

THE CORONAVIRUS PANDEMIC AND THE PLANNING SYSTEM:

PEBA'S OBSERVATIONS ON THE SCOPE FOR WORK CONDUCTED BY THE PLANNING INSPECTORATE TO CONTINUE

Introduction

1. PEBA is pleased to have been asked to work together with PINS to look at ways of keeping casework moving through the system during the Coronavirus pandemic. PEBA is ready and willing to work with PINS to see what short term measures can be achieved without undermining the integrity of the process, the public nature of inquiries and hearings or the quality of decision making.
2. PEBA recognises the benefits of ensuring case work continues to move through the system. It is in the public interest to help reduce the inevitable backlog of casework that will exist when the crisis is over, it will help to facilitate consents for appropriate development and it will thereby contribute to the recovery of the economy when the crisis has abated.
3. A similar public interest exists throughout the justice system, within which the Courts have already begun to react to the current pandemic by using remote hearings to allow the hearings to go ahead. In particular:
 - a. the Civil Justice system is now the subject of a Protocol for Remote Hearings dated 20 March 2020, which expresses a presumption that remote hearings should be used wherever possible to minimise the risk of transmission of Covid-19. The Protocol seeks to address/overcome the requirements for hearings to be in public and recorded. It envisages (paragraph 12) that it will normally be possible for all short, interlocutory or non-witness applications to be heard remotely and that some witness cases will also be suitable for remote hearings.
 - b. With effect from 24 March, the Upper Tribunal, Lands Chamber has adopted Guidance on the Conduct of Proceedings During the Covid 19 Pandemic. Like the Protocol for Remote Hearings, this Guidance (which builds on the Pilot Practice Direction on contingency arrangements in tribunals issued by the Senior President of Tribunals on 19 March 2020¹) adopts the principle that, where a decision can only be made fairly and justly at a "hearing" (which, in the context of the Upper tribunal, includes a hearing at which witnesses might be called and cross-examined) there will be a presumption that the hearing will be conducted remotely, by telephone or video link, unless this would not be fair or practical. Significantly, the Guidance states that:

¹ <https://www.judiciary.uk/wp-content/uploads/2020/03/General-Pilot-Practice->

a. [Direction-Final-For-Publication-CORRECTED-23032020.pdf](https://www.judiciary.uk/wp-content/uploads/2020/03/General-Pilot-Practice-Direction-Final-For-Publication-CORRECTED-23032020.pdf)

“Cases involving limited oral evidence, or evidence from only a small number of witnesses, may be capable of being conducted remotely by video link. In cases where the issue depends on the evidence of one expert witness on each side, a remote hearing should be both practical and capable of producing a fair and just outcome.”

PEBA notes that it is clear from both these examples that the Courts and the Upper Tribunal have clearly taken the view that cases involving live evidence and cross-examination can, in appropriate circumstances, be conducted remotely without compromising the principles of justice.

4. PEBA is aware of concerns that the sort of positive reaction shown by the Civil Justice system has not been adopted by PINS and that the pace of proposals in this area has been too slow. However, PEBA is also conscious of the differences between the inter-party nature of most civil litigation, and the planning appeals and local plans processes. Unlike most civil litigation where there are usually only two parties, the planning system, when reaching a conclusion on the suitability of development, seeks to accommodate and take account of the views of numerous stakeholders, interest groups and individuals as well as those promoting a proposal as well as the local planning authority. This helps ensure that even if interested parties disagree with the outcome they accept it because of the fairness of the process by which that decision has been reached. The need to ensure that interested parties are not shut out of the planning process is particularly important given the nature of the current crisis where the nation is being encouraged to socially distance themselves or self-isolate and Local Planning Authorities and interested groups may not have access or resources to utilise alternative means of engagement.
5. These considerations are particularly relevant in circumstances where PINS has already decided that particular appeals ought to be determined by hearing or inquiry. In arriving at those conclusions, PINS will already have concluded that some degree of oral exploration or testing of the evidence is necessary. Similarly, enforcement appeals can be legally and factually complex, and where the outcome may depend upon the veracity of numerous witnesses, including those in the local community. In all these cases, the ability to discuss or test evidence therefore needs to be safeguarded. As noted above, the Courts have not adopted the position that oral hearings can or should be downgraded to written representations but rather should take place through AV means.
6. In relation to Local Plan Examinations there is a right to be heard by those who have made representations to change the plan. The oral hearing element of local plan examination is already limited with most of a local plan examination taken up with consideration by the appointed Inspector of the evidence base, representations and statements. Nonetheless, the hearing sessions are an important part of the process.
7. In the circumstances, PEBA believes it is important that short term measures do not undermine confidence in the planning system in the long term. It is in the public interest and essential that consideration of proposals for development, either through the decision making process or the local plan making process, do not take place at the

expense of ensuring a full and fair consideration of the concerns of all stakeholders in relation to development proposals.

