Remote Council Decision Making in the Covid-19 Crisis

On Thursday 9 April 2020, Landmark Chambers hosted the "Remote Council Decision Making in the COVID-19 Crisis" Webinar, with Reuben Taylor QC, Jenny Wigley, Yaaser Vanderman and Jacqueline Lean as speakers.

During the webinar, attendees submitted a number of questions, and for those that were not answered at the end of the webinar, we have provided answers here. We have grouped the questions together into the following topics. Our answers should not be relied on as legal advice and we are not able here to provide answers to questions involving particular cases or particular sites.

Nature of remote hearings and technological issues

The requirement to ensure meetings are open to the public includes access by remote means, including video conferencing, live webcast and live interactive streaming. Could this include just an audio live feed of the meeting where members can hear and see each other?

There is a good argument that an audio live feed is sufficient. Even though this is not listed as a specific example in Regs 13-16 of the 2020 Regs, the list is not exhaustive and an audio live feed would appear to fall within the definition of "*access to the meeting through remote means*".

What about where visuals are important to the application?

As long as all the relevant parties are able to see the relevant documents during the meeting, and therefore discuss them, the answer above applies.

The planning officers society have suggested in their recent march 2020 guidance that public attendance could be achieved by making a recording available after the meeting. I am not convinced this would fall within the four corners of the regulations and constitute the meeting being 'open to the public' - what are your thoughts?

We consider this unlikely to constitute "*access to the meeting through remote means*" for the purposes of Regulations 13-16 of the 2020 Regs.

Where members are present only on audio, what safeguards should be put in place to ensure that they are actually there for any debate and not just connected but away from their PC/phone and returning for voting?

The 2020 Regs do not deal with this point and there would appear to be no legal requirements for such safeguards.

In practical terms, it may be that this can only be done by, for example, an oral direction by the chair at the outset that all members are required to remain on the call throughout and inform the chair if they need to 'leave' at any point – and asking committee members to confirm at the end that they have done so.

Our Standing Orders require members to be present throughout the officer presentation, debate etc at planning committee to be able to vote. If their internet connection drops out and then reconnects prior to the vote, have they been "present" throughout? Present issues with quorum too!

Where a member's internet connection drops out, the meeting should wait until he/she re-joins. If the other members were unaware that the member had disconnected, the matters discussed during his/her absence should be repeated once he/she re-joins. An amendment to the standing orders could clarify that a member who disconnects and re-connects to the meeting due to technological issues is still "present throughout" as long as any matters discussed during his/her absence are repeated.

How do we facilitate members of the public wishing to speak for or against a proposal who don't have access to IT, or in case of a physical meeting, can't attend due to underlying health conditions?

A telephone number able to connect to the meeting would likely be sufficient.

As well as members of the public - how can consultants/developers contribute to a meeting in what was usually the "speakers" slot of 2/3 minutes. I have had cases where I have been able to make points in that slot that have helpfully steered the subsequent discussion of Members.

We do not see that the 2020 Regs, or virtual meetings, would make a difference given that developers would still have remote access to the meetings.

What is the interplay between the access to planning committees allowed via video conferencing, and the practicalities, that many people will either not have adequate broad

band, or may simply not be sufficiently IT savvy (with respect to the older generation, often does include the older generation). Is there an equalities issue here?

There will need to be some consideration of this when the Council is considering what arrangements to put in place - it seems to us that this would fall under the public sector equality duty under s.149 Equality Act 2010 and other obligations in the Equality Act 2010.

Is there an end date or sunset clause for the 2020 regs? And are councils required to set an end date in changes to their Standing Orders etc?

They apply to all meetings until 7 May 2021. There is no end date for standing orders etc.

We have provided all our councillors with tablets, technical support and training on virtual meetings. We may amend our standing orders to permit voting via e-polls in our video conferencing platform. Where do we stand if a Member either refuses or isn't able to connect to the video conference (and therefore participate in the e-poll) but insists on connecting by phone only? Assuming we would have to accept their vote verbally if a sitting member of that committee, but this raises issues of how you verify that it is that person who is making that vote.

