

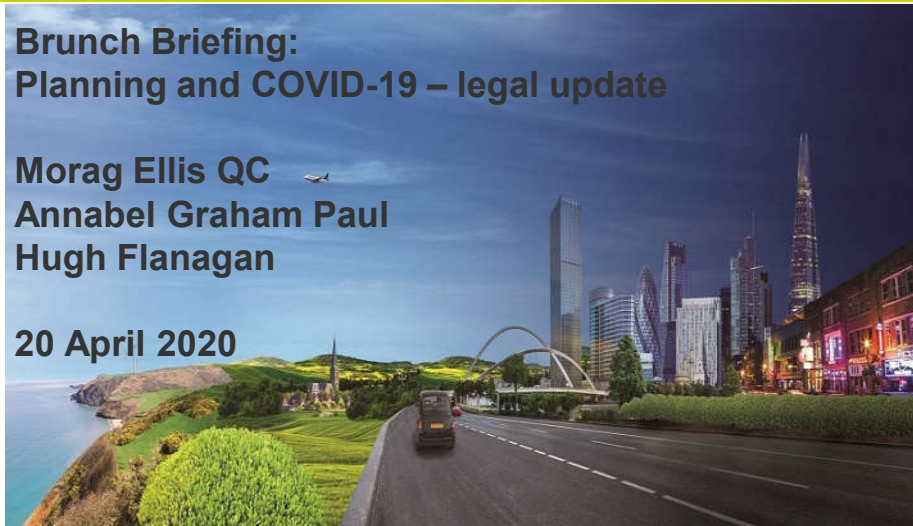


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## Brunch Briefing: Planning and COVID-19 – legal update

Morag Ellis QC  
Annabel Graham Paul  
Hugh Flanagan

20 April 2020



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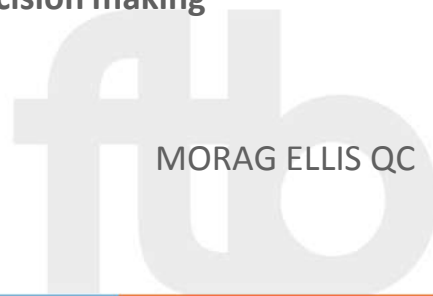


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## PLANNING and COVID – 19

Planning applications and  
local authority decision making

MORAG ELLIS QC



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## WELCOME

A film to inspire and while away the hours.....

<https://player.bfi.org.uk/free/film/watch-proud-city-a-plan-for-london-1946-online>



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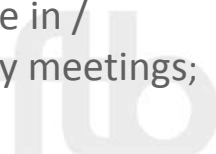


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## **Business (virtually) as usual**

S.78 Coronavirus Act 2020 power to make Regulations re:

- requirements to hold local authority meetings;
- times / periods / frequency / places of local authority meetings;
- how people may attend, speak at, vote in / otherwise participate in local authority meetings;



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- public admission and access to local authority meetings;
- the places at which, and manner in which, documents relating to local authority meetings are to be open to inspection by, or otherwise available to, members of the public.



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- provision for persons to attend, speak at, vote in, or otherwise participate in, local authority meetings without all of the persons, or without any of the persons, being together in the same place.
- regulations may make provision only in relation to local authority meetings required to be held, or held, **before 7 May 2021**

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## **Local Authorities and Police and Crime Panels (Coronavirus) (Flexibility of Local Authority and Police and Crime Panel Meetings) (England and Wales) Regulations 2020**

Into force 4<sup>th</sup> April

Parts 1 and 4 England and Wales

Parts 2 and 3 England

Part 2 – Remote Attendance: includes committee meetings

Part 3 – Modification of meeting and public access requirements

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## England

“Meeting” includes telephone / virtual meetings but member must be heard and, if practicable, seen

Regs override standing orders to contrary

LA may make new SOs re voting, access to documents and remote press and public access



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## Wales

New rules for virtual meetings and public access arrangements **do not apply**

Neil Hemington’s letter to Heads of Planning 27<sup>th</sup> March said Regs likely to be forthcoming but none yet





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## Practical decision making - Issues

### English Regs unlikely to resolve everything:

- Fear of democratic deficit for major applications
- Reluctance / lack of training of members and officers
- Domestic responsibilities (are planning etc officers “key workers”?)
- Political reluctance re more delegation



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# Planning and COVID-19 update

## Flexibility in planning

Hugh Flanagan  
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April 2020

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### • Issues

- The life of permissions
- Publicity and public participation
- New PD rights
- Time limits

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## Keeping permissions alive



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- Full pp: 3 (England) / 5 (Wales) year time limit (s.91)
- Outline pp: s.92 time limits
- Blanket extension to all permissions by legislation, as in Scotland and Ireland? Primary legislation may be needed.

