

## PLANNING AND CORONAVIRUS: AN UPDATE

Simon Randle and Katharine Elliot

4-5 Gray's Inn Square

On 13 May 2020, the Housing Secretary made a statement setting out in greater detail the Government's plan to re-start and support safe house building in England: <https://www.gov.uk/government/speeches/housing-secretarys-statement-on-coronavirus-covid-19-13-may-2020>.

The plan announced changes to a variety of matters with planning implications. This article highlights and comments on three key points for planning:

- Publicity for planning applications;
- Deferred Community Infrastructure Levy ("CIL") payments; and,
- Flexible construction site working hours.

### Publicity for planning applications

#### *What has changed?*

##### The original position

**Developers** are required to give notice to the owner or agricultural tenant of the site and that notice cannot be served electronically (s.65 Town and Country Planning Act 1990; art.13 Town and Country Planning (Development Management Procedure) (England) Order 2015/595). Developers are not currently obliged to consult prior to making an application for planning permission, save in the case of wind turbines (s.61W TCPA 1990).

**Local planning authorities ("LPAs")** are currently obliged to publicise an application for planning permission (s.65 TCPA 1990 and art.15 Town and Country Planning (Development Management Procedure) (England) Order 2015/595) by:

- site display on or near the land;
- neighbour notification letter;
- publication of a notice in a newspaper;
- publication on the LPA's website.

Due to coronavirus, there are obvious practical problems with the first two requirements: (1) it is more difficult for a developer or LPA to arrange display, distribution or publication of paper notices during the lockdown; and, (2) it is less likely in any event that such forms of publicity will come to people's attention if they are not moving around their local area as much due to restrictions on movement.

### Changes

With effect from 14 May 2020, temporary regulations have been introduced (under the Town and Country Planning (Development Management Procedure, Listed Buildings and Environmental Impact Assessment) (England) (Coronavirus) (Amendment) Regulations 2020/505) to supplement these existing statutory publicity arrangements.

LPAs will now have greater flexibility to take other reasonable steps to publicise applications if they cannot discharge the existing requirements because it is not reasonably practicable to do so for reasons connected to the effects of the coronavirus, including restrictions on movement.

- If an LPA is able to comply with one or more of the existing requirements, the LPA must comply with that requirement.
- However, if the LPA is not able to comply with a requirement because it is not reasonably practicable, the LPA must take reasonable steps to inform people who are likely to have an interest in the application of the website where notice of the application can be found. Those steps may include the use of social media and communication by electronic means and must be proportionate to the scale and impact of the development. The Government's revised guidance on Consultation and Pre-Decision Matters includes suggested forms of electronic communication which might be used (for example, the LPA's own website, local neighbourhood and community forums, Facebook and Twitter) (see <https://www.gov.uk/guidance/consultation-and-pre-decision-matters#coronavirus>, paragraphs 035 – 045).
- LPA's who exercise these alternative measures are encouraged to keep a record of how they notify the public as evidence that they took reasonable steps to engage people in the decision-making process.

The temporary regulations have also extended the minimum time limits for making representations in relation to planning applications from 14 to 21 days.

From a practical perspective, questions remain about the implementation of these temporary regulations. How can the LPA or developer ensure that matters come to people's attention on social media and other internet fora, particularly when not everyone has access to the internet (especially among the older or economically disadvantaged members of the population who may also be the most impacted by potential development)? Targetted advertising and information-sharing has recently been a hot topic and so it will be interesting to see the approach taken going forward.

## Deferred Community Infrastructure Levy ('CIL') payments

### *What will change?*

#### The current position

Liability to pay CIL arises on the commencement of a development (s.208 Planning Act 2008). The standard payment period is 60 days, however payment by instalments is permitted where the collecting authority has issued an instalment policy (reg.69B, reg.70 Community Infrastructure Levy Regulations 2010/948).

The authority has freedom to decide the number of payments, the amount of each payment and the time due. The authority may revise or withdraw the policy when appropriate. However, if instalment terms are broken, or payment is not made on or before the payment date where there is no instalment policy, the authority must issue a demand notice requiring the payment of the full CIL amount immediately.

#### Changes

The Government produced updated guidance for LPA's in relation to CIL on 13 May 2020: <https://www.gov.uk/guidance/coronavirus-covid-19-community-infrastructure-levy-guidance>.

In summary, it is proposed that the 2010 Regulations be amended in due course to give authorities more discretion to defer payment of CIL for small and medium sized developers (i.e. those with an annual turnover of less than £45 million) without having to impose

additional costs on them. Charging authorities will also have a discretion to temporarily disapply late payment interest and even to return such interest which has already been charged if it is considered appropriate to do so. This may include interest that has accrued in the period between the introduction of the lockdown and the regulatory changes coming into effect.

