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Welcome to Landmark Chambers'

'Planning in the COVID-19 Crisis' webinar

The recording may be accessed here.

Your speakers today are…

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

Charles Banner QC

Topic:
Planning Court & COVID-19

Richard Turney

Topic:
Keeping a planning permission alive during the COVID-19 crisis

Anjoli Foster

Topic:
COVID-19: shops, restaurants, cafes and drinking establishments

Matthew Henderson

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

Charles Banner QC

PINS Statement, 25th 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

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- 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?

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- The Planning Court and Court of Appeal have already heard significant planning cases via phone and video link this month.
  - See eg. Chris Katkowksi QC's and Kate Olley's blogpost, 25th 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

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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?

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- 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 critiera (as per current TCPA 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:

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- 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 25th 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 inquires are to be piloted
  - The selection criteria for inquires 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!

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Planning Court & COVID-19

Richard Turney

Overview

- Clear steer from the Lord Chief Justice that courts must continue, but taking all precautions to avoid unnecessary contact

"Hearings requiring the physical presence of parties and their representatives and others should only take place if a remote hearing is not possible and if suitable arrangements can be made to ensure safety."

- New Practice Direction 51Y together with protocol for telephone and video hearings and HMCTS guidance
- Time still runs!!

Planning Court: limitation periods for main business

- Some limitation periods which **cannot** be extended by Court:
  - Claims under s 288 TCPA 1990 (challenges to most Inspector/Secretary of State decisions) – 6 weeks
  - Claims under s 113 PCPA 2004 (local plan challenges) – 6 weeks
  - Claims under s 118 Planning Act 2008 (challenges to DCOs) – 6 weeks
- Some limitation periods which **can** be extended by Court (but rarely are, before now):
  - Claims for judicial review of planning decisions (e.g. grant of permission by local planning authority) – 6 weeks from decision
  - Claims under s 289 TCPA 1990 (challenges to appeals against enforcement notices) – 28 days from decision

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Planning Court: issuing

- Must be physically issued in Court (but this includes through posting to Court, so long as it arrives in time) and served in accordance with the relevant rule
- Follow updates on HMCTS about Court closures
- Email Court in advance to confirm arrangements
- Note that some proceedings must be served before issue (e.g. s 289 TCPA 1990)
- May issue at RCJ, Birmingham, Cardiff, Leeds, or Manchester

Planning Court: filing other documents

- See PD 5B on filing other documents by email
- See also para 6.7 of the Administrative Court Guide (and Annex 1 for the email addresses)
- Only currently available if:
  - No fee required
  - No more than 20 pages in London
  - No more than 10MB
  - Skeleton arguments to dedicated email address

Key procedural tools: time limits, phone and video

- CPR 3.1(2) provides that the court may:

  (a) extend or shorten the time for compliance with any rule, practice direction or court order (even if an application for extension is made after the time for compliance has expired);

  (b) adjourn or bring forward a hearing;

  …

  (d) hold a hearing and receive evidence by telephone or by using any other method of direct oral communication;

- CPR 2.11 provides that certain time limits can be extended by the written agreement of the parties

Adjournment on “health” grounds

- For recent Court of Appeal authority (outside of current crisis) see e.g. *Sanjay Solanki v Intercity Telecom Limited* [2018] EWCA Civ 101 at [32]-[38]
  - Fairness and Article 6(1) considerations are key
- Courts have traditionally required a high standard of medical evidence to support adjournment: see e.g. *General Medical Council v Ijaz Hayat* [2018] EWCA Civ 2796 at [38]
  - It seems unlikely that position would be sustained in the current crisis

Video conference

- For applications, PD 23A para. 7 provides *"Where the parties to a matter wish to use video conferencing facilities, and those facilities are available in the relevant court, they should apply to the Master or District Judge for directions."*

- See PD 32, Annex 3 for detailed guidance on use of video conferencing, particularly for taking evidence by video conference

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New PD and Guidance

- PD 51Y allows for hearings to take place in private where broadcast of phone/video not possible