8. However, notwithstanding the need for a solution which recognises the wider public interest of hearings, appeals and examinations in the planning system, PEBA is firmly of the view that there is no reason why a constructive approach, similar to that taken by the Civil Courts, cannot and should not be adopted by PINS.
9. In this regard, whilst many things about the future are uncertain, the government's current position of preventing public meetings is likely to be in place for some considerable time. PEBA's working assumption is therefore that it will be necessary to eliminate any need for participants to be physically present in the same room as one another, and that any participation will be via remote technology.
10. In PEBA's view, the way forward is not to "downgrade" any appeals presently scheduled to be determined as hearings or inquiries to the written representation procedure (even with the Inspector raising matters as supplementary questions) unless the main parties consent to this change and third parties wishing to participate are consulted upon it. Rather, PEBA considers there is scope for greater use to be made of remote technology such as video-conferencing and live streaming.
11. Recognising that there will not be a "one size fits all" solution, PEBA has focussed its attention on how decisions are made about when the use of such technology will be appropriate, and (where it is appropriate) how such technology can and should be used.
12. The analysis below discusses the different kinds of procedures with which PINS is concerned, and offers a view on the steps which would be required in order to enable these work streams to continue. Although we are of the view that there is no legal impediment to conduct hearings or planning inquiries via videolink technology *per se*, we consider that to implement some of these measures changes may need to be made to PINS Guidance/PPG. We attach a Note on the Procedure Rules that explains why this is so. PEBA is willing to work with PINS on any amendments to guidance and/or a protocol to achieve that.
13. PEBA also wants to work with PINS in identifying an AV option to achieve this. To assist we attach a note setting out the various technical options to achieve these measures. PEBA has established a technical group who are willing to assist PINS further on this.
14. The analysis below deals with hearings; planning and enforcement inquiries and local plan examinations. Of course in relation to these processes document management will be key. Document pagination will need to be agreed in advance and documents will need to be available electronically.

Hearings

15. PEBA consider that the hearing process lends itself to video-conferencing and live streaming. It will be important to ensure that third parties interests are properly

protected. The process would need to be worked out in detail but the following are considerations:

- a. There should be practical measures to ensure the smooth running of any video-conferencing methodology such as a single source from PINS for the details of the video-conferencing forum, invitations, numbers to call in the event of difficulty and for timetabling of sessions.
- b. There should be some form of case conference along Rosewell lines or prior electronic indication from the Inspector as to how the hearing is to be conducted in particular how third parties will engage with the hearing.
- c. Third parties wishing to speak on a topic can be asked to notify the relevant case officer in advance, provide a speaking note in advance and then participate using relevant AV technology.
- d. Sensible use of timetabling of the hearing to enable third parties to speak which could be agreed in a case management phone call or in advance via email.
- e. Streaming to enable interested parties that want to watch but not speak.
- f. Pilots of suitable hearings to see how it works and to iron out any issues

Planning Inquiries

16. The above considerations would also apply. There are two main additional matters which arise in relation to planning inquiries which need consideration. Firstly, the presentation of oral evidence through evidence in chief and cross-examination (including prevention of communication during cross-examination). Secondly the presentation of opening and closing submissions, and in particular whether these can be provided in writing rather than delivered orally or whether a summary of a closing submission should be given orally with the remainder provided in writing. Again, PEBA would be pleased to work with PINS to establish protocols governing these points.
17. The Rosewell case conferences can be used to identify for the participants how the giving of live evidence and presentation of opening and closing submissions should take place/be provided.
18. There should be pilots of more straightforward planning inquiries which if successful could be rolled out for more complex inquiries.

Enforcement Inquiries

19. PEBA consider that these inquiries present more complex issues, given the need in many such cases for sworn evidence from potentially numerous witnesses including third parties. It is suggested that the main focus at the moment should be on hearings

and planning inquiries. However if there are some straightforward enforcement inquiries that form part of the current caseload then perhaps they can be used as pilots.

Local Plan Examinations

20. PEBA considers that the oral hearings part of Local Plans presents the greatest challenge in circumstances where numerous parties wish to participate. Plans which have attracted smaller numbers of participants may be easier to tackle first. Plans where there are significant numbers of representors (many with their own teams) together with a local planning authority with numerous officers and experts will present a serious management and timetabling challenge to an examining Inspector to manage remotely.
21. It is suggested that the focus should initially be on Local Plans which have attracted low levels of public participation. Pilots of the oral hearings part of Local Plan examinations which have small numbers of participants should be held. If successful consideration can be given to whether Local Plans which have attracted significant numbers of objectors could then be held by way of videolink technology.

PEBA

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