A member who is not practicably able to see or be seen by other members during a meeting, e.g. due to technological issues, still "attends" a meeting for the purposes of Regulation 5(2)-(3) of the 2020 Regs if he/she can hear/be heard by others, e.g. connecting by phone only. If the standing orders so allow, they can give their vote over the phone and, presumably, their voice will be recognisable as the correct person. The chair can ask for confirmation if necessary. A member who is practicably able to have a video conference but refuses would appear not to "attend" for the purposes of the legislation and so might fall foul of attendance requirements in s85(1) of the Local Government Act 1972.

<u>No further meetings/decisions</u>

I am aware of at least one Local Planning Authority refusing to validate any new planning applications, due to Covid 19 and all Officers working from home and a view they are not able to validate and register new applications. Does the panel believe this is lawful and/or reasonable and have any advice/guidance to seek to counter this stance?

A blanket approach, of refusing to validate <u>any</u> new planning applications, without more, is likely to be difficult to justify if challenged. Under Article 11 of the DMPO 2015, a local authority "must" send an acknowledgment of an application "as soon as reasonably

practicable" where they receive the documents prescribed in Article 11(2) (which exercise itself involves consideration of whether the application complies with the requirements of Articles 5, 6 or 7 as applicable) and after sending such an acknowledgment "must" notify the applicant "as soon as reasonably practicable" if they consider the application is invalid.

Whilst the Courts might be sympathetic to the practical difficulties which LPAs are having to deal with, and delays this might cause to the 'usual' validation periods, a blanket decision not to validate or register new applications could, arguably, be regarded as a refusal to comply with the obligations under the DMPO, and thus is likely to be problematic.

Is there any requirement for a council to continue to undertake notification/consultation prior to reaching the decision-making stage as I am currently aware that some authorities are suspending neighbour notification and the commencement of statutory consultation periods on applications.

Although the DMPO contains obligations for notification, publicity and consultation of applications, it does not specify a timeframe within which those processes must occur after validation of an application - subject, of course, to the provisions in Article 34 as to the periods within which applications should be determined generally, and restrictions on applications being determined before the prescribed periods have elapsed following notification / consultation / publication.

If an LPA considers that, as a result of the current pandemic, that an effective consultation could not be undertaken on planning applications, then that might be seen as a justifiable reason for delaying notification/consultation. However, the longer the current restrictions go on for, the greater the expectation there is likely to be for LPAs to find a way to 'work around' those logistical constraints – not least, as any concerns about whether difficulties during the consultation process could be dealt with by other means (for example, extending the period for consultation responses), rather than postponing the whole consultation exercise *per se.*

Some Authorities are now advising that they are only considering/dealing with applications where consultation and site visit had been undertaken prior to self-isolation coming in place, with new applications being validated and assigned to an officer but nothing further being done i.e. no consultation and no action taken. How does this stack up legally?

Please see answer above.

We have a planning application for circa 50 dwellings which is approaching determination at planning committee. However, this is a largely rural authority which have cancelled all planning committees until June. Are there any provisions to enforce Councils to hold planning committees virtually or, if they decide, can they just wait until a 'normal' committee can be held?

Other than the general obligations on LPAs to determine applications, and to determine them within indicative timescales, there is no specific provision compelling Councils to hold planning committees virtually. However, given the new Regulations, it is likely to be very difficult for Councils to continue to cancel or postpone planning committee indefinitely.

Delegation of powers

With regard to delegation to officers could there be a rise in challenges to permissions made by officers or a small group of officers and members? and how do you think the courts would react given the current circumstances i.e. will they be more sympathetic to LPAs?

