

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

**Jenny Wigley**

## 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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## 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](mailto:clerks@landmarkchambers.co.uk)  
🌐 [www.landmarkchambers.co.uk](http://www.landmarkchambers.co.uk)

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