In addition to outlining these proposed amendments, the guidance encourages LPAs to actively exercise their existing discretion to introduce new instalment policies for as-yet uncommenced chargeable development and to deal more leniently with the late payment of CIL to ease financial pressures on small and medium sized developers.

This raises several questions, such as whether there should or will be changes to other factors affecting the deliverability of a site, such as affordable housing contributions. No doubt both developers and local authorities will be astute to pick up on such issues.

The competing interests for both developers and local authorities are likely to come to the fore. Local authorities are likely to be reluctant to part with any income given the current financial pressures they are facing, including due to coronavirus, and so may favour a case by case approach. However, developers may welcome further guidance from the Government encouraging a blanket deferral of CIL payments approach across the country. This would provide them with greater certainty and a quicker answer than relying on individual authorities to make decisions, which may take some time.

## Flexible construction site working hours

### *What has changed?*

#### The current position

The Government's initial guidance did not specifically refer to construction sites, leading to some confusion over whether they should remain open. It then appeared that sites could remain open, so long as Public Health England's social distancing guidelines were followed. As a result, construction has continued on some projects (such as HS2) but paused on others.

Under ss60-61 Control of Pollution Act 1974, local authorities have power to restrict noise from construction sites as may planning conditions imposed on a grant of permission.

Permitted hours therefore differ across the country, but it is common for the working hours to be 8am to 6pm Monday to Friday, 8am to 1pm on Saturdays and for no work to be allowed on Sundays and bank holidays.

There may also be contractual restrictions on the working hours for particular construction sites.

### Changes

On 13 May 2020, the Ministry of Housing, Communities and Local Government announced policies to allow more flexible working hours on construction sites where it is appropriate and with local consent (see: <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Lords/2020-05-13/HLWS230/>).

- LPAs are encouraged to actively exercise their existing discretion under the NPPF in relation to enforcement action to ensure they act proportionately when responding to suspected breaches of planning conditions governing site working hours. Where only a short term or modest increase to working hours is required, LPAs, having regard to the reason for the condition(s) in question and to their legal obligations, should not seek to undertake enforcement action.
- Where developers require longer term or more significant changes to working hours, they should apply to the LPA to temporarily amend the relevant condition or construction management plan in the usual way. LPAs should prioritise these applications and give early clarity on the acceptability of extended hours to developers, with the aim of doing so within 10 working days.
- Requests to extend working hours should be proportionate and should not involve working on Sundays or bank holidays. However, LPAs should not refuse requests to extend working hours until 9pm, Monday to Saturday without very compelling reasons for rejection, such as significant impact on neighbourhood businesses or uses which are particularly sensitive to noise, dust or vibration, which cannot be overcome through other mitigation, or where impacts on densely populated areas would be unreasonable. In some cases, such as in areas without residential properties, extending working hours beyond this, including allowing 24-hour working where appropriate, may be justified.

- Any temporary changes to construction working hours conditions granted by LPAs should not extend beyond 13 May 2021.

The Government has also launched a charter for safe working practice to enable housebuilders to make a common commitment to operate in line with government and Construction Leadership Council safe working guidance: <https://www.gov.uk/government/publications/coronavirus-covid-19-charter-for-safe-working-practice>.

It is anticipated that these changes are likely to give rise to a conflict with the public interest rationale behind the usual restrictions on site working hours. Members of the public are always unlikely to be happy if they are woken up by construction work throughout the night. Changes during daylight hours may also be particularly disruptive in circumstances where the public are confined to their houses for considerably longer hours than usual, including at the weekend. It is therefore important that new arrangements are both certain and acceptable for all those involved where possible, including contractors, developers, local authorities and the public.

A planning update has been published providing more in-depth guidance in relation to the above and other relevant planning changes: <https://www.gov.uk/guidance/coronavirus-covid-19-planning-update#community-infrastructure-levy>.

Further information from the Government is continuing to emerge. Watch this space.

**Simon Randle**  
**Katharine Elliot**

**18 May 2020**

This article is provided free of charge for information purposes only. Every reasonable effort is made to ensure the information is accurate and up to date, but no responsibility for its accuracy, or for any consequences of relying on it, is assumed by the authors or by Chambers as a whole. The information and commentary do not, and are not intended to, amount to legal advice to any person. You are strongly advised to obtain case specific advice from a lawyer; please contact the clerking team at 4-5 Gray's Inn Square (clerks@4-5.co.uk) who will be glad to assist.