There will, potentially be an increase in challenges - especially, if the decisions are for development which members of the public might usually have expected to be taken by committee at a meeting. In terms of the court's approach, it is unlikely they would adopt a materially different approach to that which they take to planning challenges at the moment, but it will be important to ensure that delegations have followed the right procedures (see eg Friends of Hethel Ltd v South Norfolk DC [2010] EWCA Civ 894. There may also be greater scrutiny of eg consultation / notification processes and availability of information

Where officers are given extended delegated powers and there have been a lot of objections to a planning application, is the likelihood of a legal challenge being successful increased particularly where the application would, under normal circumstances, have been reported to Committee for determination given the number of objections.

Please see answer above

A council I am working in has emergency powers in place to allow officers delegated powers as well as virtual committees. Our scheme has a number of objections - is it likely to be a JR issue if the delegated route is followed when there is the possibility for a virtual meeting?

This is likely to depend, at least in part, on whether the application is delegated pursuant to an amended scheme of delegation (eg a decision that applications of a certain type shall be delegated to officers), a blanket decision that all decisions will be delegated (which could be more problematic, given the legislative amendments made in the Regulations) or whether a specific decision has been made about whether delegation is appropriate in this specific case.

If an application was scheduled to be presented at committee and then the scheme of delegation changes to allow delegated decision, could the new scheme apply retrospectively to that application?

This is likely to depend on the specific provisions of the Council's Constitution, Standing Orders and Scheme of Delegation (as amended). If, for example, they permit an application to be decided under delegated powers after it had initially been allocated for consideration by Committee (or vice versa) and/or the amendments to the Scheme of Delegation made

clear that they applied to all as yet undetermined applications, that would seem less problematic than if the Council's previous practice had been that once an application had been allocated for determination by Committee it remained with Committee.

That is not to say, however, that there might not be a risk of challenge, for example, from members of the public who had indicated they wished to make representations at the committee meeting, based on legitimate expectation.

A decision on a planning application has been deferred by Members (at a Committee Meeting undertaken prior to the outbreak of COVID), can it fall to be delegated in the event the LPA has taken the decision to cancel Committee Meetings for the foreseeable future?

Please see answer above.

Site Notices

I am interested to understand what provisions are in place for Site Notices and how LPA's/applicant (Hazardous Substances Consent and DNS projects) are to proceed and not be in breach of relevant legislation?

No changes to the relevant procedural requirements have yet been made as a result of the Covid 19 crisis. Where required, site notices will need to be displayed as before.

My concern is site notices not being displayed as no one will visit the site. These are required for major application or where it is required in an adopted SCI. One council won't start considering a major application as no-one can put up the site notice and asked for a 12 month extension of time!

Site notices will still need to be displayed as required irrespective of the fact that there will be fewer passers-by to see them. It may be sensible to allow a longer period of consultation and to also notify neighbours directly in order to ensure the publicity is effective. There is no restriction on council officers attending site in order to put up a notice: Under regulation 6(2)(f) and (h) of The Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the "Coronavirus Restrictions Regulations"), persons may leave their home in order to 'fulfil a legal obligation' (6(2)(h)) and to travel for work where it is not reasonably possible to work from home (6(2)(f)). Both of these exceptions to the restriction on people leaving their homes would allow council officers to travel to put up a site notice that is required by applicable regulations or in an adopted SCI.

Posting site notices associated with various planning functions seems to be problematic for some LPA's. Is there any reason why a planning agent cannot print and affix notice (take photo etc.) as proof of posting?

There is no legal restriction preventing a planning officer from posting a site notice, particularly if such a notice is legally required (see above). Where (as is usually the case) the legal duty is specifically a duty of the local planning authority then this duty could not be delegated to the planning agent for the applicant. Whilst allowing an agent to carry out the task might appear to be a practical solution, there would be a risk that the resulting decision could be vulnerable to challenge if something went wrong and an interested person was not notified of the application. This is because the lpa would not have the protection of having met its own legal requirements (see Gerber v. Wiltshire Council [2016] EWCA at para 48).

In a planning context, where do we stand with Members attending site visits? The Members decided, prior to the lockdown, to carry out 2 site visits. In one case the applicant is understanding and is happy to defer; in the other the applicant is not so understanding. The current thought is simply to leave it to the applicant to appeal for non-determination. Of course, the public can also attend site visits.