- Arrangements are being made for press to be joined to video/phone hearings

- "Protocol Regarding Remote Hearings" provides key guidance including specific instructions on electronic bundles

Planning Court timescales

- PD 54E sets “target timescales for the hearing of significant Planning Court claims”
- These are court targets and there are no sanctions for failing to meet those targets
- For non-significant cases there are no targets in the CPR/Practice Directions
- Most planning cases will give way to “urgent business” if the Court is under pressure

Experience so far…

- Planning hearings proceeding remotely in London, Birmingham and Manchester
- Telephone and video hearings have already taken place
- Authorisation to record (pursuant to CPR 39.9) has been granted in certain cases

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Keeping a planning permission alive during the COVID-19 crisis

Anjoli Foster

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Topics covered in this talk

- Time limits for commencement of development and submission of applications for reserved matters approvals

- Section 106 obligations and Community Infrastructure Levy payments becoming due

Introduction

- Real problems emerging already on these issues in particular
- Some suggestions as to possible solutions within the current legal framework, however effective solutions will require changes to guidance and/or legislation
- Despite these real problems, none of these issues have yet been subject of new guidance or legislative change yet
- Also not been mentioned in either the recent Chief Planner's letter on COVID-19 advice or the LGA's Planning Advisory Service's FAQs on COVID-19
- But change may be coming

Time limits for commencement and reserved matters applications – the relevant law in England in TCPA 1990

- Section 91 – development must begin no later than 3 years from the grant of permission
- Section 92 – for outline permission, applications for reserved matters approval must be made no later than 3 years from the grant of permission, and development must begin no later than 2 years from the final approval of reserved matters
- In both cases the LPA can direct a different time limit at the time of grant
- Section 73 amendments – cannot use this to extend time limits (s.73(5))
- Note: s.96A for non-material amendments

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Problems for commencement and reserved matters applications during the COVID-19 crisis

- Construction industry shutdown and staff shortages
- Staff shortages and remote working challenges for applicant's planning team
- Not commercially viable
- Staff shortages and remote working challenges within LPA dealing with discharge of pre-commencement conditions and reserved matters applications
- Risk of losing the permission – have to re-apply in a new policy context and possible implications for funding

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Solutions in the current legal framework?

- Cannot apply to amend time limits
- Commence development with a “material operation” (s.56 TCPA 1990) – may be suitable in some instances
- Deemed discharge of conditions – but a number of exceptions
- Reserved matters applications – starting point is the wording of the condition – likely only need submission of application not validation (Seivers v Bromley)

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Need for new legislation – the only real solution

- New legislation for separate application to extend time or an automatic extension
- Understand something the Government is looking into
- Did it previously to deal with the last recession – new application procedure in October 2009 – though need it quicker than last time
- Preferable to have an automatic extension given existing pressures on LPAs (see s.91(3A) and (3B))

Section 106 agreements

- Problems arise where there are ongoing financial contributions, particularly when linked to passage of time

- Viability and affordable housing is a particular example – early and late stage reviews where, contrary to what was anticipated, a certain level of progress has not been reached or developer been unable complete units or sell them

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Section 106 agreements – renegotiation and modification

- Planning obligations can be voluntarily renegotiated at any point – but depends on the willingness of both parties
- A right to apply for modification after specified period under section 106A TCPA 1990 – test is whether the obligation still "serves a useful purpose" – not a high test
- Refusal can be appealed or challenged
- Until modified, the s.106 obligation remains an enforceable contract
- Need guidance from Government as to renegotiation

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Community Infrastructure Levy

- Similar issues arise as to commercial viability
- Informal agreement with the charging authority
- Exceptional circumstances relief – PPG says that an authority can grant this relief “if it deems that the levy would have an unacceptable impact on the viability of a development”
- But this must be before development commenced and is relief not a deferral
- LPA alter their installment policy in order to effect a deferment of installments
- Again a need for Government guidance or a new mechanism to apply for deferment of payments

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Summary

- Real problems arising on as to time limits, section 106 obligations and CIL payments due to the COVID-19 crisis
- Some suggestions as to solutions in the current legal framework
- But only real solutions will come through changes in guidance and legislation

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COVID- 19: shops, restaurants, cafes and drinking establishments

Matthew Henderson

Topics

- New temporary permitted development right for restaurants, cafes and drinking establishments.

