framework, as we move beyond rhetoric and legislation, to reality.

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