This will depend on the established practices and procedures in place in each individual authority. If there are procedures requiring site visits in certain types of cases then these will need to be reconsidered and formally amended, particularly if there are practical ways of avoiding the necessity of a site visit in some cases. For example, it may be worth removing any rigid requirements and leaving the question for the judgement of the planning case officer (possibly in conjunction with certain Member(s)) as to whether a committee site visit is necessary in any particular case. This judgement could then also be revisited by the committee if they considered that they needed a site visit in order to properly assess the proposal. If a site visit is needed then, in our view, travelling for the purposes of a site visit would not be unlawful under the Coronavirus Restrictions Regulations (see ref 6(2)(f)). However, gatherings of more than two persons in a public place (who are not from the same household) are banned unless they are essential for work purposes or reasonably necessary to fulfil a legal obligation (regulation 7(b) & (d) of the Coronavirus Restrictions Regulations). Furthermore, the carrying out of a site visit with appropriate social distancing may be difficult and may be particularly problematic if some members are in vulnerable groups or are self-isolating. Because of all this, where a site visit is necessary, seeking an agreement to defer would be a sensible course, and if no agreement is forthcoming then there may be no option other than to delay determination leaving open the potential for an appeal against non-determination.

Site visits – can the use of photos and wider use of videos / drone videos obviate the need for a site visit by a committee?

Yes potentially – but this would depend on any established practices and procedures in place in any particular authority, which may need to be formally amended for these purposes (see above). Also, if in any particular case the officers or committee consider that photos or video representation is insufficient for the committee to properly appreciate important site features (such as wide views and impact on context) then a site visit could still be necessary.

Hi, the LPA I work for decided to ask applicants and interested parties to provide photographs in lieu of a site visit by the officer. Would this be lawful?

It could be lawful (but established procedures or practices may need to be formally amended to facilitate this – see above). However, reliance on photographs may mean that there will be more risk of a successful legal challenge if a material matter is missed or misunderstood by the officer, leading to the decision being made on an error of fact or on the basis of an omission. In such a case, there would be less scope for the local planning authority to respond to a legal challenge by arguing that the appreciation of the site features was a matter of planning judgement for the planning officer. This is because the officer will only have had the specific information given to him or her, rather than being able to take a broad judgement on a site visit.

Is there any guidance or best practice advice in terms of proceeding with video site visits? I know that some LPAs are requesting that applicants undertake their own site visits by way of video conference with the relevant case officer to ensure that all areas can be assessed. Is this a robust site visit for the purpose of considering impacts on neighbouring properties or would this be open to challenge?

We are not aware of any published best practice guidance for video site visits. This may be a workable solution in some cases but see above for potential risks if a material matter is missed or misunderstood.

The issues of whether COVID-19 prevents a site visit is not clear. As a planning consultant I can do around 95% of my work from home but I do need to do a site visit at the beginning of the process. I have advised clients that I won't meet them/discuss issues on site but would be unaccompanied and then will discuss by telephone later, thus I will comply with social distancing. Am i going to be breaking the Covid rules if I do this?

In our view, it is unlikely that this would be in breach of the rules. As already mentioned, it is a 'reasonable excuse' and therefore lawful to leave one's home for the purposes of work if it is not reasonably possible to work from home (reg 6(2)(f) of the Coronavirus Restrictions Regulations. Carrying out a site visit would in our view fall within the category of work that cannot reasonably be carried out from home.

Time Limits and Extensions

We are receiving frequent enquiries about extension of the 3 years condition for commencement as they are ready to start but will now be unable to due to contractors shut down or lack of materials. Has there been any provision at Minister level for extension of the three years in the current circumstances similar to the extension of the MOT? Is there any likelihood that this will happen, or is there anything that local authorities can do locally?

Whilst there has been industry pressure, lobbying and publicity about the need for this, we are not aware of any Government proposed changes to legislation relating to this as yet (other than in Scotland).

