



PLANNING IN THE CONTEXT OF COVID-19

QUOD PLANNING BULLETIN 2

20 April 2020

This is Quod's second Planning in the context of Covid-19 bulletin. Whilst the 'lockdown' was only introduced in the UK on 23 March, in the space of a few short weeks, we have seen new primary legislation enacted in the Coronavirus Act 2020 and a pragmatic response from the industry. That momentum needs to continue but we can certainly see how new solutions are enabling planning to play its important role in keeping the economy moving and, critically, preparing for the recovery.

This bulletin reports on the latest measures and best practice emerging to keep planning projects moving.

PLANNING IN THE CONTEXT OF COVID-19

1. Determination of planning applications

- 1.1. The legal requirement for Councillors to be physically present at planning committees was addressed by s.78 of the [Coronavirus Act 2020](#), which provided the legislative 'hook' for the Secretary of State for MHCLG to regulate for remote committee meetings.
 - 1.2. [The Local Authorities and Police and Crime Panels \(Coronavirus\) \(Flexibility of Local Authority and Police and Crime Panel Meetings\) \(England and Wales\) Regulations 2020](#) subsequently came into force on 04 April.
 - 1.3. These Regulations allow remote planning committee meetings, with only the modest requirement that all attendees can be heard, and to hear each other. To ensure transparency, the Regulations also require that members of the public can hear proceedings and are also able to speak where they have registered to do so.
 - 1.4. Whilst planning committee meetings must remain 'open to the public', in the age of social distancing, this definition is extended to include video conferencing, live webcast and live interactive streaming. The Regulations are intentionally vague about the precise nature of remote meetings, leaving flexibility for local authorities to take an approach suitable to their circumstances. Many planning committees due to take place in April were postponed but several authorities have swiftly embraced virtual meetings such as the Royal Borough of Kensington and Chelsea, Westminster, Luton, and Waltham Forest.
 - 1.5. Notably, video feed is only required 'where practicable', though conducting meetings solely by telephone would place a much greater reliance on the detail and content of officer reports to ensure Members fully understand the proposals being considered.
 - 1.6. Importantly, the Regulations also address the legal obligation for the public to be able to inspect application documents, now allowing this requirement to be satisfied through publication on a Council's website. This is an important breakthrough that can extend into other critical areas of planning, such as the legitimacy of online consultation.
 - 1.7. Authorities are also considering the greater use of delegation powers, allowing officers or an individual member to make decisions. A pragmatic approach to delegation was advocated by Steve Quarterman CBE (departing MHCLG Chief Planner) in his [final letter to chief planning officers](#) and by the Planning Advisory Group in their [Virtual planning committee – a hints & tips guide](#).
 - 1.8. Notably, Mayoral Development Corporations do not benefit from the new powers to hold virtual meetings afforded by the Coronavirus Act 2020. This was apparently an oversight, perhaps understandable given the speed at which this primary legislation was produced. The
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government is aware, and we expect this omission to be addressed.

- 1.9. The Regulations are intended to be temporary and only apply to council meetings held before 07 May 2021, though the Government retain flexibility to amend or extend these Regulations as necessary.

2. Preventing planning permissions lapsing

- 2.1. To lawfully commence development and prevent planning permissions lapsing, it is usually necessary to discharge conditions ahead of starting works. Ensuring the timely discharge of such conditions can be a challenging task, given planning departments across the UK are still adapting to the impact of the virus on both resource and working practices.
- 2.2. Additionally, developers may be understandably reluctant to begin implementing schemes in such an uncertain time, given the complexities (and sometimes costs) of undertaking construction activities during 'lockdown' and the implications of triggering s.106 obligations. If consents are allowed to expire, however, the recovery will be postponed.
- 2.3. Quod's initial *Planning in the Context of Covid-19* bulletin considered ways to ensure the timely discharge of conditions and potential means to easily vary consents to allow time limits to be extended. Whilst s.73 applications explicitly do not allow consents to be extended, s.96A and s.97 are not bound by this restriction and may therefore offer a solution.
- 2.4. We are aware that extensions to time limits have been achieved through non-material amendment applications under s.96A of the Town and Country Planning Act 1990. In the midst of this crisis, authorities

may consider that modest extensions to time limits by a few months should be considered 'non-material'. The legitimacy of this approach would ideally be clarified by new government guidance confirming that in this crisis, the use of s.96A applications to extend time limits should be considered 'non-material'.

