

LOCAL AUTHORITIES ON COVID-19: CRITICAL INFORMATION

Local authorities have been at the forefront of the measures introduced to tackle COVID-19 and the lockdown. This has led to an unprecedented surge in responsibilities and demands, as well as coping with the continued delivery of day-to-day services. This is exacerbated by limited resources leading to the reallocation of personnel into departments they have little experience in.

This briefing takes a look at some of the main issues, regulations and guidance arising from the coronavirus crisis that affect local authorities, and what local authorities should anticipate in the coming months.



Richard Marsh (Partner)
T +44 (0)20 7783 3452
E richardmarsh@bdbpitmans.com

The UK government has collated key guidance for local authorities [here](#). In this bulletin we explore these issues in more detail and give some practical advice to ensure local authorities can meet the challenge.

BDB Pitmans is a full service law firm with its own specialist public affairs practice. While this briefing discusses the key planning and public law matters, our leading employment, corporate, charity, litigation and insolvency teams are happy to assist with any questions you may have. We can help you address the developing challenges you have to deal with.

PLANNING – NEW POWERS, ENFORCEMENT AND NAVIGATING COVID

Takeaway services – in an effort to get business, especially on the high street, up-and-running, until 23 March 2021, a new permitted development right allows for the change of use from restaurants and cafes (A3), drinking establishments (A4), a mixed use of A3 and A4,

and drinking establishments with certain food provision, to a takeaway service (AA).

This change of use is subject to conditions, namely notification to the planning authority if the building is being used or will be used for takeaway services, the change of use does not affect the previous use class, and the use of the building must revert to the previous use after the 23 March 2021.

The food and hospitality sectors are likely to be some of the last that see an easing of the lockdown restrictions, so local authorities must consider this permitted development right in the medium to long term and ensure that the conditions under the regulations are monitored for enforcement purposes. Such businesses must remain closed under the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 (the Lockdown Regulations), and local authorities should be minded of this when monitoring ongoing planning compliance.

...THERE ARE CIRCUMSTANCES WHERE DEVELOPMENT IS NOT PERMITTED UNDER THE ORDER...

Regulations – [Town and Country Planning \(General Permitted Development\) \(Coronavirus\) \(England\) \(Amendment\) Order 2020 \(SI 2020/330\)](#)

Emergency development – until 31 December 2020, development by or on behalf of a local authority (or health service body) on land it owns, leases or occupies is permitted for (i) preventing an emergency; (ii) reducing, controlling or mitigating the effects of an emergency; or (iii) taking other action in connection with an emergency.

‘Emergency’ is given a broad definition under the order: it means an event or situation which threatens serious damage to human welfare, which concerns loss of human life, human illness or injury, homelessness, damage to property, and disruption to a variety of economic services.

There are circumstances where development is not permitted under the order, for example if the land in question contains a scheduled monument, or the height of any new building exceeds certain limits.

Development under the order is subject to certain conditions, namely notification to the LPA,

the emergency use of the land must stop by 31 December 2020, and any building permitted by the Order must be removed and the land restored to its previous condition within 12 months of the end of the emergency use of the land.

These powers are already being grasped by local authorities, with temporary provision of hospital beds and medical training in vacant council buildings. The specifics of the order must be considered, as well as whether the development triggers an Environmental Impact Assessment as this will prevent use of the right. The breadth of the power is likely to match the most ambitious of local authorities, but it must be kept in mind that the emergency use must stop by the end of the 2020. This ties in with the end of the Brexit transition period, which the government has indicated it will not extend. Local authorities should ensure compliance with their various legal duties in preparation for a busy year end.

Regulation – [Town and Country Planning \(General Permitted Development\) \(Coronavirus\) \(England\) \(Amendment\) Order 2020 \(SI 2020/412\)](#)

Planning enforcement – local authorities should be robust



in ensuring its enforcement actions are legally sound, and in recent planning appeals some Inspectors have said that the effects of COVID-19 justified a longer compliance period in an enforcement notice appeal. Similarly, *Miles v National Assembly for Wales* concerned immunity from enforcement action under s171B(3) of the Town and Country Planning Act 1990 in the context of the foot and mouth outbreak. The court's key findings was that the outbreak removed the possibility of enforcement action, meaning the time lost could not count towards the 10-year period. In addition, the significant disruption prevented immunity being acquired, that being if it had not been attained by the date of the start of the outbreak.