- Written ministerial statement on delivery restrictions.

(1) 2020 Amendment Order

- Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2020

  – Came into force at 10am on 24 March 2020 (art. 1).

  – Insert new Class DA in Part 4 of Schedule 2 to the GPDO 2015 (arts. 2 & 4) – new time limited (temporary) change of use.

  – Amends article 4(1) GPDO 2015 (art. 3) – prevent the LPA/SoS from directing that development under Class DA is not to apply in relation to a specified area.

(2) New Class DA

- Class DA –
  - "Development consisting of a change of use of a building and any land within its curtilage"
  - From: Class A3 (restaurants and cafes); Class A4 (drinking establishments; mixed use for any purposes with Class A3 and ClassA4; or use as a drinking establishment with expanded food provision as defined in Class AA.
  - To: use for the provision of takeaway food. See para. DA.2: "*includes any use for any purpose within Class A5 … and any use for the provision of hot or cold food that has been prepared for consumers for collection or delivery to be consumed, reheated or cooked by consumers off the premises.*"
  - At any time from 10am 24 March 2020 – 23 March 2021.

(3) Conditions on Class DA

- Para. DA.1 –
  - "*must notify the local planning authority if the building and any land within its curtilage is being used, or will be used, for the provision of takeaway food*"
  - *"does not affect the use class which the building and any land within its curtilage had before the change of use"*
  - *"the use of the building and any land within its curtilage reverts to its previous lawful use at the end of the relevant period or, if earlier, when the developer ceases to provide takeaway food under Class DA"*

(4) WMS - context

- Context**:**
  - NPPF para. 55:

    "Effective enforcement is important to maintain public confidence in the planning system. Enforcement action is discretionary, and local planning authorities should act proportionately in respondent to suspected breaches of planning control."

  - For example:
    - Section 172(1)(b) TCPA 1990– where it appears to the LPA "*that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations*"
    - Section 187A TCPA 1990 – "may"

(5) WMS on delivery restrictions

- Made by the Secretary of State on 13 March 2020 (HCWS159).
  - "*enabling retails of food, sanitary and other essential items to increase the frequency of deliveries to their stores to support the response to Covid-19".*
  - *"The purpose of this Written Ministerial Statement, which comes into effect immediately, is to make clear that as a matter of urgency local planning authorities should take a positive approach to their engagement with food retailers and distributors, as well as the freight industry, to ensure planning controls are not a barrier to food delivery over the period of disruption caused by the coronavirus"*
  - *"Given the current situation local planning authorities should not seek to undertake planning enforcement action which would result in unnecessarily restricting deliveries of food and other essential deliveries during this period, having regard to their legal obligations"*

(6) WMS on delivery restrictions

- Made by the Secretary of State on 13 March 2020 (HCWS159).
  - *"The Government recognises that the increased frequency of deliveries, particularly at night, could have temporary impact on local residents. However, this needs to be balanced by the significant public interest in ensuring local residents have continued access to food, sanitary and other essential goods in their local shops."*
  - *"The Government will review the need for the flexibility outlined in this statement after the pressure from the coronavirus has reduced, and it is the intention to withdraw it once the immediate urgency has subsided."*

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Q&A

We will now answer as many questions.

Please feel free to continue sending any questions you may have via the Q&A section which can be found along the top or bottom of your screen.

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Thank you for listening

London
180 Fleet Street
London, EC4A 2HG
+44 (0)20 7430 1221

Birmingham
4th Floor, 2 Cornwall Street
Birmingham, B3 2DL
+44 (0)121 752 0800

Contact us
clerks@landmarkchambers.co.uk
www.landmarkchambers.co.uk

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Landmark Chambers