- 2.5. An alternative option may be presented by s.97 which allows local planning authorities to modify planning permissions "to such extent as they consider expedient", having regard to the development plan and any other material considerations. This therefore provides a potential mechanism (in theory) to extend time limits. This would require local planning authorities to make an order, advertising as required by s.98 or 99 of the TCPA.
- 2.6. The use of s.96A and s.97 to extend time limits may be considered by some to be against the spirit of the legislation, given the restrictions under s.73. However, in the absence so far of other solutions from government, we would suggest these approaches be discussed with local planning authorities. .
- 2.7. When previously faced with significant economic uncertainty following the 'credit crunch', the Government introduced temporary measures in 2009 to allow applicants to apply for the extension of time limits for planning permissions. This provides precedent and a legislative template for Government to make a similar intervention in response to the Covid-19 crisis.
- 2.8. Notably, [the Coronavirus \(Scotland\) Act 2020](#) has already introduced a mechanism to automatically extend planning permission time limits under certain circumstances. In Scotland, this sees any planning permission that would have otherwise expired

in the next six months, extended until April 2021. We are aware that MHCLG is actively considering introducing a similar approach.

- 2.9. In the meantime, s.96A or S.97 can be discussed as a route or, of course, reserved matters can be submitted, and a start made on site.

3. Planning appeals

- 3.1. In response to the crisis, the Planning Inspectorate (PINS) has postponed all planning hearings, inquiries and physical site visits until at least the end of April. PINS produced *new guidance* on 16 April which explains how it is responding to the implications of the current crisis. PINS are taking a pragmatic approach, reviewing appeals on a rolling basis, deciding the most appropriate action to take in each case.
- 3.2. PINS have set up a Project Group who are considering how appeals might proceed, with a particular focus on rights, equality and access. They have been working closely with the Planning & Environmental Bar Association (PEBA) to investigate how virtual events might operate.
- 3.3. Encouragingly, this collaboration has now led to PINS trialling an approach of holding events using telephone or video conferencing where it is accessible to all parties. The first digital pilot case for this is expected to be held perhaps as early as the end of April. PINS are continuing to explore alternative options of progressing casework safely and fairly to minimise any delays.
- 3.4. In a *video* released earlier this month, Christine Thorby (Director of Strategy) emphasised that “...*it is critical to the Planning Inspectorate that public confidence in appeals and examinations is upheld, that*

events are not downgraded, and that recommendations and decisions are fair and robust”.

- 3.5. In order to ensure robust and legally sound decisions, it will be important to still test key evidence by cross examination, or at the very least, by some form of inquisitorial process led by an Inspector. This is clearly a positive step forward and we will keenly be observing how this pilot progresses.
- 3.6. PINS are also trialling other innovations including the use of ‘virtual site visits’ with a small group of inspectors. The hope is that this pilot will confirm that appeals proceeding by written representations can be properly decided on the basis of digital images, negating the need for physical visits. This pilot should be completed in a few weeks, at which point PINS will consider its extension.
- 3.7. Whilst PINS are not suggesting converting appeals that are already lodged to all be by written representations, it may be beneficial for appellants to consider whether written representations could allow sufficient interrogation of the key matters and yield the desired outcome – given that ‘virtual site visits’ could remove impediments to such appeals progressing.

4. Nationally Significant Infrastructure Projects

- 4.1. Mirroring the approach taken to planning appeals, all preliminary meetings and hearings relating to Development Consent Orders (DCOs) have also been suspended. Since examination is primarily a written process, those examinations already underway are expected to proceed. However, the examination for the A38 Derby Junctions

project has been extended by up to five months. Nevertheless, the government, PINS and industry are working hard to find solutions to enable these nationally important projects to proceed.

- 4.2. The National Infrastructure Planning Association (NIPA) has been engaging with MHCLG and PINS with draft proposals for how the DCO regime can respond to the current crisis. This focuses on how requirements in the Planning Act 2008 relating to public consultation and the deposition of hard copies of documents could be approached.
- 4.3. It is perhaps frustrating that the Government did not see fit to use the Coronavirus Act 2020 to provide the regulatory powers for the Secretary of State to allow amendments to the DCO progress as well as the Town and Country Planning Act 1990 regime. These steps do show the way forward for the infrastructure regime and there is no reason in principle not to adopt the same approach.
- 4.4. The examination process itself may be easier to address than planning appeals because it is largely in writing and the Examining Authority is given significant discretion about how it wants to run the examination. We are advising clients that they can continue with consultation but that measures must be taken to ensure access to material as far as practical. Techniques in this respect are developing rapidly.
- 4.5. Additionally, we are supporting NIPA's advocacy for the introduction of flexible guidance from MHCLG and PINS, as well as rapid but limited legislative change.