Local authorities should take some degree of comfort from these decisions and others, but as the restrictions begin to be relaxed, they should consider how their attitudes to planning enforcement change while balancing their legal obligations.

Planning update – on 13 May 2020, MHCLG published an [update](#) which includes temporary measures to enable the planning system to continue to operate effectively during COVID-19. Many of these are intended to be temporary changes that will be removed once the economy recovers. The key points are:

- **Community Infrastructure Levy (CIL)** – the CIL Regulations will be amended to allow charging authorities

to defer payments, temporarily disapply late payment interest and provide discretion to return interest that has already been charged where appropriate to do so. The amendments have not yet gone through Parliament but the update states that this should provide local authorities with confidence to exercise enforcement powers with discretion.

- **CIL instalment policies** – charging authorities can take advantage of regulation 69B which allows CIL to be paid in instalments. New instalment policies can be brought in at any time but will only apply to chargeable developments commencing after the policy comes into effect.



- **Validating applications** – continue to encourage applications be submitted online, but ensure arrangements are in place to enable paper applications to be validated.
 - **Publicity** and consultation – temporary regulations (below) come into force from 14 May 2020 to provide flexibility to take other reasonable steps to publicise applications (including EIA development) which are proportionate to the scale and nature of the proposed development. These could include social media and electronic communication, as well as community noticeboards at supermarkets.
 - **Local plans** – should be progressed where possible. MHCLG is working on ways to address challenges that local authorities face in this regard.
 - **Neighbourhood plans** – guidance has been updated to enable significant weight to be given to neighbourhood plans awaiting referendums.
- Regulations** – [The Town and Country Planning \(Development Management Procedure, Listed Buildings and Environmental Impact Assessment\) \(England\) \(Coronavirus\) \(Amendment\) Regulations 2020](#)
- CPO update** – similarly, on the 13 May MHCLG published an [update](#) for acquiring authorities during the lockdown. The key points are:
- delays in making advance payments may have a more significant impact during the economic slowdown meaning acquiring authorities should ensure timely payments;
 - if a CPO has been submitted since 16 March and there has been no response from the MHCLG's Planning Casework Unit, contact should be made at PCU@communities.gov.uk. If a CPO will be submitted in the text six months, the Unit should be emailed to discuss handling arrangements;
 - the CPO legislation requires that certain documents must be served on certain persons. Royal Mail have indicated that they are not at present capturing customer signatures but will instead log the name of the person accepting items sent by recorded delivery. The government have said that this does, however, continue

to meet the service requirement in s6(1) of the 1981 Act;

- consider increasing time periods for responses when requesting information about interests in land to be acquired or submitting objections to CPOs; and
- business and residential claimants should be treated responsibly during the pandemic, which includes not unduly evicting residents in line with wider guidance.

Wider planning tips – many local authorities are utilising new ways of working in order to progress planning applications efficiently during COVID-19. Where technology allows, many local authorities have already held successful planning committees, or are gearing up towards doing so. Many applications and consultations are now being handled electronically to enable them to be validated as normal. Our planning tips include:

- consider accepting dated photographs or video footage rather than site visits where appropriate;
- send site notices directly to applicants to display and provide photographic evidence of doing so;
- review the scheme of delegation to enable officers

to determine applications where committees are not taking place;

- where applications are particularly contentious, consider amending the Constitution to enable them to be determined by the Head of Planning and Chair of the Planning Committee;
- consider amending the authorised signatories so there are more officers able to witness sealing, to reduce the burden and delay;
- accept agreements completed in counterpart;
- if appropriate and the matter is more straightforward, consider a unilateral undertaking rather than a bilateral agreement to avoid the need for sealing altogether;
- consider deferring triggers for payments in a s106 to later on in the build rather than on commencement of development to help development get going more quickly;
- if holding virtual planning committees), Microsoft Teams has a function which enables there to be separate rooms ie one for the committee members and one for the public. The rooms can be 'locked' to prevent others entering and video can be

...DELAYS IN MAKING ADVANCE PAYMENTS MAY HAVE A MORE SIGNIFICANT IMPACT DURING THE ECONOMIC SLOWDOWN...

stopped for one room which will assist where exempt or confidential advice needs to be given to the committee members; and

- consider amending the Constitution to allow for any technical issues which result in the committee no longer being quorate by enabling the chair to suspend the committee for 15 minutes or adjourn to a later date if there are still issues.