Will the 6 week time limit for JR be strictly applied following a virtual committee decision?

There is no reason as a matter of principle why the fact that a committee decision is held virtually would cause a delay to a legal challenge and so we see no basis for the JR time limit to be relaxed as a matter of course. However, Covid 19 related factors (such as illness, caring for family members etc) are likely to be given consideration by the Courts where relevant when considering claimants' explanations for any delays in bringing a JR claim.

Will the requirements for determination timescales be lifted?

There is no sign of this as yet.

Is anybody aware of any indication that legislation will be introduced which extends the time limits on all permissions (as is the case in Scotland)?

Not as yet – see above.

Is Zoom a Data Protection/GPDR compliant platform since it can store data overseas?

This is a complex question and we suggest that authorities receive full legal advice on it if they are concerned.

Transfers of data outside of the UK are not inhibited by GPDR but are regulated by the Data Protection Act which precludes personal data from being transferred to any country outside of the European Economic Area "unless that country or territory ensures an adequate level of protection for the rights and freedoms of data subjects in relation to the processing of personal data."

A Zoom user can change its settings so that data is retained only in Europe and the US.

The EU and the US have agreed the EU-U.S. Privacy Shield Framework. Organisations that are certified under this framework meet the standard required by the DPA.

Zoom states on its websites that:

"Zoom Video Communication, Inc. participates in and has certified its compliance with the EU-U.S. Privacy Shield Framework and the Swiss-U.S. Privacy Shield. Zoom is committed to subjecting all personal data received from EU member countries, Switzerland, and the United Kingdom, in reliance on the Privacy Shield Frameworks, to the Framework's applicable Principles."

Accordingly, it seems that, providing the user settings on Zoom are altered so that could data is only retained in Europe and the U.S., the obligations under the GPDR/DPA would appear to be met.

In any event there are other video platforms such as Skype, WebEx and Google Hangouts.

Is it open to Local Authorities to refuse to use video conference technology due to concerns that it is insecure?

There is no legal obligation on Council's to use video conferencing technology – the 2020 Regulations enable meetings to be held over telephone for example. However, Cabinet is using video technology to transact business which would suggest that it is considered sufficiently secure at national government level. The 2020 Regulations also allow for video conferencing which would also suggest that relevant platforms have been considered to be sufficiently secure.

If you are concerned that a Council is refusing to use video conferencing facilities on a basis which is not justified, we would suggest writing to the head of planning and asking for a written explanation which sets out the detailed reasons why that Council is not using video conferencing software. Any answer can then be shared with the Planning Advisory Service (which is leading the way in terms of advice on the use of this technology for planning decision making) and/or with MCHLG.

Newspaper Advertisements

The planning system requires advertisement of certain applications to be place in a newspaper "circulating in the locality" in some circumstances e.g. EIA Development, applications involving listed buildings/conservation areas.

The Planning Advisory Service is advising that adverts should still be placed in local newspapers.

However, during the lockdown period newspapers of course are not being physically circulated. As a result, there must be a real risk that these sort of procedural requirements cannot actually be complied with. This can only be addressed via legislative amendment from Government.

In the meantime, it is advisable to do all that is reasonably to place a newspaper advert. If that cannot be done locally then Council's should considered explaining on their website that this is the case and that the adverts that would normally have been published in local

newspapers will now be published on the Council website. This should mitigate the risk of successful Judicial Review but it cannot remove it.

Making Documents Available at the Council Offices

There are some types of application that require documents to be deposited and made available for inspection at Council Offices e.g. EIA development and public path orders.

Clearly, those provisions cannot be complied with whilst Council offices remain closed. This is another area where there is a need for Government to introduce legislative change.

In the meantime, it would be advisable to explain on the Council's website that documents are available on its website. Developers should also consider whether they would be prepared to provide hard copies of the relevant documents via the post to those without web access on request. If they are then the public needs to be informed of this on the Council's website. Again, these steps will assist in mitigating the risk of successful Judicial Review but they cannot remove that risk.

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