

## Planning appeals – what are the options to keep the appeal system functioning alongside social distancing?



**Charles Banner QC**

## PINS Statement, 25<sup>th</sup> March 2020

“This updated guidance follows on from the Prime Minister’s announcement on 23 March detailing further measures to curb the spread of the coronavirus.

As a consequence, we have closed the offices in Temple Quay House and instructed all staff, including Inspectors, not to travel for work.

**Until this situation changes, therefore, no site visits, hearings or inquiries will take place.**

We will, however, be considering if there is any work that can progress as follows:

*Site visits:*

We will be considering whether there are types of cases that can proceed without undertaking a visit.

*Inquiries and hearings:*

We are considering whether it might be feasible to utilise technological solutions to enable events to proceed whilst ensuring fairness for all parties, especially third parties, given that these are public events. In some cases, the Inspector might invite the parties to consider whether the case can be decided on the basis of written submissions following questions that she or he might raise.”

## What this means in practice - real examples

- Inquiry in May being adjourned indefinitely, before proof deadlines (and without exchange of proofs).
- Postponed inquiry from April re-listed for 3 weeks commencing 29 September.
- Written Reps appeal in a case where exchange of WRs completed mid-Jan will be, according to PINS, subject to “considerable delay” because a site visit (even unaccompanied) is not considered possible at the present time.
- What does all this mean for:
  - Housing delivery/supply?
  - Infrastructure?
  - The economic recovery after the COVID-19 crisis is over?
  - Manageability and resource implications of the ever increasing backlog?
  - The objectives of the Rosewell Review of the planning inquiry system?

## Lord Chief Justice Statement re civil courts

19 March 2020

“The default position now in all jurisdictions must be that hearings should be conducted with one, more than one or all participants attending remotely...

...

You will all have been following the detail of the government’s advice and the science on which it is based. It is clear that this pandemic will not be a phenomenon that continues only for a few weeks. At the best it will suppress the normal functioning of society for many months. For that reason we all need to recognise that we will be using technology to conduct business which even a month ago would have been unthinkable. Final hearings and hearings with contested evidence very shortly will inevitably be conducted using technology. Otherwise, there will be no hearings and access to justice will become a mirage. Even now we have to be thinking about the inevitable backlogs and delays that are building in the system and will build to an intolerable level if too much court business is simply adjourned.”

## What about the Planning Court and LPAs?

- The Planning Court and Court of Appeal have already heard significant planning cases via phone and video link this month.
  - See eg. Chris Katkowski QC’s and Kate Olley’s [blogpost](#), 25<sup>th</sup> March 2020.
  - A Supreme Court video hearing from last week can be watched [here](#).
- [Coronavirus Act s.78](#), & regulations to follow, will enable LPA meetings by remote conferencing
- So we will soon be in a position where appeals to PINS are from decision-maker that uses remote conferencing, and onward appeals/applications from PINS are to Courts that use remote conferencing, but PINS itself is still:
 

“considering whether it might be feasible to utilise technological solutions to enable events to proceed whilst ensuring fairness for all parties, especially third parties, given that these are public events.”

## Chief Planner Letter, 24 March 2020

### **Decision Making**

...It is important that authorities continue to provide the best service possible in these stretching times and prioritise decision-making to ensure the planning system continues to function, especially where this will support the local economy.

We ask you to take an innovative approach, using all options available to you to continue your service. We recognise that face-to-face events and meetings may have to be cancelled but we encourage you to explore every opportunity to use technology to ensure that discussions and consultations can go ahead. We also encourage you to consider delegating committee decisions where appropriate. The Government has confirmed that it will introduce legislation to allow council committee meetings to be held virtually for a temporary period, which we expect will allow planning committees to continue.

### **Planning Inspectorate guidance**

In response to the spread of COVID-19, the Planning Inspectorate (PINS) has published guidance on how it will continue to carry out its duties under the Town and Country Planning Act 1990, the Planning and Compulsory Purchase Act 2004 and the Planning Act 2008. While some site visits, hearings, inquiries and events will have to be cancelled or postponed, PINS is considering alternative arrangements where possible.