REMOTE DECISION MAKING – LEGAL FLEXIBILITY AND TECHNOLOGICAL CAPABILITY

The new regulations:

- enable meetings to proceed in circumstances where those attending the meeting are not in the same physical place and therefore providing the possibility of remote meetings;
- make provision for ensuring public access to meetings held in public and enable local authorities to make standing orders regarding remote voting and access to documents online; and
- modify the requirement for local authorities to hold annual meetings.

This rapid step into (somewhat) uncharted digital territory gives rise to a range of practical questions and challenges.

Technology

Remote participation is heavily dependent on technology. A local authority needs to consider the technological requirements it could face – attendance by hundreds of people, question and answer capability, and remote voting being the main issues.

The minimum requirement of the regulations is that those attending the meeting can hear and be heard by other attendees and members of the public are entitled to attend the meeting in order to exercise a right to speak. In relation to members of the public in attendance but without a right to speak, the regulations require that these people can hear the meeting. The regulations do make clear that where possible video facilities should also be used to enhance the audio, but that it is hearing and being heard which is the minimum.

This provision enables local authorities to use audio only facilities as a (potentially more stable) backup solution rather than placing sole reliance on a video conferencing platform.

Once appropriate technology has been selected, naturally it is of critical importance to test it in advance, and ensure that those who will be responsible

for operating relevant elements during the formal remote meeting are familiar with the platform and its operation.

New ways of working and protocols

From the outset, it is important to set out the 'rules' for any online session. This will ensure that it can be managed more effectively, just as a chair would in a normal open, public session. For example, explain that everyone apart from the speaker is on mute to prevent sound interference, establish a simple system of who will speak next and 'handing over' to each other. While the Regulations currently have a sunset of 7 May 2021, the possibility of fully or partially remote meetings going forward might be used to your advantage in enhancing local participation.

Regulations – [The Local Authorities and Police and Crime Panels \(Coronavirus\) \(Flexibility of Local Authority and Police and Crime Panel Meetings\) \(England and Wales\) Regulations 2020 \(the Regulations\) came into force on 4 April 2020](#)

The [Association of Democratic Services Officers](#) and [Local Government Association](#) have put together a very useful explainers.



PROCUREMENT AND SUPPLIER CONTRACTS – KEEPING BUSINESS TICKING

The government has produced [policy notes](#) which emphasise steps local authorities should take, including an urgent risk review of its contract portfolio and to encourage the use of procurement cards to ensure the continuity of service and efficient payments to suppliers. The existing Public Contract Regulations 2015 (PCR) already enables contracting authorities to procure goods, services or works with extreme urgency, including, but not limited to, the following:

- direct award (whether due to urgency, absence of competition or to protect exclusive rights);
- call off from an existing framework agreement;
- call for competition with accelerated timescales; and
- extending or modifying an existing contract during its term.

BDB Pitmans' tips for local authorities to consider:

- keeping a thorough and continuing audit trail of decisions and actions taken to justify the tests set out in the PCR, and mitigate against the risk of a successful legal challenge;
- limiting, where necessary, what is being procured and the length of any contract to what is essential;
- including mechanisms to secure pricing reductions

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throughout the life of the contract; and

- continuing to achieve value for money and ensure any abnormally high pricing is approved by the appropriate person within the authority.

Local authorities must be alive to future challenges from aggrieved suppliers who themselves are facing severe financial difficulty. The government's procurement policy notes highlight the difficulties that local authorities face now and in the future, in particular ensuring adherence to the conditions and criteria in the PCR emergency procedures.

DATA PROTECTION – REGULATORY UPDATES

The Secretary of State has issued four notices under the [Health Service \(Control of Patient Information\) Regulations 2002](#).

The notices require certain organisations, including local authorities, to process (confidential) patient information in a variety of different scenarios, including to make and maintain databases and for the recognition, control and prevention of diseases. These notices can reassure local authorities that the sharing and processing of patient

information is in compliance with data protection laws. There are, however, certain restrictions and exclusions that must be considered.