5. Public consultation

- 5.1. According to the UK's Office for National Statistics, 87 per cent of all adults used the internet daily or almost every day in 2019. This means online consultation has the potential to reach the vast majority of the public.
- 5.2. There are a number of innovative consultation methods which are now being deployed in response to social distancing, including targeted social media campaigns, webinars, virtual exhibitions, inter-active websites, hotlines and 'explainer' videos. It is important to ensure engagement with key stakeholders continues, many of whom may have a strong online presence, e.g. political and community leaders, interest groups etc.
- 5.3. A digital approach should be supplemented with more traditional methods of communication, including newsletters or leaflets, statutory notifications in newspapers, posters etc. It may also be appropriate to allow more time for consultation to allow for any difficulty people have accessing information.
- 5.4. There is no reason not to proceed with public consultation, therefore, providing it has been sensitively and thoughtfully approached and efforts are made to reach all interest groups. Indeed, Steve Quarterman's letter to authorities encouraged them to *"explore every opportunity to use technology to ensure that discussions and consultations can go ahead"*.

6. Housing delivery

- 6.1. Currently, the Government's advice remains that construction activities should continue, subject to safe working practices, as informed by the [Site Operating Procedures](#) published by the Construction Leadership Council. We have seen many house builders and commercial schemes pausing site construction works but many schemes are proceeding, and the Government has encouraged larger scale development such as infrastructure construction to continue.
 - 6.2. Over the last decade, a number of measures have been introduced by Government to encourage local authorities to attempt to resolve the national housing shortage. Some of these measures, if unaltered, could lead to authorities being 'penalised' for an under delivery of new housing resulting from the current crisis.
 - 6.3. The Housing Delivery Test (HDT) is an annual measurement of housing delivery. The National Planning Policy Framework (NPPF) uses the results of the HDT to impose measures on underperforming local planning authorities to boost housing supply. This includes triggering the 'presumption in favour of sustainable development' where delivery was below 75% of housing required over the previous three-year period.
 - 6.4. The next HDT results are due in November and will cover the 2019/2020 financial year. The impacts of the current crisis are unlikely to have a significant effect on those figures but could have substantial implications for the 2020/2021 financial year results, due to be published in November 2021.
 - 6.5. The constricted delivery of homes will also impact more immediately on local authorities' ability to demonstrate a 5-year Housing Land Supply. Government action to "save" consents from lapsing would help but it will, in any event, be harder for local authorities to show confidently that delivery is taking place at the rate necessary to sustain its 5-year supply calculation.
 - 6.6. An appeal by Welbeck Strategic Land II LLP against Wokingham Borough Council's refusal to approve planning permission for the erection of up to 118 dwellings was dismissed on 09 April (ref: APP/X0360/W/19/3238048). A key matter in this appeal was whether the Council could demonstrate a 5-year housing land supply.
 - 6.7. Following the inquiry, the Inspector asked the main parties for comments regarding the impact of Covid-19 on housing delivery. The Appellant asserted that the effects of delayed construction would be felt for a 3 to 6-month period, which the Inspector agreed was not unreasonable.
 - 6.8. Even with an adjustment to the housing trajectory to reflect this disruption, the Inspector concluded that the Council would still be able to demonstrate a housing land supply of 5.2 years. In other cases, such disruption to housing delivery could be sufficient to eliminate an authority's ability to demonstrate a 5-year housing land supply.
 - 6.9. Where a significant shortfall in housing delivery arises, whether this is as a result of the Covid-19 crisis or otherwise, there is no reason to think that housing delivery is any less important than it was before.
 - 6.10. Whilst some have suggested that relief is appropriate for authorities in this situation, that seems inappropriate – whatever the reason for under-delivery, mechanisms to stimulate supply are arguably more important than ever.
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7. Next

- 7.1. Many local planning authorities have been quick to adapt to this new situation, embracing new technology and procedures to ensure schemes can proceed with minimal disruption. These early adaptors provide a useful template for those other authorities who are still considering how to respond.
 - 7.2. Government has been equally responsive with the introduction of the Coronavirus Act 2020 and the publication of new regulations. PINS's recent announcement regarding their pilot schemes for virtual events and site visits is also encouraging.
 - 7.3. Whilst there are some areas that require further clarity and some limited legislative changes, such as the DCO process and preventing planning permissions lapsing, we know the Government are cognisant of these issues and we expect will take action to address these in short order.
 - 7.4. If the industry can continue to harness its pragmatism and innovation to overcome the new challenges it faces, the planning system will be well positioned to play its role in the economic recovery of the UK. Maintaining momentum will be key to achieving this and the industry's pragmatism and innovation are delivering new solutions to ensure this.
 - 7.5. We will continue to keep you updated. For further details please get in touch with your usual Quod contact or email hello@quod.com.
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