PINS will keep its guidance under review, which could change at short notice to reflect the Government's wider advice." (Note the implication that PINS's approach does not currently reflect the Government's wider advice.)

## What could a phone/video hearing involve?

- Offered to the parties as an alternative to a lengthy postponement, representations sought as to the appropriateness of the procedure and then either:
  - (i) inquiry proceeds if all main parties agree; or
  - (ii) PINS consider it is appropriate having regard to published criteria (as per current T CPA 1990 s.319A procedural determination)
- Inspector identifies main issues from the written material
- Issue specific video or phone sessions (i.e. topic based inquiry) on the main issues, inviting participation from all who have made representations; plus sessions for third parties, s.106, conditions
- Opening/closing could be done by written exchange & publication or orally.
- Prior case management phone hearing to decide which issues for cross-examination and which for round table (as per Roswell inquiry procedure).
- Live streaming

## Is this within the powers of the 1990 Act and procedure rules? -> **YES:**

- TCPA 1990, s.321(2) – an inquiry must be “in public”.
- [Civil Court protocol on remote hearings, 27 March 2020](#) para. 8:
 

“remote hearings should, so far as possible, still be public hearings. This can be achieved in a number of ways: (a) one person (whether judge, clerk or official) relaying the audio and (if available) video of the hearing to an open court room; (b) allowing accredited journalists to log in to the remote hearing; and/or (c) live streaming of the hearing over the internet, where broadcasting hearings is authorised in legislation. The principles of open justice remain paramount.”
- Tim Mould QC paper for PEBA dated 25<sup>th</sup> March 2020 concludes that, for broadly similar reasons, the provision in the Inquiries Procedure Rules and Hearings Procedure Rules for a s.78 inquiry/hearing to be held at a “place” and for specified parties to be able to “appear” would be satisfied by holding it at a “virtual place”, with live streaming and an ability to appear through remote conferencing.



## Fairness

- See my paper with Chris Katkowski QC & others, downloadable [here](#) and the the subsequent letter to SSHCLG by Sir Lynton Crosby and Gavin Stollar, downloadable [here](#).
- Note that 95% of households own a mobile phone (see <https://www.statista.com/statistics/289167/mobile-phone-penetration-in-the-uk/>)
- Common law fairness is circumstances-specific:
  - Not prescriptive and therefore no fixed right to an in-person hearing
  - The impossibility of in-person hearings is relevant to the circumstance-specific analysis
  - Comparison to in-person hearing is irrelevant – question is whether the procedure used is fair, not whether some other procedure would be better.
- ECtHR case-law confirms that an oral hearing for the purposes of Article 6(1) ECHR includes phone/video link:

***Pönkä v. Estonia* (Application 61640/11, judgment of 8th February 2017), para 39:**

“The Court has also taken account of the practical problem of the applicant serving his prison sentence in Finland at the material time, whereas the civil proceedings against him took place in Estonia. It notes that “hearing” the applicant did not necessarily have to take the form of an oral hearing in a court room in Estonia. However, it does not appear that the domestic court considered other alternative procedural options (such as the use of modern communications technology) with a view to ensuring the applicant’s right to be heard orally.”

## Public participation

- Aarhus Convention Article 6 (“public participation in decisions on specific activities” 6(7):
  - “ (7) Procedures for public participation shall allow the public to submit, in writing or, as appropriate, at a public hearing or inquiry with the applicant, any comments, information, analyses or opinions that it considers relevant to the proposed activity.”
- What matters is that the public are provided with the means to comment on the proposal that they are being consulted on. Article 6 is not prescriptive about what that means should be.

## Next steps

- PINS are intending to pilot a small number of less complex inquiries by remote conferencing
- No public statement from PINS yet about:
  - What number of inquiries are to be piloted
  - The selection criteria for inquiries to be included within the pilot
  - The timescale for the pilot
  - Whether there will then be a review before consideration is given to rolling out the pilot more broadly
  - The intended timescale of that review
  - The intended timescale for rolling out the pilot more broadly after that review (and whether it will be incremental or wholesale)

**WATCH THIS SPACE!**

# Thank you for listening

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