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- **Implementation to keep permission alive: s.56**
  - Any work of construction / demolition of building
  - Digging of a trench to contain foundations
  - Laying out of road
  - Change of use
- **Ensure work corresponds to plans: *Commercial Land v SSSLGR* [2003] JPL 358**

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- Ability to undertake works of implementation during lockdown? Some construction work taking place, e.g. HS2, with social distancing measures.
- If do works, collect detailed / date stamped evidence.
- Prepare for necessary implementation works on lifting of restrictions?

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## Publicity and public participation



- **Site notices**

- Not all applications require (DMPO England 2015 Art 15; DMPO Wales 2012 Art 12): EIA; departure from Dev't Plan; affect PRow etc
- Ask applicant to put up? But DMPO talks about publicity "*by the LPA*".
- Capable of being seen? Additional publicity required, beyond DMPO requirements?



- **Deposit of documents in locality**
  - Incl ES, CPO map and plans. E.g. s.11 ALA 81: identify “*place within locality where copy of order and map may be inspected*”
- **Statement of Community Involvement (s.18 PCPA):**
  - Can create legitimate expectation, breach of which is error of law (Majed v LB Camden [2009] EWCA Civ 1029), beyond statutory requirements.



- **Aarhus compliance: public participation**
  - Art. 6: “*public shall be informed, either by public notice or individually as appropriate ... in an adequate, timely and effective manner ...*” (see also EIA Directive and Regs)
- **Neighbour notices:**
  - More reliable? Nb LPA sometimes have choice (e.g. DMPO 2015 Art. 15(4))
  - Proving service? Registered post functioning?



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## Permitted development



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## Public health

- Development by local authority or health service body for purpose of preventing, controlling, mitigating etc public health emergency
- Subject to restrictions on size / sensitive locations etc
- Notice required (as soon as practicable after commenced)
- Time limited (12 months)
- Variations England / Wales

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## Take away / food delivery

- From A3 (restaurants, cafés) / A4 (drinking establishments) to use for provision of takeaway food (incl. A5)
- Temporary to March 2021 (automatic reversion)
- Notification requirement (but can be retrospective)
- England only: class A3 in Wales already includes hot food for consumption off the premises

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## Time limits

- Determination periods: agree extensions?
- Clocks do not stop running! Beware:
  - Prior approval applications where nil response = approval
  - Statutory deadlines (High Court challenges, CIL appeals etc)

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## Covid-19 & Planning Enforcement

Annabel Graham Paul



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## Headline Government Statements

- Robert Jenrick MP & Julie James AM's Statements of 13 March 2020 urging LPAs not to enforce against breach of delivery restrictions for food and other essential items



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## Immunity

- Enforcement is time sensitive and there is no power to extend time, even in exceptional circumstances (NB PINS also has no power to extend time to appeal)
- An enforcement notice must be issued to ‘stop the clock’ (NB service provisions in s. 329)
- If there are potential difficulties in complying, a long time period can be given
- NB LPAs always have the power to withdraw an enforcement notice, and can rely on the ‘second bite provision’ (s. 171B(4)(b))



- What if a breach isn't occurring due to changes in activity arising from Covid-19?
- *Thurrock Borough Council v Secretary of State for the Environment Transport & the Regions* [2002] EWCA Civ 226: "It would be a nonsense for a LPA to issue an enforcement notice to require a sleeping use to stop", but matter of fact and degree whether a use is an "active use" or not
- Analogy with rights of way cases: *R (Roxlena Ltd.) v Cumbria County Council* [2019] EWCA Civ 163: "use or non-use is a question of fact; the cause of any non-use is not the issue"



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## LPA resources and expediency

- Expediency test: other material considerations can include financial considerations (*Health & Safety Executive v Wolverhampton City Council* [2012] UKSC 34) and personal circumstances (*R v Kerrier DC, ex p Uzell* [1996] 71 P & CR 566)
- What about aggrieved neighbours? *R (Community Against Dean) v Shire Oak Quarries Ltd* [2017] EWHC 74 (Admin): LPA's have "especially wide margin of discretion"
- LPAs must still *maintain* a discretion in all cases – cannot have a 'blanket' policy not to enforce

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## Difficulties in Complying

- LPA power to extend time for compliance or waive / relax requirements (s. 173A)
- Potential defence to criminal prosecution under s. 179(3) or relevant consideration in whether it is 'just and proportionate' to grant an injunction under s. 187B
- But NB delay in bringing a prosecution could be an abuse of process and delay is also relevant as to whether an injunction will be granted



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- Thank you!
- Any questions? please email me at:
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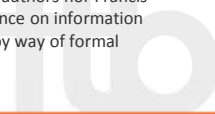
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