

The practical implications for, and risks of, making decisions during the emergency period including the use of delegated powers.

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Key Legal Risks arising from....

- Ensuring compliance with the letter of the regulations, in new and difficult circumstances;
- Needing to correctly understand the extent to which the new regulations do and do not displace existing statutory requirements;
- Understanding the relationship between the regulations and their effect on the Council's existing standing orders and published procedures (regulation 5(5));
- Not forgetting the need to observe other public law duties, and particularly the common law requirement of fairness;

Specific areas of potential risk

- Public Notification;
- Technical Issues;
- Involvement of the Public (and excluding the Public);
- Public speaking at meetings;
- Lack of site visits;
- Availability of documents;
- Reliance on delegated powers;

Public Notification of Meetings

- Regulation 4(1) appears to be very permissive
“may hold, move or cancel meetings without requirement for further notice.”

BUT

- Take care to still meet requirements for notice (reg 6 Local Authorities (Executive Arrangements) (Meetings and Access) to England Regs 2012 and para 4(1A)(a) Sch 12 1972 Act (albeit now on website);
- Observe common law requirements of fairness and possible legitimate expectation (*R (Majed) v. LB Camden* [2009] EWCA Civ 1029);

Technical Issues

- Do Members have technical means and ability to access remotely?
- Effects of drops in connectivity – potential breach of reg 5(3);
- Need for training / dry run?
- Need for protocols and procedure to guard against breaches – recess or abandonment of meeting when technical glitches hit

Involvement of the Public

- More difficult to ascertain whether the public have the technical means and ability to access remotely;
- Is the meeting still 'open to the public' if it is not accessible to some members of the public by remote means?
- Fairness considerations, but note case law on considering all the circumstances and lack of need to be the 'most fair' procedure;
- But sensible to put in place basic protocols and procedures to ensure equal and fair access to meetings;
- Effect of drops in connectivity at a crucial moment? (reg 5(3))

Excluding the Public

- Need to think through the practical issues of potentially needing to exclude the public if confidential or exempt information crops up (s.100A 1972 Act)
- And how to re-provide public access when that discussion has concluded;
- Does a member cease to 'be in remote attendance' under reg 5(2) for the period when the public attending the meeting are then excluded (unintended consequence of reg 5(3)(c)?

Public Speaking at Meetings

- Be wary of over reliance on regulation 5(5);
- Unless amended, any existing Council procedures allowing public speaking at meetings will continue to apply albeit by remote means;
- Practical implications are that those currently entitled to speak in person need to be given necessary access to speak 'live', in real time, not by pre-record (reg 5(3)(b));
- Care to ensure technological tools are in place to allow this without disruption of the meeting overall and with ability to exclude as necessary.

Site Visits

- The Regulations do not deal with site visits so existing Council procedures and practices will continue to apply in terms of what is required.
- Arguably site visits are currently unlawful under the Health Protection (Coronavirus Restrictions) (England) Regulations 2020 (but may fall within Reg 6(f) or 6(h)).
- In any event, may be impractical and/or undesirable in current circumstances
- Potentially risky to proceed in the absence of a site visit for a complicated or very visually sensitive scheme – risk of Members misunderstanding the context or being inadvertently misled by the written material and risk of breaching existing procedures and/or legitimate expectations.

Availability of Documents

- Clear can now make documents available for inspection by posting on the Council's website;
- Observe fairness requirements and ensure documents are easily found in a logical place on the website (beware fairness caveats in *Kendall v. Rochford DC* [2015] Env LR 21, at paras 93 to 94) ;
- Do not forget to include 'background papers' – i.e internal or external documents, emails, reports that are materially relied on in officer's recommendation (see s.100D, *R (oao Joicey) v. Northumberland CC* [2014] EWHC 3657 (Admin) and *Hale Bank PC v. Halton BC* [2019] EWHC 2677 (Admin)).

Reliance on Delegated Powers

- Potentially attractive solution which avoids some practical problems and legal risks
- But beware bending or stretching powers beyond their limits – consider expressly amending if required
- Decision to amend must be made on proper considerations, taking into account relevant factors
- When using delegated powers more widely, crucial to ensure observe legal requirements
- Ensure actual decision maker is provided with all necessary information to determine the application
- Duty to publish record of reasons and note *R (Rogers) v. Wycombe DC* [2017] EWHC 3317 and *R (oao Gare) v. Babergh DC* [2019] EWHC 2041 (Admin) (at para 41) re standard of reasons.

Thank you for listening

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