The Information Commissioner has also published its '[regulatory approach](#)' during the pandemic, as well as suite of other useful blogs and notes (available [here](#)). The BDB Pitmans' data protection team have discussed the Information Commissioner's important [April](#) update.

One key focus is on the use of data in the roll out of technology to combat the spread of the virus, principally through a 'track and trace' app. Local authorities must consider their role in the development of this technology, the questions posed by the Information Commissioner and how these correspond to their legal duties.

HEALTH AND SOCIAL CARE – A NEW AND CHANGING DUTIES

Local authorities' health and social care departments, as well as the Clinical Commissioning Groups (CCGs), are particularly exposed to the strains caused by the crisis. The urgent procurement of Personal Protective Equipment (PPE), the supply of medical equipment and drugs, and maintaining a

health and safety compliant workplace are just some of the demands being faced.

Local authorities should be guided by the government's [PPE Plan](#) so that they understand where they sit in the emerging crisis response structure of the NHS Supply Chain, NHS England, 'Local Resilience Forums' (LRF), Public Health England, CCGs and central government. The government is urging local authorities to be in direct communication with local care providers and act as management and distribution hubs to the LRFs.

While the lockdown restrictions begin to ease, the rapid spread of the coronavirus through care homes will continue to be a flashpoint in this pandemic. Local authorities must consider the duties they owe to those care homes they fund, as well as their more general statutory obligations under the Health and Social Care Act 2012 and The Care Act 2014.

The Coronavirus Act 2020, however, relaxes certain duties regarding the provision of care, the charging for care and the undertaking of various assessments, and '[The Care Act Easements: guidance for local authorities](#)' is essential

reading to digest the complex regulatory changes.

Local authorities should consider the Care Quality Commission's (CQC) [Emergency Support Framework](#), which sets out the regulatory and inspection approach during the pandemic. Moreover, the Local Government and Social Care Ombudsman has issued useful [guidance](#) for care providers and local authorities on administrative practice and complaint handling during the crisis.

CONSULTATIONS IN LOCKDOWN

Local authorities may to run a number of consultations during the lockdown, as well as being involved in those run by developers or other public sector bodies. Some non-government bodies (such as the [National Infrastructure Planning Association](#)) have published recommendations and advice on how consultations may continue in light of the lockdown.

The starting position is whether the duty to consult arose from a statutory duty and therefore contains detailed requirements (ie a specific site notice). If so, local authorities and consulters must comply with those statutory requirements, where possible. Novel thinking is

required where compliance is impossible or extremely difficult due to the current restrictions. It should be noted that the Lockdown Regulations provide for an individual to leave their home to fulfil a legal obligation. This may, on a reasonable interpretation, include compliance with statutory consultation criteria.

In respect of consultations planned for spring and early summer 2020, if they must continue despite the lockdown, then any plans need to be flexible enough to fit in with government restrictions while ensuring the consultation complies with the Gunning Principles. This is a difficult balance when the regulatory landscape is moving so quickly. BDB Pitmans have considered these issues in depth [here](#), but the key considerations are:

- is it feasible to continue with the planned methods of public engagement?
- is it possible to reach and engage with a sufficiently wide audience?
- will notice of the consultation reach a sufficiently wide audience?
- can online content be enhanced to better facilitate discussion?
- can the proposals be given intelligent consideration?

STATE AID – BUSINESS LIFELINE

At least until the end of the transition period on 31 December 2020, the UK remains bound to the EU's state aid rules. These determine what types of financial and non-financial assistance can be provided by central and local government to private organisations consistent with the EU's Treaty's general prohibition on distortive State Aid. These rules have been relaxed to allow for a rapid and flexible response to the crisis.

In any normal circumstances, there are certain de minimis rules below which notification to the Commission is not required – broadly €200,000 over three rolling years, subsidised loans of up to €1 million, and subsidised guarantees for loans of up to €1.5 million.

Separately, the General Block Exemption (GBER) can assist SMEs, local infrastructure projects, environmental initiatives and aid to regional airports and ports by exempting aid that meets certain conditions whilst avoiding the usual Commission notification and approval processes.

The new flexibility is encompassed under the

[European Commission's Temporary Framework](#). The framework:

- allows an expedited notification and approval process (a six to twelve months process will now take a matter of days);
- increases the relevant notification thresholds. The aid must not exceed €800,000 per business; be granted on a defined budget; and cannot be given to businesses in difficulty;
- confirms that governments can guarantee loans, provided that the 'guarantee premiums' are at a minimum level (depending on the nature of the recipient and credit risk over time); and
- allows authorities to provide recapitalisation and subordinated loans.

The existing rules and the new framework have important conditions that must be considered and rigorously applied by local authorities as they become the administrative centre for the application of certain aid schemes. For example, the 'Grant Funding Schemes' for small businesses and the retail sector puts the onus on local authorities to ensure that all state aid requirements are satisfied.



The BDB Pitmans corporate team have further explained what other government assistance the UK government is offering businesses [here](#).

TRAFFIC MANAGEMENT, GOVERNANCE AND FLY-TIPPING

Statutory Guidance – traffic management – [Network Management Duty under the Traffic Management Act 2006](#)

– as the pandemic will force changes in how we travel and commute, the Secretary of State for Transport has issued statutory guidance to reflect that ‘the government...expects local authorities to make significant changes to their road layouts to give more space to cyclists and pedestrians’. This

will have serious implications on highway authorities as they must have regard to this guidance in discharging their ‘network management duty’, and it will be relevant to existing schemes authorities are promoting or objecting to. The reallocation of road space to walking and cycling may also give rise to challenging aspects of highway and planning law that highway authorities should be aware of.

Guidance – fly tipping and recycling centre – the government is urging councils to plan for the safe re-opening of recycling centres and has published [guidance](#) to assist in that process, as well as

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[guidance](#) on prioritising waste collection. These documents should be studied carefully and considered in parallel to the duties and powers local authorities have, in conjunction with the Environment Agency, regarding fly tipping. Some rural communities have seen a 300% increase in fly tipping, and this may continue as individuals seek a quick solution when recycling centres are subject to delay-inducing social distancing rules.

Regulations – annual accounts – the [Accounts and Audit \(Coronavirus\) \(Amendment\) Regulations 2020](#) amend the Accounts and Audit Regulations 2015 to extend the deadlines for relevant authorities to publish and make available for public inspection, their annual accounts and supporting documents in relation to the financial year beginning on 1 April 2019.

Regulations – elections – [The Local Government and Police and Crime Commissioner \(Coronavirus\) \(Postponement of Elections and Referendums\) \(England and Wales\) Regulations 2020](#) provide that specified local elections and

referendums scheduled to take place after 15 March 2020, or that would otherwise be required before 5 May 2021, are postponed until 6 May 2021. Those elections include those for principal councils, parish councils, members of the Greater London Authority (GLA), the Mayor of London, elected mayors, combined authority mayors, and, in England and Wales, Police and Crime Commissioners. Any by-elections will similarly be postponed.

NEXT STEPS

The requirements placed on local government are constantly evolving during the lockdown, and these demands will change as the restriction begin to ease. Engagement with central government should be an essential part of the approach to ensure that they understand the challenges, not least the financial implications, of the new responsibilities.

Local authorities can also play a positive role in supporting their business community and priority growth sectors not least as the government develops the sector roadmaps as we come out of lockdown.

Our range of legal and communications expertise means we can help support local authorities and cope with the challenges now faced.

CONTACTS

For further information please contact:

Marisia Beard, Solicitor
T +44 (0)20 7783 3571
E marisiabeard@bdbpitmans.com

James Bowler, Solicitor
T +44 (0)20 7783 3825
E jamesbowler@bdbpitmans.com

Richard Marsh, Partner
T +44 (0)20 7783 3452
E richardmarsh@bdbpitmans.com

David Mundy, Partner
T +44 (0)20 7783 3423
E davidmundy@bdbpitmans.com

Matthew Smith, Partner
T +44 (0)20 7783 3602
E matthewsmith@bdbpitmans.com

Stuart Thomson, Head of Public Affairs
T +44 (0)20 7783 3439
E stuartthomson@bdbpitmans.com

Laura Thornton, Legal Director
T +44 (0)20 7783 3792
E laurathornton@bdbpitmans.com

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